



Successful Legal Challenge to Renewable Fuel Standard Likely to Have Minimal Long-Term Impact on Biofuels

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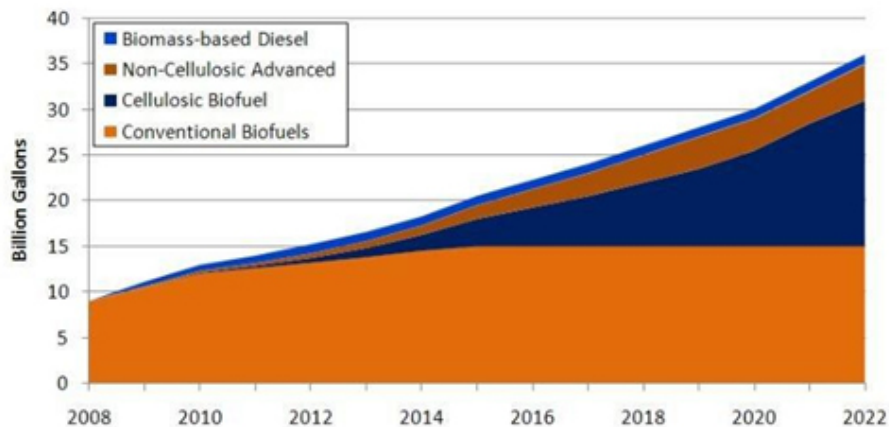
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The Energy Independence and Security Act of 2007, commonly referred to as EISA, amended the Federal Renewable Fuel Standard (RFS) by mandating specific quantities and types of renewable transportation fuels for each year—known as the yearly “applicable volume.” The applicable volume for a particular fuel (conventional biofuel, advanced biofuel, cellulosic biofuel, biomass-based diesel) determines the quantity fuel refiners, importers and blenders must purchase each year. The below graph illustrates the statutory legal requirements for renewable transportation fuels under the RFS.



The legislative standard, however, is only the first step in setting the actual yearly renewable transportation requirements. Because the volumetric requirements established by Congress in EISA

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assumed significant innovation in the cellulosic biofuel industry, Congress created an escape hatch in which the Environmental Protection Agency (EPA) can reduce the mandated quantity of advanced and cellulosic biofuel based on the projected production by the nascent industry. If the projected production volume of advanced and cellulosic biofuel for a year is less than the statutorily mandated volume, the EPA is required to reduce the applicable volume that fuel refiners, importers and blenders must purchase each year. The rationale behind this safety valve is that petroleum refiners are dependent upon the biofuel industry to produce advanced and cellulosic biofuels for them to purchase and blend into their product. If there is no biofuel to purchase, the refiners in essence have no option other than to miss the mandate and pay the accompanying penalty. As illustrated below, for each year of the RFS, the EPA has reduced the cellulosic biofuel applicable volume due to a lack of production capacity.

Cellulosic Biofuel	2010	2011	2012
EISA Mandate	100	250	500
EPA Adjusted Mandate	5	6.6	8.7

* Millions of Gallons

The Court Challenge to the 2012 Cellulosic Biofuel Mandate

The issue in the American Petroleum Institute (API) litigation is the EPA's mandate of 8.7 million gallons of cellulosic biofuel for 2012. Specifically, API challenged the process EPA used to reach the 8.7 million gallon applicable volume. EISA requires EPA to determine the projected volume of cellulosic ethanol based on an estimate created by the Energy Information Administration (EIA). The EIA projected 6.9 million gallons of cellulosic biofuel production in 2012—significantly less than the 8.7 million established by EPA as the applicable volume. The chart below illustrates the difference between EIA and EPA projections from 2010 to 2012.

Cellulosic Biofuel	2010	2011	2012
EISA Mandate	100	250	500
EIA Projection	5	3.9	6.9
EPA Adjusted Mandate	5	6.6	8.7

* Millions of Gallons

API claimed that the EPA's projection derived from a methodology biased toward overstatement in an effort to promote growth in the cellulosic biofuel industry—a methodology that is not based on a strict reading of the statute. The Court of Appeals for the District of Columbia in [API vs. EPA](#), (Jan. 25, 2013) agreed. In reaching its 8.7 million gallon projection, EPA considered EIA's projection, general progress made by the cellulosic biofuel industry, the EPA's own assessment of the industry's progress, and public comments submitted in response to the draft version of the rule. In large part, the court accepted EPA's technical approach to projecting industry capacity (slip opinion at page 8-9). It found fault, however, in EPA's acknowledged "tilt" towards "promoting growth" in the cellulosic biofuel industry in which the risk of overestimation of production volumes is set to deliberately outweigh the risk of underestimating cellulosic production (slip opinion at page 10). This effort by EPA to boost the cellulosic biofuel industry, although acknowledged by the court as Congress' intent in creating the RFS mandates, in the court's opinion, exceeded the agency's power. As a result the court vacated the cellulosic—and only the cellulosic—portion of the 2012 RFS rule.

Projected Impact on Future RFS Mandates

Although the court rejected EPA's approach favoring overestimation of projected cellulosic biofuel

production, the RFS itself, and EPA's general methodology of establishing both advanced and cellulosic biofuel projections, both survived the API challenge. As a result, regulated parties under the RFS (refiners, importers and blenders) can expect EPA to establish a final applicable volume for 2013 and beyond perhaps more in line with EIA projections, but the agency retains significant flexibility to justify deviations, even substantial deviations, from EIA estimates so long as the methodology does not have an explicit bias toward overestimation. The real question going forward with the cellulosic biofuel industry, however, will not be EPA projections, but the technical ability of the industry to develop capacity to meet RFS mandates in the future.