

PolicyPennings by Daryll E. Ray & Harwood D. Schaffer

EPA: RFS waiver issues include one-year vs. permanent and legislative semantics

In his letter to the United States Environmental Protection Agency (EPA) requesting that it grant a waiver of the Renewable Fuel Standard (RFS), Arkansas Governor Mike Beebe writes, “while the drought may have triggered the price spike in corn, an underlying cause is the federal policy mandating ever-increasing amounts of corn for fuel. Because of this policy, ethanol production now consumes approximately 40 percent of the US corn crop, and the cost for use in food production has increased by 193 percent since 2005. Put simply, ethanol policies have created significantly higher corn prices, tighter supplies, and increased volatility.”

It is clear from this statement and other comments received by the EPA that some would like to see a permanent waiver that would in effect eliminate the RFS mandate altogether. It could also be argued that without a mandate and, depending upon the relative price of crude oil and ethanol, the petroleum industry could change their refining processes in such a way as to use less ethanol in the production of gasoline. In that way more corn would be available for feed, exports, food, and various industrial uses.

While acknowledging that the role of ethanol production on the price and availability of corn is an important consideration, the EPA in its November 16, 2012 denial of a waiver of the RFS volumetric requirements makes it clear that it “has authority to grant a waiver for a period of one year only.” It can also renew a waiver “after consultation with the Secretary of Agriculture and the Secretary of Energy.... Such consultation would be in the context of evaluating the economic impacts of the initial waiver as well as whether sever economic harm is still being caused by implementation of the RFS volume requirement.”

Because the statutes establishing the RFS volumetric requirements gives the EPA the responsibility to “issue regulations ensuring that gasoline sold in the US, on an annual average basis, contain[s] a specific volume of ‘renewable fuel’ the EPA does not have the authority to grant a multi-year waiver simply because it has raised the price of corn to livestock feeders and industrial users. That kind of action would instead require an act of Congress repealing the RFS.

For that reason the EPA confined its analysis of harm to a one-year timeframe.

In our previous column we reported that the EPA found that because of the way that the refiners have taken advantage of the high octane content of ethanol by producing a lower octane gasoline for blending,

the ability of refineries to reduce their use of ethanol under a one-year waiver would be severely limited.

This column began with an analysis of a second factor that played into the EPA’s decision with regard to the request to grant a waiver of the RFS volumetric requirement—the constraint that the waivers are to be issued for no more than a year at a time.

A third issue that EPA’s waiver denial spent some time examining was the criteria it was legally required to use in deciding whether or not to grant the requested waivers.

The EPA writes, “in determining whether these waiver requests should be granted or denied, our decision is based on the relevant criteria for a waiver set forth in [legislation] — whether implementation of the RFS volume requirements would severely harm the economy of a State, a region or the United States.”

Thus the EPA concludes that the “straightforward meaning of this provision is that implementation of the RFS program itself must be the cause of the severe harm. We found that the language provided by Congress does not support the interpretation that EPA would be authorized to grant a waiver if it found that implementation of the program would significantly *contribute* to severe harm.”

If the implementation of the RFS is the cause of the severe economic harm—EPA reasons—then the implementation of the waiver must mitigate the harm. If the implementation of a waiver does not reduce corn prices and increase the amount of corn available for other uses in the one-year timeframe EPA must use in its analysis, it must conclude that the RFS volumetric requirement is not the “cause” of the severe harm.

We remember in high school English class how frustrated we would feel when the teacher would ask us to figure out what a writer meant in writing a particular sentence or line of poetry. It seemed to us like a lot of useless nitpicking. Well, in this decision the EPA spent some time nitpicking by examining the meaning of three words: “would” and “severely harm” in their statutory context.

From an analytical perspective the “EPA interprets the word ‘would’ as requiring a generally high degree of confidence that implementation of the RFS program would severely harm the economy of a State a region, or the United States.”

“In [a previous] waiver determination we noted that Congress specifically provided for a lesser degree of confidence in a related waiver provision.... That provision applies for just the first year of the RFS

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program, and provides for a waiver of the 2006 requirements based on a study by the Secretary of Energy of whether the program ‘*will likely result* in significant adverse impacts on consumers in 2006.’ (Emphasis supplied). The term ‘likely’ generally means that something is at least probable, and EPA believes that the term ‘would’... means Congress intended to require a greater degree of confidence under the waiver provision at issue here.”

The EPA argues “that while the [RFS] statute does not define the term ‘severely harm,’ the straightforward meaning of this phrase indicates that Congress set a high threshold for issuance of a waiver.” In making this argument the EPA examines another statute where “ozone nonattainment areas are classified according to their degree of impairment, along a continuum of marginal, moderate, serious, severe or extreme ozone nonattainment areas. Thus... ‘severe’ indicates a level of harm that is greater than marginal,

moderate, or serious, though less than extreme.” As a result the EPA adopts the words “severely harm” to indicate “a point quite far along a continuum of harm.”

In analyzing a decision of an agency like the EPA, it is important to remember that they must build the case for their decision brick by brick. Some of those bricks describe the current processes used by the refineries while others focus on timeframes and words like “would” and “severely harm.”

Next week we will examine the economic model that the EPA used in their technical analysis of what would happen with and without the mandate.

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