

NEWS

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Judge Sees Possible Overreach in EPA's Biofuels Decision

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By [Brian Dabbs](#)

The scaling back of advanced biofuel blending requirements between 2013 and 2014 may be an abuse of the EPA's authority, a federal appeals court judge said April 24 during oral arguments in a lawsuit challenging an aspect of the agency's renewable fuels regulation.

A Justice Department attorney representing the Environmental Protection Agency argued the agency action would ensure the most biofuel possible actually reached consumers, but Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit, dismissed that stance as agency overreach.

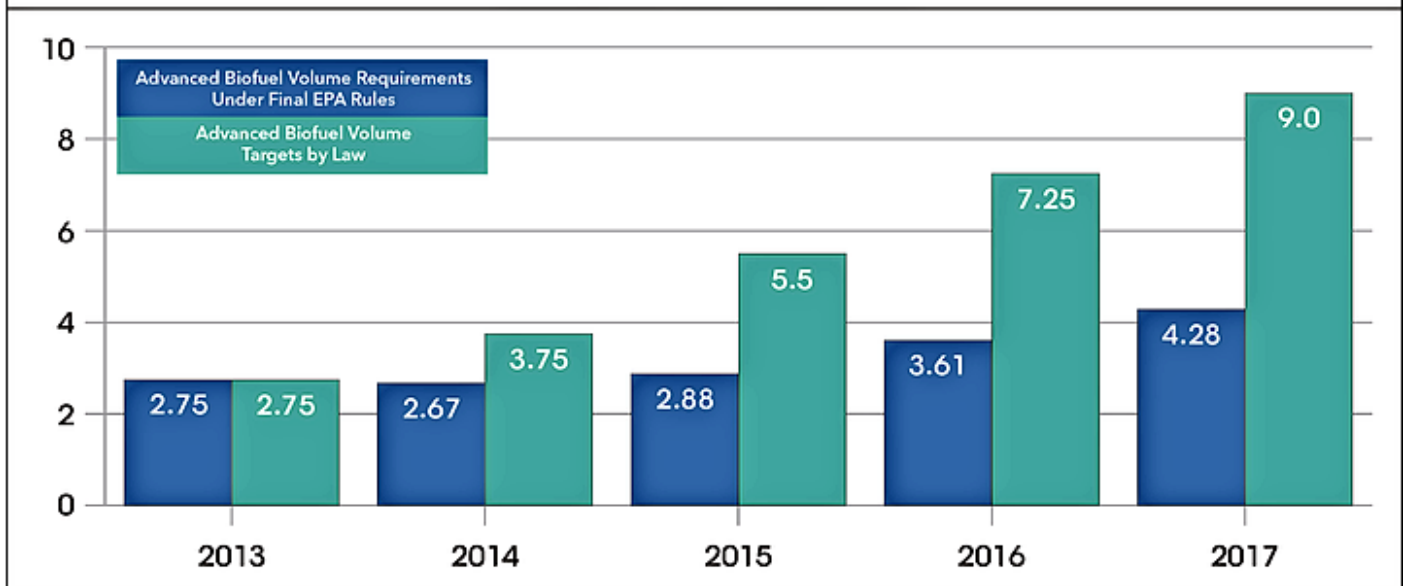
"I don't see this statute as necessarily that kind of grand authority for EPA," Kavanaugh said. "If things are totally screwed up, then Congress should fix it."

The oral arguments before the D.C. Circuit are part of a biofuel industry challenge to the EPA's renewable fuel standard (RFS) volume requirements for 2014-2016 (*Ams. for Clean Energy v. EPA, et al*, D.C. Cir., No. 16-1005, argued 4/24/17).

The RFS program, which includes annually increasing biofuel blending mandates set by Congress in 2007, aims to reduce greenhouse gas emissions and give the U.S. more energy independence.

Advanced Biofuel Volume Requirements

Billion gallons of ethanol equivalent



Source: EPA

Bloomberg BNA

Market Not Up to Speed: EPA

Infrastructure constraints prevented the agency from setting a higher advanced biofuel standard in the 2014-2016 final rule, Justice Department attorney Samara Spence said.

A limited amount of retail stations selling higher-blend fuels and lack of cars designed to run off that fuel would have made it difficult to require more advanced biofuels in the fuel supply, Spence said.

On top of that, the market for a specific advanced fuel, cellulosic biofuel, developed far more slowly than expected, impeding the biofuel industry's ability to produce more of it, Spence added. "EPA doesn't believe that would be meeting the intent of the statute," she said.

The attorney for the lead litigant in the case, however, blasted that discretion.

"EPA not only screwed up its assignment, it misunderstood its assignment," Seth Waxman, who represented the Americans for Clean Energy, told the court. The group is a renewable fuels trade association whose members include the Archer Daniels Midland Co.

First-ever Advanced Fuel Decrease

Congress included multiple waiver authorities in the law, and EPA put them to use in the final rule. Those waivers allow EPA to undercut blending targets set by Congress in the event of supply shortages or likely environmental and economic harm.

The rule required petroleum refiners and importers to blend 2.67 billion gallons the following year, a decrease from the 2013 quota. The 2014 figure fell below the statutory target by more than 1 billion gallons.

Advanced biofuel ethanol made from feedstocks other than corn emits far less greenhouse gas than conventional biofuels. The agency issued that rule in December 2015, which is roughly two years after it should have released the 2014 requirements.

A rule issued this year requires the blending of 4.28 billion gallons of advanced biofuel into the fuel supply that year.

Statute Designed to Force Market

Landmark cases, such as the 1984 Supreme Court decision involving Chevron U.S.A., Inc., give agencies deference in how to implement laws in cases where the statute is vague, Spence said. That doesn't apply to the same degree in actually curtailing congressional intent though, David Salmons, counsel for Petitioner National Biodiesel Board, said.

Judge Patricia Millett also questioned the EPA's logic in the rulemaking.

The Energy Independence and Security Act of 2007, which established the RFS, aims to actually create a market for biofuel in U.S. transportation, she said, adding that Congress designed the law to force the market to adapt to annually increasing biofuel blending mandates.

Biofuel industry representatives are quick to stress that intent. "That program was designed to transform the fuel market and force the oil industry to change the status quo—not to perpetuate it, as EPA has done through its annual rulemakings," producers, including American Coalition for Ethanol and Renewable Fuels Association, said in a statement.

Meanwhile, those producers are already [pressuring](#) the EPA to aim high for the coming year, while oil companies repeated calls for a full-fledged repeal of the program during an April 24 conference call with EPA officials.

—With assistance from David Schultz.

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