
**THE VOICES OF CORN-BASED ETHANOL:
ANOTHER LOOK AT THE ONGOING FOOD VS. FUEL
DEBATE OVER ETHANOL MANDATES AND
WAIVERS IN LIGHT OF THE 2012 DROUGHT**

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I. INTRODUCTION

Weather conditions are often a popular subject of dialogue in the mid-western United States. Whether it is simply part of small talk or a matter of serious concern, the abundance or lack of rain often comes up in the course of conversation. During the summer months of 2012, however, the severe lack of rain made big headlines not only in the Midwest, but also across the country and around the world as it raised a variety of problems and issues.¹ Included in the

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1. See, e.g., John Eligon, *Widespread Drought is Likely to Worsen*, N.Y. TIMES, July 19, 2012, <http://www.nytimes.com/2012/07/20/science/earth/severe-drought-expected-to-worsen-across-the-nation.html>; see also Tim Lister, *The Driest Season: Global Drought Causes Major Worries*, CNN (Sept. 8, 2012), <http://www.cnn.com/2012/09/07/world/drought-around-world/>

discussion of these issues was the debate between corn growers, domestic meat and poultry producers, and the biofuels industry over U.S. policy on ethanol mandates.²

The debate over ethanol policy is not new in the arena of American politics or law; it is complicated by a number of factors, which have been discussed in-depth by other commentators and are beyond the scope of this Note.³ While this Note provides a brief overview of these complex factors and the history of U.S. ethanol policy, the objective of this Note is to discuss the current state of the ethanol debate, with a focus on the issues surrounding corn-based ethanol in the wake of the 2012 drought. More specifically, this Note analyzes how the voices of the various industry and interest groups influence current trends in ethanol legislation and policy in the United States. In particular, this Note focuses on whether the current policy sufficiently addresses the concerns over availability and price of corn used for food, both for animal and human consumption. Part II of this Note provides a background of the overarching framework of the debate and discusses new and persisting concerns. Part III analyzes current ethanol legislation and policy in the context of the ethanol mandate, known as the Renewable Fuel Standard program⁴ (RFS or RFS program), and the Environmental Protection Agency (EPA)'s position on granting exemptions, or waivers, from the requirements of the standard, as authorized by section 211(o)(7) of the Clean Air Act (CAA).⁵ Part IV presents and analyzes the opposing views of American ethanol policy as it relates to the food versus fuel debate, specifically focusing on the political power and advocacy approaches of the competing interests of the ethanol industry and those of the domestic and international stakeholders in the food supply. Finally, Part V provides conclusions about the role of stakeholder views in the food versus fuel policy debate and their effect on RFS waivers and the future of the RFS program.

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2. John H. Cushman, Jr., *In Drought, A Debate Over Quota for Ethanol*, N.Y. TIMES, Aug. 16, 2012, <http://www.nytimes.com/2012/08/17/business/energy-environment/ethanol-quota-debated-by-corn-farmers-and-meat-industry.html>.

3. See generally, e.g., Brian R. Farrell, Note, *Fill 'Er Up With Corn: The Future of Ethanol Legislation in America*, 23 J. CORP. L. 373 (1998) (discussing the development of ethanol legislation and analyzing the role of government in the ethanol industry); Robert W. Hahn, *Ethanol: Law, Economics, and Politics*, 19 STAN. L. & POL'Y REV. 434 (2008) (providing a market analysis of ethanol production and analyzing the use of ethanol in energy and climate policies).

4. Clean Air Act, 42 U.S.C. § 7545 (2012); 40 C.F.R. §§ 80.1100–80.1167 (2013).

5. Clean Air Act, 42 U.S.C. § 7545(o)(7).

II. BACKGROUND ON THE USE OF ETHANOL AS PART OF U.S. ENERGY POLICY AND THE CURRENT DEBATE

Although the use of ethanol as a fuel source is currently a topic of great debate, its use has seen both ups and downs in the fuel industry dating back to the 19th century.⁶ Early in the 20th century, ethanol was used to power flexible fuel vehicles, such as Ford's Model T, and the fuel source saw increases in production and usage due to wartime demands for fuel, until its decline after the end of World War II.⁷ Then, in the late 1970s, the modern ethanol debate emerged.⁸

A. *Brief History of Ethanol Legislation and Overview of Factors Considered in the Debate*

The energy crisis of the late 1970s brought a renewed interest in ethanol, and sparked the beginning of the passage of significant legislation aimed at addressing U.S. energy policy and encouraging the production and use of ethanol as an alternative fuel source.⁹ The Energy Tax Act of 1978,¹⁰ which defined "gasohol"¹¹ and introduced a gas guzzler tax on gasoline and a tax exemption for ethanol, marked one of the first major steps of administrative and legislative action in this new direction of energy policy.¹² In the twenty years following the enactment of the gas guzzler tax, additional legislation was enacted to further increase support and subsidies for ethanol production.¹³ These efforts by Congress to support alternative energy included the enactment of the Energy Security Act of

6. *Energy Timelines: Ethanol*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/kids/energy.cfm?page=tl_ethanol (last updated June 2008) (showing the history of engines that were developed to run on either pure ethanol or an ethanol blend).

7. *Id.*

8. *See generally, e.g.*, Farrell, *supra* note 3, at 375; James A. Duffield et al., *Ethanol Policy: Past, Present, and Future*, 53 S.D. L. REV. 425, 425–30 (2008); Gregory Marose, *The Legacy of the 1970s Energy Crisis*, THE NAT'L ARCHIVES (Apr. 3, 2012), <http://blogs.archives.gov/prologue/?p=8902>.

9. *See generally, e.g.*, Duffield et al., *supra* note 8, at 425–30; Farrell, *supra* note 3, at 375; Marose, *supra* note 8.

10. Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (codified as amended at 26 U.S.C. § 4064 (2012)).

11. *Energy Timelines: Ethanol*, *supra* note 6.

12. *See generally, e.g.*, Farrell, *supra* note 3, at 375; Duffield et al., *supra* note 8, at 427–30; Zachary M. Wallen, Note, *Far from a Can of Corn: A Case for Reforming Ethanol Policy*, 52 ARIZ. L. REV. 129, 134–35 (2010).

13. *See generally, e.g.*, Wallen, *supra* note 12, at 135–37; Bruce A. McCarl & Fred O. Boadu, *Bioenergy and U.S. Renewable Fuels Standards: Law, Economic, Policy/Climate Change and Implementation Concerns*, 14 DRAKE J. AGRIC. L. 43, 45–46 (2009).

1980,¹⁴ the Crude Windfall Profit Tax Act of 1980,¹⁵ the Surface Transportation Assistance Act of 1982,¹⁶ the Tax Reform Act of 1984,¹⁷ the Alternative Motor Fuels Act of 1988,¹⁸ the Omnibus Budget Reconciliation Act of 1990,¹⁹ and the Transportation Equity Act for the 21st Century.²⁰ In general, these statutes played roles in creating, increasing, and continuing tax incentives for ethanol production and the blending of ethanol with gasoline, as well as supporting the domestic ethanol industry through loans for small producers and the imposition of tariffs on imported ethanol.²¹ The foreign affairs factor was only one influence on energy policy and legislation; Congress also considered the issue of pollution and the need for cleaner sources of fuel, as evidenced by the 1990 amendments to the CAA.²² Although the previous enactments had promoted ethanol as a source of alternative energy, the term “alternative fuel” was officially defined in the Energy Policy Act of 1992.²³ This long history of legislation from the late-1970s through the late-1990s shows how government support for ethanol has been complex and embedded in U.S. energy policy. The support has not been limited to the federal government; the Governor of Nebraska led an effort to create the Governors’ Ethanol Coalition (now known as the Governors’ Biofuels Coalition) in 1991 to promote the increased use of ethanol as a means of reducing dependence on foreign oil, helping the environment, and improving the national economy.²⁴ The Coalition’s membership is presently comprised of representatives

14. Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 (codified as amended at 42 U.S.C. § 8801 (2012)).

15. Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (codified as amended in scattered sections of 26 U.S.C. (2012)).

16. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (codified as amended at 23 U.S.C. § 101 (2012) and in scattered sections of 26 U.S.C. (2012)).

17. Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (codified as amended at 26 U.S.C. § 40 (2012)).

18. Alternative Motor Fuels Act of 1988, Pub. L. No. 100-494, 102 Stat. 2441 (codified as amended at 42 U.S.C. § 6201 (2012)).

19. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

20. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) (codified as amended in scattered sections of 16 U.S.C., 23 U.S.C., and 49 U.S.C. (2012)).

21. See Hahn, *supra* note 3, at 439–41; Wallen, *supra* note 12, at 134–37; McCarl & Boadu, *supra* note 13, at 44–46 (discussing purposes and effects of this legislation).

22. Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399 (amended 1990); Peter Z. Grossman, *If Ethanol is the Answer, What is the Question?*, 13 DRAKE J. AGRIC. L. 149, 162 (2008).

23. McCarl & Boadu, *supra* note 13, at 46.

24. *Goals*, GOVERNORS’ BIOFUELS COAL., http://www.governorsbiofuelscoalition.org/?page_id=16 (last visited April 9, 2014); *History*, GOVERNORS’ BIOFUELS COAL., http://www.governorsbiofuelscoalition.org/?page_id=12 (last visited April 9, 2014).

from thirty-three states and members of the international community.²⁵ The support, however, does not stop there. Higher fuel prices, renewed concerns over dependence on foreign oil, and growing concerns over climate change led to a new era of legislation that created the expansive RFS program, as addressed in Part III below.²⁶

B. Responses by Domestic Food Producers and International Food Aid Communities to the 2012 Drought

There are always at least two sides to a debate, however, and despite the long-standing and continued governmental support for ethanol subsidies and other incentives, ethanol programs have not gone unopposed. In fact, some commentators have sharply criticized the support for corn-based ethanol, in particular for its potentially adverse effects on the environment.²⁷ Environmental interest groups and commentators are not the only source of opposition to ethanol, though. The food versus fuel debate has previously been the subject of scholarly articles, which included discussions of the 2008 Food Crisis.²⁸ Yet, support for ethanol continued despite those discussions, and the issue is still the subject of dispute. Beginning in the summer months of 2012, the issues surrounding the impact of ethanol on the food supply and grain markets returned to the forefront of public scrutiny.²⁹ As an example of the media's attention to this issue, one news report highlighted the concern that livestock producers would be faced with skyrocketing prices for feed corn due to lower yields and the biofuel industry's use of corn for non-food purposes reporting, "[t]he worst drought in [fifty] years has sent corn prices to record levels, straining meat and dairy producers that use

25. *Coalition Members*, GOVERNORS' BIOFUELS COAL., http://www.governorsbiofuelscoalition.org/?page_id=7 (last visited April 9, 2014).

26. See Wallen, *supra* note 12, at 137; Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 633–34 (2010).

27. E.g., Angelo, *supra* note 26, at 600 ("Nevertheless, studies consistently demonstrate that reliance on corn ethanol will not help to solve the climate change crisis and poses additional environmental and social problems.") (citing William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 271 (2009)); see also Edwin Kessler, *Our Food and Fuel Future*, in BIOFUELS, SOLAR AND WIND AS RENEWABLE ENERGY SYSTEMS: BENEFITS AND RISKS, 259, 275–78 (David Pimentel ed., 2008).

28. See, e.g., Aaron Sternick, Comment, *Food Fight: The Impending Agricultural Crisis and a Reasonable Response to Price Volatility*, 23 VILL. ENVTL. L.J. 145 (2012).

29. See, e.g., Cushman, *supra* note 2.

the grain as feed.³⁰ With the many legislators, state governors, and domestic livestock producers who sought relief from the ethanol mandate by requesting RFS waivers from the EPA,³¹ and with calls from the international community to change U.S. biofuels policy,³² it is worth re-examining the nature of these policy decisions in light of the possibility of future droughts and other potential perils to the national and global food supply. Yet, the Renewable Fuels Association (RFA) has rejected these concerns, argued that RFS waivers could actually increase the cost of feed, and urged the EPA to deny the waiver requests.³³ In addition, the U.S. Secretary of Agriculture continued to show support for the mandates despite the drought.³⁴ Also, while many state governors sought a waiver, the governors of other states wrote letters urging the EPA to deny the waiver.³⁵ In particular, Iowa Governor Terry Branstad reminded the EPA of the importance of the RFS and warned against responding to the drought with an RFS waiver.³⁶ He opined that “it is not sound policy to address uncertainty in one component of the agricultural economy by increasing uncertainty in another component.”³⁷ The continued and renewed sense of concern from some groups, opposed by the persistent support of the mandate from the ethanol industry and government, begs the following questions: do recent national conditions, such as the 2012 drought, point to unresolved flaws in the ethanol support system? Is it appropriate to waive RFS standards during times of drought, and if not, what conditions would

30. Timothy Gardner & Charles Abbott, *Arkansas, N. Carolina Ask EPA to Waive Ethanol Mandate*, REUTERS (Aug. 14, 2012), <http://www.reuters.com/article/2012/08/15/us-usa-ethanol-waivers-idUSBRE87E00B20120815>.

31. *House, Senate Urge EPA to Adjust Ethanol Mandate—NCBA Backs Policymakers’ Quest to Bring Relief to US Cattle Ranchers*, NAT’L CATTLEMEN’S BEEF ASS’N (Aug. 8, 2012), <http://www.beefusa.org/newsreleases.aspx?NewsID=2605>.

32. *See, e.g., UPDATE 2—France Seeks Biofuels Pause in Global Food Strategy*, REUTERS (Sept. 12, 2012), <http://www.reuters.com/article/2012/09/12/france-agriculture-idUSL5E8KCBTC20120912>.

33. *RFA to EPA: RFS is Working; Waiver Requests are Incomplete, Insufficient and Factually Flawed*, RENEWABLE FUELS ASS’N (Oct. 11, 2012), <http://www.ethanolrfa.org/news/entry/rfa-to-epa-rfs-is-working-waiver-requests-are-incomplete-insufficient-and-f/>; *Study: Waiving RFS Could Increase Feed Costs for Livestock, Poultry Producers*, RENEWABLE FUELS ASS’N (Oct. 10, 2012), <http://www.ethanolrfa.org/news/entry/study-waiving-rfs-could-increase-feed-costs-for-livestock-poultry-producers/>.

34. Cushman, *supra* note 2.

35. *See, e.g.*, Letter from Mark Dayton, Governor, State of Minn., to Lisa Jackson, Adm’r, EPA (Sept. 28, 2012), *available at* http://www.mnbiofuels.org/docs/Gov_Dayton_RFS_Support_09282012.pdf.

36. Letter from Terry Branstad, Governor, State of Iowa, to Lisa Jackson, Adm’r, EPA (Aug. 22, 2012), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2012-0632-0015>.

37. *Id.*

constitute the right time to do so?³⁸ Do the food stakeholders of this country and the world truly have a voice in this debate, or is the support for ethanol secured in U.S. energy policy? If the above-mentioned food stakeholders do not have a strong enough voice in the debate, are their concerns nonetheless valid and should policy makers hear them?

III. LEGAL ANALYSIS OF CURRENT ETHANOL MANDATES

A. Renewable Fuel Standard Legislation

As noted in Part I, the RFS program was preceded by approximately thirty years of legislation promoting and supporting the ethanol industry. Thus, what is different about RFS? The RFS program went a step beyond simply providing incentives for ethanol production and actually established a mandate for a minimum volume of renewable fuel to be included in transportation fuel sold in the United States.³⁹ RFS was a product of the Energy Policy Act of 2005,⁴⁰ and the initial program (known as RFS1) required “7.5 billion gallons of renewable[] fuel to be blended into gasoline by 2012.”⁴¹ The Energy Independence and Security Act (EISA) of 2007 amended the RFS, now known as RFS2, by adding requirements for diesel to the program, increasing the applicable renewable fuel volume mandate to thirty-six billion gallons by the year 2022, and requiring the EPA “to apply lifecycle greenhouse gas performance threshold standards” to keep renewable fuel as a clean source of energy.⁴² RFS2 requirements replaced RFS1 requirements on July 1, 2010.⁴³ Under RFS2, the EPA is required to set and implement national renewable fuel standards through the process of notice-and-comment rulemaking.⁴⁴ The EPA has established the equations it uses to determine the annual renewable fuel standards and has published them in the Code of

38. Michael Hirtzer, *Livestock Groups Seek Drought Relief with Ethanol Waiver*, REUTERS (July 30, 2012), <http://www.reuters.com/article/2012/07/30/us-usa-ethanol-waiver-idUSBRE86Q1FR20120730> (quoting members of both sides of the debate on whether a drought is a sufficient reason to implement RFS waivers).

39. *Renewable Fuel Standard (RFS)*, OFF. OF TRANSP. & AIR QUALITY, EPA, <http://www.epa.gov/otaq/fuels/renewablefuels/index.htm> (last updated Nov. 15, 2013).

40. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of U.S.C.).

41. *Renewable Fuel Standard (RFS)*, *supra* note 39.

42. *Id.*; *see also* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended in scattered sections of 42 U.S.C.).

43. Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards, 77 Fed. Reg. 1320, 1321 (Jan. 9, 2012) (to be codified at 40 C.F.R. pt. 80).

44. Memorandum: Biofuels and Rural Economic Development, 74 Fed. Reg. 21,531 (May 5, 2009).

Federal Regulations (C.F.R.).⁴⁵ The EPA also published the percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and renewable fuel standards for 2010, 2011, 2012, and 2013 in the C.F.R.⁴⁶

There has been a sizeable increase in the production of corn ethanol during the time since the RFS legislation was enacted and, consequently, there has been an increased demand for production of corn, such that approximately one-quarter of the U.S. corn crop was used for ethanol in 2007.⁴⁷ By 2011, ethanol production “had increased to roughly 14 billion gallons using approximately 5 billion bushels of corn or 40% of the 2011 crop.”⁴⁸ According to the USDA, ethanol represented less than four percent (by volume) of the U.S. motor vehicle gasoline supply in 2006, while it was approximately 10.6% in 2011.⁴⁹ Since RFS2 went into effect on July 1, 2010, the program has produced “more than [thirty-six] billion ethanol-equivalent gallons of renewable fuel.”⁵⁰

Although the RFS mandates may have had the most significant impact on the development of the biofuels industry, the legislation officially establishing the RFS programs was not the only renewable fuels legislation of the twenty-first century. In addition, the Food, Conservation, and Energy Act of 2008 (also known as the 2008 Farm Bill) addressed renewable energy.⁵¹ Under Title IX of this Act, known as the Energy Title, biofuels programs were expanded to increase production, use, and development of renewable energy, including new biofuels tax provisions and import tariff extensions.⁵² While two components of U.S. support for ethanol, the tax credit and import tariff, were allowed to expire in 2011 due to fiscal concerns, the ethanol mandate remains intact and subject to dispute.⁵³ According to the RFA, the need for the tax incentive was reduced due

45. 40 C.F.R. § 80.1105 (2013).

46. 40 C.F.R. § 80.1405 (2013).

47. BRENT D. YACOBUCCI, CONG. RESEARCH SERV., RS22870, WAIVER AUTHORITY UNDER THE RENEWABLE FUEL STANDARD (RFS) 1 (2012).

48. *Id.*

49. *Bioenergy: Background*, ECON. RESEARCH SERV., USDA, <http://www.ers.usda.gov/topics/farm-economy/bioenergy/background.aspx#.Uoq-SCg8m0w> (last visited April 9, 2014).

50. Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70,752, 70,754 (Nov. 27, 2012) (summarizing data found on EPA’s Moderated Transaction System (EMTS)); *see also RFS2 EMTS Informational Data*, OFF. OF TRANSP. & AIR QUALITY, EPA, <http://www.epa.gov/otaq/fuels/rfsdata/index.htm> (last visited April 9, 2014).

51. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (codified as amended in scattered statutes in 7 U.S.C. (2012)).

52. *Id.* (Title IX includes 7 U.S.C. §§ 8101–8113); *2008 Farm Bill Side-by-Side: 2008 Farm Bill Overview*, ECON. RESEARCH SERV., USDA, <http://webarchives.cdlib.org/sw1vh5dg3r/http://ers.usda.gov/FarmBill/2008/Overview.htm> (last updated Aug. 20, 2008).

53. Robert Pear, *After Three Decades, Tax Credit for Ethanol Expires*, N.Y. TIMES, Jan. 1, 2012, http://www.nytimes.com/2012/01/02/business/energy-environment/after-three-decades-federal-tax-credit-for-ethanol-expires.html?_r=1&

to the current market demand for ethanol.⁵⁴ That market demand is likely to continue increasing as the ethanol mandate continues.⁵⁵

B. U.S. Policy on RFS Waivers

Even before the 2012 drought, there was recognition by policy experts and legislators that there were unintended consequences to the use of a food source in the production of a fuel source. “Emerging resource constraints related to the rapid expansion of U.S. corn ethanol production have provoked questions about its long-run sustainability and the possibility of unintended consequences in other markets as well as on the environment.”⁵⁶ Evidence of the consideration of these concerns by some legislators was reflected in the legislation for the mandates.⁵⁷

Increasing demand for corn for biofuels, the rise in energy prices, and other supply concerns in international grain markets led to rapid increases in corn and other grain prices in 2008. These higher grain prices raised concern globally over food prices and availability. Because of these concerns, there was interest among some policy-makers to amend or eliminate the RFS. Under the provisions of [Energy Policy Act of 2005] and EISA, the administrator of the Environmental Protection Agency (EPA) has the authority to waive the RFS requirements in whole or in part, in response to a petition by a state or a fuel provider, or on her own motion.⁵⁸

Thus, the authority for the RFS waiver provisions comes from section 211(o)(7) of the CAA.⁵⁹ In consideration of the waiver request, the EPA Administrator is to consult with the Secretary of Agriculture and the Secretary of Energy to determine that at least one of two conditions exists.⁶⁰ First, it must be shown that “implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States.”⁶¹ If that condition is not met, then there must be “an inadequate domestic supply.”⁶² As required by CAA section 211(o)(7), the determination of whether the criteria have been satisfied will be made following the public notice and comment period.⁶³ The poten-

54. *Id.*

55. *See id.*

56. RANDY SCHNEPF & BRENT D. YACOBUCCI, CONG. RESEARCH SERV., R40155, RENEWABLE FUEL STANDARD (RFS): OVERVIEW AND ISSUES, Summary (2013).

57. *See* YACOBUCCI, *supra* note 47, at 1.

58. *Id.*

59. 42 U.S.C. § 7545(o)(7) (2012).

60. *Id.* § 7545(o)(7)(A).

61. *Id.* § 7545(o)(7)(A)(i).

62. *Id.* § 7545(o)(7)(A)(ii).

63. *Id.* § 7545(o)(7)(A)(i)–(ii).

tial problem with this framework of criteria is that it stops there and leaves the process of granting waivers open to a lot of individual administrator discretion. As stated in its final rule, promulgated in 2007, EPA refused to go further in defining the two conditions or giving a better idea of what would satisfy them.⁶⁴ EPA stated that “[t]his final rule resulted from a collaborative effort with stakeholders, including refiners, renewable fuel producers, and distributors, who together helped to design a program that is simple, flexible, and enforceable.”⁶⁵ Yet, it remains to be seen how flexible and enforceable the program really is. The promulgation of the final rule on the establishment of the waiver criteria was subject to public notice and a period of opportunity for comment, and EPA responded to comments about whether the criteria were specific enough.⁶⁶ EPA responded to some of these comments by stating that it would not give more specific criteria because “[e]ach situation in which a waiver may be requested will be unique, and promulgating a list of more specific criteria in the abstract may be counterproductive.”⁶⁷ From this answer, one may conclude that the public will not know how the EPA is likely to rule on a waiver until the process has produced enough decisions to analyze, and even then, the ultimate decision may vary with each new administration.

1. 2008 EPA Response to the State of Texas’ Waiver Request

The EPA’s policy on exercising its waiver authority was first tested in 2008 when Texas Governor Rick Perry petitioned EPA Administrator Stephen Johnson for a waiver from the RFS requirements, claiming they resulted in a negative impact of higher corn prices on international food prices and the economy of the state of Texas.⁶⁸ Governor Perry acknowledged that other factors affect corn prices, while also including calculations on the negative economic impact of the RFS.⁶⁹ Thus, the governor asked for a waiver of fifty percent of the

64. See Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,900, 23,928 (May 1, 2007) (to be codified at 40 C.F.R. pt. 80); YACOBUCCI, *supra* note 47, at 3.

65. Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. at 23,902.

66. See *id.* at 23,928.

67. *Id.*

68. YACOBUCCI, *supra* note 47, at 1; Letter from Rick Perry, Governor, State of Tex., to Stephen L. Johnson, Adm’r, EPA (Apr. 25, 2008), available at http://www.epa.gov/otaq/renewable_fuels/rfs-texas-letter.pdf.

69. Letter from Rick Perry to Stephen L. Johnson, *supra* note 68 (arguing that, based on corn price projections for 2007 and 2008, the negative impact on the Texas economy would be \$1.17 billion and \$3.59 billion, respectively, due to the implementation of the RFS programs).

corn-ethanol production mandate.⁷⁰ The EPA, however, did not find Governor Perry's reasoning persuasive enough to grant his waiver request.⁷¹ "In August 2008[,] EPA denied the waiver request because the agency found that the effects of the RFS on food, feed, and fuel prices was minimal, and thus, the economic effects of the RFS 'could not be categorized as severe.'"⁷²

In its decision, the EPA explained its interpretation of relevant statutory provisions requiring it to focus *only on the impact of RFS*, despite wide recognition that *many factors* affect the use and overall impact of the use of biofuels, and that the agency must have a "generally high degree of confidence" that the RFS program would result in "severe harm."⁷³ As this was the first time the EPA had to address an RFS waiver request, it addressed some of the ambiguity surrounding the extent of its authority under this statutory provision.⁷⁴

First, the EPA rejected Texas' argument that since "outcomes are determined by multiple factors," Congress had intended the waivers to hinge not on whether the mandate was the only cause of harm, but rather "whether the mandates would contribute significantly to causing severe harm, as part of a mix of forces."⁷⁵ Instead, the EPA cited other statutory provisions, which allowed for consideration of a factor as a contributing cause, in support of its narrow interpretation that the statute allows for a waiver only when the RFS mandate is the *sole cause* of the severe harm.⁷⁶ Texas also reasoned that if the EPA did not accept its interpretation regarding contributing factors, then it would be impossible to ever make a finding that the criteria for a waiver had been met.⁷⁷ The agency discarded this theory as well.⁷⁸ Instead, the EPA held that this would render the actual degree of harm caused by the RFS irrelevant to whether a waiver should be granted, and that this would violate Congressional intent in enacting the provision and Congress' overall goal of promoting renewable fuel use through the RFS.⁷⁹

70. *Id.*

71. *See* YACOBUCCI, *supra* note 47, at 1.

72. *Id.*

73. Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard, 73 Fed. Reg. 47,168, 47,169 (Aug. 13, 2008) (emphasis added).

74. *Id.* at 47,170.

75. *Id.* at 47,170–71; *see also* Letter from Rick Perry to Stephen L. Johnson, *supra* note 68 (as discussed previously, arguments arose from Governor Perry's letter).

76. *See* Notice of Decision, *supra* note 73, at 47,171 (citing other provisions of CAA section 211 where Congress authorized EPA to manage a fuel based on whether it causes or contributes to a problem).

77. *Id.*

78. *Id.*

79. *Id.*

Additionally, the EPA discussed its interpretation of certain words in the relevant statutory provision, section 211(o)(7). It interpreted the statute as requiring the EPA to find a “generally high degree of confidence” that RFS implementation will result in severe harm because of Congress’ use of the word “would” in section 211(o)(7)(A), as opposed to the word “likely,” as found in section 211(o)(8).⁸⁰ The agency supported its interpretation by stating that if the requisite level of confidence that the mandate will cause harm to the economy is reached, then it will be reflected in the relief provided by the waiver.⁸¹ Furthermore, it interpreted the words “severely harm” as requiring a high threshold to be satisfied before a waiver will be granted, after comparing it to the lesser requirement of “significant adverse impacts” found in section 211(o)(8)(A), and looking at the use of the word “severe” in section 181(a).⁸² EPA also rejected Texas’ argument that it would be sufficient to only consider harm to one industry or sector of the economy, and instead broadly interpreted the word “economy” in the statute.⁸³ It will always be an uphill battle for anyone attempting to challenge the RFS through a waiver because, despite a strong showing of satisfaction of these elements in a particular waiver request, EPA retains the discretionary power to deny it. EPA pointed to Congress’ use of the word “may” rather than “shall” in its determination that Congress gave the EPA broad discretion to grant or deny a waiver request, even if the EPA finds that the RFS would severely harm the economy.⁸⁴ Thus, EPA concluded that, in its consideration of any waiver request, it would not be limited to considering only “impacts to the economy, a sector of the economy, the environment, or domestic supply.”⁸⁵ Instead, it will always evaluate the national character and effects of the requested relief of a waiver.⁸⁶

EPA also briefly addressed other issues raised during the comment period. The agency noted, however, that most of the other issues were either not relevant to the waiver request at hand, or the submissions lacked an adequate amount of evidence for the agency to properly analyze.⁸⁷ For example, EPA commented that the overall impacts of biofuels on food and feed markets in the U.S. have been aggravated by the overall economic conditions in the U.S., and that the impact of biofuels may have been overemphasized.⁸⁸ EPA dismissed most of the environmental concerns that were raised by stating that it would be

80. *Id.*

81. *Id.* at 47,172.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 47,180.

88. *Id.* at 47,181.

addressing them in the RFS2 rulemaking update, which would reflect the changes of EISA.⁸⁹

Finally, EPA provided guidance about the information applicants should use in future submissions for waiver requests, although it recognized that it was purely non-binding guidance since it was not in the form of a rule.⁹⁰ The guidance provided some hope for those seeking a way to challenge the RFS in the future because, even though only state governors could request a waiver in 2008, that opportunity would be opened up to any person subject to the RFS starting in 2009, including refiners, producers, and importers of gasoline and biofuels.⁹¹ On the other hand, challengers of the RFS would still face a procedural obstacle. While the agency acknowledged that a public notice and comment period is required before it can *grant* any waivers, it is not held to that same condition for denials. Rather, it reserves the right to use its discretion to *deny* waivers without public input if it deems it necessary to preserve agency and stakeholder time and resources.⁹² The agency also laid out its expectations that all RFS petitions include “information and analyses that address . . . the impact of implementation of the RFS, and . . . the nature and degree of harm associated with the impact of the RFS.”⁹³ Applicants are also expected to submit their requests at least six months prior to the requested start date of the waiver.⁹⁴ While these guidelines address some of the procedural expectations of the EPA regarding waiver requests, they provide little guidance on circumstances that may justify a waiver outside of the general statutory interpretations discussed above.

2. 2012 EPA Response to Waiver Requests

The EPA was not faced with another waiver request until recently, in the aftermath of the 2012 drought.⁹⁵ In response to petitions from the governors of Arkansas and North Carolina,⁹⁶ the EPA initiated the notice-and-comment period

89. *Id.*

90. *Id.* at 47,183.

91. *Id.*

92. *See id.* (discussing circumstances in which EPA could deny petitions for waivers before first soliciting public notice and comment).

93. *Id.*

94. *Id.* at 47,184.

95. *See* Cushman, *supra* note 2.

96. *See* Letter from Mike Beebe, Governor, State of Ark., to Lisa Jackson, Adm’r, EPA (Aug. 13, 2012), available at <http://www.epa.gov/oms/fuels/renewablefuels/documents/arkansas-rfs-waiver-request.pdf>; Letter from Beverly Eaves Perdue, Governor, State of N.C., to Lisa Jackson, Adm’r, EPA (Aug. 14, 2012), available at <http://www.epa.gov/oms/fuels/renewablefuels/documents/north-carolina-rfs-waiver-request.pdf>.

on August 20, 2012.⁹⁷ Before the governors even petitioned for a waiver, members of the U.S. House of Representatives and the U.S. Senate sent letters to the EPA administrator asking the agency to adjust the corn grain-ethanol portion of the RFS mandate to account for the circumstances surrounding the drought.⁹⁸ As stated in Part II.B of this Note, members of the domestic livestock industry, including two key producer groups, the National Beef Cattleman's Association (NCBA) and the National Pork Producers Council (NPPC), also petitioned the EPA for a waiver.⁹⁹

On September 10, 2012, EPA submitted notice that it was implementing an extension of the comment period until October 11, 2012 to provide the public with more time to voice their comments.¹⁰⁰ The EPA is required to make a final decision by determination to grant or deny the waiver within ninety days of the Administrator's receipt of the petition.¹⁰¹ On November 27, 2012, the EPA Administrator provided notice of its decision to, once again, deny the requests for a waiver from the RFS.¹⁰² In the official notice of its decision in the Federal Register, just as it had in 2008, EPA gave an overview of the RFS program, discussed its administrative review process, provided the technical analysis of the impacts of the RFS program which it used in its assessment, and responded to general comments on the U.S. biofuels policy.¹⁰³ In the process of making its decision, the agency considered all comments received during the comment period, engaged in assessment of a technical analysis of the impacts, and then looked at the specific language of the statute authorizing the agency to grant these types of

97. Request for Comment on Letters Seeking a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 52,715, 52,716 (Aug. 30, 2012); *Renewable Fuels: Notices*, OFF. OF TRANSP. & AIR QUALITY, EPA, <http://www.epa.gov/oms/fuels/renewablefuels/notices.htm> (last updated July 22, 2013).

98. See Letter from Bob Goodlatte et al., Members of the House of Representatives, U.S. Congress, to Lisa P. Jackson, Adm'r, EPA (Aug. 1, 2012), available at <http://www.nationalchickencouncil.org/wp-content/uploads/2012/08/house-letter-final.pdf>; Letter from Kay R. Hagan et al., Members of the Senate, U.S. Congress, to Lisa P. Jackson, Adm'r, EPA (Aug. 7, 2012), available at <http://www.meatami.com/ht/a/GetDocumentAction/i/80364>.

99. See Letter from Michael C. Formica, Chief Env'tl. Couns., Nat'l Pork Producers Council et al., to Lisa P. Jackson, Adm'r, EPA (July 30, 2012), available at <http://www.nppc.org/wp-content/uploads/20120730-mf-Final-RFS-Waiver-Petition.pdf>.

100. Request for Comment on Letters Seeking a Waiver of the Renewable Fuel Standard; Extension of Comment Period, 77 Fed. Reg. 57,565, 57,566 (Sept. 18, 2012); see also *Request for Comment on Letters Seeking a Waiver of the Renewable Fuel Standard; Extension of Comment Period*, EPA (Sept. 10, 2012), <http://www.epa.gov/oms/fuels/renewablefuels/documents/rfs-waiver-request-comment-extension.pdf>.

101. 42 U.S.C. § 7545(o)(7)(B) (2012).

102. Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70,752 (Nov. 27, 2012).

103. See generally *id.* at 70,752–76.

waivers.¹⁰⁴ As stated in the executive summary of its decision, it was guided by “the relevant criteria for a waiver set forth in CAA section 211(o)(7)—whether implementation of the RFS volume requirements would *severely harm* the economy of a State, a region[,] or the United States.”¹⁰⁵ EPA again emphasized the “high statutory threshold” set forth by this provision and declared that the evidence did not support a determination that the statutory threshold had been met.¹⁰⁶ In fact, it concluded that the evidence showed quite the opposite, in that “it is very likely that the RFS volume requirements will have *no impact* on ethanol production volumes *in the relevant time frame*, and therefore will have *no impact* on corn, food, or fuel prices.”¹⁰⁷ EPA further underscored its interpretation that Congress only gave the agency limited authority under section 211(o)(7) to grant these waivers and that the market conditions posed by the 2012 drought, as those posed in 2008, do not rise to the level required by Congress to justify a waiver.¹⁰⁸ In both situations, EPA used a model created by Iowa State University in its assessment of the impacts of drought on feedstock crops used for biofuels production under the RFS.¹⁰⁹ In eighty-nine percent of the scenarios modeled in 2012, a waiver of the RFS would have no impact on the use of ethanol, and thus, the high demand for ethanol would remain unchanged.¹¹⁰ Furthermore, the analysis showed an average change in the price of corn of fifty-eight cents per bushel in the eleven percent of scenarios where a waiver would have an effect, while only an average change of seven cents per bushels over all scenarios modeled.¹¹¹

Even though the EPA again denied the waiver request, the process itself served to provide a public forum for voicing both opposition to and support for the nation’s ethanol mandate. Not only did the EPA hear from both sides through its notice and comment rulemaking process, but the public in general was also exposed to the various sides of the debate through media coverage of the waiver process.

In its 2012 decision, the EPA again addressed the other issues and concerns raised during the notice and comment period, including the following major points: RFS impacts on certain industries; general U.S. biofuels and RFS policy; environmental impacts of biofuels and the RFS; and the agency’s interpretation

104. *See id.* at 70,753.

105. *Id.* (emphasis added).

106. *Id.*

107. *Id.* (emphasis added).

108. *Id.*

109. *Id.* at 70,753, 70,756–71 (discussing the technical analysis of the 2012 decision under this modeling system).

110. *Id.* at 70,775.

111. *Id.*

of the authorizing statute, section 211(o)(7).¹¹² In dismissing many of the criticisms of the ethanol mandate, and ethanol in general, the agency again cited its limited statutory authority to address the concerns. It echoed its 2008 response by saying that the only issue it had to decide in terms of granting or denying a waiver to the RFS was the narrow issue of whether implementation of the volume requirements over the 2012–2013 year would severely harm a state, region, or the U.S. economy during that time.¹¹³

First, the agency “acknowledge[d] the linkages between corn prices, feed prices, costs to the livestock, poultry, and dairy industries, as well as impacts on food prices.”¹¹⁴ However, the agency also noted, “the market price of corn is influenced by a variety of factors, including among other things macroeconomic factors like oil prices, international demand for coarse grains, crop production in different corn-growing countries, fertilizer costs, and weather conditions that affect crop production levels.”¹¹⁵ Thus, while recognizing the impact of the 2012 drought on corn prices and various economic sectors, the agency again concluded that the overall impact of biofuels production was irrelevant to the waiver issue.¹¹⁶

Environmental concerns over potential negative impacts of U.S. biofuels policy, such as changes to wildlife habitat and increased greenhouse gas emissions resulting from changes in land use for the production of corn, were also dismissed as exceeding the narrow scope of the EPA waiver authority.¹¹⁷ EPA did, however, point to other ways that it continues to address environmental concerns, including through lifecycle analyses of greenhouse gas emissions and a reporting provision of the 2007 EISA statute.¹¹⁸

In addition to addressing other comments about effects of ethanol and biofuels, including those from both the oil refining and renewable fuel sectors, the agency discussed questions about its legal interpretation of section 211(o)(7).¹¹⁹ EPA reiterated its basis for the 2008 interpretation, and disagreed with the American Petroleum Institute’s comment that EPA’s interpretation is too narrow and another comment that the interpretation makes it impossible to satisfy the statutory threshold for a waiver.¹²⁰ As part of its response to this comment, EPA states that changes in “key parameters and inputs used in [its] modeled

112. *Id.* at 70,771.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See id.*

118. *Id.* at 70,772.

119. *Id.* at 70,773.

120. *Id.*

analysis[, including] availability of rollover RINs, gasoline prices, and corn yields . . . could lead to analytical results that could provide support for a finding that implementation of the RFS is severely harming the economy.”¹²¹ This statement provides some insight into EPA’s analysis, and yet it leaves unanswered the question of how much of a change would, in reality, be required to lead to the analytical results required for a waiver. In further defense of its interpretations of statutory language, EPA analogized a decision by the Ninth Circuit, which upheld the agency’s interpretation of the word “would” in another provision, as requiring an applicant to “clearly demonstrate” interference in order for a grant of a waiver request.¹²² Lastly, the agency maintained that it does not need to resolve the question of how broadly it should interpret the “harm to the economy” provision because, in both 2008 and 2012, a waiver would not have been justified under either approach.¹²³ Thus, the agency concluded that, despite the severity of the 2012 drought and its impact on the economy, the implementation of the RFS itself did not pose a threat to corn prices or the national economy, and therefore did not warrant a decision to grant a waiver.

IV. POLITICAL POWER AND VOICE OF THE ETHANOL INDUSTRY

As discussed in Parts II and III above, the history of ethanol use and legislation in the United States is long and complicated. It has seen support from presidential administrations, governors, and legislators from both major political parties, but has also been subject to much criticism. As the debate continues with no decline or end in the foreseeable future, it is important to understand not only the perspectives of each of the sides, but to also look at the methods and avenues each side uses to express its position.

Advocacy for the corn ethanol industry, and the broader biofuels industry, is organized in its national trade association, the RFA. As stated in its philosophy and objectives, the association exists to “[p]romote federal, state[,] and local government policies, programs[,] and initiatives that encourage expanded ethanol use” and to educate the public and policy makers on the advantages of biofuels through its dissemination of information.¹²⁴ While this organized effort has been the “voice of the ethanol industry” since 1981, its message today has been heard loud and clear: “Don’t Mess with the RFS.”¹²⁵ The trade group touts

121. *Id.*

122. *Id.* at 70,774 (citing *Davis v. EPA*, 348 F.3d 772, 779–80 (9th Cir. 2003)).

123. *Id.* at 70,774–75.

124. *Philosophy*, RENEWABLE FUELS ASS’N, <http://www.ethanolrfa.org/pages/philosophy> (last visited April 9, 2014).

125. *Don’t Mess with the RFS*, RENEWABLE FUELS ASS’N, <http://www.ethanolrfa.org/>

the RFS as an “American Success Story” because it has reduced gas prices, stimulated the domestic economy, created jobs, and reduced the country’s dependence on foreign oil.¹²⁶

With the support of its members and the expertise of its staff, RFA has established an organized machine to promote biofuels and fight back against anti-ethanol voices.¹²⁷ As such, it provides “timely, comprehensive industry information to [its] members, Congress, federal and state government agencies, strategic partners, the media[,] and other opinion-leader audiences.”¹²⁸ Through this information, RFA tackles the food versus fuel debate directly, and dispels as a myth the argument that it has to be a choice between one or the other.¹²⁹ It addresses the issue that has continually been raised in the ethanol debate, and it rejected the 2008 food concerns, for example, as “alarmist.”¹³⁰ While acknowledging that using corn for ethanol production is not without any impact on food prices, RFA strongly rejects the notion that ethanol production is the main reason behind rising food prices. RFA cites growth in corn production and yields, rather than diversion from food uses, as the reason for the industry’s ability to produce more ethanol.¹³¹ Furthermore, ethanol advocates promote how the process of making ethanol itself actually contributes to the animal feedstock supply, and subsequently, the meat supply, through its production of ethanol co-products, or distillers dried grains with solubles, which are a highly nutritious food source for livestock.¹³² In its 2013 Ethanol Industry Outlook, RFA boasted that “every bushel of corn processed by an ethanol plant produces 2.8 gallons of ethanol—and approximately 17 pounds of animal feed,” and that in 2012, “the U.S. ethanol industry used 4.5 billion bushels of corn to produce an estimated 13.3 billion gallons of ethanol and 34.4 million metric tons of high-quality livestock feed.”¹³³ Thus, even despite the 2012 drought, RFA points to 2012 as the second largest

exchange/entry/dont-mess-with-the-rfs-part-1/ (Apr. 24, 2012); *Joint Statement: Ethanol Industry Reviewing Options After California Court Decision*, RENEWABLE FUELS ASS’N (Sept. 18, 2013), <http://www.ethanolrfa.org/news/entry/joint-statement-ethanol-industry-reviewing-options-after-california-court-d/>.

126. *Don’t Mess with the RFS*, *supra* note 125.

127. *See* BATTLING FOR THE BARREL: 2013 ETHANOL INDUSTRY OUTLOOK, RENEWABLE FUELS ASS’N 24 (2013), available at <http://ethanolrfa.org/page/-/PDFs/RFA%202013%20Ethanol%20Industry%20Outlook.pdf?nocdn=1>.

128. *Id.*

129. *See id.* at 6.

130. *See Policy Positions: Food vs. Fuel*, RENEWABLE FUELS ASS’N, <http://www.ethanolrfa.org/pages/policy-positions-food-vs-fuel> (last updated Oct. 2011).

131. *See id.*

132. *Id.*; *Corn-Based Ethanol*, POET, <http://www.poet.com/ethanol> (last visited April 9, 2014).

133. BATTLING FOR THE BARREL, *supra* note 127, at 4.

world corn crop in history and concludes that “[t]remendous increases in the productivity of American farmers” secure the domestic and international grain supply for use in not only fuel, but also feed for animal livestock and food for human consumption.¹³⁴ RFA cites studies that analyzed higher food prices in 2007–2008 in support of its claim that “a number of simultaneously occurring factors—including rising energy costs, speculation in commodities markets, currency fluctuations, underinvestment in agricultural technology, changing diets in developing countries, and rising agricultural production costs—all contributed to higher food prices around the world” during that time frame.¹³⁵ Even other non-advocate policy experts have weighed in on how RFS waivers may not be the answer for which food stakeholders are looking.¹³⁶

In 2013, RFA continues to fight back against food voices on the issue of food prices by pointing to “energy, transportation, processing, packaging, marketing[,] and other supply chain costs” as the primary sources of food cost.¹³⁷ It is also empowered by EPA’s decision to deny the latest waiver request, as RFA promotes this decision as a sign that the RFS is working and has the built-in flexibility of compliance to account for conditions of drought and years of reduced production.¹³⁸ Other ethanol advocacy groups, such as Growth Energy and American Coalition for Ethanol, provide similar information to bring awareness to the many benefits of ethanol and the RFS and to speak out against anti-ethanol voices.¹³⁹

Who could argue against a program that provides so many great advantages to the United States? While many interest groups and public officials have, in fact, stepped forward to oppose the RFS, the overwhelming majority of those in government still sing its praise. For example, U.S. Secretary of Agriculture Tom Vilsack recently “acknowledged the congressional and legal challenges facing the ethanol sector and repeated his unwavering support for the industry.”¹⁴⁰

134. *Id.* at 6.

135. *Policy Positions: Food vs. Fuel*, *supra* note 130.

136. *See, e.g.*, Wallace E. Tyner, *National and Global Market Implications of the 2012 U.S. Drought*, CHI. COUNCIL ON GLOBAL AFF. (Feb. 26, 2013), http://www.thechicagocouncil.org/UserFiles/File/GlobalAgDevelopment/Issue_Briefs/National_and_Global_Market_Implications_of_the_2012_US_Drought.pdf.

137. *BATTLING FOR THE BARREL*, *supra* note 127, at 7.

138. *See id.* at 12.

139. *See Renewable Fuel Standard (RFS)*, GROWTH ENERGY, <http://www.growthenergy.org/ethanol-issues-policy/renewable-fuel-standard-rfs/> (last visited April 9, 2014); *RFS Action Center*, AM. COAL. FOR ETHANOL, <http://www.ethanol.org/magazine/index.php?id=110> (last visited April 9, 2014).

140. Amanda Peterka, *Vilsack to Ethanol Industry — ‘You’re Winning,’ GOVERNORS’ BIOFUELS COAL.* (Feb. 8, 2013), <http://www.governorsbiofuelscoalition.org/?p=5105> (discussing

Recent attempts by legislators to further attack and attempt to either reduce the mandate volumes or altogether repeal the Renewable Fuel Standard show that the setbacks to food stakeholders from EPA's denials of waivers has not stopped the debate, and that it is still vulnerable outside of the waiver context.¹⁴¹ In his speech to the renewable fuels industry, Secretary Vilsack cited recent attacks on the industry as evidence of the industry's success and encouraged it to keep the momentum going for cellulosic ethanol.¹⁴²

In Iowa, at the heart of the nation's corn production, government and trade support for ethanol and the RFS is arguably at its strongest. Despite being hard hit by the 2012 drought, public officials and farming advocates in the state remain a strong voice for ethanol.¹⁴³ The unwavering support from the government and parts of the agricultural sector face off against an ever-present resistance to the biofuels industry from a range of sources. However, the pro-ethanol lobby remains strong despite this resistance. In fact, amidst new efforts to repeal RFS legislation, RFA is prepared to "work for a policy that has worked for America" by joining Fuels America, a coalition of industry and trade organizations with the goal of promoting and defending RFS.¹⁴⁴ Among others, the coalition, largely organized to fight against the voice of the petroleum industry, is comprised of the American Coalition for Ethanol, the National Association of Wheat Growers, the American Security Project, Growth Energy, the Advanced Ethanol Council, the National Farmers Union, the National Corn Growers Association, the Biotechnology Industry Organization, DuPont, and POET.¹⁴⁵ RFA

recent legislative proposals and upcoming committee hearings on the subject of reforming or repealing RFS).

141. See, e.g., Foreign Fuels Reduction Act, S. 977, 113th Cong. (2013); Renewable Fuel Standard Amendments Act, H.R. 1482, 113th Cong. (2013); Renewable Fuel Standard Elimination Act, H.R. 1461, 113th Cong. (2013); Renewable Fuel Standard Repeal Act, S. 1195, 113th Cong. (2013); Renewable Fuel Standard Flexibility Act, S. 3428, 112th Cong. (2012); see also Peterka, *supra* note 140.

142. See Peterka, *supra* note 140.

143. See, e.g., Press Release, Terry Branstad, Governor, State of Iowa, Branstad and Reynolds Applaud Decision to Uphold the Renewable Fuel Standard (Nov. 19, 2012), available at <https://governor.iowa.gov/2012/11/branstad-and-reynolds-applaud-decision-to-uphold-the-renewable-fuel-standard/>; Press Release, Tom Harkin, Senator, U.S. Congress, Harkin Applauds EPA Decision to Deny RFS Waiver Request (Nov. 16, 2012), available at <http://www.harkin.senate.gov/press/release.cfm?i=337935>; *Iowans Form Group to Protect the Current RFS*, IOWA FARM BUREAU (Jan. 28, 2013, 9:18 AM), http://www.iowafarmbureau.com/articles/80320/iowans_form_group_to_protect_the_current_rfs (announcing formation of the Iowa RFS Coalition and their letter to President Obama requesting his continued support for agriculture in his second term); Julia Pyper & Tiffany Stecker, *Advocates Gear Up to Defend Renewable Fuel Standard*, GOVERNORS' BIOFUELS COAL. (Feb. 8, 2013), <http://www.governorsbiofuelscoalition.org/?p=5096>.

144. BATTLING FOR THE BARREL, *supra* note 127, at 13.

145. *Id.*

and the coalition may be organized to fight against the ever-present petroleum industry, but they have also had to remain ready to respond to concerns raised by the voices of food stakeholders, particularly after events such as a drought raise national and global attention to the issue. Even though the pro-ethanol voices dismiss claims about the impact of biofuels on food availability and food prices, and livestock producers were handed a defeat in the face of the waiver denials, legislators nevertheless continue to consider the fate of the RFS, as evidenced by the recent proposals to unravel the program.

V. CONCLUSION

Despite the continued insistence of the ethanol industry and its proponents that ethanol production under the Renewable Fuel Standard does not result in higher food prices and reduced food availability, and that RFS waivers will not provide the relief sought by food stakeholders, the debate continues. Even though anti-ethanol voices have faced what may be perceived as setbacks in recent years, they continue to speak out against the ethanol industry and the RFS mandate. While the ethanol industry is currently “winning” the debate, through continued support from large portions of state and federal government and the existing ethanol mandate, it remains vulnerable to attack, particularly during times of devastating weather events, as seen most recently in the aftermath of the 2012 drought.

Although EPA denied requests for waivers from the RFS in 2008, and again in 2012, EPA’s decisions and the reasoning behind them may provide insight into the question of how the voices of opposition to ethanol are heard in the debate. It may be a question of the *effectiveness* of the current mechanisms for voicing opposition and the approach taken by the voices, rather than a question of if such mechanisms exist at all. It cannot be said that those in the food and livestock industries were denied a voice because, under the RFS waiver provisions, voices speaking out against the mandate were provided a forum through EPA’s notice and comment process and consideration of the waiver requests. Yet, they may still feel that their voices were not truly heard by EPA as their chosen method of attack failed to produce the desired results. However, this may simply be a consequence of the current legislation, and how it is designed to take into account all of the many complicated factors playing roles in the ethanol equation.

As discussed by EPA in both the 2008 and 2012 waiver decisions, their focus and statutory scope are narrow—environmental concerns and overall market concerns, for example, are not proper for the agency to consider under the law as it stands. Further, EPA is only given authority to grant waivers when the RFS is the *sole* cause of economic harm or inadequate domestic supply. Given the language of the statute and the current EPA interpretation of it, it may seem

unlikely that a waiver could be granted. Even further, as was shown during the waiver process, a waiver may not be the answer the food stakeholders are actually looking for. However, as legislators have been proposing to chip away at the RFS with increasing intensity, there remains a domestic and global interest in food prices and availability and, in another aspect of the greater ethanol debate, environmental groups continue to speak out against current biofuels policies. Livestock producers and other voices representing the food stakeholders may not have received the answer they sought; however, their voices have not been completely disregarded. Whether the latest round of Congressional efforts to repeal or reform the RFS will lead to any substantive change in policy remains to be seen. On the other hand, the voices of all sides are at least heard on some level in the public forum. While mainstream governmental support has continued to side with the ethanol industry, federal legislators have heard the call to re-evaluate the policy, and Congress will ultimately have to weigh the competing interests to determine the future of the Renewable Fuel Standard program.