

The Role of Litigation in Hindering the Biofuels Sector in the U.S. and Future Prospects

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Policy Challenges to the Bioeconomy

- Climate change mainly drives bioeconomy
 - U.S. federal law, however, contains no renewable portfolio standard, cap and trade, or low carbon fuel standard
- Without Federal leadership, U.S. relies on 50 different states' policies
 - California taking lead from GHG perspective
 - Gaps in and inconsistencies between state laws (“Balkanization”)

Litigation Pressure at Every Turn

- Federal Clean Air Act
 - Renewable Fuel Standard (RFS)
 - E15
 - Stationary Source/Tailoring rule
- State:
 - California Low Carbon Fuel Standard (LCFS)

The U.S. Federal Renewable Fuel Standard

Renewable Fuel Standard (RFS)

Lawsuits Against Blending Amounts

EPA's authority to set mandate?

- Challenge to the 2012 mandate
 - *API v. EPA*, D.C. Cir. 12-1139, published 1/25/13, Brown(GWB)/Kavanaugh(GWB)/Williams(Reag)
 - API argued set too high
 - No deference to EPA's balance of uncertainty of cellulosic volumes with "technology forcing"
 - Projected supply means what actually will happen
 - Congress couldn't have intended to penalize those who aren't responsible for producing it⁵

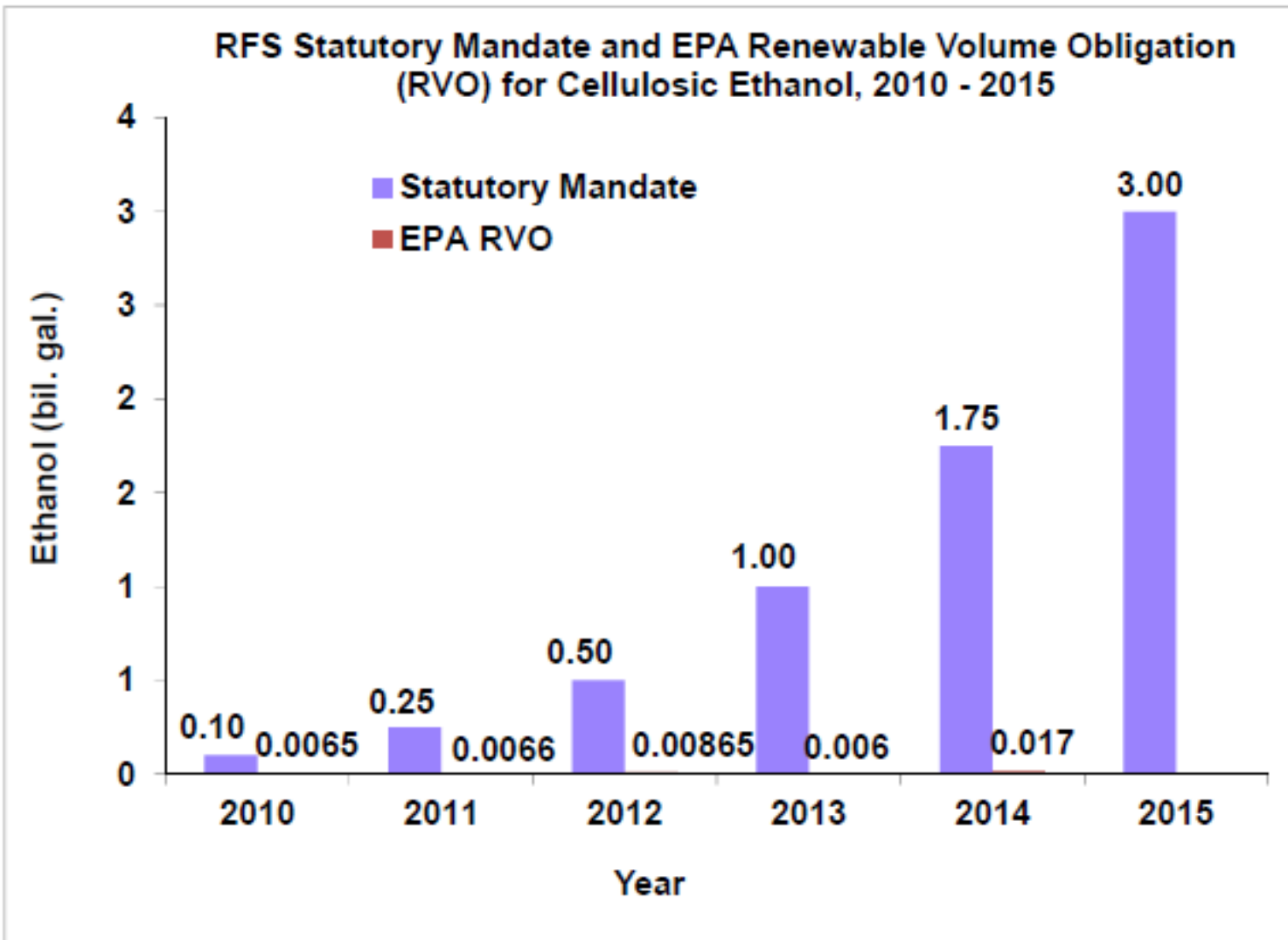
Renewable Fuel Standard (RFS)

Lawsuits Against Blending Amounts

EPA's authority to set mandate?

- Challenge to the 2013 mandate
 - *Monroe Energy v. EPA*, D.C. Cir. 13-1265, currently in abeyance) (Rogers (Clinton)/ Griffith (GWB)/ Pillard (Obama)
- 2014 rulemaking in progress
 - Intervenors' brief in *Monroe* sheds light on potential suit against EPA for its position that "blend wall" should influence RFS amounts
 - Waiver if (1) harm to environ. or economy, or (2) "inadequate supply"
 - Inconsistent with API ruling : also cannot control distribution system

Renewable Fuel Standard (RFS)



Increasing Ethanol Blending from 10% to 15%

Legal Challenge to E15

- *Grocery Manuf. Assoc. et al. v. EPA*, No. 10-1380, DC Cir., 8/17/12 (Sentelle(Reag)/ Tatel(Clinton/ Kavanaugh(GWB))
- Oil companies, grocers, and meat producers challenged EPA's approval under the Clean Air Act of increased blending to 15% (E15) as not supported by science
 - Claim damage to cars, higher costs of introducing E15, and higher input prices for food

Legal Challenge to E15

- Case thrown out on standing (Kavanaugh dissenting)
 - Injury speculative, at best
 - Engine Manuf.: only one study of engine damage, misfueling not likely to expose them to liability
 - Petroleum: Being forced to allow it because of RFS? No; EPA can waive, decision not to create one in economics, and not cause by E15
 - Grocers: too far removed from zone of interests in E15 waiver provision
- Certiorari denied

The U.S. Federal “Greenhouse Gas Tailoring Rule”

GHG Final Tailoring Rule: Background

- Based on 2007 Supreme Court ruling that GHGs are “pollutants” under the Clean Air Act
- New Obama Administration determined that GHGs "cause/contribute to air pollution that endanger public welfare"
- Led to increased efficiency standards for cars ("Corporate Average Fuel Economy" or CAFE); incentivized electric cars, not biofuels
- Under the Clean Air Act, arguably triggers stationary source limitations

GHG Final Tailoring Rule: Background

- Obama EPA therefore established "tailored" thresholds for GHG emissions from stationary sources
 - Raised from 100/250 tons/year (what the Act says) to 75,000/100,000 tons/year
- Applies to new sources, modifications, and permit renewals
- Exempts for 3 years emissions from biomass because considered carbon neutral

GHG Final Tailoring Rule: Lawsuits

Subject to numerous lawsuits

1. Lawsuit 1: Industry

- Challenged the Endangerment Finding as unscientific = LOST (cert. denied)

2. Lawsuit 2: Environmental Groups

- Cannot exempt biomass from emissions limitations = WON
- U.S. EPA must now conduct rulemaking that eNGO plaintiffs likely will challenge again on inapplicability of lifecycle methodologies

GHG Final Tailoring Rule: Lawsuits

1. Lawsuit 3: industry, some states, etc.
 - Industry challenged application of GHG emissions limits to stationary sources (*Utility Air Regulatory Group v. EPA*)
 - Argument: Clean Air Act section for prevention of significant degradation (PSD) by stationary sources says only "criteria pollutants," NOT GHGs
 - Supporting evidence: EPA had to adjust way up TPY thresholds to avoid absurd results

GHG Final Tailoring Rule: Lawsuits

1. Lawsuit 3: industry, some states, etc.
 - Appellate court= language in statute says regulation can apply to "any regulated air pollutant." This is the clear meaning of the statute.
 - Kavanaugh dissented, suggesting that permitting should only apply to those who already emit criteria pollutants; not just GHGs
 - May be the compromise decision in Sct.

The California Low Carbon Fuel Standard

The California (CA) Low Carbon Fuel Standard (LCFS)

- Finalized in December 2009
- Obligated parties that sell fuels in CA must gradually reduce carbon intensity by 10% by 2020
- Subject to lifecycle analysis accounting for fuel “pathways”
- Obligated parties can choose the default value, or seek approval of their own partially or fully (“2A/2B”)

The California (CA) Low Carbon Fuel Standard (LCFS)

The Lawsuit:

- Argues California cannot apply lifecycle analysis carbon accounting in a way that discriminates against/penalizes producers in other states = unconstitutional
- Two parts particularly challenged:
 - Transportation emissions from Midwest to CA
 - Emissions from the electricity that Midwest biorefineries use (coal-based)

The California (CA) Low Carbon Fuel Standard (LCFS)

The Lawsuit: Constitutional Foundations

- The U.S. Constitution has a clause ("the Dormant Commerce Clause") interpreted by the U.S. Supreme Court as meaning:
 - If discriminatory on its face, then state must prove no non-discriminatory alternative
 - If not discriminatory on its face, or in purpose or effect, court will balance state interest with burden on commerce

The California (CA) Low Carbon Fuel Standard (LCFS)

The Lawsuit:

- The lower federal court ("district court") held unconstitutional
- The federal appellate court ("9th Circuit") reversed the district court
 - Not discriminatory on its face b/c reason exists apart from origin to treat differently
 - GHG emission prevention/LCA is scientific
 - Applies equally
 - Penalty on imported corn
 - Not CA's fault midwesterners chose to locate near coal-power

The California (CA) Low Carbon Fuel Standard (LCFS)

- Murguia dissent says look at text first before getting to purpose; discriminatory on its face, thus apply strict scrutiny
 - Alternative exists: customized pathways for everyone
- Petition for certiorari filed recently
 - No reason apart from discrimination b/c of leakage; economic protectionism
 - Extraterritorial reach using economic clout has to be stopped, e.g., foie gras and eggs

The Absence of Litigation for Natural Gas

Observations

- Natural gas would not be an “innovation” without:
 - Complete exemption from federal environmental laws
 - State reluctance to exercise power and unsuccessful local bans
- President Obama’s EPA has been ordered to study effects, but extent is debatable
- Politically held up until after election; other studies in the works
- If exemptions ended, natural gas will not be as cheap
- Sage grouse and prairie chicken ESA listings

Water Quality Litigation and Its Effect on Bio-Renewables Policy

Observations

- Two recent federal court decisions support biomass' potential role in addressing water quality problems
 - Chesapeake Bay: U.S. EPA can push states to put non-point source (e.g., agriculture) rules in place by exercising "back stop" authority
 - Mississippi River: U.S. EPA must determine whether federal nutrient water quality standards for nitrogen are necessary
- U.S. EPA/State non-point source agreement

Concluding Thoughts

- I have always bet that RFS will not be changed legislatively; but, recent actions reducing the mandate by U.S. EPA are surprising
 - Biofuels will challenge new rule
- The U.S. Supreme Court's decision to take Tailoring Rule case likely will exclude only 3% of emissions on compromise
- Supreme Court will take LCFS case
- Obama Administration must issue fracking study some time
- Obama is working hard to put rules in place for water quality that will be hard to change

- Legal interpretations play a significant role in creating uncertainty for the biomass-based industry.
- Laws (particularly federal laws) should be maintained or changed to address this uncertainty.
- This appears very unlikely.
- Hope may be in California's success and 2014 Congressional elections.

Thank you for your time and attention!

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