

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

STATE OF IOWA; STATE OF  
NEBRASKA,

Plaintiffs,

v.

MICHAEL S. REGAN, in his  
official capacity as Administrator  
of the U.S. Environmental  
Protection Agency; UNITED  
STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendants.

Case No. \_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

The Clean Air Act imposes many duties upon the U.S. Environmental Protection Administration. Among those is a mandate to promulgate regulations in response to particular requests from State governors. Iowa's and Nebraska's governors, along with the governors of 6 other States, made the required request last year, triggering the EPA's duty to promulgate the required regulations in no more than 90 days. That deadline passed more than a year ago.

The federal government refuses to do its duty. The State of Iowa and the State of Nebraska now sue for an injunction compelling it to do so.

## **JURISDICTION**

1. This Court has subject-matter jurisdiction under section 304(a)(2) of the Act, 42 U.S.C. § 7604(a)(2), which authorizes any person, after due notice, to sue to compel the performance of a nondiscretionary duty under the Act. Section 7604(a) grants this Court jurisdiction to order EPA to perform such duty.

2. This failure to perform a nondiscretionary duty under section 211(h)(5) is appropriately raised in a citizen-suit and is neither a control nor prohibition.

3. This Court also has jurisdiction over this action and over the parties under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (suits to compel officer or agency actions).

4. The relief requested is authorized under 42 U.S.C. § 7604 and 28 U.S.C. §§ 2201, 2202, and 1361.

## **VENUE**

5. This Court is a proper venue under 28 U.S.C. § 1391(e) because this suit names an agency of the United States and an officer of the United States acting in his official capacity, and a substantial part of the events or omissions giving rise to the Plaintiff States' claims occurred in this judicial district.

6. EPA's failure to promulgate regulations as required by section 211(h) of the Act, 42 U.S.C. § 7545(h), prolongs the risk of harm from increased emissions levels to millions of residents in each of the Plaintiff

States and impedes the States' attempt to improve air quality consistent with the Act in areas including the Des Moines Metropolitan Area, which includes counties located in this judicial district.

### **PARTIES**

7. The Plaintiffs are the State of Iowa and the State of Nebraska. They bring this action on behalf of their Governors, their residents, and themselves to protect their interests as administrators of healthcare programs and schools, as employers, and as regulators and sovereigns responsible for protecting and preserving natural resources in trust. Both States are “persons” entitled to sue under section 302(e) of the Act, 42 U.S.C. § 7602(e).

8. Defendant U.S. Environmental Protection Agency is the federal agency charged with implementing the Act.

9. Defendant Michael S. Regan is the Administrator of EPA. He is charged with implementing and enforcing the Act, including the Act's nondiscretionary duty to “promulgate regulations . . . not later than 90 days after the receipt of a notification from a Governor” under section 211(h).

### **NOTICE**

10. A plaintiff who intends to bring an action “where there is an alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator” must notify

the Administrator of its intent to sue sixty days before doing so. 42 U.S.C. § 7604(a)(2), (b)(2).

11. The States notified EPA on March 6, 2023, of their intention to file suit for EPA's failure to perform the nondiscretionary duties described here. *See id.*; *see also* 40 C.F.R. part 54. A copy of the notice letter is attached as Exhibit 2. EPA acknowledged receipt of Plaintiffs' Notice of Intent to Sue on March 6, 2023.

12. The statutory 60-day notice period expired on May 5, 2023, without action by EPA. The States file this suit on August 7, after the expiration of the 60-day notice period.

## **BACKGROUND**

### **I. Gasoline regulation under the Clean Air Act.**

#### **A. EPA's regulation of gasoline volatility.**

13. The Clean Air Act is a comprehensive regulatory framework intended to keep America's air clean. Under the Act, EPA regulates fuels and fuel additives for vehicles. Reid vapor pressure, or RVP, measures the volatility of gasoline and other petroleum products. It is defined as the absolute vapor pressure of fuel at 100 degrees Fahrenheit, which is the temperature at which gasoline is stored and transported. *See* 42 U.S.C. § 7545(h).

14. EPA first took regulatory action to control the volatility of gasoline in 1987. *See* 52 FR 31,274 (August 19, 1987); 54 FR 11,868

(March 22, 1989); 55 FR 23,658 (June 11, 1990). EPA regulates RVP because higher gasoline volatility leads to higher evaporative emissions of gasoline during summer months. Its regulations are intended to reduce volatile organic compound (“VOC”) emissions that contribute to the formation of ground-level ozone—that is, 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).

15. After EPA’s initial regulations, 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.

16. Congress in 2005 also enacted an ethanol waiver, which allows fuel blends that include 10 percent denatured anhydrous ethanol (“E10”) to have a higher RVP. 42 U.S.C. § 7545(h)(4). That waiver specifically granted E10 a 1-psi volatility waiver, allowing such blends to have a 1.0-psi greater RVP than otherwise allowed. That allowance applies only to E10 and does not extend to 10-to-15 percent denatured anhydrous ethanol (“E15”). 88 Fed. Reg. at 13,759–60.

17. When Congress enacted the volatility waiver, E10 comprised only a small portion of gasoline sold in the United States. E15 gasoline constituted an insignificant portion of the national gasoline market.

Today, almost all gasoline sold is E10, and the waiver therefore applies to most gasoline. *Id.* at 13,760.

**B. EPA's regulation of gasoline additives.**

18. In 2005, Congress again amended the Act as part of the Energy Policy Act of 2005, which added to the Act section 211(h)(5), codified today at 42 U.S.C. § 7545(h). *Id.*

19. The Act tasks the Administrator with promulgating regulations designating fuels or fuel additives for automotive use. 42 U.S.C. § 7545(a). It includes parameters that allow certain 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).

20. 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 season. 42 U.S.C. § 7545(h)(1). However, the Act also sets the RVP for E10 gasoline at 1 psi greater than the standard limit. E10 gasoline may thus be sold with a 10-psi RVP rather than the default 9.0-psi RVP generally authorized for other gasoline during the summer months.

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

21. Throughout itself, the Act refers to and relies on States to enforce various of its requirements. *See, e.g.,* 42 U.S.C. §§ 7545(c)(4)(C), 7545(h)(5), 7545(k)(6). The Act also assigns certain powers to the States'

Governors. As Congress set forth in the Act, when a Governor applies, the Administrator must act. *See, e.g., id.* §§ 7545(h)(5), 7545(k)(6).

22. One of those explicit assignments concerns the RVP limitation exemption for E10. Under the Act, Governors may apply for a waiver from that exemption if applying it would “increase emissions that contribute to air pollution in any area in the State[.]” *Id.* § 7545(h)(5).

23. On notification of a Governor’s request and the request’s 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).” *Id.* § 7545(h)(5)(A).

24. The Act thereby empowers States to act in a manner to best protect their States’ air quality. This is not only consistent with the Clean Air Act’s plain text and intent; it is a respectful approach to division of powers among the federal and State governments required by the Constitution.

25. That approach is further embodied in the deadlines the Act sets, which prohibit the federal government from perpetually delaying a response. 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. . . .” *Id.* § 7545(h)(5)(B).

26. 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.” *Id.* § 7545(h)(5)(C)(i)–(ii).

## **II. The Governors request a waiver.**

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

27. Engine technology has improved since the Act’s enactment and all cars sold in the United States after 2001 can use E15.

28. 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.

29. 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 this special treatment of E10, E15 gasoline could be sold in any market that also sells E10. This special treatment, though, means that 10-psi RVP E10 may be sold year-round, but 10-psi RVP E15 may not.

### **B. The Governors request a waiver and support it with evidence.**

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

31. EPA’s ad hoc approach of effecting its policy through emergency waivers does not give refiners enough time to ensure full access to E15 in



the States that seek that access, denying residents of those States the clean-burning and less expensive E15 that they seek for their cars.

32. On April 28, 2022, a bipartisan group of Governors from Iowa, Nebraska, Illinois, Kansas, Minnesota, North Dakota, and South Dakota sent a letter to the Administrator seeking the waiver contemplated in section 211(h)(5). Request from States for Removal of Gasoline Volatility Waiver, 88 Fed. Reg. at 13,760. This was the first section 211(h)(5) request submitted to EPA. *Id.* While the petition was pending, Kansas and North Dakota rescinded their requests while Ohio and Missouri lodged their own requests. *Id.*

33. The original Governors' letter requested that EPA promulgate a rule applying, rather than the 10-psi RVP limitation established by section 211(h)(4), 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.*

34. The letter cited a Health Effects Institute Panel on the health effects of traffic related air pollution to explain that high gasoline vapor pressures cause high emissions from motor vehicles and so should be a priority fuel quality issue. And that Panel explained that a reduction in vapor pressure is one of the more cost-effective, fuel-related approaches to reduce emissions.

35. Going beyond that high-quality evidence, the States attached supporting documentation to their letter, an academic analysis drafted by Janet Yanowitz, P.E., Ph.D, titled “Emissions Impacts of the Elimination of the 1-psi RVP Waiver for E10 in Eight States.” *Id.* at 13,761. That analysis used EPA’s Motor Vehicle Emissions Simulator Version 3.0.3 (“MOVES3”) model to estimate the impact on air emissions from onroad and nonroad vehicles that will follow from EPA’s issuance of the Governor’s requested waiver.

36. MOVES3 is a complex emission-modeling system intended to estimate air pollution emissions from mobile sources in the United States. The model is based on individual physical processes, which are then scaled up to emulate fleets, and a database that builds these hypothetical fleets based on vehicle and fuel data specific to those areas. MOVES3 also incorporates data involving meteorology, source-type populations, age distributions, vehicle type, and many other factors.

37. Dr. Yanowitz’s analysis ran the model for a July weekday in 2023 in each of the 8 States to understand the effect of during the summer high ozone season, when the E15 limits are in effect. *Id.* She kept many factors in the MOVES3 model constant to test the effect of a change from 9-psi for E10 fuels to 10-psi and estimated the effect of the requested waiver on air quality in Iowa, Nebraska, Kansas, Wisconsin, South Dakota, Minnesota, North Dakota, and Illinois.

38. Her conclusion estimated that the Governors' requested waiver will decrease in each State from all three tested pollutants: volatile organic compounds, nitrogen oxides, and carbon monoxide emissions.

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

39. EPA acknowledged receipt of the Governors' April 28 letter. The high-ozone season began on or around May 1, 2022, without the requested waiver's going into effect. Despite the clear 90-day deadline set forth in the Clean Air Act, July 27, 2022, came and went without EPA's promulgating the required rules.

40. After follow-up letters from Governors and from a bipartisan group of Attorneys General, EPA on March 6, 2023, issued its proposed rule, "Request from States for Removal of Gasoline Volatility Waiver." 88 Fed. Reg. 13758. This was nearly a year after the Governors had first requested the waiver and more than eight months after EPA's deadline to promulgate the regulations.

41. 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. It accepted that the data the Governors highlighted indicated that the submissions "demonstrated reductions in emissions of CO, NO<sub>x</sub>, 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.

42. 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 Clean Air Act’s deadline for the waiver to go into effect. 42 U.S.C. § 7545(h)(5)(C)(i)–(ii)

43. 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 Comments critical of the proposed rule, many suggested those concerns could be ameliorated by the April 28, 2024, start date.

44. It is now more than 90 days after the end of the notice-and-comment period, and EPA has not issued a final rule— a final rule that the Clean Air Act required take effect more than two months ago; a final rule the Clean Air Act required EPA to promulgate last July.

### **HARM TO STATES FROM EPA’S FAILURE TO COMPLY WITH ITS MANDATORY STATUTORY DUTY**

45. The bipartisan Governors attached to their April 28 letter evidence that failure to promulgate the rules as required by the Act would lead to increased emissions in their states during the summer driving season.

46. Increased emissions during the summer driving months as shown by the MOVES3 simulation stand to harm the States' residents.

47. Lack of access to E15 gasoline stands to create economic harms to those who would seek to buy the less expensive E15 gasoline in the States that asked for an RVP waiver.

48. The Act contemplates a federalist system by which the Administrator and EPA must act, without discretion, at times when properly notified by Governors.

49. Irreparable harm is done to the sovereign interests of the States when EPA fails to follow the Act as enacted by Congress and improperly declines to promulgate rules after being asked by Governors.

50. EPA acknowledged the initial requests made by the Governors of many States in spring of 2022 yet failed to act promptly thereafter, indeed failing to act at all until nearly a year later.

51. Contrary to the Act, EPA has taken no action to remedy the problems identified by the Governors—this despite EPA's own models' projecting that withholding a waiver will continue to cause increased emissions in the States.

52. Emergency waivers issued ad hoc by EPA can 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.

53. Further delays in issuing a final rule threaten to affect the viability of issuance of the requested waivers for the summer 2024 high ozone driving season.

54. EPA's failure to timely act to approve and finalize its proposed rule is a clear breach of EPA's nondiscretionary statutory duty. EPA's failure harms the public health and welfare of millions of residents in the Plaintiff States.

55. The Plaintiff States have a sovereign duty and responsibility to protect the health and welfare of their residents and quality of their environments. Yet in large part because of EPA's failure to promulgate a final rule, their residents continue to breathe air with additional, yet avoidable, emissions.

56. Until EPA finalizes its rules, the Plaintiff States are denied the relief provided by section 211(h) of the Act and may face delays in providing to their residents the E15 fuel that will best serve their air quality and pocketbooks.

57. As a result of EPA's failure to timely promulgate an RVP waiver consistent with the Act, Plaintiffs suffered and will continue to suffer harm from the increase in air pollution.

58. If EPA fails to follow the Act and fails to timely issue a waiver consistent with section 211(h) then the increased air pollution the Act seeks to avoid will harm millions of residents of both Iowa and Nebraska.

**CLAIM FOR RELIEF**  
**(Failure to Perform a Nondiscretionary Duty under 42 U.S.C.**  
**§ 7545(h))**

59. The Act's section 211(h) 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).

60. The Administrator received notice from the Governors on or around April 28, 2022, and the 90-day deadline elapsed on July 27, 2022.

61. EPA did not promulgate a rule establishing the applicable standard for 2023, and still has not done so for 2024.

62. EPA's failure to timely promulgate the rule in accordance with section 211(h) constitutes a failure to "perform any act or duty . . . which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2).

63. EPA's failure has harmed and will harm Plaintiffs and the citizens of their states by impairing their air quality, contributing to the detriment of the health and welfare of our residents, environment, economy, and property.

64. EPA's failure to timely issue a final rule constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" under 42 U.S.C. § 7604(a)(2).

65. EPA's ongoing failure to timely issue a final rule following the Governors' notification more than two years ago has harmed and continues to harm Plaintiffs by delaying implementation of measures

necessary to reduce the availability of what should be lawfully available fuel mixtures, including E15.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff States ask this Court to enter judgment:

1. Declaring that the Defendants have failed to perform a nondiscretionary act or duty under 42 U.S.C. § 7545(h) to promulgate regulations within 90 days of receiving the Governors' request;
2. Enjoining EPA to promulgate a final rule promptly under 42 U.S.C. § 7545 by a date certain, but more than six months before the first day of the 2024 high ozone season;
3. Awarding States their costs of litigation, including reasonable attorneys' fees recoverable under 42 U.S.C. § 7604(d);
4. Retaining jurisdiction over this matter to ensure EPA's compliance with the Court's order; and
5. Awarding any other relief that this Court deems just and proper.



August 7, 2023

Respectfully submitted,

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/s/ Eric H. Wessan

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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 August 7, 2023:

- |  |  |
|--|--|
| <input type="checkbox"/> U.S. Mail         | <input type="checkbox"/> FAX               |
| <input type="checkbox"/> Hand Delivery     | <input type="checkbox"/> Overnight Courier |
| <input type="checkbox"/> Federal Express   | <input type="checkbox"/> Other             |
| <input checked="" type="checkbox"/> CM/ECF |  |

Signature: /s/ Eric H. Wessan