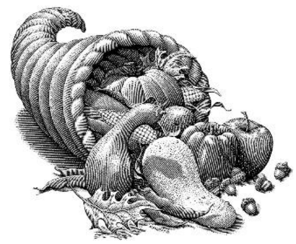
EPA DIRECTED TO DENY BIOFUEL WAIVERS TO DOMESTIC OIL REFINERS

The action represents a big win for corn producers and biofuel advocates



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Reuters News Service reported on September 8, 2020, that the Environmental Protection Agency has been directed to deny dozens of oil refiner requests for retroactive waivers from U.S. biofuel laws. EPA implements the biofuels program, Renewable Fuel Standard (RFS), a federal law requiring that domestic oil refiners must blend billions of gallons of biofuels into their fuel, or buy credits from those that do.

The EPA also is in charge of granting exemptions to the RFS program, after the Department of Energy reviews exemption applications. Small refiners that prove the rules would financially harm them can apply for exemptions, which relieve oil refiners from compliance with the RFS.

The waivers have created tensions between the influential oil and corn lobbies, both major constituencies for Trump as he seeks re-election in November. Agricultural interests argue that the biofuel mandate is vital to maintaining the financial health of corn farmers across America. Many petroleum industry members, especially the smaller refiners, argue that the RFS program is an unsustainable financial burden on their operations.

Background on U.S. Biofuels Policy

U.S. biofuels policy developed in response to growing concerns in the United States about energy independence, agricultural surpluses, and climate change. The RFS program, a production mandate for biofuels, was promulgated in 2005. Before then, import tariffs and other measures were enacted into law to try and impact America's dependence on foreign energy sources.

However, little prospective analysis was conducted on how these policies would affect the food system, much less the environment or health. The focus instead was on increasing the demand for production and use of biofuels to (i) decrease dependence on foreign oil, (ii) reduce greenhouse gas emissions and (iii) increase rural incomes.

Congress authorized the RFS program under the Energy Policy Act of 2005 (EPAct), which amended the Clean Air Act (CAA). The Energy Independence and Security Act of 2007 (EISA) further amended the CAA by expanding the RFS program.

The four renewable fuel categories under the RFS are:

- Biomass-based diesel
- Cellulosic biofuel
- Advanced biofuel
- Total renewable fuel

The 2007 enactment of EISA significantly increased the size of the program and included key changes, including:

- Boosting the long-term goals to 36 billion gallons of renewable fuel;
- Extending yearly volume requirements out to 2022;
- Adding explicit definitions for renewable fuels to qualify (*e.g.,* renewable biomass, GHG emissions);
- Creating grandfathering allowances for volumes from certain existing facilities;
- Including specific types of waiver authorities.

The statute also contains a general waiver authority that allows the Administrator to waive the RFS volumes, in whole or in part, based on a determination that implementation of the program is causing severe economic or environmental harm, or based on inadequate domestic supply.

The Controversy Over Retroactive Biofuel Blending Waivers

Many smaller refineries argue that the RFS program places an unfair economic burden on them, and filed suit to challenge the program. Industry advocates also lobbied the Trump Administration for exemptions from the program's requirements. In response to that lobbying, the EPA had sought to ease the regulatory burden on refiners by granting retroactive exemptions to dozens of small refining facilities.

However, in January of 2020, the U.S. Court of Appeals for the Tenth Judicial Circuit rejected the oil refiners claims, also holding that the EPA's Small Refinery Exemptions can be used as extensions for refineries that had secured them continuously each year since 2010. The federal appellate court's decision also called into question the future of the EPA's exemption program, because most of the recipients of waivers in recent years have not continuously received waiver extensions in each year since 2010. In fact, the standard set by the 10th Circuit's decision excluded only all but two refineries from consideration for future exemptions.

A Turnaround In Policy

The EPA has roughly quadrupled the number of retroactive biofuel blending waivers it grants to oil companies, compared with previous years. In June of 2020, the EPA disclosed that it had received 52 new petitions for retroactive biofuel blending waivers. If granted, would help bring oil refiners into compliance with the 10th Circuit's court ruling of earlier this year.

However, many industrial agriculture lobbyists and biofuel advocates have called on the current administration to reject the waiver requests. They assert that the RFS program assures market stability and helps American farmers at a time when the trade wars and COVID-19 pandemic are creating unparalleled instability for the nation's agricultural sector.

In contrast, organizations such as The American Fuel & Petrochemical Manufacturers, which represents many merchant refiners, have argued publicly that the EPA wrongly denied justifiable biofuel blending waivers in the past. These advocates argue that refiners are justified to seek relief now for those years.

If the EPA declines to issue the pending waiver requests as recently reported, all sides seem to acknowledge that refiners would have no option but to comply with RFS program and the decision of the federal appellate court. Following news that the EPA might reject the pending waiver requests, U.S. renewable fuel credits for 2020 rose to their highest levels since March of 2018. On September 8, 2020, credits traded at $0.55 each, up nearly eighteen percent (18%) from the previous session.

Long Term Consequences?

Advocates and lobbyists on both sides of the issue have their set positions. What seems to be missing from the debate are the bigger picture ramifications of a biofuels policy.

Economists and social scientists recognize that the linkages between energy markets and the food system created by the biofuels mandate has produced unintended consequences. These included increased costs for food producers, upward pressure on globally-traded commodity prices, and a public outlay of subsidies (as well as a de facto private underwriting through higher prices) for ethanol production that has been significantly greater than anticipated.

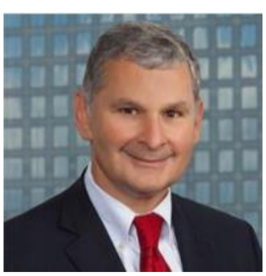
Because corn is a food and feed staple, the RFS program has had unintended effects on U.S. agricultural production by altering the mix of crops planted. This also has produced unintended effects on the global food system, which seeks a predictable, and increasing, supply of food.

Moreover, the energy and environmental footprint of corn production calls into question its suitability as a renewable substitute for gasoline. Corn production requires more water, as well as more petroleum-based fertilizers and other additives, than many other agricultural food options. Corn also is far from the healthiest option available to American farmers whose production choices supply the nation's food chain.

These trade-offs weaken the justification of the current policy on the basis of U.S. energy security, particularly as reliance on imported oil has been reduced recently by increased domestic energy production. And yet, would alternative policies have fewer shortcomings?

Policy makers would be wise to examine how the RFS program might be compared to an alternate policy of eliminating subsidies for fossil fuels. The elimination of such subsidies worldwide is a goal to which numerous international bodies and their member countries have committed, but not yet fulfilled. This policy alternative has potential impacts on U.S. domestic agricultural production and the global food system, but the ways in which those impacts are manifested are likely to be different from the RFS program, as are its health, environmental, social, and economic implications.

Such a comparison would shed light on the merits and shortcomings of different ways to pursue the same goals. Recent events suggest the time for a reevaluation may be near.



Richard M. Blau leads GrayRobinson's Nationwide Alcohol Beverage and Food Law Department, focusing on the laws that govern the manufacture, importation, processing distribution, marketing, sale and consumption of foods and beverages. Richard devotes a substantial portion of his practice to trade regulation, legislative lobbying, brand development and protection, M & A compliance guidance, litigation and mediation involving the members of the food industry.