

# Request from States for Removal of Gasoline Volatility Waiver

## Response to Comments

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Assessment and Standards Division  
Office of Transportation and Air Quality  
U.S. Environmental Protection Agency

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## List of Acronyms and Abbreviations

Numerous acronyms and abbreviations are included in this document. While this may not be an exhaustive list, to ease the reading of this document and for reference purposes, the following acronyms and abbreviations are defined here:

bpcd	Barrels per Calendar Day
BOB	Gasoline Before Oxygenate Blending
CAA	Clean Air Act
CBOB	Conventional Gasoline Before Oxygenate Blending
CO	Carbon Monoxide
CWA	Clean Water Act
EISA	Energy Independence and Security Act
EPA	U.S. Environmental Protection Agency
EPAct	Energy Policy Act of 2005
LSR	Light Straight Run Naphtha
NOx	Nitrogen Oxides
PM	Particulate Matter
PTD	Product Transfer Document
RFS	Renewable Fuel Standard
RVP	Reid Vapor Pressure
SIP	State Implementation Plan
TSD	Technical Support Document
USDA	U.S. Department of Agriculture
VOC	Volatile Organic Compound

# 1. Broad Policy Issues

## **Comment:**

Many commenters expressed their support for the rule and suggested that it would grow the market for E15, resulting in economic benefits to the ethanol industry, lower fuel prices, enhanced energy security, and lower greenhouse gas emissions.

## **Response:**

We thank the commenters for their support.

## **Comment:**

Several commenters suggested that modeling performed by the petitioning states indicated that removal of the 1-psi waiver would improve air quality. One commenter suggested that the removal of the 1-psi waiver would lower the volatility of gasoline, which would decrease evaporative emissions. The commenter also noted that the rule would facilitate air quality improvements from potential increased availability of E15 blends. Another commenter expressed concern that “changing the 1-psi waiver is considered air pollution,” citing to a recent study indicating that E15 reduces emissions of PM, CO, and NO<sub>x</sub> compared to E10.

## **Response:**

We thank the commenters for their comments and acknowledge the studies cited. The demonstration required by the Clean Air Act (CAA) reflects an increase in emissions as a result of the 1-psi waiver being in place. Specifically, as explained in Preamble Section IV, we assessed whether the supporting documentation provided by the petitioning states and the MOVES modeling results submitted to EPA demonstrated a reduction in emissions of pollutants upon removal of the 1-psi waiver for E10. In particular, the modeling demonstrated emissions reductions in volatile organic compounds (VOCs), CO, and NO<sub>x</sub> within each state upon removal of the 1-psi waiver. EPA has consistently explained that adding 10 percent ethanol to gasoline causes roughly a 1.0 psi RVP increase in the blend’s volatility, which is the premise for the 1-psi waiver contained in CAA section 211(h)(4).<sup>1</sup> At proposal, EPA also explained that we do not interpret the CAA as requiring a demonstration of a reduction in emissions of all pollutants that contribute to air pollution in the requesting states because reducing RVP is a volatility control measure. We are of the view, therefore, that it is more appropriate to evaluate the impact of the 1-psi waiver on VOC emissions from gasoline containing 10% ethanol.

## **Comment:**

One commenter suggested that the rule would lead to the balkanization of the gasoline market, and supported delay until inefficiencies through the downstream distribution chain are resolved.

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<sup>1</sup> See, e.g., 52 FR 31274, 31293 (August 19, 1987).

**Response:**

Removal of the 1-psi waiver will result in a different gasoline type that will need to be produced and distributed to the petitioning states. We discuss our assessment of the resulting impacts on the downstream distribution chain in Preamble Section V.B and the Technical Support Document (TSD).

**Comment:**

One commenter suggested that the rule “lacks significant environmental benefits” and indicated the purpose of the petitioning states’ petitions is to allow blending of E15 in the summer months. The commenter suggested that EPA should consider the full lifecycle emissions of removing the 1-psi waiver.

**Response:**

We disagree. CAA section 211(h)(5) calls for the removal of the 1-psi RVP waiver for E10 upon a showing of emissions increases that are associated with the 1-psi waiver. Evaporative emissions from motor vehicles and off-highway equipment are a major source of VOCs. The amount of evaporative emissions from a gasoline blend is closely related to its volatility, which increases when 10-15% ethanol is blended with gasoline. EPA has consistently explained that adding 10% ethanol to gasoline causes roughly a 1.0 psi RVP increase in the blend’s volatility, which is the premise for the 1-psi waiver contained in CAA section 211(h)(4) and the subject of this action.<sup>2</sup> Evaporative emissions from gasoline—specifically VOCs—are precursors to the formation of tropospheric ozone and contribute to the nation’s ground-level ozone problem. NO<sub>x</sub> and CO can also be ozone precursors. Exposure to ground-level ozone can reduce lung function (thereby aggravating asthma or other respiratory conditions), increase susceptibility to respiratory infection, and may contribute to premature death in people with heart and lung disease. We thus find that demonstration of increased VOC emissions with the 1-psi waiver in place is sufficient to grant the petitions for removal of the waiver. The commenter correctly notes modeled increases in PM and on-road benzene emissions as a result of removing the 1-psi waiver, as compared to “fractional percentage decrease of VOCs, [CO, and NO<sub>x</sub>].” But even were EPA to look at the modeled emissions impacts of CO and NO<sub>x</sub>, those reductions would, in addition to VOC emissions impacts, also satisfy the requirements of the statute and could justify granting the petitions. We note that the magnitude of increases and decreases is about the same for all pollutants. We do not find that full lifecycle emissions are required by CAA section 211(h)(5), which EPA has interpreted as calling for the petitions to be granted upon demonstration only that the 1-psi waiver increases emissions when applied to gasoline containing 10% ethanol. In this regard, based on our determination that the petitioning states have met the statutory criteria for removal of the 1-psi waiver, we are compelled to remove the 1-psi waiver in those states.

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<sup>2</sup> See, e.g., 52 FR 31274, 31292-93 (August 19, 1987); 54 FR 11868, 11879 (March 22, 1989).

## 2. Legal Authorities

### 2.1 Petition Requirements

#### Comment:

One commenter suggested that EPA could not approve requests for removal of the 1-psi waiver because the statute requires that the request demonstrate that “the waiver *will increase* emissions.” The commenter suggested that the petitioning states have not met the demonstration. They contend that this is because E10 is the ubiquitous gasoline blend, and any change in air quality from the 1-psi waiver occurred long ago; thus, in 2023, the 1-psi waiver would not increase emissions as compared to the status quo. The commenter pointed to the context for the enactment of CAA section 211(h)(5) alongside the Renewable Fuel Standard (RFS) program in 2005, suggesting that the RFS program was intended to “push ethanol beyond the Midwest” and CAA section 211(h)(5) would “ensure states could preserve air quality as ethanol blends expanded into other parts of the country.”

#### Response:

We disagree with the commenter. Evaporative emissions from motor vehicles and off-highway equipment are a major source of VOCs that contribute to ozone formation. The amount of evaporative emissions from a gasoline blend is closely related to its volatility, which generally increases when ethanol is blended with gasoline. As discussed in Preamble Section III, EPA has consistently explained that adding 10% ethanol to gasoline causes roughly a 1.0 psi RVP increase in the blend’s volatility. This increase in the blend’s volatility is reflected in the 1-psi waiver contained in CAA section 211(h)(4) and the subject of this action.

In 1989, EPA began regulating the volatility of gasoline due to its impact on vehicle emissions, especially evaporative emissions.<sup>3</sup> Vehicles were designed to capture evaporative emissions with RVP levels up to 9.0 psi, but higher in-use fuel RVP levels were leading to excessive in-use evaporative VOC emissions, which is a key contributor to ozone formation. Despite the impact of higher RVP on emissions, gasoline containing 10% ethanol (E10) was provided with a 1-psi waiver from the new RVP standards to allow the then-common market practice of splash blending 10% ethanol on top of finished gasoline. At that time, E10 comprised such a small portion of the gasoline pool that supporting the nascent ethanol industry was deemed more important than the small increase in evaporative emissions that would result from the increase in fuel volatility from splash blending of ethanol.<sup>4</sup> In the 1990 CAA amendments, a 1-psi waiver exclusively for fuel blends of gasoline and 10 percent ethanol was specifically provided in CAA section 211(h)(4).

In the Energy Policy Act of 2005 (EPAct), as the commenter correctly notes, Congress instituted a renewable fuel program requiring increasing volumes of renewable fuel be used in gasoline through 2022. In recognition of the expected increase in ethanol use resulting from these

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<sup>3</sup> 54 FR 11868 (March 22, 1989).

<sup>4</sup> See, e.g., 52 FR 31293-95 (August 19, 1987); 54 FR 11879 (March 22, 1989).

provisions, Congress added the state relief provision in CAA section 211(h)(5) to allow states to obtain an exclusion from the less-stringent RVP limit under CAA section 211(h)(4) for air quality reasons. Relevant legislative history indicates that CAA section 211(h)(5) is intended to allow states an “expedited process” for the elimination of the 1-psi waiver in areas where application of the waiver would increase emissions that contribute to air pollution.<sup>5</sup>

The statute requires a demonstration that the 1-psi waiver increases emissions that contribute to air pollution in the state of the requesting governor. Specifically, CAA section 211(h)(5)(A) requires EPA to remove the 1-psi waiver if it “will increase emissions that contribute to air pollution . . . during the high ozone season.” The term “will” connotes consideration of emissions that are expected in the future and as relevant here during the “high ozone season.”<sup>6</sup> Further, as instructed in CAA section 211(h)(1), we have defined “high ozone season” as the period from “June 1 through September 15 for retailers and [whole purchaser consumers], and May 1 through September 15 for all other persons.”<sup>7</sup> Legislative history also indicates that this provision “provides States an expedited process to eliminate the one-pound waiver in any area of a State if the State demonstrates to the Administrator that the one-pound waiver will increase emissions that contribute to air pollution in any area in the State.”<sup>8</sup> Thus, the text and legislative history indicate Congress viewed section 211(h)(5) as addressing the potential for air pollution problems from the relaxed RVP limit in section 211(h)(4).

CAA section 211(h)(5) therefore recognizes that the relaxed RVP limit in CAA section 211(h)(4) could increase emissions that contribute to air pollution and provides states with an appropriate solution. As noted previously, the effects of increased RVP on evaporative emission control systems have been consistently documented in past EPA rulemakings.<sup>9</sup> We therefore read the phrase as calling for the consideration of emissions that are expected in the petitioning states during future high ozone seasons. And when a state notifies EPA that the RVP limit under CAA section 211(h)(4) is contributing to air pollution in the state of the requesting governor, EPA is to apply the more stringent RVP limit under paragraph (1) in lieu of the relaxed limit allowed under CAA section 211(h)(4).

It is noteworthy, that at the time CAA section 211(h)(5) was enacted, there was indeed more limited availability of E10, and thus, any additional E10 sold that utilized the 1-psi waiver in the summer months could indeed “increase emissions” with increased volatility as modeled by MOVES.

EPAct enacted the first iteration of the RFS program, which required up to 7.5 billion gallons of renewable fuel to be used in the United States. The CAA and RFS program were modified in 2007, through the Energy Independence and Security Act (EISA), which increased the volumes

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<sup>5</sup> S. Rep. No. 108-57, 108th Cong. 1st Sess. at 10 (2003) (Conf. Rep.).

<sup>6</sup> This reading is like, for example, our reading of “will” in CAA section 110(a)(2)(D)(i). (The term “will” in CAA section 110(a)(2)(D) means that State implementation plans are required to eliminate the appropriate amounts of emissions that presently, or that are expected in the future, contribute significantly to nonattainment downwind. 63 FR 57375 (October 27, 1998)).

<sup>7</sup> 40 CFR 1090.80.

<sup>8</sup> S. Rep. No. 108-57, 108th Cong. 1st Sess. at 10 (2003) (Conf. Rep.).

<sup>9</sup> See, e.g., 52 FR 31293-95 (August 19, 1987); 54 FR 11879 (March 22, 1989).



of renewable fuel required, at which time Congress acted with CAA section 211(h)(5) still in place.

That ethanol blends have expanded into the U.S.—and more specifically into the petitioning states—does not mean that CAA section 211(h)(5) no longer applies. As modeled by the petitioning states, the existence of the 1-psi waiver currently results in increased VOCs emissions and its removal will reduce these emissions in the petitioning states during the high ozone season. Given such demonstration, it would not be reasonable to read CAA section 211(h)(5) as prohibiting states from making such a request at the current time simply because, as suggested by the commenter, the 1-psi waiver cannot increase emissions compared to the status quo.

**Comment:**

One commenter stated, without further explanation, that Congress required petitioning states to submit “detailed supporting documentation” concerning the impact on any area of the state where they seek to have the 1-psi waiver removed, suggesting that what was submitted by the petitioning states did not meet this standard.

**Response:**

We disagree. CAA section 211(h)(5) reads, in relevant part, “[u]pon notification, accompanied by supporting documentation, from the Governor of a State that the Reid vapor pressure limitation established by paragraph (4) will increase emissions that contribute to air pollution in any area in the State.” As explained Preamble Section III, EPA’s role is to evaluate the supporting documentation provided by the governors. CAA section 211(h)(5) is silent as to the specific supporting documentation, and relevant legislative history indicates that the supporting documentation provided by governors need not be as stringent as that called for under CAA section 211(c)(4)(c).<sup>10</sup> Under CAA section 211(c)(4)(C)(i), a state must make a “necessity” showing prior to EPA approval of a fuel measure into the state implementation plan (SIP). This “necessity” showing calls for, amongst other things, a demonstration of the emissions shortfall needed for attainment of a particular air quality standard.<sup>11</sup> As explained in Preamble Section III, EPA views MOVES as an appropriate tool for modeling the emission impacts required by CAA section 211(h)(5). The MOVES runs performed by the states compared emissions from motor vehicles and nonroad vehicles and equipment with and without the 1-psi waiver for E10 in each state in during the summer season. We also note that similar analyses have been used to support prior EPA actions for federal and state fuel programs.<sup>12</sup> EPA is of the view, therefore, that a demonstration of increased VOC emissions with the 1-psi waiver in place is sufficient to grant the petitions for removal of the 1-psi waiver.

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<sup>10</sup> Senate Report No. 106-426 at 12 (September 28, 2000).

<sup>11</sup> CAA section 211(c)(4)(C)(i). The “Guidance on Use of Opt-in to RFG and Low RVP Requirements in Ozone SIPs,” August 1997, gives further guidance on factors EPA is likely to consider in making a finding of “necessity” under CAA section 211(c)(4)(C)(i).

<sup>12</sup> For example, on June 7, 2017, EPA published a final rule to relax the federal 7.8 psi RVP standard in the Nashville, TN area (82 FR 26354) and on March 12, 2021, EPA published two final rules that removed approved regulations from the Kansas and Missouri SIPs that required the sale of 7.0 psi RVP gasoline in the Kansas City, KS-MO area (86 FR 14000 and 86 FR 14007).

Therefore, we disagree with the commenter that the CAA requires more supporting documentation than was submitted by the petitioning states. Even were we to accept the commenter's formulation as correct, the MOVES runs—covering all areas of the state where the 1-psi waiver currently applies—are “detailed supporting documentation” and thus would satisfy the commenter.

**Comment:**

One commenter suggested that the states do not cite an “air quality concern” and that Congress's purpose behind enacting CAA section 211(h)(5) was to address air quality concerns. The commenter suggested that EPA's interpretation of “emissions that contribute to air pollution” is inconsistent with the meaning of “air pollutant,” as discussed by EPA in prior rulemaking actions.

**Response:**

CAA section 211(h)(5) uses the phrase “emissions that contribute to air pollution.” As explained in Preamble Section III, CAA section 211(h)(1) requires EPA to set RVP standards to address “evaporative emissions.” Reducing RVP is a volatility control measure for VOCs, which are “air pollutants” as contemplated by CAA section 302(g).<sup>13</sup> Evaporative emissions from gasoline—specifically VOCs—are precursors to the formation of tropospheric ozone and contribute to the nation's ground-level ozone problem. Exposure to ground-level ozone can reduce lung function (thereby aggravating asthma or other respiratory conditions), increase susceptibility to respiratory infection, and may contribute to premature death in people with heart and lung disease.<sup>14</sup> Additionally, EPA has consistently explained that adding 10% ethanol to gasoline causes roughly a 1.0 psi RVP increase in the blend's volatility, which is the premise for the 1-psi waiver contained in CAA section 211(h)(4) and the subject of this action.<sup>15</sup> EPA is of the view, therefore, that it is reasonable to consider “air pollution” emanating from emissions of such gasoline and, thus, that it may be most appropriate to evaluate the impact of the 1-psi waiver for E10 on VOC emissions in addressing petitions to remove the 1-psi waiver under CAA section 211(h)(5).

We also note that the commenter does not provide a source for their asserted Congressional purpose.

**Comment:**

One commenter suggested that the CAA does not require notice and comment for EPA to issue regulations implementing removal of the 1-psi waiver in the petitioning states. The commenter also suggested that by requesting comment on the petitioning states' MOVES analyses, EPA was

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<sup>13</sup> 40 CFR 51.100(s).

<sup>14</sup> See, e.g., Regulatory Impact Analysis: Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards Final Rule, EPA-420-R-14-005, at 6-4-5.

<sup>15</sup> See, e.g., 52 FR 31293-95 (August 19, 1987); 54 FR 11879 (March 22, 1989).

“delegate[ing] to the general public . . . EPA’s required technical evaluation of the states’ analysis regarding air emission impacts.”

**Response:**

CAA section 211(h)(5) states that EPA “shall, *by regulation*, apply . . . the Reid vapor pressure limitation established by paragraph (1).” This reference to regulation implies a notice and comment process, as modifications to EPA’s regulations under the CAA are subject to the CAA section 307(d) rulemaking process. Specifically, CAA section 307(d)(1)(E) reads “This subsection applies to -- . . . the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section [211] of this title.” Therefore, we disagree with commenters; the CAA does require notice and comment for EPA to remove the 1-psi waiver, *by regulation*, under CAA section 211(h)(5).

Additionally, the statute requires a demonstration that the 1-psi waiver increases emissions that contribute to air pollution in the state of the requesting governor. Thus, EPA’s role is to evaluate the supporting documentation provided by the governors. EPA requested public comment on the MOVES modeling submitted by the petitioning states and we have evaluated the modeling results to determine whether the statutory criteria are met, taking into consideration the comments received. As previously explained, if EPA concludes that the supporting documentation demonstrates emissions increases with the 1-psi waiver in place, then CAA section 211(h)(5) requires EPA to promulgate regulations to remove the 1-psi waiver as requested. This is not “improperly delegating” this authority as suggested by the commenter.

**Comment:**

One commenter suggested that the CAA does not compel EPA to grant the request of the petitioning states if doing so would result in an insufficient supply of gasoline, or where there is evidence that eliminating the 1-psi waiver would increase emissions that contribute to air pollution.

**Response:**

While it is true that the CAA allows EPA to delay implementation of the removal of the 1-psi waiver based on insufficient supply of gasoline in the petitioning states under CAA section 211(h)(5)(C), it does not provide that an insufficient supply of gasoline as a basis for EPA to deny such a request. Additionally, for the reasons discussed in Preamble Section II and in earlier responses to comments, we do not read the statute to require reductions of *all* emissions that contribute to air pollution.

## 2.2 Extension Requirements

### **Comment:**

Several commenters supported removal of the 1-psi waiver in the petitioning states beginning in the summer of 2023. One commenter suggested that EPA failed to meet the statutory criteria required to delay the effective date (i.e., to demonstrate that there would be an insufficient supply of gasoline in the petitioning states if the waiver is removed for the summer of 2023). One commenter stated that by delaying implementation to 2024, EPA was favoring refiners over the environment, consumers, and retailers.

### **Response:**

We disagree with comments that EPA failed to demonstrate that there would be an insufficient supply of gasoline in the petitioning states if the effective date of the removal of the waiver is the summer of 2023. In the proposal, we concluded that there would have been insufficient supply of gasoline in the petitioning states in the summer of 2023 and in doing so, we discussed several factors informing our determination.<sup>16</sup> To the extent the commenter's concerns are relevant for our renewal of the determination of insufficient supply for the summer of 2024, we have considered them in making such a determination. We acknowledge comments that are in support of our proposal.

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<sup>16</sup> 88 FR 13767 (March 6, 2023).

### 3. Supply Analysis

#### Comment:

One commenter submitted a report (the Baker and O'Brien Study)<sup>17</sup> that showed that removing the 1-psi waiver in seven states would reduce the supply of gasoline by 88–125 thousand barrels per day (kbpd) and the supply of distillate fuel by 20–33 kbpd.<sup>18</sup> The Baker and O'Brien Study included a description of the supply analysis, a summary of a survey of refiners and petroleum fuel distributors, a refinery modeling study, and descriptions of various analyses and conclusions.

The Baker and O'Brien Study contained the following assumptions and conclusions:

- Refiners would need to remove and sell incremental high RVP streams to comply with removal of 1-psi waiver.
- Many potentially affected refiners currently operate near a physical or economic limit for removing light ends from summer gasoline, and therefore would need to invest in fractionation, piping, and storage.
- Some refineries cannot produce low-RVP conventional gasoline before oxygenate blending (CBOB) by solely removing butane and would need to remove light straight run naphtha (LSR) with a much larger impact on gasoline supply.
- Some refiners may need to reduce crude unit utilization rates, thus lowering gasoline and distillate production.
- Some refiners may find recovering lost octane from removing high-octane butane to be a challenge; all refiners already maximize alkylate unit throughput, some refiners could increase reformer rate or severity, while others are maximized, some refiners may need to purchase high octane gasoline blendstocks (e.g., alkylate or toluene).
- Many remote areas rely on a single pipeline source.
- In the near term, pipelines and terminals would have limited capacity to segregate an additional type of gasoline without making capital investments.
- Due to logistical constraints, some 9.0 psi RVP CBOB areas would only be supplied with low-RVP CBOB.
- Implementation of capital investments in fractionation, tanks, and pipeline typically requires two years after management approval—thus, most capital additions would not be completed until the summer of 2025 or later.
- Refiners and pipeline operators are hesitant to pre-invest due to uncertainty regarding changes in RVP specifications or extension of the 1-psi waiver.
- Supply shortfall would be made up by production from Gulf Coast refineries.

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<sup>17</sup> Baker and O'Brien, "Midwest States Gasoline RVP – 1 psi Waiver Study, Report for American Fuel and Petrochemical Manufacturers," February 24, 2023. Submitted as part of comments from the American Fuel and Petrochemical Manufacturers (AFPM), Docket Item No. EPA-HQ-OAR-2022-0513-0077.

<sup>18</sup> The Baker and O'Brien Study only assessed eliminating the 1-psi waiver in seven of the petitioning states and did not include Missouri.

- Pipelines that distribute refined product from the Gulf Coast into PADD 2 have limited capacity (often full in summer) but could be sufficient under stable summer supply conditions.
- PADD 2 gasoline supply would be much more vulnerable to outages if an unplanned refinery shutdown were to occur.

**Response:**

After our proposal, we conducted an analysis of the effect of the removal of 1-psi waiver in the petitioning states on the supply of gasoline. Based on this analysis, we now estimate that the decrease in gasoline supply would be 30–80 kbpd, which is much larger than our estimate at proposal (20 kbpd).<sup>19</sup> Nevertheless, our estimated impact on supply is still considerably lower than that estimated by the commenter for several reasons. The primary reason for this difference is that the commenter assumed that some refineries would need to reduce their crude oil throughput capacity to produce low-RVP CBOB, as discussed in TSD Section 3.E.

Additionally, we posit that the supply impact is likely to be less than estimated in the Baker and O'Brien Study due to the timing of when they surveyed refiners. It is likely that to enable completing the study before the end of the comment period, refiners were surveyed early in the comment period when they would not have had sufficient time to complete a thorough review of how they could produce low-RVP CBOB. When faced with the realities of the removal of the 1-psi waiver in the petitioning states going into effect, refiners will conduct detailed studies of the feasibility and economics associated with a range of options for producing low-RVP CBOB at their refineries. These detailed studies will include not only whether a refinery's equipment can produce low-RVP CBOB based on its current operating conditions and adjustments to its operations, but also whether there are other options for producing low-RVP CBOB, including refining a heavier crude oil slate or purchasing heavier gasoline blendstocks. If a refinery is faced with having to remove less-volatile gasoline blendstocks (e.g., pentanes, NGL, or LSR) to solely produce low-RVP CBOB, it will review the feasibility and economics of other options to produce only a portion of its CBOB as low-RVP, which it could do by solely removing butanes at a lower cost and distributing higher-RVP CBOB into different markets. Further discussion of our assessment of the refining industry's ability to produce low-RVP gasoline can be found in TSD Section 3.

Another possible reason for our lower estimate of the supply impact compared to the Baker and O'Brien Study is the projection of the amount of low-RVP gasoline that would be sold in non-petitioning states. While the Baker and O'Brien Study indicated that removal of the 1-psi waiver would result in some low-RVP gasoline being sold in non-petitioning states, it did not indicate whether the study's supply impact analysis actually assumed any low-RVP gasoline would be sold in non-petitioning states. As summarized in the TSD, our analysis assumed a range of low-RVP gasoline would be sold in non-petitioning states.

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<sup>19</sup> See TSD Section 3.B.

**Comment:**

Several commenters submitted petitions that stated that there would be insufficient fuel supply if the 1-psi waiver was removed in the petitioning states in 2024. Another commenter stated that removal of the 1-psi waiver would have undesirable consequences on gasoline supply.

**Response:**

We identified two primary factors affecting the supply of gasoline in the petitioning states as a result of making the removal of the 1-psi waiver effective in 2024. First, refiners will have to remove volatile hydrocarbons to produce low-RVP CBOB, which would result in a smaller volume of available gasoline. Second, certain parts of the fuel distribution system are not capable of distributing a second gasoline type (i.e., low-RVP CBOB in addition to the existing 9.0 psi RVP CBOB). These two separate factors affect gasoline supply, and both challenge the fuel distribution system's ability to supply gasoline to all gasoline markets in petitioning states. In TSD Section 3, we assessed both factors and concluded that there would be an insufficient supply of gasoline in the petitioning states in 2024.

We have assumed that the commenters have based their insufficient supply claim on the supply analysis conducted by the refining industry as part of the Baker and O'Brien Study discussed in the previous response and the TSD. The Baker and O'Brien Study projected a very large impact on gasoline supply—up to 125 kbpd of reduced gasoline production. While our projection of the supply reduction is smaller (30–80 kbpd), it is still much higher than at proposal (20 kbpd). The Baker and O'Brien Study assumed that makeup gasoline supply would have to come from the Gulf Coast. However, one commenter claiming insufficient supply referred to the 125 kbpd reduction and claimed that pipeline capacity from the Gulf Coast is insufficient to make up this volume.

In addition to refineries having to produce low-RVP gasoline, the fuel distribution system must also overcome its limitations to supply the petitioning states. A particular concern are those fuel distribution assets (e.g., pipelines) that cannot supply an additional gasoline type. For these assets, primarily supplying non-petitioning states would preclude them from supplying petitioning states. It is this limitation that likely led to the commenter's conclusion that there would be insufficient supply of gasoline to the petitioning states. With this limitation, the next most expedient source of gasoline supply to these undersupplied portions of petitioning states would be by truck, rail, or barge, either from distant downstream terminals in petitioning states or from refinery racks. Increased gasoline prices in those underserved gasoline markets could cause the distribution of gasoline from these other means of supply. Given the existing flexibility in these systems and the magnitude of the expected supply shortfall, it is unlikely that they would be able to sufficiently make up for the supply shortfall in 2024.

The most certain way to work around limitations in the fuel distribution system would be to overproduce low-RVP CBOB and distribute it to both petitioning and non-petitioning states alike, as described in TSD Section 3.B.

To the extent that low-RVP gasoline is sold in non-petitioning states, butane could be blended into the low-RVP gasoline at downstream terminals, which would reduce both the cost and supply impacts of overproducing low-RVP gasoline. Based on conversations with industry, there are a limited number of such terminals in the affected area. Our estimated 30–80 kbpd gasoline supply impact does not assume any downstream butane blending because most terminals likely lack the capability to do so. However, to the extent that butane blending can occur at downstream terminals, it would help alleviate a portion of the gasoline supply shortfall to the petitioning states while allowing gasoline to be more fungibly distributed in PADD 2.

**Comment:**

One commenter stated that EPA did not demonstrate that there would be an insufficient supply of gasoline in the petitioning states if the waiver was removed before the summer of 2023. The commenter was critical of EPA’s delay in responding to the petitions to remove the 1-psi waiver, alleged that EPA failed to perform a detailed examination of the ability of refiners and other supply chain participants to produce and distribute low RVP-gasoline, and suggested that EPA’s high-level analysis of the conditions in the summer of 2023 was insufficient. The commenter was also critical of EPA’s use of the MathPro and ICF studies to justify the delay. The commenter further stated that one of the criteria that EPA used was the existing low inventory of gasoline in PADD 2 and that the statute requires a finding that the removal of the 1-psi waiver itself would result in an insufficient supply of gasoline.

**Response:**

We disagree with the commenter. At proposal we determined that there would be an insufficient supply of gasoline in the petitioning states if the effective date of the 1-psi waiver in the petitioning states was 2023. This determination was based on our consideration of the following: (1) Low gasoline inventories; (2) The limited time available for coordination between various parties to make the necessary physical changes to the gasoline production and distribution infrastructure; and (3) The physical loss of supply necessary to produce low-RVP CBOB. On these bases we proposed to remove the 1-psi RVP waiver in the summer of 2024 instead.<sup>20</sup>

The commenter’s suggestions that EPA’s analysis was high-level and inconsistent with the tone of the studies cited are not bases to invalidate EPA’s analysis. Rather, based on the information before us at the time of the proposal, we evaluated the factors articulated above and determined that removal of the 1-psi waiver in the petitioning states was likely to lead to an insufficient supply of gasoline in the petitioning states. That gasoline inventories were low prior to the removal of the 1-psi waiver is a factor that informs our analysis and not the sole basis for our determination. Lower gasoline inventories prior to removal of the 1-psi waiver going into effect that could otherwise be drawn upon to supply gasoline to consumers in the petitioning states means that reductions in new gasoline production as a result of lowering gasoline RVP are more likely to result in supply shortages and disruptions. Our continued use of this metric in renewing the determination of insufficient supply for 2024 is also appropriate.

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<sup>20</sup> 88 FR 13758, 13767 (March 6, 2023).



## 4. Cost Analyses and Price Impacts

### Comment:

Several commenters stated that although EPA conducted an analysis of costs to refiners and pipelines as a result of removing the 1-psi waiver, there was no corresponding analysis of the cost savings to consumers through the increased availability of E15. Multiple commenters stated that by removing the 1-psi waiver, consumers using E15 would save between 5–88¢/gal compared to E10, with most commenters estimating a cost savings of 10–25¢/gal.

### Response:

Impacts of the removal of the 1-psi waiver on E15 use, as well as the price of E15 and its costs to consumer are beyond of scope of this action. We received similar comments on the RFS Set Rule and addressed them as part of that action.<sup>21</sup>

### Comment:

One commenter stated that, in addition to supply impacts, removal of the 1-psi waiver would result in increased fuel costs due to the capital costs of producing low-RVP CBOB. The commenter estimated that costs could range from 2–12¢/gal and that price spikes could be as high as 60¢/gal. The commenter then compared cost estimates provided by two different models and made the following conclusions:

- A “typical RVP cost model” is inaccurate as it relies on the cost of butane removal only.
- An “extended cost model” estimates costs more accurately, as it accounts for additional process changes needed in the refining process in addition to butane removal.

### Response:

For our final rule cost analysis, we evaluated several studies provided by commentors, including the one provided by this commenter (Baker and O’Brien Study) as well as two MathPro Studies conducted by RFA<sup>22</sup> and ICCT.<sup>23</sup> The MathPro Studies used a typical RVP cost model to review possible impacts and estimated a net cost of approximately 2¢/gal for nationwide removal of the 1-psi waiver.

The Baker and O’Brien Study argued that the typical RVP cost model leaves out factors that are likely to impact refiners and distribution, which will also impact cost. The study’s extended cost model took into consideration aspects other than butane removal that may be affected in order for refiners to produce low-RVP CBOB and projected both near-term and long-term costs. The

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<sup>21</sup> “Renewable Fuel Standard (RFS) Program: Standards for 2023–2025 and Other Changes, Response to Comments,” EPA-420-R-23-014, June 2023 (RFS Set Rule RTC), Section 9.1.1.

<sup>22</sup> MathPro, “Assessment of a 1-psi reduction in the RVP of Conventional Gasoline Blendstock (CBOB) in the Summer Gasoline Season,” prepared for the Renewable Fuels Association (RFA), December 1, 2021.

<sup>23</sup> MathPro, “Refining Economics of a National Low Sulfur, Low RVP Gasoline Standard,” prepared for the International Council for Clean Transportation (ICCT), October 25, 2011.

short-term costs were estimated to be 3–12¢/gal in both petitioning and non-petitioning states. The long-term costs were estimated to be 3–11¢/gal in the petitioning states but had a lower range of 3–8¢/gal in non-petitioning states. The study’s reasoning behind this variation was the assumption that additional time for implementation of the removal of the 1-psi waiver would allow refineries to make necessary changes to better handle the production of low-RVP CBOB.

Using these studies, we were able to estimate likely cost impacts and found that they would likely range somewhere in-between the MathPro and the Baker and O’Brien Studies. As stated in the Baker and O’Brien Study, the typical RVP cost modeling used by MathPro missed some aspects of refinery changes that will likely need to be made and therefore likely underestimated the cost impacts. The Baker and O’Brien Study, using refinery-by-refinery data, presented a more comprehensive account of what refineries may need to do in order to produce low-RVP CBOB. However, this modeling may have missed some opportunities to minimize cost impacts (e.g., downstream butane blending), thus causing it to be too conservative in its estimated cost impacts.

**Comment:**

Several commenters expressed concern for how removal of the 1-psi waiver would impact gasoline prices, and how this would affect consumers.

**Response:**

As discussed above, upon a request from a governor that is accompanied by a successful demonstration of emissions increases as a result of the 1-psi waiver, EPA is required to remove the 1-psi waiver. The relevant statutory provisions do not provide EPA with the authority to consider fuel cost or price impacts and we assume that any fuel cost or price impacts to consumers were taken into consideration by the governors of the petitioning states in submitting their petitions. Therefore, regardless of the magnitude of the impact of this action on fuel costs or prices, EPA has not considered them in this action.

Although we are not required to consider price impacts in granting the petitions for removal of the 1-psi waiver, due to concerns over price impacts and the connection between supply and price, we nonetheless evaluated and discuss how removal of the 1-psi waiver will affect the gasoline market and the factors that could affect the price of gasoline in the TSD.

**Comment:**

Several commenters stated that if the 1-psi waiver is not removed, E15 retail stations will lose a significant amount of money as a result of not being able to sell E15 during the summer. One commenter suggested that EPA did not consider the potential impact on E15 fuel retailers if removal of the 1-psi waiver is delayed to 2024, including potential costs from relabeling pumps, product blending adjustments, and tank clean out costs.

**Response:**

CAA section 211(h)(5)(C) provides that EPA shall extend the effective date upon determination that there will be an insufficient supply of gasoline in the petitioning states. This does not allow EPA to choose not to delay as a result of costs to retailers from having to adjust product offerings. Furthermore, the costs associated with switching from E15 to E10 are minor in comparison to the costs associated with producing and distributing low-RVP gasoline, especially considering the relatively small number of E15 retailers. Additionally, EPA granted emergency fuel waivers in the summer of 2023 such that E15 could continue to be sold without retailers incurring the costs cited by the commenter.

## **5. Associated Regulatory Provisions**

### **5.1 New Designation and Associated PTD Language**

#### **Comment:**

One commenter supported the proposed new designation and associated product transfer document (PTD) language for summer CBOB in the petitioning states. The commenter also recommended using language specifically identifying such gasoline as meeting the applicable RVP standard without the 1-psi waiver so that it is not confused with other gasoline that still receives the 1-psi RVP waiver.

#### **Response:**

We thank the commenter for their support and believe the final designation and PTD requirements clearly identify E10 as meeting the RVP requirement without a 1-psi waiver to avoid confusion consistent with the commenter's suggestion.

## 5.2 Regulatory Reinstatement Mechanism

### **Comment:**

Several commenters supported the proposed regulatory approach for reinstatement of the 1-psi waiver. One commenter supported the approach because it recognizes the opportunities to add additional fungibility to the fuel supply by eliminating a requirement for a boutique fuel. Another commenter suggested that the process was a sensible way for states to opt back into the 1-psi waiver.

### **Response:**

We thank the commenters for their support.

### **Comment:**

One commenter supported EPA establishing a 1-psi waiver reinstatement process modeled after the existing regulations at 40 CFR 1090.925 that allow for the removal of the 7.8 psi low-RVP fuels program. However, the commenter requested that any reinstatement process allow for a rapid turnaround time to alleviate the supply disruptions that would likely result from removal of the 1-psi waiver.

### **Response:**

While we recognize the importance of a rapid turnaround time to alleviate supply disruptions, we must also provide sufficient notice to affected parties and the market. Thus, we have provided that a state requesting reinstatement of the 1-psi waiver should provide an effective date for such reinstatement, but also that such a date may not be any sooner than 90 days from the receipt of the request. This time period will allow all parties to be aware of the change prior to implementation.

### **Comment:**

One commenter agreed that states seeking to reinstate the 1-psi waiver should not be required to demonstrate the air quality impact of the 1-psi waiver reinstatement if the 1-psi waiver was not part of a SIP. The commenter was concerned that the capital investments necessary to implement the removal of the 1-psi waiver in the petitioning states may become stranded investments. The commenter suggested that EPA follow a normal regulatory process in the event a state seeks to restore the 1-psi waiver whereby EPA provides the opportunity for notice and comment on the appropriate implementation timeline.

### **Response:**

While we recognize the value of notice and comment rulemaking for many regulatory processes, we believe that the ability to quickly reinstate the 1-psi waiver upon request from a state is

properly balanced against the length of time necessary for a rulemaking process to proceed and have decided that no shorter than 90 days from the state's reinstatement request is appropriate.

## 6. Response to Petitions to Delay the Effective Date

### **Comment:**

Several commenters requested that EPA extend the effective date of the removal of the 1-psi waiver in the petitioning states under CAA section 211(h)(5)(C). These requests suggested that there would be an insufficient supply of gasoline in the petitioning states, non-petitioning states, and/or impacts on the supply of other fuels as well.

### **Response:**

To the extent commenters seek an extension of the effective date of the removal of the 1-psi waiver to 2026, those petitions remain pending, as discussed in Preamble Section VI.

Additionally, to the extent commenters seek an extension of the effective date on the basis of insufficient supply in non-petitioning states, or an insufficient supply of a fuel other than gasoline, we note that the CAA does not allow for an extension of the effective date on that basis.<sup>24</sup>

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<sup>24</sup> See CAA section 211(h)(5)(C), which states that EPA shall extend the effective upon determination that removal of the 1-psi waiver “would result in an insufficient supply of gasoline in the State,” where “State” refers back to the notification by a governor of a state to remove the 1-psi waiver, and “gasoline” is explicitly referenced without mention of other fuel types.

## 7. Other Comments

### 7.1 Statutory and Executive Order Reviews

#### Comment:

Several comments stated that the proposed rule was legally deficient because EPA failed to consider the impact of the removal of the 1-psi waiver on small refiners under the Regulatory Flexibility Act (RFA). These commenters identified several potential small refiners that distribute gasoline to the petitioning states and requested that EPA assess the impact of the removal of the 1-psi waiver on these small refiners.

#### Response:

The commenters identify three specific refiners that they claim are small entities and distribute gasoline to the petitioning states: Ergon-West Virginia, Inc. (“EWVI”), Wyoming Refining Company (“WRC”), and CountryMark Refining and Logistics, LLC (“CountryMark”). While the commenters provided information regarding the areas within the petitioning states where the refiners distribute their gasoline, they do not explain how these refiners qualify as small refiners. Therefore, we used publicly available information to determine the eligibility of these refiners to qualify as small refiners.

Historically, under EPA’s fuel regulations, a “small refiner” must have a corporate-average crude oil capacity less than or equal to 155,000 barrels per calendar day (bpcd) and employ no more than 1,500 employees for all subsidiary companies, all parent companies, all subsidiaries of the parent companies, and all joint venture partners.<sup>25</sup> As EPA has previously noted, “[t]hese refiners generally have greater difficulty in raising and securing capital for investing in capital improvements and in competing for engineering resources and projects.”<sup>26</sup> The Small Business Administration (SBA) similarly defines a small refiner as employing no more than 1,500 employees.<sup>27</sup>

EWVI is owned by Ergon, Inc. (“Ergon”).<sup>28</sup> Ergon is estimated to employ approximately 3,000 employees<sup>29</sup> and operates two petroleum refineries<sup>30</sup> with a combined crude oil throughput

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<sup>25</sup> See, e.g., 40 CFR 80.225 (2019), 40 CFR 80.550 (2019), 40 CFR 80.1142(a) (2019), 40 CFR 80.1338 (2019), 40 CFR 80.1442(a), 40 CFR 80.1620 (2019). EPA did not include this definition of “small refiner” in its new fuel quality regulations in 40 CFR part 1090 because at the time when the Fuels Regulatory Streamlining rule was finalized, there were no specific provisions or flexibilities in effect for small refiners (i.e., they had all expired and small refiners were complying with the same requirements as non-small refiners). Thus, there was no need for EPA to transpose the longstanding small refiner definition from 40 CFR part 80 to the new 40 CFR part 1090.

<sup>26</sup> 72 FR 23925 (May 1, 2007).

<sup>27</sup> 13 CFR 121.201, Subsector 324, NAICS code 324110.

<sup>28</sup> <https://ergon.com/about>.

<sup>29</sup> <https://www.ibisworld.com/us/company/ergon-inc/9754/>.

<sup>30</sup> Ergon Refining (Vicksburg, MS) (26,500 bpcd) and Ergon West Virginia. (Newell, WV) (22,300 bpcd).



capacity of approximately 50,000 bpcd.<sup>31</sup> Since the number of employees employed by Ergon exceeds 1,500, EPA does not believe that EWVI qualifies as a small refiner.

WRC is owned by Par Pacific Holdings, Inc. (“Par Pacific”).<sup>32</sup> Par Pacific is estimated to employ approximately 1,700 employees<sup>33</sup> and operates four petroleum refineries<sup>34</sup> with a combined crude oil throughput capacity of approximately 215,000 bpcd.<sup>35</sup> Since the number of employees employed by Par Pacific exceeds 1,500 and its total crude oil throughput capacity exceeds 155,000 bpcd, EPA does not believe that WRC qualifies as a small refiner.

CountryMark is owned by CountryMark Cooperative Holding Corp (“CountryMark Coop”). CountryMark Coop is estimated to employ approximately 500 employees<sup>36</sup> and operates one petroleum refinery<sup>37</sup> with a crude oil throughput capacity of approximately 34,500 bpcd.<sup>38</sup> Since the number of employees employed by CountryMark Coop is less than 1,500 and its total crude oil throughput capacity is less than 155,000 bpcd, EPA believes that CountryMark qualifies as a small refiner.

Given the information before us, we agree that CountryMark likely qualifies as a small refiner that distributes gasoline to the petitioning states. However, we disagree that EWVI and WRC qualify as small refiners and therefore we are not required to specifically evaluate the impact of this action on them under the Regulatory Flexibility Act. Nonetheless, for purposes of the screening analysis to evaluate the potential impacts of the removal of the 1-psi waiver on small entities, we have evaluated the impact of this rulemaking on CountryMark as well as EWVI and WRC. As detailed in TSD Section 8, based on our cost-to-sales analysis, these refiners would be affected at less than 1% of their sales as a result of the removal of the 1-psi waiver in the petitioning states and therefore this action will not have a significant economic impact on a substantial number of small entities.

#### **Comment:**

One commenter stated that they would have to either incur significant costs to produce low-RVP CBOB for Illinois and Ohio or be forced to abandon those markets because it could not justify the large capital investments needed to produce and distribute the new fuel. The commenter goes

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<sup>31</sup> <https://www.eia.gov/petroleum/refinerycapacity/table3.pdf>.

<sup>32</sup> <https://www.parpacific.com/about-us>.

<sup>33</sup> Par Pacific states that it employed 1,397 employees as of December 31, 2022.

[https://otp.tools.investis.com/clients/us/par\\_pacific/SEC/sec-show.aspx?FilingId=16440355&Cik=0000821483&Type=PDF&hasPdf=1](https://otp.tools.investis.com/clients/us/par_pacific/SEC/sec-show.aspx?FilingId=16440355&Cik=0000821483&Type=PDF&hasPdf=1). However, this employee count does not include the recently-acquired Par Montana refinery, which Par Pacific states employs approximately 320 additional employees. <https://www.parpacific.com/operations/refining-logistics/par-montana>.

<sup>34</sup> Par Hawaii Refining (Kapolei, HI) (93,500 bpcd), US Oil and Refining (Tacoma, WA) (40,700 bpcd), Wyoming Refining Company (Newcastle, WY) (18,000 bpcd), and Par Montana (Billings, MT) (61,500 bpcd).

<sup>35</sup> <https://www.eia.gov/petroleum/refinerycapacity/table3.pdf>. Par Pacific acquired the ExxonMobil Billings refinery in mid-2023 and is reflected as “ExxonMobil Refining & Supply Co” in EIA’s Refinery Capacity Report 2023.

<sup>36</sup> <https://www.zoominfo.com/c/countrymark/27199891>.

<sup>37</sup> <https://www.countrymark.com/countrymark/AboutUs/Refinery.aspx>.

<sup>38</sup> <https://www.eia.gov/petroleum/refinerycapacity/table3.pdf>.

on to claim that "[i]t is EPA's job to not cause disproportionate economic hardship to small refiners by ignoring their legal obligation to consider the impact on small refiners."

**Response:**

First, as discussed in the previous response, we have concluded that the removal of the 1-psi waiver in the petitioning states will not have a significant economic impact on a substantial number of small entities, including the commenter (CountryMark).

Furthermore, as discussed in Preamble Section V.B.1, we believe that the market may go through a "sorting out" process, wherein some refineries shift their historic markets. In addition to portions of southern Illinois (10 counties) and southwestern Ohio (6 counties), CountryMark primarily distributes its gasoline throughout the state of Indiana—as well as portions of northern Kentucky (14 counties) and western Michigan (6 counties)—all of which are unaffected by this action and will continue to use 9.0 psi RVP CBOB.<sup>39</sup> As noted by CountryMark, it will likely either have to shift their markets to only serve those states that retained the 1-psi waiver (Indiana, Kentucky, and Michigan) or continue to serve their existing markets by lowering the volatility of some portion of the gasoline they produce. Notably, however, CountryMark owns and operates a proprietary pipeline and terminal system and thus retains significant flexibility in determining which gasoline types they produce and distribute, unlike most other refiners serving the same markets as CountryMark.<sup>40</sup> This means that CountryMark will likely have a significant cost advantage over other refiners that distribute fuel to Indiana, Kentucky, and Michigan—CountryMark will be able to distribute lower-cost 9.0 psi RVP CBOB to these states, whereas other refiners may be limited to only distributing more-expensive low-RVP CBOB due to pipeline limitations.

If CountryMark chooses not to produce low-RVP CBOB for Illinois and Ohio, we believe that it would likely offset this market loss by increasing its distribution presence in western Michigan, as CountryMark's distribution network in western Michigan is non-contiguous and spread out over a large area of the state, making it ripe for additional market penetration. If CountryMark does choose to produce low-RVP CBOB for Illinois and Ohio, it would still enjoy a significant cost advantage over other refiners in the border areas of Indiana, Kentucky, and Michigan by continuing to offer lower-cost 9.0 psi RVP CBOB, while other refiners may only be able to offer more-expensive low-RVP CBOB. The price CountryMark receives for the gasoline it sells in these areas will likely increase to match the price of the low-RVP CBOB being sold by the marginal refiner in these areas, thereby increasing CountryMark's revenues. Therefore, contrary to CountryMark's assertions, we do not believe that this action will "cause disproportionate economic hardship to small refiners," including CountryMark.

Finally, as discussed in the Preamble Section VII and TSD Section 5, there is the potential for a significant short-term price increase in and around the petitioning states associated with supply disruptions as the low-RVP requirement is rolled out and the market adjusts. During this time

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<sup>39</sup> <https://www.countrymark.com/countrymark/Portals/0/member%20map%208-2022.pdf>

<sup>40</sup> <https://www.countrymark.com/countrymark/AboutUs/Pipeline/ProductsPipelineMap.aspx>

period, consumers will pay higher prices for their gasoline to the benefit of refiners, including CountryMark.

**Comment:**

One commenter stated that the market shift caused by the removal of the 1-psi waiver in the petitioning states could impact small refiners that do not distribute gasoline to the petitioning states.

**Response:**

The commenter fails to identify a specific small refiner that distributes gasoline outside the petitioning states that would be impacted by the removal of the 1-psi waiver. Instead, the commenter only speculates about high-level hypothetical impacts as a result of the removal of the 1-psi waiver that *could* affect a hypothetical small refiner distributing gasoline outside the petitioning states. Absent information about such a specific small refiner that would be affected, we cannot evaluate how the removal of the 1-psi waiver may impact a hypothetical small refiner that distributes gasoline outside the petitioning states.

## 7.2 Endangered Species Act

### Comment:

One commenter suggested that this rule will “create a new demand for ethanol and other biofuels, further incentivize crop production and land conversion,” as well as “increased pesticide and fertilizer runoff that pollutes waterways, worsens dead zones, and harm endangered wildlife.” The commenter also suggested that EPA “has discretion to consider landscape level impacts to threatened and endangered species associated with the E15 authorization.”

### Response:

This action itself does not authorize E15. Furthermore, the extent to which this action may increase the sale of E15 is expected to be minimal. As discussed in the recent RFS Set rule, the primary constraint on the growth of E15 sales has been the rate of growth of retail infrastructure that is compatible with E15.<sup>41</sup> Further, as a result of a series of EPA actions, including a now-invalidated rulemaking to extend the 1-psi waiver to E15 in 2019,<sup>42</sup> and a series of emergency fuel waivers for E15 allowing the sale of higher volatility E15 since summer 2022,<sup>43</sup> parties blending E15 have been able to utilize the same blendstock as used when blending E10. This action is not anticipated to materially change the marketplace for E15 in the short term. Any changes to crop production in the long term would not be a consequence caused by this action given significant uncertainty in the decision-making associated with corn production.<sup>44</sup>

Additionally, contrary to the commenter’s assertions, EPA lacks the discretion to deny the petitions from the petitioning states on the basis of impacts to listed species or critical habitat. Section 7(a)(2) of the ESA requires federal agencies, in consultation with one or both of the Services, to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of federally listed endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.<sup>45</sup> Under relevant implementing regulations and caselaw, section 7(a)(2) applies only to actions where there is discretionary federal involvement or control.<sup>46</sup>

In *Defenders of Wildlife*, the Supreme Court evaluated a claim that EPA was required to engage in Section 7 consultation in the context of its approval of a state permitting program under the Clean Water Act (CWA). In that case, the Court held that when a federal agency is required by statute to undertake a particular action without considering species impacts, there is no relevant

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<sup>41</sup> RFS Set Rule RIA, Chapter 1.7.2.

<sup>42</sup> “Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations,” 84 FR 26980 (June 10, 2019).

<sup>43</sup> See, e.g., “E15 Emergency Fuel Waiver,” August 30, 2023. Available at: <https://www.epa.gov/system/files/documents/2023-08/e15-waiver-letter-2023-29-08.pdf>.

<sup>44</sup> See Biological Evaluation of the Renewable Fuel Standard Set Rule and Addendum, discussing the inherent uncertainties in attributing decisions related to the production of corn for use as ethanol.

<sup>45</sup> 16 U.S.C. 1536(a)(2).

<sup>46</sup> 50 CFR 402.03; *National Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007) (*Defenders of Wildlife*).

agency discretion, and thus the requirements of ESA Section 7(a)(2) do not apply.<sup>47</sup> With regard to EPA’s transfer of CWA permitting authority to a state, the relevant CWA provision specified that EPA “shall approve” a state permitting program if a list of CWA statutory criteria are met. The Court found that the relevant CWA program approval criteria did not include consideration of endangered or threatened species and stated that “[n]othing in the text of [the relevant CWA provision] authorizes EPA to consider the protection of threatened or endangered species as an end in itself when evaluating [an] application” to transfer a permitting program to a state.<sup>48</sup> Accordingly, the Court held that the CWA required EPA to approve the state’s permitting program if the statutory criteria were met; those criteria did not include the consideration of ESA-protected species; and thus, consistent with 50 CFR 402.03, the nondiscretionary action to transfer CWA permitting authority to the state did not trigger ESA Section 7 consultation requirements.

Similar to the CWA program approval provision at issue in *Defenders of Wildlife*, the CAA contains specific direction to EPA to promulgate regulations when specified criteria are met. None of those provisions provide EPA the discretion to deny petitions based on extra-statutory criteria. Per CAA section 211(h)(5), upon notification, with supporting documentation, EPA “shall remove [the 1-psi waiver].” Notably, this provision provides no criteria for EPA to consider other than the demonstration that the 1-psi waiver will increase emissions in the state. Therefore, EPA cannot deny such a request on the basis of impacts to listed species or critical habitat.

In light of this carefully constrained statutory scheme, EPA is without discretion to deny the requests from the governors with respect to removal of the 1-psi waiver in these states based on section 7(a) of the ESA.

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<sup>47</sup> *Defenders of Wildlife* at 2536.

<sup>48</sup> *Id.* at 2537.

### **7.3 Timing**

**Comment:**

Several commenters mentioned EPA's delay in finalizing the removal of the 1-psi waiver in the petitioning states and expressed disappointment in the proposed delay to 2024.

**Response:**

We acknowledge the commenters concerns and have worked to expeditiously issue the final rule.

## **7.4 Beyond the Scope**

### **Comment:**

Commenters addressed numerous additional topics, including but not limited to the following:

- A nationwide 9.0 psi RVP cap on gasoline volatility.
- Emergency fuel waivers for the summer of 2023.
- The air quality benefits, fuel price impacts, and supply of E15.

### **Response:**

These comments are all beyond the scope of this rulemaking. These topics are not further addressed in this document.