

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[FRL-6169-5]

RIN 2060-AG77

Regulation of Fuels and Fuel Additives: Modification of the Covered Areas Provision for Reformulated Gasoline

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final action modifies § 80.70(k) of the reformulated gasoline (RFG) regulations to allow states to opt into the RFG program for any area currently or previously designated as an ozone nonattainment area under the national one-hour ozone standard, as of November 15, 1990, the date of the enactment of the Clean Air Act Amendments of 1990 (1990 Amendments), or any time later. This final action encompasses all nonattainment areas including Marginal, Moderate, Serious and Severe ozone nonattainment areas, as well as those areas classified as transitional, sub-marginal, no data or incomplete data areas. Section 80.70(k) currently provides that any area classified as a Marginal, Moderate, Serious or Severe ozone nonattainment area may be included in the RFG program on petition by the Governor of the State in which the area is located. Today's final action will expand this provision to allow states to opt into the RFG program for areas which had been previously classified as Marginal, Moderate, Serious or Severe for ozone, but were subsequently redesignated to attainment. This final rule will also allow opt in to RFG for those areas designated nonattainment that do not fit into Section 181(a)'s classification scheme and therefore were classified as transitional, sub-marginal or areas with incomplete data. This will provide states an additional option for all areas currently or previously designated nonattainment since the 1990 amendments to the Clean Air Act that may be used to avoid the air quality problems that can lead to a violation of air quality standards. Allowing states to opt into the RFG program for these areas will help to ensure that these areas have options available to continue to achieve and maintain compliance with the ozone standard.

EFFECTIVE DATE: This final rule is effective upon September 29, 1998.

ADDRESSES: Materials relevant to the final rule have been placed in Public Docket A-96-30 at the address below. A reasonable fee may be charged by EPA for copying docket materials. Documents may be inspected at the Air Docket Section between the hours of 8:00 a.m. and 5:30 p.m., Monday through Friday. The Air Division Docket is located at the U.S. Environmental Protection Agency, Waterside Mall, Room M-1500, 401 M Street, S.W., Washington, D.C. 20460 (telephone 202/260-7540, fax 202/260-4400).

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SUPPLEMENTARY INFORMATION:

Availability on the TTNBBS

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/>
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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:

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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 which produce, import or distribute gasoline for sale in areas formerly classified as ozone nonattainment areas which opt into the RFG program, and retail gasoline stations located in those areas. Regulated categories and entities include:

| Category | Examples of regulated entities |
|--------------|--|
| Industry ... | Refiners, importers, oxygenate blenders, terminal operators, distributors, retail gasoline stations. |

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 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 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
- II. Description of Final Rule
- III. Response to Comments
- IV. Administrative Designation and Regulatory Analysis
 - A. Public Participation
 - B. Executive Order 12866
 - C. Executive Order 12875: Enhancing Intergovernmental Partnerships

- D. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments
- E. Regulatory Flexibility
- F. Paperwork Reduction Act
- G. Unfunded Mandates Reform Act
- H. Submission to Congress and the General Accounting Office
- I. Children's Health Protection
- J. National Technology Transfer and Advancement Act of 1995 (NTTAA)
- K. Statutory Authority

I. Background

Section 107(d) of the Clean Air Act, as amended in 1990 (the Act), requires states to identify all areas that do not meet the national ambient air quality standards (NAAQS) for ozone, and directs EPA to designate these areas as ozone nonattainment areas. Section 181(a) of the Act requires EPA to classify each area designated as an ozone nonattainment area pursuant to section 107(d) as a Marginal, Moderate, Serious, Severe or Extreme area, based on the design value for the area, and using methodology developed by the Agency. EPA used this scheme to classify all areas that were designated as in nonattainment for ozone at the time of the enactment of the 1990 Amendments, except for certain "nonclassifiable" areas. Some of these nonclassifiable areas were designated nonattainment prior to the 1990 amendments and others were designated attainment before November 15, 1990. All of these areas were designated nonattainment at the time of the enactment of the 1990 amendments. Those in the former category would be required to attain by November 15, 1995, while those in the latter group would have an attainment date five years from the effective date of the nonattainment designation. See 57 FR 13524-13527 (April 16, 1992).

Section 211(k)(5) of the Act prohibits the sale or dispensing by any person of conventional gasoline to ultimate consumers in any RFG covered area. Section 211(k)(6) of the Act, as amended in 1990, provides that, upon the application of the Governor of a State, the Administrator shall apply the prohibition contained in section 211(k)(5) in any area in the State classified under Section 181 of the Act as a Marginal, Moderate, Serious or Severe area (the "opt-in" provision).¹ In any such case, the Administrator must establish an appropriate effective date for such prohibition that is not later

than one year after such application is received, and publish the application and effective date in the **Federal Register**.

EPA's current regulation, 40 CFR 80.70(k), provides that any area classified under 40 CFR part 81, subpart C, as a Marginal, Moderate, Serious or Severe ozone nonattainment area may be included as a RFG covered area on petition of the Governor of the State in which the area is located. EPA published proposed changes to this regulation on March 28, 1997 (62 FR 15074).

II. Description of Final Rule

The rule finalized today revises the opt-in provision of § 80.70(k) to apply it to any area designated as nonattainment for the one-hour ozone standard as of November 15, 1990, the date the 1990 Amendments were enacted, or any time later. This action will allow states to opt into the RFG program for areas which previously had been classified as Marginal, Moderate, Serious or Severe ozone nonattainment areas or those nonattainment areas classified as transitional, sub-marginal, no data or incomplete data areas, but which have been redesignated to attainment since 1990. This will provide additional flexibility to the states to ensure continued compliance with the NAAQS for ozone. States with such redesignated areas will have the flexibility to include the RFG program in their maintenance plans or use RFG as a contingency measure for these areas. This final action also permits any current nonattainment area classified as transitional, sub-marginal, or no data or incomplete data areas to participate in the RFG program through the opt-in provision in section 211(k)(6).

EPA is revising its opt-in rule in two ways. First, an area that is currently designated attainment may also opt in if it was previously designated as nonattainment for ozone under the one-hour standard, as of November 15, 1990 or at any time later. Second, any area designated as nonattainment for ozone under the one-hour standard will be allowed to opt into the federal RFG program. This includes areas classified as transitional, sub-marginal, and no data or incomplete data areas. EPA's authority to adopt these revisions is discussed in the response to comments section of the notice. The revisions are appropriate because any nonattainment area, including the submarginal and other areas, will benefit from the ozone reduction and other air quality benefits provided by the federal RFG program. RFG has been shown to be an important, cost-effective measure to reduce the air

pollution from motor vehicles that contributes to ozone levels. This rule will provide additional ozone nonattainment areas with an effective option in solving the air quality problems faced in the area. For similar reasons, areas that previously were designated nonattainment will have federal RFG as an additional option that may be used to keep air quality from degrading and leading to noncompliance. It will provide an additional option for states that will help them to ensure that these areas continue to achieve and maintain compliance with the ozone NAAQS. Many of the areas recently redesignated as attainment for ozone have ozone levels which are relatively close to the NAAQS, and are concerned about experiencing violations in the future. This rule will provide an additional, cost effective measure for states to use in avoiding this result.

The air quality benefits that may be achieved in the additional areas that may opt in under this rule can be achieved without placing an unreasonable burden on the refining and distribution industry. Analysis of the distribution systems shows that RFG is already in the major distribution systems, pipelines and terminals, and is being handled without any additional problems. In some instances, the areas which are interested in using RFG in the near term are contiguous to areas currently using RFG so the fuel is already on distribution systems which handle RFG. Increasing the use of RFG should not adversely affect the system.

EPA also believes no excessive burden exists for areas that are not contiguous to current RFG areas. Section 211(k)(6)(A) of the Act gives the Administrator discretion to "establish an effective date * * * as he deems appropriate * * *" EPA interprets this provision to mean that it has broad discretion to consider any factors reasonably relevant to the timing of the effective date. This would include factors that affect industry and the distribution systems in the potential opt-in area. The Phoenix, Arizona opt-in is a recent example of a non-contiguous area which successfully completed the opt-in process without disruption to supply or excessive burden to industry. EPA's analysis in Phoenix showed that the capacity to supply federal RFG to the opt-in area exceeded the estimated gasoline demand. See 62 FR 30260 (June 3, 1997). Refiners were able to adequately supply federal RFG for Phoenix within 30 days of the publication of the final rule. RFG was available at the retail level 60 days after publication of the

¹ Extreme areas are not listed in section 211(k)(6) for purposes of opt-in to the federal RFG program. The Los Angeles area is the only area classified as extreme for ozone, and it is a mandatory RFG covered area under the Act. See section 211(k)(10)(D).

final rule. Each opt-in request will involve potential regulatory burdens that are unique to that area. Therefore, EPA will review each opt-in request and the particular facts pertaining to the potential opt-in area and the suppliers for that area to determine the appropriate implementation date.

EPA requested comment on whether a minimum lead-time of up to one year should be used in setting the effective date and whether this should apply to former non-attainment areas that opt in and/or areas that are designated as non-attainment at the time they opt in. EPA has decided not to adopt a mandatory minimum lead-time of one year for the effective date of an opt-in at this time. Instead, EPA retains the discretion to set an effective date on a case-by-case basis, as the Administrator deems appropriate, subject to the limit in Section 211(k)(6) of one year after the application is received. This issue and the responses to comments received are discussed further in Section III of this final rule.

EPA requested comment on whether or not the Agency should require that the Governor consider the costs of other ozone control programs in making the determination to adopt RFG. EPA requested comment on the approach, including whether EPA would have authority to impose such a requirement and whether it would be appropriate to do so. After consideration of the comments, EPA has decided not to adopt such a requirement, for the reasons described in Section III. C of this document.

Any area that opts into the RFG program under section 80.70(k), whether currently or previously designated as nonattainment for the one-hour ozone NAAQS, will be subject to all rules promulgated by the Agency for opting out of the RFG program. On October 20, 1997, EPA revised the opt-out procedures for areas that opt into RFG. See 62 FR 54552. The agency revised its opt-out rules to ensure a smooth transition between Phase I and Phase II of the reformulated gasoline program. Under these rules, if a state or area chooses to opt out of this program, the effective date of the opt-out will be no earlier than January 1, 2004. States which previously had opted into the program must remain in the RFG program until December 31, 2003 unless an opt-out petition was submitted to the EPA by December 31, 1997. Under the revised rules, opt-out petitions received on or after January 1, 2004 will be subject to the same procedures that applied prior to December 31, 1997. These procedures generally provide that opt-out petitions become effective 90 days from approval.

III. Response to Comments

EPA received comments from three associations representing the oil industry, gasoline producers, and distributors. Eight domestic gasoline producers individually submitted statements supporting the comments submitted by their representing associations. Of the domestic gasoline producers who commented on the NPRM, only one offered support for promulgation of the NPRM. Five state environmental departments submitted favorable comments on the NPRM. One private citizen commented on the NPRM. One futures and trading organization offered comments on the proposed rulemaking.

The issues discussed in the public comments include: EPA's legal authority to expand the reformulated gasoline (RFG) program and EPA's interpretation of section 211(k)(6)(A); the intent of Congress regarding "former nonattainment areas"; required lead-in period for the opt-in process; the inclusion of sub-marginal areas as former nonattainment areas allowed to opt into the RFG program; inclusion of all areas, attainment and nonattainment for opt into the RFG program; and the consideration of local supply and distribution systems when approving a Governor's petition to opt into the RFG program. This is not intended to be an exhaustive list of comments. A complete set of comments is available from the Air Docket (A-96-30). The issues and comments are addressed below.

A. Legal Authority

1. EPA's Proposal

EPA proposed to modify 40 CFR 80.70(k) of the reformulated gasoline (RFG) regulations to allow states to opt into the RFG program for any area classified as a Marginal, Moderate, Serious or Severe ozone nonattainment area as of November 15, 1990 or any time later. The proposed rule would expand the provision to allow states to opt into the RFG program for areas which had been previously classified as Marginal, Moderate, Serious or Severe for ozone but were subsequently redesignated to attainment. Under this approach, states would be provided with an additional cost-effective way to ensure achievement and maintenance of compliance with the ozone standard.

2. Comments

EPA received several comments questioning the Agency's legal authority for its proposal. Several parties from the oil industry commented that EPA's inclusion of former nonattainment areas into the RFG program is contrary to the

plain language and structure of the Act. The commenters argued that under section 211(k)(6)(A), the Administrator can only apply the prohibition set forth in paragraph (5) in any area in the state classified under subpart 2 of part D of title I as a Marginal, Moderate, Serious or Severe ozone nonattainment area. Areas that have been redesignated to attainment status for ozone under 107(d) of the Act are clearly not classified as Marginal, Moderate, Serious or Severe ozone nonattainment areas, and therefore, cannot opt into the RFG program under section 211(k)(6)(A).

One commenter representing an independent oil petroleum refiner supported EPA's proposed rule. The commenter stated that EPA is within its legal authority to expand the RFG regulations to include former nonattainment areas because Congress did not indicate that states must exercise the opt-in option prior to redesignation of the area to attainment. The commenter argued that section 211(k)(6) establishes by operation of law a category of areas within states for which EPA has a nondiscretionary duty to bring into the federal RFG program upon submission of a state governor's application.

The commenter argued that EPA has discretion to clarify that the RFG opt-in alternative remains available as a state control strategy for redesignated areas. The commenter suggests that this discretionary authority is based on EPA's inherent regulatory powers to fill in statutory gaps left by Congress so long as it is implementing the federal RFG program in a manner consistent with general statutory scheme. The commenter argues that the continuation of the RFG control alternative for redesignated areas is clearly a permissible and reasonable interpretation of its statutory mandate for administering the federal RFG program pursuant to section 211(k), just as EPA has determined the appropriateness of establishing a mechanism for opting out of the RFG program.

All of the state environmental departments and agencies which commented on the rule supported the EPA's proposed approach. These state agencies strongly support the proposed rule to allow former nonattainment areas (current maintenance areas) to opt into the RFG program. Some of these state commenters suggested that the agency include transitional and sub-marginal areas in the final rule. Another suggested that the agency provide guidance to allow any area whether it be designated as attainment or nonattainment to be included in the

RFG program to maintain air quality. None of the state agencies commented on EPA's legal authority to modify the reformulated gasoline rule.

Several of the commenters representing the oil industry argued that the fact that Congress did not mention "former nonattainment areas" in section 211(k)(6)(A) must be presumed to be an intentional policy choice made by Congress, particularly since both section 211(h) and (m) expressly provide for such areas. The commenters argued that the Congress had no intention of offering the opt-in right to areas after they achieved attainment status. One commenter stated that the proposal would circumvent the clear geographic limitations that Congress established for the RFG program. Another stated that the agency cannot ascribe to itself new authority simply because the Congress failed to anticipate this rulemaking and did not expressly prohibit the EPA from expanding opt-in rights. This commenter stated that the nonattainment threshold specified by Congress must be crossed for the right to opt into the RFG program.

One commenter in support of the proposed rule stated that the proposed rule implements the fundamental approach taken by Congress in enacting the Clean Air Act. This commenter stated that the proposed approach demonstrates a clear commitment to allowing states the flexibility to determine the appropriate mix of measures needed to meet their goals for controlling air pollution. The commenter stated that EPA's action is consistent with Congress' intention to allow states to select from numerous optional control strategies.

One commenter noted that the proposed rule contradicts the agency's Regulatory Impact Analysis (RIA) for the RFG regulations. This commenter said that in the 1993 RIA, EPA stated that the opt-in language of section 211 clearly limits opt-in to areas in a State classified as Marginal, Moderate, Serious, or Severe for ozone nonattainment. The commenter added that EPA's interpretation of section 211(k) in 1993 found no distinction between areas designated attainment before and after enactment of the Act, because no distinction exists.

Commenters representing the oil industry argued that section 211(k)(6)(A) is a clear exception to the general procedures of section 211(c). Although the procedures in section 211(k)(6)(A) establish an expedited process for states to initiate the imposition of federal fuel controls, commenters argued, the procedures in section 211(k)(6)(A) are not available

everywhere. Commenters stated that Congress chose to limit the RFG program and the expedited procedures in section 211(k)(6)(A) to areas classified as Marginal, Moderate, Serious and Severe ozone nonattainment areas. For all other areas, including those areas that had the opportunity to use section 211(k)(6)(A) but did not exercise that option while it existed, Congress left in place the general procedures of section 211(c). The commenter concluded that under section 211(c)(1), EPA could attempt to promulgate regulations imposing RFG control in ozone attainment areas, provided that EPA meets all the substantive and procedural requirements set forth in section 211(c). The commenter also suggested that EPA utilize section 211(c)(4)(c) which would allow the agency to approve state fuel controls in the state's SIP, provided that the state fuel controls are necessary to achieve the NAAQS. Several other independent oil and petroleum companies submitted comments in support of these claims.

Five state environmental agencies and one private citizen commented that the proposed rule did not go far enough to allow states the flexibility they require to attain their clean air goals. One state environmental agency commented that they should have the flexibility to consider all possible options should the need arise for additional reductions in the levels of ozone-producing pollutants. Another state agency stated that the option to opt into the RFG program should also explicitly extend to former "submarginal" ozone nonattainment areas that have been redesignated since the date of the enactment of the 1990 Clean Air Act Amendments. The state agency argued that former "submarginal" ozone nonattainment areas should not be prohibited from implementing control measures that are available to current nonattainment areas, particularly when such measures may be needed to address violations that occur after redesignation. The state commented that all former ozone nonattainment areas subject to the maintenance plan provisions of Section 175A of the CAA should be allowed to voluntarily participate in the RFG program through the opt-in process. This flexibility, the state continued, is particularly important for maintenance areas where the ozone standard is threatened or where violations have already occurred.

Another state agency suggested that attainment areas be allowed to include RFG in their maintenance plans or as a contingency measure. Another agency commented that it is reasonable that any

redesignated area operating under an approved maintenance plan be eligible to opt into RFG. The private citizen commented that the proposal should not be limited to former nonattainment areas but should allow states the option to opt into the RFG program in any area, including current attainment areas, where the Governor of the State applies for such coverage and certifies such coverage is necessary to maintain the attainment standard in the area. Such a provision, the commenter argues, would assist the States in maintaining air quality in attainment areas at risk of moving into a nonattainment status and would be consistent with the similar provision in the oxygenated fuels program which requires the program to remain in effect where necessary to maintain attainment with the standard.

3. EPA's Response

EPA's proposal and the comments received on it raise two basic questions of statutory authority. Under section 211(k)(6), may an area that was previously designated as nonattainment opt into the RFG program after it has been redesignated attainment? Under section 211(k)(6), may any ozone nonattainment area opt in, including transitional, sub-marginal and no data/incomplete data areas?

Congressional intent on this issue may be discerned from the text of section 211(k), its context in the Act, and the relevant legislative history. A review of these provisions leads to the conclusion that section 211(k)(6) may reasonably be interpreted as authorizing opt-in under both situations described above. For the reasons described earlier, concerning the benefits from expanding the current rules limits on opt-in, EPA is revising its opt-in regulation consistent with this interpretation.

The text of section 211(k)(6) is relatively brief regarding opt-ins. It states that a state may opt into the federal RFG program for "any area in the State classified under subpart 2 of part D of title I as a Marginal, Moderate, Serious, or Severe Area." EPA shall by rule extend the effective date of the opt-in for "Marginal, Moderate, Serious, or Severe Areas," if there is insufficient domestic capacity to produce RFG, and shall issue such extensions for "areas with a lower ozone classification before issuing any such extension for areas with a higher classification." The specific issue of whether the opt-in provision includes former nonattainment areas is not addressed. Did Congress intend to only include areas currently designated as ozone nonattainment areas, or did it intend to cover all areas currently or previously

designated as nonattainment? Likewise, did Congress use the terms "marginal, moderate, serious, or severe areas" to identify only those ozone nonattainment areas with those classifications, or did Congress list these terms as a way to indicate that all ozone nonattainment areas could opt in?

On the latter issue, the classification scheme in Section 181 of the Act indicates that Congress did intend to allow all ozone nonattainment areas the opportunity to opt in to the federal RFG program. Section 181 provides for each ozone nonattainment area to be classified as Marginal, Moderate, Serious, Severe, or Extreme, depending on its design value. The provision indicates that Congress believed that "[e]ach area designated nonattainment for ozone" would be classified in one of these categories. The use of a list of these terms in section 211(k)(6) reasonably indicates that Congress' intent regarding state opt-in was to identify the universe of all ozone nonattainment areas, and not a subset comprising most but not all nonattainment areas.

The fact that EPA later was not able to classify all ozone nonattainment areas under this scheme does not change the reasonable implication from the text of section 211(k)(6) that Congress expected that all ozone nonattainment areas would have the opportunity to opt in. Certain ozone nonattainment areas could not be classified as Marginal or above because of incomplete monitoring data or because they were nonattainment pre-enactment but did not violate the standard during the primary data gathering years of 1987-1989.² However, all these areas were designated as nonattainment areas for ozone at the time of enactment of the 1990 amendments to the Act. The legislative history indicates that Congress did expect such areas to be designated as ozone nonattainment areas. For example, the Senate Environment and Public Works Committee Report accompanying S. 1630 contains a list of 102 expected nonattainment areas, all of which Congress expected would be classified under Section 181's classification scheme.³ Some of the listed areas were

²For example, the submarginal classification, which is not identified in the classification scheme of the Act, was created by EPA to address areas that were designated nonattainment but had a design value lower than the threshold for Marginal areas due to an adjustment for missing data when calculating expected exceedances. These areas had violations of the ozone NAAQS in 1987-1989. See 57 FR 13524-13527 (April 16, 1992).

³Senate Committee on Environment and Public Works, 103d Cong, 1st Sess., 2 A Legislative History

ultimately classified as Submarginal (e.g., Kansas City) or Incomplete/no data nonattainment areas (e.g., Saginaw-Bay City-Midland, MI, Cheshire County, NH, Salem, OR, and several Pennsylvania counties). The House Energy and Commerce Committee Report on H.R. 3030 contains a similar list of expected ozone nonattainment areas "indicating on a preliminary basis how areas will likely be classified under [Section 181]." The House list contains 100 expected ozone nonattainment areas, and again lists each area under one of the Section 181 classification categories, including areas that were ultimately classified as Submarginal (e.g., Kansas City) or incomplete/no data (e.g., Saginaw-Bay City-Midland, MI, Cheshire County, NH, Salem, OR, and several Pennsylvania counties). See Leg. Hist. at 3254-55. This legislative history indicates that Congress expected that all areas designated nonattainment for ozone would be classified under one of the Section 181 classifications, and that Congress' failure to mention the classifications such as submarginal, and no data/incomplete data areas does not represent an intent to exclude these nonattainment areas from the scope of section 211(k)(6).

The legislative history of the opt-in provision clearly indicates that Congress did intend to provide this option to all ozone nonattainment areas. It also supports the view that former nonattainment areas do not lose their opportunity to opt in once they are redesignated as an attainment area.

H.R. 3030, as reported out of the House Committee on Energy and Commerce, required that EPA establish a federal RFG program, and require the sale of RFG in all ozone nonattainment areas with a 1988 design value at or above 0.18 ppm. (Leg. Hist. at 3021). This would cover areas classified as Severe or Extreme. (Leg. Hist. at 3253) There was no provision in the Committee's bill for opt-in by any other nonattainment areas. However, an opt-in provision was considered and adopted by the House during the floor debate on H.R. 3030. This opt-in provision was almost identical to the provision eventually enacted as section 211(k)(6). It provided for opt-in by any area "classified under subpart 2 of part D of title I as a Marginal, Moderate, or Serious Area. * * *"⁴ (Leg. Hist. at 2063). Rep. Richardson, one of the authors of this opt-in amendment, was

of the Clean Air Act Amendments of 1990 at 8375-77 (1993) ("Leg. Hist").

⁴ Severe and Extreme areas were mandatory RFG areas under H.R. 3030 as passed by the House. (Leg. Hist. at 2062).

questioned about the geographic scope of the RFG requirements and stated that the opt-in provision "allows any other nonattainment area to adopt these standards of its own free will, and subject to any domestic capacity, any State or locality may, in order to maintain attainment or just as a matter of general public policy," adopt the RFG standards. (Leg. Hist. at 2690, emphasis added). Rep. McMillan described the RFG provision in the Richardson-Madigan opt-in amendment to H.R. 3030 as having a "much needed degree of flexibility in it—specifically, cities in the future that fall below their ambient air quality requirements can opt into the system, provided that the EPA judges that doing so would not create a dramatic gas supply problem." (Leg. Hist. at 2762). As noted later, these views were repeated in the floor debate on the bill reported out of the Conference Committee.

In the Senate, S. 1630 as introduced would have required that EPA adopt national fuel standards to reduce motor vehicle pollutants, and authorized EPA to require the sale of gasoline in nonattainment areas to achieve and maintain the NAAQS. (Leg. Hist. at 9169 (as introduced) and 8053 (as reported out of the Committee on the Environment and Public Works)) The Committee bill was amended during floor debate, and a provision was added establishing a mandatory RFG program in ozone nonattainment areas with a design value of 0.18 or higher. States with a moderate or serious ozone nonattainment area could propose to revise their SIP to include a requirement that RFG be sold in the area. (Leg. Hist. at 6817, 4387)⁵ As in the House, the Senate moved from a program with specified areas where RFG was mandatory to a program where RFG was mandatory in certain areas but could be expanded at a state's request to more nonattainment areas. In the floor debate leading to the passage of S. 1630, Sen. Baucus described the opt-in provision as "if a city wishes to have the RFG standards provided for in this amendment, a city could choose to do so. Not only the nine cities that are the Severest in nonattainment but the Serious or even the Moderate areas could opt in." (Leg. Hist. at 6834) Sen. Nickles described the RFG program as applying to the nine cities with the worst ozone levels, but allowing "the

⁵The classification system in S.1630 did not include a Marginal classification, so all ozone nonattainment areas were expected to be classified as Moderate, Serious, Severe, or Extreme, based on the percent amount by which the area exceeded the ozone NAAQS in the last calendar year before enactment (See Leg.Hist. at 4195).

other nonattainment cities" to opt in (Leg. Hist. at 6826).

The opt-in provision in the Conference Committee bill closely followed the opt-in provision in the House bill. The Report of the Conference Committee describes the RFG provision as mandating RFG "in the nine cities with the most Severe ozone pollution beginning in 1995. States could elect to have the requirements apply in other cities with ozone pollution problems." (Leg. Hist. at 336). Rep. Madigan, a co-author of the opt-in provision in the House bill, described the Conference Committee's bill opt-in provision as "allow[ing] all other ozone nonattainment areas to opt in to the program * * * provided EPA is satisfied that sufficient supplies of reformulated gasolines could be made available. By encouraging other areas to opt into the program, the legislation will dramatically improve fuel quality nationwide." (Leg. Hist. at 1266, emphasis added) Sen. Baucus stated that "[t]he language of the provision clearly allows any nonattainment area which wants to opt in to the RFG programs to do so. They should be afforded every opportunity, and at the earliest possible date, to opt in to the program subject to approval by EPA." (Leg. Hist. at 1024, emphasis added) Sen. Durenberger described the RFG provision in the conference agreement as applying to the nine cities with the worst ozone nonattainment problems, and stating that "[o]ther cities may elect to join the program at any time beginning in 1995." (Leg. Hist. at 852)

The drafters of the final opt-in provision intended to provide an opportunity for all ozone nonattainment areas to opt into the federal program. The statements of various other members of Congress support this interpretation. Congress' intent was that all ozone nonattainment areas have the opportunity to opt into the federal RFG program. The use of the string of terms "Marginal, Moderate, Serious, and Severe" in Section 211(k)(6) is ambiguous. Under one reading, only the specifically mentioned areas would be able to opt in under this provision. Alternatively, the string of terms could be read to as a phrase intended to mean all areas designated nonattainment for ozone. EPA believes the latter reading of the string of terms is more reasonable, and is consistent with Congressional intent. Based on this, it is reasonable to interpret section 211(k)(6) as applying to all ozone nonattainment areas, including the transitional, sub-marginal, and no data/incomplete data areas that were not classified marginal or worse.

A literal interpretation of the string of terms would also lead to absurd results. A rigid, literal interpretation of the opt-in provision that would exclude ozone nonattainment areas not classified as Marginal, Moderate, Serious, or Severe should be rejected as it would frustrate Congressional intent. See *Environmental Defense Fund v. EPA*, 82 F.3d. 451 (D.C. Cir. 1996), where the court upheld EPA's interpretation of Section 176(c), permitting a state to change its SIP under certain conditions to account for a federal action despite the language of Section 176(c)(1) regarding conformity of federal actions to the SIP currently in place. The court stated that "the literal terms of the statute would prevent the federal action from proceeding until such time as a full-fledged SIP revision could be developed, submitted, and approved. * * * This rigid application of the conformity rule would block a federal action that the state desires and promises to accommodate through the appropriate adjustments to levels of emissions from other sources. Because this literal reading of the statute would actually frustrate the congressional intent supporting it, we look to the EPA for an interpretation of the statute more true to the Congress's purposes." *EDF v. EPA*, 82 F.3d. at 468. EPA's interpretation of Section 211(k)(6) as applying to any area designated nonattainment since the enactment of the 1990 Clean Air Act amendments is also consistent with a recent decision from the D.C. Circuit Court of Appeals. In *Mova Pharmaceutical Corp. v. Shalala*, 140F. 3d 1060, 1069 (D.C. Cir. 1998), the court stated that "[w]hen the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent." In this action, EPA's interpretation of the Act serves to protect Congressional intent in enacting Section 211(k)(6), as evidenced by the legislative history and by the language of Section 181. The Agency's interpretation is narrowly drawn to match Congressional intent in adopting the opt-in provision.

The legislative history does not explicitly address the issue of opt-in by former nonattainment areas. However it does show that Congress carefully considered the geographic scope of the RFG program, considering several different mandatory programs as well as different opt-in provisions.⁶ The opt-in

⁶For example, in the version of S.1630 that passed the Senate, the RFG program was mandated for all ozone nonattainment areas with a design value of 0.18 or higher, (Leg. Hist. at 4384), which

provision that came out of this extensive deliberation reflects Congress' intention to allow every ozone nonattainment area, whether in existence at the time of enactment or designated nonattainment at a later time, the opportunity to opt in and gain the air quality benefits of the federal RFG program. Congress envisioned a program that could include a very large number of opt-in areas, and a federal program of this size was considered fully appropriate. Nowhere is there any indication that Congress intended this opportunity to expire at some point in the future, or any indication that the appropriate size of the program was expected to shrink over time as more areas reached attainment.

Congress also did not mandate that nonattainment areas opt out of the program after they reached attainment. Congress apparently expected that former nonattainment areas could and would continue to be part of the federal RFG program after redesignation as an attainment area. Allowing former nonattainment areas to opt in after redesignation is consistent with this intent. As discussed above, it is a reasonable way to expand the option available to states that need the air quality benefits provided by RFG.

Comments from the oil industry claim that EPA's reading of Section 211(k)(6)(A) is particularly inappropriate in light of the Agency's authority under Section 211(c). The commenter states that EPA is interpreting its authority under Section 211(k)(6)(A) broadly as a way to regulate fuel in attainment areas, and that EPA should properly attempt to impose RFG requirements in attainment areas under Section 211(c)(1), provided that the Agency meets the substantive and procedural requirements of that section, or that EPA could approve state fuel controls in SIPs under Section 211(c)(4)(C), provided that such controls are necessary to achieve a NAAQS.

In this action, EPA is not interpreting Section 211(k)(6)(A) as authorizing the Agency to impose RFG requirements broadly in ozone attainment areas. Rather, EPA is adopting an interpretation of states' opportunity to opt into the RFG program that is consistent with Congressional intent, as described above. Former nonattainment areas that are now attainment areas will

would have resulted in 9 mandatory areas (Leg. Hist. at 8375), with an opt-in provision for the remaining 93 anticipated ozone nonattainment areas (Leg. Hist. at 4387). H.R. 3030, as introduced, contained a mandatory RFG requirement for the 9 worst ozone nonattainment areas, with no opt-in provision. (Leg. Hist. at 3084), but the House debated and finally adopted an opt-in provision almost identical to CAA Section 211(k)(6).

be able to opt in to federal RFG. This is based on their status as former nonattainment areas, not on their status as attainment areas. It is a reasonable interpretation of the Congressional intent behind Section 211(k)(6), and is therefore an appropriate interpretation.

For the same reason, EPA disagrees with the commenter's reference to *American Petroleum Institute v. EPA*, 52 F.3d. 1113 (D.C. Cir. 1984), where the court stated that "EPA does not have an independent source of authority to control or prohibit nonrenewable oxygenates springing from the considerations enumerated in Section 211(k)(1)." *API v. EPA*, 52 F.3d. at 1120-21. The issue addressed by the court in *API v. EPA* was whether EPA could include a fuel content requirement for federal RFG concerning renewable oxygenates that was not expressly specified in section 211(k)(1), based on the discretion to take various factors into consideration when establishing the requirements of reformulated gasoline specified in the section. That case did not address Section 211(k)(6), and did not address the geographic scope of the RFG program. Unlike *API v. EPA*, questions of the breadth of agency authority to establish a variety of new or additional RFG fuel content requirements are not involved here. The only question here is the reasonable interpretation of Congressional intent concerning a narrow issue involving geographic scope of this federal program. The *API* case is not relevant to this action.

Moreover, opting into RFG is distinct from a state's adoption of its own fuel controls under Section 211(c)(4), which generally preempts state fuel controls in certain circumstances, and authorizes EPA to grant a waiver of federal preemption if certain requirements are met. EPA agrees that a state's adoption of state regulations requiring the sale of RFG in areas within its jurisdiction would be subject to the provisions of Section 211(c)(4). However, Congress provided an opportunity for states to opt into the federal RFG program in Section 211(k)(6), separate and distinct from states' ability to adopt their own fuel programs under Section 211(c)(4), and these two provisions are not mutually exclusive. One involves the scope of the federal RFG program, the other involves when a state program is preempted. For example, even prior to today's action, a Marginal ozone nonattainment area could choose to opt into the RFG program under Section 211(k)(6), or could choose to adopt its own state fuel controls subject to the limitations and requirements of Section 211(c)(4). Today's action does not change this

situation, but simply adopts an interpretation of the scope of the opportunity to opt in that is consistent with Congressional intent, as described in detail above.

As described in the NPRM, EPA's interpretation of Section 211(k)(6) as applying to all areas designated nonattainment for ozone is not inconsistent with EPA's response to comments received regarding "unclassifiable/attainment" areas in the prior RFG program rulemaking. Unclassifiable/attainment areas were not designated nonattainment at or since the time of enactment of the 1990 amendments to the Act. When EPA first adopted regulations for the RFG program, EPA stated that these *attainment areas* will not be able to opt into the RFG program, due to statutory limitations. See 59 FR 7809 (February 16, 1994). EPA did not specifically address former nonattainment areas redesignated to attainment. Today's action specifically addresses former nonattainment areas, and interprets Section 211(k)(6) consistent with Congress' intent to ensure that areas previously designated nonattainment have the option to opt into the federal RFG program. This will help to ensure that they do not fall back into nonattainment after having achieved air quality improvement.

Commenters point to EPA's statement in a **Federal Register** notice announcing a SIP approval action for the Detroit-Ann Arbor area as evidence that EPA's proposed interpretation of Section 211(k)(6) is inconsistent with EPA's previous interpretation. The Detroit-Ann Arbor SIP action did not articulate specific reasons that, as an area redesignated to attainment, the state could not request to opt in for this area under Section 211(k)(6). In fact, that SIP action did no more than reflect the then current status under EPA's national RFG regulations. This rulemaking is now revising those regulations, after notice and an opportunity for public comment. EPA's March 1997 proposal being finalized today presented the Agency's position on this particular question at the national level. To the extent that this is a change in approach the agency has provided a reasoned explanation. See *Motor Vehicle Mfrs. Assn. v. State Farm*, 463 U.S. 29 (1983). As described above, today's action is consistent with statements made in the record for the RFG rulemaking. The Agency has provided a reasoned analysis for its current interpretation.

EPA disagrees with commenters who stated that the inclusion of provisions for areas redesignated attainment in Sections 211(h) and 211(m), and the

absence of any such provisions in Section 211(k)(6), indicate that Congress did not intend to include such redesignated areas in Section 211(k)(6). Section 211(h) directs EPA to adopt regulations requiring low RVP gasoline to be sold throughout the country. This provision also states that EPA's regulations "shall not make it unlawful for any person to sell, offer for supply, transport, or introduce into commerce gasoline with a Reid Vapor Pressure [RVP] of 9.0 pounds per square inch (psi) or lower in any area designated under Section 107 as an attainment area. Notwithstanding the previous sentence, the Administrator may impose a Reid vapor pressure requirement lower than 9.0 pounds per square inch (psi) in any area, formerly an ozone nonattainment area, which has been redesignated as an attainment area." Commenters claim that since Congress expressly authorized EPA to adopt a low RVP requirement in former ozone nonattainment areas under Section 211(h), the absence of such language in Section 211(k)(6) indicates that Congress intentionally chose not to address such areas in the RFG opt-in provision.

Sections 211(h) and 211(m) both specifically address what federal requirements apply in attainment areas, as well as nonattainment areas. Section 211(h) contains an express prohibition against federal RVP requirements lower than 9.0 psi in attainment areas. Section 211(m)(6) specifies that states are not required to adopt an oxygenated gasoline program in CO attainment areas. The provisions that commenters reference create an exception from these requirements. In Section 211(h), the exception is that EPA may impose an RVP requirement lower than 9.0 psi in former nonattainment areas. In Section 211(m), the exception is that the oxygenated gasoline requirements will continue to remain in effect in former CO nonattainment areas to the extent such requirements are needed to maintain the CO NAAQS in that area.

In Section 211(h) and (m) Congress addressed requirements for both attainment areas and nonattainment areas, and in this context it expressly addressed former nonattainment areas, to treat them differently from other attainment areas. Sections 211(k)(1) and (k)(6), however, only address nonattainment areas. Section 211(k)(1) and (k)(6), unlike Sections 211(h) and (m), do not address and prohibit attainment areas from opting into RFG. The absence of an exception for former nonattainment areas, as in sections 211(h) and (m), is not relevant because there is no general prohibition in Section 211(k)(6) regarding attainment

areas. The analysis of the language and legislative history of section 211(k)(6) indicates that EPA's interpretation is reasonable and consistent with Congressional intent.

As with any other opt-in area, any area that becomes an RFG covered area under the authority of today's final rule will be subject to all Agency regulations for opting out of the RFG program. EPA's opt-out regulations are found at 40 CFR 80.72. See 62 FR 54552 (October 20, 1997).

B. Opt-in under the Eight-Hour Ozone NAAQS

While the analysis and interpretation described above applies to areas designated nonattainment under the one-hour ozone NAAQS, EPA also believes that areas designated nonattainment under the recently adopted eight-hour ozone NAAQS may also opt into the federal RFG program based on the same analysis and interpretation. EPA is not, however, adopting that interpretation into the regulations at this time. EPA did not propose or discuss that interpretation in the NPRM. While EPA believes that it is the correct interpretation, EPA will take final agency action on this issue at a later time after notice and an opportunity for comment. This could occur, for example, in a rulemaking to set the effective date to opt in for an area that is designated nonattainment under the eight-hour NAAQS (and that had not previously been designated as a nonattainment area under the one-hour NAAQS.)⁷ EPA believes that opt-in into RFG for such new nonattainment areas would be a cost effective way to obtain the significant ozone and toxic control benefits associated with the federal RFG program.

C. Mandatory One-Year Lead Time to Opt Into the RFG Program

1. EPA's Proposal

The proposal requested comment on whether a minimum lead-time of one year should be used in setting the effective date and whether this should apply to former nonattainment areas that opt-in and/or areas that are classified as nonattainment when they opt in.

2. Comments

One commenter stated that when establishing the effective date of an opt-in, EPA should take into account the particular circumstances in the opt-in area and natural transition points in the

program to ensure that the petroleum industry is provided with adequate lead-time to meet the new demand for RFG.

One commenter representing a futures and trading organization commented that opt-ins should never be allowed without a minimum of 90 days prior notice to the public, and longer in appropriate circumstances, and that EPA should promulgate regulations that permit prior notice and public comment before such opt-ins are approved by the agency.

One commenter suggested that all RFG opt-in programs become effective at the first of the year. The commenter argued that since the RFG rule originally targeted January 1, 1995 as the original start-up date for the Federal program, many of the rules were designed for a calendar year program. The commenter also stated that the enforcement discretion EPA has had to exercise could be avoided by starting opt-ins on January 1.

3. EPA's Response

The Administrator has authority under section 211(k)(6) to establish an effective date for a state's entrance into the RFG program that is up to one year from the date of receipt of a petition to opt in from the Governor. The Administrator also has authority to delay the effective date of a state's opt-in to the program for an additional year, if after consultation with the Secretary of Energy, she determines that there is insufficient domestic capacity to produce certified reformulated gasoline, and may renew this delay for two more years. The Administrator will consider the result of any sudden and unexpected increase in the demand for RFG caused by opt-ins before setting an effective date that she deems appropriate. The Administrator will also consider whether the local supply and distribution system will be able to deliver adequate quantities of RFG to the opt-in area before making a final decision on the effective date of the program. As to the question of beginning all opt-ins on January 1, EPA believes that this would inappropriately limit the flexibility of the opt-in provision as it is outlined in section 211(k)(6). In addition, EPA's current opt-in process considers relevant enforcement factors and the industry's need for lead time when setting the effective opt-in date. For these reasons and after consideration of the comments, EPA has decided not to adopt regulations establishing a minimum one year lead time for the effective date of a state opt-in. EPA will continue to establish effective dates on

a case-by-case basis, after consideration of all relevant factors through a notice and comment rulemaking process.

D. Cost Consideration for Other Programs Before Adopting RFG

1. EPA's Proposal

The proposal requested comment on whether or not EPA should require that the Governor consider the costs of other potential ozone control programs in making the determination to adopt RFG. EPA requested comment on the appropriateness of such an approach, including whether the Agency had the authority to impose such a requirement.

2. Comments

Several commenters representing the oil industry stated that a state's decision to opt into RFG should be based on need, good science, and a thorough analysis of the incremental cost-effectiveness relative to other control measures. The commenters argued that states should carefully consider these topics to avoid having to address the opt-out question. The commenters stated that EPA has the authority to require states to conduct a thorough cost-benefit analysis under section 211(k)(1) of the Act.

3. EPA's Response

States generally analyze cost effectiveness, even if informally, in deciding to request opt-in to RFG. EPA does not believe it is appropriate for the agency to second guess the states' analysis regarding the costs and benefits of opting into RFG. Section 211(k)(6) does not require the Governor to investigate the cost of the RFG program before submitting an application to the Administrator to opt into the program, and does not authorize EPA to deny a Governor's request because the Agency concludes that opt-in to RFG is not a cost effective ozone control option for a particular area. Rather, Section 211(k)(6) simply directs EPA to set an effective date for a state's opt in to RFG once a Governor's request is received. Moreover, EPA does not believe that the Agency's authority under Section 211(k)(1) to get the content and performance requirements of RFG is relevant to its action on state opt-ins under Section 211(k)(6). Section 211(k)(6) sets out the specific process for state opt-in, and Section 211(k)(1) provides authority for promulgation of the RFG standards. Therefore, the final rulemaking does not include any requirement that states demonstrate they have analyzed the cost-effectiveness of RFG and other ozone

⁷ If the area had previously been designated as a nonattainment area under the one-hour NAAQS, then today's rule would allow it to opt-in.

control measures in order to opt into the RFG program.

Clearly, the costs of this final rulemaking will vary depending on the area that chooses to opt into the program. However, cost effectiveness

estimates were prepared as part of the reformulated gasoline rule's regulatory impact analysis (RIA) completed in 1993. The table below depicts, by RVP region (Class B areas are southern RVP areas and Class C areas are northern

RVP areas), estimated costs of the RFG program. These are averaged values. This does not reflect a new analysis of the costs and benefits of the RFG program, but simply an adjustment to reflect 1997 cost relative to 1990.

COST-EFFECTIVENESS OF THE RFG PROGRAM FOR VOC AND NO_x CONTROL IN 1990 AND 1997 DOLLARS

| RVP region | \$1990 | \$1990 | \$1997 PPI* | \$1997 PPI* | \$1997 GDP** | \$1997 GDP** |
|------------------------------------|-----------------------|---------|-------------|-------------|--------------|--------------|
| | Class B | Class C | Class B | Class C | Class B | Class C |
| | Phase I RFG-VOC | 270 | 260 | 335 | 335 | 320 |
| Phase II RFG-VOC | 390 | 410 | 570 | 560 | 460 | 490 |
| Phase II RFG-NO _x | 3240 | 3250 | 3620 | 3640 | 3860 | 3870 |

* Adjusted based on the producers price index for capital prices (+11.2%) (to adjust refinery capital costs), and gasoline prices (-8.6%) (for operating costs).

** Adjusted based on the gross domestic product implicit price deflator, which is 1.192.

Note that the GDP implicit price deflator is a generic price indicator and does not necessarily reflect specific factors relevant to the refining industry.

IV. Administrative Designation and Regulatory Analysis

A. Public Participation

EPA published the proposed rule on March 28, 1997 (62 FR 15074), and no public hearing was requested. Twenty-two comments were received from various stakeholders during the 30 day comment period that followed publication of the proposed rule. EPA reviewed and considered all written comments submitted on this proposal. 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-96-30.

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. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

C. Executive Order 12875: Enhancing Intergovernmental Partnerships

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of

section 1(a) of Executive Order 12875 do not apply to this rule.

D. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Today's final rule does not create a mandate for any tribal governments. The rule does not impose any enforceable duties on these entities. Today's final rule will affect only those refiners, importers or blenders of gasoline that choose to produce or import RFG for sale in the former nonattainment area that chooses

to participate in the program, and gasoline distributors and retail stations in those areas. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities, for the reasons described below and in the NPRM. Today's action codifies in regulatory text EPA's interpretation of states' ability to opt into the federal RFG program under Section 211(k)(6). This action does not mandate the RFG program for any areas, but rather clarifies which areas qualify for opt-in under Section 211(k)(6). This provision of the Act grants to states broad discretion to decide whether to opt into the RFG program. Upon receipt of a governor's request to opt in, EPA would conduct a rulemaking process to set the effective date for the opt in. In that rulemaking, EPA would determine whether that particular opt in would have a significant economic impact on a substantial number of small entities. See 62 FR 30260 (June 3, 1997). Such determination is more appropriately made in the context of a specific opt-in request, because impacts on small entities will depend on factors such as the number of small entities affected by a particular area's opting into RFG, whether small refiners provide gasoline to the area opting in, the local gasoline distribution network, the timing of the opt-in, and other case-specific facts.

F. Paperwork Reduction Act

This action does not add any new requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Office of Management and Budget (OMB) has approved the information collection requirements contained in the final RFG/anti-dumping rulemaking (See 59 FR 7716, February 16, 1994) and has assigned OMB control number 2060-0277 (EPA ICR No. 1951.08).

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.

G. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 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 final 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.

H. Submission to Congress and the General Accounting Office

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit 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 United States prior to publication of the rule. The rule is not a major rule as defined by 5 U.S.C. 804(2).

I. Children's Health Protection

This final rule is not subject to E.O. 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62FR19885, April 23, 1997), because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

J. National Technology Transfer and Advancement Act of 1995 (NTTAA)

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub L. No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

K. Statutory Authority

The statutory authority for the rules finalized today is granted to EPA by sections 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: September 22, 1998.

Carol M. Browner,
Administrator.

40 CFR part 80 is amended as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

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

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

2. Section 80.70 is amended by revising paragraph (k) to read as follows:

§ 80.70 Covered areas.

* * * * *

(k) Any other area currently or previously designated as a

nonattainment area for ozone under 40 CFR 50.9 and part D of Title I of the Clean Air Act, as of November 15, 1990, or any time later, may be included on petition of the governor of the state in which the area is located. Effective one year after an area has been reclassified as a severe ozone nonattainment area, such severe area shall also be a covered area for purposes of this subpart D.

* * * * *

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