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IOWA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

March 6, 2023

SENT VIA EMAIL AND CERTIFIED MAIL

The Honorable Michael Regan
Mail Code 1101A
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: ***Effective Date of Regulations Promulgated Under the Clean Air Act – Section 304(b)(2) Notice***

Dear Administrator Regan:

We write on behalf of the States of Iowa and Nebraska to provide notice required by section 304(b)(2) of the Clean Air Act based on the U.S. Environmental Protection Agency's failure to perform mandatory, non-discretionary duties under section 211(h)(5) of the Act. Within 90 days of notification by a State Governor, the Administrator is required to promulgate regulations that apply, in lieu of the Reid vapor pressure ("RVP") limitation established by 211(h)(4), the RVP limitation established in 211(h)(1) to all fuel blends containing gasoline and 10 percent ethanol that are sold, offered for sale, dispensed, supplied, offered for supply, transported, or introduced in commerce in a state during the high ozone season.¹ The Administrator's delay in acting on such a request and the proposed further delay in implementation constitute arbitrary and capricious action, violate the statutory text, and are in effect a constructive denial of the waiver the Governors requested. Iowa and Nebraska notify the EPA that they reserve the right to sue to seek injunctive relief, and all other relief authorized by law.

On April 28, 2022, Governor Kim Reynolds of Iowa and Governor Pete Ricketts of Nebraska formally notified the Administrator that the RVP limitation established by 211(h)(4) increases emissions that contribute to air pollution in their states.

The Governors requested that, pursuant to the 211(h)(5) of the Act, the Administrator promulgate regulations to instead apply the RVP limitation

¹ 42 U.S.C. § 7545(h)(5)(A).

established by 211(h)(1) within the required 90 days. The Governors explained that this action would not only reduce emissions that contribute air pollution, but would also provide relief, flexibility, and certainty for the fuel market and consumers amid record-high gasoline prices within their states. Indeed, the Proposed Rule agrees that “the supporting documentation provided by the petitioning states find that the MOVES modeling results submitted to the EPA demonstrate a reduction in emissions of multiple pollutants upon removal of the 1-psi waiver for E10, as required under CAA section 211(h)(5).”²

On receiving a Governor’s notification, the Act states that the Administrator “shall, by regulation,” effectuate the Governor’s requested action.³ Indeed, the proposed rule agrees that the statutory language “provides limited if any discretion for EPA to consider other issues” once it receives a request from a Governor.⁴ The Act further requires that such regulations shall be promulgated “not later than 90 days after the date of receipt of a notification from a Governor.”⁵ Thus, the mandatory, non-discretionary deadline for promulgating these regulations was July 27, 2022.

Yet after taking almost a year to respond to the Governors’ requests, the proposed rule has as an effective date April 28, 2024—exactly two years from when the first request was sent. Indeed, there is no guarantee even then that the proposed rule will go into effect, as the EPA has received and solicited additional petitions from stakeholders requesting further extension.

The undue delay has led now to an even further delay of implementation. Without emergency action or a lawsuit, the RVP waiver will remain in effect throughout the 2023 summer driving season. EPA’s delay and inaction is, in effect, a constructive denial.

EPA’s failure to perform these mandatory, non-discretionary duties in a timely manner violates the Clean Air Act. The Administrator’s action in granting the Governors’ request is proper and required by the statute, but the one-year delay stands to harm air quality. It also creates uncertainty and confusion in the marketplace, and left unaddressed, will result in increased emissions and higher fuel prices for consumers. At best, this delay is arbitrary and capricious, at worst it is plainly unlawful.

² Request From States for Removal of Gasoline Volatility Waiver, 88 Fed. Reg. 13758 (proposed Mar. 6, 2023) (to be codified at 40 C.F.R. pt. 1090), at *13.

³ 42 U.S.C. § 7545(h)(5)(A).

⁴ 88 Fed. Reg. 13760.

⁵ 42 U.S.C. § 7545 (h)(5)(B).

Purportedly driving EPA’s delay is its decision to find an “insufficient supply of gasoline” in the States requesting the Section 211 waiver.⁶ EPA’s finding elides an uncomfortable fact—for much of the year, the infrastructure EPA frets will struggle to comply with the waiver handles gasoline at the RVP levels the waiver will allow.⁷ Indeed, EPA itself acknowledges that it is “highly likely that refineries that supply gasoline” to petitioning states will “adjust their refinery processes to reduce the RVP of their CBOB [Conventional gasoline before oxygenate blending].”⁸

The EPA suggests three reasons underlying its assessment of insufficient supply: “(1) The already low gasoline inventories; (2) The need for early coordination between various parties to make the necessary physical changes to the gasoline production and distribution infrastructure and the associated lead time required; and (3) The physical loss of supply necessary to produce a lower RVP gasoline.”⁹ There is no explanation as to how the gasoline supply normally manages with those concerns in the normal course during the Fall, Winter, and Spring. To the extent there are real production, distribution, retail, and other problems as raised by EPA, those are problems of EPA’s own creation. Had EPA responded as required in the 90-day window, there would be no need for the delay to accommodate the infrastructure necessary for an April 2023 waiver.

Therefore, the States of Iowa and Nebraska urge EPA to change the effective date of the regulations in the covered states to April 28, 2023. If EPA believes it is not able to comply with the Clean Air Act and promulgate the timely regulations, we demand that EPA issue temporary emergency declarations for the 2023 high-ozone season to bridge the gap until the waiver takes place. Should EPA fail to do so within 60 days of this notice,¹⁰ we reserve the right to sue for relief, including an order compelling EPA to promptly perform its mandatory, non-discretionary duties.¹¹

⁶ 88 Fed. Reg. 13767.

⁷ *Id.* Indeed, the regulation recognizes there is already a complicated patchwork of regulations with different RVP standards that refiners and gasoline transporters already expertly navigate. *Id.* at *13767–68.

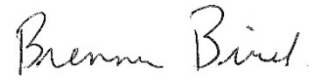
⁸ *Id.* at 13764.

⁹ *Id.* at 13767.

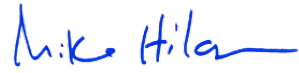
¹⁰ *See* 42 U.S.C. § 7604(b)(2) (“No action may be commenced . . . under subsection (a)(2) prior to 60 days after the plaintiff has given notice of such action to the Administrator.”).

¹¹ *See* 42 U.S.C. § 7604(a)(2) (“any person may commence a civil action . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator”); 5 U.S.C. § 706(1) (“The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed”).

Sincere regards,

A handwritten signature in black ink that reads "Brenna Bird". The signature is written in a cursive style with a prominent initial "B".

Brenna Bird
Attorney General of Iowa

A handwritten signature in blue ink that reads "Mike Hilgers". The signature is written in a cursive style with a prominent initial "M".

Mike Hilgers
Attorney General of Nebraska