RENEWABLE FUELS ASSOCIATION

April 20, 2023

Attention: Docket ID No. EPA-HQ-OAR-2022-0513

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
EPA Docket Center
Office of Air and Radiation Docket
Mail Code 28221T
1200 Pennsylvania Ave NW
Washington, DC 20460

Via: www.regulations.gov

Re: Comments on Proposed Rule; *Request from States for Removal of Gasoline Volatility Waiver* (88 Fed. Reg. 13758; March 6, 2023).

Dear Administrator Regan,

The Renewable Fuels Association (RFA) appreciates the opportunity to submit the attached comments regarding the U.S. Environmental Protection Agency's (EPA) proposed rule issued in response to petitions by the governors of several Midwest states to remove the 1-pound per square inch Reid vapor pressure waiver for summer conventional gasoline containing 10% ethanol (E10). EPA, *Request from States for Removal of Gasoline Volatility Waiver*; Proposed Rule (88 Fed. Reg. 13758; March 6, 2023).

RFA is the leading trade association for America's ethanol industry. Its mission is to drive expanded demand for American-made renewable fuels and bioproducts worldwide. Founded in 1981, RFA serves as the premier organization for industry leaders and supporters. With over 300 members, we work every day to help America become cleaner, safer, and more economically vibrant.

RFA is pleased that EPA is finally taking action to implement the governors' petitions, which will improve air quality and create a level playing field for 15% ethanol blends (E15) across much of the Midwest. Growing the market for E15 is not only vital to the future of the ethanol industry, but it also has direct benefits for American citizens, in the form of lower fuel prices, enhanced energy security, and lower greenhouse gas emissions. From January 2022 to early April 2023, E15 has been priced at an average discount of $0.27 per gallon to regular E10 unleaded at retail, or 7.4%.

However, we are deeply disappointed that EPA is proposing to delay implementation until April 2024. The original governors' petition was submitted to the Agency with all supporting documentation on April 28, 2022. EPA had a duty under Section 211(h)(5)(b) of the Clean Air Act to approve and implement the governors' petition within 90 days, which would have been no later than July 27, 2022. Instead, the administration did not act on the petition for nearly a year, and now EPA is using this delay as an excuse to defer implementation for another year. This is creating considerable uncertainty in the marketplace and putting at risk hundreds of millions of dollars of infrastructure investment by fuel retailers, ethanol producers, the U.S. Department of Agriculture, and other stakeholders.

There is no economic, environmental, or legal justification for the Agency to defer implementation another year. If there is any problem with implementing the governors' requests this summer, it is one of the administration's own making, which is not a legitimate reason for further delay. We strongly encourage EPA to reconsider its proposed delay, and we urge EPA to implement this rule before the summer volatility control season begins on June 1, 2023. If the Agency believes it cannot do so, then it should consider using other regulatory authorities to ensure that consumers have uninterrupted access to lower-cost, lower-carbon E15 this summer. Indeed, the conditions that led EPA to issue a series of emergency E15 waivers last summer still exist in the marketplace today.

These issues and others are discussed more fully in the attached comments. Thank you again for the opportunity to comment on this important rulemaking proposal, and please do not hesitate to contact me should you have any questions.

Sincerely,

Geoff Cooper
President & CEO

COMMENTS OF THE

RENEWABLE FUELS ASSOCIATION (RFA)

IN RESPONSE TO

REQUEST FROM STATES FOR REMOVAL OF GASOLINE VOLATILITY WAIVER,

PROPOSED RULE

DOCKET ID NO. EPA-HQ-OAR-2022-0513

88 FED. REG. 13758 (MARCH 6, 2023)

The Renewable Fuels Association (RFA) submits these comments in response to the U.S. Environmental Protection Agency's (EPA) proposed rule to remove the 1-pound per square inch (psi) Reid vapor pressure (RVP) waiver for conventional gasoline containing 10% ethanol (E10) sold in the summer in several Midwest states. EPA, *Request from States for Removal of Gasoline Volatility Waiver*; Proposed Rule (88 Fed. Reg. 13758; March 6, 2023).

On April 28, 2022, the governors of eight states notified EPA that they had decided to forgo the 1-psi RVP volatility waiver provided to E10 in Section 211(h)(4) of the Clean Air Act (the Act), beginning in the summer of 2023. The governors submitted their petition pursuant to Section 211(h)(5) of the Act, which provides that the Administrator shall remove the waiver via regulation upon a demonstration that it increases emissions that contribute to air pollution in any area of a state. The submission to EPA contained the necessary supporting documentation regarding emissions impacts. Subsequently, the governors of Ohio and Missouri notified the Agency of their intent to forgo the waiver as well.[1]

RFA is pleased that EPA is finally taking action to implement the governors' petitions, which will reduce emissions that contribute to air pollution and will create a level playing field for 15% ethanol blends (E15) across much of the Midwest. Growing the market for E15 is not only vital to the future of the ethanol industry, but it also has direct benefits for American citizens, in the form of lower fuel prices, enhanced energy security, and lower greenhouse gas emissions. All of these objectives have been the subject of rulemakings and executive orders issued by the Biden administration over the last two years. Last summer, at a time of record gasoline prices, consumers saved 20-30 cents per gallon on average by choosing E15.

[1] While the Missouri petition was not submitted until Dec. 21, 2022, the EPA proposal recognized that the "petition provided quantified reductions in VOC, NO_X, and CO emissions in Missouri based on MOVES modeling" (88 Fed. Reg. 13761).

However, we are deeply disappointed by EPA's lengthy and unjustified delay in publishing its response to the governors' petition and especially its proposal to defer implementation until April 2024. The Agency had a duty under Section 211(h)(5) of the Act to approve and implement the petitions within 90 days of receipt, which in the case of the initial request would have been no later than July 27, 2022. We strongly encourage EPA to reconsider its proposal to delay the implementation date, as we believe there is still time for the rule to take effect before the upcoming summer volatility control season begins on June 1, 2023.

There is no economic, environmental, or legal justification for the Agency to delay implementation by another year. The following comments address specific items in EPA's proposed rule.

I. EPA's failure to act on the governors' petitions for nearly a year and its proposal to delay implementation are unjustifiable and contrary to its statutory mandate.

EPA's issuance of the proposed rule on March 1, 2023, violates its obligation under Section 211(h)(5)(b) of the Act, which requires EPA to promulgate a regulation upon notification by a governor and accompanying "supporting documentation"…"not later than 90 days after the date of receipt."[2] EPA received the original governors' petition on April 28, 2022, but did not even propose to approve the petition until 308 days later, and final promulgation will most likely occur more than one year after receipt of the petition. EPA's statutory obligation to promulgate regulations implementing a governor's request pursuant to 211(h)(5) is non-discretionary in nature, as evidenced by the statute's use of the term "shall" in both 211(h)(5)(A) and 211(h)(5)(B).

Additionally, nothing in the statute or its regulatory history suggests the Agency's obligation to promulgate regulations implementing a governor's request under 211(h)(5) is subject to the public notice and comment process. Nor does the statute suggest a delegation to the general public of EPA's required technical evaluation of the states' analysis regarding air emission impacts resulting from the waiver, which the Agency has effectively done by seeking public comment.

Now, because EPA failed to meet its statutory obligation to promulgate regulations within 90 days of receiving the governors' petition, the Agency is proposing to delay implementation of the rule until April of 2024. Thus, simply because EPA was derelict in acting on the governors' petition, the residents of their states could potentially be prevented from accessing lower-cost, lower-carbon E15 during the summer of 2023.

[2] EPA released a pre-publication version of the proposal on March 1, 2023. The proposal was published in the Federal Register on March 6, 2023 (88 Fed. Reg. 13758).

II. EPA did not demonstrate that there would be an insufficient supply of gasoline in the petitioning states if the waiver is removed before the 2023 summer volatility control season.

Section 211(h)(5)(C)(ii) of the Clean Air Act allows the Administrator to "extend the effective date" of the promulgated regulation (i.e., delay implementation) *if* the Administrator "determines…that promulgation of regulations…would result in an insufficient supply of gasoline in the State…" This is the only permissible justification for delaying implementation of a governor's request to forgo the 1-psi RVP waiver in their state. EPA has failed to demonstrate that there would be an insufficient supply of gasoline as a consequence of implementing these regulations; thus, EPA has failed to meet the criteria necessary to justify a delay in implementation.

EPA states in the proposal, "We interpret 'insufficient supply of gasoline' to *require a demonstration* that gasoline supply disruptions are likely resulting from removal of the 1-psi waiver."[3] (Emphasis added.) The Agency had nearly a year to consider the governors' petitions. During that time, it could have conducted a detailed examination of the ability of refiners and other supply chain participants to provide the necessary quantities of lower-RVP conventional gasoline blendstock (CBOB), along with an analysis of any impacts on the fuel market. Instead, the Agency took a high-level view of the supply chain and referred extensively to studies that RFA commissioned from MathPro Inc. and ICF, LLC, although its use of those studies to justify its proposed determination of insufficient supply was inconsistent with the findings and tone of the reports.

EPA acknowledges, "At this time, we cannot predict which of the refineries that currently produce fuel for use in the petitioning states would choose to produce 8.0 psi RVP CBOB for use in the petitioning states."[4] Moreover, the proposal and accompanying "Technical Support Document for the Proposed Removal of the 1-psi Waiver" were replete with conjecture about hypothetical outcomes of the removal of the waiver, rather than substantiated findings about what would actually be expected to happen. The following are examples of statements in the proposal (emphasis added):

- "[A]dditional refineries outside of the immediate region *may* modify their operations to provide a lower RVP fuel."[5]
- "Therefore, this action *could* result in changes at refineries both within and outside of the Midwest region."[6]
- "For *some* refineries, removal of the 1-psi waiver *may* result in the refinery reducing the volatility of all the CBOB they produce. For other refineries, it *may* result in a choice to produce a new 8.0 psi RVP CBOB for distribution to the

[3] 88 Fed. Reg. at 13762.
[4] 88 Fed. Reg. at 13763.
[5] *Ibid*
[6] *Ibid*

petitioning states, while continuing to produce the current 9.0 psi RVP CBOB for distribution to other states."

- "In the near term, the large additional influx of excess butane *may* exceed the existing storage capacity, transport capacity, amount desired in the markets, or alkylation unit capacity."[7]
- "For those refineries that distribute all, or even most, of their gasoline to the petitioning states, this proposal will have little impact on their distribution operations. They can switch over their existing product tanks to hold only the lower RVP gasoline blendstock. However, for those refineries that produce gasoline for both the petitioning states and non-petitioning states, they *may* need to add additional tanks, pipes, manifolds, and control systems to store the additional grades of gasoline."[8]
- "It *may* be that, due to tankage and logistical limitations, refineries serving both markets *may* all initially shift all of their production to the lower RVP blendstock."[9]
- "*If* new regular and premium grades of the lower RVP CBOB needs to be shipped on the pipeline, then it *may* require the addition of new tankage at these breakout tank facilities."[10]

It is clear from a complete reading of the proposal that EPA failed to demonstrate that there would be an insufficient supply of gasoline in the petitioning states if the waiver were removed this summer. Rather, the Agency simply described circumstances that might potentially develop under hypothetical conditions. Further, none of the letters and comments from petroleum refiners and pipeline companies referenced by EPA establish a clear demonstration that promulgation of the regulations would result in an insufficient supply of gasoline. In addition, EPA does not characterize any of these letters from refiners and pipeline companies as a formal "petition of any person," as described in 211(h)(5)(C)(ii)(I), nor does EPA definitively state that it agrees with assertions of "insufficient supply" from the refiners and pipeline operators.

Finally, EPA based its finding of insufficient supply on three "*potential* supply constraints" (emphasis added), the first of which is low gasoline inventories.[11] A key statistic EPA cited is that Midwest (PADD 2) gasoline inventories at the end of January were the lowest since the Energy Information Administration (EIA) began reporting such statistics in 1990. However, the trigger for granting an extension of the effective date under 211(h)(5)(C)(ii) is a determination that "*promulgation of the regulations*…would result in an insufficient supply of gasoline." (Emphasis added.) In other words, the current level of gasoline inventories in the absence of promulgated regulations is not a relevant consideration.

[7] 88 Fed. Reg. at 13764.
[8] *Ibid*
[9] *Ibid*
[10] 88 Fed. Reg. at 13765.
[11] 88 Fed. Reg. at 13767.

III. EPA mischaracterizes the MathPro and ICF studies to justify its proposed action.

RFA commissioned MathPro and ICF to conduct studies of the implications of adapting summertime conventional gasoline in the Midwest to meet the lower-RVP specification required if the E10 waiver were removed. MathPro conducted an analysis of the additional costs that would be incurred by refiners.[12] As ICF described its study, "The focus … was limited to the supply chain for petroleum-derived gasoline blendstocks, including impacts to refiners, pipelines, and distribution terminals. The study provides an overview of the summer gasoline supply/demand balance and the composition of gasoline demand within the 8-state region and projects how these market dynamics are expected to change by summer 2023 when the RVP waiver opt-out would take effect."[13]

Although the ICF report is best considered in its entirety, its overall conclusion was that "maintaining supply in this market is expected to be manageable for refiners and pipeline operators under normal circumstances." Additionally, ICF determined that "most refineries, pipelines, and distribution terminals within the region should be able to fully switch over to the new lower-RVP gasoline specification with minimal challenges associated with product segregation."

Regarding butane, ICF indicated that because the region "is projected to have a surplus of in-region refinery gasoline production in summer 2023," the reduction in butane blending that would be necessary to reduce RVP "is expected to be manageable." EPA's proposal questioned butane handling and transportation capacity, but ICF examined the issue and determined that "refinery, pipeline, rail, and truck operators already have significant capacity to move butane and handling surplus butane during the summer month[s] is not expected to cause a significant issue."

MathPro analyzed the additional costs that would be incurred to produce lower-RVP CBOB in PADDs 1-4 – regions that collectively account for a large majority of the CBOB produced in the U.S. Specific to the Midwest (PADD 2), it estimated that the cost to refiners for reducing CBOB RVP by 1 psi in the summertime would be 2.2 cents per gallon. However, there would be a slight improvement of the fuel economy of the resulting gasoline, due to the removal of butanes and pentanes and their replacement with higher-density hydrocarbon blendstocks. This would result in an energy density savings of 0.7 cent per gallon that would accrue to consumers. Thus, the net cost would be 1.5 cents per gallon.

Notably, in the Technical Support Document, EPA stated, "Since the proposed rule affects only a portion of the states that comprise PADD 2 gasoline production, the capital

[12] MathPro. 2021. "Assessment of a 1 PSI Reduction in the RVP of Conventional Gasoline Blendstock (CBOB) in the Summer Gasoline Season." https://d35t1syewk4d42.cloudfront.net/upload/files/Policy/Documents/Assessment%20of%20Reducing%20RVP%20Of%20Gasoline%20in%20Summer%20Season%20%20Dec%202021.pdf.

[13] EPA has the full ICF report. As EPA noted in the Technical Support Document, the study "was completed prior to the addition of the Ohio and Missouri petitions to remove the 1-psi waiver and prior to Kansas and North Dakota rescinding their petitions."

costs for refineries would be expected to be perhaps half of those estimated by Mathpro. If the available excess volumetric and octane production capacity among all PADD 2 refineries, as well as the PADD 3 refineries that supply PADD 2, is sufficient to make up for this removed butane, then the refining sector may not need to invest any capital dollars to cover the removed butane. If this is the case, *refineries may be able to adapt to this change by the summer of 2023*." (Emphasis added.)

It is also notable that EPA acknowledges in the proposal, "At this time, we cannot quantify the gasoline supply impacts as a result of distribution issues."[14] Combined with the overall analysis and findings in the MathPro and ICF studies, these statements indicate that a determination cannot be made that there would be an insufficient supply of gasoline this summer.

Finally, although EPA spends a considerable amount of time discussing the MathPro study, it recognizes in the Technical Support Document that "consideration of costs and prices are not factors in EPA's decision making on this proposed action." This is an important acknowledgement by the agency; nothing in the statute permits EPA to consider costs to refiners as a condition of approving a governor's petition. In any case, as the MathPro and ICF studies demonstrate, any incremental cost to refineries related to reducing the RVP of CBOB by 1 psi during the summer would be minimal. If EPA were to conduct a more comprehensive analysis of the impacts of waiver removal on the gasoline market, it would also need to take into account that ethanol has been priced at a significant discount to gasoline blendstock at the wholesale level since the beginning of 2022, which continues to be the case.

This wholesale cost-competitiveness has filtered through to retail prices. On average from January 2022 to early April 2023, E15 was priced at a $0.27 per gallon (7.4%) discount to regular E10 unleaded at retail according to E15prices.com, a website featuring crowd-sourced, near real-time information on retail fuel prices at specific stations (Exhibit 1). This estimate is based on more than 1,500 user submissions that included prices for both E15 and E10 at the same retail location on the same date. Geographically, it encompasses 580 unique retail locations operating in 30 states, equivalent to about 21% of the 2,751 known stations in the E15prices.com database.

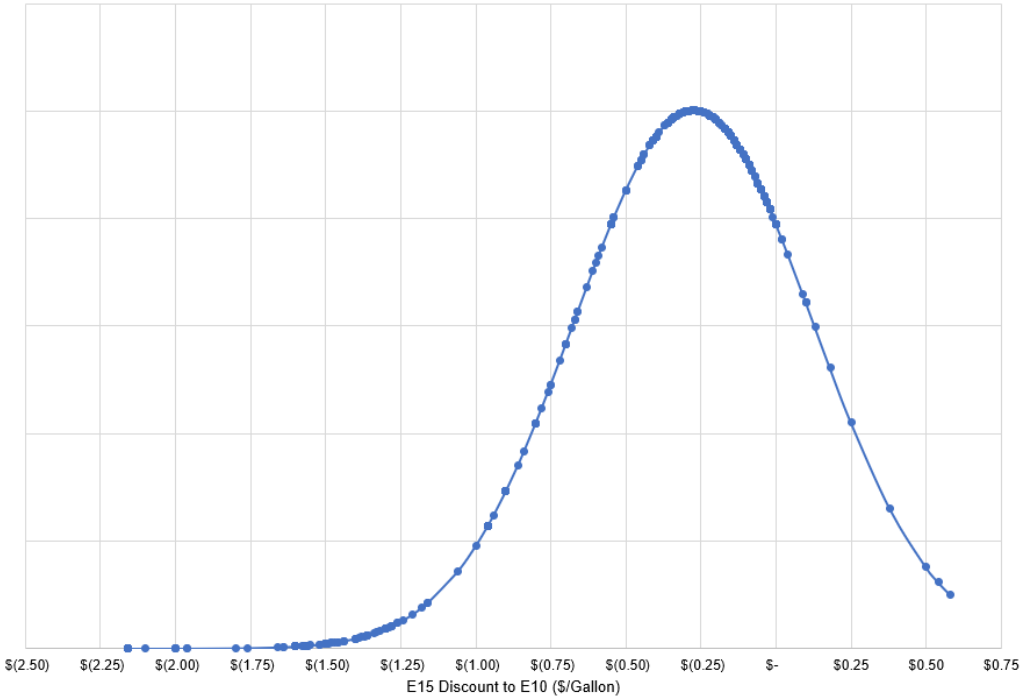
IV. Any difficulty in implementing the waiver removal in the summer of 2023 would likely be a result of EPA's lengthy delay in responding to the governors' petitions.

If there is any difficulty in implementing the waiver removal in time for this summer's volatility control season, the root cause would be EPA's failure to promulgate a regulation last year for all states other than Missouri, in violation of Section 211(h)(5)(b).[15] EPA admits, "We recognize that the initial requests made by the governors of many of the states were

[14] 88 Fed. Reg. at 13767.
[15] The petition by the governor of Missouri was submitted on December 21, 2022.

submitted in the spring of 2022, such that a summer of 2023 effective date may have been possible."[16] The agency's violation was of its own making, and no *post hoc* rationale can justify additional delay in the implementation of EPA's statutory obligation.

Exhibit 1: National E15 Price Discount to E10, from Jan. 1, 2022, to Apr. 7, 2023



Source: E15prices.com

Such a delay would harm renewable fuel producers in these states and put at risk large-scale investments by fuel retailers, the U.S. Department of Agriculture (USDA), and other stakeholders. This includes funds from the Biofuels Infrastructure Partnership (BIP) and the subsequent Higher Blends Infrastructure Incentive Program (HBIIP) that were administered by the USDA.

Nationally, the federal government has allocated $300 million to date to the two programs, including $100 million for BIP and $200 million for HBIIP. At least $280 million has been invested by the private sector in projects that received USDA funding through BIP and the first round of HBIIP. The private investment associated with the second round of HBIIP is expected to exceed the combined amount for BIP and the first round of HBIIP. Thus, total investment by the federal government and private sector in connection with the two programs is estimated to be approximately $1 billion. Although these are national statistics, 60% of the stations selling E15 are in the states covered by EPA's proposal, according to E15prices.com.

EPA should redress its statutory shortcomings by promptly finalizing its proposal in time for the 2023 ozone season. EPA acknowledges that it has not demonstrated that

[16] 88 Fed. Reg. at 13759.

promulgation of the regulation would result in insufficient supply, stating in the Technical Support Document, “Given the large number of variables, we are not able to project what the supply impact might be and the resulting impact on gasoline prices.” Thus, EPA has failed to satisfy the only statutory criterion allowing an extension of the effective date.

While it cannot be ruled out that there will be an unforeseen disruption in gasoline supplies this summer (e.g., a refinery outage), such an event is impossible to predict in advance. Regulations cannot be based on the mere possibility of an adverse event occurring simultaneously with their implementation, and in this case the identification of such a possibility does not serve as demonstration that there will be an insufficient supply of CBOB in the petitioning states. Additionally, EPA has other regulatory authorities available to address such unforeseen disruptions and emergencies (e.g., Section 211(c)(4)(C)(ii) of the Clean Air Act).

ICF addressed the potential for disruptions and determined that such “events in the Midwest have occurred approximately once every four years.” Notably, ExxonMobil started up the large-scale expansion of its Beaumont, Texas, refinery in March, adding 250,000 barrels per day of capacity, which would help offset any U.S. refinery outage this summer.[17]

Unless EPA acts quickly, many Midwest drivers will soon lose the ability to purchase E15, a fuel that has saved American consumers an average $0.27 per gallon since the beginning of last year—a time of record gasoline prices.

V. Conclusion

RFA appreciates the opportunity to submit these comments regarding EPA’s proposed rule that was issued in response to petitions by the governors of several Midwest states to remove the 1-psi RVP waiver for E10. We urge EPA to reconsider its proposed timeline and implement the rule before the summer volatility control season begins on June 1, 2023.

[17] ExxonMobil. 2023. "ExxonMobil Boosts Fuel Supply with $2 Billion Beaumont Refinery Expansion." Accessed April 12, 2023. https://corporate.exxonmobil.com/news/news-releases/2023/0316_exxonmobil-boosts-fuel-supply-with-2-billion-dollar-beaumont-refinery-expansion.