



Department of Justice

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Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Air and Radiation Docket
Docket ID No. EPA-HQ-OAR-2013-0479
Docket ID No. EPA-HQ-OAR-2013-0747
Mailcode: 6102T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator McCarthy:

The purpose of this letter is to comment on EPA's proposed 2014 Standards for the Renewable Fuel Standard Program, and the related petitions urging EPA to waive the applicable statutory renewable fuel standards contained in the Clean Air Act, section 211(o)(2)(B). While we appreciate EPA's past efforts to implement this important program, the current proposal ignores the express terms of the statute and would contravene Congressional intent to foster increased production of renewable fuels. The production of renewable fuels is a critical part of Iowa's economy - providing a key market for agricultural crops and creating thousands of jobs.

EPA's proposed 2014 Renewable Fuel Standards rely, in part, on the general waiver authority contained in section 211(o)(7)(A), which authorizes the Administrator to waive the statutory standards and reduce the "national quantity of renewable fuel" required under section 211(o)(2). This general waiver is authorized only when implementation of the statutory standards would severely harm the economy or when there is an "inadequate domestic supply." Clean Air Act, section 211(o)(7)(A)(i) and (ii).

EPA is not proposing to find that implementation of the standards would severely harm the economy, but instead concludes that there is an "inadequate domestic supply." EPA reaches this conclusion by suggesting that the phrase "inadequate domestic supply" is ambiguous and should be interpreted to allow consideration, not only of factors affecting the ability to produce renewable fuels but also "factors affecting the ability to distribute, blend, dispense, and consume those renewable fuels." 78 Fed. Reg. 230, 71755 (Nov. 29, 2013).

Review of EPA's construction of the statutes it administers is governed by the two-part test in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). First, if the intent of Congress is clear, the court as well as the agency must give effect to the unambiguously expressed intent of Congress. *Id.* Second, if Congress has not directly addressed the precise question at issue, then the agency's answer must be a permissible construction of the statute. *Id.*

The statute here is not ambiguous. The general waiver provision expressly provides that the EPA may reduce "the national quantity of renewable fuel" under paragraph 2 of section 211(o) if it determines that there is an "inadequate domestic supply." Clean Air Act, section 211(o)(7)(A)(ii). The latter phrase authorizes a general waiver only when there is an inadequate domestic supply of "renewable fuel," not blended fuel.

The national renewable fuel standards in paragraph 2 of section 211(o) specify the "applicable volume of renewable fuel," which must be contained within "transportation fuel." Similarly, the general waiver phrase "inadequate domestic supply" refers, not to blended fuel, but to the supply of "renewable fuel." "Renewable fuel" is defined to mean "fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel." Clean Air Act, section 211(o)(1)(J).

Accordingly, general waiver of the national renewable fuel standards under section 211(o)(7)(A)(ii) is not authorized unless there is an inadequate domestic supply of renewable fuel, not blended fuel.

Other factors such as distribution capacity of blended fuel provide no basis for a general waiver under section 211(o)(7)(A)(ii). This analysis is buttressed by other provisions in section 211 which, unlike the general waiver provision in section 211(o)(7)(A)(ii), expressly authorize consideration of "distribution capacity." *E.g.*, Clean Air Act, section 211(m)(3)(C)(i) (authorizing waiver of requirements for oxygenated gasoline when there is an "inadequate domestic supply of, or distribution capacity for, oxygenated gasoline"); section 211(c)(4)(C)(ii)(I) (authorizing temporary waiver of controls relating to fuels and fuel additive which would "prevent the distribution of an adequate supply of the fuel or fuel additive to consumers"); and sections 211(k)(6)(B)(i)(I) and (iii)(I) (authorizing deferral of reformulated gasoline requirements in a State that opts in to the program where "there is insufficient capacity to supply reformulated gasoline").

In addition, Congress' express inclusion of the term "distribution capacity" in other sections of the same Act provides further proof that Congress did not intend for the EPA to consider "distribution capacity" under the general waiver provision of section 211(o)(7)(A)(ii). *See Sebelius v. Cloer*, 133 S. Ct. 1886, 1894 (2013) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.").

The legislative history of section 211 also makes clear that Congress did not authorize a general waiver of the national renewable fuel standards based on “distribution capacity.” The House of Representatives’ version of the Energy Policy Act of 2005 would have expressly authorized a general waiver if there was an “inadequate domestic supply *or distribution capacity to meet the requirement.*” Energy Policy Act of 2005, H.R. 6, 109th Cong. § 1501(a)(2) (emphasis added). The Senate removed that emphasized language and the final statute was adopted accordingly. Pub. L. 109-58, 119 Stat. 594, § 1501(a)(2).

Even if the statute was ambiguous, the EPA’s proposed waiver under section 211(o)(7)(A)(ii) would not be a permissible construction of the statute. The Congressional purpose in enacting the renewable fuel standards was “to move the United States towards greater energy independence and security” and “to increase the production of clean renewable fuels.” Energy Independence and Security Act of 2007, Pub. L. 110-140, 121 Stat. 1492. Congress sought to achieve those purposes by establishing enforceable national renewable standards, increasing in increments between 2006 and 2022, thereby allowing the fuel industry to make necessary adjustments. If the EPA waived national renewable fuel standards, not because of an inadequate supply of renewable fuel, but rather because of limited distribution capacity of blended fuels, it would be removing the incentives adopted by Congress to foster increased production of renewable fuels and greater energy independence.

We respectfully request that you decline to waive the national renewable fuel standards under section 211(o)(7)(A)(ii), except when there is an inadequate domestic supply of renewable fuels, not blended fuel. Thank you for your consideration.

Sincerely,



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