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Supply and Demand, One and the Same Since When?: The EPA's Failed Attempt to Find a Loophole in the Renewable Fuel Standard

*"We shall require a substantially new manner of thinking if humanity is to survive."*¹

INTRODUCTION

Since Congress's promulgation of the Clean Air Act in 1963,² the United States government has attempted to focus domestic consumers on reducing the amount of pollution they contribute to the environment. Moreover, in two amendments to the Clean Air Act—one in 2005 and another in 2007—Congress promulgated and expanded the Renewable Fuel Standard (RFS) program, authorizing the United States Environmental Protection Agency (EPA) to mandate an annually increasing production of renewable fuels.³ As consumers use what is provided, the production and availability of fuels that generate less carbon dioxide when burned is critical to the overall goal of reducing pollution. The consumption of renewable fuels reduces carbon dioxide emissions, which slows the rise of global temperatures.⁴ Thus, the closer producers get to yielding a transportation fuel composed of 100% renewable fuel, the closer consumers will be to achieving the goal of the Clean Air Act and RFS—reducing pollution.

Though the RFS appears theoretically sound, its implementation has proven difficult. Until 2013, the problem rested with renewable fuel producers, who were unable to generate the mandated supply. Today's problem, however, lies with the retailers and advertisers. Fuel retailers, commanded by large oil companies that have dominated the fuel market for decades, claim that practical and infrastructural constraints, known as

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1. Robert Shogan, *Mankind's Challenge: Living with Terror: The Bomb is 40*, L.A. TIMES, Aug. 4, 1985, articles.latimes.com/1985-08-04/news/mn-4275_1_atomic-bomb [https://perma.cc/VV3K-EP9Z] (quoting Albert Einstein).

2. 42 U.S.C. §§ 7401–661 (2015).

3. Energy Policy Act of 2005 (EPAAct), Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C. & 26 U.S.C.); Energy Independence and Security Act of 2007, Pub. L. No. 110-40, §§ 201–04, 121 Stat. 1492 (2007).

4. See U.S. ENVTL. PROT. AGENCY, *Overview of Greenhouse Gases: Carbon Dioxide Emissions*, epa.gov/ghgemissions/overview-greenhouse-gases [https://perma.cc/M67G-VPSX] (last visited Apr. 9, 2017).

the “blendwall,” deem the RFS required amounts unattainable.⁵ The EPA appears sympathetic to this notion, and as a result, it has lowered the statutory volumes of renewable fuel to meet consumption and distribution constraints.⁶ However, it is unclear whether the EPA has the power to do so. The EPA’s recent actions, especially those since 2013, have undermined the goals and requirements of the RFS, undercut investment in advanced biofuels, and raised greenhouse gas emissions in the transportation fuel sector.⁷ Renewable fuels required to be used by the RFS statute “reduce emissions of greenhouse gases compared to fossil fuels,” so the EPA’s reduction in renewable fuel volumes subject to the RFS has a direct and damaging impact on greenhouse gas emissions goals.⁸

Part I of this Comment will provide a brief overview of renewable fuels, noting key differences in the nature and uses of first-generation biofuels. Part II addresses the history and recent popularization of ethanol, a first-generation biofuel that provides a fuel source arguably more eco-friendly than more traditional sources such as petroleum. Part III describes the RFS, tracing its evolution from its origins in 2005 to the current law in effect. It will also discuss the relevant statutory provisions that the EPA relied on when reducing the statutory volumes of renewable fuel for 2014–2016. Part IV provides an overview of the EPA’s interpretation of its statutory authority and claim that it has the power to consider the blendwall constraints when determining whether there is an “inadequate domestic supply” of renewable fuels. Finally, Part V of this Comment provides the framework for judicial review of agency interpretations of statutes and will include an analysis, using two landmark cases involving agency interpretation, to determine whether the EPA has overstepped the constitutional bounds of its authority with its broad interpretation of the RFS waiver provision.

5. See Marc J. Rauch, *Big Oil’s Anti-E15 Campaign Filled with Gross Exaggerations and Misinformation*, AUTO CHANNEL (May 16, 2012), theautochannel.com/news/2012/05/16/036507-big-oil-s-anti-e15-campaign-filed-with-gross-exaggerations.html [<https://perma.cc/MU9E-S4VA>].

6. Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420 (Dec. 14, 2015).

7. Letter from Brent Erickson, Exec. Vice President, Biotechnology Indus. Org., to Gina McCarthy, Adm’r, EPA, 1–2 (July 27, 2015), bio.org/sites/default/files/EPA-HQ-OAR-2015-0111%20-%20BIO%202014-2016%20RFS%20Comments%20-%202015-07-27.pdf [<https://perma.cc/WP2C-XJU9>] (referencing Docket No. EPA-HQ-OAR-2015-0111).

8. See Regulation of Fuels and Fuel Additives: Modifications to Renewable Fuel Standard Program, 78 Fed. Reg. 62462, 62465 (Oct. 22, 2013); see also *id.* at 62468 (noting that Clean Air Act section 211(o) “requires all renewable fuels used in the RFS program . . . to meet specified thresholds for reductions in lifecycle greenhouse gas emissions compared to a baseline fossil fuel”).

I. AN OVERVIEW OF BIOFUELS

As the RFS contains vocabulary new to those unfamiliar with scientific study, it is important to define key terms detailed in the legislation before discussing its ramifications. Thus, familiarization with biofuel—the topic Congress attempts to legislatively control in the RFS—will create the foundation necessary to understand the potential conflicts that the current statutory language permits.

While the U.S. has historically relied on petroleum to satisfy the majority of its energy needs, the consequences of that reliance have proven grave. Among other things, the exploration for and production of petroleum releases dangerous toxins into the atmosphere, contributes to greenhouse gas emissions, and often involves consequential oil spills, which cause great environmental damage.⁹ In an effort to reduce U.S. reliance on such an environmentally unfriendly resource, car manufacturers and utility companies have been in serious pursuit of alternative energy sources. Among the leading contenders are biofuels—the renewable, clean burning fuels that Congress addresses in the RFS.

“Biofuel” denotes any fuel produced from renewable biomass, which includes plants, woody materials, and organic wastes.¹⁰ Plants take in carbon dioxide as they grow and, theoretically, emit the same amount of carbon dioxide when burned as fuel.¹¹ While some observers consider biofuels to be “carbon neutral,”¹² others argue that the use of fossil fuels needed to produce the sources of biofuel effectively create higher carbon dioxide emissions than can be balanced out by the burning of those biofuels.¹³ Nevertheless, they contribute far less carbon than the production of petroleum. Transportation biofuels, which are those used in motor vehicles, motor vehicle engines, non-road vehicles, or non-road engines (except for ocean-going vessels),¹⁴ are commonly classified as first-, second-, or third-generation biofuels.¹⁵ The different generation

9. See generally Wout Broekema, *Crisis-Induced Learning and Issue Politicization in the EU: The Braer, Sea Empress, Erika, and Prestige Oil Spill Disasters*, in PUBLIC ADMINISTRATION: SYMPOSIUM: DESIGNING RESILIENT INSTITUTIONS FOR TRANSBOUNDARY CRISIS MANAGEMENT 381 (Arjen Boin & Martin Lodge ed., 2016).

10. Melissa Powers, *King Corn: Will the Renewable Fuel Standard Eventually End Corn Ethanol's Reign?*, 11 VT. J. ENVTL. L. 667, 667 (2010). The biofuel definition explicitly excludes fossil fuels.

11. Cymie Payne, *Local Meets Global: The Low Carbon Fuel Standard and the WTO*, 34 N.C.J. INT'L L. & COM. REG 891, 895 (2009).

12. Powers, *supra* note 10, at 669.

13. See *id.*

14. 42 U.S.C. § 7545 (o)(1)(L) (2015).

15. See Powers, *supra* note 10, at 667.

designations depend on the sources used to derive these fuels, their current or future commercial availability, their overall energy efficiency, and the potential side effects of their production and use.¹⁶

A. First-Generation Biofuels

Although the definition of first-generation biofuel is not scientifically established, the term generally refers to biofuels that are currently produced on a commercial scale.¹⁷ As first-generation biofuels are extracted from plants that typically serve as crops or feedstocks,¹⁸ they can be derived using relatively simple technology and can be produced in massive quantities at a lower production cost.¹⁹ Ethanol and biodiesel—both serving as replacements for transportation fuel—are the two main categories of first-generation biofuel.²⁰ This Comment will focus solely on ethanol because the EPA has chosen to waive the total renewable fuel requirement, which has historically been composed of ethanol.

B. Second- and Third-Generation Biofuels

Second-generation biofuels are those that are close to approaching commercial scale production status and include fuels produced from non-food, cellulosic materials rather than from feedstocks.²¹ It is more difficult to mass-produce these biofuels due to challenges in releasing the sugars from these materials necessary to convert them to ethanol.²²

Third-generation biofuels include several experimental alcohols developed from crops and the promising—and proven—technology of algae-based biodiesels (oilgae).²³ These biofuels are not yet available due to lack of production experience—algae growth requires extensive amounts of water, nitrogen, and phosphorous that makes it more costly to produce.²⁴ Large-scale oilgae production is unlikely to occur in the near

16. *Id.*

17. Timothy A. Slating & Jay P. Kesan, *The Renewable Fuel Standard 3.0? Moving Forward With the Federal Biofuel Mandate*, 20 N.Y.U. ENVTL. L. J. 374, 386 (2014).

18. *Id.* at 388.

19. *Id.*

20. Powers, *supra* note 10, at 675.

21. Anselm Eisentraut, *Sustainable Production of Second-Generation Biofuels: Potential and Perspectives in Major Economies and Developing Countries*, INT'L ENERGY AGENCY I, 80 (2010).

22. *Id.*

23. Powers, *supra* note 10, at 676.

24. *Id.*

future because companies with enough capital to invest in the process are hesitant to face the high production costs.

II. AN INTRODUCTION TO ETHANOL

The vast majority of ethanol, or ethyl alcohol, is derived from starch- and sugar-based feedstocks.²⁵ The use of these food materials, easy to extract and ferment, makes large-scale ethanol production affordable.²⁶ Corn serves as the feedstock for most domestic ethanol production and is currently the leading crop in the U.S. As concerns surrounding corn's availability for human and livestock have risen, the RFS has limited the amount of starch-based ethanol permitted to satisfy the statutory volume of 15 billion gallons.²⁷ This limitation is in place to ensure that enough corn remains to meet demand in livestock feed, human food, and export markets.²⁸

A. Background and History

Despite ethanol's recent popularization, it is not a new engine fuel. It has been used since the 1820s, when Samuel Morey introduced its use in his first internal combustion engine prototype.²⁹ Ethanol fuel then received little attention until 1860, when Nicholas Otto began experimenting with internal combustion engines.³⁰ Later, in 1896, Henry Ford designed his first car, the "Quadricycle," to run on pure ethanol.³¹ In 1908, Ford's revolutionary "Model T" was capable of running on gasoline, ethanol, or a combination of both.³² While Ford continued to advocate for ethanol fuel during the prohibition movement, lower prices caused gasoline to prevail.

25. U.S. DEP'T OF ENERGY, *Alternative Fuels Data Center: Ethanol Production and Distribution*, afdc.energy.gov/fuels/ethanol_production.html [https://perma.cc/LR3A-3FHE] (last visited Apr. 9, 2017).

26. U.S. DEP'T OF ENERGY, *Alternative Fuels Data Center: Ethanol Feedstocks*, afdc.energy.gov/fuels/ethanol_feedstocks.html [https://perma.cc/8PDT-F3WH] (last visited Apr. 9, 2017).

27. *Id.*

28. See Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420, 77,466–67 (Dec. 14, 2015); Brent D. Yacobucci, CONG. RESEARCH SERV., R42824, ANALYSIS OF RENEWABLE IDENTIFICATION NUMBERS (RINS) IN THE RENEWABLE FUEL STANDARD (RFS) 1 (2013).

29. See HORST O. HARDENBERG, SAMUEL MOREY AND HIS ATMOSPHERIC ENGINE (1992). His discovery was overlooked, mostly due to the success of steam power at the time.

30. See LYLE CUMMINS, INTERNAL FIRE: THE INTERNAL COMBUSTION ENGINE 1673–1900 (1989).

31. See *Henry Ford*, HISTORY.COM, history.com/topics/henry-ford [https://perma.cc/QF39-7MS8] (last visited Apr. 9, 2017).

32. *Id.*

In the late 1970s, the U.S. saw long-term growth in gasoline containing up to 10% ethanol (E10).³³ The discovery that methyl tertiary butyl ether (MTBE) was contaminating groundwater spurred the demand for ethanol produced from field corn, thus opening a new market for ethanol.³⁴

The steep growth in twenty-first century ethanol use was driven by federal legislation aimed to reduce oil use and enhance energy security. As discussed below, Congress sought, through promulgation of the Energy Policy Act of 2005 (EPAct), the Energy Independence and Security Act of 2007 (EISA), and the RFS arising from each, to significantly reduce reliance on foreign fuel sources and to reduce greenhouse gases.

B. Ethanol's Rise in Popularity

As rule makers promulgated legislation to counter the negative environmental impacts of diesel gasoline, biofuels, including ethanol, grew increasingly popular. More than 97% of today's biofuel comes in the form of ethanol.³⁵ Ethanol-blended fuel is typically E10 (90% gasoline, 10% ethanol), which is the blend approved for use by every major automaker in the world.³⁶ Today, nearly all of the approximately 139 billion gallons of gasoline used for transportation purposes contains 10% ethanol.³⁷ To illustrate, when consumers go to gas stations to fill up their tanks, they can normally look on the pump and find a sign containing language similar to "contains 10% ethanol." This sign effectively alerts the consumer that he or she will be putting E10 gasoline into the vehicle.

In addition to E10, the EPA works with auto manufacturers to qualify cars for higher blend levels—most notably, E15 (contains 15% ethanol) and E85 (contains 85% ethanol). While E85 contains the least amount of diesel fuel (15%), the only vehicles able to efficiently burn this fuel are flex-fuel vehicles, which have not gained enough popularity to dominate the automobile market.³⁸ In addition, though some car models from 2001 and later have been approved for E15, the warranties of many automakers

33. Jeffrey Goettemoeller & Adrian Goettemoeller, SUSTAINABLE ETHANOL: BIOFUELS, BIREFINERIES, CELLULOSIC BIOMASS, FLEX-FUEL VEHICLES, AND SUSTAINABLE FARMING FOR ENERGY INDEPENDENCE 42 (2007).

34. *Id.*

35. RENEWABLE FUELS ASS'N, POCKET GUIDE TO ETHANOL 2015, 1, 2 (2015). As discussed above, corn-based ethanol is considered a first-generation biofuel. As such, ethanol is a biodegradable, high-octane motor fuel derived from the sugars, starches, and cellulosic matter found in plants.

36. Rauch, *supra* note 5, at 1.

37. Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420, 77,421 (Dec. 14, 2015).

38. *Id.* at 77,438.

do not cover the use of E15 fuel.³⁹ As a result, the fuel market is dominated by E0 (100% gasoline) and E10.⁴⁰

III. THE RENEWABLE FUEL STANDARD

In the mid-2000s, growing concerns over energy security, greenhouse gas emissions, and steep oil prices combined to reinvigorate consumer, governmental, and commercial support for new biofuels.⁴¹ To address these concerns, Congress promulgated the RFS, a statutory mandate that requires domestic transportation fuel to contain a specified, minimum volume of biofuel.⁴² The RFS has played a dominant role in the continued development of the United States biofuel sector; however, the standards that the EPA released for 2014 through 2016 reflect a novel and questionable interpretation of the statutory language. This Comment presents the evolution of the original RFS to the law in effect today and highlights sections on which the legislative authority relied when setting the 2014–2016 standards.

A. Evolution of the Renewable Fuel Standard

In order to ascertain the legislature's intent when enacting law, it is imperative to understand the circumstances under which the law was created. This Comment thus provides a brief description of RFS1, the prior version of the RFS, and RFS2, the current law in effect.

1. Origins and RFS1

Congress passed the EAct in response to increasing national demand for transportation fuel, declining domestic production of refined petroleum products, and rising environmental concerns associated with rapid and negative climate change.⁴³ As part of a larger program to encourage development of renewable fuels, the EAct amended the fuel provisions of the Clean Air Act⁴⁴ to establish the RFS, set forth at section 211o of the

39. Rauch, *supra* note 5, at 1.

40. Michael Romita, *The Renewable Fuel Program at an Inflection Point: Policy Implication of EPA's Proposed 2014-2016 Renewable Fuel Standard*, 45 ENVTL. L. 10674, 10674 (2015).

41. Energy Policy Act of 2005 (EAct), Pub. L. No. 109-58, § 1224, 119 Stat. 594, 954 (2005) (codified as amended in scattered sections of 42 U.S.C. and 26 U.S.C.).

42. *Id.*

43. Romita, *supra* note 40, at 10675.

44. See 42 U.S.C. §§ 7401–7671 (2009).

Clean Air Act.⁴⁵ The original RFS, commonly known as RFS1, authorized the EPA to establish a comprehensive program to replace traditional diesel gasoline with increasing annual volumes of renewable fuel.⁴⁶

Under RFS1, Congress required the EPA to determine and publish annual percentage standards for each compliance year.⁴⁷ Obligated parties—generally producers and importers of gasoline and diesel fuel—were to use these percentage standards to calculate their individual compliance obligations.⁴⁸ There are four percentage standards, each of which is applied to the volume of non-renewable gasoline and diesel produced or imported by each obligated party during a given year.⁴⁹ The application of the percentage standard serves to determine the individual volume obligation with respect to each of the renewable fuel types—advanced biofuel, biomass-based diesel, cellulosic biofuel, and conventional biofuel.⁵⁰ Renewable Identification Numbers (RINS) are assigned by renewable fuel producers to each gallon of qualifying renewable fuel and serve as a means for demonstrating compliance by obligated parties.⁵¹ Aside from using sufficient current-year RINS to demonstrate compliance in a given year, obligated parties may also choose one of two options: to use available RINS from the prior year towards the current year's requirement, for up to a 20% cap, or to carry forward a deficit into the next compliance year.⁵²

Prior to promulgation of RFS1, the U.S. had produced a total of only 3.9 billion gallons of ethanol.⁵³ The high production cost of advanced ethanol appeared to thwart further production; thus, absent government interjection, fuel ethanol production was projected to plateau. To overcome production barriers, RFS1 mandated an increased use of renewable fuel to 4.0 billion gallons in 2006, increasing yearly production to 7.5 billions in 2012.⁵⁴

2. *The Current Law—RFS2*

In the wake of rising oil prices, Congress promulgated EISA as a comprehensive bill designed to increase energy efficiency and the

45. *Id.* § 7545(o).

46. *Id.*

47. *See id.* § 7545(o)(3)(B)(i).

48. *Id.* § 7545(o)(3)(B)(ii).

49. *Id.* § 7545(o)(2)(B)(i).

50. *Id.* § 7545(o)(2)(A)(i).

51. *Id.* § 7545(o)(2)(A)(iii).

52. *Id.* § 7545(o)(2).

53. Energy Independence and Security Act of 2007, Pub. L. No. 110–140, §§ 201–04, 121 Stat. 1492, 1519–30 (2007).

54. *See* § 7545(o)(2)(B).

availability of renewable energy.⁵⁵ Known as RFS2, this act significantly expanded RFS1, extending by ten years the compliance period in which Congress specified the required volume of renewable fuels—now through 2022.⁵⁶ Congress also increased the yearly-required volumes⁵⁷ and added new, categorized mandates to begin in 2009.⁵⁸ The categorized mandates, nested within the total renewable fuel mandate, were separated into four types: cellulosic biofuel, biomass-based diesel, advanced biofuel, and total (conventional) renewable fuel.⁵⁹

B. Key RFS Provisions—Waivers

RFS2 places three waiver provisions at the EPA's disposal: a cellulosic biofuel waiver, a biomass-based diesel waiver, and a general waiver.⁶⁰ The legislation dictates that if a waiver is issued in favor of a producer, it automatically expires after one year unless extended by the EPA Administrator.⁶¹

1. The Cellulosic Biofuel Waiver

The EPA must annually determine the projected volume of cellulosic biofuel production for the following year.⁶² If the projected volume is less than the applicable volume set forth by Congress in § 7545(o)(2)(B)(i)(III), the EPA must lower the applicable value using the cellulosic waiver.⁶³

If the EPA lowers the applicable volume of cellulosic biofuel, it then has the authority to reduce the applicable volumes of both advanced biofuel and total renewable fuel by the same or lesser amount.⁶⁴ There is no requirement that the EPA reduce these quotas, nor does the statute mandate any factors the EPA must consider in its determination to lower or to maintain these amounts.⁶⁵ Thus, the EPA thus enjoys broad discretion in whether, and under what circumstances, it reduces the advanced and total renewable fuel volumes under the cellulosic biofuel waiver provision.⁶⁶

55. Energy Independence and Security Act of 2007, §§ 201–04.

56. § 7545(o)(2)(B)(i).

57. *See id.*

58. *Id.*

59. *Id.* § 7545(o)(2)(B)(i)(I)–(IV).

60. *See id.* § 7545(o)(7)(D)–(F).

61. *Id.* § 7545(o)(7)(C).

62. *Id.* § 7545(o)(7)(D)(i).

63. *Id.*

64. *Id.*

65. Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420, 77,433–434 (Dec. 14, 2015).

66. *See id.* at 77,434.

2. General Waiver

If the EPA finds that reduction of the advanced biofuel and total renewable fuel permitted under its cellulosic waiver authority is insufficient to address supply limitations, it can then use its general waiver authority to effectuate a further reduction—one beyond that allowed by the cellulosic waiver.⁶⁷

Section 211(o)(7) of the Clean Air Act grants the EPA Administrator authority to waive, in whole or in part, the national renewable fuel requirements if one of two situations occurs. First, the EPA Administrator, in consultation with the Secretaries of Agriculture and Energy, may lower or waive the statutory amount if the Administrator determines that implementation of the requirement would severely harm the economy or environment of a state, region, or the U.S.⁶⁸ In addition, the EPA Administrator may waive or reduce the statutory requirements if there is an existing inadequate domestic supply.⁶⁹ On the petition of a state, fuel provider, or at the Administrator's own discretion (in consultation with the Secretaries of Agriculture and Energy), the EPA Administrator may grant a waiver or reduction for a single year.⁷⁰ The EPA may not waive the requirement for an individual state or supplier, but must instead adjust the total national requirement.⁷¹ Thus, in the event of a waiver, all suppliers' quotas would be reduced by the same percentage.

The EPA must also approve or deny a waiver petition within ninety days of its receipt, after providing public notice and opportunity for comment.⁷² A granted waiver expires after one year, subject to extension by the EPA Administrator in consultation with the Secretaries of Agriculture and Energy.⁷³

IV. EPA WAIVER OF THE 2014–2016 STANDARDS—THE CRUX OF THE PROBLEM

For the first time since Congress promulgated the RFS, the EPA utilized both the cellulosic and general waiver provisions to significantly reduce the statutory volumes for 2014–2016.⁷⁴ While the EPA's use of its

67. *Id.*

68. *Id.* § 7545(o)(7)(A)(i).

69. *Id.* § 7545(o)(7)(A)(ii).

70. *Id.* § 7545(o)(7)(C).

71. *Id.* § 7545(o)(7)(A).

72. *Id.* § 7545(o)(7)(A)–(B).

73. *Id.* § 7545(o)(7)(C).

74. *See generally* Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420, 77,435 (Dec. 14, 2015).

cellulosic waiver came as no surprise, its use of its general waiver authority is one of the most controversial aspects of its Final Rule.⁷⁵ The EPA argued that there is an “inadequate domestic supply” of renewable fuel for 2014–2016 to justify its substantial reduction of the statutory volumes; however, its broad interpretation of the statutory phrase *inadequate domestic supply* allowed it to consider a vast array of factors, including those which seemingly pertain to inadequate demand for—rather than inadequate supply of—renewable fuel.⁷⁶

A. Statutory Volumes Waived or Reduced by the EPA

The EPA, for the first time and upon its own motion, proposed to lower the 2014 overall RFS mandate from 18.15 billion gallons to 15.21 billion, and the advanced biofuel mandate from 3.75 billion gallons to 2.20 billion.⁷⁷ After evaluating the availability of qualifying renewable fuels and factors,⁷⁸ that in some cases limit supplying those fuels to the vehicles that can consume them, the EPA proposed to reduce the volumes of advanced biofuel and total renewable fuel due to an “inadequate domestic supply of these fuels.”⁷⁹

The EPA published in the Federal Register its final volumes for cellulosic biofuel, biomass-based diesel (biodiesel), advanced biofuel, and total renewable fuel for 2014, 2015, and 2016, on December 14, 2015.⁸⁰ In its Final Rule, the EPA raised the volumes of all fuel categories above those in the proposed rule; however, the finalized volumes remain far below the statutory levels.⁸¹ For 2014, where actual volumes supplied to the market were known, the final volumes do not differ significantly from those proposed. This resulted in final volumes nearly 2 billion gallons below the 2014 statutory requirement for total renewable fuels.⁸² For 2015, where it had more than nine months of data on actual production, the EPA

75. Jonathan Coppess, *Evaluating EPA's Arguments for RFS Waiver Authority*, 4 FARMDOC DAILY 7 (Jan. 16, 2014), farmdocdaily.illinois.edu/2014/01/evaluating-epa-arguments-rfs-waiver-authority.html [<https://perma.cc/PYK2-NLSG>].

76. *See id.*

77. 80 Fed. Reg. at 77,424 (stating the original 2014 volume mandates); U.S. ENVTL. PROT. AGENCY, EPA PROPOSES 2014 RENEWABLE FUEL STANDARDS, 2015 BIOMASS-BASED DIESEL VOLUME 2 (Nov. 2013), epa.gov/sites/production/files/2015-08/documents/420f13048.pdf [<https://perma.cc/P9SB-DP5N>] (stating the proposed reduced 2014 volume mandates).

78. *See* 80 Fed. Reg. at 77,431. These considerations include both the limitations in production and import of biofuels and factors that constrain supplying available volumes specified.

79. *Id.* at 77,435.

80. *See generally* 80 Fed. Reg. 77,420.

81. *Id.* at 77,440.

82. *Id.*

raised—but only slightly—the final volumes for nearly all of the fuel categories.⁸³ The final 2015 amounts reflect both actual supply and an extrapolation from those amounts for the remaining months of the year, resulting in moderate growth from the 2014 volumes.⁸⁴ Though growth occurred, the finalized 2015 volumes remained well below the 2015 statutory requirements.

For 2016, the EPA substantially increased its final volumes for total renewable fuel, and slightly increased its volumes for the other fuel categories. While the final volume for total renewable fuel is still far below the statutory volume, the EPA's adjustment reflects a significant increase from both the proposed and final 2015 volumes. The EPA notes that the increase between the 2016 and 2015 volumes is “as ambitious as can reasonably be justified”⁸⁵ and reflects the EPA's “best judgment”⁸⁶ as to the domestic supply of renewable fuels.

B. Factors the EPA Considered when Reducing Statutory Volumes

First, the EPA utilized its cellulosic waiver to reduce the volumes of advanced biofuel and total renewable fuel to address the shortfall in actual produced cellulosic biofuel compared to statutory levels. The EPA then combined the cellulosic waiver with its general waiver to establish its final volume for total renewable fuel, effectively augmenting the cellulosic waiver with its finding of *inadequate domestic supply* of ethanol and advanced biofuels to meet statutory volumes. While the EPA made its determination by estimating the volumes of cellulosic, biodiesel, and advanced biofuels that might actually be available in late 2015 and 2016, it also considered the blendwall.⁸⁷ Thus, it concluded that limitations on transportation fuel and constraints on the market's ability to absorb more ethanol in the fuel blend constituted relevant factors in determining whether there is an “inadequate domestic supply” of renewable fuel.

The two major industries affected by the U.S. fuel market—biofuel and oil—have and continue to debate the definition of *inadequate domestic supply*, a phrase that arguably appears to leave room for much interpretation. To biofuel proponents, the phrase is clear: it is the volume

83. *Id.* at 77,447–448.

84. *Id.* at 77,442.

85. *Id.* at 77,427.

86. *Id.* at 77,449.

87. *Id.* at 77,433. The “E10 blendwall” represents the volume of ethanol that can be consumed domestically if all gasoline contains 10% ethanol and there are no higher-level ethanol blends consumed such as E15 or E85.

of renewable fuel that can be produced or imported.⁸⁸ Further, ethanol is abundant at the moment due to falling feedstock (corn) prices and a record harvest, spurring production.⁸⁹ Bob Dineen, the president of the Renewable Fuels Association and lobbyist for major ethanol producers, stated that “inadequate domestic supply of—and this is important—of renewable fuel . . . and we’re swimming in renewable fuel. Inadequate domestic supply is not the issue.”⁹⁰

In stark contrast, the oil industry deems *inadequate domestic supply* to represent the volume of biofuel-blended gasoline that can be physically sold in the U.S.⁹¹ Oil proponents argue that the country lacks the consumer demand and physical infrastructure to sell gasoline blended with more than 10% ethanol, for reasons that will be discussed below. The EPA appears sympathetic to this argument, providing in its final standards that the ethanol blendwall is an important reality.⁹² The EPA further reasons that constraints on distribution and consumption of ethanol-blended fuels equate to *inadequate domestic supply* that triggers its general waiver authority. It provides that “[an] adequacy of supply would logically be understood in terms of the parties who use the supply of renewable fuel” and should “involve consideration of factors different from those involved when considering adequacy of supply to obligated parties.”⁹³ It concludes that the concept of supply should “encompass the full range of constraints that could result in an inadequate supply of renewable fuel to the ultimate consumers, including fuel infrastructure and other constraints” such as “factors affecting the ability to distribute, blend, dispense, and consume those renewable fuels in vehicles.”⁹⁴

While the EPA and the oil industry claim that this interpretation is plausible, critics argue that, in the event that there is actually an inadequate domestic supply of renewable fuel, it is the result of oil companies’ decisions to short the market by not providing enough gasoline or diesel.⁹⁵ As the final standards include the use of the EPA’s general waiver authority for the first time, the EPA’s interpretation of its administrative power will be at the heart of upcoming litigation. Disputes will arise pertaining to the legality of the EPA’s interpretation of *inadequate*

88. Cezary Podkul, *Analysis: Brewing U.S. Ethanol Legal Battle Hinges on the Meaning of ‘Supply.’* REUTERS, Oct. 17, 2013, reuters.com/article/us-ethanol-supply-analysis-idUSBRE99H02N20131018 [<https://perma.cc/X428-U6PP>].

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* 80 Fed. Reg. at 77,423.

93. *Id.* at 77,436.

94. *Id.* at 77,435.

95. Podkul, *supra* note 88.

domestic supply, and the courts will be faced with determining the scope of the EPA's administrative and interpretive authority.

V. EPA INTERPRETIVE AUTHORITY: THE ADMINISTRATIVE PROCEDURE ACT

Agencies, like the EPA, operate pursuant to statutes that empower them to act in some sphere. The Administrative Procedure Act (APA) governs the feasibility of final "agency action," which is defined to include the whole or part of an agency rule or order.⁹⁶ The EPA's finalized standards for 2014–2016, and thus the interpretation of its general waiver authority, constitute final agency action. This subjects the EPA to the APA's codified standards. The APA establishes a standard of review that courts are to employ when analyzing the legitimacy of agency action.⁹⁷

In the present case, the issue is whether the EPA's discharge of its authority—its broad interpretation of its general waiver authority to provide for consideration of the blendwall constraints—is reasonable. Such a question falls within the province of traditional arbitrary and capricious review under 5 U.S.C. § 706(2)(A). In reviewing the EPA's interpretation, the task is to determine whether the agency rationally considered factors to define *inadequate domestic supply*.⁹⁸

The APA sets the scope of review in § 706.⁹⁹ Section 706(2) involves the scope of review for questions of law, which include claims as to the meaning of a constitutional, statutory, or regulatory provision.¹⁰⁰ The APA provides that courts must set aside agency action that "is not in accordance with the law," or that is "in excess of statutory jurisdiction, authority, or limitations, short of statutory right."¹⁰¹ The Supreme Court established the landmark two-step test for the judicial review of agency statutory interpretation in *Chevron v. Natural Resources Defense Council*.¹⁰² The first step requires determining whether the statutory language being interpreted is ambiguous, or whether the meaning of the provision is clear using traditional tools of statutory construction.¹⁰³ If the meaning of the provision is clear, that is the end of the matter, and the court announces the clear meaning of the statute.¹⁰⁴ If, however, the meaning of the

96. See Administrative Procedure Act § 1, 5 U.S.C. § 551(13) (2012).

97. See 5 U.S.C. § 706 (2012).

98. See *id.* at 77,429.

99. WILLIAM F. FUNK & RICHARD H. SEAMON, EXAMPLES AND EXPLANATIONS: ADMINISTRATIVE LAW 1, 271 (4th ed. 2012).

100. *Id.*

101. § 706(2)(A), (C); FUNK & SEAMON, *supra* note 99, at 272.

102. See 467 U.S. 837 (1984).

103. *Id.* at 842–43.

104. *Id.*

provision is unclear, the court moves to the second step, which requires the court to determine whether the agency's construction is based on a reasonable interpretation of the statute.¹⁰⁵ If the agency's interpretation is reasonable or permissible, the court upholds the agency's interpretation, even if the court does not believe it is the best interpretation.¹⁰⁶

In *Chevron*, the Supreme Court found the EPA's broad definition of *source* to be a permissible construction of a statute seeking to promote reduction of air pollution.¹⁰⁷ The EPA cited to its varied interpretation of *source* to demonstrate its consistent and flexible reading of the term over time.¹⁰⁸ The Court found that the court of appeal's inflexible reading and holding that the EPA had not interpreted the statute permissibly was a basic legal error.¹⁰⁹

A. Chevron Step 1: Whether the Clean Air Act is Ambiguous with Respect to "Inadequate Domestic Supply"

The first step of *Chevron* requires the court to determine whether the statute under which the agency is acting is unambiguous or silent on the issue in question.¹¹⁰ The test is whether there is ambiguity with regard to the "precise question at issue."¹¹¹ Thus, the question here is whether Congress, when granting the EPA waiver authority in the case of *inadequate domestic supply* intended to allow for consideration of the blendwall constraints.

There are four versions of *Chevron* step one.¹¹² Under "original" *Chevron*, the case would be decided in step one only if Congress has explicitly answered the exact question at issue in the case.¹¹³ Using "traditional tools" *Chevron*, the reviewing court employs all of the traditional tools of statutory interpretation to find clear congressional intent.¹¹⁴ Operating under "plain meaning" *Chevron*, the court finds clear congressional intent using the plain meaning rule, which provides that if the language of the statute is clear, there is no need to look outside the statute in order to ascertain the statute's meaning.¹¹⁵ Finally, under

105. *Id.*

106. FUNK & SEAMON, *supra* note 99, at 275.

107. *See Chevron*, 467 U.S. at 842.

108. *Id.* at 856.

109. JACK M. BEERMANN, *INSIDE ADMINISTRATIVE LAW: WHAT MATTERS AND WHY* 128 (2011).

110. *Chevron*, 467 U.S. at 842–43.

111. *Id.*

112. BEERMANN, *supra* note 109, at 130–31.

113. *Id.*

114. *Id.* at 130.

115. *Id.*

“extraordinary cases” *Chevron*, the reviewing court finds clear congressional intent based on an examination of the history and political context of the particular issue, which it finds leads to only one possible congressional intent.¹¹⁶

This Comment applies the “traditional tools” version of *Chevron* step one to the EPA’s interpretation of *inadequate domestic supply*. Under this less deferential standard, courts are more likely to find congressional intent on a matter and are thus more likely to reverse the agency’s interpretation. This Comment attempts to ascertain Congress’s intent using tools including: language, structure, purpose, legislative history, and canons of construction.¹¹⁷ Additionally, since *Chevron*, judges have looked beyond legislative history to the common usage,¹¹⁸ dictionary definition,¹¹⁹ and technical meaning¹²⁰ of contested statutory language, as well as to traditional canons of statutory interpretation.¹²¹ Courts have also interpreted enabling acts in light of other legislation, “particularly where Congress has spoken subsequently and more specifically to the topic at hand.”¹²² Most strikingly, courts have also considered the economic and political magnitude of the agency action at issue.¹²³

I. Statutory Text

Courts begin analysis of statutory construction by examining the written text and determining whether the particular provision is—in isolation—ambiguous.¹²⁴ Courts generally assume that the words of a statute mean what an “ordinary” and “reasonable” person would understand them to mean.¹²⁵ In regard to *inadequate domestic supply*, the term *domestic* unambiguously refers to the supply existing within U.S. borders, as *domestic* is understood to mean “of, relating to, or involving one’s own country.”¹²⁶ In addition, various provisions of the RFS refer to the amount of renewable fuel in the U.S.¹²⁷ While many terms in the

116. *Id.* at 131.

117. *Id.* at 130.

118. CHARLES H. KOCH, JR., WILLIAM S. JORDAN III & RICHARD W. MURPHY, ADMINISTRATIVE LAW: CASES AND MATERIAL 1071 (6th ed. 2010).

119. *Id.*

120. *Id.* at 1068.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1070.

125. *Id.*

126. *Domestic*, BLACK’S LAW DICTIONARY (10th ed. 2009).

127. *See generally* 42 U.S.C. § 7545.

provisions are clear, there is sufficient lack of clarity concerning both *inadequate* and *supply*.

a. Supply

The EPA claims in its Final Rule that *inadequate domestic supply* is ambiguous.¹²⁸ It then asserts 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.”¹²⁹ Adopting a broad definition, the EPA’s concept of *supply* encompasses not only what is produced, but also what is sold and subsequently used by consumers. Opponents of the reduced RFS mandates oppose the EPA’s broad reading, insisting instead that the EPA’s insertion of consumer demand into a supply analysis is illogical, and is thus an overreach of its constitutional authority. These opponents urge that *supply*, in the context of the RFS, denotes the “volume of renewable fuel that can be produced or imported.”¹³⁰ They effectively rely on language that confines the RFS compliance provisions to “. . . refineries, blenders, distributors, and importers.”¹³¹ This list of “obligated parties” does not include end consumers.¹³² Further, this narrow definition precludes the EPA’s consideration of the blendwall constraints and limits its focus to the nation’s capacity to physically produce renewable fuel.

Legal sources define *supply* as “the amount of goods produced or available at a given price.”¹³³ Under this definition, determination of the “amount . . . available to be purchased”¹³⁴ necessarily includes consideration of factors affecting the ability to sell the product. In this case, in order for renewable fuel to be available for purchase, it would have to be made available to consumers at the pump. This would require acknowledgement of distribution constraints, as without infrastructure suitable for the housing and dispensing of higher ethanol-blended fuel, it is impossible for consumers to purchase it.

The EPA argues that the isolated statute appears ambiguous in reference to the inadequate supply of which product triggers the EPA’s general waiver authority. The EPA notes that it is unclear whether the “available renewable fuel” definition encompasses neat renewable fuel¹³⁵

128. Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420, 77,435 (Dec. 14, 2015).

129. *Id.*

130. Podkul, *supra* note 88.

131. *Id.*

132. *See id.*

133. *Supply*, Black’s Law Dictionary (10th ed. 2014).

134. *Id.*

135. Neat renewable fuel is a renewable fuel to which 1% or less of gasoline fuel has been added. 40 C.F.R. § 80.1401 (2016).

or whether it also includes the renewable fuel blended with transportation fuel. If construed narrowly to apply only to neat renewable fuel, the EPA has no authority to consider blendwall and distribution constraints. Conversely, should a court determine that ambiguity lends itself in favor of EPA discretion, the fuel supply in question will encompass blended fuels and will ultimately permit the incorporation of the infrastructural constraints addressed in the EPA's Final Rule.

In this regard, the EPA is mistaken. The *inadequate domestic supply* in question refers undoubtedly to renewable fuel—the antecedent for *supply* in 42 U.S.C. § 7545(o)(7)(A)(ii) in the “renewable fuel required under paragraph (2),” which immediately precedes sections (i) and (ii).¹³⁶ “Paragraph (2)” refers to § 7545(o)(2), which specifies the “applicable volume of renewable fuel.”¹³⁷ As further explained *infra*, this clearly refers to the renewable fuel available for purchase by obligated parties, not finished fuels that contain a specified fraction of renewable fuels, which are distributed to end consumers. Subparagraph (o)(2)(A) directed the EPA to promulgate regulations to “ensure that transportation fuel sold or introduced into commerce in the United States . . . on an annual average basis, contains at least the applicable volume of renewable fuel . . . determined in accordance with subparagraph (B)[.]”¹³⁸ Subparagraph B of paragraph (o)(2) contains tables that provide the statutory volume requirements for the four categories of renewable fuel: total renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel.

b. Inadequate

Even if the court were to interpret *supply* narrowly to exclude the blendwall constraints, the EPA can and should argue that the term *inadequate* is also ambiguous. Depending on which dictionary you consult, *inadequate* is subject to a number of reasonable definitions.

Inadequate can be commonly defined as “inept or unsuitable.”¹³⁹ Under this definition, inadequate supply would be construed to mean that the supply is unsuitable in relation to another factor. As demand and supply for a given source are intimately linked, an enormous supply in relation to a dwindling demand may deem a supply unsuitable for that demand. This definition lends itself in favor of the EPA's interpretation, which provides:

136. See § 7545(o)(7)(A).

137. *Id.* § 7545(o)(2).

138. *Id.* § (o)(2)(A)(i).

139. *Inadequate*, DICTIONARY.COM, dictionary.reference.com/browse/inadequate [<https://perma.cc/7YA7-PVX2>] (last visited Apr. 10, 2017).

Adequacy of the supply would logically be understood in terms of the parties who use the supply of renewable qualifying fuels. Adequacy of supply could affect various parties, including obligated parties, blenders, and consumers. Adequacy of the renewable fuel supply with respect to the consumer might well involve consideration of factors different from those involved when considering adequacy of the upstream supply of biofuels to the obligated parties.¹⁴⁰

Opponents may argue that *inadequate* is defined as “not enough” or insufficient.¹⁴¹ If a court were to construe *supply* to indicate the amount produced, this definition would lend itself to an interpretation consistent with that of biofuel proponents. In this context, if the amount produced satisfies the statutory volumes, the EPA would have no authority to interpret its general waiver authority as it has in its Final Rule.

2. Other Factors to Consider

Though *inadequate domestic supply* appears ambiguous when read in isolation, a reviewing court employing a “statutory tools” *Chevron* step one analysis will consider materials beyond the specific text to determine the proper meaning of a statutory provision.¹⁴² In fact, reasonable statutory interpretation by an agency must account for both the specific context in which language is used and the broader context of the statute as a whole.¹⁴³ Agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference.¹⁴⁴ Further, *Chevron* itself considered not only the language of the statute, but also the legislative history and policy arguments regarding the provision in question.¹⁴⁵

a. Legislative History and Congressional Intent

The legislative history is limited as to whether Congress intended *inadequate domestic supply* to encompass the blendwall constraints. However, it is likely that legal challenges to the 2014–2016 standard

140. Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420, 77,436 (Dec. 14, 2015).

141. *Inadequate*, CAMBRIDGE DICTIONARY, dictionary.cambridge.org/us/dictionary/english/inadequate [https://perma.cc/EU57-DJWS] (last visited Apr. 9, 2017).

142. KOCH, JORDAN & MURPHY, *supra* note 118, at 1076.

143. *Id.*

144. *Id.*

145. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 862–67 (1984).

reductions will shift focus on a two-word phrase removed from the 2005 law that established the RFS. Congress declined to pass a bill providing for express consideration of “distribution capacity” in the general waiver provisions of the RFS.¹⁴⁶ This refusal is significant as it raises questions regarding the reason Congress chose to exclude the language. There is no legislative history explaining why Congress enacted the language in lieu of the alternative formation. On one hand, Congress may have found the phrase “inadequate domestic supply” sufficiently broad to cover distribution capacity, thus striking the phrase as superfluous and unnecessary. Further, Congress may have deemed the language too narrow, as it suggested that constraints on delivering fuel to the ultimate consumer—other than “distribution capacity”—should not be considered for purposes of enacting a general waiver. Under these theories, Congress found “inadequate supply” sufficient to cover all aspects of supply, in terms of both production of and capacity to sell and consume it.

However, while not dispositive, legislative history “strongly militates against a judgment that Congress intended as a result that it expressly declined to act.”¹⁴⁷ The Supreme Court has confirmed that “[w]here Congress includes particular language in one section of a statute but omits it in another, it is presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹⁴⁸ Under this presumption, and as noted by advocates of the biofuels industry, if Congress meant to include “capacity to supply” in addition to or as opposed to “supply,” it would have done so.

b. Neighboring Statutory Provisions

The remainder of the statutory scheme often clarifies a provision that seems ambiguous in isolation—only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.¹⁴⁹ Further, there are many fuel-related provisions of the Clean Air Act with waiver provisions similar to that found in the RFS. The EPA claims that these statutes emphasize both the ambiguity of the RFS general waiver provision and the reasonableness of applying it broadly to include

146. See, e.g., H.R. 6, 109th Cong. (2005) (citing to § 1501(a)(2)).

147. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974); see also *Doe v. Chao*, 540 U.S. 614, 622–23 (2004) (Privacy Act does not authorize presumed damages because “Congress cut out the very language in the bill that would have authorized any presumed damages.”).

148. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1894 (2013) (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997)).

149. *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (citing *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)).

adequacy of supply to the ultimate consumer of transportation fuel.¹⁵⁰ However, when looking at Congressional word choice, these statutes demonstrate that Congress intended for the EPA to consider distribution capacity in addition to supply, since it says so expressly.

i. Section 211(c)(4)(C)(ii)

Section 211(c)(4)(C)(ii) of the Clean Air Act provides the EPA with waiver authority to address “extreme and unusual fuel or fuel additive supply circumstances . . . which prevent the distribution of an adequate supply of fuel or fuel additive to consumers.”¹⁵¹ Here, Congress indicates that the adequacy of supply is related to the availability of fuel or fuel additive to the ultimate consumer. The statutory language expressly grants the EPA authority to consider distribution constraints.

Unlike § 211(c)(4)(C)(ii), the RFS general waiver provision does not contain such clarity. Though the EPA argues that the broad and ambiguous wording provides discretionary power to interpret the scope of its waiver authority as “relating to [the] supply of renewable fuel [in neat or blended form] to the ultimate consumer,”¹⁵² one must question why Congress deleted the statutory language from earlier bill drafts.

ii. Section 211(m)(3)(c)

Section 211(m)(3)(c) of the Clean Air Act allows the EPA to delay the effective date of oxygenated gasoline requirements for certain carbon monoxide nonattainment areas if it finds “inadequate domestic supply of, or distribution capacity for, oxygenated gasoline . . . or fuel additives” needed to make oxygenated gasoline.¹⁵³ The linguistic choice hints that “inadequate domestic supply” should be read as more limited in scope, in particular to exclude consideration of distribution capacity.

The RFS uses *inadequate domestic supply* without the further clarification of § 211(m)(3)(c). On one hand, this may indicate that Congress provides the EPA discretion to determine the adequacy of the supply of renewable fuel in terms of availability for use by the ultimate consumer, including consideration of capacity to distribute the product to the ultimate consumer. More likely, however, Congress’s deliberate exclusion of “distribution capacity” from the RFS general waiver

150. Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420, 77,437–438 (Dec. 14, 2015).

151. See also 42 U.S.C. § 7545(c)(4)(C)(ii)(I).

152. 80 Fed. Reg. at 77,437.

153. See § 7545(m)(3)(C)(i).

provision strongly lends itself to a narrow interpretation of “inadequate domestic supply”—one that excludes distribution constraints.

3. *Determining Whether “Inadequate Domestic Supply” is Ambiguous under “Tools of Construction” Chevron Step One*

A statute cannot be interpreted to grant power beyond its text unless it is done to effectuate the statute’s purpose.¹⁵⁴ Congress promulgated the RFS to decrease American dependence on foreign oil sources and to combat rising global temperatures. This requires that an increased amount of renewable fuel be produced. Though the legislative history is scant, when analyzing the RFS provisions in concert with neighboring provisions of the Clean Air Act, it appears that Congress intentionally struck the language relating to distribution capacity because it did not intend for the EPA to consider it when waiving the RFS statutory levels. As such, the statutory language read in context of the Clean Air Act clearly prohibits the EPA from waiving or reducing statutory volumes to address distribution constraints.¹⁵⁵ A court should find this statute to clearly refer to *inadequate domestic supply* in its narrowest sense.

B. *Chevron Step Two: Determining Whether the EPA’s Interpretation is Reasonable*

If a court finds *inadequate domestic supply* to be ambiguous, the EPA must then demonstrate that its interpretation of this phrase is rational. The *Chevron* Step Two analysis requires the court to determine whether the EPA’s construction is based on a reasonable or permissible interpretation of the statute.¹⁵⁶

Chevron provides that an agency interpretation should be upheld unless it is “arbitrary, capricious, or manifestly contrary to statute.”¹⁵⁷ In other words, a court must uphold agency action if there is a rational basis for it.¹⁵⁸ While this determination appears simple at first blush, defining precisely what constitutes a reasonable or permissible construction of a statute, or what materials a court is required to consider in making that determination, is often difficult. Further, there is confusion over whether *Chevron* Step Two pertains to the reasonableness of an agency’s interpretation as a matter of the meaning of the statute’s language or is more about the reasonableness of the agency’s policy decision and

154. KOCH, JORDAN & MURPHY, *supra* note 118, at 1076.

155. *See supra* Part V.A.2.b.

156. *See supra* Part V.A.2.b.

157. *See supra* Part V.A.2.b.

158. *See supra* Part V.A.2.b.

judgment to adopt the particular meaning.¹⁵⁹ Thus, the most important function of “arbitrary and capricious review” is its application to questions of judgment.¹⁶⁰ The Supreme Court currently uses the “rational relationship test,”¹⁶¹ a highly deferential assessment that deems laws unconstitutional only if there is no possible rational basis to further a legitimate governmental interest.¹⁶²

The leading application of the “arbitrary and capricious” standard of review is found in *Motor Vehicles Manufacturers Association v. State Farm Mutual*,¹⁶³ which involved a challenge to a decision by the National Highway Traffic Safety Administration (NHSTA) to rescind a rule in which the agency had required every automaker to include, in every car marketed in the U.S. after a specified date, one of two safety devices—air bags or automatic seatbelts.¹⁶⁴ The Supreme Court, in a unanimous decision holding the NHSTA’s action arbitrary and capricious, wrote what has become the standard paragraph describing “arbitrary and capricious review”:

Normally, an agency rule would be arbitrary and capricious if the agency has relief on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁶⁵

The Supreme Court has applied the *State Farm* test to several agency rulemakings. Taken together, these cases illustrate: (1) the Court remains committed to the test announced in *State Farm*—a decision is arbitrary and capricious unless an agency engaged in a reasoned decision-making process; (2) the *State Farm* test is extremely malleable; and (3) the question whether an agency engaged in a reasoned decision-making within the meaning of *State Farm* is often identical to the question courts consider under *Chevron* Step Two—whether an agency’s construction of an ambiguous provision in an agency-administered statute is reasonable. Because these standards appear to be similarly construed, this Comment analyzes *Chevron* Step Two in light of the *State Farm* factors.

159. See *supra* Part V.A.2.b.

160. See *supra* Part V.A.2.b.

161. See *supra* Part V.A.2.b.

162. See *supra* Part V.A.2.b.

163. 463 U.S. 29, 43 (1983).

164. *Id.*

165. *Id.* at 43.

1. Whether the EPA Considered Factors Congress Did Not Identify

The Supreme Court announced in *State Farm*: “[N]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider”¹⁶⁶ This statement can be interpreted in two ways: (1) to prohibit an agency from considering a factor *unless* Congress specifically instructed it to do so; or (2) to prohibit an agency from considering a factor only if Congress specifically prohibited it from doing so. The second alternative should be adopted because Congress’s plain intent is to allow an agency to attempt to further a list of societal goals that is far too long to incorporate into any statute.¹⁶⁷

Further, a key prong of arbitrariness review is an examination of the number and nature of “relevant factors” considered by an agency in reaching its policy decision.¹⁶⁸ There are two contexts in which this analysis takes place. The first occurs when the relevant factors are provided by statute, and requires the reviewing court to ask whether the factors actually relied upon by the agency comport with those in the statute.¹⁶⁹ The second involves congressional silence regarding the relevant factors and asks whether an agency’s own choices regarding which factors to consider satisfy the review.¹⁷⁰

The present case involves the second scenario, as Congress appears silent with regard to what factors the EPA is to consider when determining whether to apply its waiver authority. However, though Congress is silent with regard to the waiver provision itself, examination of congressional intent behind EISA and other RFS statutes sheds some light on the issue. It demonstrates that Congress’s active choice to excise particular language from the general waiver provision demonstrates intent to limit the factors the EPA can consider when exercising its waiver authority. Further, it appears that the EPA stepped beyond the bounds of its authority by considering factors Congress has implicitly prohibited.

The EPA notes a number of factors it considered when formulating the final volumes for 2014–2016. These include, but are not limited to: limitations on supply of cellulosic biofuel; insufficient supply of other advanced biofuel to offset the shortfall in cellulosic biofuel; and practical and legal constraints on the ability of the market to supply renewable fuels

166. *Id.*

167. J. MASRHAW & D. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 214–15 (1990).

168. Louis J. Virelli III, *Destructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 753 (2014).

169. *Id.* at 754.

170. *Id.* at 754–55.

to the vehicles that can use them.¹⁷¹ While the first two factors clearly implicate the supply of renewable fuels, the third factor appears to blur the line between supply and distribution of supply. Congress does not specifically enumerate factors that the EPA must consider when determining whether there is a supply inadequate enough to trigger the EPA's waiver authority; however, reading this provision in light of neighboring statutes and EISA language lends to a narrower interpretation of both *supply* and to the appropriate factors to use when determining whether such *supply* is adequate.

Further, the RFS provides that the promulgated regulations for renewable fuels, as well as the obligation itself, apply to "refineries, blenders, distributors, and importers, as appropriate."¹⁷² When defining the obligated parties, Congress does not mention consumers. Again, an active exclusion of the word "consumers" from the obligated party definition evidences congressional intent to limit the application of the RFS to those responsible for producing the renewable fuel, not to expand it to consumer use.

2. Whether the EPA Failed to Consider an Important Aspect of the Problem

The EPA's reduction of the statutory volumes will undermine certainty and predictability for investors and other biofuel market participants.¹⁷³ This will undoubtedly lead to negative environmental and economic consequences that run contrary to Congress's legislative purposes in enacting the statute.¹⁷⁴

The underlying reality is that market pressures drive innovation; however, there is no way markets can assess the value of avoiding "catastrophic climate change, or for the benefit of disentangling [themselves] from the geopolitical and national security concerns that come along with serious dependence on the oil market."¹⁷⁵ Though the goals of decreasing dependence on the oil market are worth pursuing, the

171. See Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420, 77,426 (Dec. 14, 2015).

172. See 42 U.S.C. § 7545(o)(2)(A)(iii)(I).

173. Jim Lane, *Industry's Withering Critique of EPA's Renewable Fuel Standard Proposals for 2014, 2015, 2016: The Digested Version*, BIOFUELS DIGEST (July 19, 2015), biofuelsdigest.com/bdigest/2015/07/29/industrys-withering-critique-of-epas-renewable-fuel-standard-proposals-for-2014-2015-2016-the-digested-version/ [https://perma.cc/V63R-S8DL].

174. *Id.*

175. Jeff Spross, *Why the EPA Cut Down the Biofuel Standard for the First Time Ever*, THINK PROGRESS (Nov. 18, 2013, 12:26 PM), thinkprogress.org/climate/2013/11/18/2956771/epa-cut-biofuel-mandate/ [https://perma.cc/8H7C-7GEA].

market will not achieve them if left to its own devices. Oil refiners, car companies, and station supply chains have no inherent motivation to see how far they can push the technology for higher blends. Moreover, like all businesses, refiners, car companies, and supply chains are hesitant to take on the added costs and risks of accommodating higher renewable fuel blends without concrete incentive.¹⁷⁶ For this reason, the pressure to drive this necessary innovation must come from the government. This means that the RFS must be implemented in its intended form.

Bob Dinneen claimed “the minute you introduce blending capacity or blendwall considerations into a decision as to whether or not to waive the problem is the minute you take the nation’s renewable fuel policy away from the statute and put it in the hands of oil companies.”¹⁷⁷

The Alliance of Automobile Manufacturers and the American Automobile Manufacturers insist that the EPA is pushing E15 too hard and too quickly.¹⁷⁸ Service stations also struggle with the costs and practical challenges of updating their equipment to take E15 blends and higher.¹⁷⁹ While this is the practical reality, oil companies are to blame. These companies structure their contracts with service stations to hold down the sale of higher blends, and to prevent advertising. If the oil companies were so concerned with surplus ethanol, they would make it much easier for service stations to sell higher blends.¹⁸⁰ Most importantly, this would involve the willingness to implement the infrastructure designed to blend, distribute, and dispense renewable fuels.

It is not that the EPA failed to consider the impact of its statutory reduction on American innovators; it is that it failed to consider the magnitude of that impact. By giving in to notions of the blendwall, the EPA is effectively handing the future of the biofuels industry to the oil companies.

3. Whether the EPA Offered an Explanation for its Decision that Runs Counter to the Evidence Before It

This element, known as the “rational connection” factor, serves as an important check on potentially irrational administrative conduct that goes to the very heart of the justifications of the administrative state. Its deferential approach fosters agency expertise and efficiency, while at the

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

same time guarding against administration that is so irrational as to betray its democratic pedigree.¹⁸¹

In agency decisions involving scientific or technical information, an issue arises as to whether an agency had processes to ensure the reliability or veracity of information inputs to its policy decisions.¹⁸² Reliable inputs provide substantive information relevant to policymakers and create a rational basis from which administrators may justify their policy determinations.¹⁸³ The process for exclusion of unreliable information is even more important, as unreliable information could cause agencies to make poorly informed decisions, “manufacture uncertainty,” or otherwise mischaracterize those inputs in support of a policy decision that is not in fact supported by data.¹⁸⁴

It appears that the EPA has placed too much reliance on the distribution problems professed by retailers. The oil industry has declared that there is no role for any ethanol beyond E10, or for the RFS at all.¹⁸⁵ However, they clearly have a vested interest in distracting the legislature from looking at E85, and will stop at nothing to keep the debate focused on the limitations of E10. The corn ethanol lobby would like to pretend that the infrastructural constraints are not real, and have been entirely manufactured by the oil industry. While the infrastructural challenges of the blendwall are real, they are more like speed bumps, which require slowing down—not stopping.

4. Whether the EPA’s Interpretation is So Implausible that it Could Not Be Ascribed to a Difference in View of the Product of Agency Expertise

Although the EPA’s Acting Assistant Administrator of the Office of Air and Radiation provided that the lowered standards established a “path for ambitious, responsible growth in biofuels,” the EPA’s decision to lower the 2014–2016 statutory levels set by Congress is neither ambitious

181. Virelli, *supra* note 168, at 758.

182. *Id.* at 745.

183. *Id.*

184. *Id.* Factors include: slower expected development of the cellulosic biofuel industry, less growth in gasoline use than expected when Congress enacted the provisions in 2007, constraints in supplying biofuels to consumers, a limited number and geographic distribution of retail stations that offer higher ethanol blends, and decrease in total gasoline consumption. *See, e.g.*, Final Renewable Fuel Standards for 2014, 2015 and 2016 and the Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420, 77,422, 432, 433 (Dec. 14, 2015).

185. *See* Spross, *supra* note 175.

nor responsible.¹⁸⁶ It makes little sense that in promulgating a mandate for the commercialization of biofuels, which implies a mandate that they be consumed, Congress intended to grant the EPA authority to waive that mandate in light of consumption constraints. In fact, these constraints were likely part of the original impetus for the mandate. It seems much more plausible that Congress intended for its mandate to be waived in the event that there is sufficient production of domestic biofuels to satisfy it.¹⁸⁷ In the end, the RFS program was designed to force the oil industry to change the statute quo, not to perpetuate it. The entire purpose of the program would be subverted if the oil industry is rewarded for its failure to take the steps necessary to ensure that it is capable of distributing, blending, and dispensing the renewable fuel volumes required by the statute.¹⁸⁸

CONCLUSION

While courts will defer to agency interpretations of statutes that they are charged with implementing, this deference is not without limits.¹⁸⁹ The EPA's proffered interpretation is not consistent with the text, structure, or purposes of the statute, and is unreasonable.¹⁹⁰ Moreover, the EPA's interpretation is directed in significant part to accommodating the economic interests of parties who are obligated to comply with the statutory renewable volume obligations, which is not a permissible basis for waiving or ignoring the requirements of the statute.¹⁹¹ With all due respect to the EPA, the Agency's proposed interpretation of "inadequate domestic supply" amounts to a rhetorical sleight of hand.¹⁹² Supply is not demand. The EPA appears to have acted contrary to congressional intent by considering blendwall constraints to trigger its general waiver authority. However, even if a court were to construe the statutory language broadly to find it ambiguous and give the EPA discretion to consider the blendwall factors, the EPA's decision will not satisfy the four-factor test set forth in *State Farm*, or the *Chevron's* Step Two. Not only does the EPA

186. *Re-examining EPA's Management of the Renewable Fuel Standard Program: Before the Subcomm. on Regulatory Affairs & Fed. Mgmt., Comm. on Homeland Sec. & Gov. Affairs*, 114th Cong. 5 (2015) (statement of Janet McCabe, Assistant Adm'r., Office of Air & Radiation, EPA).

187. Slating & Kesan, *supra* note 17, at 435.

188. *See id.*

189. *See* Letter from Brian Jennings, Exec. Vice President, Am. Coal. for Ethanol, to Gina McCarthy, Adm'r, EPA (July 27, 2015), ethanol.org/news/news/2015/07/27/aces-comments-to-the-epa-on-the-proposed-rfs-for-2015-and-2016/ [<https://perma.cc/4Y4J-4M9T>].

190. *See id.*

191. *See id.*

192. *See id.*

appear to consider factors expressly unintended by Congress, as evidenced by the excision of language pertaining to “distribution capacity,” it also fails to consider a serious and evident impact of the statutory reduction. By adopting the oil companies’ narratives regarding the ability of the market to effectively distribute increasing volumes of renewable fuels, rather than putting the RFS back on track, the EPA has created its own slower, costlier, and ultimately diminished track for renewable fuels in the U.S.

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