



Questioning the Final RFS Rule, Part 2: the Meaning of the Word ‘Supply’

Jonathan Coppess

Department of Agricultural and Consumer Economics
University of Illinois

January 14, 2016

farmdoc daily (6):9

Recommended citation format: Coppess, J. "Questioning the Final RFS Rule, Part 2: the Meaning of the Word ‘Supply’." *farmdoc daily* (6):9, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, January 14, 2016.

Permalink: <http://farmdocdaily.illinois.edu/2016/01/questioning-the-final-rfs-rule-part-2.html>

Today's article continues the discussion of EPA's [final rule](#) for the RFS. The previous article in this series provided background on the RFS and a general review of the final rule (*farmdoc daily* [January 7, 2016](#)). This article looks specifically at EPA's interpretation of the word 'supply' in the waiver provision 'inadequate domestic supply' and what Congress intended it to mean.

Discussion

When it interprets the RFS, EPA must adhere to any clear directive from Congress, but "ambiguous" terms provide some degree of reasonable delegation to EPA and courts give "considerable weight . . . to an executive department's construction of a statutory scheme it is entrusted to administer."¹ EPA argues that the phrase is ambiguous because Congress did "not specify what the general term 'supply' refers to" (Final RFS Rule, at 37). EPA concludes that the "common understanding" of the term supply is "an amount of a resource or product that is available for use by the person or place at issue" and that for renewable transportation fuel this would be "in terms of the person or place using the product" which it argues includes the ultimate consumer purchasing gasoline (Final RFS Rule, at 37). Ambiguity does not, however, provide complete delegation and deference to the agency because statutory interpretation of specific words cannot be done in isolation; it must be "in context" in order to produce "a substantive effect that is compatible with the rest of the law."²

EPA's interpretation includes the ultimate consumer because the definition for renewable fuel is "fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel" (45 U.S.C. §7545(o)(1)(J)). EPA argues that "there is no 'renewable fuel' and the RFS program does not achieve the desired benefits of the program unless biofuels like ethanol and biodiesel are actually used to replace fossil-based transportation fuels" by a person at issue (Final RFS Rule, at 37). EPA contends that Congress did not specify the person at issue. EPA's conclusion raises questions because Congress explicitly stated that all regulations promulgated for the RFS program "shall contain compliance provisions applicable to refineries, blenders, distributors, and importers" (45 U.S.C. §7545(o)(2)(A)(iii)(I)). This may well settle EPA's question and any ambiguity because the persons at issue for the mandate and waiver are the obligated parties (refineries, blenders, distributors and importers) not

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consumers. Additionally, the legislative history appears to support this reading. The House **wrote** the waiver for when “there is an inadequate domestic supply **or distribution capacity** to meet the requirement” (emphasis added); the **Senate** did not include “or distribution capacity” and the Senate version **prevailed**. While not definitive, this does indicate that when the two chambers resolved differences in conference, the conferees accepted the Senate’s version. The ethanol industry has **argued** that Congress intentionally removed the phrase so it would not be a consideration.

Finally, Congressional meaning for the word supply can be informed by the larger statutory context. That context, however, cannot be used to distort the statute; an agency’s discretion “does not license interpretive gerrymanders.”³ The Clean Air Act also regulates fuels based on their oxygen content due to additives such as ethanol (45 U.S.C. §7545(m); 40 C.F.R. §80.2). The oxygenate provision explicitly applies to “any gasoline sold, or dispensed, to the ultimate consumer . . . or sold or dispensed directly by fuel refiners or marketers to persons who sell or dispense to ultimate consumers” (45 U.S.C. §7545(m)(2)). The waiver authority includes when there is “an inadequate domestic supply of, or distribution capacity for, oxygenated gasoline” and Congress clarified that “the Administrator shall consider distribution capacity separately from the adequacy of domestic supply” (45 U.S.C. §7545(m)(3)(C)). Congress has demonstrated that it includes the ultimate consumer when it so intends, and that it has clearly distinguished between supply and the ultimate consumer or distribution capacity. The provisions in the RFS are conspicuous for the absence of both the ultimate consumer and distribution capacity, which may weigh against EPA’s interpretation.

Common sense agrees. The RFS was intended to increase renewable fuels production and supply but the ultimate consumer does not directly purchase renewable fuel and is not subject to the mandate. In fact, the consumer has minimal control over transportation fuels, and even less when it comes to how much renewable fuel is blended into what is sold at the pump. Currently, most of the ultimate consumers in this country can purchase only E10 unless they own an E85 vehicle and are at a station that sells E85. The only parties purchasing renewable fuel that have to be concerned about its supply are the obligated parties. This is the more natural reading of the statute and EPA admits that the renewable fuels industry is able to produce enough to supply the obligated parties under the mandate (excluding cellulosic ethanol). EPA’s extensive discussion about how the existing fuel infrastructure and the regulatory system continue to limit renewable fuels availability to the ultimate consumer may well indicate an acknowledgement of this reading. As such, EPA’s definition of supply raises significant questions.

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¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (commonly referred to as “Chevron deference”).

² *King v. Burwell*, 135 S.Ct. 2480, 2489 and 2492 (2015); Coppess, J., “[What the Obamacare and Power Plant Decisions Might Mean for the RFS Rule.](#)” *farmdoc daily* (5):125, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, July 10, 2015.

³ *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015) (by which the Court meant interpretations “under which an agency keeps parts of statutory context it likes while throwing away parts it does not”). See also, Coppess, J., “[What the Obamacare and Power Plant Decisions Might Mean for the RFS Rule.](#)” *farmdoc daily* (5):125, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, July 10, 2015.