The Environmental Protection Agency's Authority to Amend the Renewable Fuel Standard

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ABOUT BPC

Founded in 2007 by former Senate Majority Leaders Howard Baker, Tom Daschle, Bob Dole and George Mitchell, the Bipartisan Policy Center is a non-profit organization that drives principled solutions through rigorous analysis, reasoned negotiation and respectful dialogue. With projects in multiple issue areas, BPC combines politically balanced policymaking with strong, proactive advocacy and outreach.

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Substantial changes in energy markets, persistent challenges in courts, and difficulties in the implementation of relevant enacting laws have kept the Renewable Fuel Standard (RFS) at the forefront of energy policy discussions. There are both strong advocates in support of holding firm on the existing requirements and calls for outright repeal. But there also exists an active middle ground focusing on reforming, not repealing, the RFS.

The Bipartisan Policy Center (BPC) is undertaking a yearlong effort aimed at fostering constructive dialogue and action on reforming the RFS. To do this, BPC is convening a diverse RFS advisory group to discuss opportunities for reform, hosting public workshops to solicit broad input, and ultimately publishing viable policy options based, in part, on the advisory group's deliberations.

As part of this effort, BPC has commissioned a series of background papers on various RFS topics. These papers are targeted at a broad audience that includes not only BPC's advisory group, but also policymakers, industry, and the public, with the intention of educating and informing the wider debate surrounding this issue. Given a topic as complex as the RFS, these papers cover multiple issues, providing a focused view from the perspectives of technology, infrastructure, policy, and law. The first three background papers listed will be released in early February. The remaining two, which are two separate law firms' perspectives on the same topic, will be released by the end of February.

1. **Technical Barriers to the Consumption of Higher Blends of Ethanol**
   The International Council on Clean Transportation
2. **Petroleum and Renewable Fuels Supply Chain**
   Stillwater Associates LLC
3. **Inventory of Federal Regulations Affecting Biofuels other than the Renewable Fuel Standard**
   Van Ness Feldman
4. **The Environmental Protection Agency's Authority to Amend the Renewable Fuel Standard**
   Sutherland Asbill & Brennan LLP
5. **The Environmental Protection Agency's Authority to Amend the Renewable Fuel Standard**
   Bracewell & Giuliani LLP

BPC is releasing these papers as they were presented to us. The findings and opinions expressed in these background papers are solely those of the author(s). BPC takes no position on the findings nor conclusions developed in these papers, and they do not necessarily represent the views of BPC staff or the RFS advisory group.

To read other background papers in the series or for additional information about this effort, please visit http://bipartisanpolicy.org/projects/energy/renewable-fuel.

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Introduction

The Bipartisan Policy Center has requested that Sutherland Asbill & Brennan LLP provide the following analysis of how the Environmental Protection Agency (EPA) could amend the Renewable Fuel Standard (RFS) absent a statutory change to its authorizing statutory provision under Section 211(o) of the Clean Air Act (CAA). Specifically, this paper addresses the ways in which EPA could make short- and long-term adjustments to the RFS volume mandates as well as the potential flexibilities that EPA could adopt in the program's compliance mechanisms without additional action by Congress. This paper explores areas where EPA may amend the RFS and situations where EPA may be prohibited by statute from creating additional flexibilities.

This paper does not take a position on whether EPA should amend the RFS or what method EPA should take to amend the RFS.

EPA's Underlying Authority to Interpret the CAA

Under the U.S. system of government, the executive branch, of which EPA is a part, is tasked with implementing the laws passed by Congress and signed by the president. The Energy Policy Act of 2005 (EPAct) and the Energy Independence and Security Act of 2007 (EISA) amended Section 211 of the CAA to mandate the use of increasing volumes of various types of Renewable Fuel, which is defined as fuel from renewable biomass that is used as transportation fuel, heating oil, and jet fuel and that has lifecycle greenhouse gas emissions that are at least 20 percent less than an equivalent amount of gasoline or diesel.[1] Congress codified these mandates in Section 211(o) of the CAA, establishing a credit-trading program and a variety of ways to adjust the mandates and the credit-trading program. EPA subsequently developed regulations implementing the mandates and expanding the complexities of the credit-trading scheme. These regulations became known as RFS1 and RFS2 respectively. As of July 1, 2010, RFS2 took full effect and continues to govern the production and use of Renewable Fuel under EISA.[2]

When interpreting EPAct and EISA in implementing the RFS, EPA is bound by constitutional considerations, many of which are codified in the Administrative Procedure Act (APA). The APA establishes the standards of review that courts employ when analyzing the legitimacy of an agency action. The APA asserts that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of an agency action."[3] The APA requires a court to set aside any agency action that is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (known as the "arbitrary and capricious" standard); (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence when the issue was reviewed by an agency in a hearing that produced a written record for examination; or (6) unwarranted by the facts to the extent that the facts are subject to independent review.[4]

With respect to judicial review of agency statutory interpretation, the Supreme Court established the landmark two-step test in *Chevron v. Natural Resources Defense Council*.[5] The first step of this test requires a court to determine whether the statute under which the agency is acting is unambiguous or is silent on the issue in question.[6] If the statute is unambiguous on the subject, then the agency must give effect to the statute and cannot take any action contrary to the statute.[7] If the statute is silent or ambiguous on the issue in

question, then the court moves to the second step of the *Chevron* analysis, which requires the court to determine whether the agency's construction is based on a reasonable or permissible interpretation of the statute.[8] An agency interpretation is reasonable and permissible and thus should be upheld under step two of *Chevron* unless it is "arbitrary, capricious, or manifestly contrary to the statute."[9]

Other Supreme Court decisions have added color to the *Chevron* analysis. Most notably, the Supreme Court has indicated that courts should afford further deference to agency interpretations that are a result of a formal, deliberative process and that require expertise and specialized knowledge.[10] Accordingly, as EPA developed most, if not all, of the RFS regulations through formal proceedings utilizing its expertise in interpreting EPAct and EISA, reviewing courts likely would afford such regulations substantial judicial deference.

A court's review of agency action under the arbitrary and capricious standard is very narrow, and the court may not substitute its own judgment for that of the agency.[11] The court must uphold agency action if there is a rational basis for such action.[12] In contrast, the substantial evidence standard asks "whether or not a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion."[13]

With regard to EPA's findings of fact when developing the RFS regulations under EPAct and EISA, such findings must be supported by "substantial evidence."[14] The substantial evidence rule does not permit the rejection of agency findings simply because a reasonable mind might have arrived at a contrary conclusion.[15] Instead, the substantial evidence standard allows for rejecting EPA's factual findings only if a reasonable mind would necessarily come to a different conclusion.[16] As a result, both EPA's factual findings and statutory interpretation of EPAct and EISA when developing the regulations of the RFS are subject to substantial deference.

RFS Volume Mandate Reduction Authority under the CAA

When Congress passed EISA in 2007, it built a number of waiver provisions directly into the statute itself. These waiver provisions are not creatures of regulation, but instead are directly part of the statute. As a result, EPA can elect to exercise this authority, provided that doing so is within the bounds of the requirements of the statutory language of the CAA.

Adjustment when Setting the Annual Standards

The statutory language of the CAA provides that if the projected volume of Cellulosic Biofuel production is less than required, EPA must, by November 30 of the year immediately prior to the compliance year, reduce the Cellulosic Biofuel volume otherwise required by EISA to the projected volume available during that calendar year.[17] EPA also may reduce the Total Renewable Fuel and Advanced Biofuel volume requirements by a same or lesser volume.[18] EPA makes such adjustments when setting the annual percentages that Obligated Parties (refiners, component blenders and importers of gasoline and diesel[19]) must apply against their gasoline and diesel production and imports to determine the number of RINs (renewable identification numbers) they must retire to comply with the RFS. Conversely, if EPA determines that the projected production of Cellulosic Biofuel exceeds the Cellulosic Biofuel mandate for the following year, the statutory mandates for the following year for Cellulosic Biofuel, Total Renewable Fuel and Advanced Biofuel may not be reduced under this authority.[20] The reductions allowed by this provision only apply for one year.[21]

Historically, due to lack of commercial production of significant volumes of Cellulosic Biofuel, EPA has exercised this authority with respect to the Cellulosic Biofuel requirement every year in which the RFS2 has been in effect. In contrast, until its most recent proposal for the 2014 mandates, EPA had not exercised or even proposed exercising this authority with respect to the Total Renewable Fuel or Advanced Biofuel mandates.

The CAA directs EPA to, no later than November 30, determine if any reductions in the Cellulosic Biofuel mandate are warranted for the following calendar year.[22] This determination is "based on" projections provided by the Energy Information Administration ("EIA").[23] EPA must reduce the minimum applicable volume to this projection if the minimum applicable volume exceeds such projection.[24] A substantial reduction is possible if the projected volume is quite low because EPA must set the minimum applicable volume, taking into account that estimate.[25] Under the plain language of the statute, EPA is

mandated to set the minimum applicable Cellulosic Biofuel volume requirement "to the projected volume," which could be interpreted as the amount projected by the EIA.[26] This statutory language arguably does not allow EPA to set the minimum applicable volume below the projected volume estimate.[27] As discussed below, however, courts have not agreed with this interpretation.

When implementing this statutory mandate and reducing the Cellulosic Biofuel requirement, EPA may elect to reduce the volume requirements for Total Renewable Fuel and Advanced Biofuel by the same or lesser amount that it reduces the Cellulosic Biofuel volume.[28] Accordingly, this provision offers EPA discretion when lowering the Cellulosic Biofuel volume requirement to also lower the Total Renewable Fuel and Advanced Biofuel volume requirements.[29]

This discretion extends not only to electing whether to reduce the Total Renewable Fuel and Advanced Biofuel volume requirements when reducing the Cellulosic Biofuel requirement, but also the amount by which EPA may elect to reduce the Total Renewable Fuel and Advanced Biofuel mandates. The statute does not require that EPA reach specific determinations before deciding to exercise this discretionary authority and merely states that it may reduce the Total Renewable Fuel and Advanced Biofuel requirements by the "same or a lesser volume" as the reduction in the Cellulosic Biofuel requirement.[30] Courts have said that this decision, while in EPA's discretion, must be rational but "does not always imply a high degree of quantitative specificity."[31]

Notably, EPA interprets its authority such that it may reduce both the Total Renewable Fuel and Advanced Biofuel volumes, but not one or the other. Such a construction is based on the use of the conjunction "and" rather than "or" joining "Renewable Fuel" and "Advanced Biofuels" in the following provision: "For any calendar year in which the Administrator makes [a reduction in the Cellulosic Biofuel mandate], the Administrator may also reduce the applicable volume of Renewable Fuel and Advanced Biofuels requirement … by the same or a lesser volume."[32] While it may be reasonable for EPA to interpret this provision such that it could reduce just the Advanced Biofuel requirement without reducing the Total Renewable Fuel mandate or vice-versa, EPA is currently committed to this interpretation.

While EPA cannot reduce the Total Renewable Fuel and Advanced Biofuel minimum applicable standards by more than the volume by which it reduced the Cellulosic Biofuel minimum applicable requirements under this authority, it can reduce these standards by less than the reduction in the Cellulosic Biofuel requirement.[33] Since the Renewable Fuel and Advanced Biofuel minimum applicable requirements are inherently larger than the Cellulosic Biofuel minimum applicable requirement, reductions to the Total Renewable Fuel and Advanced Biofuels standards may not be proportionally as substantial as they are for the Cellulosic Biofuels. It is important to note that this provision of the CAA provides EPA with no authority to lower the minimum-volume requirements for Cellulosic Biofuel, Total Renewable Fuel, and Advanced Biofuels if the projected production volume for Cellulosic Biofuel exceeds the minimum requirement under EISA.[34]

Due to the extremely low levels of Cellulosic Biofuel produced commercially to date, EPA has reduced the Cellulosic Biofuel mandate every year the RFS2 has been in effect "based on" EIA estimates. The D.C. Circuit has asserted that EPA's determination of the Cellulosic Biofuel requirement is entitled to *Chevron* deference, meaning that a court should uphold this determination unless it is "arbitrary, capricious or manifestly contrary" to the CAA.[35] In light of this deference, the D.C. Circuit interpreted the language "based on" as not requiring "slavish adherence by EPA to the EIA estimate," but requiring "great respect but allowing deviation consistent with that respect."[36] The D.C. Circuit limited EPA's discretion by requiring EPA's determination to predict what will actually happen by striving for accuracy above all else.[37] When applying these standards to EPA's determination of the Cellulosic Biofuel requirement for 2012, the Court struck down EPA's determination because it was aspirational in nature rather than "outcome-neutral."[38] In light of this case, while EPA has discretion in setting the projection, which is the ultimate indicator of the applicable volume requirement for Cellulosic Biofuel for the next year, it may not pursue a number that is inaccurate or make its determination based on pursuing goals other than accuracy.

General Waiver Authority

Separately from its authority to adjust the Total Renewable Fuel and Advanced Biofuel requirements when setting the Cellulosic Biofuel volume, the statutory language of the CAA also provides that EPA may waive any or all of the mandates of the RFS in whole or in part on petition from a state or entity subject to the RFS or on EPA's own motion if it determines: (1) implementation would "severely harm the economy or environment of a State, region or the United States"; or (2) there is an "inadequate domestic supply."[39] EPA must respond to any waiver petition within 90 days of receipt and must provide public notice and opportunity to comment.[40]

This provision of the CAA provides for the most significant potential reductions from the volumes that would otherwise be mandated for all types of Renewable Fuels under EISA. This provision allows EPA—in consultation with the secretary of agriculture and the secretary of energy, and subject to public notice and opportunity to comment—to reduce or eliminate the minimum applicable volume requirements for any or all of the Renewable Fuel categories.[41] This waiver provision has been a part of the RFS since it was first authorized under EPAct.

This provision of the CAA contains no specified limits on the amount by which EPA can reduce any applicable volume requirement if EPA can make one of the two factual findings outlined above.[42] Additionally, while EPA can exercise this authority on petition by one or more states or by any person subject to the RFS, it may also do so on its own motion.[43]

As noted, EPA must first make a finding that one of the two triggering scenarios has occurred. On two separate occasions in the past five years, EPA has responded to petitions from states and organizations to exercise this authority based on the first finding that the RFS is causing severe economic harm.

In April 2008, the State of Texas sought a 50 percent reduction of the 2008/2009 mandate, due to severe economic harm.[44] The State contended that the mandate was having a negative impact on Texas's economy by contributing to increased corn prices, which in turn were driving up prices for livestock feed and consumer food items.[45] EPA rejected the State's request, reasoning that the statutory waiver criteria required that the mandate "must itself be the cause of the severe harm" rather than merely "contribute" to it.[46] EPA further opined that there must be a "high degree of confidence that severe harm would occur" if the mandate was fully implemented.[47]

In August 2012, several states filed waiver requests in the wake of 2012's drought, which resulted in a reduced corn harvest.[48] EPA rejected the waiver requests because it did not find that implementation of the RFS in 2012–2013 would cause "severe economic harm."[49] Specifically, the government's economic analyses of the impacts of the RFS on the agricultural sector showed that on average waiving the mandate would only reduce corn prices by approximately 1 percent, and economic analyses of impacts in the energy sector showed that waiving the mandates would not impact household energy costs.[50] In rejecting the petition, EPA followed the high bar it set for itself in the 2008 Texas petition decision for determining severe economic harm.[51] EPA is not necessarily bound by its past decisions and could reconsider its reasoning under different circumstances in the future.[52]

Notably, the petitioners for both waiver requests did not challenge EPA's decision in court. The decision not to challenge EPA's decision may have been in part based on the deference a reviewing court would have afforded EPA's factual findings on whether the RFS was causing severe economic harm. Such a factual finding must be a product of notice and comment rulemaking, which both petitions were, and thus a court would likely review any challenge to such action under the substantial evidence standard given this formal record.[53] If EPA were to determine that a reduction in the RFS is necessary to avoid severe economic harm, the actual amount of reduction would also likely be subject to substantial evidence review given that such a factual finding would also create a formal record.[54]

Currently, both on its own motion and in response to petitions from several Obligated Parties, EPA is proposing to exercise its waiver authority to reduce the 2014 RFS mandates based on a finding that there is "inadequate domestic supply."[55] Notably, the statute does not state whether there must be an inadequate domestic supply of Renewable Fuel (either neat Renewable Fuel or blended with gasoline or diesel to produce a transportation fuel) or gasoline or diesel fuel, or all three. EPA is proposing to exercise this authority for the 2014 standards because it believes there will be an "inadequate domestic supply" of Renewable Fuel to meet the Total Renewable Fuel mandate.[56] EPA believes what constitutes "inadequate domestic supply" is ambiguous, but asserts that "the common understanding of this term is an amount of a resource or product that is available for use by the person or place at issue."[57] Further, EPA believes that the provision can reasonably be "best interpreted" to 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.[58] This would include, for instance, factors affecting the ability to produce or

import qualifying Renewable Fuels as well as factors affecting the ability to distribute, blend, dispense, and consume those Renewable Fuels.[59] EPA is proposing this finding not because Renewable Fuel producers could not produce the amount required by statute, but because of "practical constraints" that presently limit consumers from purchasing gasoline with more than 10 percent ethanol or "E10." (This limit is known as the "ethanol blendwall.")[60]

In making the determination that inadequate domestic supply can take into account the practical constraints of the ethanol blendwall in limiting the supply of Renewable Fuel blended with gasoline, EPA is relying on the fact that Congress did not specify the fuel type that must be in short supply, in contrast to the way Congress structured the waiver provisions under the reformulated gasoline program and the oxygenated gasoline requirements for certain carbon monoxide nonattainment areas.[61] EPA notes, however, that prior to final adoption of EISA, Congress had before it bills that would have provided for an EPA waiver in situations where there was "inadequate domestic supply or distribution capacity to meet the requirement," and that Congress chose not to adopt such language.[62] Therefore, EPA believes it has the discretion to determine whether the adequacy of the supply of Renewable Fuel can reasonably be judged in terms of availability for use by the ultimate consumer, including consideration of the capacity to distribute the product to the ultimate consumer.[63]

It seems inevitable that certain groups will challenge this interpretation, if finalized, and argue that Congress would have included references to other possible constraints if it intended EPA to take those into account. Such groups will state, therefore, that EPA does not have the authority to consider the blendwall when determining whether there is adequate domestic supply to satisfy the mandates. These groups will likely argue that EPA may not lower the standards if it can be shown that Renewable Fuel producers can produce enough Renewable Fuel to meet the mandates, regardless of whether gasoline retailers and vehicle manufacturers must make costly investments and offer gasoline with high ethanol content at extremely low prices to encourage consumers to purchase the high-ethanol-content gasoline to overcome the practical constraints of the blendwall. Such court challenges to EPA's interpretation of EISA would be considered under the deferential *Chevron* standard.[64] Under step two of *Chevron*, EPA's determination would be upheld unless it is arbitrary and capricious.[65]

A waiver under this provision terminates after one year but can be renewed by EPA in consultation with the secretary of agriculture and the secretary of energy.[66] Indeed, in its proposal to exercise this authority for the 2014 standards, EPA states that its analysis of this provision is a "framework" that "would also be appropriate for later years, subject to adjustments made in the course of the rulemaking process and taking into account the specific facts about the availability of Renewable Fuels at the time of the final rulemaking."[67]

Long-term Adjustment Beginning in 2016

The statutory language of the CAA provides that beginning with 2016 standards and for the duration of the program, EPA must modify the applicable volume requirements for any Renewable Fuel category in all years following a waiver of: (1) at least 20 percent of any applicable volume requirement for a Renewable Fuel category in two consecutive years; or (2) at least 50 percent of a volume requirement for a Renewable Fuel category in a single year.[68] The statutory language of this provision does not specify whether this requirement is triggered when EPA has exercised its authority to adjust the standard when reducing the Cellulosic Biofuel volume in the annual standard setting authority or when exercising its general waiver authority or both.

Under this authority, EPA may not modify any of the volume requirements for any year before 2016, and the triggering events only relate to EPA adjustment of the volume requirements in the preceding year or two years.[69] Correspondingly, the fact that EPA has waived the Cellulosic Biofuel requirement by more than 50 percent for every year in which the RFS has been in effect is not yet relevant under this authority. Instead, EPA would need to make such a reduction in 2015 to trigger this authority. Similarly, if EPA finalizes its proposal for 2014 that would establish a 41 percent reduction in the Advanced Biofuel category and a 16 percent reduction in the Total Renewable Fuel category and EPA makes similar adjustments to the 2015 standards, EPA would be required to make a long-term adjustment to the Advanced Biofuel category (but not the Total Renewable Fuel Category because its reduction did not reach the 20 percent threshold). EPA must promulgate a rule establishing such adjustments for all of the following years within one year after issuing the waiver triggering its long-term adjustment authority.[70] Furthermore, EPA must promulgate rules establishing the applicable volumes under this authority no later than 14 months before the first year for which such applicable volumes will apply.[71]

EPA has little discretion to initiate reductions under this provision.[72] Once triggered, however, EPA has discretion subject to certain factors laid out in the statute to determine the amount of the reduction.[73] The statute specifies the following factors that must be considered by EPA in consultation with the U.S. Department of Energy (DOE) and U.S. Department of Agriculture (USDA) when determining the volumes required under this adjustment authority: (1) the impact of the production and use of Renewable Fuels on the environment; (2) the impact on the energy security of the United States; (3) the expected annual rate of future commercial production of Renewable Fuels; (4) the impact of Renewable Fuels on the infrastructure of the United States; (5) the impact of the use of Renewable Fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and (6) the impact of the use of Renewable Fuels on other factors such as job creation, the price and supply of agricultural commodities, rural economic development, and food prices.[74] Accordingly, this provision allows EPA to modify the applicable volumes by any amount, but EPA cannot promulgate rules that change the existing standards arbitrarily or without any basis.[75] Therefore, this modification could result in a complete

elimination of any minimum applicable volume, or it could reduce these volumes by a de minimis amount. It is unclear, however, how much of a constraint these factors are on EPA setting volumes for future years.

This provision also only applies to 20 percent or 50 percent reductions in the years covered through 2022.[76] Therefore, taking this restriction together with the prohibition on the application of this rule to any years before 2016, EPA's rule modifying applicable volume requirements will only apply from 2016–2022, although EPA has authority to set volumes after 2022 in accordance with certain statutory factors. Additionally, this long-term adjustment may not ever apply to the Biomass-Based Diesel requirement as the mandate is set at a minimum of one billion gallons beginning in 2012—well before the triggering of this adjustment authority in 2016.[77]

Temporary Biomass-Based Diesel Waiver Authority

The statutory language of the CAA provides that EPA shall reduce the Biomass-Based Diesel mandate up to 15 percent for a 60-day period if there is a significant feedstock disruption or other market circumstances that would make the price of Biomass-Based Diesel increase significantly.[78] If EPA determines that such circumstances are continuing, EPA may extend the 15 percent waiver for a second consecutive 60-day period.[79]

This provision requires EPA to consult periodically with the DOE and USDA in evaluating the impact of the Biomass-Based Diesel mandate on the price of diesel fuel. In the event that market conditions threaten to increase the price of Biomass-Based Diesel, this provision requires EPA to reduce the Biomass-Based Diesel requirement, but this reduction cannot exceed 15 percent of the applicable annual requirement and is limited to 60 days.[80] This provision, however, allows EPA to extend this 60-day period by another 60 days if EPA finds that the disruption or circumstances that initially gave rise to the reduction are ongoing.[81] Unlike the initial reduction, an extension is not required, but discretionary.[82] The extension may only be for a reduction that does not exceed 15 percent.[83] The clause of this provision allowing for a second waiver period could be construed so as to also allow for additional extensions of an extension period by asserting that EPA may reduce "the applicable annual requirement" for an additional 60-day period if the disruption or circumstances described in the clause allowing for the initial waiver period *or* "*this clause*" continue.[84]

This provision of the CAA also allows but does not require EPA to reduce the applicable volume requirement for the Total Renewable Fuel and Advanced Biofuel mandates by the same or lesser volume as it reduced the Biomass-Based Diesel mandate.[85]

The mechanics of how EPA would reduce the Biomass-Based Diesel mandate by 15 percent for only a 60-day period (or several 60-day periods) is not clear on the face of the statute. The RFS mandates are annual standards, not daily, monthly, or 60-day-long standards. As a result, it is not clear whether Congress intended EPA to annualize a 15 percent reduction for a 60-day period across the entire compliance year, which would actually result in a 2.4 percent reduction in the annual standards, or through some other mathematical calculation.

To date, EPA has never made a determination that a significant renewable feedstock disruption or other market condition is causing the price of Biomass-Based Diesel to increase significantly; therefore, EPA has not yet exercised this authority under the RFS. Such a factual determination would be valid provided it was supported by substantial evidence. With regard to EPA's interpretation of its authority and the standards it might establish for exercising its authority, such interpretation would be subject to *Chevron* review and must not be arbitrary and capricious.

Adjustment of Required Greenhouse Gas Reductions

In order to qualify as Renewable Fuel under the RFS and thereby be eligible for RIN generation, the fuel in question must represent a specific amount of lifecycle greenhouse gas reductions when compared to an equivalent volume of gasoline or diesel fuel. The amount of greenhouse gas reductions achieved by a particular fuel corresponds to the type of RIN the fuel generates and the mandate that such RINs satisfy. First, all Renewable Fuel must achieve at least a 20 percent greenhouse gas reduction.[86] Second, the Advanced Biofuel (a sub-mandate of the Total Renewable Fuel mandate) must achieve at least a 50 percent greenhouse gas reduction.[87] Third, Biomass-Based Diesel (a sub-mandate of the Advanced Biofuel mandate) must also achieve a 50 percent greenhouse gas reduction.[88] Fourth and finally, Cellulosic Biofuel must achieve a 60 percent greenhouse gas reduction.[89]

The statutory language of the CAA provides that EPA may adjust these required greenhouse gas reductions by 10 percentage points for any or all four categories of Renewable Fuel based on the factors set forth below.[90] EPA may not adjust the required greenhouse gas emission reductions to require greenhouse gas reductions greater than 20 percent (the requirement percentage for Renewable Fuel), 50 percent (the required percentage for Advanced Biofuel and Biomass-Based Diesel), and 60 percent (the required percentage for Cellulosic Biofuel)—EPA may only lower the requirements below those levels.[91]

EPA has some discretion in initiating reductions under this provision, but less discretion in determining the amount of such reductions.[92] This provision allows EPA to adjust the 20 percent reduction in lifecycle greenhouse gas emissions required for all Renewable Fuel without making any specified factual finding.[93] In contrast, however, in order to adjust the 50 and 60 percent reductions in lifecycle greenhouse gas emissions required for Advanced Biofuel, Biomass-Based Diesel, and Cellulosic Biofuel, EPA must determine that such reductions are not commercially feasible for fuels made using a variety of feedstocks, technologies, and processes before adjusting these requirements.[94] Note that any adjustments made under this provision only apply to Renewable Fuels generated from new facilities that commenced construction after the effective date of such adjustment.

EPA may reduce the required greenhouse gas reductions by a maximum of 10 percent, and the reductions must be the minimum possible adjustments so that the greenhouse gas reductions are set to the maximum achievable levels.[95] All of these adjustments must take cost into consideration when determining the maximum achievable level.[96] For a reduction

in the greenhouse gas reductions required for Renewable Fuel, EPA must consider the costs associated with achieving the greenhouse gas reductions for natural gas fired corn-based ethanol plants. For a reduction in the greenhouse gas reductions required for Advanced Biofuel, Biomass-Based Diesel, and Cellulosic Biofuel, EPA must consider the costs associated with achieving the greenhouse gas reductions arising from the use of a variety of feedstocks, technologies, and processes.[97]

After making an initial adjustment to these percentage reductions in lifestyle greenhouse gas emissions, EPA may only make further adjustments if it determines that there has been a significant change in the analytical methodology used for determining the lifecycle greenhouse gas emissions.[98] EPA is required, however, to review and revise its adjustments within five years of their promulgation.[99] Therefore, theoretically, even if EPA cannot make a finding that there has been a significant change in the analytical methodology used for determining greenhouse gas emissions, it can adjust the reductions in greenhouse gas emissions under its duty to review and revise the previous adjustments.[100]

EPA has never exercised this authority to adjust the greenhouse gas reductions since the inception of the RFS. If EPA were to exercise this authority, however, it could potentially result in an increase in the number of RINs generated, as a larger number of fuels likely would be able to meet the less stringent greenhouse gas reduction requirements and qualify as Renewable Fuel for RIN generation purposes at new facilities. Therefore, it is unlikely to provide significant relief until it is in effect for a considerable period of time.

The factual determinations necessary to initiate these adjustments would need to be supported by substantial evidence. With regard to EPA's interpretation of its authority and the standards it might establish for exercising its authority, such interpretation would be subject to *Chevron* review and must not be arbitrary and capricious.

Analysis of EPA's Authority to Amend the RFS Regulatory Regime

Replacement of Invalid RINs

Is EPA Required to Hold Obligated Parties Strictly Liable for Retiring Invalid RINs?

In recent years, EPA has held Obligated Parties strictly liable for using invalid RINs for compliance purposes to satisfy their annual obligations. In doing so, EPA has imposed fines and penalties on Obligated Parties and required these companies to retire replacement RINs.[101] EPA has imposed such liability despite the fact that the Obligated Parties did not cause the invalidity of such RINs, and the Obligated Parties had a good-faith belief in the validity of the RINs retired.[102]

No portion of the CAA explicitly requires EPA to, or prohibits EPA from, holding Obligated Parties strictly liable for retiring invalid RINs. There are, however, provisions of the CAA that could arguably be construed to allow EPA to impose such liability in certain circumstances.[103] EPA has exercised such authority and developed regulations making the use of an invalid RIN a prohibited act.[104]

Specifically, section 211(o)(2)(A)(i) of the CAA requires EPA to promulgate new regulations and revise existing regulations "to ensure that transportation fuel sold or introduced into commerce in the United States … contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel."[105] Section 211(o)(5)(A)(i) of the CAA requires regulations promulgated under Section 211(o)(2)(A) to provide "for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2)."[106]

Under a possible interpretation of both of these provisions, EPA may be required to correct a situation in which invalid RINs are generated and used for compliance purposes. The use of invalid RINs could interfere with EPA ensuring that U.S. commerce contains "at least the applicable volume of renewable fuel."[107] If an invalid RIN is taken into account in the calculation of the applicable volume of Renewable Fuel in U.S. commerce, then the applicable volume will not be satisfied, as no Renewable Fuel was generated with respect to the RIN in question.[108] Invalid RINs may also interfere with EPA's duty to ensure that "an appropriate amount of credits" is generated, because inappropriate amounts of credits are

generated in the case of invalid RINs as no amount of Renewable Fuel gave rise to the creation of such RINs.[109]

While these statutory provisions may require EPA to fix the problems created by invalid RINs, they do not require EPA to fix the problem in any particular way. As a result, EPA is not required to hold an Obligated Party strictly liable for RIN invalidity when the Obligated Party did not cause or contribute to the invalidity. Instead, EPA could impose liability only on, and require RIN replacement or other compensatory act only from, the culpable Renewable Fuel producer (or other culpable entities). If the Renewable Fuel producer was bankrupt or otherwise would not provide replacement RINs, EPA could provide for an alternative mechanism for RIN replacement. This flexibility to create a different liability scheme under the RFS is demonstrated by EPA's recent proposal to establish a RIN verification system that would absolve Obligated Parties from the strict liability RIN replacement scheme in certain instances.

RIN Multipliers for Different Renewable Fuel Types

Can EPA Adjust the RIN Multipliers so that Certain Types of Renewable Fuel Can Generate More RINs?

The existing RFS regulations provide that the number of RINs generated on each gallon of Renewable Fuel varies depending on the type of Renewable Fuel.[110] Ethanol generates 1.0 RINs per gallon, biodiesel generates 1.5 RINs per gallon, renewable diesel generates 1.7 RINs per gallon, and producers of other types of Renewable Fuel can apply for their own RIN multiplier for their particular fuel type.[111] These multipliers are known as "equivalence values" and are set forth in the regulations to equate the varying energy content of different types of Renewable Fuel.[112]

EPA's authority to set equivalence values is derived under Section 211(o)(5)(A), which allows EPA to impose regulations for the generation of an "appropriate" amount of credits.[113] Since equivalence values determine how many RINs can be generated on a gallon of a certain type of Renewable Fuel, regulations setting such values directly impact the number of RINs available for retirement to satisfy the mandates of the RFS. Correspondingly, equivalence values also may impact the price of those RINs in the RIN trading market.

EPA can likely adjust equivalence values for the various types of Renewable Fuel as long as such a decision is supported by substantial evidence and if the adjustment is made through the formal rulemaking process.[114] Simply because an agency has taken inconsistent positions on the issue in question does not mean that its latest determination does not warrant *Chevron* deference.[115] As long as the agency adequately explains its reversal in policy, this decision is treated just like any other agency action.[116] Correspondingly, if EPA gives sufficient factual justification for changing an equivalence value, such an action will likely withstand judicial review. Such a factual justification would relate to the energy content of the different types of Renewable Fuel. In fact, an EPA action of changing an

equivalence value could be granted more deference because the generation of these values is highly technical and based on EPA's particular expertise.[117]

Definition of Renewable Fuel

Can EPA Expand the Regulatory Definition of Renewable Fuel?

If EPA had the authority to expand its definitions of Renewable Fuel, Advanced Biofuel, Biomass-Based Diesel, and Cellulosic Biofuel, it could increase the number of sources that would be eligible to qualify to meet the RFS mandates. One such possible example would be to amend the regulatory definition of Renewable Fuel to include electricity produced from wind and solar power that is used as a transportation fuel.

The current EPA regulatory definitions of Renewable Fuel, Advanced Biofuel, and Cellulosic Biofuel mirror the CAA's statutory definitions; however, the regulatory definition of Biomass-Based Diesel is slightly narrower than the statutory definition.[118] As a result, EPA likely cannot expand its regulatory definitions of Renewable Fuel, Advanced Biofuel, and Cellulosic Biofuel, but may be able to expand the definition of Biomass-Based Diesel.

Under step one of the *Chevron* analysis, when the applicable statute is unambiguous concerning a certain issue, any agency action that conflicts with such a statute is impermissible.[119] Since the statute speaks to the definitions of Renewable Fuel, Advanced Biofuel, Biomass-Based Diesel, and Cellulosic Biofuel, EPA likely cannot alter such definitions in a meaningful way. The fact that EPA has narrowed the definition of Biomass-Based Diesel in its regulations when compared with the statutory definition may allow it to expand the definition.

Under both the language of the CAA and EPA's regulations, Renewable Fuel is defined as "fuel that is produced from renewable biomass that is used to replace or reduce the quantity of fossil fuel present in transportation fuel," and, if generated from a facility which was built after December 19, 2007, achieves "at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions."[120]

The CAA and the regulations both define Advanced Biofuel as "renewable fuel, other than ethanol derived from cornstarch, that has lifecycle greenhouse gas emissions … that are at least 50 percent less than baseline greenhouse gas emissions."[121]

Cellulosic Biofuel, which is a subset of Renewable Fuel and Advanced Biofuel, is defined as "renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions … that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions."[122]

The regulatory definition of Biomass-Based Diesel, however, differs slightly as the CAA provides a broad definition and the regulations provide a more specific definition of the term. The CAA defines Biomass-Based Diesel as a "renewable fuel that is biodiesel" such that it is "a diesel fuel produced from non-petroleum renewable resources that meets the

registration requirements of fuel and fuel additives established by the Environmental Protection Agency under section 211 of the CAA," and "has lifecycle greenhouse gas emissions … that are at least 50 percent less than baseline lifecycle greenhouse gas emissions."[123] The regulations define Biomass-Based Diesel as a fuel that has "lifecycle greenhouse gas emissions that are at least 50 percent less than baseline lifecycle greenhouse gas emissions … [that] is a transportation fuel, transportation fuel additive, heating oil, or jet fuel … [and] meets the definition of either biodiesel or non-ester renewable diesel," and "is registered as a motor vehicle fuel or fuel additive under 40 C.F.R. part 79, if the fuel or fuel additive is intended for use in a motor vehicle."[124] The notable difference in these definitions is that the regulatory definition requires that fuel types of the Biomass-Based Diesel category be either biodiesel or non-ester renewable diesel. The regulations further define biodiesel as "a mono-alkyl ester that meets ASTM D 6751" and non-ester renewable diesel as "a fuel which can be used in an engine designed to operate on conventional diesel fuel, or be heating oil or jet fuel" and is "[n]ot a mono-alkyl ester."[125] Because the statute does not reference biodiesel or non-ester renewable diesel, it is arguable that EPA's regulatory definition unnecessarily requires Biomass-Based Diesel fuel to meet the specific definitions for biodiesel or non-ester renewable diesel.

Note that the statutory definition of Renewable Fuel, and thereby all of the subcategories of Renewable Fuel, requires that Renewable Fuel be sourced from renewable biomass. Both Section 211(o) of the CAA and the regulations define Renewable Fuel as fuel produced from renewable biomass that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.[126] The definition of renewable biomass is clearly set out in the statute and the regulations as well.[127] The statute states that renewable biomass is defined as: "(i) Planted crops and crop residue … ; (ii) Planted trees and tree residue … ; (iii) Animal waste material and animal byproducts; (iv) Slash and pre-commercial thinnings … ; (v) Biomass obtained from the immediate vicinity of buildings and other areas ... ; (vi) Algae; and (vii) Separated yard waste or food waste, including recycled cooking and trap grease."[128] Given that the CAA and the regulations explicitly set forth the definition of renewable biomass, only pathways that involve feedstock that is considered renewable biomass will lead to the creation of Renewable Fuel that qualifies for RIN generation. Because of this requirement built into the statute itself, Renewable Fuel cannot be sourced from non-biomass-based sources, such as wind, solar, geothermal, or hydroelectric resources even when used as a transportation fuel.

If EPA were to create pathways based on types of feedstock or other energy sources not considered renewable biomass under the CAA, judicial review could strike such action down under step one of *Chevron*.[129] Given that the statute has unambiguously defined renewable biomass and Renewable Fuel, it left no gap for EPA to fill with its own regulatory action. EPA action that permits the generation of RINs for feedstocks that are not considered renewable biomass would directly conflict with the statute and thus is an impermissible agency action.

Treatment of Foreign Renewable Fuel

Can EPA Reduce the Additional Obligations Currently Imposed on Renewable Fuel Importers and Foreign Producers such that They are Regulated in the Same Manner as Domestic Producers?

EPA can likely reduce the obligations imposed on foreign Renewable Fuel producers as long as such action is not arbitrary and capricious.[130] The CAA neither explicitly proscribes nor prohibits the imposition of additional obligations on foreign Renewable Fuel, while EPA's regulations promulgated pursuant to the CAA do impose additional obligations on foreign Renewable Fuel.[131]

EPA's RFS regulations require that producers and importers of Renewable Fuel produced from foreign-grown feedstocks obtain very detailed and specific information on the land used to grow the feedstocks that were used to produce the Renewable Fuel in question.[132] These documents must show that the land in question was under cultivation or fallow prior to December 19, 2007. As a practical matter, this requirement is generally applicable to foreign Renewable Fuel producers and importers of foreign Renewable Fuel. The gathering of these documents can be extremely time intensive and expensive as farmers and Renewable Fuel producers in foreign countries historically have not maintained such documentation. Furthermore, government and private records in many countries may not be of the same quality or type as they are in the United States. While importers and foreign producers have made significant investments to ensure that such records are produced and maintained, such companies must still spend considerable resources ensuring that the documents for all cargo sent to the United States meet EPA's requirements. Producers of Renewable Fuel sourced from domestic feedstock are not subject to such documentation requirements.

EPA may not waive or change the requirement that Renewable Fuel can only be produced from feedstocks grown on land that was fallow or under cultivation prior to December 19, 2007, because this requirement is contained explicitly within the statutory text of the CAA.[133] However, no part of the CAA requires that documentation be gathered to prove that the land was fallow or under cultivation as of December 19, 2007. Instead, EPA has developed the documentation requirement under its authority under the CAA to "ensure that transportation fuel sold or introduced into commerce in the United States … contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel."[134] Specifically, the documentation requirements relate to proving that the fuel was derived from feedstocks grown on land that was fallow or under cultivation prior to December 19, 2007—one of the requirements for fuel to qualify as "Renewable Fuel." As a result, it could be argued that these requirements are necessary to ensure that sufficient volumes of Renewable Fuel are in fact being produced rather than product that does not in fact qualify as Renewable Fuel.

Nonetheless, because the documentation requirement is not part of the statute, EPA can remove or modify this requirement from the RFS regulations as long as such action is not arbitrary and capricious.[135] EPA could justify regulatory action waiving or modifying this documentation requirement for foreign producers by reasoning that burdensome documentation requirements may deter entities from producing Renewable Fuel and, thus, an adequate volume of Renewable Fuel may not exist in U.S. commerce.[136]

While EPA's regulations impose the documentation requirement on all importers and producers of Renewable Fuel regardless of the source of the Renewable Fuel, EPA has waived this documentation requirement for producers and importers of Renewable Fuel produced from feedstock cultivated in the United States and Canada.[137] Specifically, EPA has found that because there has not been a fundamental change in the aggregate amount of land under cultivation in the United States and Canada since December 19, 2007, it is reasonable to waive the documentation requirement for feedstocks grown in those countries (i.e., the "aggregate compliance" approach).[138] The National Wildlife Federation challenged the basis for the aggregate compliance approach in 2011, but later withdrew its lawsuit for reasons that are not clear based on court documents. Note that EPA could apply a similar aggregate compliance approach to feedstocks grown in other countries if such a finding were supported by substantial evidence. Similarly, EPA could find the aggregate compliance approach no longer applicable to the United States and Canada.

Separately, in order to ensure recourse if non-compliance occurs outside the jurisdiction of the United States, currently EPA requires all foreign Renewable Fuel producers that generate RINs to: (1) post and maintain a bond equal to $0.01 per gallon of Renewable Fuel on which RINs are generated in a given year; (2) submit to the jurisdiction of the United States; and (3) secure certifications submitting to the jurisdiction of the United States from all other companies that take custody of the Renewable Fuel from the time the Renewable Fuel is produced to the time it is loaded on the vessel for shipment to the United States.[139] These requirements are very burdensome, and in many cases, it is impossible for foreign companies to meet all of the requirements. Despite this, EPA has issued a draft rulemaking that would subject all foreign producers to these requirements and significantly increase the bonding requirements regardless of whether the foreign producer generates the RINs or an importer generates the RINs, which is the more common practice. If EPA were to move forward with finalizing such a rulemaking, it would likely be much more costly for companies to bring Renewable Fuel to the United States, and in many cases, foreign producers and importers may elect to ship their product elsewhere. Domestic Renewable Fuel producers are not subject to any of these requirements, and EPA is not proposing to subject them to these requirements.

The CAA does not specifically require these additional requirements on foreign Renewable Fuel producers or importers of foreign Renewable Fuel. Instead, EPA's authority to promulgate these regulations concerning foreign Renewable Fuel is derived from a general authority in the CAA that requires EPA to promulgate regulations to ensure that transportation fuel sold or introduced into commerce in the United States contains the

applicable volume of Renewable Fuel.[140] Additionally, the CAA requires EPA to promulgate regulations that contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of the RFS are met.[141] Because of the lack of jurisdiction that the United States has over the activities of foreign Renewable Fuel producers, the additional obligations imposed upon such foreign producers could be characterized as necessary to "ensure that the transportation fuel introduced into commerce in the United States" contains the applicable volume of Renewable Fuel.[142] These regulations governing foreign producer obligations also could be characterized as compliance provisions applicable to importers that are appropriate to ensure that the requirements of the RFS are met.[143]

Nonetheless, because these requirements are not specifically contained in the CAA, EPA could remove or modify the existing requirements from the RFS regulations and could elect not to move forward with the rulemaking change to impose these requirements on all Renewable Fuel importers. Either such action could help facilitate further Renewable Fuel imports into the United States. As previously stated in this paper, a change to the existing regulations must be able to stand arbitrary and capricious review under the *Chevron* analysis.[144]

Lastly, it may be helpful to note that the CAA does not provide EPA with the authority to outright ban or otherwise limit imports of Renewable Fuel. Additionally, any such ban or limit would need to comply with World Trade Organization and free-trade agreement requirements.

Renewable Volume Obligation Deficit Carryover Provisions

May EPA Allow Obligated Parties to Carry Compliance Deficits in Back-to-Back Years?

An Obligated Party may carry a deficit in one or more standards in one compliance period (*i.e.*, calendar year). The deficit may be for the entire obligation or a lesser amount. However, the RFS regulations prohibit an Obligated Party from carrying a deficit in its compliance obligation for a particular standard for two or more years in a row.[145] This prohibition on carrying a deficit in back-to-back years may not be waived or otherwise altered by EPA regulation as it is explicitly contained in the statutory language of the CAA.[146]

The CAA unambiguously asserts that an entity may carry a deficit over into the next calendar year on the condition that, in the next calendar year, the entity achieves compliance with the Renewable Fuel volume requirement and retires the necessary RINs to offset the RIN deficit of the previous year.[147] Therefore, an Obligated Party may not carry a deficit in back-to-back years for the same standard. Furthermore, the Obligated Party carrying the deficit must make up the deficit in the following compliance year.[148] EPA's

regulations currently mirror this statutory prohibition on carrying a deficit for more than one year.[149] An Obligated Party, however, can carry back-to-back deficits in separate standards.

If EPA attempted to allow Obligated Parties to carry a deficit for more than a year, a court would likely strike such action down as invalid under step one of *Chevron* because Congress by statute explicitly addressed this issue.[150] EPA's action would directly conflict with the statute and thus violate *Chevron* principles.[151]

RIN Carryover Provisions

May EPA Allow RINs to be Used for Compliance for Longer than the Compliance Year in which They are Generated and the Following Year?

Under EPA's RFS regulations, RINs may be used for compliance only for the year in which they are generated and the following year.[152] After that time period, the RINs expire. This lifespan of a RIN may not be adjusted as it is explicitly contained in the statutory language of the CAA.[153]

The CAA expressly states, "a credit generated under [the RFS] shall be valid to show compliance for the 12 months as of the date of the generation."[154] Because the volume mandates of the RFS are annual requirements, a RIN that is valid for 12 months may be used in the compliance year in which it is generated as well as in the following year. EPA's regulations promulgated pursuant to Section 211(o) of the CAA also enforce this one-year limitation.[155] Any EPA action allowing RINs to be used for a longer period of time would violate *Chevron* principles.[156]

Limiting RIN Trading

Can EPA Limit the Number of Times RINs Are Traded or Limit RIN Trading only to Obligated Parties?

Currently under its regulations, EPA allows anyone to trade credits provided the person is registered with EPA as a RIN trader, and there is not a limit on the number of times in which credits may be traded. Although the CAA contains an entire section addressing the RIN program, it neither explicitly prohibits nor commands EPA to limit the number of times RINs are traded or to limit RIN trading only to Obligated Parties.[157] Similarly, the CAA does not contain any language that requires EPA to regulate the stability of the RIN market and does not contain any prohibition on EPA developing regulations that would regulate the stability of the RIN market. Accordingly, EPA may be able to impose regulations pursuing these objectives as long as doing so passes the *Chevron* analysis. Under such analysis, when a statute does not address an issue specifically, as is the case here, the court will grant substantial deference to an agency decision.[158] EPA must show that its decision to take either of these actions has a rational basis and is not arbitrary and capricious.[159]

Section 211(o)(5)(B) of the CAA, titled "Use of Credits," however, seems to directly address who may take ownership of RINs. Specifically, the CAA states that a person who generates credits may transfer all or a portion of the credits to "another person," which is not a defined term.[160] This language may be relevant in a court's judicial review of agency action limiting RIN trading only to Obligated Parties. If EPA were to limit trading only to Obligated Parties, a court may not permit such action depending on how broadly or narrowly it construes the language "another person."

Lastly, Section 211(o) of the CAA does not address whether information related to RIN trades may be made available to the public, but any such information that EPA seeks to be made available to the public would be subject to the constraints of the Freedom of Information Act—including the constraints on making confidential business information available to the public.

RIN Pricing

Can EPA Set a Minimum or Maximum Price for RINs?

The CAA only contains one provision that expressly mentions the prices of RINs. This provision allows EPA to set a floor price for Cellulosic Biofuel waiver credits that EPA is required to sell when EPA reduces the Cellulosic Biofuel minimum-volume requirement.[161] Outside of this provision, the CAA neither explicitly requires nor prohibits the setting of a maximum or minimum price for RINs.

When EPA reduces the Cellulosic Biofuel minimum-volume requirement, the agency must offer for sale waiver credits at the higher of $0.25 per gallon or the amount by which $3.00 per gallon exceeds the average wholesale price of gasoline.[162] Note that this provision allows for the setting of a floor for only Cellulosic Biofuel waiver credits and not RINs, only allows a minimum and not a maximum price to be set, and only allows for this price-setting when there is a waiver of the minimum-volume requirements for Cellulosic Biofuel.[163] EPA does not set a minimum price for Cellulosic Biofuel RINs, but instead merely sets a minimum price for the waiver credits that EPA itself must offer for sale.[164] Therefore, EPA is not actually regulating the market for RINs or regulating the price of any RINs that were generated by Renewable Fuel producers or importers. Parties are not prohibited from transferring RINs to another party at no cost to the other party.

If EPA were to decide to set a maximum or minimum price for RINs, this action would be subject to judicial review under the *Chevron* two step test.[165] This action would be analyzed under step two of *Chevron*, because the statute does not explicitly address RIN prices.[166] Accordingly, EPA's action in setting a maximum or minimum price on RINs may not be arbitrary and capricious.[167] Because EPA's general authority does not include setting market prices, it is unlikely that a court would uphold any such action.

Vehicle Refueling Liability

Can EPA Address Vehicle Refueling Liability Pursuant to the RFS Statutory Authority?

No, EPA does not have the authority to address vehicle refueling liability under the RFS. Section 211(o) of the CAA only provides EPA authority to impose regulations regarding the amount of Renewable Fuel in transportation fuel sold or introduced into commerce in the United States.[168] This authority in no way encompasses addressing liability for vehicle damages as a result of fueling vehicles with Renewable Fuel. Section 211(o) does not speak to liability in such instances.

Technology Pathway Review

Can EPA Adjust or Expedite the Approval of New RIN Generation Pathways for Different Types of Renewable Fuel?

Under EPA's existing RFS regulations, RINs may only be generated on Renewable Fuel if EPA has approved a pathway that approves the feedstock, production process, and fuel type for the fuel in question.[169] EPA may approve such pathways on its own initiative or upon a petition from an individual company.[170] Recently, EPA has come under criticism for the length of time that it takes in approving a new RIN generation pathway, either on its own initiative or upon a petition from a private party.

As an initial matter, neither the CAA nor EPA's regulations prescribe any minimum or maximum limits on the amount of time that is required to approve a new RIN generation pathway. As a result, EPA may expedite its approval of an individual pathway approval or establish a standardized expedited pathway approval process so long as its pathway approvals or denials are supported by substantial evidence.

The CAA does not explicitly contain any requirements for RIN generation pathways. Instead, when EPA promulgated its pathway regulations it was likely acting under its broad authority to ensure that the applicable volume of Renewable Fuel is used in transportation fuel sold or introduced into the United States commerce and the need to ensure that all Renewable Fuel is derived from feedstocks meeting the definition of renewable biomass as well as meets relevant greenhouse gas reductions.[171] The approval of new pathways and the process by which these pathways are created affect the applicable volume of Renewable Fuel available in the United States commerce in various ways. Therefore, the regulations may serve the purpose of ensuring that all pathways approved create fuel within the definition of Renewable Fuel. In contrast, if such pathways instead allowed for the creation of fuel that is not Renewable Fuel, an inadequate volume of Renewable Fuel might not be produced to meet the requirements of EISA. On the other hand, the easier it is for Obligated Parties to get more pathways approved, presumably, the more Renewable Fuel would be created and introduced into commerce.

Despite the fact that EPA has already established the process for approving RIN generation pathways, a change to the process may survive judicial review under the *Chevron* analysis. The Supreme Court in *Chevron* stated that even though EPA had changed regulatory definitions at different times, a new interpretation deserved deference.[172] Simply because an agency has taken inconsistent positions on an issue does not mean that its latest determination does not warrant *Chevron* deference.[173] As long as the agency adequately explains its reversal in policy, this decision is treated just like any other agency action.[174] Correspondingly, as the CAA does not specifically address the process of approving new pathways, if EPA gives sufficient reasons for changing this process, such an action could withstand arbitrary and capricious judicial review.

Endnotes

[1] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501, 119 STAT. 1067, 1067-76; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, §§ 202-203, 121 STAT. 1521-1528.

[2] Herein, references to "RFS" will refer to the currently in effect RFS2 regulations.

[3] 5 U.S.C. § 706 (2013).

[4] *Id.*

[5] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

[11] *Chevron*, 467 U.S. at 844.

[12] *Id.* at 842-44.

[13] *Consolidated Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 217 (1938).

[14] 5 U.S.C. § 706.

[15] *Consolidated Edison*, 305 U.S. at 217.

[16] *Id.*

[17] 42 U.S.C. § 7545(o)(7)(D)(i) (2013).

[18] *Id.*

[19] "Diesel" is defined under RFS2 as all products meeting the definition of MVNRLM diesel fuel at 40 C.F.R. §80.2 (qqq). 40 C.F.R. § 80.1401. "MVNRLM" is motor vehicle, non-road, locomotive and marine diesel, which is commercially known as "ultra low sulfur diesel."

[20] 42 U.S.C. § 7545(o)(7)(D)(i) (2013).

[21] *Id.*

[22] *Id.*

[23] *Id.* § 7545(o)(3)(B)(i).

[24] *Id.* § 7545(o)(7)(D)(i).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *American Petroleum Institute v. EPA*, 706 F.3d 474, 481 (2013).

[32] 42 U.S.C. § 7545(o)(7)(D)(i).

[33] *Id.*

[34] *Id.*

[35] *Chevron,* 467 U.S. at 844; *API*, 706 F.3d at 478.

[36] *API*, 706 F.3d at 478.

[37] *Id.* at 479.

[38] *Id.*

[39] *42 U.S.C.* § 7545(o)(7)(A).

[40] *Id.* § 7545(o)(7)(B).

[41] *Id.* § 7545(o)(7)(A).

[42] *Id.*

[43] *Id.*

[44] Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard, 73 Fed. Reg. 47168, 47168 (Aug. 13, 2008).

[45] *Id.* at 47169.

[46] *Id.* at 47170-71.

[47] *Id.* at 47171.

[48] Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70752, 70753 (Nov. 27, 2012).

[49] *Id.*

[50] *Id.*

[51] *Id.* at 70774.

[52] *Id.* at 70755.

[53] 5 U.S.C. § 706.

[54] *Id.*

[55] 2014 Standards for the Renewable Fuel Standard Program, 78 Fed. Reg. 71732, 71734 (Nov. 29, 2013).

[56] *Id.*

[57] *Id.* at 71755.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 71756.

[62] *Id.* at 71757.

[63] *Id.*

[64] *Chevron*, 467 U.S. at 844.

[65] *Id.*

[66] 42 U.S.C. § 7545(o)(7)(C).

[67] 78 Fed. Reg. 71732, 71735.

[68] *42 U.S.C.* § 7545(o)(7)(F).

[69] *Id.*

[70] *Id.* § 7545(o)(7)(F)(ii).

[71] *Id.* § 7545(o)(2)(B)(ii).

[72] *Id.* § 7545(o)(7)(F).

[73] *Id.*

[74] *Id.* § 7545(o)(2)(B)(ii).

[75] *Id.*

[76] *Id.* § 7545(o)(7)(F).

[77] *Id.* § 7545(o)(2)(B)(i).

[78] *Id.* § 7545(o)(7)(E)(ii).

[79] *Id.* § 7545(o)(7)(E)(iii).

[80] *Id*. § 7545(o)(7)(E)(ii).

[81] *Id.* § 7545(o)(7)(E)(iii).

[82] *Id.*

[83] *Id.*

[84] *Id.* (emphasis added).

[85] *Id.* § 7545(o)(7)(E)(ii).

[86] 40 C.F.R. § 80.1403(b).

[87] *Id.* § 80.1401.

[88] *Id.*

[89] *Id.*

[90] 42 U.S.C. § 7545(o)(4)(A).

[91] *Id.*

[92] *Id.* § 7545(o)(4)(A-B).

[93] *Id.* § 7545(o)(4)(A).

[94] *Id.*

[95] *Id.* § 7545(o)(4)(B-C).

[96] *Id.*

[97] *Id.* § 7545(o)(4)(A).

[98] *Id.* § 7545(o)(4)(E).

[99] *Id.* § 7545(o)(4)(D).

[100] *Id.*

[101] For example: *In the Matter of: Trafigura AG*, U.S. Environmental Protection Agency Administrative Settlement Agreement AED/MSEB #7977 (April 18, 2012).

[102] *Id.*

[103] 42 U.S.C. § 7545(5); 40 C.F.R. §§ 80.1431(a)(2), (b)(2), 80.1460(c)(1).

[104] 40 C.F.R. § 80.1460.

[105] 42 U.S.C. § 7545(o)(2)(A)(i).

[106] *Id.* § 7545(o)(5)(A).

[107] *Id.* § 7545(o)(2)(A)(i).

[108] *Id.*

[109] *Id.* § 7545(o)(5)(A).

[110] 40 C.F.R. § 80.115.

[111] *Id.* § 80.115(b).

[112] *Id.*

[113] 42 U.S.C. § 7545(o)(5)(A).

[114] 5 U.S.C. § 706; *Citizens*, 401 U.S. at 414-15.

[115] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

[116] *Id.*

[117] *Barnhart*, 535 U.S. at 222.

[118] 42 U.S.C. § 7545(o)(1); 40 C.F.R. § 80.1401.

[119] *Chevron,* 467 U.S. at 842-44 (1984).

[120] 42 U.S.C. § 7545(o)(1)(J), (2)(A)(i); 40 C.F.R. § 80.1401.

[121] 42 U.S.C. § 7545(o)(1)(B); 40 C.F.R. § 80.1401.

[122] 42 U.S.C. § 7545(o)(1)(E); 40 C.F.R. § 80.1401.

[123] 42 U.S.C. §§ 7545(o)(1)(D).

[124] 40 C.F.R. § 80.1401.

[125] *Id*.

[126] 42 U.S.C. § 7545(o)(1)(J); 40 C.F.R. § 80.1401.

[127] 42 U.S.C. § 7545(o)(1)(I); 40 C.F.R. § 80.1401.

[128] 42 U.S.C. § 7545(o)(1)(I).

[129] *Chevron*, at 467 U.S. at 862-64.

[130] *Id.*

[131] 40 C.F.R. § 80.1466.

[132] 40 C.F.R. § 80.1401.

[133] 42 U.S.C. § 7545(o)(1)(I).

[134] *Id.* § 7545(2)(A)(i).

[135] *Chevron*, 467 U.S. 842-44.

[136] 42 U.S.C. § 7545(o)(2)(A)(i).

[137] Regulation of Fuels and Fuel Additives: Changes to the Renewable Fuel Standard Program, 75 Fed. Reg. 14670-01, 14682 (March 26, 2010).

[138] *Id.*

[139] 40 C.F.R. § 80.1466.

[140] *42 U.S.C.* § 7545 (o)(2)(A)(i).

[141] *Id.* § 7545 (o)(2)(A)(iii).

[142] *Id.* § 7545 (o)(2)(A)(i).

[143] *Id.* § 7545(o)(2)(A)(iii).

[144] *Chevron*, 467 U.S. 842-44.

[145] 42 U.S.C. § 7545(o)(5)(D).

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] 40 C.F.R. § 80.1427(b)(1).

[150] *Chevron*, 467 U.S. 842-44.

[151] *Id.*

[152] 40 C.F.R. § 80.1428.

[153] 42 U.S.C. § 7545(o)((5)(C).

[154] *Id.*

[155] 40 C.F.R. § 80.1428.

[156] *Chevron*, 467 U.S. 842-44.

[157] 42 U.S.C. § 7545(o)(5).

[158] *Chevron*, 467 U.S. 842-44.

[159] *Id.*

[160] 42 U.S.C. § 7545(o)(5)(B).

[161] 42 U.S.C. § 7545(o)(7)(D)(ii).

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Chevron*, 467 U.S. 842-44.

[166] *Id.*

[167] *Id.*

[168] 42 U.S.C. 7545(o)(2)(A)(i).

[169] 40 C.F.R. § 80.1426.

[170] 40 C.F.R. § 80.1416.

[171] 42 U.S.C. § 7545(o)(2)(A)(i).

[172] *Chevron*, 467 U.S. at 863.

[173] *Brand X,* 545 U.S. at 981.

[174] *Id.*