

IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF IOWA
 CENTRAL DIVISION

<p>STATE OF IOWA; STATE OF NEBRASKA,</p> <p>Plaintiffs,</p> <p>v.</p> <p>MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,</p> <p>Defendants.</p>	<p>Case No. 4:23-cv-00284-RGE-SBJ</p> <p style="text-align: center;">BRIEF IN SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT</p>
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INTRODUCTION

This entire dispute boils down to the U.S. Environmental Protection Agency failing to meet a nondiscretionary deadline. If Governors send EPA a formal request, the Clean Air Act requires EPA to revoke the special waiver for E10 gasoline. That waiver allows E10 to be sold with a Reid Vapor Pressure (“RVP”) of 10.0-psi in the summer months—while all other gas sold must have an RVP of 9.0-psi in those months. That disadvantages E15—which has a very similar RVP to E10. So if EPA follows the law and revokes E10’s waiver in the requesting States, E15 could be sold on an even playing field with E10 in those States.

The Act not only requires EPA to issue a rule setting aside the waiver if Governors request it, but it requires that the rule setting the waiver aside be finalized within 90 days. On April 28, 2022, a bipartisan group of eight Governors sent EPA a request to remove the waiver in their States. EPA failed to issue a rule within 90 days. Now, more than 400 days later and more than a year after that 90-day period expired, EPA’s continued delay risks yet another year without the fuels the Governors requested—and that they are entitled to under the Act. Each day that this case continues, unresolved, is a day that EPA continues its now long-standing violating of the Clean Air Act.

A bipartisan coalition of Attorneys General sent a second letter to EPA asking them to follow their statutory duties. Then Iowa and Nebraska sent a Notice of Intent to Sue, warning that continued noncompliance with EPA’s mandatory duty could lead to a lawsuit. EPA responded by starting the rulemaking process, proposing a rule that would grant the States’ requested waiver, and opened notice and comment. Yet

the process then ground to a halt. And despite the comment period's closing, and no meaningful pushback on EPA's rule, EPA has failed to publish its proposed rule.

Iowa and Nebraska sued EPA seeking declaratory and injunctive relief asking EPA to finalize its rule. 42 U.S.C. § 7545(h). EPA answered, admitting its failure to promulgate a rule within the required 90-day period. Indeed, EPA conceded that it did not promulgate the requested rule for 2023, and still has not done so for 2024. Plaintiffs now move for summary judgment.

BACKGROUND

I. Gasoline regulation under the Clean Air Act.

A. EPA's regulation of gasoline volatility.

Congress enacted the Clean Air Act to help ensure our nation's air remains clean. That important objective is achieved by the Act's comprehensive regulatory framework. One responsibility the Act imposes on EPA is to regulate vehicle fuels and fuel additives. And to achieve that, Congress tasked EPA with using RVP as a measurement. RVP is the absolute vapor pressure of fuel at the temperature at which it is stored and transported. See 42 U.S.C. § 7545(h).

EPA regulates RVP because higher volatility leads to higher emissions. EPA took the first steps to regulate RVP during summer, the primary driving season. Its regulations at that time sought to reduce volatile organic compound emissions that contribute to smog. *Req. from States for Removal of Gasoline Volatility Waiver*, 88 Fed. Reg. 13,758, 13,759 (Mar. 6, 2023) (to amend 40 C.F.R. § 1090). EPA acted before Congress, publishing its first regulation in 1987. See 52 Fed. Reg. 31,274 (August 19, 1987); 54 Fed. Reg. 11,868 (March 22, 1989); 55 Fed. Reg. 23,658 (June 11, 1990).

Agreeing with EPA, Congress amended the Act in 1990 to include volatility levels for summer gasoline. *Id.* The amendments codified EPA’s previous regulatory approach, which included establishing a 9.0 pounds per square inch (“psi”) RVP standard for gasoline volatility in the summer high-ozone driving season. *Id.* at 13,760.

Congress again amended the Act as part of the Energy Policy Act of 2005, which added to the Act section 211(h)(5). *See* 42 U.S.C. § 7545(h). That amendment included an ethanol waiver that allows fuel blends that include 10 percent denatured anhydrous ethanol gasoline (“E10”) to have a higher RVP. 42 U.S.C. § 7545(h)(4). Congress recognized that E10 had emissions advantages over ethanol-less fuel, and so found the added volatility acceptable. That waiver allowed E10 an additional 1-psi greater RVP than allowed to other fuels. But Congress did not anticipate the coming popularity of 10-to-15 percent denatured anhydrous ethanol gasoline (“E15”) and so did not extend the waiver to E15. 88 Fed. Reg. at 13,759–60. That is despite E15 having a very similar RVP to E10—meaning that any waiver that applies to E10 discourages E15’s adoption.

When Congress enacted the volatility waiver in 2005, most gasoline sold in the United States was not even ten-percent ethanol. E15’s market share was negligible. Today, almost all gasoline sold is E10, and the waiver thus applies to most gasoline. *Id.* at 13,760. And so the waiver’s exclusion of E15 which may have made sense at the time—E15 was an insignificant part of the national fuel supply—now creates an environmental problem. Fortunately, that problem can be resolved under the Act.

B. EPA's regulation of gasoline additives.

The Act tasks the Administrator with promulgating regulations designating fuels or fuel additives for automotive use. 42 U.S.C. § 7545(a). It allows fuels to be sold at different times of year, in part based on the reactivity or volatility of those gasoline mixtures. *See* 42 U.S.C. § 7545(k)(10).

The Act's RVP waiver for E10 gasoline during the summer allows E10 to be sold when other fuels, including fuels with safer amounts of emissions, cannot. The Act generally requires the Administrator to adopt regulations that prohibit selling or transporting gasoline with an RVP of 9.0 psi during the high-ozone summer driving season. 42 U.S.C. § 7545(h)(1). But the Act also gives E10 a waiver allowing for another 1.0-psi. So E10 gasoline may be sold with a 10.0-psi RVP rather than the default 9.0-psi RVP limit for other gasoline during the summer months. By contrast, E15 gasoline may not be sold with that higher RVP during the summer.

C. Authority of States and their Governors under the Act.

The Act often refers to and relies on States for enforcement. *See, e.g.*, 42 U.S.C. §§ 7545(c)(4)(C), 7545(h)(5), 7545(k)(6). The Act also authorizes States' Governors to enforce some statutory obligations. Some of that authority comes in the form of nondiscretionary duties imposed on EPA and the Administrator. That means that, sometimes, when a Governor asks, the Administrator must act. *See, e.g.*, 42 U.S.C. §§ 7545(h)(5), 7545(k)(6).

One area where Governors may ask EPA to act is to adjust E10's RVP waiver. Under the Act, Governors may apply for a waiver-from-the-waiver, if applying the

E10 waiver will “increase emissions that contribute to air pollution in any area in the State.” 42 U.S.C. § 7545(h)(5).

After EPA receives a Governor’s request and supporting documentation, the Administrator “shall, by regulation, apply in lieu of the [10-psi RVP limit] established by paragraph (4), the [9.0-psi limit] established by paragraph (1).” 42 U.S.C. § 7545(h)(5)(A).

The Act empowers States to protect their air quality. That approach follows the Act’s plain text and intent. Indeed, it is a respectful approach to division of powers among the federal and State governments required by the Constitution.

The Act’s mandatory deadlines, which prohibit the federal government from indefinitely delaying its response, are further evidence of Congress’s careful federalism balancing. The Act requires the Administrator to “promulgate regulations” implementing the requested waiver “not later than 90 days after the date of receipt of a notification from a Governor.” 42 U.S.C. § 7545(h)(5)(B). That deadline is mandatory, not aspirational.

The regulations then “take effect on the later of” either “the first day of the first high-ozone season for the area that begins after the date of receipt of the notification” or “1 year after the date of receipt of the notification.” 42 U.S.C. § 7545(h)(5)(C)(i)–(ii). That ensures a prompt response by EPA after Governors ask for it to act to protect the State’s air quality.

II. The Governors request a waiver.

A. The law makes E15, though a cleaner and cheaper alternative, less available than E10.

All cars sold in the United States after 2001 can use E15. Many Governors, States, and consumers prefer access to E15 as it produces fewer dangerous emissions than does E10. It is also cheaper. And E15 has a very similar RVP to E10—similar enough that any regulation that has allowed sale of E10 in the United States could allow E15 as well. But most consumers are denied access to year-round E15. 88 Fed. Reg. at 13,759.

The Act's ethanol waiver gives only E10, not E15, an extra 1.0-psi RVP. Without that special treatment, E15 gasoline could be sold in any market that also sells E10. The waiver's special treatment for only E10, though, means that 10.0-psi RVP E10 may be sold year-round, but 10.0-psi RVP E15 may not.

B. The Governors notify EPA of its waiver request in April 2022.

Over the last five years, and for several reasons, EPA has issued series of emergency waivers in certain jurisdictions to allow E15 sales year-round.

EPA's ad hoc policy-through-emergency-waivers approach does not give refiners enough time to ensure full access to E15. States that want year-round E15 are denied access. So those States' residents cannot buy the clean-burning and less expensive E15 that they want during the summer driving season.

On April 28, 2022, a bipartisan group of Governors from Iowa, Nebraska, Illinois, Kansas, Minnesota, North Dakota, and South Dakota sent a letter with supporting documentation to the Administrator seeking a section 211(h)(5) waiver.

Request from States for Removal of Gasoline Volatility Waiver, 88 Fed. Reg. at 13,760. That letter was the first section 211(h)(5) request submitted to EPA. *Id.* During that petition's long pendency, Kansas and North Dakota rescinded their requests while Ohio and Missouri lodged their own requests. *Id.*

The Governors' asked EPA to promulgate a Rule applying the 9.0-psi RVP limitation established by section 211(h)(1) to all fuel blends containing gasoline and E10 that are sold, offered for sale, dispensed, supplied, offered for supply, transported, or introduced into commerce in those states for the 2023 summer ozone control season. *Id.* Responding to the Governors' request will allow E10 to be treated the same as E15, rather than rather than giving E10 alone the 10.0-psi RVP waiver established by section 211(h)(4).

C. EPA repeatedly misses the Clean Air Act's deadlines.

The Governors sent their letter on April 28, 2022, and EPA acknowledged receipt. The summer driving high-ozone season began days later on May 1, without the requested waiver going into effect. Despite the Act's clear 90-day deadline, July 27, came and went without EPA's promulgating the required rules.

After follow-up letters from Governors and from a bipartisan group of Attorneys General, EPA on March 6, 2023, proposed its Rule, "Request from States for Removal of Gasoline Volatility Waiver." 88 Fed. Reg. 13,758. That proposed Rule came nearly a year after the Governors first requested the waiver and more than eight months after EPA's deadline to promulgate the regulations.

EPA's proposed rule recognized that "the prescriptive statutory language 'shall' provides limited if any discretion for EPA" to consider impacts upon receipt of

notification from Governors of their request for a waiver. *Id.* at 13,760. EPA accepted that the Governors’ data explained that the requested waiver would reduce “emissions of CO, NO_x, and VOCs within the state upon removal of the 1-psi waiver.” *Id.* at 13,761. EPA thus “propos[ed] to remove the 1-psi waiver in the petitioning states based on the supporting documentation provided, as required by the [Act].” *Id.* at 13,762.

The Administrator found that, despite EPA’s being the cause of delay, that the waiver would go into effect for Iowa, Nebraska, Illinois, Minnesota, Missouri, Ohio, South Dakota, and Wisconsin on April 28, 2024. *Id.* at 13,770. That is precisely two years after the date of the Governors’ waiver request—and one year after the Act’s deadline. 42 U.S.C. §§ 7545(h)(5)(C)(i)–(ii)

All comments on the proposed regulation were due on or before April 20, 2023. *Id.* at 13,758. Many comments supported the proposed Rule. Of the critical comments, many suggested their concerns would be ameliorated by the April 28, 2024, start date for the proposed Rule.

STATEMENT OF UNDISPUTED FACTS

The Act’s section 211(g) requires the Administrator to “promulgate regulations under subparagraph (A) not later than 90 days after the date of receipt of a notification from a Governor under that subparagraph.” 42 U.S.C. § 7545(h)(5). The Administrator received notice from the Governors on or around April 28, 2022. The 90-day deadline elapsed on July 27, 2022. EPA concedes it did not promulgate a rule establishing the applicable standard for 2023 within the required time, and still has not done so for 2024. (App. 67 ¶ 60.)

EPA’s failure to follow section 211(h) and timely promulgate the rule is a failure to “perform any act or duty . . . which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2).

STANDARD OF REVIEW

Summary judgment is proper if the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

The standard for a permanent injunction “is essentially the same as for a preliminary injunction, except that to obtain a permanent injunction the movant must attain success on the merits.” *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999) (citing *Amoco Prod. Co. v. Vill of Gambell, Alaska*, 480 U.S. 531, 546 n. 12 (1987)). When deciding whether to issue a permanent injunction, “a district court must take into account the threat of irreparable harm to the movant, the balance between this harm and the harm to the other party if the injunction is granted, the probability of movant’s success on the merits, and the public interest.” *Id.*; see *SD Voice v. Noem*, 60 F.4th 1071, 1077 (8th Cir. 2023) (same).

ARGUMENT

I. This Court should enter declaratory and injunctive relief.

EPA’s failure to timely act to approve and finalize its proposed rule breaches its nondiscretionary statutory duty. Because of that admitted failure, Plaintiffs show actual success on the merits and satisfy the remaining requirements for a permanent injunction. Accordingly, this Court should enter a permanent injunction enjoining

EPA to promulgate a final rule promptly by a date certain, giving as much time as possible before the 2024 high-ozone season. *See* 42 U.S.C. § 7545.

A. Plaintiffs can demonstrate actual success on the merits.

Plaintiffs can show actual success on the merits. The Act requires EPA to finalize regulations implementing a requested waiver “not later than 90 days after the date of receipt of a notification from a Governor.” 42 U.S.C. § 7545(h)(5)(B).

Here, the Governors requested a section 211(h) waiver on April 28, 2022. EPA received notice from the Governors on or around that date, and the 90-day deadline elapsed on July 27, 2022. Now, more than fifteen months have passed since the deadline elapsed. EPA admits that it failed to issue a Rule for 2023 and concedes that it still has not done so for 2024. (App. 67 ¶ 61.) Because EPA violated a nondiscretionary duty, Plaintiffs have established actual success on the merits.

B. Plaintiffs will experience irreparable harm absent a permanent injunction.

The Act contemplates a federalist system by which the Administrator and EPA must, without discretion, issue a rule after being notified by Governors. EPA violates States’ sovereign interests when it fails to follow federal law. *See, e.g., North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015). To the extent an agency is bound “to follow its own regulation” it is also bound to follow requirements imposed by Congress. *See Suci v. I.N.S.*, 755 F.2d 127, 129 (8th Cir. 1985).

Indeed, EPA has taken no meaningful action to remedy the problems identified by the Governors despite EPA’s own models’ projecting that lack of a waiver will continue to cause increased emissions in the States. Ad hoc emergency waivers issued

by EPA only partially fix the problems—without ample lead time for refiners to ensure access to the correct fuel and E15 there will be insufficient supplies for the upcoming summer season. While EPA has proposed a Rule, until that Rule is promulgated EPA’s responsibilities remain unfulfilled.

EPA’s failure to follow the act will also cause irreparable harm to the public health and welfare of millions of residents in Iowa and Nebraska. Plaintiffs have a sovereign duty and responsibility to protect the health and welfare of their residents and quality of their environments. Yet EPA’s failure to promulgate a final Rule, forces their residents continue to breathe air with additional, avoidable emissions.

Until EPA finalizes its rules, Plaintiffs are denied the section 211(h)’s relief and face unlawful delays in providing their residents the E15 fuel that will best serve their air quality and pocketbooks. If EPA continues to fail to follow the Act and timely issue a waiver, then the increased air pollution the Act seeks to avoid will continue to harm millions of residents of both Iowa and Nebraska during the 2024 summer driving season.

C. A permanent injunction will not inflict injury on other parties.

A permanent injunction will not inflict injury on EPA. Following congressionally mandated duties is not injurious and is part of EPA’s function as a regulatory agency. Indeed, issuing a permanent solution will allow fuels to be sold in the requesting States that have an RVP of 10.0 on an even playing field with E10. That is better than relying on emergency waivers will save EPA the time of revisiting this issue annually. And promulgating standards in compliance with section 211(h)

rather than waiting until after the deadline has elapsed will save EPA the burden of costly litigation.

D. Public interest will be harmed without a permanent injunction.

The public interest is harmed without a permanent injunction. The absence of an E15 waiver hurts the public health and welfare of millions of residents of Plaintiff States and causes economic harm to consumers and refiners. And EPA's failure to follow the Act harms the public interest.

EPA's failure to issue a E15 waiver harms public health. A letter attached to Plaintiffs' complaint cited a Health Effects Institute Panel on the health effects of traffic related air pollution. (App. 53.) That letter explained that high gasoline vapor pressures cause high emissions from motor vehicles. It is common knowledge that increased emissions from motor vehicles can result in many health problems, including "increase mortality rates, especially among infants of poor families; increase lung cancer rates; aggravate asthma and other respiratory diseases; and impose significant social welfare costs." *New York v. EPA*, 413 F.3d 3, 30 (D.C. Cir. 2005). E15 is lower in carbon emissions, tailpipe emissions, and evaporative emissions, which prevents that harm to public health.

EPA's failure to issue a waiver also creates economic harms. Lack of access to E15 gasoline hurts consumers who would seek to buy the less expensive E15 gasoline in the States that asked for an RVP waiver. Indeed, E15 usually saves drivers between 5 and 10 cents per gallon.

The absence of a permanent solution to year-round E15 sales also hurts refineries. Emergency waivers appear ad hoc, resulting in market uncertainty. This

harms small refineries and renewable fuel producers by undermining their ability to plan for infrastructure upgrades and renewable fuel demand. A permanent solution and year-round access to E15 will create economic certainty for refineries and consumers alike.

CONCLUSION

This Court should declare that EPA has failed to perform a nondiscretionary act or duty under 42 U.S.C. § 7545(h) and enter a permanent injunction enjoining EPA to promulgate a final rule promptly by a date certain, and that date should be as promptly as practicable.

Respectfully submitted,

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Electronically filed and served on all parties of record.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on November 29, 2023:

U.S. Mail FAX
 Hand Delivery Overnight

Courier

Federal Express Other
 CM/ECF

Signature: /s/ Eric H. Wessan