the issue of the scope of the exemption for rules of ''particular applicability.''

H. Paperwork Reduction Act

This rule does not contain any information collection requirements which require OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

J. Judicial Review

Under CAA section 307(b)(1), a petition to review today's action may be filed in the Court of Appeals for the appropriate circuit by October 27, 1997. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2) of the Act.

Dated: August 20, 1997.

Felicia Marcus,

Regional Administrator.

[FR Doc. 97–22948 Filed 8–27–97; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[FRL–5883–3]

RIN 2060–AH48

Regulation of Fuels and Fuel Additives: Baseline Requirements for Gasoline Produced by Foreign Refiners

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule revises the requirements for imported conventional gasoline. The Agency has revised the rules for conventional gasoline (59 FR 7716, February 16, 1994) to allow a foreign refiner to choose to petition EPA to establish an individual baseline reflecting the quality and quantity of gasoline produced at a foreign refinery in 1990 that was shipped to the United States. The foreign refiner is required to meet the same requirements relating to the establishment and use of individual refinery baselines as are met by domestic refiners. This final action also includes additional requirements that address issues that are unique to refiners and refineries located outside the United States, namely those related to tracking the movement of gasoline from the refinery to the United States border, monitoring compliance with the requirements applicable to foreign refiners, and imposition of appropriate sanctions for violations. EPA will monitor the quality of imported conventional gasoline, and if it exceeds a specified benchmark, EPA will apply appropriate remedial action. Under this final action, the baseline for gasoline imported from refiners without an individual baseline would be adjusted to remedy the exceedance.

EPA believes this final rulemaking is consistent with the Agency's commitment to fully protect public health and the environment, and with the U.S. commitment to comply with its obligations under the World Trade Organization agreement.

DATES: This final rule is effective August 27, 1997.

ADDRESSES: Materials relevant to the final rule have been placed in Public Docket A–97–26 at the address below. Additional materials can be found in Public Dockets A–91–02 and A–92–12, A–94–25 and A–96–33 located at Room M–1500, Waterside Mall (ground floor), U.S. Environmental Protection Agency, 401 M Street S.W., Washington, DC 20460. The docket may be inspected from 8 a.m. until 5:30 p.m. Monday through Friday. A reasonable fee may be charged by EPA for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Karen Smith, Fuels and Energy Division, U.S. EPA (6406J), 401 M Street, SW., Washington, DC 20460, Telephone: (202) 233–9674.

SUPPLEMENTARY INFORMATION:

Availability on the TTNBSS

Copies of this final rule are available electronically from the EPA Internet Web site and via dial-up modem on the Technology Transfer Network (TTN), which is an electronic bulletin board system (BBS) operated by EPA's Office of Air Quality Planning and Standards. Both services are free of charge, except for your existing cost of Internet connectivity or the cost of the phone call to TTN. Users are able to access and download files on their first call using a personal computer per the following information. The official **Federal Register** version is made available on the day of publication on the primary Internet sites listed below. The EPA Office of Mobile Sources also publishes these notices on the secondary Web site listed below and on the TTN BBS.

Internet (Web)

http://www.epa.gov/docs/fedrgstr/EPA–AIR/

(either select desired date or use Search feature)

http://www.epa.gov/OMSWWW/

(look in What's New or under the specific rulemaking topic)

TTNBBS: The TTNBBS can be accessed with a dial-in phone line and a high-speed modem (PHι 919–541–5742). The parity of your modem should be set to none, the data bits to 8, and the stop bits to 1. Either a 1200, 2400, 9600, or 14400 baud modem should be used. When first signing on, the user will be required to answer some basic informational questions for registration purposes. After completing the registration process, proceed through the following series of menus:

(T) Gateway to TTN Technical Areas (Bulletin Boards)

(M) OMS—Mobile Sources Information

(Alerts display a chronological list of recent documents)

(K) Rulemaking and Reporting

At this point, choose the topic (e.g, Fuels) and subtopic (e.g., Reformulated Gasoline) of the rulemaking, and the system will list all available files in the chosen category in date order with brief descriptions. To download a file, type the letter ''D'' and hit your Enter key. Then select a transfer protocol that is supported by the terminal software on your own computer, and pick the appropriate command on your own software to receive the file using that same protocol. After getting the files you want onto your computer, you can quit the TTN BBS with the ''G''oodbye command.

Please note that due to differences between the software used to develop the document and the software into which the document may be downloaded, changes in format, page length, etc. may occur.

Regulated Entities

Entities regulated by this action are those foreign refiners and importers which produce, import or distribute gasoline for sale in the United States. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Foreign Refiners, Importers.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities potentially regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be

regulated. To determine whether your company or facility may potentially be regulated by this action, you should carefully examine the applicability criteria of part 80, subpart D, of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

The remainder of this final rulemaking is organized in the following sections:

I. Background
A. Current Requirements for Imported Gasoline
B. May 1994 Proposal
C. The WTO Dispute Settlement Proceeding
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8. Diversion of FRGAS to Non-U.S. Markets
9. Attest Requirements
10. Imports from Canada by Truck
E. Remedial Measures
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V. Administrative Designation and Regulatory Analysis
A. Public Participation
B. Executive Order 12866
C. Economic Impact and Impact on Small Entities
D. Paperwork Reduction Act
E. Unfunded Mandates
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G. Statutory Authority
Regulation of Fuels and Fuel Additives

I. Background

A. Current Requirements for Imported Gasoline

On December 15, 1993, EPA issued final regulations that establish requirements for reformulated gasoline (RFG) and conventional gasoline (CG) (together the Gasoline Rule), as prescribed by section 211(k) of the Clean Air Act (the Act). See 59 FR 7716 (February 16, 1994). Under the Gasoline Rule, compliance by refiners and importers with the CG requirements and certain RFG requirements is measured against baselines that are intended to reflect a refinery's or importer's 1990 gasoline quality. Domestic refiners are required to establish individual refinery baselines of the quality and quantity of the gasoline produced at each refinery in 1990. Domestic refinery baselines are calculated using, in hierarchical order based on the availability of data, 1990 gasoline test data (Method 1), 1990 blendstock test data (Method 2), or post-1990 blendstock and/or gasoline test data (Method 3). Under the Gasoline Rule domestic blenders of gasoline and importers of foreign-produced gasoline are treated differently than domestic refiners in that they are required to establish baselines of the quality and quantity of gasoline they produced or imported in 1990 using Method 1 data, if available. However, almost all blenders and importers lack the actual 1990 test data necessary to establish a baseline using Method 1 data. As a result, blenders and importers are assigned the statutory baseline, a baseline established by EPA in 1993 to approximate average gasoline quality in the United States in 1990,[1] with the consequence that almost all gasoline produced at foreign refineries is evaluated through the importer using the statutory baseline.[2] The baseline-setting scheme is specified in 40 CFR 80.91 through 80.93, and is discussed in the Preamble to the final rule at 59 FR 7791 (February 16, 1994).

In preparing the Gasoline Rule, EPA focused on three major issues regarding the use of individual baselines for foreign refiners in the RFG and CG programs. EPA's overriding consideration was the ultimate environmental consequences of the baseline-setting scheme. The three issues that EPA focused on were: (1) The technical difficulty of using baseline-setting Methods 2 and 3 to accurately predict the quality of the subset of a foreign refinery's gasoline that was exported to the U.S. in 1990; (2) the ability of the Agency to adequately verify and enforce the use of individual foreign refinery baselines, including problems identifying the refinery of origin of imported gasoline and enforcing gasoline content requirements against a foreign refiner; and (3) the risk of adverse environmental effects from providing refiners or importers with options in establishing baselines.

In developing the Gasoline Rule, EPA considered but did not go forward with allowing foreign refiners the option of petitioning EPA to establish individual baselines using Methods 1, 2, and 3, or defaulting to the statutory baseline. EPA's reasons for not adopting the option at that time are discussed at 59 FR 7785–7788 (February 16, 1994). When EPA issued the final rule on December 15, 1993, however, it was not fully satisfied that the baseline-setting scheme applicable to importers and foreign refiners was the optimum solution and continued to consider the issue.

B. May 1994 Proposal

In May 1994, EPA proposed to amend the Gasoline Rule to define criteria and procedures by which foreign refiners would be allowed to establish individual refinery baselines that reflected the properties and volume of the gasoline that was produced at a foreign refinery in 1990 and exported for use within the United States. Under this proposal, if a foreign refiner made the requisite showing through a petition process EPA would establish an individual foreign refinery baseline. U.S. importers of RFG produced at the foreign refinery would have used the individual foreign refinery baseline

[1] The statutory baseline is calculated pursuant to section 211(k)(10)(B) of the Act which specifies the properties of summertime statutory baseline gasoline, and instructs EPA to establish the average properties of 1990 wintertime gasoline. The Gasoline Rule specifies the properties of 1990 wintertime gasoline in § 80.45(b)(2), and the combined summer and winter, or annual, statutory baseline gasoline properties in § 80.91(c)(5).

Importers are required to meet various conventional gasoline requirements by comparing the annual average quality of the gasoline they import against the statutory baseline. An individual batch of imported conventional gasoline is not subject to any requirements, only the annual average of gasoline imported by the importer. Foreign refiners are not subject to the requirements of the current Gasoline Rule.

[2] Only one importer had the Method 1 data necessary to establish an individual baseline.

values to demonstrate compliance with the limited number of RFG requirements that are based on individual baselines. Importers would not have been allowed to use individual foreign refinery baselines for the CG requirements. Foreign refinery baselines would have been used only during the period 1995 through 1997[3] and only up to a volume of gasoline each year that equaled the foreign refinery's 1990 baseline volume. The proposal also included detailed enforcement and verification procedures.

Subsequent to the May 1994 proposal, Congress included restrictive language in the legislation on EPA's appropriations related to the May 1994 proposal. EPA took no further action on this proposal.

C. The WTO Dispute Settlement Proceeding

In 1995, the governments of Venezuela and Brazil initiated dispute settlement proceedings before the World Trade Organization (WTO), challenging as discriminatory the different treatment applied by the Gasoline Rule to imported gasoline and gasoline produced by U.S. refiners. Among other defenses, the United States argued that the rule was justified by the difficulties associated with implementing and enforcing individual baseline requirements with respect to foreign refiners and by the potential environmental impact resulting from providing foreign refiners the choice of employing individual baselines. The dispute settlement panel reviewing the matter found the regulation discriminatory under the General Agreement on Tariffs and Trade 1994 (GATT) and that the United States had not shown that the GATT's health, enforcement or conservation exceptions applied. The U.S. appealed, arguing that the measure is covered by the GATT conservation exception. The WTO Appellate Body recognized that the United States had legitimate concerns, and modified the findings of the dispute settlement panel accordingly, but concluded the rule did not satisfy all the requirements for this exception. The Appellate Body based this conclusion on its views that (1) the United States had not adequately explored options available to deal with its compliance assurance concerns, in particular international cooperative arrangements, and (2) the United States had been concerned about the costs of the various regulatory options to domestic refiners but there was no evidence demonstrating similar concern about the costs to foreign refiners. The Appellate Body recommended that the United States bring EPA's regulations into conformity with WTO obligations, leaving the United States to determine how it would comply.

On June 19, 1996 after the Administration had consulted with Congress, the United States advised the WTO that the United States intended to meet U.S. obligations with respect to the results of the WTO dispute settlement proceedings, that the EPA had initiated an open process to examine any and all options for compliance, and that a key criterion in evaluating options would be fully protecting public health and the environment. On June 28, 1996, EPA published an invitation for public comment in the **Federal Register** (61 FR 33703), seeking input and suggestions from all interested parties. The comment period closed on September 26, 1996.

D. Invitation for Public Comment

The invitation for public comment was an attempt to identify any and all options available to the Agency to meet U.S. international obligations in response to the WTO decision. EPA's goal was to identify all feasible options that are consistent with EPA's commitment to fully protect public health and the environment, and at the same time are consistent with the obligations of the United States under the WTO.

Specifically, EPA invited comment on: (1) How to accurately establish a reliable and verifiable individual baseline for a foreign refinery; (2) how EPA could adequately monitor compliance with and enforce any baseline requirements; (3) how EPA could effectively determine the refinery of origin of imported gasoline, so as to determine the appropriate baseline to apply to the imported gasoline; (4) the potential environmental impacts from implementing any suggested options; and (5) a method by which EPA could better quantify or characterize potential environmental impacts of any options proposed. EPA also requested that commenters provide information and analysis on the public health, environmental and economic impact associated with any option presented.

EPA received sixteen comments from various interested parties during the comment period. Additional comments were received subsequent to the comment period. To review the comments submitted during the invitation for public comment see Air Docket A–96–33 or 62 FR 24778 under Section D, Invitation for Public Comment.

E. Requiring Individual Baselines for Foreign Refiners

In preparing the earlier proposal and this final rule EPA attempted to identify any and all options available to the Agency to meet U.S. international obligations in response to the WTO decision. EPA's goal was to identify all feasible options that are consistent with EPA's commitment to fully protect public health and the environment, and at the same time are consistent with the obligations of the United States under the WTO. Comments submitted to EPA during and after the public comment period, and EPA's consideration of this issue, identified two broad approaches for consideration involving individual baselines for foreign refineries.[4]

One approach would require the use of individual baselines (IB) by foreign refiners. Use of individual baselines by foreign refiners would be mandatory, not optional. Under this approach, EPA would apply basically the same requirements that apply to domestic refiners to foreign refiners. For the reasons discussed in the proposal, and later in this notice, EPA is not adopting this approach. EPA is instead adopting the approach proposed, which allows foreign refiners to establish and use an IB but does not mandate it. EPA will monitor the emissions quality of imported gasoline and adjust the baselines for gasoline imported from refiners without an individual baseline if a specified benchmark is exceeded.

The mandatory approach would require all foreign refiners who market gasoline to the U.S. to submit petitions to establish an individual refinery baseline, using the same methods and procedures currently in the regulations. Once an IB was assigned for a refinery, that IB would be used in developing a volume weighted compliance baseline. Under one approach, the foreign refiner would meet the NO_X and exhaust toxics requirements for CG exported to the U.S. by that foreign refinery, in the same manner as domestic refiners. Under an alternative approach the domestic importer would establish a volume weighted compliance baseline reflecting the quantity and IBs of gasoline imported from various foreign

[3] Individual refinery baselines are used to set certain content requirements for RFG only through 1997. See 40 CFR 80.41.

[4] The discussion in the preamble will focus on imports of CG, as compared to imports of RFG. After January 1, 1998, individual baselines have no application in the RFG program. For CG, however, individual baselines will continue to be used in setting the compliance requirement for all CG. The application of the final rule to RFG prior to January 1, 1998 is discussed separately in this notice at section II.F.

refineries, and the domestic importer would meet the applicable CG requirements. In either case, the use of a foreign refinery IB would be subject to a volume cap, as for domestic refiners. Foreign refiners would be subject to audits and inspections to verify the IB and to verify the quantity and quality of gasoline sent to the U.S. from that foreign refinery.[5]

Significant additional requirements would also need to be imposed on gasoline imported under a foreign refiner's IB. For domestic refiners, almost all gasoline is produced for the U.S. market and the very small volume that is exported can be readily tracked and subtracted from the domestic refiner's compliance calculations. The domestic refiner then bases its CG compliance calculations on the quality and quantity of finished gasoline when it leaves the refinery. At that point it has entered the U.S. gasoline market, and there is no need to track the gasoline or to segregate it from gasoline produced by another refinery.

For a foreign refiner, only a portion of the refinery's total production is likely to be sent to the U.S., ranging from a very small percentage to a significant minority of production. The gasoline also may travel through a long and complicated distribution system from the point it leaves the refinery gate to the point it enters the U.S. market. However the IB for a specific foreign refinery would properly apply only to gasoline produced at that foreign refinery, and would not apply to gasoline produced at a different foreign refinery.

Several facts would therefore need to be clearly established to properly apply a foreign refinery's IB to a batch of imported gasoline. First, the refinery that produced the specific batch of imported gasoline must be identified. Second, it must be demonstrated that this batch of gasoline has not been mixed with gasoline produced by a different foreign refinery with a different IB, from the point it left the refinery-of-origin to the point it entered the U.S. market. Third, the total amount of CG and RFG produced by the foreign refinery and sent to the U.S. market must be determined, to establish when the volume cap is exceeded. As with domestic refiners, it would also be important to track blendstocks produced and sent to the U.S. from a foreign refinery, so a foreign refiner could not avoid a stringent IB by shipping blendstocks instead of finished gasoline. Tracking and segregation requirements would need to be adopted to implement this.

A certain amount of gasoline is imported from fungible gasoline supplies, where the refinery of origin is not known. This occurred in 1990, and would be expected to continue to occur in the future. It would be reasonable to allow the practice to continue, and gasoline imported from such sources would continue to be subject to the statutory baseline (SB). However a mechanism would need to be imposed so that this supply of fungible gasoline could not be used as a way to avoid a more stringent IB.

Under this approach, EPA would need to establish IBs for all foreign refineries, most of which sent only a small volume of gasoline to the U.S. in 1990. The methods used to set IBs for domestic refiners could still be used to establish the quality and quantity of gasoline sent to the U.S. by a foreign refiner in 1990. Given the large number of foreign refineries involved and the potential for widely varying technical and other ability to establish IBs, it is not clear that all foreign refiners would have the information necessary to establish an accurate IB for gasoline sent to the U.S. in 1990.

The Department of Energy (DOE) has advised EPA that this approach could seriously affect the supply and price of gasoline in the U.S. market. Currently gasoline is imported into the U.S. market from a free moving and fungible distribution system for imported gasoline. The volume of imported gasoline, while small compared to the total U.S. gasoline supply, can have a significant impact on gasoline prices. Imported gasoline tends to moderate price increases by increasing the sources of gasoline to meet U.S. demand, whether in response to a trend of increasing demand over time, or a short term supply problem based on local or temporary changes in domestic supply or demand.

The mandatory approach outlined above would significantly change the way gasoline is imported to the U.S. market, greatly increasing the complexity and making it more likely that gasoline could not be quickly and readily diverted to the U.S. market to meet demand. This would make it more likely that imported gasoline would not play the same role that it currently does in moderating price increases. The long term supply implications are harder to predict.

The increase in complexity from this approach is based on the need to ensure that the right IB is applied to a batch of imported gasoline, that an IB is only used up to the applicable volume cap, and that parties do not circumvent the appropriate IB by shifting gasoline or blendstocks through other parties. Modifying the tracking and monitoring restrictions described above to try and resolve the supply concerns would increase the risk of adverse environmental effects from this approach.

EPA is also concerned that this approach might produce incentives that would tend to reduce the average quality of imported CG. For example, gasoline from refiners with cleaner IBs would be measured against a more stringent baseline than under the current rules, while gasoline from refiners with dirtier IBs would be measured against a less stringent baseline than under the current rules. Additional costs would be associated with segregation, tracking, and other requirements described above. To the extent these changes put refiners with clean IBs at an economic disadvantage compared to refiners with either the SB or an IB dirtier than the SB, it could potentially push the supply of gasoline away from refiners with clean IBs.

After evaluating this approach, EPA did not propose it. While it appears generally neutral in requiring individual baselines for both domestic and foreign refiners, upon full consideration this approach presents too great a risk of adverse effects on gasoline supply and prices. EPA also has questions as to its potential environmental impact. The Agency instead proposed the optional use of individual baselines, with specific provisions for monitoring gasoline quality and remedying any adverse environmental effects. EPA's rationale (including the Department of Energy's analysis) for selecting this option is further outlined below in Section IV. Response to Comments: Mandatory vs. Optional Baselines.

F. Summary of Comments from NPRM

EPA received comments from nine associations representing various groups including domestic gasoline producers, domestic importers, and environmental organizations. Three domestic refiners individually submitted statements supporting the comments submitted by their representing associations. Three foreign refiners commented. One state environmental organization submitted favorable comments to the NPRM. EPA also received comments from the Commission of the European Communities.

[5] These and many other elements of a mandatory IB approach would also apply where foreign refiners are provided an option to establish and use an IB. As discussed later, it is the application of these factors across all imported gasoline that leads to the concerns raised by DOE relating to the supply and price of gasoline in the U.S. market.

The issues addressed in the public comments include: the question of mandatory versus optional baselines; EPA's use of cost considerations in the final rule; the consideration of seasonal impacts to prevent additional competitive advantages for foreign refiners; whether or not the Agency has established appropriate and adequate monitoring, compliance and enforcement requirements; the requirement for a waiver of sovereign immunity; and the implementation of the remedial action. This is not intended to be an exhaustive list of comments. A complete set of comments is available from the Air Docket (A–97–26). The major issues and comments are addressed in the Response to Comment section of this final rule.

II. Description of Final Rule

A. Introduction

Today's final action allows foreign refiners the option to establish and use IBs under the conventional gasoline program. Specific regulatory provisions will be implemented to ensure that the optional use of an IB will not lead to adverse environmental impacts. This involves monitoring the average quality of imported gasoline, and if a specified benchmark is exceeded, remedial action will be taken. The remedial action involves making the requirements for imported gasoline not subject to an IB more stringent. This will ensure the environmental neutrality of this approach.

Under this final rule, the procedures and methods for setting an IB, as well as the tracking, segregation and other compliance related provisions described below will all apply. However, they will only apply where a foreign refiner chooses to apply for an IB.

The volume of gasoline that can be imported under the IB for a foreign refinery is limited in the same manner as for domestic refiners, relative to a refinery's 1990 baseline volume. Since the foreign refiner seeks an IB in order to specifically produce gasoline for the U.S. market, the tracking and segregation requirements noted above should not have a significant impact on the ready availability of gasoline for import. The current requirements for imported gasoline will continue to apply for all of the other gasoline imported into the U.S.

There was some concern about the possible environmental impact of providing this option to foreign refiners. A foreign refiner may only have an economic incentive to seek an IB if it will be less stringent than the SB. Gasoline produced by this foreign refiner would then be measured against this less stringent IB. Other imported gasoline would be measured against the SB through the importer. As compared to the situation in 1990, there would be the potential for the quality of imported gasoline to degrade from an emissions perspective.

The size and amount of this impact, however, is difficult to quantify. It would depend on the number of foreign refiners that receive an IB, the specific emissions levels of the IBs assigned, and the volume of gasoline included in the IB. It would also depend on the source and amount of CG and RFG imported into the U.S. in a specific year. It is also hard to quantify to what extent, if any, foreign refiners who produced gasoline in 1990 that was cleaner than the SB would ship gasoline that is dirtier than what they shipped in 1990. These circumstances, as well as the existence of a volume cap on the use of IB's, and the large variation in the total levels of CG and RFG imports each year make it difficult to assess in advance the risk of an adverse environmental impact.

EPA is addressing these potential environmental concerns in the final rule by: (1) Establishing a benchmark for the quality of imported gasoline that will reasonably identify when the factors identified above have led to an adverse environmental impact; (2) monitoring imported gasoline to determine whether the benchmark has been exceeded; and (3) if the benchmark is exceeded, imposing a remedy that compensates for the adverse environmental impact.[6]

The benchmark for imported gasoline quality is the volume-weighted average of the IBs for domestic refiners. EPA is finalizing a benchmark for NO_X emissions performance set at the volume weighted average for domestic baselines. No benchmark is being set at this time for exhaust toxics emissions performance, as there does not appear to be the same potential for environmental degradation that there could be for NO_X.

EPA will monitor the quality of imported gasoline based on the annual compliance reports filed by importers and foreign refiners producing gasoline that is exported to the U.S. Each year EPA will evaluate the volume weighted annual average quality of the three prior years and compare it to the benchmark. If the average quality of imported gasoline exceeds the benchmark, NO_X requirements for gasoline imported from refiners without an IB (currently set at the SB) will increase in stringency the following year by an amount equivalent to the exceedance. This will occur each time the annual monitoring indicates that the benchmark is exceeded. If the amount of an exceedance either increases or decreases, the amount of the remedy will be correspondingly adjusted on an annual basis. If the annual monitoring shows that imported gasoline does not exceed the benchmark, the compliance requirements will be reduced to the SB for the following year. The more stringent requirements will apply to all imported gasoline except for gasoline produced by foreign refiners with an IB.

This approach meets the goals of environmental protection and compliance with international obligations, as announced in the June 1996 Invitation for Public Comment, and avoids the potential supply, price and environmental consequences of the alternative approaches considered by EPA.

The remainder of this section describes the contents of this final rule. The following sections describe the changes made from the proposal as well as the response to comments received by the Agency. The preamble to the proposal also provides additional information related to provisions that EPA is finalizing without change from the proposal.

B. Requirements for Foreign Refiners With Individual Refinery Baselines

1. Establish Refinery Baselines

Under this final action, a foreign refiner has the option of submitting an individual refinery baseline petition to EPA. The refinery baseline would reflect the quality and quantity of gasoline produced at the foreign refinery in 1990 that was exported to the U.S.

The procedures for establishing individual refinery baselines are located in sections 80.90 through 80.93. These same procedures were used by domestic refiners to develop their IBs based on their overall gasoline quantity and quality for 1990.

EPA is requiring that foreign refiners that elect to develop individual refinery baselines would also follow these procedures to determine the quality and quantity of gasoline they produced in 1990 that was exported to the U.S. As is the case for domestic refiners, under section 80.92 baseline petitions would have to be supported by the report of an EPA-approved baseline auditor.

i. *Required Information:* The requirements for establishing individual baselines for foreign refineries are essentially the same as the baseline establishment requirements for domestic refineries. EPA is adopting additional requirements for foreign

[6] EPA has adopted an analogous approach in the RFG program. See 40 CFR 80.41 and 80.68.

refineries that address the unique circumstances associated with establishing and enforcing the establishment and use of an individual baseline by a foreign refiner.

The procedures for developing individual refinery baselines, set forth in sections 80.90 through 80.93, are highlighted below and discussed with respect to foreign refineries.

- A foreign refinery's individual baseline (i.e., quality and quantity information) must be calculated using, in hierarchical order based on the availability of data, 1990 gasoline test data (Method 1), 1990 blendstock test data (Method 2), or post-1990 blendstock and/or gasoline test data (Method 3) to determine the quality and quantity of the subset of gasoline exported to the United States in 1990.
- All data collected beginning in 1990 and through the last date of any data collection under section 80.91(d)(1)(i)(B) must be used in the development of the foreign refineries baseline.
- Baseline petitions must be submitted in the same manner as is required of domestic refiners under section 80.93. Baseline petitions must be submitted before January 1, 2002. EPA is requiring the same type and quality of information and level of accuracy in establishing a baseline no matter when a foreign refiner applies for a baseline.
- EPA is requiring that in order for a refinery to receive an approved baseline, the refinery must commit to give EPA's auditors full access to the foreign refinery to conduct announced and unannounced inspections and audits related to the baseline development and submission. EPA baseline audits could occur at any time after a baseline petition has been submitted, either before or after EPA approves a refinery baseline.
- Under section 80.93(b)(1)(i) foreign refiners are required to provide any additional information requested by EPA to support a baseline submittal or petition, as is required for domestic refiners.
- Under section 80.93(c) a separate baseline will be established for each foreign refinery. However, as is the case of U.S. refiners a foreign refiner could petition EPA for a single refinery baseline for two closely integrated facilities under section 80.91(e)(1). In addition, as is the case for U.S. refiners, a foreign refiner who operates more than one refinery with individual baselines would be able to aggregate the baselines of some or all of its refineries under section 80.101(h).
- All documentation included in a baseline submission or petition must be in the English language or include an English language translation.

ii. *EPA Action on Baseline Submissions:* As for the domestic refiner baseline approval process, EPA will subject foreign refinery baseline submissions to an in-depth analysis and review. EPA also reserves the right to inspect, audit and review all records or facilities used to generate data submitted to the Agency prior to acting on a baseline submission or petition.

After conducting its review of the data and analysis in a baseline submission, EPA will assign an individual baseline that represents the quality and quantity of gasoline exported to the U.S. in 1990. EPA believes that individual refinery baselines can be established for foreign refineries for which individual baselines are sought to the same degree of confidence as the baselines established for domestic refineries. Further guidance on EPA's expectations for the petition submission and approval process is provided in the proposed rule at 62 FR 24781 (May 6, 1997).

2. Compliance With CG NO_X and Exhaust Toxics Requirements

The gasoline produced at a foreign refinery with an individual refinery baseline that is imported into the United States is called ''Foreign Refinery Gasoline,'' or ''FRGAS.'' Foreign refiners with individual baselines are required to designate all FRGAS into one of two categories: conventional gasoline FRGAS that is included in the foreign refiner's NO_X and exhaust toxics compliance calculations, which is called ''certified FRGAS,'' and all other FRGAS, which is called ''non-certified FRGAS.'' The non-certified FRGAS category includes gasoline that meets the quality requirements for RFG, as well as gasoline that is not RFG quality and has not been included in the foreign refiner's NO_X and exhaust toxics compliance calculations.

Foreign refiners who obtain individual foreign refinery baselines will have to meet the NO_X and exhaust toxics emissions performance requirements for all gasoline classified as certified FRGAS.[7]

In addition, foreign refiners with an individual refinery baseline will be required to meet all requirements used to demonstrate compliance with the CG emissions requirements. Certain adjustments to these provisions are specified in the regulations to apply them to foreign refiners. These are the same requirements that apply to domestic refiners, and include the following:

- To register with EPA, section 80.103.
- To designate each batch of FRGAS as certified or non-certified, section 80.65(d).
- To determine the volume and properties of each certified FRGAS batch through sampling and testing, section 80.101(i).
- To determine the volume of each batch of non-certified FRGAS in order to complete the compliance baseline calculation in section 80.101(f).
- To prepare product transfer documents for FRGAS, sections 80.77 and 80.106.
- To keep certain records for five years, sections 80.74 and 80.104.
- To submit reports to EPA on each batch of FRGAS, on the volume of non-certified FRGAS, and on the annual average quality of certified FRGAS, sections 80.75 and 80.105.
- To comply with an annual cap on the volume of specified blendstocks that are transferred to others and used to produce gasoline for the U.S., section 80.102.
- To have an independent audit performed of refinery operations each year to review certain activities related to the FRGAS requirements, sections 80.125 through 80.130. However, the audit procedures for non-certified FRGAS would be limited to the procedures that evaluate the quantity of non-certified FRGAS, and audits would not be required to include procedures intended to verify information about non-certified FRGAS that is unrelated to the compliance baseline calculation, such as the quality of non-certified FRGAS quality or VOC-control designations.

Under section 80.101(f) a compliance baseline for NO_X and exhaust toxics compliance is calculated for each calendar year averaging period based on a refinery's 1990 baseline volume and baseline NO_X and exhaust toxics values, and the total gasoline volume (CG and RFG) produced at the refinery and imported into the U.S. during the averaging period. As a result, a foreign refiner with an individual refinery baseline will be required to establish the volume of U.S. market gasoline that is non-certified FRGAS in order to calculate the refinery's compliance baseline for the NO_X and exhaust toxics CG requirements (see footnotes at 62 FR 24782 for further clarification).

[7] Non-certified FRGAS will be regulated through the importer. If the importer classifies it as RFG, it will have to meet the RFG requirements. If the importer classifies it as CG, it will have to meet the importers compliance baseline for CG, which in almost all cases is the statutory baseline.

Therefore, a foreign refiner with an individual refinery baseline will be required to designate each batch of U.S. market gasoline as certified FRGAS or non-certified FRGAS, to establish the volume and properties of gasoline designated as certified FRGAS, and to establish the volume of gasoline designated as non-certified FRGAS.

All foreign refiners with individual refinery baselines will be required to submit annual reports to EPA that demonstrate the average NO_X and exhaust toxics emissions for certified FRGAS meets the refinery's compliance baseline for the averaging period.

Under today's final action, certified FRGAS will be treated basically under the same rules as gasoline produced for the U.S. market at a domestic refinery. The certified FRGAS will be subject to the same conventional gasoline requirements as the conventional gasoline produced by domestic refiners. During 1997, under section 80.101(b)(1) a refinery's annual average for sulfur, T–90, olefins and exhaust benzene emissions may not exceed its individual baseline for these fuel characteristics. Starting in 1998 a refinery's annual average conventional gasoline NO_X and exhaust toxics emissions may not exceed its individual baseline for these fuel characteristics. In order to evaluate compliance, however, certified FRGAS must be designated as such at the point of production, and must be tracked to determine that it in fact is exported to the U.S.

In order to determine compliance with the NO_X and exhaust toxics requirements for certified FRGAS, the quality and quantity of each batch of certified FRGAS must be determined. The volume of non-certified FRGAS also will have to be determined, because the compliance baseline applicable to a refinery depends on the total volume of gasoline produced at a refinery and imported into the U.S. market, including both certified and non-certified FRGAS. To determine the quality and/or quantity of this gasoline, a foreign refiner will have to designate FRGAS when it is produced. It also is important that gasoline used in a foreign refinery's compliance calculation all be designated as FRGAS and actually imported into the U.S.

In the case of certified FRGAS the foreign refiner must include the gasoline in the refinery's NO_X and exhaust toxics compliance calculations, and meet the refinery tracking requirements, described below. Gasoline that is not classified as FRGAS and is not imported into the U.S. must be excluded from the refinery's compliance calculations, and the refiner is not required to meet the refinery tracking requirements for this gasoline.

However, the foreign refiner will continue to be required to include all non-certified FRGAS in the refinery's compliance baseline calculations and to meet the refinery tracking requirements for all non-certified FRGAS. This is necessary in order to prevent adverse environmental effects. As in the case of domestic refiners, all gasoline imported into the United States must be included in a refinery's compliance baseline calculation because a larger volume of non-certified FRGAS results in a more stringent compliance baseline applicable to the certified FRGAS.

3. Requirements for Tracking Refinery of Origin

EPA is finalizing a series of requirements to accurately identify both certified and non-certified FRGAS gasoline upon its arrival into the U.S. There is the potential for adverse environmental results if a foreign refiner includes gasoline in its CG NO_X and exhaust toxics compliance calculations that is not imported into the U.S. In addition, there is environmental risk if a foreign refiner fails to include in its compliance baseline calculations the volume of any gasoline that is imported into the U.S.

i. *Segregation of FRGAS:* EPA is requiring that certified FRGAS must remain physically segregated from non-certified FRGAS and from certified FRGAS produced at another refinery, from the foreign refinery to the U.S. port of entry. As a result of this requirement, when a foreign refiner loads FRGAS onto a ship for transport to the U.S. the foreign refiner must know the gasoline is exclusively FRGAS that is being included in the refinery compliance calculations (for certified FRGAS), or compliance baseline calculations (in the case of non-certified FRGAS).

This segregation requirement would not prohibit a foreign refiner from combining batches of certified FRGAS, or combining batches of non-certified FRGAS, that are produced at a single refinery into larger volumes for shipment. In addition, where multiple refineries have been aggregated under § 80.101(h), certified FRGAS produced at the aggregated refineries may be combined, and non-certified FRGAS produced at the aggregated refineries may be combined.

ii. *Foreign Refiner Certification of FRGAS:* EPA is requiring that foreign refiners of FRGAS prepare a certification, signed by an appropriate foreign refiner official, for FRGAS when it is loaded onto a ship for transport to the U.S. This certification must identify the gasoline as being FRGAS, whether the FRGAS is certified or non-certified, the foreign refinery where the FRGAS was produced, and the volume of the FRGAS being transported. In the case of certified FRGAS the certification must also include the properties of the gasoline being transported and a declaration that the gasoline is being included in the NO_X and exhaust toxics compliance calculations for the foreign refinery. A single declaration may apply to the entire contents of a vessel where the gasoline is only certified FRGAS or is only non-certified FRGAS.

The foreign refiner certification must be supported by an inspection by an independent, EPA-approved third party such as an independent laboratory. The independent party must confirm the refinery of origin, guarantee that no prohibited mixing occurred, and determine the volume and properties of the certified FRGAS, and the volume of non-certified FRGAS.

The independent party is required to prepare a report on these inspections that becomes a part of the foreign refiner's certification. The independent party also must submit an inspection report to EPA.

iii. *U.S. Importer Receipt of FRGAS:* Under this final rule, the U.S. importer must classify certified-FRGAS as such if the gasoline is accompanied by a foreign refiner certification that is properly supported by an independent party's report, and if test results from the load port are consistent with test results from the U.S. port of entry.

The regulations require the importer to test the FRGAS, and include criteria for comparing the load port and port of entry testing. The test results have to agree, for five specified parameters (sulfur, benzene, gravity, E200 and E300), within the reproducibility limits for the test procedures for these parameters. The two volume determinations, corrected for temperature, have to agree within one percent. EPA believes this level of volume correlation is appropriate because it is well within the level of correlation normally expected in commercial transactions. EPA understands that protests normally are initiated if ship volume determinations in commercial dealings differ by 0.5%.

Importers are required to include in their NO_X and exhaust toxics compliance calculations any FRGAS for which the importer does not obtain a certificate by the foreign refiner supported by a report prepared by an independent third party, or FRGAS where the load and entry port comparison is outside the range specified in the regulations.

In the case of FRGAS for which the importer obtains a properly supported foreign refiner certificate, but where the volume and/or parameter results from the load port and port of entry do not meet the range requirements, the gasoline must be imported as non-certified FRGAS.[8] In addition, the *foreign refiner* is required to remove the volume and properties of the FRGAS from its NO_X and exhaust toxics compliance calculations, because the gasoline now is classified as non-certified FRGAS. However, the foreign refiner must retain the volume of the FRGAS in its compliance baseline calculation, the same as any other non-certified FRGAS, unless the foreign refiner can demonstrate that the importer did not classify the gasoline or as RFG or use it to produce RFG.

In a case of load port and port of entry test results that are outside the specified range for certified FRGAS, the regulations also allow the gasoline to retain this classification if the NO_X and exhaust toxics emissions performance based upon port of entry test results is ''cleaner'' for both pollutants than the emissions performance based upon the load port test results.

U.S. importers are required to report to EPA on each batch of FRGAS imported, identifying the foreign refinery, whether the FRGAS is certified or non-certified, the volume and properties of certified FRGAS, and the volume of non-certified FRGAS.[9]

iv. *Attest Engagement Requirements:* Under today's final rule, foreign refiners of FRGAS must meet the independent attest engagement requirements in sections 80.125 through 80.130, the same as domestic refiners, although the attest requirements for non-certified FRGAS are limited to those related to the volume of non-certified FRGAS produced at a foreign refinery.[10] EPA is adopting additional attest requirements that relate to the FRGAS requirements. These attest requirements supplement the requirements regarding an independent party determination of the refinery that produced FRGAS loaded onto a ship. The focus of the attest requirements will be on the foreign refinery operations, while the requirements for certification by an independent party focus on the transportation and storage of gasoline from the refinery to the point of ship loading.

For further details on the procedures an auditor will be required to perform see 62 FR 24784 (May 6, 1997) ''Attest Engagement Requirements.''

v. *Requirements for Third Parties:* EPA is requiring that FRGAS sampling, volume and fuel quality determinations and determinations of refinery of origin at the loading port will have to be performed by an independent party. The criteria for independence are the same criteria that apply for the independent sampling and testing requirement for domestic refiners and importers, and that are specified at section 80.65(f)(2)(ii). In addition, persons performing this work must be EPA approved. EPA approval will be based on the ability to perform the required work as demonstrated through a petition process.

Independent parties will have to agree to allow EPA inspections and audits relative to their work under the Gasoline Rule for the foreign refiner that are similar to the commitments required by foreign refiners, described below.

Third party sampling and testing is a necessary part of the foreign refiner FRGAS program. However, in response to comments EPA is modifying these requirements in several ways for this final rule, as discussed below.

4. Measures Related to Monitoring Compliance and Enforcement

i. *Introduction:* The requirements for foreign refiners with individual refinery baselines must be subject to strong measures for monitoring compliance and enforcing violations, as are domestic refiners. However, there are a number of unique circumstances associated with monitoring compliance and enforcing requirements for foreign refiners. EPA is adopting a range of provisions designed to address these concerns in a comprehensive manner. These provisions will promote EPA's ability to monitor compliance with the requirements related to foreign refinery baselines, to conduct enforcement actions when violations of these requirements are found, and to impose sanctions that will constitute a deterrent to future violations.

The purpose of the provisions is to ensure that EPA's compliance and enforcement activities with regard to foreign refiners will be on a par with those for domestic refiners, in order to assure achievement of the environmental objectives of the gasoline programs.

ii. *Inspections and audits:* EPA intends to inspect and audit foreign refineries with individual baselines and other facilities located overseas to determine compliance with requirements related to establishing a baseline, identifying refineries or origin, and other requirements proposed today. Foreign refiner inspections and audits will be like domestic refiner inspections and audits with regard to types of facilities visited, types of information reviewed, and types of persons who conduct the inspections and audits. As with domestic inspections and audits, some of the inspections and audits may be announced while some will be unannounced.

With the exception of the limited waiver of sovereign immunity, all aspects of section (ii) inspections and audits (62 FR 24784–24785, May 6, 1997) outlined in the proposal are adopted by today's action. For a detailed list of the inspection and audit requirements refer to that section of the proposed rule. EPA's response to comment and final action on the limited waiver of sovereign immunity is addressed below in section D.

Where a foreign refiner fails to abide by the terms of the foreign refiner commitments, or a foreign government fails to allow entry for the purpose of EPA inspections and audits, EPA may withdraw or suspend the refiner's individual refinery baseline.

iii. *Administrative, civil, and criminal enforcement actions:* A foreign refiner with an individual refinery baseline who submits false documents to EPA or who fails to meet other requirements will be subject to civil, and in certain cases criminal, enforcement, and EPA is adopting requirements that will facilitate prosecution of such violations. These requirements consist of provisions relating to a waiver of sovereign immunity, and commitments the foreign refiner must include in a baseline petition submitted to EPA.

Each foreign refiner seeking an individual refinery baseline must identify an agent for service in the U.S. and agree that service on this agent constitutes service on the foreign refiner and its employees. This agent for service need not be a general agent for service; the agent need only be authorized to accept service by EPA, or otherwise by the U.S., for enforcement actions related to these regulatory provisions. The agent for service must be located in the District of Columbia.

Foreign refiners have to acknowledge that the forum for civil enforcement actions will be governed by Clean Air

[8] The importer may also treat as GTAB any gasoline classified as non-certified FRGAS.

[9] Non-certified FRGAS also must be included in the U.S. importer's compliance calculations for RFG or conventional gasoline. The importer must meet all current requirements for such gasoline, such as sampling, testing and reporting.

[10] ''Attest engagement'' is a term of art used by auditors to describe the conduct of specified audit procedures—the auditor attests to the conduct and results of the specified audit, or attest, procedures completed during the attest engagement. The requirements in sections 80.125 through 80.130 consist of specified attest procedures dealing with the Gasoline Rule and instructions for the conduct of these procedures.

Act (CAA) section 205. CAA section 205(b) specifies that the venue for district court actions is either the district where the violation occurred or where the defendant resides or in the Administrator's principal place of business. However, EPA believes that the U.S. district court for the District of Columbia would be the appropriate court for violations related to the requirements proposed today that are committed by defendants who reside outside the U.S. Administrative assessment of civil penalties is allowed under CAA section 205(c) where the penalty amount does not exceed $200,000, or where the EPA Administrator and the Attorney General jointly determine that a case involving a larger penalty is appropriate for administrative penalty assessment.

Foreign refiners of FRGAS must acknowledge that civil and criminal enforcement actions will use the same U.S. civil and criminal substantive and procedural laws that apply in enforcement actions against domestic refiners. All of these requirements are finalized in today's rulemaking.

iv. *Sanctions for civil and criminal violations:* The sanctions for civil and criminal violations committed by foreign refiners with individual refinery baselines or employees of such foreign refiners include the sanctions specified in the Clean Air Act. Under CAA section 211(d) the penalty for civil violations of the RFG and conventional gasoline requirements is up to $25,000 per day of violation plus the amount of economic benefit or savings resulting from the violation. Injunctive authority is included under section 211(d)(2) as well. CAA section 113(c) specifies that the criminal penalty for first violations of knowingly making false statements or reports is a fine pursuant to title 18 of the U.S. Code, or imprisonment for up to 5 years, or both. The period of maximum imprisonment and the maximum fine are doubled for repeat convictions.

Foreign refiners seeking and then operating under an individual refinery baseline must post a bond with the U.S. Treasury that will be available to satisfy any civil penalty or criminal fine that is imposed against the refiner or its employees, but only with regards to enforcement of the regulatory provisions adopted today. The amount of this bond is $0.01 per gallon of certified FRGAS imported from the refiner into the U.S. per year, based on the maximum annual volume of certified FRGAS imports during the most recent five year period during which the foreign refiner exported certified FRGAS to the U.S. using an individual refinery baseline. However, the initial bond amount will be based on the volume of conventional gasoline or certified FRGAS produced at a foreign refinery that was imported into the U.S. during the year immediately preceding the year the baseline petition is submitted.[11] The foreign refiner must submit with its baseline petition a bond to reflect this volume, and include with its baseline petition information necessary to accurately establish the conventional gasoline volume for the preceding year. The foreign refiner then each year would take into account in its bond amount calculation the certified FRGAS volume for an additional year until there is a five year history, at which time the certified FRGAS volume review would include only the most recent five years.

As an alternative to posting the bond with the U.S. Treasury, a foreign refiner may meet the bond requirement by obtaining a bond in the proper amount from a third party surety agent that would be payable to satisfy U.S. judicial judgments for civil or administrative penalties against the foreign refiner provided that EPA agrees in advance to the third party and the nature of the surety agreement. In addition, the bond requirement may be met by an alternative commitment that results in assets of an appropriate liquidity and value being readily available to the United States, provided that EPA agrees in advance to the alternative.

As with domestic refiners, any violation of a regulatory requirement by a foreign refiner could result in the imposition of penalties. For foreign refiners with individual refinery baselines the assessment of a penalty could then result in the forfeiture of a bond to satisfy the penalty. This would, for example, include a failure to allow EPA inspections and audits; failure to submit required audit reports prepared by an independent auditor; or failure to properly identify the source refinery for FRGAS.

If a foreign refiner with an individual refinery baseline fails to meet any requirements, including those that apply to all refiners under the current regulations, and/or the additional requirements that would apply only to foreign refiners, then EPA may administratively withdraw or suspend its individual refinery baseline.

Withdrawal or suspension of an individual refinery baseline may be imposed for all of the refineries operated by a foreign refiner, or for a subset of a foreign refiner's refineries where appropriate. EPA will impose this sanction in a particular case only after evaluating the circumstances and exercising its discretion based on factors such as egregiousness, willfulness and prior violations. The withdrawal or suspension may be imposed for a limited time.

C. Baseline Adjustment for Imported Gasoline That Is Non-FRGAS or Non-Certified FRGAS

1. Introduction

Allowing foreign refiners to choose whether to establish an IB creates a potential for adverse environmental impact. This potential is addressed by monitoring the quality of imported gasoline, comparing it to a benchmark, and taking remedial action if the benchmark is exceeded. The details of this approach are described below.

2. Monitoring

Under the current regulations, importers submit an annual report concerning the quality of the CG they import. See 40 CFR 80.105. Importers submit an annual report after the end of the calendar year, comparing the quality of the gasoline they imported against the applicable annual average requirements. Starting in 1998, these requirements are for NO_X and exhaust toxics emission performance, determined under the Complex Model.

Under the current rules, the annual report is due by the last day of February following the end of the annual averaging period. An attest engagement report is due by May 30. The importer's report must include the total gallons of CG imported, the annual average compliance baseline, and the annual average for the gasoline imported that calendar year. The importer must also include the volume, grade and qualities for each batch of imported gasoline.

Under today's final rule, importers will continue to submit the reports described above for CG produced by foreign refiners without an IB. For gasoline produced by a foreign refiner with an IB, both the importer and the foreign refiner will submit reports to EPA. In combination these reports will contain all of the information submitted for gasoline produced by refiners without an IB.

These annual reports submitted by importers and foreign refiners provide EPA with batch by batch information for all CG imported during that year. From these, EPA will determine the volume weighted average quality for all imported CG. This will be a simple and straightforward way to monitor

[11] A foreign refinery's 1990 baseline volume would not be appropriate for setting the bond amount, because in 1990 the Gasoline Rule was not in effect, so there was no gasoline identified as conventional or RFG.

imported gasoline quality. Additional sampling and testing by EPA would be duplicative, as the importer must sample and test each batch of imported gasoline. 40 CFR 80.101(i).

3. An Appropriate Benchmark

The purpose of the benchmark is to reasonably determine when allowing foreign refiners the option to use an IB or to not use an IB has caused degradation of the quality of imported gasoline from 1990 quality of imported gasoline.

Ideally, EPA would use the volume weighted average of the quality of gasoline sent to the U.S. by foreign refineries in 1990. EPA does not have this information, but does have information on the volume weighted average baselines for domestic refineries. This average accounts for approximately 95% of the U.S. gasoline market in 1990, and reflects a wide diversity in types and kinds of refineries. There is no available data indicating that gasoline imported from foreign refineries was not consistent with this average, and absent evidence to the contrary it is not unreasonable to assume that average foreign gasoline quality in 1990 was generally equivalent to domestic gasoline quality. Also it would not be reasonable to measure overall quality for gasoline produced by foreign refiners using stricter criteria than that applied to domestic refiners, in the absence of evidence to support such an action.

The benchmark should be set at a point such that an exceedance of the benchmark reasonably indicates that the average quality of imported gasoline has degraded from 1990 levels because of the option provided to foreign refiners in using or not using an IB. Many additional factors also affect the average quality of imported gasoline. For example, there is a wide variety in the level of imports from year to year. The source and volume of imports from specific countries and refineries also varies significantly from year to year. Despite general trends in amount and source of imported gasoline, there remains a lot of year to year variability. A change in average gasoline quality during any particular year therefore might indicate the effects of allowing the option for IBs, or it might reflect the unique circumstances of that year, which may well change the next year.

Since the existence of an exceedance of the benchmark is designed to detect a multi-year trend, EPA will use a three year average for comparison against the benchmark. This will be a rolling average; e.g. the average for years 1 through 3 will be compared to the benchmark one year, the next year the average for years 2 through 4 will be compared, and so on.

EPA is setting this benchmark for NO_X at the volume weighted baseline average for domestic refiners: 1465 mg/mile for NO_X.[12]

For toxics, the evidence to date tends to show there would not likely be an adverse impact from allowing the option to use IBs. In 1995, the volume weighted annual average of imported gasoline for exhaust toxics was 86.64 mg/mile. This was cleaner than both the statutory baseline (104.5 mg/mile) and the volume weighted average for domestic baselines (97.34 mg/mile).[13] In addition, one foreign refiner that is a major supplier to the U.S. market has submitted detailed information to EPA on their expected IB, and the information submitted by the foreign refiner to date indicates that their IB for exhaust toxics would be cleaner than the SB.[14] Further information is discussed in the response to comments section. EPA believes the present circumstances do not indicate that there is a risk of adverse environmental impact, and a benchmark and provisions for remedial action are not needed for exhaust toxics at this time. Instead, EPA will monitor the average quality of imported gasoline for exhaust toxics as for NO_X, and if an adverse trend occurs EPA will develop a benchmark and remedial provisions analogous to that adopted for NO_X.

At the start of the program, the volume weighted average for 1998 and 1999 will be compared to the benchmark, and then the average for 1998, 1999 and 2000, to start the three year rolling average. A one year average for 1998 alone would not by itself appear adequate to detect a multi-year trend, while a two year average would be more effective in this regard. The effects of imports in 1998 would still be fully accounted for, in the two year average including 1999. Since an IB might start to be used in 1997, EPA will include with the 1998 imports all gasoline imported in 1997 after the date any gasoline subject to an IB is imported in 1997.

4. Remedial Action Upon an Exceedance

If a volume weighted three year annual average for imported CG exceeds the benchmark for NO_X then EPA will take remedial action. The remedial action will be an adjustment applied to the compliance baseline for CG not included in the CG compliance calculations of a foreign refiner with an IB. The adjustment to the baseline will equal the amount of the exceedance of the benchmark.

This will be reevaluated each year by comparing the average for the three prior years to the benchmark. If there is no exceedance, then a prior adjustment will be terminated. If there is an exceedance, then a new adjustment will be imposed that equals the amount of the current exceedance. For example, if the three year annual average exceeds the NO_X benchmark by 5 mg/mile, then the compliance baseline for NO_X will be adjusted by 5 mg/mile. If there is no exceedance in the next years comparison, then the adjustment will be dropped.[15]

5. Imported Gasoline Subject to the Remedial Action

A foreign refiner using an IB will follow the same procedures as a domestic refiner—the quality of its CG will be measured against the IB of the refiner that produced it. Foreign refiners without an IB would have chosen to have their gasoline measured against the SB instead of an IB, and reasonably could be expected to include refiners whose IB would have been more stringent than the SB. It is the use of IBs by some refiners, and the degradation below 1990 quality in CG produced by foreign refiners without an IB, that has the potential to cause the average CG quality to be adversely affected when other refiners are subject to an IB. Since the foreign refiner with an IB would be acting no differently than domestic refiners with an IB, the remedial action will be applied to CG imported from refiners without an IB.

D. Requirements for U.S. Importers

Under today's action U.S. importers must meet NO_X and exhaust toxics requirements for all imported CG that is not designated as certified FRGAS, and must exclude from importer CG compliance calculations all CG that is designated as certified FRGAS. A mechanism is provided by which U.S. importers would demonstrate that imported CG is certified FRGAS. The baseline that will apply to U.S. importers of non-FRGAS and non-

[12] This value is based on the Phase 2 Complex Model, and will be used prior to and after 2000.

[13] In 1995 the volume weighted average for NO_X for imported gasoline was 1415.9 mg/mile, while the SB was 1461 mg/mile, and the volume weighted average for domestic baselines was 1465 mg/mile.

[14] See 59 FR 22809 (May 3, 1994).

[15] For the initial years of the program, an exceedance for 1998 and 1999 will lead to a remedial adjustment that equals the exceedance, but no more than 1% of the SB for NO_X. The 1% cap is designed to avoid imposing an unnecessarily stringent adjustment that could result from the absence of data from a complete three year cycle.

certified FRGAS will be the statutory baseline or any adjusted baseline as discussed in section II.C above. EPA is not changing the current requirement that U.S. importers meet all requirements for imported RFG.

1. Imported Certified FRGAS

Certified FRGAS must be excluded from the U.S. importer's CG compliance calculations. This prevents the double counting that would result if certified FRGAS were included in the CG compliance calculations of both the foreign refiner and the U.S. importer. However, the U.S. importer must determine the quality and quantity of certified FRGAS at the U.S. port of entry, which the importer then reports to the foreign refiner and to EPA in order to be compared with the foreign load port testing.

A U.S. importer must classify an imported gasoline batch as certified FRGAS if the gasoline is accompanied by a certification prepared by the foreign refiner that identifies the gasoline as certified FRGAS to be included in the foreign refinery CG compliance calculations, and a report on the certified FRGAS batch prepared by an independent third party, and the load and entry port comparison is within the specified range. In this way the U.S. importer acts like a domestic distributor and would not be responsible for meeting the NO_X and exhaust toxics requirements for this gasoline. The U.S. importer is not responsible for whether the foreign refiner meets the annual NO_X and exhaust toxics requirements for certified FRGAS, including whether the foreign refiner properly calculates the refinery's compliance baseline each year.

However, the U.S. importer is responsible for ensuring the foreign refiner certification was in fact prepared by the foreign refiner named on the certificate, and that the foreign refinery has been assigned an individual refinery baseline by EPA. If a certified FRGAS certification was not prepared by the named foreign refiner, for example if it is a forgery, the U.S. importer will be required to classify the gasoline as non-FRGAS and include the gasoline in the importer's CG compliance calculations. Similarly, if the certificate accompanying a batch of certified FRGAS names a foreign refinery that has not been assigned an individual baseline, the U.S. importer will be required to classify the gasoline as non-FRGAS and include the gasoline in the importer's CG compliance calculations. It is necessary to make U.S. importers responsible for accounting for imported CG in these situations in order to enable EPA to enforce the CG requirements effectively. EPA would have great difficulty enforcing requirements against a foreign party who may have created fraudulent FRGAS certification documents, other than a foreign refiner who has established an individual refinery baseline.

EPA believes U.S. importers can easily protect themselves against this type of liability. EPA will publish on its computer bulletin board the identity of foreign refineries that have been assigned individual baselines, that may be used by importers to identify legitimate foreign refiners of FRGAS. Importers can avoid relying on false certificates by selecting reliable business partners, or by contacting the foreign refiner to ensure the authenticity of the certificate for any particular certified FRGAS batch.

The U.S. importer must use an independent third party to determine information about each certified FRGAS batch. The batch quality and quantity must be determined through sampling and testing prior to off loading the ship, and that will be compared with the quality and quantity determined at the load port after the ship was loaded. The independent party also must use the product transfer documents to determine the identity of the foreign refinery where the certified FRGAS was produced. The importer submits a report to the foreign refiner and to EPA containing the batch information.

U.S. importers may not classify certified FRGAS as ''gasoline treated as blendstock,'' (GTAB), because to do so would result in the same CG being included in two compliance calculations.[16] In addition, U.S. importers may not use GTAB procedures to convert certified FRGAS into RFG, for the same reason that domestic regulated parties are not allowed to convert CG into RFG. Conversion of CG into RFG is prohibited because of concern such conversions could result in degradation of the CG gasoline pool. For example, in the absence of this constraint a refiner could produce very clean CG that in fact meets the RFG requirements, include this gasoline in the refiner's CG compliance calculations to offset other dirty CG, and then convert this gasoline into RFG. The result of this would be degradation in the average quality of the refiner's CG. This same effect would be possible if importers could convert certified FRGAS into RFG.

2. Imported Non-FRGAS or Non-Certified FRGAS

U.S. importers must meet all current requirements for imported gasoline that is produced at a foreign refinery without an individual baseline (i.e., non-FRGAS), and for gasoline produced at a foreign refinery with an individual baseline where the gasoline is not included in the foreign refinery's NO_X and exhaust toxics compliance calculations (i.e., non-certified FRGAS). If the importer classifies the gasoline as conventional, the importer must include the gasoline in its NO_X and exhaust toxics compliance calculations. However, the baseline used by importers would be the baseline described in section II.C of this preamble. If the imported gasoline is classified as RFG, the importer must meet all RFG quality and other requirements for the gasoline.

Importers are allowed to use the current GTAB procedures to reblend or reclassify imported non-FRGAS and non-certified FRGAS.

In the case of non-FRGAS, importers have no requirements related to tracking the refinery of origin. In the case of non-certified FRGAS the importer must meet additional requirements related to tracking the refinery of origin. The importer must have an independent laboratory determine the volume of each non-certified FRGAS batch, and report this volume to the foreign refiner and to EPA to be compared with the load port volume. The volume of non-certified FRGAS produced at a foreign refinery with an individual baseline is used to calculate the refinery's CG compliance baseline, which constitutes a volume cap on use of an individual refinery baseline.

E. Early Use of Individual Foreign Refinery Baselines

A foreign refiner who submits a petition for an individual refinery baseline may begin using the individual baseline prior to EPA approval of the baseline petition, provided EPA makes a preliminary finding the baseline petition is complete, and the foreign refiner also has completed certain requirements proposed today. However, any gasoline imported under a requested IB will be subject to the actual IB assigned by EPA.

[16] EPA has issued guidance under the current regulations that allows importers to classify imported gasoline as blendstock, called GTAB, that the importer must use to produce gasoline at a refinery operated by the importer-company. The purpose of the GTAB procedures is to enable importers to conduct remedial blending of imported gasoline, or to reclassify gasoline with regard to RFG or CG, before imported gasoline is introduced into U.S. commerce. This puts importers on a more equal footing with refiners, who are able to reblend or reclassify gasoline prior to shipping gasoline from the refinery.

EPA will conduct a completeness evaluation as the first step in baseline review process, and will notify a foreign refiner of the results of the completeness review on request. However, the initial completeness review does not bar EPA from requiring a foreign refiner to submit additional information later in the baseline review process.

The additional requirements a foreign refiner will have to complete in order to use an individual baseline early are related to ensuring EPA's ability to monitor and enforce compliance by the foreign refiner with all applicable requirements during the early use period. The particular requirements that will have to be met are: (1) The commitments regarding EPA inspections and the forum for enforcement actions, and (2) the requirements related to posting of a bond.

If these conditions are met, the foreign refiner may begin classifying gasoline as certified and non-certified FRGAS, and may use the individual refinery baseline to demonstrate compliance with the NO_X and exhaust toxics requirements.[17] However, a foreign refiner will be required to meet the NO_X and exhaust toxics requirements for certified FRGAS using the refinery baseline values that ultimately are approved by EPA. Thus, if a foreign refiner elects to use an individual refinery baseline early, and uses baseline values that are less stringent than the baseline values ultimately approved by EPA, the refiner's compliance with the NO_X and exhaust toxics requirements will nevertheless be measured relative to the approved baseline values. If this evaluation results in a violation of the NO_X and exhaust toxics requirements, the foreign refiner will be held liable.

F. Requirements for RFG Before 1998

The scope of this final rule is limited to requirements for conventional gasoline. The CG requirements rely on refinery baselines both now and in the future. The RFG requirements for sulfur, T–90 and olefin content also rely on individual refinery baselines, but only until the Complex Model applies beginning in January, 1998. In the proposed rule EPA requested comments on whether the regulations should allow individual refinery baselines to be used for these RFG requirements if a foreign refiner obtains an individual baseline before January, 1998. The only comments on this issue stated that there would be insufficient time before January, 1998 to justify use of individual baselines for RFG and no commenters requested that this rule apply to RFG. This final rule is therefore limited to conventional gasoline.

III. Summary of Changes From Proposal

The following list identifies aspects of the proposed rule (62 FR 24776) that were modified in the final rule.

- The proposal would have required foreign refiners to submit baseline information on the foreign refinery's overall gasoline production for 1990. This requirement is deleted in the final rule. Baseline information must be submitted for the gasoline sent to the U.S. in 1990, however, EPA reserves the right to seek further information where appropriate.
- The proposal would have required that where a foreign refiner is owned or operated by a foreign government, the government would have to sign a waiver of sovereign immunity. The final rule instead includes a regulatory requirement that if a foreign refiner establishes and uses an individual baseline it will constitute a waiver of sovereign immunity for purposes of EPA or other U.S. enforcement actions based on violations of the requirements adopted today.
- The proposal would have required that the foreign refiner post a bond in order to receive an individual refinery baseline. In the final rule the bond requirement and bond amount are retained, however the foreign refiner many meet the bond requirement with other assets, subject to EPA approval.
- The proposal would have established various requirements relating to verifying the source of gasoline imported under an individual baseline—sampling and testing by independent third parties at the load port and discharge port, comparisons of the test results, and certifications as to identity and source of the gasoline. If the gasoline failed the load and entry port comparison it would still be included in the foreign refiner's compliance calculation. In addition, no gasoline classified by the foreign refiner as intended for the U.S. could be diverted to a non-U.S. market. Many of the details of those related provisions have been modified to increase the flexibility for importers and foreign refiners, to be consistent with the tracking purpose of the provisions, and to take into account any potential for adverse environmental impact.

IV. Response to Comments

A. Optional vs. Mandatory Baselines

1. EPA's Proposal

EPA proposed that foreign refiners would be allowed to establish and use individual baselines, but it would not be mandatory. If a refiner did not establish and use an IB, the gasoline they export to the U.S. would be regulated through the importer, and subject to the importer's baseline. Specific regulatory provisions would be implemented to ensure that the option to use an individual baseline would not lead to adverse environmental impacts. This would involve monitoring the average quality of imported gasoline, and if a specified benchmark is exceeded, remedial action would be taken by adjusting the requirements applicable to imported gasoline.

Under this approach, the volume of gasoline that could be imported under the individual baseline for a foreign refinery would be limited in the same manner as for domestic refiners, relative to a refinery's 1990 baseline volume.

2. Comments: Optional Versus Mandatory Individual Baseline Approach

Several parties from the domestic refining and distribution industry commented that EPA should not offer foreign refineries the opportunity to choose between either an individual baseline or the statutory baseline. The commenters suggested that offering the choice discriminates against domestic refiners who do not have the opportunity to choose, and offers the foreign refiners a competitive advantage.

These commenters argued that foreign refiners already have a competitive advantage because they are subject to fewer environmental costs at their refineries relative to U.S. refiners, and they are not subject to U.S. RFG or anti-dumping regulations on the majority of their production which is not for the U.S. market. These commenters urge EPA to avoid any final regulation which would further upset the competitive balance and concluded that foreign refiners should be treated in the same manner as domestic refiners.

These commenters argued that foreign refiners who would otherwise have individual baselines more stringent than the statutory baseline would not apply for an IB (their product would be regulated through the importer, who is subject to the statutory baseline), while those with baselines less stringent than the statutory baseline would choose to establish and use an individual baseline. The domestic industry also

[17] During 1997, under section 80.101(b)(1) the CG requirements are for sulfur, T–90, olefins and exhaust benzene emissions. Beginning in 1998 the CG requirements are for NO_X and exhaust toxics emissions performance.

noted that many U.S. refiners with baselines more stringent than average could significantly benefit if they were given the choice of choosing the statutory baseline.

To avoid this perceived inequity, domestic refiners maintain that if all foreign refiners are not held to the statutory baseline, then they must be required all to establish an individual baseline for product shipped to the U.S. in 1990, or domestic refiners should be offered the same option to operate at the statutory baseline if they choose to do so.

One commenter stated that EPA is obligated under the Clean Air Act to favor protecting the environment over energy and economic considerations. The commenter stated that in *American Petroleum Institute* v. *EPA* (52 F. 3d 113, 1120 (D.C. Cir. 1995), the court explicitly noted that these non-environmental factors are not to be used as an independent grant of authority for EPA rulemaking.

The same commenter suggested that EPA and DOE concerns regarding price and supply impacts were an inappropriate foundation for this rulemaking. The commenter stated that the structure of the Clean Air Act, with its emphasis on protecting public health, meant that supply or price concerns cannot provide the foundation for this rule. The commenter concluded that EPA has an overriding obligation to consider air quality before any other factors, and that obligation should lead EPA to a decision to require mandatory baselines for all foreign refiners.

Another commenter suggested that EPA's reliance on DOE's analysis was inadequate for selecting optional baselines over mandatory baselines. The commenter, an association representing certain domestic refiners, stated that they do not believe DOE or any other organization can credibly quantify the impact of foreign refiner baseline restrictions on the U.S. market just as DOE could not quantify the impact of baseline requirements on domestic refiners.

Another association representing the domestic refining and distribution industry commented that despite DOE's concerns, a more serious threat to U.S. gasoline supply is adopting a rule which discriminates against domestic refiners. The commenter suggested that domestic refiners' business is extremely sensitive to unequal treatment in the international marketplace. The commenter suggested that during a short term supply emergency, EPA could establish a temporary waiver procedure to provide limited relief from baseline requirements. This commenter also suggested that any waiver should apply to all suppliers in an affected region and not be limited to foreign suppliers.

Foreign refiners, domestic gasoline marketers and domestic importers and blenders and others commented that the optional individual baseline is appropriate.

3. EPA Response

Optional Baselines for Domestic Refiners

EPA analyzed two approaches to establishing individual baselines for foreign refiners. One involved mandating that all foreign refiners obtain and use an IB in order to market conventional gasoline in the United States, the other approach provided this as an option but did not mandate it. For the reasons described in the proposal, and in this notice, EPA believes there are serious problems with the mandatory approach based on the risk that it could significantly disrupt the marketing of foreign conventional gasoline to the United States and therefore have significant impacts on the cost of gasoline. The proposal also discussed the potential for degradation in emissions quality of gasoline from the mandatory baseline approach. Because of this, EPA proposed and is adopting an optional approach.

EPA does not agree that this discriminates against the domestic refining and distribution industry, or that domestic refiners should be provided the same option. While foreign refiners are provided a choice that domestic refiners are not provided, this is because the supply and price impacts from mandating the use of IBs for imported gasoline differ significantly from those for domestic gasoline. In addition, this choice can be provided to foreign refiners without adverse environmental impacts, through the use of the baseline adjustment mechanism to monitor and offset any potential degradation in the pool of imported gasoline. Providing the same choice to domestic refiners would very likely lead to a significant degradation of the much larger pool of domestically produced gasoline, that could only be remedied through an expensive and cost-ineffective adjustment mechanism.

In establishing the rules for conventional and reformulated gasoline, EPA determined that domestic refiners are all able to establish individual baselines. Under section 211(k)(8) of the Act, EPA therefore requires that domestic refiners establish and use IBs. This is a cost-effective way to ensure that domestically produced conventional gasoline does not degrade in emissions related quality below 1990 levels. It has been successfully implemented without significant disruptions to the supply or price of conventional gasoline. Continuing this approach for domestic refiners does not present a risk of significantly disrupting the gasoline supply and price market. This would be a much less cost effective way to keep conventional gasoline quality at 1990 levels than mandating the use of IBs for domestic refiners.

Providing domestic refiners the choice between use of an IB and use of the statutory baseline would likely lead, according to commenters, to many domestic refiners making this choice.[18] EPA would have to establish a benchmark and adjustment mechanism, similar to that proposed for imported gasoline, to monitor for and offset any degradation of the gasoline pool resulting from providing such an option. Given the large volume of gasoline involved, which is much larger than the volume of imported gasoline at issue here, and the expectation that exercising such a choice to use the SB would be based on the economic value of producing gasoline designed to meet a less stringent baseline with the resulting bias for a dirtier gasoline pool, EPA would almost assuredly be called on to impose an across the board adjustment to baselines for domestic refiners to offset degradation of the gasoline pool from 1990 levels. This would result in the kind of ''reformulation'' of conventional gasoline to stay at 1990 levels that the mandatory use of IBs was meant to avoid.

As compared to gasoline produced by domestic refiners, EPA has two potential parties whom it can regulate with respect to gasoline produced by foreign refiners. For imported gasoline EPA could regulate either the importer, or the foreign refiner. EPA therefore has discretion under section 211(k)(8) as to which party, and under what conditions, it imposes the requirements for conventional gasoline that is imported. For example, under the current regulations all foreign produced gasoline is regulated through the importer, and importers are not provided an option concerning establishment and use of an IB, while foreign refiners are not directly regulated.

For the reasons and circumstances described in section I.E. and in the proposal, EPA has rejected the approach of mandating that all foreign refiners establish and use an IB in order to

[18] Since domestic refiners have adequate data to establish an IB, this would not be consistent with the requirements of section 211(k)(8).

market conventional gasoline in the U.S. EPA has instead determined that it is appropriate to continue regulating imported conventional gasoline through the importer in all cases except those where a foreign refiner has adequate data and chooses to establish and use an IB. The concerns on price and supply which lead to rejecting the mandatory approach for foreign refiners do not apply to domestic refiners, and therefore do not provide a basis for changing the mandatory approach currently applied for domestic refiners. In addition, providing this option to foreign refiners is less likely to lead to a degradation of the average qualities of imported gasoline than the much more likely degradation that would occur to the much larger pool of domestically produced gasoline if the same option were provided to domestic refiners.

In sum, the mandatory use of IBs for domestic refiners has worked successfully, without significantly disrupting the supply and cost of conventional gasoline. Requiring the same approach for imported conventional gasoline, presents the risk of this kind of significant disruption. Providing domestic refiners with an option to establish and use IBs would very likely lead to a degradation in the emissions quality of conventional gasoline, over a very large percentage of the total volume of conventional gasoline. This degradation could be remedied by a baseline adjustment mechanism, however this would be a less-cost effective way to avoid such degradation than not providing such an option. Providing foreign refiners with the option to establish and use an IB presents a risk of environmental degradation, but this covers a much smaller pool of gasoline and it is unclear whether and to what extent there will in fact be a degradation in the pool of imported gasoline. If there is, it can be readily remedied consistent with the flexibility currently available to importers and foreign refiners to determine what gasoline is imported into the U.S., without the potential supply and price impacts from mandating the use of IBs for imported gasoline.

Consideration of Environmental Impact of Providing an Option for an Individual Baseline

Several commenters suggested that the Agency's proposal put trade and economic considerations over its concern for protecting the environment. On the contrary, the Agency believes that this final rule is fully consistent with the Agency's commitment to fully protect public health and the environment.

EPA considered two different approaches to the use of IBs by foreign refiners.[19] It is reasonable for EPA to consider the cost impacts of the two approaches and adopt the one that avoids the risks attendant with seriously disrupting the importation of conventional gasoline into the U.S. In this case, the provisions adopted concerning the option to establish and use an individual baseline will fully protect the public health and environment, and achieve the Clean Air Act goals for the conventional gasoline program. This will be achieved without risking significant disruption to the supply or price of conventional gasoline.

Impact of Mandatory Approach on Gasoline Supply/Price

Commenters objected that EPA did not have an adequate basis to reject the mandatory baseline approach based on supply and cost considerations.

Based on the information presented by DOE, EPA believes that requiring individual baselines for all foreign refiners presents too great a risk of adverse effects on gasoline supply and prices. To fully understand how mandatory baselines for imported conventional gasoline could impact the gasoline market it is first important to understand the role imports play in the domestic market. Foreign imports account for 6%–8% of total U.S. gasoline consumption. Almost all (over 95%) of imports come into Petroleum Administration for Defense Districts (PADD) I, the U.S. east coast, where they represent about 20% of total gasoline supply.

Imported gasoline plays a significant role in the domestic gasoline market. Imported gasoline augments the supply of gasoline on the east coast of the United States, an area with an already large demand. During the summer of 1996, U.S. east coast and gulf coast refinery operating utilization rates were in excess of 96%. Only about 150 thousand barrels a day of additional domestic gasoline production capacity was available. However, the market was demanding about 500 thousand barrels a day of additional gasoline. Imported gasoline made up the gap with over two-thirds of the imports meeting a need that could not be served by U.S. refineries.[20]

One commenter suggested that EPA's optional individual baseline approach discriminates against domestic refiners to such a degree that domestic refining capacity in the United States could contract as a result of this unequal treatment, which would have a more severe impact on the gasoline market in the United States. However, the current production rates of east coast and gulf coast refineries would indicate that this consequence is highly unlikely. It is clear that U.S. demand for gasoline will continue to increase at a rate surpassing U.S. production. The suggestion that domestic refineries will reduce their production in light of such a demand seems implausible.

One commenter suggested that EPA establish a temporary waiver procedure to provide limited relief from baseline requirements during short-term supply emergencies. Although EPA arguably may have the authority to establish such a waiver provision, it would be an impracticable solution in this instance. It is clear from the DOE's analysis outlined below that the disruption mandatory baselines would cause to the sale and importation of opportunistic gasoline could leave the U.S. market with a constant risk of short term supply and price disruptions, and the temporary waiver provision could not be implemented in a time frame that would eliminate this risk. Moreover it would require the U.S. government to arbitrarily determine the appropriate market price of gasoline.

Much of the gasoline imported into PADD I is shipped into the United States on an ad hoc basis. Currently gasoline is imported into the U.S. market from a free moving and fungible distribution system. This opportunistic sale of gasoline is an important element in the U.S., and particularly the east coast, gasoline supply system. The broad based use of tracking and monitoring restrictions which would be required by mandatory individual baselines would eliminate the flexibility necessary to quickly divert opportunistic gasoline to the U.S. should the market demand it. This would make it more likely that imported gasoline would not play the same role that it currently does in moderating price increases.

The amount of opportunistic gasoline imported into the United States is not inconsequential. DOE's analysis indicates that in 1996, a total of 25

[19] The potential for an adverse environmental impact from providing an option to foreign refiners, and EPA's mechanism to monitor for and fully offset any such adverse impact, is explained in detail in the proposal and elsewhere in this notice. The potential for an adverse environmental impact from the mandatory IB approach is described in the proposal at 62 FR 24779.

[20] Analysis provided in comments submitted by the Department of Energy, July 23, 1997 in response to the May 6, 1997, NPRM.

separate importers brought gasoline, of all types, to the U.S. east coast from about 40 refineries in 28 countries. Of this amount, over 40% was imported as opportunistic gasoline. The ability to quickly draw gasoline supplies from various parts of the world to the U.S. market is important in moderating price swings and meeting consumer demand.

While most imported gasoline enters the U.S. market on the east coast it impacts gasoline prices nationwide. Imported gasoline tends to moderate price increases by increasing the sources of gasoline to meet U.S. demand. DOE examined New York harbor, Chicago and Gulf Coast spot prices for conventional gasoline which showed highly correlated movements throughout 1996. The pipelines linkages between PADD III and PADDs I and II are the key mechanism for linking the prices.

The DOE analysis concluded that a 1 cent per gallon change in New York spot prices, driven by a shortage of imports, could affect the over 4 million B/D of conventional gasoline being used in PADD's I, II and III. A 1 cent/gallon price change, lasting as little as one week (typical of the time required to get additional gasoline shipments to the U.S. east coast from Europe or from the gulf coast by water), could cost or save gasoline consumers over $10 million.[21]

While a number of factors are at work in market fluctuations it is clear that the volume of imported gasoline is price responsive. By rapidly providing additional supply, consumer demand is met without the large price increases that would be necessary to control gasoline demand.

EPA disagrees with the comment that an option to establish an individual baseline should not be provided because it would give foreign refiners a competitive advantage over domestic refiners. Foreign refiners who establish an individual baseline will be subject to the same requirements as domestic refiners, with additional requirements dictated by their unique circumstances. Foreign refiners will be required to fulfill the additional burden of tracking and segregating their imported gasoline to ensure that the correct individual baseline is being used for the purposes of the compliance calculation.

Gasoline from foreign refiners who do not establish an individual baseline would be subject, through the importer, to an adjustment to the importer baseline needed to offset any adverse environmental impact from a foreign refiner's choice not to seek an individual baseline.

As described above, this option is provided to foreign refiners based on the significant difference in circumstances between applying the mandatory use of individual baselines to domestic or foreign refiners, and the significant difference in potential adverse impact on the environment and gasoline supply and prices.

Role of Consideration of Costs

One commenter argued that EPA's obligation under the Clean Air Act to protect the environment take priority over costs and economic concerns in this rulemaking.

EPA's authority to take costs and economic factors into consideration when establishing rules protective of the environment depends on the terms of the specific statutory provision at issue. As in prior rulemakings establishing the conventional gasoline program, EPA's authority is based on sections 211(k)(8) and 211(c)(1) of the Act. Each of these provisions gives EPA discretion to take cost and other relevant factors into consideration when establishing requirements that meet the air quality goals of the conventional gasoline program. In the prior rulemakings for the conventional gasoline program, EPA has taken these factors into consideration when establishing the requirements needed to meet the air quality requirements of this program. For example, EPA's CG requirements include the ability to obtain an adjustment to the IB under certain circumstances related to economics; establish testing, recordkeeping and reporting requirements which reasonably take into account the burden of the measures, and reflect the decision in the 1993 rulemaking to not establish specific emissions requirements for VOCs, CO, and non-exhaust toxics, based in part on economic considerations. In this case it is also reasonable to consider adverse supply and cost impacts when determining the appropriate approach. The statutory provisions noted above provide EPA with the discretion to consider these factors.

B. Establishment of an Individual Baseline (IB)

1. Overview

Comments were submitted on a number of issues with regard to establishment of individual baselines by foreign refiners. These issues included the proposed requirement to submit baseline information on the foreign refinery's overall gasoline production as well as the subset of gasoline which was sent to the U.S. in 1990; the proposed January 1, 2002 deadline for submittal of foreign refinery baseline petitions; and foreign refinery aggregation for compliance purposes.

In summary, EPA is not requiring foreign refiners to submit baseline information on the foreign refinery's overall gasoline production. EPA reserves the right to require such information in a specific case if it is needed to reasonably evaluate a baseline submission. EPA is retaining the proposed January 1, 2002 deadline for baseline petition submittals. In general, with regard to other baseline issues, such as aggregation, baseline volumes, and baseline review, audit and approval, EPA is maintaining the same requirements for foreign refiners as for domestic refiners, as proposed.

2. Use of Total 1990 Product Data

EPA proposed that a foreign refinery would have to submit information regarding its total 1990 gasoline production as well as information regarding the subset of the refinery's gasoline production which was sent to the U.S. in 1990. EPA believed that information on the total refinery gasoline production would be useful in the calculation and verification of the quality of the subset of gasoline sent to the U.S. in 1990.

Commenters indicated that requiring an individual baseline calculation for the total gasoline production was burdensome, costly, and, in general, of little additional value. Commenters indicated that the quality of the subset of gasoline sent to the U.S. in 1990 could be accurately determined without the additional information on the refinery's total gasoline production. One commenter also stated that EPA previously concluded that the overall quality from a foreign refinery might bear scant resemblance to the quality of the portion going to the U.S. market. This commenter also stated that requiring information on a foreign refiner's overall gasoline production is wholly unnecessary.

In general, EPA agrees with the commenters that requiring information in all cases on the overall 1990 gasoline production of a foreign refinery may be costly and may provide little additional value. Thus, EPA will only require that a foreign refiner's baseline petition contain information relevant to the calculation of the baseline for the subset of gasoline sent to the U.S. in 1990. Nonetheless, the calculation of a refinery baseline per these regulations is complex, with wide variances in the types and amounts of data available on

[21] Comments from DOE on EPA's May 6, 1997 NPRM, page 2.

the subset of 1990 gasoline which came to the U.S. As with domestic refiners, EPA reserves the right to request additional information to evaluate a petition for an IB, where such information is needed to reasonably determine an accurate IB. In specific cases this might include much or all of the information pertaining to the refinery's 1990 total gasoline production.

3. January 2002 Deadline

EPA proposed that baseline submissions would have to be submitted to the Agency by January 1, 2002. EPA proposed this date in order to allow for the collection of both summer and winter data and the preparation of a baseline petition subsequent to June 1, 2000, the scheduled date EPA would announce the average quality of imported gasoline for the first monitoring period of 1998 and 1999. Domestic refiners had approximately one year following issuance of the final regulations in December 1993 to prepare (including completion of sampling, testing and analysis) and submit their individual baselines to EPA prior to the start of the program on January 1, 1995.

EPA received comments indicating that the proposed deadline was appropriate, and others indicating that such a deadline was unnecessary, and perhaps arbitrary. Commenters opposing a deadline thought that foreign refiners should be allowed to apply for an individual baseline when they desire to, for example, when export volumes to the U.S. increase and/or pricing conditions are favorable. One commenter questioned whether baseline petitions would be accepted prior to January 1, 2000, and suggested that EPA specify a reasonable period of time in which it will act on a baseline submission, as the commenter indicated EPA did with domestic refiners.

EPA continues to believe that a deadline for the receipt of foreign refiner baselines is appropriate in order to avoid the increased uncertainty in determining an individual baseline too many years after the 1990 time period that an IB is based upon. A reasonable deadline such as January 1, 2002 provides foreign refiners several years to exercise the option provided here, and will assure that EPA has a reasonable factual basis to determine an accurate IB regarding 1990 gasoline volume and quality. It will also maintain requirements similar to those imposed on domestic refiners. While a foreign refiner would not have the right under the regulations to seek an IB after January 1, 2002, after this date a foreign refiner could still petition EPA to revise this rule and establish an IB, for example, where the refiner could demonstrate that it is able to establish an accurate and verifiable IB.

Foreign refiners may submit a baseline petition to EPA at any time prior to January 1, 2002. However, if gasoline is imported using an IB while a petition for an IB is pending, the foreign refiner will be subject to the ultimate approved baseline, which may change significantly (to their benefit or detriment) from the original submission due to errors or omissions uncovered during EPA review. In general, baselines are reviewed in the order received, but a well prepared and ultimately correct baseline may be approved prior to a baseline submitted earlier which was less well prepared or incorrect.

EPA is not establishing a specific time frame to act upon baselines, due to the many uncertainties, discussed above, regarding the completeness of the original submittals and the number of questions EPA may have for a refiner before determining that a submittal is complete, accurate, and appropriate for approval. The Agency's review of submissions by domestic refiners took between a few months and two years, depending on the quality and completeness of the original submission. EPA will review foreign refiner baseline submissions in an expeditious and timely manner but cannot specify a time frame in which a foreign refiner baseline will be acted upon. Foreign refiners can export conventional gasoline to the U.S. using an IB under the program requirements finalized today without an approved baseline. Foreign refiners should note that once a baseline petition is submitted and a refiner begins to use an IB, the refiner will be held to compliance with the ultimately approved baseline.

4. Aggregation

As stated in the proposal, a foreign refiner who operates more than one refinery with an individual baseline would be able to aggregate the baselines of some or all of its refineries, as allowed for domestic refiners.

Commenters said that allowing a foreign refiner to aggregate refineries with both unique individual baselines and statutory baselines gave additional flexibility to foreign refiners who would already have the option of having or not having an individual baseline. One commenter also stated that foreign refiners should be subject to the same one-time decision regarding aggregation as domestic refiners. Commenters also said that foreign refiners should not be allowed to game the system by electing either an individual baseline (for refineries dirtier than the statutory baseline) or the statutory baseline (for refineries cleaner than the statutory baseline) on a refinery-by-refinery basis for facilities owned by a single entity. These commenters claimed that allowing some individual baseline refineries and some statutory baseline refineries under a single owner would ''aggravate the competitive discrimination against domestic refiners.'' According to these commenters, all refineries owned by a single entity should all have either an individual baseline or all have the statutory baseline, and if a baseline for one of the refineries could not be established, then no individual baseline should be given to any of the refineries of a single entity.

EPA did not propose that all or none of the refineries of a foreign refiner would have to have an individual baseline, because a central element of the proposal was to provide foreign refiners an option: either obtain an individual baseline and fulfill all of the requirements accompanying the use of an individual baseline by a foreign refinery, or continue with the current requirements with respect to gasoline produced for the U.S., subject to any remedial baseline adjustment.

Many of the comments above focused on foreign refineries with statutory baselines. In fact, under today's rule, no foreign refinery which does not apply for an individual baseline will have the statutory baseline. Foreign refineries which apply for and receive an individual baseline will either have a unique individual baseline or will have the statutory baseline (with a zero baseline volume) e.g., where the refinery was not in operation in 1990 or produced no gasoline for the U.S. in 1990. All other foreign refineries will have no baseline, and their gasoline will be regulated through the importer's baseline, typically the statutory baseline. Thus, under this rule, it is possible that some refineries of a foreign refiner would have an approved individual baseline and some would have no baseline. An aggregate baseline (or baselines) of a foreign refiner could only be composed of the baselines of its facilities with approved individual baselines. Foreign refineries without an individual baseline cannot be included in an aggregate baseline.

A foreign refiner may choose to obtain an individual baseline for one, some, all or none of its refineries. Limiting the option to cases where all of a refiner's refineries receive IBs is counter to the reasons for providing an option. For

example, it would lead to cases where a foreign refiner wanted to establish an IB for a refinery and had adequate data to do so, but was precluded from this because it could not establish an IB for a different refinery, or to situations where EPA or the foreign refiner would have to prove a negative in order to establish an IB, i.e., that no IB could be developed for one refinery as a condition of allowing an IB for a different refinery where the data was available. These results would be inconsistent with the general approach of giving foreign refiners an option to establish individual baselines where they want, and have adequate data to do so.

In summary, the requirements for aggregating baselines for foreign refiners are the same as those for domestic refiners, namely, all facilities in an aggregate baseline must have an assigned individual baseline, either a unique individual baseline or the statutory baseline. Aggregate baselines may be composed of some or all of a refiner's refineries with assigned individual baselines, and a refiner may have more than one aggregate baseline. Each refinery, though, can only be part of one aggregation. As with domestic refiners, the decision to form an aggregate baseline is a one-time decision.

5. Baseline Volumes

Several commenters indicated that foreign refiners should be subject to the same baseline volume constraints as domestic refiners, namely, that the individual baseline applies up to their baseline volume limit, and the statutory baseline applies to all volume in excess of the baseline volume per the calculation of compliance baseline values in 80.101(f), namely, a volume-weighted average of the individual baseline value and the corresponding statutory baseline value. EPA agrees. EPA proposed and is finalizing a requirement that foreign refiners would be subject to the same restrictions for individual baseline volumes as are domestic refiners, per 80.101(f).

One commenter suggested, that where it is difficult to quantify volumes exported to the U.S. by a refiner, that Energy Information Administration (EIA) reported country totals be used to verify and cap quantities reported by foreign refiners. The commenter suggested that the sum of all baseline volumes reported to EPA from a country cannot exceed the total country volume reported by EIA in 1990. According to the commenter, this should be done on a seasonal basis to assure that complex model winter/summer differences are properly accounted for.

EPA proposed and is finalizing that those foreign refiners which petition the Agency for an individual baseline will have to adequately account for the volumes of gasoline they sent to the U.S. in 1990. EPA agrees that EIA data would be a useful tool for checking that the sum of the baseline volumes of each facility did not exceed the 1990 country levels reported in EIA.

16. Baseline Audits

Several commenters indicated their concern that foreign refiners submitting baseline petitions should be subject to the same requirements with regard to review by an EPA-approved independent baseline auditor, and EPA audits and approval of baselines. EPA proposed and is finalizing requirements that all foreign refinery individual baseline petitions be reviewed by an EPA-approved independent baseline auditor. Once submitted to the Agency, they will undergo the same comprehensive and detailed review process used to evaluate baseline submissions by domestic refiners.

7. Miscellaneous

Several commenters indicated that foreign refiners would have a competitive advantage vis-a-vis the proposed regulations in a number of areas, including the fact that they are not subject to conventional gasoline and other environmental requirements for all of the non-U.S. bound gasoline they produce. Commenters claimed that clean gasoline for the U.S. could be made less expensively because foreign refiners could ''dump'' dirty components into the gasoline destined for their home markets and other non-U.S. markets which have fewer restrictions on gasoline quality than the U.S. One commenter suggested that a foreign refiner seeking an individual baseline should be required to demonstrate that it is not, in fact, dumping dirty components into gasoline sold in its home market.

EPA acknowledges that foreign refiners may have additional flexibility, as indicated by commenters. However, as EPA has indicated previously, section 211(k) of the Clean Air Act is not aimed at regulating the quality of gasoline used in other countries, nor at regulating foreign refiners except with regard to the gasoline they send to the U.S.

C. Type of Requirement for FRGAS

1. Summer vs. Winter Averaging

A few commenters suggested that foreign refiners with individual baselines would have additional flexibility over domestic refiners because of seasonal differences in the complex model. They stated that the same gasoline evaluated under the winter model produces significantly higher emissions than gasoline evaluated under the summer model, and because of this, foreign refiners could meet their emission requirements with poorer quality gasoline by increasing imports of summer gasoline (or importing a lower portion of winter gasoline). Commenters also stated that gasoline imports have traditionally been higher in the summer. According to commenters, domestic refiners are essentially limited to domestic markets and fixed seasonal demand, and do not have the opportunity to systematically control their summer/winter production. Commenters suggested that EPA require foreign refiner compliance on a seasonal basis, or offer the seasonal basis option to domestic refiners. One commenter also suggested that the benchmark be based on the last 3 year running average of imported summer gasoline.

Starting in 1998, compliance with IBs only applies to conventional gasoline for which only certain exhaust emissions are of concern. The winter complex model does produce higher exhaust emissions for a given fuel than the summer version of the model. However, EPA disagrees that foreign refiners could take advantage of this by systematically producing more summer than winter gasoline. First, U.S. gasoline demand increases nationwide during the summer. Domestic refiners produce more gasoline in the summer, and it would seem logical that imports would also increase during the summer. EPA agrees that domestic refiners are essentially limited to domestic markets, however, EPA believes that both foreign and domestic refiners are limited to the seasonal demand. It would not be prudent for a foreign or domestic refiner to market additional volumes of summer gasoline beyond what it could reasonably expect to be used, because of storage issues and the fact that, for foreign refiner's with an individual baseline, gasoline in excess of their baseline volume is evaluated at the statutory baseline, just as for domestic refiners.[22]

[22] On a related matter, EPA recently proposed a requirement that conventional gasoline will be classified as summer gasoline only where the gasoline both meets A federal RVP requirements under section 80.27, and is intended for use in an area subject to the RVP requirements during the period these requirements are in effect. If adopted this would limit inappropriate classification of

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Providing different averaging periods for foreign and domestic refiners of CG would not be consistent with EPA's basic approach of applying the same requirements to foreign and domestic refiners except where clear and convincing reasons call for different requirements (such as providing an option to establish and use an IB to foreign refiners as compared to mandating an IB, imposing additional requirements related to tracking of gasoline and compliance assurance, and establishing a mechanism to offset any adverse environmental impact from providing the option to establish and use and IB). In addition, providing domestic but not foreign refiners with an option to average seasonally would clearly lead to adverse environmental impacts, as domestic refiners would choose the averaging period that required less control of gasoline quality. For these reasons EPA is not adopting the suggested approach.

2. Other

One commenter suggested that foreign refiners have yet another advantage because they can blend components such as MTBE into their gasoline prior to entry into the U.S. at the tariff rate for motor fuels while domestic refiners must pay a significantly higher chemical duty on MTBE imported for gasoline blending. While the tariff situation described by the commenter could provide an advantage to foreign refiners, this tariff differential already exists, and is not a result of, nor will it necessarily be exacerbated by, today's rule.

D. Liability

1. Party Responsible for Meeting the Gasoline Quality Requirements for FRGAS

a. EPA's Proposal: EPA proposed that a foreign refiner who obtains an individual refinery baseline would be responsible for meeting the NO_X and exhaust toxics requirements for the conventional gasoline produced at the foreign refinery and imported into the United States. This is like the requirements that apply to a domestic refiner, who must meet the NO_X and exhaust toxics and requirements for conventional gasoline produced at the domestic refinery and used in the United States. EPA also requested comments on an alternative option, where the U.S. importer would be responsible for meeting the NO_X and exhaust toxics requirements for imported conventional gasoline produced by a foreign refiner with an individual refinery baseline, but using the baseline that applies to the foreign refinery.

b. Comments: EPA received comments from two foreign refiners who supported the alternative option of making the U.S. importer responsible for meeting the conventional gasoline NO_X and exhaust toxics requirements. EPA also received comments from a group of U.S. importers who opposed placing this responsibility on U.S. importers if the importer would have liability for violations that result if a foreign refiner specifies incorrect baseline values for specific FRGAS batches.

One foreign refiner suggested an approach they believe would allow U.S. importers to meet the NO_X and exhaust toxics requirements for imported FRGAS without risk of incorrect baseline values, by removing any uncertainty regarding the baseline values that apply to each individual batch of imported FRGAS. This foreign refiner suggested that for a foreign refiner with an individual baseline, the annual compliance baseline for an upcoming year would be established at the beginning of that year, using an assumption for the total volume of gasoline (conventional gasoline plus RFG) that will be produced and shipped to the U.S. during the upcoming year.[23]

The foreign refiner suggested that this assumed volume would be the refinery's prior year volume or the refinery's volume projections for the upcoming year, and that EPA would approve each foreign refiner's volume assumption in advance of each year. In this way the foreign refiner and U.S. importers of that refiner's gasoline would have certainty at the beginning of each year of the compliance baseline that applies to gasoline produced at the foreign refinery during the year. This foreign refiner also suggested that if the refinery's actual gasoline volume during the year is different than the assumed volume a correction would be applied to the refinery's compliance baseline in a subsequent year.

The foreign refiner stated that this approach, as compared to the approach where the foreign refiner would meet the NO_X and exhaust toxics requirements, would be simpler, more feasible, and would require fewer resources to implement, largely because U.S. importers would be responsible for demonstrating compliance with the NO_X and exhaust toxics requirements.

Another foreign refiner commented that in a case where the gasoline produced by a foreign refiner with an individual refinery baseline is imported into the U.S. by a single importer, the U.S. importer could take all compliance responsibility for this gasoline.

c. EPA's Response: EPA is finalizing this foreign refiner requirement as proposed for the following reasons.

Requiring U.S. importers to meet the NO_X and exhaust toxics requirements for FRGAS presents an inherent difficulty, in that the compliance baseline that applies to conventional gasoline is not known until the end of each year. Domestic refiners are able to operate with this uncertainty, because the refiner can update a refinery's projected compliance baseline throughout the year based on gasoline volumes, and the refiner has the ability to adjust conventional gasoline quality to meet these projections. In contrast, U.S. importers of FRGAS would have to rely on the foreign refiner to estimate the compliance baseline that applies to each FRGAS batch, and the U.S. importer would be liable if imported conventional gasoline quality failed to meet these projections. U.S. importers have commented that it is this uncertainty that most hampers their operations—that an importer could rely in good faith on the foreign refiner's compliance baseline estimate, yet the importer would be liable if the estimate ultimately is incorrect.

winter gasoline as summer gasoline. If the agency adopts this proposal, all gasoline produced for use in the continental United States between May 1 and September 15 each year would be classified as summer gasoline. This proposal was created to reduce the amount of gasoline that was being accounted for as summer gasoline which really only had summer RVP but was intended for use outside the summer time period. (See 62 FR 37338).

[23] Under section 80.101(f) a compliance baseline for NO_X and exhaust toxics compliance is calculated for each calendar year averaging period based on a refinery's 1990 baseline volume and baseline NO_X and exhaust toxics values, and the total U.S. gasoline volume (conventional gasoline and RFG) produced at the refinery during the year. The compliance baseline equation caps use of a refinery's individual baseline values at the refinery's baseline volume, and any additional gasoline volume (conventional gasoline and RFG) for a year moves the refinery's compliance baseline values in the direction of the statutory baseline. Thus, a refinery's annual compliance baseline, and as a result the refinery's NO_X and exhaust toxics requirements for the year, are not finally established until the end of the year when the refinery's total gasoline volume for the year is known.

Section 80.101(b) requires use of compliance baselines only for the simple model requirements that apply before 1998. However, in another rulemaking EPA has proposed to require use of compliance baselines for the complex model requirements that apply beginning in 1998. See 62 FR 37363 (July 11, 1997). EPA believes this proposed change will be final before the beginning of 1998. In any case, the same provision will apply to both domestic and foreign refiners.

While the alternative suggested by one foreign refiner (using EPA-approved volume projections each year to specify a foreign refinery's compliance baseline at the beginning of the year) would remove this uncertainty, it has the disadvantage of constantly requiring corrections in a subsequent year. It is unlikely a foreign refiner's annual volume projections will ever exactly match the refinery's actual annual volume. As a result, if this approach were adopted EPA probably would be required to calculate and implement corrections each year for each foreign refinery with an individual baseline. In addition, these corrections could not be applied immediately, because a foreign refinery's annual volume will not be established until reports could be filed, and the correction calculated, which would necessarily occur in the subsequent year. As a result, it is likely there would be a one year lag in applying corrections, e.g., if a foreign refiner's volume projection for 1998 were incorrect the details of this error would not be known until some time in 1999, and the correction could not occur until 2000. It is preferable that NO_X and exhaust toxics requirements be met each year without the expectation of constant subsequent correction, if other considerations are equal. This also avoids any risk of adverse environmental consequences that could result if the foreign refiner ceased supplying gasoline to the United States before the correction could be completed.

In addition, domestic refiners do not have the option of using an incorrect compliance baseline each year and correcting for the error in a subsequent year, and there are no compelling reasons to treat foreign refiners differently in this regard.

EPA agrees that, in general, it is easier to monitor and enforce requirements that apply to parties present in the United States such as U.S. importers, as compared to parties located outside the United States such as foreign refiners. However, even if EPA were to adopt the suggested approach of requiring U.S. importers to meet the NO_X and exhaust toxics requirements for FRGAS, foreign refiners of FRGAS would continue to have significant responsibilities under the regulations that EPA would monitor and enforce. The foreign refiner would have to establish individual refinery baselines; submit supported volume projections to EPA; and meet a range of requirements associated with establishing the refinery's actual volume of FRGAS each year, including designation of FRGAS, load port sampling and testing, record keeping and reporting, and attest requirements. EPA would have to monitor compliance with these requirements even if U.S. importers met the NO_X and exhaust toxics requirements.

EPA disagrees with the comment by one foreign refiner that the U.S. importer could be responsible for meeting all requirements associated with FRGAS where a foreign refiner's FRGAS is imported by a single U.S. importer. A foreign refinery's annual compliance baseline is based on the refinery's volume of conventional gasoline and RFG FRGAS, and this volume can most properly be established using information available only at the foreign refinery. As a result, regardless of the responsibilities assumed by the U.S. importer the foreign refiner still must, *inter alia,* keep records, file reports, commission an attest engagement, and agree to allow EPA inspections and audits.

On balance, EPA believes the proposed approach of requiring foreign refiners of FRGAS to meet the NO_X and exhaust toxics requirements is the best approach in that it does not impose unwarranted uncertainties on importers, avoids the uncertainty of subsequent corrections on a yearly basis, and is consistent with the requirements on domestic refiners.

2. Sovereign Immunity and Agent for Service of Process

a. EPA's Proposal: EPA proposed that where a foreign refiner is owned or operated by a foreign government, the government would have to issue a waiver of sovereign immunity before the refiner could obtain an individual refinery baseline. As proposed, this waiver would have to be signed by an official of the foreign government at the cabinet secretary level or higher who has responsibility for the foreign refinery, and would have to specify the waiver would apply in any case of prosecution by the United States for civil or criminal violations related to FRGAS requirements including requirements in relevant Clean Air Act sections and Title 18 United States Code.

b. Comments: EPA received comments addressing the sovereign immunity waiver proposal from several foreign government-owned refiners and from a domestic association that represents independent gasoline marketers. In addition, EPA received comments from associations representing domestic refiners that generally addressed EPA's proposed enforcement requirements without specifically discussing the proposed sovereign immunity waiver requirement.

The foreign government-owned refiners and the association of domestic marketers commented that the proposed waiver of sovereign immunity is unnecessary. One of these foreign refiners commented that in the antitrust context the U.S. Department of Justice has taken the position that foreign government-owned corporations operating in the commercial marketplace are subject to U.S. antitrust laws to the same extent as foreign private-owned firms. This commenter concluded that waivers of sovereign immunity are unnecessary to enforce the antitrust laws, and that this same conclusion also should apply to enforcement under the Clean Air Act.

Two other foreign refiners referred to 28 U.S.C. 1605(a)(2) of the Foreign Sovereign Immunities Act (FSIA), which provides that a foreign sovereign is not entitled to immunity in an action based on certain ''commercial activity.'' These commenters further stated or implied that a foreign refiner, by engaging in the production and sale of gasoline for export to the U.S., would be covered by the provisions of this section and, hence, would not be entitled to sovereign immunity under the FSIA with respect to matters covered by this regulation. These commenters concluded, as a result, that the proposed sovereign immunity waiver requirement is unnecessary. One foreign refiner commenter said the proposed sovereign immunity waiver requirement is particularly objectionable if the waiver must be signed by a cabinet secretary.

One foreign refiner said the proposed scope of the waiver is too broad, because EPA had proposed that the waiver would need to apply to all provisions of Title 18, United States Code. This foreign refiner said, in addition, that sovereign immunity cannot be a condition for according national treatment under Article III of GATT 1994.

The association of domestic marketers commented that the proposed requirement to waive sovereign immunity is inflammatory, and that other proposed enforcement mechanisms are sufficient for appropriate EPA enforcement, including the possibility of revoking an individual refinery baseline, and the required foreign refiner commitments regarding EPA inspections and audits, naming an agent for service, and bond posting.

The associations representing domestic refiners did not specifically address the proposed sovereign immunity waiver requirement, but did support EPA's proposed enforcement

requirements in general. In addition, one of these associations commented that EPA also should require there be an extradition treaty in place with a foreign government before allowing a refiner in that country to obtain an individual refinery baseline. This commenter stated that in the absence of an extradition treaty there could not be adequate enforcement of criminal violations.

c. EPA's Response: EPA continues to believe that to provide adequate enforcement mechanisms related to the establishment and use of individual baselines by foreign refiners, the issue of sovereign immunity needs to be addressed for foreign government-owned refiners. Therefore, EPA has retained a specific provision in the final rule addressing sovereign immunity. However, the form of this sovereign immunity provision is being revised based on EPA's evaluation of the comments and prior U.S. administrative practice in this area.

Under the FSIA a foreign refiner who obtains an individual refinery baseline from EPA, exports FRGAS to the United States, and violates requirements applicable to the foreign refiner under this rule has engaged in the kind of activity that falls within an exception to sovereign immunity under 28 U.S.C. 1605(a)(2), (commonly referred to as the ''commercial activity'' exception) as asserted by the commenters. However, EPA is aware of no judicial precedent directly addressing these issues in the context of a regulatory enforcement action by an agency of the United States. As a result, a degree of uncertainty remains on the issue of whether United States courts would rule in all cases that a foreign refiner who obtains and uses an individual refinery baseline automatically is ineligible to claim sovereign immunity in the context of an EPA enforcement action for violations of the FRGAS requirements.

Under 28 U.S.C. 1605(a)(1) the issue of sovereign immunity can be resolved where the foreign government waives sovereign immunity. EPA has evaluated and adopted an approach to a sovereign immunity waiver that provides EPA with the ability to effectively enforce the requirements applicable to a foreign refiner, in combination with other provisions adopted today. This is similar to the approach used by the U.S. Department of Transportation in the context of economic licenses issued to foreign air carriers that are necessary for those carriers to conduct commercial operations in foreign air transportation to and from the United States. The DOT approach does not require an official of the foreign government to sign a separate document waiving sovereign immunity. Rather, DOT licenses for foreign air carriers, whether government or privately owned, include a condition that states, in essence, that operation under the license by a foreign air carrier constitutes a waiver of sovereign immunity under the FSIA.[24]

DOT has included this type of waiver of sovereign immunity clause in its foreign air carrier licenses for several decades, and sovereign immunity has not been raised as an issue in DOT enforcement of its requirements against foreign government-owned air carriers. Foreign government-owned air carriers have willingly operated under this waiver of sovereign immunity license term, indicating that this approach for addressing the issue of sovereign immunity has been acceptable to all foreign governments concerned.

Based on the success of this administrative approach by another U.S. agency, EPA is including a similar provision in the foreign refiner final rule that is like the DOT approach, but uses regulatory language that is somewhat different from the language used by DOT. The regulatory language used by EPA acts to preclude a defense of sovereign immunity for purposes of the FSIA as well as for any enforcement actions that may be taken which may not be subject to the provisions of the FSIA. The sole purpose and effect of the regulatory language is limited to precluding the use of sovereign immunity as a defense to an otherwise valid EPA or other U.S. enforcement action based on a violation of the requirements that apply to a foreign refiner as a result of obtaining and using an individual refinery baseline.

Under this regulatory provision, when a foreign government-owned refiner submits a petition to EPA for an individual refinery baseline, the baseline submission constitutes a waiver of sovereign immunity for purposes of 28 U.S.C. 1605(a)(1) of the FSIA, e.g., for an enforcement action based on incorrect or fraudulent submissions. In addition, when a foreign government-owned refiner operates under an individual refinery baseline by supplying FRGAS to the U.S., this constitutes an additional waiver of sovereign immunity under the FSIA, e.g., for enforcement actions based on failure to comply with the exhaust toxics or NO_X emissions requirements, failure to submit reports, or failure to provide access to inspectors. This waiver of sovereign immunity would also apply for any enforcement action not otherwise subject to the FSIA.

If a foreign government-owned refiner states that it reserves the right to or will assert a sovereign immunity defense in the context of any EPA enforcement action for violations of the requirements under these regulations, or in fact raises such a claim, then EPA may, in addition to other remedies in law, take action to deny or withdraw all individual refinery baselines that have been issued to the foreign refiner.

3. Agent for Service of Process

a. EPA Proposal: EPA proposed that in order to obtain an individual refinery baseline a foreign refiner would be required to name an agent for service of process located in Washington, D.C.

b. Comments: One foreign government-owned refiner objected to the proposed requirement to name an agent for service of process located in Washington, D.C. as being unnecessary for a foreign government-owned refiner. This commenter stated that the FSIA specifies procedures for achieving service of process that do not involve a named agent. In addition, the commenter said the requirement for an agent for service of process should be limited to service of process in EPA enforcement actions and should not cover service of process in non-related actions, such as private commercial claims raised by other parties.

c. EPA's Response: EPA remains convinced that the final rule should include a provision as proposed for all foreign refiners acting under an individual baseline, including foreign refiners that are foreign government-owned, to name an agent for service of process in Washington, D.C. While it is true the FSIA includes procedures for service of process on foreign government-owned firms, the FSIA procedures are cumbersome at best.[25] In

[24] The Department of Transportation's Conditions of Authority that applies to foreign air carriers includes the following provision:

In the conduct of the operations authorized, the holder shall:

* * * * *

(7) Agree that operations under this authority constitute a waiver of sovereign immunity, for purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place

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DOT Order 87–8–8 (issued July 31, 1987).

[25] For example, 28 U.S.C. 1608(b)(2) provides that service on an agency or instrumentality of a foreign state must be accomplished by delivery of copies of the summons and complaint to an officer, general agent, or other agent authorized by appointment or law to receive service of process in the United States, or in accordance with applicable

addition, 28 U.S.C. 1608(b)(1) of the FSIA states that service of process on an agency or instrumentality of a foreign government may be by delivery of a copy of the summons and complaint in accordance with any ''special arrangement'' for service between the plaintiff and the agency or instrumentality of the foreign government. EPA believes a foreign government-owned refiner naming an agent for service of process, as proposed, would constitute a ''special arrangement'' for service under 28 U.S.C. 1608(b)(1), and service on such an agent by EPA would resolve any question regarding whether service has been accomplished.

Commenters have not described any reason why it would be difficult or expensive for a foreign government-owned refiner to name an agent for service of process in Washington, D.C., but only that there is an alternative under the FSIA. EPA believes that, on balance, it is more appropriate to require all foreign refiners seeking an individual refinery baseline, including foreign government-owned refiners, to name an agent for service, instead of relying on the alternative under 28 U.S.C. 1608(b) (2) and (3) of the FSIA. It will reduce the administrative burden on EPA and will not add any significant burden on the foreign refiner.

Finally, EPA agrees that the agent for service of process need not be authorized to receive process from parties other than EPA or others in the United States government, or for enforcement actions other than those that result from a foreign refiner having petitioned for and used an individual refinery baseline.

4. Bond Requirement

a. EPA Proposal: EPA proposed that a foreign refiner would be required to post a bond in order to receive an individual refinery baseline. The amount proposed for this bond would be calculated by multiplying the annual volume of conventional gasoline exported to the U.S. by the foreign refiner, in gallons, times $0.01. The bond amount that applies each year would be calculated using the annual volume for the single year that had the greatest volume among the immediately preceding five years. EPA also proposed that the bond requirement could be met if a bond is obtained from a third party surety agent, provided that EPA approves the surety agreement.

b. Comments: EPA received comments on the bond proposal from two foreign refiners who opposed requiring bonds or believed them to be unnecessary, and from an association of domestic refiners who supported the bond proposal.

One foreign refiner commented that although it could accept a bond requirement, such a requirement is not necessary. This commenter also stated that the amount proposed for the bond is too large, and that the bond amount required for any particular foreign refiner should be reduced over time based on the refiner's compliance record. This commenter stated that bonds need not be for the full amount of any possible liability, because a lesser, but significant, bond amount would create an incentive for good conduct, which serves one purpose of a bond. However, this commenter did not suggest any alternative bond amount.

The other foreign refiner, who also objected to the proposed bond requirement, interpreted the proposal as requiring that bond amounts be calculated based on the cumulative volume of FRGAS exported to the U.S. by a refiner over the prior five years, and stated that the bond amount that would result raises questions under Article II and Article III of the GATT. This commenter also stated it is aware of no surety agent who would issue a bond to cover judgments against a foreign refiner for Clean Air Act violations. Further, this commenter stated that EPA should rely on penalties other than bonds, such as imposing a sanction of prohibiting the sale in the U.S. of gasoline produced by a foreign refiner who has violated the Clean Air Act.

The association representing certain domestic refiners commented in support of the bond proposal, stating that posting of bonds by foreign refiners is critical for effective enforcement.

c. EPA's Response: A bond requirement was proposed because of concern that collecting a judgment against a refiner located outside the United States for an enforcement action related to the requirements of this rule is more difficult than collecting a judgment against a domestic refiner. None of the comments refuted this basic concern. The bond requirement has the effect of enabling EPA to collect penalties against foreign refiners in a straightforward manner, analogous to penalty collections against domestic refiners.

The bond amount EPA proposed, annual conventional gasoline gallons times $0.01, was based on an estimate of the penalty that could result if a foreign refiner violated the exhaust toxics or NO_X requirements. These requirements are met based on average conventional gasoline quality over a calendar year averaging period, and penalty amounts are calculated, in part, based on the volume of gasoline in violation. As a result, it is appropriate to use a foreign refiners's annual conventional gasoline volume as the yardstick for calculating bond amounts. Penalty amounts also are based on the amount the exhaust toxics and/or NO_X requirements are exceeded, and for egregious violations penalty amounts may well exceed $0.01 per gallon. As a result, the proposed penalty amount does not cover the maximum possible penalty. Nevertheless, EPA believes the proposed amount is appropriate because it ensures that a penalty up to this amount may be collected, which constitutes a significant incentive for a foreign refiner to avoid violations.

The comments of one foreign refiner, that bond amounts would be calculated using the foreign refiner's five year cumulative gasoline volume, were based on an apparent misunderstanding of the bond proposal. EPA intends that bond amounts be calculated using the annual conventional gasoline volume for a single year, that year which has the highest volume for the preceding five years. EPA is slightly revising the language in the bond provision to make this intent clear. The bond amount applicable each year is calculated using the single year, among the past five years, when the largest volume of conventional gasoline was exported to the U.S.

EPA's review indicates that these concerns appear to be unfounded. Surety agents will be available to issue bonds to cover judgments for violations of the FRGAS requirements. Representatives of two national associations of surety agents, the Surety Association of America and the American Surety Association, told EPA there is nothing inherent in the FRGAS requirements that would prevent surety agents from writing bonds for foreign refiners as contemplated. The representatives said the proposed FRGAS bond requirement is analogous to the bonds required by the U.S. Customs Service, which routinely are issued by third party surety agents. These representatives concluded that foreign refiners can locate third party surety agents who would issue bonds to

international conventions on service of judicial documents; and section 1608(b)(3) provides that if service cannot be made under section 1608(b)(2), by delivering copies of the summons and complaint, with translations into the official language of the foreign state, if reasonably calculated to give actual notice, as directed by an authority of the foreign state or political subdivision in response to a letter rogatory, by return receipt mail from the clerk of the court to the agency or instrumentality to be served, or as directed by the court consistent with the law of the foreign state.

meet the FRGAS requirement, and that the annual fee probably would be between one-half and two percent of the bond amount depending on company-specific factors such as the general business strength and reputation of the foreign refiner and the type and amount of collateral offered.

However, EPA now believes it is possible for a foreign refiner to meet the purpose and intent of the bond requirement through means other than posting the requisite bond amount with the Treasurer of the United States or a bond issued by a third party surety. For example, if a foreign refiner owns assets that are located in the United States it may be possible for the foreign refiner to pledge these assets in a way that would be equivalent to posting a cash bond. As a result, EPA has modified the bond requirement to allow a foreign refiner to petition EPA to be allowed to satisfy the bond requirement through an alternative means. EPA will rule on any such petition based on whether there is certainty as to the ready availability of liquid assets, or easily liquidated assets, that are equal in value to the bond requirement.

For the foregoing reasons, EPA is finalizing the proposed bond requirement modified to allow petitions for alternative bonding mechanisms.

EPA has included in the final rule a provision that specifies that a foreign refiner's bond may only be used to satisfy judgments against the foreign refiner that result from violations of the FRGAS requirements.

EPA also is adopting a requirement that the bond may be used to satisfy judgments that result from violations by the foreign refiner for causing another person to violate the regulations.[26] For example, the regulations include a prohibition against combining certified FRGAS with non-certified FRGAS that applies to any person. If a foreign refiner causes a third party to violate this prohibition, this would be a violation by the foreign refiner, and the bond could be used to satisfy a judgment resulting from this violation.

EPA intends to reevaluate the amount required for bonds after the FRGAS program has been in place for approximately two years. Based on EPA's experience in implementing and enforcing the FRGAS program up to that time EPA will evaluate whether it should revise the regulations to allow a foreign refiner to submit a petition to EPA to reduce the required bond amount, based on factors such as its history of compliance and the strength of quality assurance programs in place at the refinery to ensure violations will not occur. EPA invites all parties to consider any modifications of the bond requirement they believe would be appropriate based on their experience with the FRGAS program, and to submit these suggestions to EPA at that time.

5. Foreign Refiner Commitments

a. EPA's Proposal: EPA proposed that a foreign refiner would have to submit as part of their baseline petition a commitment to allow EPA inspections and audits related to the FRGAS requirements, and its acceptance of United States courts or administrative tribunals acting under United States law as the forum for any enforcement action, in order to receive an individual refinery baseline. EPA also proposed that this commitment would have to be signed by the owner or president of the foreign refiner business, or by the relevant government official in the case of government-owned foreign refiners.

EPA proposed that the scope of EPA inspections and audits may include information related to baseline establishment, the quality and quantity of FRGAS, transfers of FRGAS, sampling and testing of FRGAS, and reports submitted to EPA.

b. Comments: EPA received a comment from a foreign refiner on the proposed commitments related to allowing EPA inspections and audits. This commenter stated that while it is willing to allow EPA inspections and audits, these should relate solely to establishment and use of an individual refinery baseline. EPA also received a comment from a domestic environmental non-governmental organization, expressing the view that the proposed foreign refiner commitments will be less effective than the authorities available in the United States for ensuring EPA's ability to conduct an effective enforcement program.

c. EPA's Response: EPA agrees the scope of any EPA inspection or audit to which a foreign refiner would consent would be limited to matters relevant to compliance with the FRGAS requirements. The commitment requirement is limited in this manner.

The scope of EPA audits of a foreign refiner clearly could include a review of all information related to baseline establishment, and the quality and quantity of all gasoline identified by the foreign refiner as FRGAS. However, EPA auditors also must be able to verify that gasoline and blendstock not identified as FRGAS by the foreign refiner in fact went to non-U.S. markets. If a foreign refiner were able to exclude from its compliance baseline calculations the volume of any gasoline or blendstock delivered to the U.S., the compliance baseline values would be inappropriately lenient. This concern is discussed more fully, below. EPA auditors must be able to review documents and other information related to gasoline not classified as FRGAS by the foreign refiner in order to verify this gasoline was used in non-U.S. markets and, hence, to guard against this possible form of cheating. As a result, the effective scope of EPA audits must include all gasoline and blendstock produced at a foreign refinery with an individual baseline, and not just the gasoline classified by the foreign refiner as FRGAS.

The final regulations are being revised to clarify that the foreign refiner commitment must be to allow EPA inspections and audits with this scope.

EPA generally agrees that the required foreign refiner commitments do not give EPA enforcement authorities that are exactly equivalent in all respects to the authorities available in the United States, such as the availability of search warrants, injunctions, and subpoenas. However, EPA believes the proposed commitments, when honored by the foreign refiner, will give EPA the ability to effectively enforce the requirements, as is done domestically. In addition, EPA has the recourse of withdrawing the individual refinery baseline of any foreign refiner who fails to honor these commitments.

6. Gasoline Tracking Requirements

a. EPA's Proposal: EPA proposed a series of requirements intended to allow EPA to ensure that gasoline, identified on arrival in the U.S. as FRGAS that was produced at a specific foreign refinery, in fact was produced at that foreign refinery. These proposed requirements include the following.

- Foreign refiners with individual baselines would designate all gasoline to be imported into the United States as FRGAS when produced.
- A foreign refinery's certified FRGAS would remain segregated from its non-certified FRGAS, and from gasoline produced at a different foreign refinery until entry into the U.S., except that FRGAS produced at refineries that have been aggregated could be combined.
- An independent third party would sample each certified FRGAS batch subsequent to loading onboard a vessel, and test for all complex model parameters.
- An independent third party would review gasoline transfer documents to verify the gasoline loaded onboard a

[26] EPA also has included language in Section 80.94(n) that prohibits foreign refiners from causing violations by other parties.

vessel was produced at the foreign refinery.

• The foreign refiner would prepare a certification to accompany the vessel identifying the gasoline as FRGAS, which would include a report prepared by the independent third party.

• U.S. importers would sample and test certified FRGAS on arrival at the U.S. port of entry. The foreign refiner would compare the volume and property results from the port of entry testing, with the volume and property results from the load port testing. If the test results differ by more than the ranges allowed in section 80.65(e)(1), or if the volume measurements differ by more than one percent, the foreign refiner would have to adjust its compliance calculations to reflect the discrepancy.

• The U.S. importer would treat the gasoline as certified FRGAS if it received the proper certification and third party report, and the load port and port of entry test results are consistent.

b. Comments and EPA's Responses:

(1) Option to Classify Gasoline as Non-FRGAS

(a) Comment

One foreign refiner and a group of independent U.S. importers commented that foreign refiners with individual refinery baselines should have the option of designating gasoline for the U.S. market as FRGAS or as non-FRGAS.[27] The conventional gasoline designated as FRGAS would be subject to the foreign refiner's individual baseline, and the conventional gasoline designated as non-FRGAS would be treated as any other gasoline regulated through the U.S. importer, subject to the assigned statutory baseline.

The U.S. importers stated that this flexibility is desirable in order to increase the volume of imported conventional gasoline that could be classified as ''gasoline treated as blendstock,'' or GTAB.[28] Non-FRGAS then could be blended with other GTAB or blendstocks where desired, and classified by the importer either as conventional or reformulated gasoline. The importer then would account for it in its compliance calculations.

(b) EPA's Response

In the case of non-certified FRGAS produced by a foreign refiner with an individual baseline, it is important that the volume of all such gasoline be included in the compliance baseline calculation of the foreign refiner for conventional gasoline. Even though a refinery's annual compliance baseline applies only to the NO_X and exhaust toxics requirements for conventional gasoline, the equation used to calculate the compliance baseline includes the volume of *all* gasoline produced at a refinery that is used in the United States including RFG.[29] If a foreign refiner were allowed to exclude the volume of non-certified FRGAS from compliance baseline calculations, the compliance baseline would be less stringent than if the volume of all certified and non-certified FRGAS were included.

The effect of the compliance baseline equation, in the case of a refiner whose overall gasoline volume exceeds its individual baseline volume, is to move the NO_X and exhaust toxics compliance baseline in the direction of the statutory baseline values. EPA assumes that any foreign refiner who obtains an individual refinery baseline will likely have an individual baseline value for at least one complex model requirement (NO_X or exhaust toxics emissions performance) that is less stringent than the statutory baseline values. Hence, the effect of the compliance baseline equation for such a refiner is more stringent for the NO_X or exhaust toxics, or for both requirements, and the magnitude of this effect increases as the volume of the refinery's U.S. export-gasoline increases.

In the case of conventional gasoline produced by a foreign refiner with an individual baseline, the reason given by commenters for allowing the foreign refiner to classify this gasoline as non-FRGAS is to give additional flexibility to the U.S. importer. This flexibility results from the option of classifying imported conventional gasoline as GTAB, which under the proposal would only be available if the imported conventional gasoline is non-FRGAS.[30] This flexibility is lost if conventional gasoline was classified as conventional FRGAS because it would have been previously certified by the foreign refiner and included in the foreign refiner's compliance calculations.

EPA is concerned that if foreign refiners had the option of classifying conventional gasoline as FRGAS or as non-FRGAS, a foreign refiner could classify very ''clean'' conventional gasoline as non-FRGAS, including gasoline that in fact meets the quality requirements for reformulated gasoline. This ''clean'' conventional gasoline then could be classified as GTAB by the U.S. importer and reclassified as reformulated gasoline. In this way a foreign refiner could avoid including all RFG in its compliance baseline calculations, which would result in adverse environmental consequences.

However, this result would not be possible if the foreign refiner includes in its compliance baseline calculations *all* gasoline imported into the United States (i.e., all FRGAS), whether or not the gasoline is included in the foreign refiner's NO_X and exhaust toxics compliance calculations.

Assuming the foreign refiners counts the volume in its compliance baseline equation, there is no adverse environmental consequence if the importer can treat the foreign refiner's gasoline, whether RFG or CG, as GTAB. If the gasoline is treated as GTAB, it will be imported subject to the requirements applicable to the importer for either RFG or CG, depending on how the importer classifies the gasoline. In both cases the importer would include the gasoline in it's compliance calculations, and the importer's compliance requirement would in all cases be more stringent than the CG compliance baseline for the foreign refiner.

As a result the final rules establish two categories of FRGAS—''certified FRGAS'' and ''non-certified FRGAS.'' The foreign refiner designates all gasoline that it produces and that is sent to the US as FRGAS, and FRGAS is further classified as either certified or non-certified FRGAS. The foreign refiner can include gasoline of any quality in the non-certified FRGAS category, including gasoline that meets the quality requirements for RFG or CG.

Gasoline classified as certified FRGAS will be subject to the compliance baseline for NO_X and exhaust toxics applicable for the foreign refiner. The volume of all FRGAS, certified and non-certified, must be included in the foreign refiner's compliance baseline calculation.

The importer may not include certified FRGAS in the importer's NO_X and exhaust toxics compliance calculations. However, importers must meet requirements for all non-certified FRGAS the same as for non-FRGAS, i.e.,

[27] EPA proposed to define ''FRGAS'' as gasoline produced at a foreign refinery that has been assigned an individual refinery baseline, and that is included in the foreign refinery's conventional gasoline compliance calculations, or compliance baseline calculations.

[28] See description of GTAB, above.

[29] The compliance baseline equation at section 80.101(f) requires a refiner to include the volumes of all gasoline used in the U.S., including conventional gasoline, RFG, RFG blendstock for oxygenate blending (RBOB), and California gasoline under section 80.81. In addition, where a refiner is required to include blendstocks in its compliance calculations under section 80.102 the volume of blendstocks also would be included in compliance baseline calculations. These requirements apply equally to domestic and to foreign refiners.

[30] In the case of conventional gasoline classified by the importer as GTAB, the importer is able to add blendstocks to the gasoline if the gasoline is ''cleaner'' than required, or to reclassify the gasoline as RFG.

non-certified FRGAS must be classified by the importer as CG or RFG and meet the applicable quality requirements, or must be classified as GTAB and subsequently meet the CG or RFG requirements. The importer may treat any non-certified FRGAS as GTAB.[31]

As described above, there will be no adverse environmental impact from this. It will also increase flexibility under the regulations for both importers and foreign refiners.

To implement this change, EPA is revising the regulations so that the appropriate classification, tracking, record-keeping and reporting occurs for non-certified FRGAS. To accomplish this, the provisions proposed for ''RFG FRGAS'' would basically be applied for all non-certified FRGAS, whether RFG or CG.

In addition, EPA is adopting an additional flexibility regarding FRGAS classification that was not proposed. A foreign refiner who has obtained an individual refinery baseline may elect each calendar year to not participate in the FRGAS program at all, provided notice is provided to EPA before the beginning of the calendar year. If such a foreign refiner gives timely non-participation notice to EPA, the foreign refiner could not classify any gasoline, conventional gasoline or RFG, as FRGAS during the calendar year, and the individual refinery baseline would have no effect for that year. In this situation the foreign refiner would not have to meet the gasoline tracking requirements during the year (designation, independent sampling and testing, attest engagements, etc.), and the refiner would not have to submit reports to EPA. However, such a non-participating foreign refiner would remain subject to EPA audits and enforcement that focus on prior years when the refiner did participate in the FRGAS program. As a result, enforcement-related requirements, such as the refiner commitments and bond, would remain in effect during any period of non-participation.

A foreign refiner who has elected the non-participation status could begin participating again at the beginning of any subsequent year by giving notice to EPA before the beginning of the year when participation is to begin.

Also, where a foreign refiner operates multiple refineries with individual baselines that have been aggregated under section 80.101(h), the foreign refiner is required to make the same FRGAS election for all refineries in the aggregation. This consistency requirement for aggregated refineries is similar to the requirement that aggregation decisions cannot be modified from year-to-year, that applies to domestic and foreign refiners. If a foreign refiner of aggregated refineries could elect non-participation FRGAS status for only one refinery in the aggregation while electing for the remaining refineries to participate in the FRGAS program, this would have the effect of changing the aggregation for the participating refinery or refineries.

EPA believes the additional flexibility of allowing an annual FRGAS election is appropriate because there would be no adverse environmental effect if a foreign refiner with a relatively ''dirty'' individual baseline elected to not use that baseline. In that case, the conventional gasoline would be regulated through the importer, who is subject to the statutory baseline.

As a result, EPA is finalizing the regulations to require a foreign refiner with an individual refinery baseline to classify all gasoline exported to the United States as FRGAS, or, at the foreign refiner's election, to classify no gasoline as FRGAS. A foreign refiner with an individual refinery baseline would not be allowed to classify part of its gasoline as FRGAS and part as non-FRGAS during a calendar year.

EPA also is including a provision in the final rule to specifically prohibit a foreign refiner with an individual baseline from failing to include in the refinery compliance baseline calculations all gasoline produced at the foreign refinery that is used in the U.S., and including any blendstock produced at the foreign refinery that is used to produce RFG used in the U.S. If EPA discovers that a foreign refiner with an individual baseline has produced gasoline that was used in the U.S., but that was not included in the refinery's compliance baseline calculations, this would be a violation of the prohibition. In addition, this also would result in a recalculation of the refinery's compliance baseline for the relevant year, *ab initio,* which could result in the foreign refiner violating the revised NO_X and exhaust toxics requirements for that year. It would be no defense if the gasoline or blendstock had been transferred to a third party who was responsible for exporting the gasoline or blendstock to the U.S., even if the foreign refiner had no actual knowledge of the subsequent U.S. export or if the foreign refiner had a good faith belief the gasoline or blendstocks would be used only in non-U.S. markets.

This is similar to the requirement at section 80.67(h)(3) that prohibits domestic refiners from using improperly created oxygen or benzene credits regardless of any good faith belief the credits were valid, and if invalid credits are used results in EPA recalculating the refiner's compliance calculations, *ab initio,* with the invalid credits being removed.

As a result, EPA believes it would be prudent for foreign refiners of FRGAS to take appropriate commercial steps to ensure they are informed if gasoline or blendstock transferred to third parties ultimately is exported to the U.S. If a foreign refiner fails to take reasonable steps in this regard, and EPA determines that the refiner's gasoline or blendstock is exported to the U.S. by a third party without being included in the refiner's compliance baseline calculations, EPA will consider this an aggravating factor in determining the amount of any penalty imposed against the foreign refiner for the violation.

(2) Third Party Testing Requirements

(a) Comments

EPA received several comments related to the proposed third party testing requirements and the comparison of load port test results with port of entry test results. One foreign refiner and an association of domestic gasoline marketers commented that load port testing is not necessary, and the foreign refiner stated their comment is based on the view that EPA should require U.S. importers to meet NO_X and exhaust toxics requirements based on testing only at the U.S. port of entry and EPA audits of refinery records.

A number of comments were related to factors intended to reduce the costs associated with third party testing. Two foreign refiners commented that if third party testing is required, the load port testing requirement should require analysis only of vessel composite samples instead of separate analyses for each vessel compartment. One foreign refiner commented that the parameters required to be analyzed should be limited to gravity, T50, T90, benzene and sulfur, or in the alternative, for NO_X and exhaust toxics emissions performance. Two foreign refiners commented that the third party tester should not be required to use an independent laboratory, and instead should be allowed to observe the testing

[31] In another rulemaking EPA has proposed giving refiners and importers additional flexibility for reclassifying previously certified gasoline, called the PCG option. See 62 FR 37349 (July 11, 1997). The proposed PCG option would allow a refiner or importer to reclassify previously certified conventional gasoline as RFG, provided the refiner or importer replaces the reclassified conventional gasoline during the same averaging period. EPA believes the PCG option, if adopted, would give U.S. importers flexibility regarding conventional gasoline classified by the foreign refiner as certified FRGAS.

in the foreign refiner's laboratory or use the foreign refiner's laboratory equipment, because at present there are no independent laboratory facilities located near their foreign refineries.

Two foreign refiners commented that comparisons of load port testing with port of entry testing should be on the basis of ASTM reproducibility,[32] instead of the comparison criteria proposed by EPA.

One foreign refiner also commented that in the case of inconsistent load port—port of entry test results, the U.S. importer should be responsible for meeting the NO_X and exhaust toxics requirements for the gasoline.

An association of domestic refiners commented that the proposed requirements for third party testing are necessary for an effective enforcement program.

(b) EPA's Response

EPA continues to believe third party sampling and testing is a necessary part of the foreign refiner FRGAS program. However, in response to comments EPA is modifying these requirements in several ways in the final rule.

The primary purpose served by the third party sampling and testing requirements is to provide information useful in evaluating whether any event has occurred since the gasoline was loaded into the vessel that would cast doubt on the identification of the source refinery of FRGAS. The NO_X and exhaust toxics requirements are met on the basis of sampling and testing conducted by the foreign refiner at the foreign refinery (not necessarily at the load port), and is largely unrelated to the third party load port sampling and testing. The tracking purpose of the third party testing requirements provides the focus for evaluating the comments received on this issue.

In the case of gasoline classified as non-certified FRGAS, EPA now believes that no third party load port sampling or testing to determine gasoline properties is necessary. There is no adverse environmental effect if a foreign refiner includes FRGAS in its compliance baseline calculations even if this gasoline was produced by a different refiner. As a result, there is little need for third party testing intended to verify gasoline was produced at the specified foreign refinery, and, hence, EPA is dropping the requirement for third parties to determine properties of non-certified FRGAS. However, EPA has retained the requirement for third party determination of volume for non-certified FRGAS, because the volume of all FRGAS is important to the accuracy of the compliance baseline calculation.

In addition, the foreign refiner is required to prepare a certification to accompany shipments of non-certified FRGAS that identify the foreign refinery and the volume, supported by the report of the independent third party. The requirement also remains that the U.S. importer must report the volume of non-certified FRGAS to EPA and to the foreign refiner. EPA intends to monitor the volumes of non-certified FRGAS used by foreign refiners in their compliance baseline calculations. If EPA discovers that the volume of non-certified FRGAS included in a foreign refiner's compliance baseline calculation is incorrect (for example, discovers this violation during an audit of the foreign refinery), EPA will recalculate the refinery's compliance baseline and evaluate the refinery's compliance with the NO_X and exhaust toxics requirements on this basis.

In the case of gasoline classified as certified FRGAS, EPA believes third party testing is needed in order to verify the imported gasoline was produced at the named foreign refinery and subsequent to loading was not mixed with gasoline from a different foreign refinery. Only conventional gasoline that is produced at the foreign refinery with an individual baseline is entitled to use that baseline, and it would be inappropriate for the foreign refiner or anyone else to substitute conventional gasoline produced at another refinery.[33] However, the purpose of third party sampling and testing of certified FRGAS is limited to identifying the source refinery. As a result, and in response to comments received, EPA has revised the parameters that must be tested by the third party, the manner in which the third party may determine the property values, and the criteria that are used to compare load port and port of entry test results to more reasonably reflect the purpose of this sampling and testing.

The purpose of comparing load port and port of entry test results is to verify the gasoline on board a vessel on arrival at the U.S. port of entry is the same gasoline that was loaded by the refiner at the load port, i.e., to verify that the vessel has not stopped en route to the U.S. to discharge or take on gasoline. EPA had proposed that this comparison must be of all complex model parameters.[34] A foreign refiner commented that a comparison based on test results for a subset of the complex model parameters would also meet the purpose of this provision, i.e., test results for sulfur, benzene, T50, T90, and gravity. EPA agrees the vessel tracking purpose is served by comparing results for the suggested parameters, although the distillation terms E200 and E300 that are used in the complex model are being substituted for the distillation terms T50 and T90 recommended by the commenter. It is highly likely the gasoline on board a vessel has not been altered if the values for these five parameters plus the gasoline volume are unchanged.

However, it nevertheless is necessary for the foreign refiner to have the third party determine values for all complex model parameters for certified FRGAS loaded onto the vessel, so the foreign refiner can correct its NO_X compliance and exhaust toxics calculations in the event the results from load port and port of entry testing are inconsistent, or the vessel is diverted to a non-U.S. market, as discussed below. The additional parameters that must be established for the vessel are aromatics, olefins, oxygenate and RVP. These additional parameters may be established by the third party testing the ship composite sample for them. In addition, if a vessel is loaded from shore tanks containing gasoline that has been tested for the additional parameters and the volume from each shore tank that was loaded is known, the third party may calculate the additional parameter values for the gasoline that was loaded onto the vessel.

Thus, the load port testing must be for all complex model parameters, but the comparison of load port and port of entry samples must be only for the subset of parameters.

EPA also now believes the appropriate basis for comparison of load port and port of entry testing is ASTM reproducibility, as recommended in the comments. EPA proposed requiring these comparisons be based on the ranges specified at 40 CFR 80.65(e)(2)(i). However, these proposed ranges currently are used under the regulations to compare a refiner's internal test results for RFG with the test results obtained by the refiner's independent

[32] The American Society of Testing and Materials, ASTM, is a non-governmental body that describes test methods, including test methods for gasoline parameters, that are generally recognized as industry-standard test methods. ASTM includes precision measures for each test method in the form of repeatability and reproducibility statistics. In general, repeatability reflects intra-laboratory variability, while reproducibility reflects inter-laboratory variability.

[33] As discussed elsewhere in this preamble, foreign refiners of FRGAS who have aggregated refineries may mix or substitute gasoline produced at any refinery within the aggregation.

[34] The parameters that are used in the complex model are sulfur, aromatics, olefins, benzene, oxygenate, distillation (E200 and E300), and gravity. See 40 CFR 80.65(e)(2)(i).

laboratory. The purpose is to verify the actual quality of the gasoline, not the source refinery. A relatively high degree of correlation in test results would be expected between a refiner and the single independent laboratory selected and used by the refiner on an ongoing basis. In contrast, a foreign refiner's load port test results for FRGAS normally will be compared with port of entry testing conducted by multiple importers, where unusually high correlation in test results would not be expected. EPA believes ASTM reproducibility is an appropriate correlation criteria in this situation in light of the tracking purpose of load port and port of entry test comparisons. ASTM reproducibility for most parameters is calculated using the test result obtained in each test, and the reproducibility value that must be used for each load port-port of entry comparison must be calculated using the port of entry test result.[35] The final regulations are being revised accordingly.

Also in light of the limited purpose of load port testing, EPA now believes this testing need not be conducted in an independent laboratory. This is in contrast to independent sampling and testing of RFG, which must be conducted at an independent laboratory. EPA believes the purpose of load port testing may be achieved if the independent chemist observes the foreign refiner chemist conduct the required tests or if the independent chemist uses the foreign refiner's laboratory equipment. In addition, load port testing of certified FRGAS could be conducted by the independent third party at an independent laboratory. The final regulations are being revised accordingly.

EPA proposed that load port testing would be conducted separately for each quantity of gasoline that is not homogeneous with regard to the properties being tested, i.e., that separate testing would be conducted for each batch.[36] Commenters stated that EPA instead should allow parties to conduct load port-port of entry test comparisons on the basis of vessel composite samples. Based on the tracking purpose of load port-port of entry test comparisons, EPA agrees with the commenters' suggestion. The point of comparing load port with port of entry test results is to establish that a vessel has not stopped en route to the United States to add new gasoline. The gasoline quality and quantity changes that would result from such a mid-journey stop would be revealed by comparing the analysis results of vessel composite samples, and EPA now believes there is no need to require separate comparisons for each gasoline batch being transported on a vessel.

EPA proposed that if port of entry test results for certified FRGAS differ from load port test results by more than the specified ranges, the foreign refiner would be required to correct its compliance calculations to reflect the port of entry results. Foreign refiners objected, stating they sell their gasoline ''free on board'' (FOB) the foreign load port, and, hence, have no control and are not responsible for what happens to it afterwards.

EPA now believes the proposed approach is not the most appropriate consequence when port of entry test results are inconsistent with load port test results. Instead, EPA believes the U.S. importer should simply treat the gasoline as non-certified FRGAS. In the case of inconsistent results from load port and port of entry testing, the implication is the gasoline was not produced by the foreign refiner or has been mixed with gasoline not produced by the foreign refiner, and is not entitled to the foreign refinery's individual baseline. In addition, the U.S. importer must inform the foreign refiner of the inconsistent results, and the foreign refiner must adjust its compliance calculations to remove the qualities and volume of the conventional gasoline from the refinery NO_X and exhaust toxics compliance calculations.

However, the foreign refiner may not remove the volume from its compliance baseline calculations. This is necessary in order to prevent the adverse impacts, described above, that could occur if foreign refiners of FRGAS or their importers have the option of classifying conventional gasoline as ''non-FRGAS.'' Requiring the named foreign refiner to retain the volume of the non-certified FRGAS in its compliance baseline calculations even where load port and port of entry test results are inconsistent removes any incentive for the foreign refiner or its U.S. importer to manipulate test results in order to make them inconsistent, and in this way to ship to the United States gasoline that could be treated as ''non-FRGAS.''

EPA is providing an exception to this requirement. In the case of test results outside the specified ranges the foreign refiner need not retain the volume of the gasoline in its compliance baseline calculations, where the foreign refiner can demonstrate that the U.S. importer does not classify the imported gasoline as reformulated gasoline, or use the imported gasoline to produce reformulated gasoline through the GTAB protocol. This exception is appropriate because the potential for adverse environmental effects only exists where the gasoline is used as reformulated gasoline in the U.S.[37] EPA intends to review compliance with this exception when it conducts audits of foreign refiners and U.S. importers. If EPA discovers that a foreign refiner excluded the volume of certified FRGAS from its compliance baseline calculations based on inconsistent load port—port of entry testing, but the gasoline was classified as reformulated gasoline by the U.S. importer, the foreign refiner's compliance baseline calculation will be adjusted, *ab initio,* which could result in a violation of the NO_X and exhaust toxics requirements by the foreign refiner. This would be true in a case where only a portion of the gasoline at issue has been classified as reformulated gasoline using the GTAB protocol. Moreover, the foreign refiner could not avoid this result even if it had a good faith belief the U.S. importer would not use the gasoline at issue to produce reformulated gasoline. The burden is on the foreign refiner to demonstrate that the gasoline was not classified as reformulated.

EPA is adopting an additional basis for retaining the certified FRGAS classification of conventional gasoline, even if the load port and port of entry test results are outside the specified ranges. This is based on a comparison of the NO_X and exhaust toxics emissions performance of the FRGAS calculated using load port test results, with the emissions performance calculated using port of entry test results. If the port of entry emissions performance for both NO_X and exhaust toxics, in milligrams per mile, is smaller than the load port emissions performance (i.e., cleaner),

[35] For example, under the ASTM test for benzene, ASTM D 3606–92, reproducibility is calculated as 0.28 times the measured value. If the benzene tests for a particular vessel are 2.50 vol% from the load port composite sample, and 1.80 vol% from the port of entry composite sample, the reproducibility calculated as 1.80 vol% ± 0.50 vol% based on the 1.80 vol% port of entry result, i.e., the load port result would be consistent with the port of entry result if it is between 1.30 vol% and 2.30 vol%. In this example the benzene test results are inconsistent because the load port result is larger than 2.30 vol%.

[36] 40 CFR 80.2(gg) defines an RFG batch as a quantity that is homogeneous with regard to the RFG parameters. In another rulemaking, EPA has proposed that this definition also would apply to conventional gasoline. See 62 FR 37339 (July 11, 1997).

[37] If the gasoline is included in the importer's CG compliance calculations, it will be subject to the statutory baseline, which is more stringent than the applicable compliance baseline where the foreign refiner includes the volume in its compliance baseline equation.

the gasoline remains classified as certified FRGAS regardless of the parameter test results comparisons. This exception is appropriate because there is no adverse environmental effect if the quality of the conventional gasoline *improves* in terms of NO_X and exhaust toxics emissions performance. However, this exception would not apply if EPA is able to establish that the vessel in fact stopped en route to the United States and took on additional gasoline produced at a different foreign refinery.

7. Diversion of FRGAS to Non-U.S. Markets

a. EPA Proposal: EPA proposed that all gasoline produced at a foreign refinery with an individual baseline that is exported to the U.S. must be classified as FRGAS. However, EPA left open and requested comment on the issue of whether the regulations should allow FRGAS to be diverted to a non-U.S. market after production, for example, whether a vessel containing FRGAS could be diverted to a non-U.S. market.

b. Comments: EPA received comments from two foreign refiners and an association representing domestic marketers that recommended foreign refiners be given the option of diverting FRGAS to non-U.S. markets. The two foreign refiners stated that foreign refiners could implement commercial procedures that would allow them to know when FRGAS has been diverted to a non-U.S. market, and the foreign refiner could correct their compliance calculations accordingly.

c. EPA's Response: EPA now agrees that foreign refiners of FRGAS should be allowed to divert certified and non-certified FRGAS to non-U.S. markets, provided the foreign refiner corrects its compliance baseline calculations, and in the case of certified FRGAS its NO_X and exhaust toxics compliance calculations, to reflect the diversion. In the case of diverted certified FRGAS, the foreign refiner must use the load port test results, and the load port volume, as the basis for correcting the NO_X and exhaust toxics compliance calculations. A foreign refiner may treat FRGAS as having been diverted only if the foreign refiner is able to demonstrate the gasoline in fact was used outside the U.S. This demonstration must be in the form of documents obtained from the recipient of the gasoline that certify where the gasoline will be used, and that the gasoline will not be imported into the United States. Provisions have been included in the final rule to reflect these requirements.

8. Attest Requirements

a. EPA Proposal: Under the Gasoline Rule foreign refiners of FRGAS, like domestic refiners, are required to commission an attest engagement each year.[38] EPA proposed additional attest procedures dealing with the FRGAS requirements, that would have to be completed by foreign refiners of FRGAS.

b. Comments: EPA received comments on the proposed FRGAS attest procedures from a domestic firm of Certified Public Accountants. These comments included specific suggestions regarding the wording used in certain proposed FRGAS attest provisions.

c. EPA's Response: EPA has modified the attest procedures to address the comments received. In particular, EPA has included additional details in the attest procedure that requires the auditor to determine whether FRGAS was produced at the foreign refinery in question, and whether FRGAS was produced at any non-FRGAS or FRGAS produced at a different refinery.

9. Truck Imports

a. EPA Proposal: EPA did not distinguish gasoline that is imported into the U.S. by truck, from gasoline that is transported by vessel, in the foreign refiner proposed rule. However, in implementing the current regulations EPA has allowed an additional option for meeting the conventional gasoline requirements where the gasoline is imported into the U.S. by truck, because of the costs associated with every-batch sampling that is required for imported gasoline. Under this option truck importers are allowed to demonstrate compliance with the conventional gasoline requirements based on the quality of gasoline at the terminal located outside the U.S. where the trucks are loaded. This quality must meet the statutory baseline on an every-gallon basis, and not an annual average basis. The foreign terminal operator provides the U.S. importer with documents for each truck loaded at the terminal, that demonstrate the gasoline meets these quality requirements. These documents must be based on complete sampling and testing by the foreign terminal operator. In addition, the U.S. importer must conduct a program of periodic quality assurance testing of the gasoline dispensed at the foreign terminal to verify the accuracy of the foreign refiner's documents. This option was allowed in guidance issued by EPA in *Reformulated Gasoline and Anti-Dumping Questions and Answers* (October 29, 1994), and has been proposed for inclusion in the Gasoline Rule in another rulemaking, 62 FR 37367 (July 11, 1997).

b. Comments: EPA received comments from a coalition of companies who import gasoline into the United States by truck. These commenters stated that EPA should structure the foreign refiner requirements in a manner that allows truck importers to continue using the testing option described above.

In particular, these commenters expressed the view that the foreign refiner FRGAS requirements would affect truck importers only if an individual refinery baseline is sought by the foreign refiner supplying gasoline to the terminal used by truck importers. If an individual refinery baseline is obtained by such a foreign refiner, the commenters suggested the foreign refinery should be considered analogous to the load port, and the truck loading terminal should be considered analogous to the U.S. port of entry. In this way the gasoline dispensed at the truck loading terminal would have no additional testing requirements that would be met by the U.S. importer.

c. EPA's Response: Where the foreign refiner has not obtained an individual refinery baseline the testing option available to truck importers, described above, is unaffected by the foreign refiner requirements being promulgated. However, if conventional gasoline imported by a truck importer is produced at a foreign refinery with an individual baseline the current importer testing option is not available. This is true because the truck testing option does not allow any gasoline to meet NO_X and exhaust toxics quality requirements other than statutory baseline-based requirements.

EPA believes it may be possible to modify the testing option available to truck importers for application with gasoline produced at a foreign refinery with an individual refinery baseline. However, this is not the most appropriate rulemaking for such a modification. As described above, EPA has proposed in a separate rulemaking to include this truck importer testing option in the regulations, which EPA hopes to complete by the end of December 1997. EPA believes it would be most appropriate to address all issues related to testing by truck importers in that separate rulemaking, including

[38] ''Attest engagement'' is a term of art used by auditors to describe the conduct of audit procedures that have been agreed upon in advance by the auditor and the subject of the audit—the auditor attests to the conduct and results of the specified audit, or attest, procedures completed during the attest engagement. The requirements in sections 80.125 through 80.130 consist of specified attest procedures dealing with the Gasoline Rule and instructions for the conduct of these procedures.

where the foreign refiner has obtained an individual refinery baseline. In the meantime, if EPA receives an individual refinery baseline petition from a foreign refiner that supplies truck importers, EPA will attempt to address the issue of the truck testing option through modifying the Question and Answer guidance.

E. Remedial Measures

1. EPA's Proposal

Allowing foreign refiners to choose whether to establish an individual baseline creates a potential for adverse environmental impact. This would be addressed by monitoring the quality of imported gasoline, comparing it to a benchmark, and taking remedial action if the benchmark is exceeded.

EPA would monitor the entire pool of imported gasoline, and determine the volume weighted average quality of the gasoline. This average would be compared to a benchmark. The purpose of the benchmark is to reasonably determine when allowing foreign refiners the option to use or not use an IB has caused degradation of the quality of imported gasoline from the 1990 quality of imported gasoline. The best measure of this, given the absence of actual data on the average quality of gasoline imported in 1990, would be the volume weighted average baseline for domestic refiners.

Since the use of a benchmark is designed to detect a multi-year trend stemming from providing foreign refiners the option to use or not use an IB, as compared to short term changes in gasoline quality attributable to the many other factors that can affect the quality of imported gasoline on a year to year basis, EPA proposed to use a three year rolling average of the quality of imported gasoline. Thus each year the average quality of the imported CG for the prior three years would be compared to the benchmark.

If the benchmark was exceeded, EPA would take remedial action by adjusting the requirement applicable to imported CG that is not subject to an IB. The adjustment would be equal to the amount of the exceedance. The existence and level of the adjustment would be evaluated each year by comparing the benchmark to the most recent 3 year average. The adjusted requirement would apply to CG imported from refiners without an IB.

Under the proposal, a benchmark would be set for NO_X emissions but not for exhaust toxics, as the evidence prior to the proposal indicated that there would not likely be an adverse impact on toxics from allowing the option to use an IB. Instead, EPA would monitor the quality of imported CG for toxics, and if an adverse trend were to occur EPA would develop at that time an appropriate benchmark and adjustment mechanism, analogous to that proposed for NO_X.

2. Comments

Comments were received from various associations and members of the refining and distribution industry, importers, gasoline marketers, foreign refiners, a state environmental office and an environmental group. Several of the commenters supported the proposed approach in general, suggesting changes to specific parts of the proposal. One commenter suggested extending the approach to include all imported and domestic conventional gasoline, using this mechanism to improve the average quality of fuel in areas with poor fuel quality. One commenter from the gasoline refining and distribution industry opposed the general approach of the proposal arguing that the after-the-fact approach of the proposal was inappropriate as it would allow air quality to degrade before remedial action was taken.

Several commenters suggested changes to the benchmark. One commenter suggested that a three year running average of the quality of domestic CG would be a better way to ensure that imported gasoline was no dirtier than domestic gasoline on average. Another commenter suggested that a benchmark based on a one year average instead of a three year average would be more protective of air quality and therefore more appropriate. Another commenter suggested using the statutory baseline as the benchmark instead of the volume weighted average of domestic refiner IBs. One commenter suggested that remedial action should be triggered when the benchmark was exceeded by an amount reflecting the reproducibility of the test results for NO_X emissions. Finally, one commenter suggested using a national average as the benchmark, done by individual metropolitan areas.

While one commenter supported limiting the benchmark to NO_X, two commenters recommended adding a benchmark for toxics. One commenter questioned EPA's lack of a benchmark for toxics, given the difficulty in analyzing import data and enforcing requirements against foreign refiners and the importance of the toxics reductions from the RFG and CG programs. Another commenter suggested monitoring exhaust toxics as well as NO_X as domestic refiners are subject to requirements for both, the prior history of the toxics qualities of imported CG does not assure the quality of future imports of CG, and the additional monitoring and reporting would not impose significant effort for either EPA or the affected industry. This commenter also expressed the view that gasoline produced outside the U.S. would be likely to have higher toxics on average than that produced in the U.S., based on the on-going phase out of lead, the summer to winter ratio of imports, and the results of a 1993 National Petroleum Council study on gasoline quality. In addition, EPA was cautioned to exclude data from the U.S. Virgin Islands in determining the toxics qualities of imported CG.

One commenter objected that the adjustment mechanism did not comply with the legal requirements spelled out by the WTO Appellate Body and Panel, in that it could lead to subjecting imported gasoline to stricter requirements than identical domestic gasoline. The commenter argues that even though domestic refiners were required to use an IB, there could still be changes in the average quality of domestic gasoline yet no adjustment mechanism was employed in that case.

3. EPA's Response

For the reasons decribed below, EPA is finalizing these provisions as proposed.

The ''after-the-fact'' approach of these provisions is based on EPA's inability to accurately quantify ahead of time the actual adverse impact, if any, from allowing foreign refiners the option to use or not use an IB. EPA does believe providing such an option clearly creates the potential for such an adverse impact, but the size and amount of the impact is difficult to quantify with any degree of certainty ahead of time, as well as whether or not it will occur. It would depend on a variety of factors, some of which would change from year to year—the number of foreign refiners that receive an IB, the actual IBs assigned to them, the volume of gasoline included in the IB, the source and amount of CG and RFG imported each year, and the extent, if any, to which foreign refiners whose 1990 exports to the U.S. were cleaner on average than the SB would now ship gasoline that is dirtier than what they exported to the U.S. in 1990.

No commenter disputed the above, or suggested a way for EPA to fairly quantify ahead of time the potential risk of an adverse environmental impact. Given this uncertainty, EPA continues to believe that the better course is to monitor imported CG, measure it against a benchmark designed to reflect a multi-

year trend in gasoline quality, and if the benchmark is exceeded adjust the gasoline quality requirement for imported CG by an amount that offsets this adverse impact. EPA also does not believe it is appropriate to extend this monitoring and adjustment approach to include all CG, both domestic and imported. All domestic refiners and blenders of CG have been assigned an IB, and do not have the option to choose between the SB and an IB. As a result, for domestic refiners there is not the same ability to choose a less stringent requirement, based on economic reasons, with the resulting potential for an adverse environmental impact, as there is for foreign refiners. Therefore, there is not the same need to protect against such an adverse impact for domestically produced gasoline.

EPA proposed a three year rolling average in the comparison to the benchmark as it is a better mechanism to detect a multi-year trend. A one year average was rejected in the proposal as it might only reflect the year to year volatility in the source and quantities of imported CG which occur for a variety of reasons independent of the option to use an IB. The commenter suggesting the use of a one year average did not provide any evidence to rebut this view, but argued instead that a one year average would be more protective of air quality. EPA is finalizing the three year rolling average as it is a better mechanism to determine when air quality has been adversely impacted from providing the option to use an IB, and therefore needs to be protected by an adjustment.

EPA proposed comparing the average quality of imported CG to the volume weighted average of the IBs for domestic refiners. This reflects the central purpose of the CG program as applied to imported gasoline—to avoid degradation in the quality of imported gasoline from the quality of gasoline imported in 1990. As noted in the proposal, we do not have actual data on the quality of gasoline imported in 1990 and it is not unreasonable to assume that the average quality of imported gasoline was generally equivalent to the volume weighted average of IBs for domestic refiners, absent evidence to the contrary. The proposed benchmark is based on this view, and no commenter contested these assumptions or presented evidence to the contrary. One commenter suggested comparing imported CG to the average quality of CG currently produced by domestic refiners, another suggested using a national average done by metropolitan area, and another suggested comparing it to the SB. EPA is not adopting these methods because each of them is a less direct way to meet the purpose identified above. These alternatives would be a less certain way to meet the objectives as they are less directly related to the quality of gasoline imported in 1990.

EPA disagrees with the suggestion that the remedial action should be triggered when the benchmark is exceeded by an amount reflecting the reproducibility of the test results for NO_X emissions. The reproducibility of test results addresses comparisons of individual test results conducted for example in different labs. It is not relevant when comparing averages that are based on numerous data points. A multi-year rolling average is an adequate benchmark to determine the existence of an adverse trend, and an additional element for reproducibility of individual test results is not needed.

EPA's proposal to establish a benchmark for NO_X at this time but not for exhaust toxics was based on a review of the annual reports submitted by importers for calendar year 1995. Those reports showed that the average level of exhaust toxics for gasoline imported in 1995 was significantly cleaner than either the statutory baseline or the volume weighted average of individual baselines for domestic refiners. In addition, information previously submitted by one foreign refiner indicated that the IB they would seek would be cleaner than the SB for exhaust toxics. Based on this, EPA did not believe there was enough indication that there would be an adverse impact on toxics to warrant establishing a benchmark and adjustment mechanism at this time. Instead, EPA would monitor the toxics qualities of imported gasoline and adopt a benchmark and adjustment mechanism in the future if appropriate.

None of the commenters provided information or reasons that warrant a different conclusion. The claim that data on imported gasoline is hard to analyze is unfounded, as it is relatively easy to determine the volume weighted average quality of imported gasoline from the batch reports submitted by importers. The same information will still be available under the regulations finalized today; the fact that some of the information may now be submitted by foreign refiners does not change the availability and quality of the data submitted. Since the regulatory changes adopted today will only affect conventional gasoline, there will be no impact at all on the important toxics reductions obtained in the RFG program. The fact that domestic refiners are subject to requirements for both NO_X and exhaust toxics is not a reason to set a benchmark for toxics now, as both importers and foreign refiners with an approved IB will also be subject to requirements for NO_X and exhaust toxics. While the prior history of the toxics quality of imported gasoline does not assure that the future quality will be the same, it does indicate that it is much less likely that a toxics problem will develop from allowing foreign refiners to use an IB. Since the proposal was published, EPA has been able to evaluate the batch reports submitted by importers for calendar year 1996. The results follow the same pattern as in 1995—the average toxics quality of imported gasoline is significantly cleaner than either the SB or the volume weighted average of the IBs for domestic refiners. Data from the Virgin Islands was not included in either the 1995 or 1996 calculations, as this is not considered imported gasoline for purposes of the CG or RFG regulations. Data on the actual toxics quality of imported gasoline in 1995 and 1996 provides concrete evidence for evaluating the risk of an adverse impact on toxics from allowing foreign refiners an option to use IBs. This data is more probative on this issue than the potential but unspecified impacts of lead-phase down on foreign produced gasoline and the overall quality of gasoline produced overseas in 1993, which would be dominated by gasoline produced and used overseas as compared to gasoline exported to the U.S. EPA is therefore not adopting a benchmark for exhaust toxics at this time, and instead will continue to monitor the average toxics quality of imported gasoline and will take appropriate action to adopt a benchmark and adjustment mechanism for exhaust toxics if circumstances develop which warrant such action.

F. Compliance With WTO Obligations

Some commenters claimed that certain provisions related to enforcing compliance with the requirements for establishment and use of an individual baseline, and the mechanism for remedial measures, were not consistent with the obligations of the United States under the World Trade Organization agreement.

This rule meets the commitment of the United States to comply with its obligations under the World Trade Organization agreement with respect to this matter. This rule provides all foreign refiners with the opportunity to apply for and use an individual baseline. To the limited extent that foreign refiners with individual baselines are to be subject to different

requirements than domestic refiners, great care has been taken to ensure that these requirements are limited to those that are essential to address issues that are unique to refiners exporting gasoline to the United States.

V. Administrative Designation and Regulatory Analysis

A. Public Participation

The agency held a public hearing on May 20, 1997, to hear comments on the Notice of Proposed Rulemaking (62 FR 24776) published on May 6, 1997. Comments were provided at the hearing by the National Petroleum Refiner's Association and the Independent Refiners Coalition. EPA reviewed and considered written comments on the proposal submitted by the same groups as well as written comments from various other commenters. These comments have been presented and addressed in the preamble above. (See Response to Comments, Section IV) All comments received by the Agency are located in the EPA Air Docket A–97–26.

B. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency

(3) Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action,'' as such, this action was submitted to OMB for review.

C. Economic Impact and Impact on Small Entities

EPA has determined that this final rule will not have a significant impact on a substantial number of small entities because only a limited number of domestic entities would be affected by this rule and would be small entities. In addition, today's action will not significantly change the requirements applicable to importers of gasoline produced by foreign refineries. A regulatory flexibility analysis has therefore not been prepared.

Of the entire population of importers currently reporting to the EPA, somewhat less than 100 importers that would be subject to today's proposed rule are small entities. Under 40 CFR. 80.65 and 80.101 the requirements for imported CG must currently be met by the importer. The current requirements are based on the statutory baseline while today's final rule would require either foreign refiners or importers to meet the CG requirements using the baselines of the various foreign refineries. Other importers would continue to meet the CG requirements using the statutory baseline or an adjusted baseline. This will not, however, have a significant impact on the importer, as the importer will continue to only import gasoline that allows it to meet the annual average requirements, and such gasoline would continue to be available from the foreign refineries. The provision generally corresponds with existing requirements. This final rule will continue the requirement that importers be responsible for sampling and testing for foreign gasoline imported into the U.S. Importers will be responsible for this activity at the port of entry in the U.S. Importers will rely on the foreign refiners and the independent party's to establish refinery of origin. Importers can accomplish this by making private arrangements with the importing foreign refiner and the independent party. The Agency believes that, in general, exercising good business practices with reputable foreign refiners will tend to eliminate any impact on the importer. The impact of today's final rule will therefore either not increase an importers cost, or would do so only marginally.

The issue of baselines for imported gasoline is discussed generally in section VII–C of the Regulatory Impact Analysis that was prepared to support the Final Rule for gasoline. A copy of this document may be found in the RFG docket, number A–92–12, at the location identified in the **ADDRESSES** section of this document.

D. The Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1591.08) and a copy may be obtained from Sandy Farmer, Regulatory Information Division; U.S. Environmental Protection Agency (2136); 401 M St., S.W.; Washington, DC 20460 or by calling (202) 260–2740. The information requirements are not effective until OMB approves them.

This final rule will allow foreign refiners to establish individual baselines to demonstrate compliance with the Agency's gasoline rule. The information collected will enable EPA to evaluate imported gasoline in a manner similar to gasoline produced at domestic refineries. Section 211(k) specifically recognizes the need for recordkeeping, reporting and sampling/testing requirements for enforcement of this program. Because of the complex nature of the gasoline rule, EPA cannot determine compliance merely by taking samples of gasoline at various facilities.

Estimated labor and cost burdens for this rule are:

No. Of Respondents, 32.

Total Annual Response, 90.

Average labor burden per response, 2.1 hours.

Average cost burden per response, $1,408.

Total annual hours requested, 192 hours.

Total annual capital costs, $126,700.00.

Capital cost are those cost associated with testing of gasoline by independent laboratories.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for

EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, OPPE Regulatory Information Division, U.S. Environmental Protection Agency (2137), 401 M Street, SW., Washington, DC 20460, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., N.W., Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or tribal governments or the private sector. The rule imposes no enforceable duty on any State, local or tribal governments or the private sector.

F. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a major rule as defined by 5 U.S.C. 804(2).

G. Statutory Authority

The statutory authority for the rules proposed today is granted to EPA by sections 114, 211 (c) and (k), and 301 of the Clean Air Act, as amended, 42 U.S.C. 7414, 7545 (c) and (k), and 7601.

List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: August 19, 1997.

Carol M. Browner,

Administrator.

40 CFR Part 80 is amended as follows:

PART 80—REGULATIONS OF FUELS AND FUEL ADDITIVES

1. The authority citation for part 80 continues to read as follows:

Authority: Sections 114, 211 and 301(a) of the Clean Air Act as amended, 42 U.S.C. 7414, 7545 and 7601(a).

2. Section 80.94 is added to subpart E to read as follows:

§ 80.94 Requirements for gasoline produced at foreign refineries.

(a) *Definitions.* (1) A *foreign refinery* is a refinery that is located outside the United States, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (collectively referred to in this section as ''the United States'').

(2) A *foreign refiner* is a person who meets the definition of refiner under § 80.2(i) for foreign refinery.

(3) *FRGAS* means gasoline produced at a foreign refinery that has been assigned an individual refinery baseline and that is imported into the United States.

(4) *Non-FRGAS* means gasoline that is produced at a foreign refinery that has not been assigned an individual refinery baseline, gasoline produced at a foreign refinery with an individual refinery baseline that is not imported into the United States, and gasoline produced at a foreign refinery with an individual baseline during a year when the foreign refiner has opted to not participate in the FRGAS program under paragraph (c)(3) of this section.

(5) *Certified FRGAS* means FRGAS the foreign refiner intends to include in the foreign refinery's NO_X and exhaust toxics compliance calculations under § 80.101(g), and does include in these compliance calculations when reported to EPA.

(6) *Non-certified FRGAS* means FRGAS that is not certified FRGAS.

(b) *Baseline establishment.* Any foreign refiner may submit to EPA a petition for an individual refinery baseline, under §§ 80.90 through 80.93.

(1) The provisions for baselines as specified in §§ 80.90 through 80.93 shall apply to a foreign refinery, except where provided otherwise in this section.

(2) The baseline for a foreign refinery shall reflect only the volume and properties of gasoline produced in 1990 that was imported into the United States.

(3) A baseline petition shall establish the volume of conventional gasoline produced at a foreign refinery and imported into the United States during the calendar year immediately preceding the year the baseline petition is submitted.

(4) In making determinations for foreign refinery baselines EPA will consider all information supplied by a foreign refiner, and in addition may rely on any and all appropriate assumptions necessary to make such a determination.

(5) Where a foreign refiner submits a petition that is incomplete or inadequate to establish an accurate baseline, and the refiner fails to cure this defect after a request for more information, then EPA shall not assign an individual refinery baseline.

(6) Baseline petitions under this paragraph (b) of this section must be submitted before January 1, 2002.

(c) *General requirements for foreign refiners with individual refinery baselines.* Any foreign refiner of a refinery that has been assigned an individual baseline under paragraph (b) of this section shall designate all gasoline produced at the foreign refinery that is exported to the United States as either certified FRGAS or as non-

certified FRGAS, except as provided in paragraph (c)(3) of this section.

(1)(i) In the case of certified FRGAS, the foreign refiner shall meet all requirements that apply to refiners under 40 CFR part 80, subparts D, E and F.

(ii) If the foreign refinery baseline is assigned, or a foreign refiner begins early use of a refinery baseline under paragraph (r) of this section, on a date other than January 1, the compliance baseline for the initial year shall be calculated under § 80.101(f) using an adjusted baseline volume, as follows:

$AV_{1990} = (D/365) \times V_{1990}$

where:

AV_{1990} = Adjusted 1990 baseline volume

D = Number of days remaining in the year, beginning with the day the foreign refinery baseline is approved or the day the foreign refiner begins early use of a refinery baseline, whichever is later

V_{1990} = Foreign refinery's 1990 baseline volume.

(2) In the case of non-certified FRGAS, the foreign refiner shall meet the following requirements, except the foreign refiner shall substitute the name ''non-certified FRGAS'' for the names ''reformulated gasoline'' or ''RBOB'' wherever they appear in the following requirements:

(i) The designation requirements in § 80.65(d)(1);

(ii) The recordkeeping requirements in § 80.74 (a), and (b)(3);

(iii) The reporting requirements in § 80.75 (a), (m), and (n);

(iv) The registration requirements in § 80.76;

(v) The product transfer document requirements in § 80.77 (a) through (f), and (j);

(vi) The prohibition in § 80.78(a)(10), (b) and (c); and

(vii) The independent audit requirements in §§ 80.125 through 80.127, 80.128 (a) through (c), and (g) through (i), and 80.130.

(3)(i) Any foreign refiner that has been assigned an individual baseline for a foreign refinery under paragraph (b) of this section may elect to classify no gasoline imported into the United States as FRGAS, provided the foreign refiner notifies EPA of the election no later than November 1 of the prior calendar year.

(ii) An election under paragraph (c)(3)(i) of this section shall:

(A) Be for an entire calendar year averaging period and apply to all gasoline produced during the calendar year at the foreign refinery that is imported into the United States; and

(B) Remain in effect for each succeeding calendar year averaging period, unless and until the foreign refiner notifies EPA of a termination of the election. The change in election shall take effect at the beginning of the next calendar year.

(iii) A foreign refiner who has aggregated refineries under § 80.101(h) shall make the same election under paragraph (c)(3)(i) of this section for all refineries in the aggregation.

(d) *Designation, product transfer documents, and foreign refiner certification.* (1) Any foreign refiner of a foreign refinery that has been assigned an individual baseline shall designate each batch of FRGAS as such at the time the gasoline is produced, unless the foreign refiner has elected to classify no gasoline exported to the United States as FRGAS under paragraph (c)(3)(i) of this section.

(2) On each occasion when any person transfers custody or title to any FRGAS prior to its being imported into the United States, the following information shall be included as part of the product transfer document information in §§ 80.77 and 80.106:

(i) Identification of the gasoline as certified FRGAS or as non-certified FRGAS; and

(ii) The name and EPA refinery registration number of the refinery where the FRGAS was produced.

(3) On each occasion when FRGAS is loaded onto a vessel or other transportation mode for transport to the United States, the foreign refiner shall prepare a certification for each batch of the FRGAS that meets the following requirements:

(i) The certification shall include the report of the independent third party under paragraph (f) of this section, and the following additional information:

(A) The name and EPA registration number of the refinery that produced the FRGAS;

(B) The identification of the gasoline as certified FRGAS or non-certified FRGAS;

(C) The volume of FRGAS being transported, in gallons;

(D) A declaration that the FRGAS is being included in the compliance baseline calculations under § 80.101(f) for the refinery that produced the FRGAS; and

(E) In the case of certified FRGAS:

(*1*) The values for each parameter required to calculate NO_X and exhaust toxics emissions performance as determined under paragraph (f) of this section; and

(*2*) A declaration that the FRGAS is being included in the compliance calculations under § 80.101(g) for the refinery that produced the FRGAS.

(ii) The certification shall be made part of the product transfer documents for the FRGAS.

(e) *Transfers of FRGAS to non-United States markets.* The foreign refiner is responsible to ensure that all gasoline classified as FRGAS is imported into the United States. A foreign refiner may remove the FRGAS classification, and the gasoline need not be imported into the United States, but only if:

(1)(i) The foreign refiner excludes:

(A) The volume of gasoline from the refinery's compliance baseline calculations under § 80.101(h); and

(B) In the case of certified FRGAS, the volume and parameter values of the gasoline from the compliance calculations under § 80.101(g);

(ii) The exclusions under paragraph (e)(1)(i) of this section shall be on the basis of the parameter and volumes determined under paragraph (f) of this section; and

(2) The foreign refiner obtains sufficient evidence in the form of documentation that the gasoline was not imported into the United States.

(f) *Load port independent sampling, testing and refinery identification.* (1) On each occasion FRGAS is loaded onto a vessel for transport to the United States a foreign refiner shall have an independent third party:

(i) Inspect the vessel prior to loading and determine the volume of any tank bottoms;

(ii) Determine the volume of FRGAS loaded onto the vessel (exclusive of any tank bottoms present before vessel loading);

(iii) Obtain the EPA-assigned registration number of the foreign refinery;

(iv) Determine the name and country of registration of the vessel used to transport the FRGAS to the United States; and

(v) Determine the date and time the vessel departs the port serving the foreign refinery.

(2) On each occasion certified FRGAS is loaded onto a vessel for transport to the United States a foreign refiner shall have an independent third party:

(i) Collect a representative sample of the certified FRGAS from each vessel compartment subsequent to loading on the vessel and prior to departure of the vessel from the port serving the foreign refinery;

(ii) Prepare a volume-weighted vessel composite sample from the compartment samples, and determine the values for sulfur, benzene, gravity, E200 and E300 using the methodologies specified in § 80.46, by:

(A) The third party analyzing the sample; or

(B) The third party observing the foreign refiner analyze the sample;

(iii) Determine the values for aromatics, olefins, RVP and each oxygenate specified in § 80.65(e)(2) for the gasoline loaded onto the vessel, by:

(A) Completing the analysis procedures under paragraph (f)(2)(ii) of this section for the additional parameters; or

(B) Obtaining from the foreign refiner the test results of samples collected from each shore tank containing gasoline that was loaded onto the vessel, and calculating the parameter values for the gasoline loaded onto the vessel from the tank parameter values and the gasoline volume from each such shore tank that was loaded;

(iv) Review original documents that reflect movement and storage of the certified FRGAS from the refinery to the load port, and from this review determine:

(A) The refinery at which the FRGAS was produced; and

(B) That the FRGAS remained segregated from:

(*1*) Non-FRGAS and non-certified FRGAS; and

(*2*) Other certified FRGAS produced at a different refinery, except that certified FRGAS may be combined with other certified FRGAS produced at refineries that are aggregated under § 80.101(h);

(3) The independent third party shall submit a report:

(i) To the foreign refiner containing the information required under paragraphs (f) (1) and (2) of this section, to accompany the product transfer documents for the vessel; and

(ii) To the Administrator containing the information required under paragraphs (f) (1) and (2) of this section, within thirty days following the date of the independent third party's inspection. This report shall include a description of the method used to determine the identity of the refinery at which the gasoline was produced, that the gasoline remained segregated as specified in paragraph (n)(1) of this section, and a description of the gasoline's movement and storage between production at the source refinery and vessel loading.

(4) A person may be used to meet the third party requirements in this paragraph (f) only if:

(i) The person is approved in advance by EPA, based on a demonstration of ability to perform the procedures required in this paragraph (f);

(ii) The person is independent under the criteria specified in § 80.65(f)(2)(iii); and

(iii) The person signs a commitment that contains the provisions specified in paragraph (i) of this section with regard to activities, facilities and documents relevant to compliance with the requirements of this paragraph (f).

(g) *Comparison of load port and port of entry testing.* (1)(i) Any foreign refiner and any United States importer of certified FRGAS shall compare the results from the load port testing under paragraph (f) of this section, with the port of entry testing as reported under paragraph (o) of this section, for the volume of gasoline, for the parameter values for sulfur, benzene, gravity, E200 and E300, and for the NO_X and exhaust toxics emissions performance; except that

(ii) Where a vessel transporting certified FRGAS off loads this gasoline at more than one United States port of entry, and the conditions of paragraph (g)(2)(i) of this section are not met at the first United States port of entry, the requirements of paragraph (g)(1) and (g)(2) of this section do not apply at subsequent ports of entry if the United States importer obtains a certification from the vessel owner or his immediate designee that the vessel has not loaded any gasoline or blendstock between the first United States port of entry and the subsequent port of entry.

(2)(i) The requirements of paragraph (g)(2)(ii) apply if:

(A)(*1*) The temperature-corrected volumes determined at the port of entry and at the load port differ by more than one percent; or

(*2*) For any parameter specified in paragraph (f)(2)(ii) of this section, the values determined at the port of entry and at the load port differ by more than the reproducibility amount specified for the port of entry test result by the American Society of Testing and Materials (ASTM); unless

(B) The NO_X and exhaust toxics emissions performance, in grams per mile, calculated using the port of entry test results, are each equal to or less than the NO_X and exhaust toxics emissions performance calculated using the load port test results;

(ii) The United States importer and the foreign refiner shall treat the gasoline as non-certified FRGAS, and the foreign refiner shall:

(A) Exclude the gasoline volume and properties from its conventional gasoline NO_X and exhaust toxics compliance calculations under § 80.101(g); and

(B) Include the gasoline volume in its compliance baseline calculation under § 80.101(f), unless the foreign refiner establishes that the United States importer classified the gasoline only as conventional gasoline and not as reformulated gasoline.

(h) *Attest requirements.* The following additional procedures shall be carried out by any foreign refiner of FRGAS as part of the attest engagement for each foreign refinery under 40 CFR part 80, subpart F.

(1) Include in the inventory reconciliation analysis under § 80.128(b) and the tender analysis under § 80.128(c) non-FRGAS in addition to the gasoline types listed in § 80.128 (b) and (c).

(2) Obtain separate listings of all tenders of certified FRGAS, and of non-certified FRGAS. Agree the total volume of tenders from the listings to the gasoline inventory reconciliation analysis in § 80.128(b), and to the volumes determined by the third party under paragraph (f)(1) of this section.

(3) For each tender under paragraph (h)(2) of this section where the gasoline is loaded onto a marine vessel, report as a finding the name and country of registration of each vessel, and the volumes of FRGAS loaded onto each vessel.

(4) Select a sample from the list of vessels identified in paragraph (h)(3) of this section used to transport certified FRGAS, in accordance with the guidelines in § 80.127, and for each vessel selected perform the following:

(i) Obtain the report of the independent third party, under paragraph (f) of this section, and of the United States importer under paragraph (o) of this section.

(A) Agree the information in these reports with regard to vessel identification, gasoline volumes and test results.

(B) Identify, and report as a finding, each occasion the load port and port of entry parameter and volume results differ by more than the amounts allowed in paragraph (g) of this section, and determine whether the foreign refiner adjusted its refinery calculations as required in paragraph (g) of this section.

(ii) Obtain the documents used by the independent third party to determine transportation and storage of the certified FRGAS from the refinery to the load port, under paragraph (f) of this section. Obtain tank activity records for any storage tank where the certified FRGAS is stored, and pipeline activity records for any pipeline used to transport the certified FRGAS, prior to being loaded onto the vessel. Use these records to determine whether the certified FRGAS was produced at the refinery that is the subject of the attest engagement, and whether the certified FRGAS was mixed with any non-certified FRGAS, non-FRGAS, or any certified FRGAS produced at a different

refinery that was not aggregated under § 80.101(h).

(5)(i) Select a sample from the list of vessels identified in paragraph (h)(3) of this section used to transport certified and non-certified FRGAS, in accordance with the guidelines in § 80.127, and for each vessel selected perform the following:

(ii) Obtain a commercial document of general circulation that lists vessel arrivals and departures, and that includes the port and date of departure of the vessel, and the port of entry and date of arrival of the vessel. Agree the vessel's departure and arrival locations and dates from the independent third party and United States importer reports to the information contained in the commercial document.

(6) Obtain separate listings of all tenders of non-FRGAS, and perform the following:

(i) Agree the total volume of tenders from the listings to the gasoline inventory reconciliation analysis in § 80.128(b).

(ii) Obtain a separate listing of the tenders under paragraph (h)(6) of this section where the gasoline is loaded onto a marine vessel. Select a sample from this listing in accordance with the guidelines in § 80.127, and obtain a commercial document of general circulation that lists vessel arrivals and departures, and that includes the port and date of departure and the ports and dates where the gasoline was off loaded for the selected vessels. Determine and report as a finding the country where the gasoline was off loaded for each vessel selected.

(7) In order to complete the requirements of this paragraph (h) an auditor shall:

(i) Be independent of the foreign refiner;

(ii) Be licensed as a Certified Public Accountant in the United States and a citizen of the United States, or be approved in advance by EPA based on a demonstration of ability to perform the procedures required in §§ 80.125 through 80.130 and this paragraph (h); and

(iii) Sign a commitment that contains the provisions specified in paragraph (i) of this section with regard to activities and documents relevant to compliance with the requirements of §§ 80.125 through 80.130 and this paragraph (h).

(i) *Foreign refiner commitments.* Any foreign refiner shall commit to and comply with the provisions contained in this paragraph (i) as a condition to being assigned an individual refinery baseline.

(1) Any United States Environmental Protection Agency inspector or auditor will be given full, complete and immediate access to conduct inspections and audits of the foreign refinery.

(i) Inspections and audits may be either announced in advance by EPA, or unannounced.

(ii) Access will be provided to any location where:

(A) Gasoline is produced;

(B) Documents related to refinery operations are kept;

(C) Gasoline or blendstock samples are tested or stored; and

(D) FRGAS is stored or transported between the foreign refinery and the United States, including storage tanks, vessels and pipelines.

(iii) Inspections and audits may be by EPA employees or contractors to EPA.

(iv) Any documents requested that are related to matters covered by inspections and audits will be provided to an EPA inspector or auditor on request.

(v) Inspections and audits by EPA may include review and copying of any documents related to:

(A) Refinery baseline establishment, including the volume and parameters, and transfers of title or custody, of any gasoline or blendstocks, whether FRGAS or non-FRGAS, produced at the foreign refinery during the period January 1, 1990 through the date of the refinery baseline petition or through the date of the inspection or audit if a baseline petition has not been approved, and any work papers related to refinery baseline establishment;

(B) The parameters and volume of FRGAS;

(C) The proper classification of gasoline as being FRGAS or as not being FRGAS, or as certified FRGAS or as non-certified FRGAS;

(D) Transfers of title or custody to FRGAS;

(E) Sampling and testing of FRGAS;

(F) Work performed and reports prepared by independent third parties and by independent auditors under the requirements of this section, including work papers; and

(G) Reports prepared for submission to EPA, and any work papers related to such reports.

(vi) Inspections and audits by EPA may include taking samples of gasoline or blendstock, and interviewing employees.

(vii) Any employee of the foreign refiner will be made available for interview by the EPA inspector or auditor, on request, within a reasonable time period.

(viii) English language translations of any documents will be provided to an EPA inspector or auditor, on request, within 10 working days.

(ix) English language interpreters will be provided to accompany EPA inspectors and auditors, on request.

(2) An agent for service of process located in the District of Columbia will be named, and service on this agent constitutes service on the foreign refiner or any officer, or employee of the foreign refiner for any action by EPA or otherwise by the United States related to the requirements of 40 CFR part 80, subparts D, E and F.

(3) The forum for any civil or criminal enforcement action related to the provisions of this section for violations of the Clean Air Act or regulations promulgated thereunder shall be governed by the Clean Air Act, including the EPA administrative forum where allowed under the Clean Air Act.

(4) United States substantive and procedural laws shall apply to any civil or criminal enforcement action against the foreign refiner or any employee of the foreign refiner related to the provisions of this section.

(5) Submitting a petition for an individual refinery baseline, producing and exporting gasoline under an individual refinery baseline, and all other actions to comply with the requirements of 40 CFR part 80, subparts D, E and F relating to the establishment and use of an individual refinery baseline constitute actions or activities covered by and within the meaning of 28 U.S.C. 1605(a)(2), but solely with respect to actions instituted against the foreign refiner, its agents, officers, and employees in any court or other tribunal in the United States for conduct that violates the requirements applicable to the foreign refiner under 40 CFR part 80, subparts D, E and F, including such conduct that violates Title 18 U.S.C. section 1001, Clean Air Act section 113(c)(2), or other applicable provisions of the Clean Air Act.

(6) The foreign refiner, or its agents, officers, or employees, will not seek to detain or to impose civil or criminal remedies against EPA inspectors or auditors, whether EPA employees or EPA contractors, for actions performed within the scope of EPA employment related to the provisions of this section.

(7) The commitment required by this paragraph (i) shall be signed by the owner or president of the foreign refiner business.

(8) In any case where FRGAS produced at a foreign refinery is stored or transported by another company between the refinery and the vessel that transports the FRGAS to the United States, the foreign refiner shall obtain from each such other company a commitment that meets the

requirements specified in paragraphs (i)(1) through (7) of this section, and these commitments shall be included in the foreign refiner's baseline petition.

(j) *Sovereign immunity.* By submitting a petition for an individual foreign refinery baseline under this section, or by producing and exporting gasoline to the United States under an individual refinery baseline under this section, the foreign refiner, its agents, officers, and employees, without exception, become subject to the full operation of the administrative and judicial enforcement powers and provisions of the United States without limitation based on sovereign immunity, with respect to actions instituted against the foreign refiner, its agents, officers, and employees in any court or other tribunal in the United States for conduct that violates the requirements applicable to the foreign refiner under 40 CFR part 80, subparts D, E and F, including such conduct that violates Title 18 U.S.C. section 1001, Clean Air Act section 113(c)(2), or other applicable provisions of the Clean Air Act.

(k) *Bond posting.* Any foreign refiner shall meet the requirements of this paragraph (k) as a condition to being assigned an individual refinery baseline.

(1) The foreign refiner shall post a bond of the amount calculated using the following equation:

$$Bond = G \times \$0.01$$

where:

Bond=amount of the bond in U.S. dollars

G=the largest volume of conventional gasoline produced at the foreign refinery and exported to the United States, in gallons, during a single calendar year among the most recent of the following calendar years, up to a maximum of five calendar years: the calendar year immediately preceding the date the baseline petition is submitted, the calendar year the baseline petition is submitted, and each succeeding calendar year

(2) Bonds shall be posted by:

(i) Paying the amount of the bond to the Treasurer of the United States;

(ii) Obtaining a bond in the proper amount from a third party surety agent that is payable to satisfy United States judicial judgments against the foreign refiner, provided EPA agrees in advance as to the third party and the nature of the surety agreement; or

(iii) An alternative commitment that results in assets of an appropriate liquidity and value being readily available to the United States, provided EPA agrees in advance as to the alternative commitment.

(3) If the bond amount for a foreign refinery increases the foreign refiner shall increase the bond to cover the shortfall within 90 days of the date the bond amount changes. If the bond amount decreases, the foreign refiner may reduce the amount of the bond beginning 90 days after the date the bond amount changes.

(4) Bonds posted under this paragraph (k) shall be used to satisfy any judicial judgment that results from an administrative or judicial enforcement action for conduct in violation of 40 CFR part 80, subparts D, E and F, including such conduct that violates Title 18 U.S.C. section 1001, Clean Air Act section 113(c)(2), or other applicable provisions of the Clean Air Act.

(5) On any occasion a foreign refiner bond is used to satisfy any judgment, the foreign refiner shall increase the bond to cover the amount used within 90 days of the date the bond is used.

(l) *Blendstock tracking.* For purposes of blendstock tracking by any foreign refiner under § 80.102 by a foreign refiner with an individual refinery baseline, the foreign refiner may exclude from the calculations required in § 80.102(d) the volume of applicable blendstocks for which the foreign refiner has sufficient evidence in the form of documentation that the blendstocks were used to produce gasoline used outside the United States.

(m) *English language reports.* Any report or other document submitted to EPA by any foreign refiner shall be in the English language, or shall include an English language translation.

(n) *Prohibitions.* (1) No person may combine certified FRGAS with any non-certified FRGAS or non-FRGAS, and no person may combine certified FRGAS with any certified FRGAS produced at a different refinery that is not aggregated under § 80.101(h), except as provided in paragraph (e) of this section.

(2) No foreign refiner or other person may cause another person to commit an action prohibited in paragraph (n)(1) of this section, or that otherwise violates the requirements of this section.

(o) *United States importer requirements.* Any United States importer shall meet the following requirements.

(1) Each batch of imported gasoline shall be classified by the importer as being FRGAS or as non-FRGAS, and each batch classified as FRGAS shall be further classified as certified FRGAS or as non-certified FRGAS.

(2) Gasoline shall be classified as certified FRGAS or as non-certified FRGAS according to the designation by the foreign refiner if this designation is supported by product transfer documents prepared by the foreign refiner as required in paragraph (d) of this section, unless the gasoline is classified as non-certified FRGAS under paragraph (g) of this section.

(3) For each gasoline batch classified as FRGAS, any United States importer shall perform the following procedures.

(i) In the case of both certified and non-certified FRGAS, have an independent third party:

(A) Determine the volume of gasoline in the vessel;

(B) Use the foreign refiner's FRGAS certification to determine the name and EPA-assigned registration number of the foreign refinery that produced the FRGAS;

(C) Determine the name and country of registration of the vessel used to transport the FRGAS to the United States; and

(D) Determine the date and time the vessel arrives at the United States port of entry.

(ii) In the case of certified FRGAS, have an independent third party:

(A) Collect a representative sample from each vessel compartment subsequent to the vessel's arrival at the United States port of entry and prior to off loading any gasoline from the vessel;

(B) Prepare a volume-weighted vessel composite sample from the compartment samples; and

(C) Determine the values for sulfur, benzene, gravity, E200 and E300 using the methodologies specified in § 80.46, by:

(*1*) The third party analyzing the sample; or

(*2*) The third party observing the importer analyze the sample

(4) Any importer shall submit reports within thirty days following the date any vessel transporting FRGAS arrives at the United States port of entry:

(i) To the Administrator containing the information determined under paragraph (o)(3) of this section; and

(ii) To the foreign refiner containing the information determined under paragraph (o)(3)(ii) of this section.

(5)(i) Any United States importer shall meet the requirements specified for conventional gasoline in § 80.101 for any imported conventional gasoline that is not classified as certified FRGAS under paragraph (o)(2) of this section.

(ii) The baseline applicable to a United States importer who has not been assigned an individual importer baseline under § 80.91(b)(4) shall be the baseline specified in paragraph (p) of this section.

(p) *Importer Baseline.* (1) Each calendar year starting in 2000, the Administrator shall calculate the

volume weighted average NO_X emissions of imported conventional gasoline for a multi-year period (MYA_{NOx}). This calculation:

(i) Shall use the Phase II Complex Model;

(ii) Shall include all conventional gasoline in the following categories:

(A) Imported conventional gasoline that is classified as conventional gasoline, and included in the conventional gasoline compliance calculations of importers for each year; and

(B) Imported conventional gasoline that is classified as certified FRGAS, and included in the conventional gasoline compliance calculations of foreign refiners for each year;

(iii)(A) In 2000 only, shall be for the 1998 and 1999 averaging periods and also shall include all conventional gasoline classified as FRGAS and included in the conventional gasoline compliance calculations of a foreign refiner for 1997, and all conventional gasoline batches not classified as FRGAS that are imported during 1997 beginning on the date the first batch of FRGAS arrives at a United States port of entry; and

(B) Starting in 2001, shall include imported conventional gasoline during the prior three calendar year averaging periods.

(2)(i) If the volume-weighted average NO_X emissions (MYA_{NOx}), calculated in paragraph (p)(1) of this section, is greater than 1,465 mg/mile, the Administrator shall calculate an adjusted baseline for NO_X according to the following equation:

$$AB_{NOx} = 1{,}465 \text{ mg/mile} - (MYA_{NOx} - 1{,}465 \text{ mg/mile})$$

where:

AB_{NOx} = Adjusted NO_X baseline, in mg/mile

MYA_{NOx} = Multi-year average NO_X emissions, in mg/mile

(ii) For the 1998 and 1999 multi-year averaging period only the value of AB_{NOx} shall not be larger than 1,480 mg/mile regardless of the calculation under paragraph (p)(2)(i) of this section.

(3)(i) Notwithstanding the provisions of § 80.91(b)(4)(iii), the baseline NO_X emissions values applicable to any United States importer who has not been assigned an individual importer baseline under § 80.91(b)(4) shall be the more stringent of the statutory baseline value for NO_X under § 80.91(c)(5), or the adjusted NO_X baseline calculated in paragraph (p)(2) of this section.

(ii) On or before June 1 of each calendar year, the Administrator shall announce the NO_X baseline that applies to importers under this paragraph (p). If the baseline is an adjusted baseline, it shall be effective for any conventional gasoline imported beginning 60 days following the Administrator's announcement. If the baseline is the statutory baseline, it shall be effective upon announcement. A baseline shall remain in effect until the effective date of a subsequent change to the baseline pursuant to this paragraph (p).

(q) *Withdrawal or suspension of a foreign refinery's baseline.* EPA may withdraw or suspend a baseline that has been assigned to a foreign refinery where:

(1) A foreign refiner fails to meet any requirement of this section;

(2) A foreign government fails to allow EPA inspections as provided in paragraph (i)(1) of this section;

(3) A foreign refiner asserts a claim of, or a right to claim, sovereign immunity in an action to enforce the requirements in 40 CFR part 80, subparts D, E and F; or

(4) A foreign refiner fails to pay a civil or criminal penalty that is not satisfied using the foreign refiner bond specified in paragraph (k) of this section.

(r) *Early use of a foreign refinery baseline.* (1) A foreign refiner may begin using an individual refinery baseline before EPA has approved the baseline, provided that:

(i) A baseline petition has been submitted as required in paragraph (b) of this section;

(ii) EPA has made a provisional finding that the baseline petition is complete;

(iii) The foreign refiner has made the commitments required in paragraph (i) of this section;

(iv) The persons who will meet the independent third party and independent attest requirements for the foreign refinery have made the commitments required in paragraphs (f)(3)(iii) and (h)(7)(iii) of this section; and

(v) The foreign refiner has met the bond requirements of paragraph (k) of this section.

(2) In any case where a foreign refiner uses an individual refinery baseline before final approval under paragraph (r)(1) of this section, and the foreign refinery baseline values that ultimately are approved by EPA are more stringent than the early baseline values used by the foreign refiner, the foreign refiner shall recalculate its compliance, *ab initio,* using the baseline values approved by EPA, and the foreign refiner shall be liable for any resulting violation of the conventional gasoline requirements.

(s) *Additional requirements for petitions, reports and certificates.* Any petition for a refinery baseline under paragraph (b) of this section, any report or other submission required by paragraphs (c), (f)(2), or (i) of this section, and any certification under paragraph (d)(3) or (g)(1)(ii) of this section shall be:

(1) Submitted in accordance with procedures specified by the Administrator, including use of any forms that may specified by the Administrator.

(2) Be signed by the president or owner of the foreign refiner company, or in the case of (g)(1)(ii) the vessel owner, or by that person's immediate designee, and shall contain the following declaration:

I hereby certify: (1) that I have actual authority to sign on behalf of and to bind [insert name of foreign refiner or vessel owner] with regard to all statements contained herein; (2) that I am aware that the information contained herein is being certified, or submitted to the United States Environmental Protection Agency, under the requirements of 40 CFR part 80, subparts D, E and F and that the information is material for determining compliance under these regulations; and (3) that I have read and understand the information being certified or submitted, and this information is true, complete and correct to the best of my knowledge and belief after I have taken reasonable and appropriate steps to verify the accuracy thereof.

I affirm that I have read and understand that the provisions of 40 CFR part 80, subparts D, E and F, including 40 CFR 80.94 (i), (j) and (k), apply to [insert name of foreign refiner or vessel owner]. Pursuant to Clean Air Act section 113(c) and Title 18, United States Code, section 1001, the penalty for furnishing false, incomplete or misleading information in this certification or submission is a fine of up to $10,000, and/or imprisonment for up to five years.

[FR Doc. 97–22803 Filed 8–27–97; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 268 and 271

[FRL–5884–2]

RIN 2050–AD38

Second Emergency Revision of the Land Disposal Restrictions (LDR) Treatment Standards for Listed Hazardous Wastes From Carbamate Production

AGENCY: Environmental Protection Agency (EPA, the Agency).

ACTION: Immediate final rule.

SUMMARY: This second emergency revision extends the time that the alternative carbamate treatment