

as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement

Act of 1995 (15 U.S.C. 272 *note*) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 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 in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 24, 2006. 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).)

List of Subjects 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 6, 2006.

Richard E. Greene,
Regional Administrator, Region 6.

■ 40 CFR Part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS—Texas

■ 2. The second table in § 52.2270(e) entitled "EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP" is amended by adding two new entries to the end of the table for "Post 1996 Rate of Progress Plan" and for "Revisions to the 1990 Base Year Inventory", both for the Beaumont/Port Arthur, TX area. The additions read as follows: § 52.2270 Identification of plan

* * * * *
(e) * * *

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or non-attainment area	State submittal/effective date	EPA approval date	Comments
* Post 1996 Rate of Progress Plan.	* Beaumont/Port Arthur, TX	* 11/16/04	* February 22, 2006.	* *
* Revisions to the 1990 Base Year Inventory.	* Beaumont/Port Arthur, TX	* 11/16/04	* February 22, 2006.	* *

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA-HQ-OAR-2005-0170; FRL-8035-2]

Regulation of Fuels and Fuel Additives: Removal of Reformulated Gasoline Oxygen Content Requirement for California Gasoline and Revision of Commingling Prohibition To Address Non-Oxygenated Reformulated Gasoline in California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: In the Energy Policy Act of 2005 (Energy Act), Congress removed the oxygen content requirement for reformulated gasoline (RFG) in Section 211(k) of the Clean Air Act (CAA). The Energy Act specified that this change was to be immediately effective in California, and that it would be effective 270 days after enactment for the rest of the country. This direct final rule amends the fuels regulations to remove the oxygen content requirement for RFG for gasoline produced and sold for use in California, thereby making the fuels

regulations consistent with amended Section 211(k). In addition, for gasoline produced and sold for use in California, this rule extends the current prohibition against combining VOC-controlled RFG blended with ethanol with VOC-controlled RFG blended with any other type of oxygenate from January 1 through September 15, to also prohibit combining VOC-controlled RFG blended with ethanol with non-oxygenated VOC-controlled RFG during that time period, except in limited circumstances authorized by the Act.

The removal of the RFG oxygen content requirement and revision of the commingling prohibition for gasoline produced and sold for use in all areas of the country is being published in a separate direct final rule that will have a later effective date than this California specific rulemaking.

DATES: This rule is effective on April 24, 2006, without further notice unless we receive adverse comment by March 24, 2006. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the portion of the final rule on which adverse comment was received will not take effect. Those portions of the rule on which adverse comment was not received will go into effect on the effective date noted above.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2005-0170 by one of the following methods:

1. <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

2. E-mail: Group A-AND-R-DOCKET@epa.gov. Attention Docket ID No. OAR-2005-0170.

4. Mail: Air and Radiation Docket, Environmental Protection Agency, Mailcode: 6406J, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.

5. Hand Delivery: EPA Docket Center, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B102, Mail Code 6102T, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2005-

0170. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

We are only taking comment on issues related to the removal of the oxygen requirement for RFG produced and sold for use in California, and the provisions regarding the combining of ethanol blended California RFG with non-oxygenated California RFG and provisions for retailers regarding the combining of ethanol blended California RFG with non-ethanol blended California RFG. Comments on any other issues or provisions in the RFG regulations are beyond the scope of this rulemaking.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at

the Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT:

Marilyn Bennett, Transportation and Regional Programs Division, Office of Transportation and Air Quality (6406J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 343-9624; fax number: (202) 343-2803; e-mail address: mbennett@epa.gov.

SUPPLEMENTARY INFORMATION: EPA is publishing this rule without prior proposal because we view this action to be noncontroversial and anticipate no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register** publication, we are publishing a separate document that will serve as the proposal to adopt the provisions in this Direct Final Rule if adverse comments are filed. This rule will be effective on April 24, 2006 without further notice except to the extent that we receive adverse comment by March 24, 2006. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the portion of the rule on which adverse comment was received will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Any distinct amendment, paragraph, or section of today's rule for which we do not receive adverse comment will become effective on the date set out above, notwithstanding any adverse comment on any other distinct amendment, paragraph, or section of today's rule.

I. General Information

A. Does This Action Apply To Me?

Entities potentially affected by this action include those involved with the production and importation of conventional gasoline motor fuel. Regulated categories and entities affected by this action include:

Category	NAICS codes ^a	SIC codes ^b	Examples of potentially regulated parties
Industry	324110	2911	Petroleum Refiners, Importers.
Industry	422710	5171	Gasoline Marketers and Distributors.
	422720	5172	
Industry	484220	4212	Gasoline Carriers.
	484230	4213	

^aNorth American Industry Classification System (NAICS).

^bStandard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could be potentially regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria of Part 80, subparts D, E and F of title 40 of the Code of Federal Regulations. If you have any question regarding applicability of this action to a particular entity, consult the person in the preceding **FOR FURTHER INFORMATION CONTACT** section above.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
 2. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
 3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
 4. Describe any assumptions and provide any technical information and/or data that you used.
 5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
 6. Provide specific examples to illustrate your concerns, and suggest alternatives.
 7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
 8. Make sure to submit your comments by the comment period deadline identified.
3. *Docket Copying Costs.* You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR Part 2.

C. Outline of This Preamble

- I. General Information
- II. Removal of the RFG Oxygen Content Requirement for California Gasoline
- III. Combining Ethanol Blended California RFG With Non-Ethanol Blended California RFG

- IV. Environmental Effects of This Action
- V. Statutory and Executive Order Reviews
- VI. Statutory Provisions and Legal Authority

II. Removal of the RFG Oxygen Content Requirement for California Gasoline

Section 211(k) of the 1990 Amendments to the CAA required reformulated gasoline (RFG) to contain oxygen in an amount that equals or exceeds 2.0 weight percent. CAA Section 211(k)(2)(B). Accordingly, EPA's current regulations require RFG refiners, importers and oxygenate blenders to meet a 2.0 or greater weight percent oxygen content standard. 40 CFR 80.41. Recently, Congress passed legislation which amended Section 211(k) of the CAA to remove the RFG oxygen requirement.¹ The Energy Act specified that this change was to be immediately effective in California, and that it would be effective 270 days after enactment for the rest of the country. To make the fuels rules consistent with the current Section 211(k), today's rule modifies the RFG regulations to remove the oxygen standard in § 80.41 for gasoline produced and sold for use in California.² (Modifications to the RFG regulations to remove the oxygen standard for gasoline produced and sold for use in all areas of the country are being published in a separate rulemaking.)

Today's rule also modifies other provisions of the RFG regulations which relate to the removal of the oxygen content requirement for gasoline produced and sold for use in California. The modifications to the affected sections are listed in the following table:

§§ 80.41(e) and (f)	Removes the per-gallon and averaged oxygen standards for Phase II Complex Model RFG for gasoline produced and sold for use in California. ³
§ 80.41(o)	Adds a provision which specifies that the requirements in § 80.41(o) do not apply to California gasoline.

¹ Energy Policy Act of 2005, Pub. L. 109-58 (HR6), section 1504(a), 119 STAT 594, 1076-1077(2005).

² The RFG regulations were promulgated under authority of CAA Section 211(c) as well as CAA Section 211(k). The regulations were adopted under section 211(c) primarily for the purpose of applying

the preemption provisions in Section 211(c)(4). See 59 FR 7809 (February 16, 1994.)

³ The regulations also include oxygen minimum standards for simple model RFG and Phase I complex Model RFG, and an oxygen maximum standard for simple model RFG. See §§ 80.41(a) through (d), and (g). These standards are no longer

in effect and today's rule does not modify the regulations to remove these standards or compliance requirements relating to these standards, except where such requirements are included in provisions requiring other changes in today's rule.

- § 80.78(a) Removes the prohibition against producing and marketing California RFG that does not meet the oxygen minimum standard since the oxygen standard has been removed. Also removes requirements for California gasoline to meet the oxygen minimum standard during transition from RBOB to RFG in a storage tank. (Today's rule also removes the provision in § 80.78(a)(1) regarding compliance with the maximum oxygen standard in § 80.41 for simple model RFG. See footnote 3.)
- § 80.79 Removes quality assurance requirement to test California gasoline for compliance with the oxygen standard.
- § 80.81(d) Removes requirement for oxygenate blenders to exclude California gasoline from compliance calculations since oxygenate blenders are no longer required to demonstrate compliance with a standard.
- § 80.81(e) Removes § 80.81(e)(2) which required refiners, importers and oxygenate blenders to provide written notification to EPA to produce or import gasoline certified under Title 13 of the California Code of Regulations, sections 2265 or 2266, or to comply with an oxygen content compliance survey option, since these requirements related to ensuring compliance with the federal RFG oxygen content standard. Also removes reference to oxygenate blenders in § 80.81(e)(3) regarding withdrawal of California gasoline exemptions for parties who have violated California or federal RFG regulations.
- § 80.81(h) Removes provisions for oxygenate blenders to use California test methods for purposes of compliance testing, since oxygenate blenders are no longer required to conduct testing for compliance with the oxygen standard.

III. Combining Ethanol Blended California RFG With Non-Ethanol Blended California RFG

As discussed above, Section 211(k) required RFG to contain a minimum of 2.0 weight percent oxygen, and the current fuels regulations reflect this requirement. Refiners, importers and oxygenate blenders have used different oxygenates to meet this requirement. RFG that contains ethanol must be specially blended to account for the RVP "boost" that ethanol provides, and the consequent possibility of increased VOC emissions. EPA's existing regulations prohibit the commingling of ethanol-blended RFG with RFG containing other oxygenates because the non-ethanol RFG is typically not able to be mixed with ethanol and still comply with the VOC performance standards. Since all RFG is currently required to contain oxygen, the regulations do not now contain a prohibition against combining ethanol-blended RFG with non-oxygenated RFG. With the removal of the oxygen content requirement for RFG, EPA expects that refiners and importers will be producing some RFG without oxygen and some with ethanol or other oxygenates. Mixing ethanol-blended RFG with non-oxygenated RFG has the same potential to create an RVP "boost" for the non-oxygenated gasoline as mixing ethanol blended RFG with RFG blended with other oxygenates. This is of particular concern regarding RFG because most refiners and importers comply with the RFG VOC emissions performance standard on an annual average basis calculated at the point of production or importation. All downstream parties are prohibited from marketing RFG which does not comply with a less stringent downstream VOC standard. However, even though the combined gasoline may meet the downstream VOC standard, combining

ethanol-blended RFG with non-oxygenated RFG may cause some gasoline to have VOC emissions which are higher on average than the gasoline as produced or imported. Thus, with regard to gasoline produced and sold for use in California, today's rule extends the commingling prohibition currently in the fuels regulations to include a prohibition against combining VOC-controlled ethanol blended RFG with VOC-controlled non-oxygenated RFG during the period January 1 through September 15, with one exception, described below.

The Energy Act contains a provision which specifically addresses the combining of ethanol-blended RFG with non-ethanol-blended RFG.⁴ Under this new provision, retail outlets are allowed to sell non-ethanol-blended RFG which has been combined with ethanol-blended RFG under certain conditions. First, each batch of gasoline to be blended must have been "individually certified as in compliance with subsections (h) and (k) prior to being blended." Second, the retailer must notify EPA prior to combining the gasolines and identify the exact location of the retail outlet and specific tank in which the gasoline is to be combined. Third, the retailer must retain, and, upon request by EPA, make available for inspection certifications accounting for all gasoline at the retail outlet. Fourth, retailers are prohibited from combining VOC-controlled gasoline with non-VOC-controlled gasoline between June 1 and September 15. Retailers are also limited with regard to the frequency in which batches of non-ethanol-blended RFG may be combined with ethanol-blended RFG. Retailers may combine such batches of RFG a maximum of two

periods between May 1 and September 15. Each period may be no more than ten consecutive calendar days. This direct final rule implements this provision of the Energy Act for California gasoline. A separate direct final rule will implement this provision for the rest of the country, with a later effective date coinciding with the removal of the RFG oxygen content requirement for such areas.

This new provision will typically be used by retail outlets to change from the use of RFG containing ethanol to RFG not containing ethanol or vice versa. (Such a change is usually referred to as a "tank turnover.") Such blending can result in additional VOC emissions, perhaps resulting in gasoline that does not comply with downstream VOC standards. The Energy Act is unclear as to when the gasoline in the tank where blending occurs must be in compliance with the downstream VOC standard.

EPA has already promulgated regulations setting out a methodology for making tank turnovers. 40 CFR 80.78(a)(10). EPA believes retailers and wholesale purchaser-consumers should have additional flexibility during the time that they are converting their tanks from one type of RFG to another, while minimizing the time period during which non-compliant gasoline is present in their tanks and being sold. Today's changes provide additional flexibility to the regulated parties by interpreting the Energy Act to provide retailers and wholesale purchaser-consumers with relief from compliance with the downstream VOC standard during the ten-day blending period, but requiring that the gasoline in the tank thereafter be in compliance or be deemed in compliance with the downstream VOC standard.

To provide assurance that gasoline is in compliance with the downstream VOC standard after the ten-day period,

⁴ Energy Policy Act of 2005, Pub. L. 109-58 (HR6), section 1513, 119 STAT 594, 1088-1090 (2005).

today's regulations provide that there be two options available for retailers and wholesale purchaser-consumers. Under the first option, the retailer may add both ethanol-blended RFG and non-ethanol-blended RFG to the same tank an unlimited number of times during the ten-day period, but must test the gasoline in the tank at the end of the ten-day period to make sure that the RFG is in compliance with the VOC standard. Under the second option, the retailer must draw the tank down as much as practicable at the start of the ten-day period, before RFG of another type is added to the tank, and add only RFG of one type to the tank during the ten-day period. That is, the retailer may not add both ethanol-blended RFG and non-ethanol-blended RFG to the tank during the ten-day period, but may add only one of these types of RFG. EPA believes that when retailers and wholesale purchaser-consumers use this second option it is likely that their gasoline will comply with the downstream VOC standard at the end of the ten-day period, so that testing will not be necessary. We also believe that this approach is compatible with current practices of most retailers and wholesale purchaser-consumers, and expect that most will find it preferable to testing at the end of the ten-day period.

The commingling provisions apply at a retail level such that each retailer may take advantage of a maximum of two ten-day blending periods between May 1 and September 15 of each calendar year. Thus, the options described above are available to each retail outlet for each of two ten-day periods during the VOC control period. During each ten-day period the options are available for all tanks at that retail outlet.

Regarding the requirement that each batch of gasoline to be blended must have been individually certified as in compliance with subsections (h) and (k), EPA notes that all gasoline in compliance with RFG requirements is deemed certified under Section 211(k) pursuant to § 80.40(a). Section 211(h) addresses RVP requirements for gasoline, but EPA does not have a program to certify gasoline as in compliance with this provision. For purposes of the commingling exception for retail outlets incorporated today in § 80.78(a)(8), EPA will deem gasoline that is in compliance with the regulatory requirements implementing Section 211(h) to be certified under that section. Regarding the requirement that retailers retain and make available to EPA upon request "certifications" accounting for all gasoline at the retail outlet, EPA will deem this requirement

fulfilled where the retailer retains and makes available to EPA, upon request, the product transfer documentation required under § 80.77 for all gasoline at the retail outlet.

Under this direct final rule, the provisions which allow retailers to sell non-ethanol-blended California RFG that has been combined with ethanol-blended California RFG also apply to wholesale purchaser-consumers. Like retailers, wholesale purchaser-consumers are parties who dispense gasoline into vehicles, and EPA interprets the Energy Act reference to retailers as applying equally to them. As a result, wholesale purchaser-consumers are treated in the same manner as retailers under this rule. This is consistent with the manner in which wholesale purchaser-consumers have been treated in the past under the fuels regulations.

Most of the provisions of this rule are necessary to implement amendments to the Clean Air Act included in the Energy Act that eliminate the RFG oxygen content requirement and allow limited commingling of ethanol-blended and non-ethanol-blended RFG. The extension of the general commingling prohibition in the fuels regulations to cover non-oxygenated RFG is necessary because of the Energy Act amendments, but is issued pursuant to authority of CAA Section 211(k). This provision extends the current program to reflect the presence of non-oxygenated RFG, and is designed to enhance environmental benefits of the RFG program at reasonable cost to regulated parties.

IV. Environmental Effects of This Action

Little or no environmental impact is anticipated to occur as a result of today's action to remove the oxygenate requirement for California RFG. The RFG standards consist of content and emission performance standards. Refiners and importers will have to continue to meet all the emission performance standards for RFG whether or not the RFG contains any oxygenate. This includes both the VOC and NO_x emission performance standards, as well as the air toxics emission performance standards which were tightened in the mobile source air toxics (MSAT) rule in 2001.⁵ New MSAT standards currently under development are anticipated to achieve even greater air toxics emission reductions.

We have analyzed the potential impacts on emissions that could result from removal of the oxygenate

requirement in the context of requests for waivers of the federal oxygen requirement.⁶ We found that changes in ethanol use could lead to small increases in some emissions and small decreases in others while still meeting the RFG performance standards. These potential impacts are associated with the degree to which ethanol will continue to be blended into RFG after removal of the oxygen requirement. Past analyses have projected significant use of ethanol in RFG in California despite removal of the oxygenate requirement.⁷ Given current gasoline prices and the tightness in the gasoline market, the favorable economics of ethanol blending, a continuing concern over MTBE use by refiners, the emission performance standards still in place for RFG, and the upcoming renewable fuels mandate,⁸ we believe that ethanol will continue to be used in RFG in California after the oxygen requirement is removed. As a result, we believe that the removal of the oxygenate mandate will have little or no environmental impact in the near future. We will be looking at the long term effect of oxygenate use in the context of the rulemaking to implement the renewable fuels mandate.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to 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;

⁵ See e.g., California Oxygen Waiver Decision, EPA420-S-05-005 (June 2005); Analysis of and Action on New York Department of Conservation's Request for a Waiver of the Oxygen Content Requirement in Federal Reformulated Gasoline, EPA420-D-05-06 (June 2005).

⁷ Technical Support Document: Analysis of California's Request for Waiver of the Reformulated Gasoline Oxygen Content Requirement for California Covered Areas, EPA420-R-01-016 (June 2001).

⁸ Energy Policy Act of 2005, Pub. L. 109-58 (HR6), section 1501, 119 STAT 594, 1067-1076, (2005).

⁶ 66 FR 17230 (March 29, 2001).

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

(3) Materially alter the budgetary impact of entitlements, 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.

It has been determined that this direct final rule does not satisfy the criteria stated above. As a result, this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review. Today's rule removes certain requirements for all refiners, importers and oxygenate blenders of RFG in California. As a result, this rule is expected to greatly reduce overall compliance costs for all refiners, importers and oxygenate blenders of California RFG. This rule also provides options for gasoline retailers in California to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Although there may be small compliance costs associated with one of these options, we believe that the additional flexibility provided by this option will reduce overall compliance costs for these parties.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Refiners, importers and oxygenate blenders of California RFG are exempt from the reporting and recordkeeping requirements under the RFG regulations. 40 CFR 80.81. Therefore, the removal of the oxygen requirement for California RFG will not have any ICR implications for refiners, importers and oxygenate blenders of California RFG. Small testing costs may be associated with one of the options for California gasoline retailers to commingle compliant gasolines. However, these testing costs are expected to be minimal and will be greatly outweighed by the flexibility provided by the option to commingle compliant gasolines. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations in 40 CFR part 80 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060-0277, EPA ICR number 1591.15. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection

Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566-1672.

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 in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small

entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This direct final rule removes certain requirements for all refiners, importers and oxygenate blenders of California RFG, including small business refiners, importers and oxygenate blenders. Specifically, this rule removes the burden on refiners, importers and oxygenate blenders to comply with the RFG oxygen requirement and associated compliance requirements. This rule also provides options for gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. Although one option requires some compliance testing, the testing costs are expected to be minimal. As a result, we have concluded that this direct final rule, overall, will relieve regulatory burden for small entities subject to the RFG regulations.

D. 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.

This direct 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 that will result in expenditures of \$100 million or more. This rule affects gasoline refiners, importers and oxygenate blenders by removing the oxygen content requirement for RFG and associated compliance requirements, and allows gasoline retailers options for commingling compliant gasolines which otherwise would be prohibited from being commingled. This rule will have the overall effect of reducing the burden of the RFG regulations on these regulated parties. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This direct final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule removes the burden on regulated parties of having to comply with the oxygen standard for RFG in California, and allows gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from

being commingled. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

This direct final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. This rule applies to gasoline refiners, importers, oxygenate blenders and retailers who supply RFG in California. This action contains certain modifications to the federal requirements for RFG, and does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required

under the Order has the potential to influence the regulation. This direct final rule is not subject to Executive Order 13045 because it is not economically significant and does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Acts That Significantly Affect Energy Supply, Distribution, or Use

This direct final rule is not an economically "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it does not have a significant adverse effect on the supply, distribution, or use of energy. This rule eliminates the oxygen content requirement for RFG in California. This change will have the effect of reducing burdens on suppliers of RFG, which, in turn, may have a positive effect on gasoline supplies. RFG refiners and blenders may continue to use oxygenates at their discretion where and when it is most economical to do so. With the implementation of the renewable fuels standard also contained in the Energy Act, the blending of ethanol, in particular, into gasoline is expected to increase considerably, not decrease. Therefore, despite this action to remove the oxygenate mandate for RFG in California, when viewed in the context of companion energy legislation, overall use of oxygenates is expected to increase in the future. This rule also allows gasoline retailers to commingle certain compliant gasolines which otherwise would be prohibited from being commingled. This also may have a positive effect on gasoline supplies.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 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 direct final rule does not establish new technical standards within the meaning of the NTTAA. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

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 in the **Federal Register**. A "major rule" cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(a).

K. Clean Air Act Section 307(d)

This rule is subject to Section 307(d) of the CAA. Section 307(d)(7)(B) provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to the EPA should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Director of the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20004.

VI. Statutory Provisions and Legal Authority

The statutory authority for the actions in today's direct final rule comes from sections 211(c), 211(k) and 301(a) of the CAA.

List of Subjects in 40 CFR Part 80

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

Dated: February 14, 2006.

Stephen L. Johnson,
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: 42 U.S.C. 7414, 7545 and 7601(a).

Subpart D—[Amended]

- 2. Section 80.41 is amended by:
 - a. In the tables in paragraphs (e) and (f), revising the entries "Oxygen content (percent, by weight)"; and
 - b. adding paragraph (o)(4), to read as follows:

§ 80.41 Standards and requirements for compliance.

*	*	*	*	*	
(e)	*	*	*	*	
	*	*	*	*	*
	Oxygen content (percent, by weight) (does not apply to gasoline subject to the provisions in § 80.81)				≥2.0
	*	*	*	*	*
(f)	*	*	*	*	
	*	*	*	*	*
	Oxygen content (percent, by weight) (does not apply to gasoline subject to the provisions in § 80.81):				
	Standard				≥2.1
	Per-Gallon Minimum				≥1.5
	*	*	*	*	*
	*	*	*	*	*
(o)	*	*	*	*	

(4) Paragraph (o) of this section does not apply to gasoline subject to the provisions in § 80.81.

■ 3. Section 80.78 is amended by adding paragraphs (a)(1)(ii)(C), (a)(8)(i) through (iv), and (a)(11)(iv)(D) to read as follows:

§ 80.78 Controls and prohibitions on reformulated gasoline.

- * * * * *
- (a) * * *
- (1) * * *
- (ii) * * *

(C) Paragraph (a)(1)(ii)(A) does not apply to gasoline subject to the provisions in § 80.81.

* * * * *

(8) * * *

(i) For gasoline that is subject to the provisions in § 80.81, no person may combine any ethanol-blended VOC-controlled reformulated gasoline with any non-ethanol-blended VOC-controlled reformulated gasoline during the period January 1 through September 15, except that:

(ii) Retailers and wholesale purchaser-consumers may combine at a retail outlet or wholesale purchaser-consumer facility ethanol-blended VOC-controlled reformulated gasoline with non-ethanol-blended VOC-controlled reformulated gasoline, provided that the retailer or wholesale purchaser-consumer:

(A) Combines only batches of reformulated gasoline that have been certified under this subpart;

(B) Notifies EPA prior to combining the gasolines and identifies the exact location of the retail outlet or wholesale purchase-consumer facility and the specific tank in which the gasolines will be combined;

(C) Retains and, upon request by EPA, makes available for inspection product transfer documentation accounting for all gasoline at the retail outlet or wholesale purchaser-consumer facility; and

(D) Does not combine any VOC-controlled gasoline with any non-VOC controlled gasoline between June 1 and September 15 of each calendar year;

(iii) A retailer or wholesale purchaser-consumer may combine ethanol-blended reformulated gasoline with non-ethanol-blended reformulated gasoline under paragraph (a)(8)(ii) of this section a maximum of two periods between May 1 and September 15 of each calendar year, each such period to extend for a period of no more than ten consecutive calendar days. At the end of the ten-day period, the gasoline must be in compliance with the VOC minimum standard under § 80.41.

(A) The retailer or wholesale purchaser-consumer may demonstrate compliance with the VOC minimum standard by testing the gasoline at the end of the ten-day period using the test methods in § 80.46, where the test results show that the gasoline meets the VOC minimum standard. Under this option, the retailer or wholesale purchaser-consumer may add both ethanol blended reformulated gasoline and non-ethanol blended reformulated gasoline to the same tank an unlimited number of times during the ten-day period; or

(B) The retailer or wholesale purchaser-consumer will be deemed in compliance with the VOC minimum standard where the retailer or wholesale purchaser-consumer draws the tank down as low as practicable before receiving product of the other type into the tank and receives only product of the other type into the tank during the ten-day period. Under this option, the retailer or wholesale purchaser-consumer is not required to test the gasoline at the end of the ten-day period.

(iv) Nothing in paragraphs (a)(8)(ii) or (iii) of this section shall preempt existing State laws or regulations regulating the combining of ethanol-blended reformulated gasoline with non-ethanol-blended reformulated gasoline or prohibit a State from adopting such laws or regulations in the future.

* * * * *

(11) * * *

(iv) * * *

(D) Paragraphs (a)(11)(iv)(A) and (C) of this section do not apply to gasoline subject to the provisions in § 80.81.

* * * * *

■ 4. Section 80.79 is amended by adding paragraph (a)(5) and adding a sentence at the end of paragraph (c)(1), to read as follows:

§ 80.79 Liability for violations of the prohibited activities.

(a) * * *

(5) Notwithstanding the provisions in paragraphs (a)(1) through (a)(4) of this section, for gasoline subject to the provisions in § 80.81:

(i) Only a retailer or wholesale purchaser-consumer shall be deemed in violation for combining gasolines in a manner that is inconsistent with § 80.78(a)(8)(ii) or (iii), or for gasoline which does not comply with the VOC minimum standard under § 80.41 after the retailer or wholesale purchaser-consumer combines or causes the combining of compliant gasolines in a manner inconsistent with § 80.78(a)(8)(ii) or (iii);

(ii) No person shall be deemed in violation for gasoline which does not comply with the VOC minimum standard under § 80.41 where the non-compliance is solely due to the combining of compliant gasolines by a retailer or wholesale purchaser-consumer in a manner that is consistent with § 80.78(a)(8)(ii) and (iii).

* * * * *

(c) * * *

(1) * * * For gasoline subject to the provisions in § 80.81, a party is not required to conduct periodic sampling

and testing to determine compliance with the oxygen minimum standard.

* * * * *

■ 5. Section 80.81 is amended by revising paragraphs (d), (e)(3), and (h)(1) introductory text, and removing and reserving paragraph (e)(2) to read as follows:

§ 80.81 Enforcement exemptions for California gasoline.

* * * * *

(d) Any refiner or importer that produces or imports gasoline that is sold, intended for sale, or made available for sale as a motor vehicle fuel in the State of California subsequent to March 1, 1996, shall demonstrate compliance with the standards specified in §§ 80.41 and 80.90 by excluding the volume and properties of such gasoline from all conventional gasoline and reformulated gasoline that it produces or imports that is not sold, intended for sale, or made available for sale as a motor vehicle fuel in the State of California subsequent to such date. The exemption provided in this section does not exempt any refiner or importer from demonstrating compliance with such standards for all gasoline that it produces or imports.

(e) * * *

(2) [Reserved]

(3)(i) Such exemption provisions shall not apply to any refiner or importer of California gasoline who has been assessed a civil, criminal or administrative penalty for a violation of subpart D, E or F of this part or for a violation of the California Phase 2 reformulated gasoline regulations set forth in Title 13, California Code of Regulations, sections 2260 *et seq.*, effective 90 days after the date of final agency or district court adjudication of such penalty assessment.

(ii) Any refiner or importer subject to the provisions of paragraph (e)(3)(i) of this section may submit a petition to the Administrator for relief, in whole or in part, from the applicability of such provisions, for good cause. Good cause may include a showing that the violation for which a penalty was assessed was not a substantial violation of the Federal California reformulated gasoline regulations.

* * * * *

(h)(1) For the purposes of the batch sampling and analysis requirements contained in § 80.65(e)(1) and § 80.101(i)(1)(i)(A), any refiner or importer of California gasoline may use a sampling and/or analysis methodology prescribed in Title 13, California Code of Regulations, section 2260 *et seq.* (as amended July 2, 1996), in lieu of any

applicable methodology specified in § 80.46, with regards to:

* * * * *

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA-HQ-OAR-2005-0170; FRL-8035-1]

Regulation of Fuels and Fuel Additives: Removal of Reformulated Gasoline Oxygen Content Requirement and Revision of Commingling Prohibition To Address Non-Oxygenated Reformulated Gasoline

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: In the Energy Policy Act of 2005 (Energy Act), Congress removed the oxygen content requirement for reformulated gasoline (RFG) in section 211(k) of the Clean Air Act (CAA). To be consistent with the current CAA section 211(k), this direct final rule amends the fuels regulations to remove the oxygen content requirement for RFG. This rule also removes requirements which were included in the regulations to implement and ensure compliance with the oxygen content requirement. In addition, this rule extends the current prohibition against combining VOC-controlled RFG blended with ethanol with VOC-controlled RFG blended with any other type of oxygenate from January 1 through September 15, to also prohibit combining VOC-controlled RFG blended with ethanol with non-oxygenated VOC-controlled RFG during that time period, except in limited circumstances authorized by the Act.

DATES: This rule is effective on May 5, 2006, or April 24, 2006, whichever is later, without further notice unless we receive adverse comment by March 24, 2006. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the portion of the final rule on which adverse comment was received will not take effect. Those portions of the rule on which adverse comment was not received will go into effect on the effective date noted above.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2005-0170 by one of the following methods:

1. <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.