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Evaluating EPA's Arguments for RFS Waiver Authority

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A previous article (*farmdoc daily* November 6, 2013) reviewed the leaked draft of EPA's proposed rule setting the Renewable Fuel Standard mandates for 2014 and concluded that EPA was making novel use of the authority provided by Congress. In November, EPA released the proposed regulation for public review and comment (the proposed rule can be found here). In the proposed rule, EPA proposes setting the RFS mandates lower than the statutory levels and makes an argument in support of its interpretation that the general waiver authority allows it to do so. This article evaluates EPA's argument in support of this use of the general waiver authority.

Discussion

The process for the EPA proposal to become a final rule involves a 60-day public comment period that began when the rule was published on November 29, 2013. Comments must be received on or before January 28, 2014. Once the comment period closes, EPA has to review all public comments and respond to them in its final regulation. There is no set date for publication of the final rule and it depends on the number of public comments, how long it takes EPA to review them, as well as the time it takes to move the final regulation through the administrative process. Once the final rule is published in the Federal Register, it is effective and binding on the industry; should there be any legal challenges to the regulation, they would be expected shortly after the final rule is published.

The heart of the matter is whether the waiver authority Congress provided to the EPA allows it to waive the specific RFS requirements on the basis of the infrastructural challenges posed by the E10 blend wall. EPA's long argument, distilled to its essence, is that the statutory phrase "inadequate domestic supply" is ambiguous because Congress failed to specify what it meant by supply and therefore it is reasonable for EPA to include "factors beyond the capacity to produce" renewable fuels, such as the "ability to distribute, blend, dispense and consume those renewable fuels." Ambiguity is important to EPA because the Supreme Court has said that if a statute is ambiguous and the intent of Congress is not clear, a court must give deference to an agency's interpretation of the statute it is implementing. This is known in the legal world as "Chevron Deference" based on the 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (a copy of the decision can be found here). EPA defines supply as an "amount of a resource

or product that is available for use by the person or place at issue." For support, EPA refers to this definition in the online version of the Oxford Dictionaries: "a stock of a resource from which a person or place can be provided with the necessary amount of that resource."

Whether the word "supply" can be read to mean something other than an amount or stock, but instead depends on what is available or can be provided, seems like a proverbial splitting of hairs. And it is not likely, on its own, to allow EPA to use its waiver authority in this manner. Ambiguity is not a free pass; giving deference to an agency's interpretation does not require a court to agree with that interpretation. EPA still must demonstrate that its interpretation is a reasonable and permissible reading of the statute in light of Congressional intent. Fundamentally, this goes to the separation of powers among the branches of the federal government in the Constitution, where Article I, Section 1 states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."

Does EPA's proposed rule and its use of the general waiver authority in the statute go beyond implementing the RFS, crossing the Constitutional line into a form of legislating? Congressional intent is very important. As discussed in the previous article, a federal judge has already emphasized that Congress clearly intended for the RFS to expand the production and use of ever higher levels of renewable fuel, and that the volumes provided in the statute were not to be reduced easily. EPA does not dispute this intent. To understand how EPA's arguments would hold up if challenged in court in light of this clear intent, there are three Supreme Court cases that appear to be very instructive.

In the 1994 case *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.* (a copy of the decision can be found here), the Supreme Court considered an agency's authority to "modify" requirements of a law it administered, especially when those requirements were considered the "centerpiece of the Act's regulatory scheme." The Court did not give the agency deference because the agency's interpretation of its authority to make modifications to the statutory scheme designed by Congress went too far. Even if the agency's idea is a good one, the Court said that it is not entitled to make a fundamental revision to the statute. The Court emphasized that it was "highly unlikely" that Congress would leave such an important determination to agency discretion and "even more unlikely" that it would do so "through such a subtle device" as the authority to make modifications.

In 2000, the Supreme Court disagreed with an agency's claim that it had the authority to regulate tobacco in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.* (a copy of the decision can be found here). The Court sympathized with the seriousness of the problem the agency was trying to address, but was not persuaded by its argument for authority because an agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." Deference is proper only when Congressional ambiguity implies that Congress meant for the agency to "fill in the statutory gaps" but not for important matters and major questions. Congress is not likely to delegate decisions of "economic and political significance to an agency" and certainly not in "so cryptic a fashion" that requires an "extremely strained understanding" of terms used in the statute. The limits for delegating legislative powers is rooted in the need for political accountability to the voting public, which is primarily Congress: "no matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable" the power of an agency "must always be grounded in a valid grant of authority from Congress."

Finally, in 2001 the Supreme Court reviewed an EPA argument for authority under the Clean Air Act in the case *Whitman v. American Trucking Assn., Inc.* (a copy of the decision can be found here). With respect to the how Congress uses terms in a statute, the Court refused to find an implicit authorization for EPA to consider something that has been "expressly granted" in other parts of the same statute. Congress must make a clear "textual commitment of authority to EPA" to consider such matters. The Court colorfully stated that Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." To the Court "modest words" do not provide such immense power to change statutory requirements. Furthermore, the Court would not twist the concept of ambiguity on a "highly significant issue" because the Court considered it implausible that Congress would delegate such a matter to an agency. For proper delegation to take place, Congress must confer decision making authority on agencies clearly, with intelligible principles and "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." An agency goes "over the edge of reasonable interpretation" when it tries to use one part of the statute to

render “utterly inoperative” a separate part of the statute. In what would seem to be particularly relevant to an argument for use of waiver authority, the Court pointed out that an agency “may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” The Court made note of the fact that a statutory “plan reaching so far into the future was not enacted to be abandoned the next time the EPA” reviewed it.

Whitman v. American Trucking Assn., Inc. would appear to be particularly instructive here because the Clean Air Act also contains other waiver provisions for transportation fuel requirements, most notably those for oxygenated fuels. These provisions can be found in the same part of the Act that houses the RFS. They provide authority to waive oxygenate requirements if EPA determines that there is an “inadequate domestic supply of, **or distribution capacity for**, oxygenated gasoline meeting the requirements.” (emphasis added) Simply put, if Congress wanted EPA to consider distribution capacity (i.e. the blend wall) it would have said so. Congress clearly knew how to provide such authority because it did so for oxygenated fuels in the same part of the statute. Congress did not, however, include the same phrase (“or distribution capacity for”) in the RFS waiver provision, and that would seem to be a strong indication that the blend wall is outside EPA’s waiver authority.

Conclusion

The bottom line here, setting aside case law and parsing dictionary definitions, is really a matter of who gets to make this kind of decision about the RFS: Congress or the Executive branch. It is not about whether the blend wall is a problem; nor is it about the merits of having the blend wall regulate the year-to-year mandates. The real issue is whether EPA is the proper player in our Constitutional system of government to design such a policy solution if one is necessary. It is entirely possible that Congress understood the blend wall issues in 2007 when it created the RFS. Congress may well have intended for the mandates in the statute to motivate or force the industry to find solutions for the myriad challenges facing renewable fuels, including the blend wall. What we do know from the law is the clear intention that the RFS drive production of increasing amounts of renewable fuels to replace fuels derived from oil. By using the blend wall in this manner, EPA may well be short-circuiting those goals and intentions. It is therefore difficult to see how EPA is doing anything other than legislating a policy in place of – if not contrary to – Congress. Whether the policy makes sense does not matter; the central issue is whether it is Constitutionally-acceptable for EPA to make this binding policy decision as it carries out the statute. And this is the issue that may have to be eventually decided in the courts.

References

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (No. 82-1005). Legal Information Institute, Cornell University Law School. https://www.law.cornell.edu/supremecourt/text/467/837.

Coppess, J. "EPA Authority to Reduce the RFS." *farmdoc daily* (3):212, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, November 6, 2013.

Supreme Court of the United States. “MCI Telecommunications Corp. *v.* American Telephone & Telegraph Co. Legal Information Institute, Cornell University Law School.” No. 93-356. Argued March 21, 1994 -- Decided June 17, 1994. https://www.law.cornell.edu/supct/html/93-356.ZS.html.

U. S. Environmental Protection Agency. *Renewable Fuel Standard Program*. http://www.epa.gov/renewable-fuel-standard-program.