

How The Election May Affect The Renewable Fuel Standard

By **Robert Meyers and Elizabeth Dawson** (October 2, 2020, 3:36 PM EDT)

The old adage "the more things change, the more they stay the same" may not seem particularly apt in the age of COVID-19. But it may still be true for at least one area of environmental policy: the Clean Air Act's Renewable Fuel Standard.

The next presidential election is approaching, and despite the large differences between the two candidates on a host of issues — not least of them environmental policy — the RFS is its own peculiar animal, evidenced by its tortured legislative and litigation history.

As a quick refresher, the RFS specifies annually increasing volumes of renewable fuel for U.S. transportation fuel through 2022.[1] It was originally enacted by Congress in 2005, after two failed attempts to approve the program in 2002 and 2003 as part of broader energy legislation.[2] The program was greatly expanded in size and scope in 2007, with passage of the Energy Independence and Security Act, or EISA.[3]

Those provisions were developed in an informal House-Senate conference committee. The final bill text was introduced in Congress only a few days prior to passage.[4] Thus, on each of the four occasions when the full House and Senate considered establishing a renewable fuel mandate, the RFS was never considered as a stand-alone measure, only as part of a broad array of energy measures — and many times was protected from floor amendments.[5]

In Washington, process often begets policy, and the consequences of this legislative process may still be apparent today. For example, many assumptions about the ease in developing new biofuels — remember switchgrass[6] and KiOR?[7] — proved, at best, overly optimistic.

And what exactly Congress meant by the particular language it used in designing the RFS has been litigated in every U.S. Environmental Protection Administration annual RFS rulemaking since 2012. Currently, both the 2019 and 2020 RFS rules are under review in the U.S. Court of Appeals for the District of Columbia Circuit.

Which brings us to the 2020 presidential election and its probable impact on the RFS. Ethanol has traditionally played a role in politics, particularly given Iowa's first-in-the-nation caucuses.[8] And, while



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the impact of the RFS in the general election is less clear,[9] the Democratic Party platform calls for "strengthening the Renewable Fuel Standard, supporting E15 blends, and supporting research, development and deployment of biofuels." [10]

Former Vice President Joe Biden has also criticized the Trump administration for the "granting of [RFS] waivers to Big Oil." [11] But, since Trump took office, the EPA has promulgated rules to increase RFS volume requirements by nearly 2 billion gallons and pave the way for more E15, a blend of 85% gasoline and 15% ethanol. [12]

The EPA also recently denied 54 requests from small petroleum refineries for economic hardship exemptions from RFS. [13] As for biofuels research and development programs, these have been in place for many years and have been consistently funded by the U.S. Department of Agriculture, U.S. Department of Energy and other federal entities, regardless of the occupant of the White House. [14]

Against this backdrop, whoever is elected president in November will be faced with several contentious rulemakings and chronic issues affecting implementation of the RFS. In other words, there's no free lunch. Among the most prominent issues in 2021 alone are the following.

The Reset Rule

Section 211(o)(7)(F) of the Clean Air Act requires the EPA to promulgate a rule that modifies — or "resets" — RFS statutory volumes once the EPA waives 20% of these volumes for two consecutive years, or 50% in a single year.

This requirement was triggered for cellulosic ethanol — one of four renewable fuels that make up the RFS — in 2016, [15] and for total renewable fuel in 2019. [16] A reset rule was sent from the EPA to the White House Office of Management and Budget last year for review, but was subsequently relegated to the OMB's long term agenda — even though the EPA's statutory duty is to promulgate the reset within one year of the triggering event. [17]

The Set Rule

Clean Air Act Section 211(o)(2)(B) only provides statutory volumes for renewable fuel through 2022. For other calendar years after 2022, the EPA must utilize statutory criteria to set new annual volumes. This provision of the RFS contains seven elements and considerations, including approximately 20 factors that the EPA must analyze. [18]

2021 RFS

A proposed rule to set RFS standards for 2021, and biomass-based diesel standards for 2022, has been pending at the OMB since May 13. [19]

This means that a final 2021 rule will not be issued until well into 2021 — in the most optimistic scenario — despite the Clean Air Act's requirement that RFS requirements be determined by Nov. 30 of this year. [20]

Use of RFS Waivers

In the latest RFS rule, promulgated for 2020, the EPA set volume requirements at 20.09 billion gallons.

This level is 10 billion gallons below the statutory level, and required that the EPA use its cellulosic waiver authority to reduce volumes, as it has done in every RFS rule promulgated over the last decade.

Other RFS waivers exist for severe economic harm, inadequate domestic supply, severe environmental harm and biomass-based diesel.

Environmental Impact

For the first time in late 2019, the EPA determined, pursuant to the Endangered Species Act, that the RFS standards had "no effect on threatened or endangered species."^[21] This action was attributable to remand of the 2018 RFS rule, in which the D.C. Circuit concluded that the EPA had a duty to comply with the ESA in the annual RFS rulemakings.^[22]

Pending litigation on the 2019 RFS rule raises additional environmental issues concerning aggregate compliance — i.e., the amount of land converted to renewable fuel production — and whether the EPA failed to exercise waiver authority, despite severe environmental harm.^[23]

Point of Obligation

The RFS requires the EPA to determine who complies with RFS obligations, requiring the standard to be applicable to "refineries, blenders, and importers, as appropriate."^[24] This issue has been the subject of repeated litigation.

Small Refinery Exemptions

Clean Air Act Section 211(o)(9)(B) allows small refineries to petition the EPA for an exemption from the annual RFS requirements when faced with disproportionate economic hardship.

The EPA's authority and methodologies in granting small refinery exemptions have been litigated in the U.S. Court of Appeals for the Fourth Circuit, the U.S. Court of Appeals for the Eighth Circuit, the U.S. Court of Appeals for the Tenth Circuit and the D.C. Circuit — and are an issue in the 2019 and 2020 RFS rules, as well as other pending litigation.

Faced with such a daunting number of rules and decisions, one might reasonably ask whether there are any simpler alternatives to the RFS in the future. Since the mandate is statutory, any alternative would require an act of Congress. And would that be more likely in a Biden administration — where a major shift in environmental policy is preordained — or in a second-term Trump administration?

The answer is: It's hard to tell. The RFS was born as an energy issue, and it tended to split Congress more along regional and economic lines, rather than political ones. Either a Trump or Biden administration seeking legislative action will face not only this historical split, but also new fissures presented by environmental arguments against expanding RFS mandates for conventional biofuels, land use issues involving biofuel production and opposition to liquid transportation fuels in general.

The RFS, by focusing on mandates for renewable fuels with 0% to 60% reductions in lifecycle greenhouse gas emissions,^[25] is at odds with the Green New Deal, which calls for investment in "zero-emission vehicle infrastructure and manufacturing."^[26] Similarly, the imposition of government mandates to either comply with RFS requirements or purchase renewable fuel credits, including cellulosic biofuel credits,^[27] may be viewed as inconsistent with the 2016 Republican Party platform, calling for "the

cost-effective development of renewable energy sources [including biofuel] by private capital." [28]

Knitting the various constituencies together is difficult work, and past efforts show that it has taken both time and the right opportunity to package the RFS along with other measures with broad support. In an era of political polarization, it should be remembered that both the 2005 and 2007 energy bills required a considerable degree of bipartisan cooperation. [29] So, in short, whomever is elected president and whomever controls Congress, the odds are that with respect to the RFS, it will be more of the same.

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[1] 42 U.S.C. § 7545(o)(2)(B).

[2] H.R. 4, the Energy Policy Act of 2002; H.R. 6, the 2003 Energy Policy Act.

[3] Pub. L. 110-140 (2017).

[4] See, e.g., H. Rpt. 110-937 at 51; Engrossed Amendment of the House to H.R. 6, Dec. 7, 2007; H.R. 6 as passed by the Senate, June 21, 2007.

[5] For example, no floor amendments to RFS mandates were allowed in the House for the 2003 Energy Policy Act, the 2005 Energy Policy Act or EISA.

[6] Darren Goode, "When Energy Dreams Fall Short," Politico.com (Aug. 25, 2013), <https://www.politico.com/story/2013/08/alternative-energy-sources-095855>.

[7] See, e.g. "KiOR. The inside true story of a company gone wrong," Biofuels Digest (May 17, 2016).

[8] See, e.g. Geoff Cooper, "Don't count out ethanol this election season," Des Moines Register (Jan. 31, 2020), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2020/01/31/ethanol-thriving-four-years-after-supposed-iowa-caucuses-demise/2858941001/>.

[9] See Tyler Jett, "Iowa Poll: What is the top issue as likely voters consider their choices? Republicans, Democrats sharply split," Des Moines Register (Sept. 23, 2020), <https://www.desmoinesregister.com/story/news/2020/09/23/iowa-poll-economy-pandemic-likely-voters-split-party-top-issue/5860155002/>.

[10] 2020 Democratic Party platform at 19.

[11] "Biden announces commitment to RFS," Biomass Magazine, Aug. 25, 2020.

[12] 84 Fed. Reg. 26,980 (June 10, 2019).

[13] Denial of Small Refinery Gap-Filling Petitions, Sept. 16, 2020, <https://www.epa.gov/sites/production/files/2020-09/documents/rfs-denial-small-refinery-gap->

filling-petitions-2020-09-14.pdf.

[14] See, e.g., Alternative Fuels Data Center, <https://afdc.energy.gov/fuels/laws/BIOD?state=US>.

[15] The conditions for reset were actually met by 2011, but Clean Air Act Section 211(o)(F) did not allow adjustment prior to 2016.

[16] 84 Fed. Reg. 36,762, 36,766/1 & n.11 (July 29, 2019).

[17] RIN: 2060-AU28.

[18] 42 U.S.C. § 7545(o)(2)(B)(ii).

[19] RIN: 2060-AU82.

[20] Other RFS rules have been late in the past. For example, the rule establishing requirements for 2014 was not published in the Federal Register until Dec. 14, 2015, or over two years late. 80 Fed. Reg. 77,420 (Dec. 14, 2015).

[21] Endangered Species Act No Effect Finding for the 2020 Final Rule, EPA-HQ-OAR-2019-0136-2123.

[22] *Id.* at 2; *American Fuel and Petrochemical Manufacturers v. EPA*, 937 F.3d 559 (D.C. Cir. 2019).

[23] *National Wildlife Federation, Healthy Gulf, and Sierra Club v. EPA*, No. 19-1039 (D.C. Cir.) consolidated with No. 19-1023, *Growth Energy v. EPA*.

[24] 42 U.S.C. § 7545(o)(3)(B)(ii).

[25] 42 U.S.C. §§ 7545(o)(1)(C), (D), (E), (H), (2)(A)(i); 40 C.F.R. § 80.1403.

[26] H. Res. 109.

[27] 42 U.S.C. § 7545(o)(7)(D)(ii).

[28] Republican Party platform 2016 at 19. The Republican Party did not adopt a platform for the 2020 election cycle.

[29] The Energy Policy Act of 2005 was approved in the House of Representatives on a vote of 275 to 156 (with 200 Republicans and 75 Democrats voting yea) and in the Senate by a vote of 74 to 25. EISA was approved in the House of Representatives on a vote of 314 to 100 and in the Senate (while both were under Democratic control) by 86-8. Both bills were signed by President George W. Bush.