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. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements 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 not-for-profit enterprises, and small governmental jurisdictions. Since this final rule is not subject to notice-and-comment requirements under the APA, or any other statutes, it is not subject to sections 603 or 604 of the RFA. Furthermore, this action will not have a significant impact on a substantial number of small entities because these findings under section 110 and subchapter I, part D of the Act do not, in-and-of-themselves, directly impose any new requirements on small entities. *See Mid-Tex Electric Cooperative, Inc.* v. *FEC*, 773 F.2nd 327 (D.C. Cir. 1985) (agency's certification need only consider the rule's impact on entities subject to the requirements of the rule). Instead, this action makes findings of failure to submit and establishes a schedule for Texas to stop the clocks and does not directly regulate any entities. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

Sections 202 and 205 do not apply to this action because the findings that Texas failed to submit the required SIP for the DFW area do not, in-and-of-themselves constitute a Federal mandate, because they do not impose any enforceable duty on any entity. In addition, the Act does not permit EPA to consider the type of analyses described in section 205 in determining whether a State has failed to submit a required SIP. Finally, section 203 does not apply to the action because the SIP submittal schedule to stop the clocks would only affect the State of Texas, which is not a small government.

G. Submission to Congress and the Comptroller General

The Congressional Review Act (CRA), 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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary, or contrary to public interest. This determination must be supported by a brief statement, 5 U.S.C. 808(z). As stated previously, EPA has made a good cause finding, including the reasons therefor, and established an effective date of May 13, 1999, the date of signature. The 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**. This action is not a ''major'' rule as defined by 5 U.S.C. 804(2).

H. Paperwork Reduction Act

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

I. Petitions for Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 2, 1999. 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 in 40 CFR Part 52

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

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

Dated: May 13, 1999.

Gregg A. Cooke,

Regional Administrator, Region 6.

[FR Doc. 99–13806 Filed 6–1–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[NV–034–0016; FRL–6350–5]

Approval and Promulgation of Implementation Plans; Nevada State Implementation Plan Revision, Clark County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing the approval of revisions to the Nevada State Implementation Plan (SIP) proposed in the **Federal Register** on December 11, 1998. This action specifically includes approval of revisions to Clark County Health District's wintertime oxygenated fuels program. This approval action will incorporate these revisions into the federally approved SIP. The intended effect of approving these revisions is to regulate emissions of carbon monoxides (CO) in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). Thus, EPA is finalizing the approval of these revisions into the Nevada SIP under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards and plan requirements for nonattainment areas.

EFFECTIVE DATE: This action is effective on July 2, 1999.

ADDRESSES: Copies of the SIP revision and EPA's evaluation report are available for public inspection at EPA's Region 9 office during normal business hours. Copies of these documents are

also available for inspection at the following locations:

Nevada Division of Environmental Protection, Bureau of Air Quality, 123 W. Nye Lane, Carson City, NV

Clark County Health District, P.O. Box 3902, 625 Shadow Lane, Las Vegas, NV

FOR FURTHER INFORMATION CONTACT: Roxanne Johnson, Air Planning Office (AIR–2), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901, (415) 744–1225.

SUPPLEMENTARY INFORMATION:

I. Applicability

The revisions being approved into the Nevada SIP include: Clark County District Board of Health, (Clark County), Air Pollution Control (APC) Section 53, *Oxygenated Gasoline Program* (as amended and approved on September 25, 1997). This SIP revision was submitted by the Nevada Division of Environmental Protection to EPA on August 7, 1998.

II. Background

On December 11, 1998, EPA proposed to approve Clark County's Oxygenated Gasoline Program as a revision to the Nevada SIP. 63 FR 68415. EPA has evaluated the revisions for consistency with the requirements of the CAA and EPA regulations. EPA has found that Clark County's revisions to its wintertime gasoline oxygenated fuels program meet applicable EPA requirements. A detailed discussion of the SIP revisions and evaluation has been provided in the December 11, 1998 **Federal Register** (63 FR 68415), and in the technical support document (TSD) available at EPA's Region IX office.

III. Response to Public Comments

A 30-day public comment period was provided in the notice of proposed rulemaking, 63 FR 68415, December 11, 1998. EPA received only one comment letter, from the Western States Petroleum Association (WSPA). WSPA's comments and EPA's responses are set forth below.

A. Preemption

WSPA commented that Nevada's 3.5% oxygen content requirement is preempted by section 211(c)(4) of the Act because EPA has previously promulgated regulations to prescribe controls or prohibitions on the oxygen content of gasoline and by section 211(m)(2) because this section of the Act requires certain nonattainment areas to implement an oxygenated gasoline program with not less than 2.7% oxygen. WSPA also commented that Clark County's 3.5% gasoline oxygen content requirement is preempted under the doctrines of conflict and field preemption.

EPA does not believe that Clark County's 3.5% gasoline oxygen content requirement is barred by section 211(m) or preempted by the Act, either explicitly under section 211(c)(4)(A) or implicitly based on the judicial doctrines of conflict preemption or field preemption. EPA's response to WSPA's preemption comments begins with a discussion of consistency with section 211(m), followed by a response to the other preemption arguments.

1. Consistency with Section 211(m)

On March 18, 1997, the Clark County Commission adopted a resolution requesting that the Board of Health adopt the proposed regulations specifying that the minimum oxygen content of wintertime gasoline shall be 3.5% oxygen by weight, starting October 1, 1997. Because the Las Vegas Valley was being designated by EPA as a serious nonattainment area for carbon monoxide (CO), the Board of Health moved to propose the minimum 3.5% oxygenate regulation to help reach attainment of the National Ambient Air Quality Standards for CO.

Section 211(m)(1) requires that certain states with areas designated nonattainment for CO implement an oxygenated gasoline program. This applies to states containing CO nonattainment areas with a CO design value [1] of at least 9.5 parts per million based on 1988 and 1989 data.

Section 211(m) requires that various states submit revisions to their SIP, and implement oxygenated gasoline programs. This section also identifies certain elements that the state program must contain. Section 211(m)(2)(A) identifies the geographic area of the state program (it must apply throughout the Consolidated Metropolitan Statistical Area (CMSA) or the Metropolitan Statistical Area (MSA)) and the time period of the program (it must apply during that portion of the year in which the area is prone to high ambient concentrations of CO, as determined by the Administrator, but no less than four months). Section 211(m)(2)(A)(B) requires that gasoline be blended to contain not less than 2.7% oxygen. Under certain circumstances (section 211(m)(7)), gasoline must be blended to contain not less than 3.1% oxygen. Section 211(m)(5) requires that EPA promulgate guidelines for states to implement provisions for marketable oxygen credits. This section also authorizes EPA to waive the above requirements under limited circumstances.

WSPA argues that, under section 211(m), a state must adopt a 2.7% standard and may not adopt any other standard, except as expressly provided in section 211(m)(7). The requirement that gasoline be blended to contain ''not less than 2.7 percent oxygen by weight'' would therefore set both a floor and a ceiling for a minimum oxygen content that a state must establish.[2] Clark County's requirement of a 3.5% minimum oxygen content would violate the requirements of section 211(m) under this interpretation. EPA believes that the better reading of section 211(m)(2) is that, at a minimum, states must require that gasoline contain 2.7% oxygen by weight, and that states could satisfy this by requiring gasoline to contain 2.7% oxygen or by setting any higher requirement such as 3.1% oxygen content, or 3.5% oxygen content.

Neither the text of section 211(m) nor the legislative history indicate a clear Congressional intent to prohibit states from adopting any oxygen content requirement greater than 2.7%. This interpretation would be inconsistent with the general structure of the Act because it would restrict the ability of states to develop programs to meet the federal ambient air quality standards. *See* Title I generally, sections 107, 110, and 116. Oxygenated gasoline is one of the simplest and most cost-effective measures for control of carbon monoxide. This interpretation would limit a state's ability to use this strategy for air quality purposes, as any increase above the 2.7% minimum would only be allowed where a severe nonattainment area had already failed to meet its statutory deadline for attaining the NAAQS. Thus, states would be barred from adopting any oxygen content requirement above 2.7%, even where an area needed a more stringent

[1] The carbon dioxide design value is a surrogate measure of attainment status, a measure of progress, and an indicator of how much concentrations must be reduced to meet the standard.

[2] In support of its claim, WSPA points to the 1996 extension of the CO attainment date for the Las Vegas area. WSPA argues that in the preamble to that action EPA identified the 2.7% oxygen content requirement without expressing that the requirement for the area was a minimum content requirement. EPA believes WSPA has read too much into the preamble's abbreviated listing of requirements for the area. Nothing in that preamble indicated an intent to interpret the confines of section 211(m)(2). In fact, EPA noted that Clark County had revised its regulations ''to meet the minimum 2.7% oxygenate by weight requirement of the CAA.'' 61 FR 41759, 41763 (Aug. 12, 1996).

standard to attain the NAAQS. Instead, such a state with a moderate nonattainment area could not take action needed to meet the air quality standard. The area would likely have to continue to violate the standard until it had been upgraded to a severe nonattainment area and had missed the deadline for severe nonattainment areas to come into compliance with the NAAQS, before it could adopt a more effective control measure designed to help attain the NAAQS. There is no indication that Congress intended a limitation so potentially injurious to public health and so contrary to rational planning. This interpretation is also inconsistent with the principle that a statute should not be read to preempt state authority unless it is clear that Congress intended such a result. *See Medtronic, Inc.* v. *Lohr,* 518 U.S. 470, 485 (1996); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

WSPA asserts that the legislative history of sections 211 (m) and (k) shows that the 2.7% oxygen content level was set to ensure fuel neutrality and opportunity for all oxygenates in the marketplace. They argue that state programs requiring greater than 2.7% oxygen conflict with this goal and Congress therefore intended to prohibit them.[3] However, while much of the legislative history of section 211(m) concerns the appropriate level at which to set the minimum federally mandated oxygenate requirement in the Clean Air Act, there is no indication that Congress intended to bar the states from setting more stringent oxygenate requirements.

The Chafee-Baucus Statement of the Senate Managers (discussing the Conference Committee version of the bill which Congress adopted as the 1990 Amendments to the CAA) states merely that ''[t]he conference agreement requires any gasoline sold in a carbon monoxide nonattainment area to contain at least 2.7 percent oxygen. * * *'' Senate Committee on Environment and Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990 (hereinafter ''Legislative History'') at 896 (1993) (statement from Senate debate on October 27, 1990). Senator Simpson and Congressmen Sharp and Hall all reiterated a statement that has been cited in support of the proposition that section 211(m) bars states from requiring a higher fuel oxygen content. ''The level of 2.7 percent was chosen in part to provide more even opportunities for competition between the two major oxygenates, methyl tertiary butyl ether, or MTBE, and ethyl alcohol, or ethanol. * * * The *Administrator* may not discriminate among these different oxygenates, and should encourage fair competition among them.'' Legislative History at 1171 (statement from Senate debate on October 26, 1990) (emphasis added). *See also id.* at 1216, 1328. Senator Simpson and others added that in exercising its waiver authority under section 211(m)(3), EPA may not approve partial waivers of the oxygenate requirements. ''In particular, new 211 (k) and (m) already create several new kinds of gasoline, and different oxygen concentrations may already exist under the various NO_X cap provisions of these two subsections. Further balkanizing of the gasoline industry—with different oxygenate concentrations in different east coast cities, for example—potentially risks further disruptions and precision from refiners that may not be possible.'' *Id.* at 1169 (statement from Senate debate October 26, 1990). All of these statements address limitations on EPA's, not states', authority to choose between oxygenates or set more or less stringent oxygen content requirements. These statements simply give no indication of whether or not Congress intended to limit states' ability to set more stringent requirements, which might be critical to carry out their responsibility to adopt state implementation plans to protect the health of their citizens.

Other statements in the legislative history suggest that Congress was primarily concerned about establishing a preference for one oxygenate over another as a matter of federal law and intended to give states flexibility in their fuels programs. The Senate version of the bill provided that the wintertime oxygen content requirements would be a direct federal mandate on the fuel producers to sell gasoline with at least 3.1% oxygen content, rather than a directive to states for their state implementation plans. S.1630, 103d Cong. (1990), *reprinted in* Legislative History at 4119, 4388. Commenting on his proposed amendment to substitute 2.7% for 3.1% oxygen content, Senator Lautenberg stated:

> But the question is, should we, *as a Federal initiative,* provide an advantage to one of these fuels over another? I do not think so. * * * [A 2.7% requirement] would allow for open and free competition among the various fuels and *provide State and local officials with the flexibility to decide what fuels they need in their areas.* * * * [The 3.1% requirement] takes away flexibility from State and local officials. * * * [Quoting from State and Territorial Air Pollution Program Administrators (STAPPA) and Association of Local Air Pollution Control Officials (ALAPCO) letter] ''We believe it is critically important that any alternative fuels programs be 'fuel neutral.' This *would provide State and local governments with the ability to select from a variety of fuels*—not just gasohol—to address problems (e.g., carbon monoxide and ozone) unique to their jurisdictions.'' * * * [A]nd most importantly, as STAPPA noted, [my amendment] *would allow localities to use the fuels that best meet their particular needs.* * * * USDA notes that four States have oxygenated fuels program in place: Arizona, Colorado, Nevada, and New Mexico. * * * [The 3.1% requirement] would force the areas that already have oxygenated fuels programs to scrap them and switch to gasohol. * * *

Legislative History at 5429–5430 (statement from Senate debate on March 7, 1990) (emphasis added). Senator Wirth added: ''As I understand it, the amendment offered by the Senator from New Jersey would not set this issue in concrete. It would require that oxygenated fuels sold in these nonattainment areas contain 2.7 percent oxygen. *If, a few years down the road it makes sense for a State,* or a city like Denver, *to set a higher minimum oxygen content, that possibility always exists. All we are saying with this amendment is that we don't want to set a national minimum oxygen content standard* of 3.1 percent.'' *Id.* at 5457 (emphasis added).

While Senator Lautenberg's 2.7% oxygen content amendment did not pass in the Senate, the final CAA set a 2.7% oxygen content requirement. Consequently, the arguments advanced by Senators Lautenberg and Wirth should be considered indicative of some of the reasons underlying Congress' final decision to adopt a 2.7% minimum standard rather than a 3.1% minimum standard. As enunciated by Senators Lautenberg and Wirth, preserving state flexibility to make choices regarding the best fuel requirements for a particular locality was an important motivation for preferring 2.7% over 3.1%. This goal hardly comports with an intent to limit states' ability to adopt oxygen content requirements more stringent than 2.7%. Senator Wirth's statement, in particular, makes it clear that these provisions were not intended to prevent states from adopting more stringent requirements. Nor did Senator Wirth anticipate that states would have to jump any particular hurdle before adopting such requirements. Rather, he stated ''that possibility always exists'' if ''down the road it makes sense.''

In addition, during the debates over the Senate bill several senators referred to the existing oxygenated fuels

[3] This concern arises because ethanol is currently the only oxygenate additive that may lawfully be blended in gasoline at levels greater than 2.7% oxygen by weight.

programs that states were already implementing at that time. At least one of those programs was more stringent than 2.7%. Nowhere was it suggested or noted that the legislation would require the state to remove that program. In contrast, Senator Lautenberg explicitly raised as an objection to the 3.1% requirement that it would negate existing state programs mandating a 2.7% oxygen content.

The most reasonable inference from this legislative history is that Congress did not want to directly mandate that all state programs under section 211(m) require greater than 2.7% oxygen, as this would severely reduce the flexibility of states to develop their own programs and would by act of Congress directly limit open competition in the marketplace between oxygenates.[4] Congress rejected a provision that would require all state oxygenated gasoline programs under section 211(m) to require 3.1% oxygen content. Instead, Congress set the minimum amount acceptable under section 211(m) at 2.7%, and only mandated that states adopt standards setting a higher oxygen content under limited circumstances. Section 211(m)(7)[5]. While Congress rejected a federal requirement for an oxygen content greater than 2.7%, there is no similar indication that Congress intended to prohibit states from adopting such programs where the state considered it appropriate. To the contrary, the statements of individual congressmen indicate an intent to preserve state flexibility. Section 211(m)'s provision on marketable oxygen credits also supports this view. While Congress did not mandate that states adopt such credit programs, they are explicitly authorized to do so. This gives states the flexibility to structure their programs as desired, including the ability to adopt credit programs to promote the use of various oxygenates even where the minimum oxygen content is greater than 2.7%.[6]

Section 211(m) is most reasonably interpreted as requiring adoption of an oxygenated gasoline program with any weight percent oxygen content requirement that will result in gasoline being blended to contain not less than 2.7% oxygen by weight. A content requirement of 2.7% or higher satisfies this requirement and is authorized by section 211(m). This interpretation is consistent with the terms of section 211(m) and the legislative history discussed above. It is also consistent with the Clean Air Act's basic approach of providing flexibility to the states in developing state programs to achieve and maintain the NAAQS. Under the Act, states have the primary responsibility for determining the manner by which to achieve these air quality standards. *See* CAA section 116; *Virginia* v. *EPA*, 108 F.3d 1397 (D.C. Cir. 1997), *reh'g* granted, 116 F.3d 499 (D.C. Cir. 1997) (modifying so as not to vacate Part 85 of EPA's final rule). EPA has relied on this interpretation in approving SIP revisions for state programs. *See* 62 FR 10690 (March 10, 1997) (approval of 3.1% oxygen content requirement for Denver, CO); 62 FR 49442 (September 22, 1997) (approval of 3.5% oxygen content as a contingency measure for Spokane, WA).

2. Preemption under the Clean Air Act

WSPA has raised three separate arguments claiming that state programs under section 211(m) requiring gasoline blending at levels greater than 2.7% are preempted under the Act, except where required under section 211(m)(7). The first argument is that section 211(c)(4)(A) prohibits such programs absent a showing of necessity under section 211(c)(4)(C). The second argument is that the state program is in conflict with the Clean Air Act and is therefore preempted. Finally, it has been argued that the state program is preempted because Congress through the Clean Air Act has occupied the field of gasoline oxygen content controls.

a. *Preemption under section 211(c)(4).* Section 211(c)(4) of the Act is a provision of general applicability that expressly prohibits state fuel controls under specified circumstances. Section 211(c)(1) of the Act authorizes EPA to prescribe a control or prohibition on a fuel or fuel additive upon a finding that emissions products from such fuel or fuel additive may endanger public health or welfare, or impair emission control devices or systems.

Section 211(c)(4)(A) prohibits states from prescribing or attempting to enforce a control or prohibition respecting any characteristic or component of a fuel or fuel additive if EPA has prescribed a control or prohibition applicable to the same characteristic or component under section 211(c)(1).[7] This prohibition does not apply if the state control is identical to EPA's.[8] Section 211(c)(4)(C) provides that a state may prescribe and enforce such a nonidentical fuel control or prohibition if EPA approves the provision in a state implementation plan (SIP). EPA may approve the state control or prohibition in a SIP only if it is necessary to achieve the NAAQS that the plan implements.

For the purpose of determining whether a state gasoline requirement is preempted under section 211(c)(4)(A), EPA believes it is appropriate to look at the federal gasoline requirements applicable in the area where the state requirements would apply. For further discussion see the May 26, 1998 letter from Margo T. Oge, Director, US EPA Office of Mobile Sources in the docket for this action. (See docket file: NV–OXY–98–VI.) Clark County is subject to the conventional gasoline requirements, not the RFG requirements. 40 CFR 80.70; 40 CFR 80.101(b)(3). Thus, any preemption under section 211(c)(4)(A) of Clark County's oxygen content controls would have to be based on federal oxygen content requirements found in the conventional gasoline regulations. The only conventional gasoline provision adopted under section 211(c)(1) that directly references oxygen content is the use of oxygen content as an input into the Complex Model, which is used to measure emissions performance for the exhaust toxics and NO_X performance standards. As discussed below, however, EPA need not address the issue of whether the conventional gasoline provisions arguably preempt state control of oxygen in conventional gasoline areas because EPA believes that section 211(m) authorizes the Clark County requirement and overrides any potential preemption under section 211(c)(4).

[4] Similarly, certain members of Congress indicated that they did not want EPA, the federal agency implementing section 211(m), to use its waiver authority under sections 211(m) and 211(k) in a manner that would limit the marketplace.

[5] WSPA claims that treating the 2.7% oxygen content requirement in section 211(m)(2) as merely a floor would effectively read out of the statute section 211(m)(7), which requires serious nonattainment areas to require gasoline with a minimum oxygen content of 3.1 %. EPA is not persuaded by WSPA's logic. Because both section 211(m)(2) and 211(m)(7) are phrased in terms of minimum requirements, there is no inconsistency created by allowing states to adopt programs that meet or exceed these requirements. Section 211(m)(7) still serves a purpose—it requires an increase in the minimum oxygenate content for certain serious nonattainment areas that have not previously exercised their discretion to require greater oxygen content levels.

[6] For example, if a state sets an oxygen content standard of 3.1% without any provisions for a credit program, refiners could not meet such a requirement by using MTBE. If a state included a credit program, however, refiners could meet a 3.1% oxygen content standard by supplying a combination of some oxygenated gasoline using ethanol (at 3.5% oxygen content) and some oxygenated gasoline using MTBE (at 2.7% oxygen content).

[7] State regulation is also prohibited if EPA publishes a finding in the **Federal Register** that no control or prohibition of the characteristic or component is necessary.

[8] The prohibition also does not apply to California. Section 211(c)(4)(B).

Even assuming a state control on oxygen content would otherwise be preempted under section 211(c)(4)(A), in the absence of section 211(m), a threshold issue is whether the CAA requires the state to satisfy both the necessity requirement of section 211(c)(4)(C) as well as the requirements of section 211(m) for the state oxygenated gasoline program to be approved into a SIP.[9] WSPA asserts, ''[I]f Congress intended to exempt CAA § 211(m) from the preemption provisions of § 211(c)(4)(A) it would certainly have done so expressly within § 211(m).'' EPA disagrees. EPA believes section 211(m) itself is an express statement on the ability of states to control oxygen content. It seems more logical to conclude that, given Congress' intent to provide state flexibility and ensure attainment of the CO NAAQS, if Congress has intended states also to satisfy the conditions of 211(c)(4), it would have expressly referenced that section.

EPA believes the most reasonable interpretation is that those elements of a state oxygenated gasoline program within the range of programs specified by section 211(m) are not subject to the preemption provisions of section 211(c)(4). However, those elements of a state oxygenated gasoline program beyond the range of programs specified by section 211(m) would be subject to section 211(c)(4)(A) and, if preempted, would be required to show necessity under section 211(c)(4)(C).[10]

The interaction of section 211(c)(4) and section 211(m) is not addressed in the text of these provisions, and it is not discussed in the legislative history. The structure of section 211, however, indicates that section 211(m) is the best indication of Congressional intent concerning the criteria for SIP approval of state programs in the designated CO nonattainment areas. While section 211(c)(4) addresses state fuel control programs in general, Congress specifically addressed state oxygenated gasoline programs in section 211(m). Congress required that certain states adopt these programs, and Congress specified several elements that the programs must contain. Yet Congress did not indicate that the section 211(m) requirements for a state oxygenated gasoline program may be subject to preemption under section 211(c)(4) and, if preempted, could not be approved absent a showing of necessity under section 211(c)(4)(C). It is reasonable to interpret section 211 such that the requirement of a necessity showing under section 211(c)(4)(C) does not apply to those elements of a state program that are specified in section 211(m) because the more specific provisions of section 211(m) take precedence over the more general provisions of section 211(c)(4) for those elements. Congress required states to adopt those elements of a program and submit them as a SIP revision, and Congress expected that EPA would be able to approve such a SIP revision without a further showing of necessity under section 211(c)(4)(C).

Consider, for example, a state oxygenated gasoline program that extends beyond the boundaries of the CMSA or MSA. Section 211(m) contains a specific requirement regarding geographic scope—the program must include the entire CMSA or MSA. Requiring oxygenated gasoline within the CMSA/MSA is clearly within the range of program elements specified under section 211(m), and thus such a state requirement would not be subject to the preemption and necessity demonstration provisions of section 211(c)(4). If section 211(m) and 211(c)(4) were not interpreted in this manner, a state program might satisfy this requirement of section 211(m), but if oxygen content requirements were preempted under section 211(c)(4)(A), the state program might still not be approvable into the SIP.[11] This would be contrary to the clear purpose of section 211(m) that certain states would have approved into their SIPs and implement the oxygenated gasoline requirements specified in section 211(m).

That portion of the state program requiring oxygenated gasoline beyond the CMSA or MSA, however, involves a state gasoline control beyond that which Congress required or expected in order to comply with section 211(m). Hence, such a provision should be subject to the requirements of section 211(c)(4)(C) if the state program would otherwise be preempted under section 211(c)(4)(A). The structure of section 211 does not indicate that oxygenated gasoline requirements beyond the geographic area specified in section 211(m) should be approvable without restriction under section 211(c)(4)(C).

The elements of geographic scope and control period are clearly specified in section 211(m) as a single area or time period.[12] However, the oxygen content requirement is not limited to a single specified value. Congress did not specify, for example, that the state program must require exactly 2.7% oxygen content, nor, as discussed above, did Congress prohibit states from establishing a larger weight percent requirement. Instead Congress specified that the SIP revisions must contain provisions requiring that gasoline be blended to contain not less than 2.7% oxygen by weight.

Arguably, the oxygen content requirements of section 211(m) could be read in the same manner as the geographic scope and control period provisions. Under this approach, a state requirement that is set at 2.7% would not be subject to the preemption provisions of section 211(c)(4), including the necessity showing under section 211(c)(4)(C). However, for any requirement above 2.7%, the state would have to show that the requirement is necessary, if the state program would otherwise be preempted under section 211(c)(4)(A).[13]

An alternative interpretation is that the oxygen content requirements of section 211(m)(2) call for any one of a range of minimum concentrations, and not one specific level. Any content requirement that results in gasoline containing not less 2.7% oxygen is within the scope of programs authorized and envisioned by Congress under section 211(m). Under this interpretation, a state requirement of greater than 2.7% oxygen content would not be subject to preemption under section 211(c)(4) and the state would

[9] This issue only arises where a state control would be preempted under section 211(c)(4)(A) (without reference to the requirements of section 211(m)). If the state control would not be preempted under section 211(c)(4)(A), then the criteria for approval of a SIP in section 211(c)(4)(C) are not applicable. The SIP revision would have to be consistent with section 211(m) but not section 211(c)(4)(C).

[10] EPA discussed the relationship between 211(m) and 211(c)(4) in approving a CO SIP revision for New Jersey. *See* 61 FR 5299 (February 12, 1996).

[11] For example, preempted state fuel controls may not be approved for a waiver unless they are necessary for achieving a NAAQS. As a result, waivers for fuel measures can only be justified for areas where emission reductions are necessary for a NAAQS. The 211(m) program, however, requires adoption of the oxygen control throughout the MSA or CMSA, irrespective of need. It is conceivable that the area needing CO reductions to achieve the NAAQS is smaller than the MSA or CMSA. Thus a state might find itself required by 211(m) to adopt a control for the entire MSA or CMSA, and yet unable to justify a waiver under 211(c)(4) for an oxygen control applicable to the entire area.

[12] Section 211(m)(2) provides that the requirements shall apply during the portion of the year in which the area is prone to high ambient concentrations of CO, which shall be as determined by the Administrator. The Administrator may not select a time period of less than four months, except under limited specified circumstances. For any given area, the Administrator would determine a specific time period in which the area is prone to high ambient concentrations of CO.

[13] Section 211(c)(4)(C) would not apply under this interpretation where a state program was required to require at least 3.1% oxygen content under section 211(m).

not need to show necessity under section 211(c)(4)(C).

EPA believes that the latter interpretation better implements Congressional intent. The text of section 211(m)(2) is reasonably read to envision a range of oxygen contents, whereas the geographic scope and control period are specifically identified as a single area or time period. The legislative history indicates that Congress intended to provide flexibility to states regarding oxygen content, and did not want to restrain that flexibility by setting a federal mandate for a specific oxygen level that states must require. While Congress deliberately rejected a federal mandate that would reduce the market opportunities for various oxygenates, it did this with the goal of preserving state flexibility, not limiting it, and the latter interpretation is consistent with this goal. Moreover, the overall structure established by the Act supports this interpretation, as the Act assigns states the primary responsibility to adopt programs to achieve clean air goals and preserves flexibility for the states in developing the programs needed to satisfy this role. This interpretation is also consistent with the general principle of avoiding a statutory interpretation that preempts state action unless Congressional intent to do so is clear. *See Medtronic, Inc.* v. *Lohr,* 518 U.S. 470, 485 (1996); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Thus, EPA believes that a state is not preempted under the provisions of section 211(c)(4) from adopting a weight percent oxygen requirement greater than 2.7% under a section 211(m) state program, within the geographic scope and control period specified in section 211(m), and that EPA may approve a SIP revision to implement such a section 211(m) program without a showing of necessity under section 211(c)(4)(C).

b. Conflict preemption. WSPA commented that Clark County's 3.5% oxygen rule is preempted under the doctrine of conflict preemption because it hinders the accomplishment of a federal objective—namely EPA's ''charge'' under the waiver provisions of section 211(m)(3) to ''ensur(e) that the areas with the greatest need for oxygenated gasoline receive priority in obtaining such gasoline.'' WSPA has not documented any problem with the supply or availability of compliant gasoline or oxygenates. In fact, refiners have been providing gasoline containing a minimum 3.5% oxygen content for at least two winter seasons, and there are no indications of a lack of supply of oxygenates in other areas subject to section 211(m). Thus, there do not appear to be concerns under 211(m)(3). Likewise, WSPA has not supported its conflict preemption assertion.

A federal statute implicitly overrides a state law when the state law is in actual conflict with the federal law. This occurs when it is impossible for a private party to comply with both the state and federal requirements, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995) (quoting *English* v. *General Electric Co.*, 496 U.S. 72, 78–79 (1990) and *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). Contrary to WSPA's comments, EPA has not seen any evidence indicating that the Clark County provisions for oxygenated gasoline would lead to either of these results. First, there is no impossibility here; it is practically and legally possible to blend and supply gasoline that meets the federal conventional gasoline requirements and that has an oxygen content of 3.5%. Second, EPA does not believe that the 3.5% oxygen content requirement would be an obstacle to the accomplishment and execution of Congress' purposes. Here, a primary objective of Congress is that gasoline meet all of the applicable requirements specified in section 211, including the oxygenated gasoline provisions of section 211(m), the summertime RVP requirements of section 211(h), and the conventional gasoline requirements of section 211(k)(8). A state program requiring greater than 2.7% oxygen content is not an obstacle to accomplishing this Congressional objective; rather, it is consistent with the requirements of section 211(m) and the goals of Congress embodied in this provision. By providing that states must set an oxygen content at least as stringent as 2.7%, section 211(m) contemplates that states may require higher oxygen contents. In addition, such higher oxygen content requirements do not conflict with the federal summertime RVP or conventional gasoline requirements applicable in Clark County.[14] There is no evidence that the Clark County requirement would conflict with or interfere with the specifications for annual oxygen content limits in the conventional gasoline program, or interfere with refiners' or importers' ability to produce complying conventional gasoline.

c. Field preemption. WSPA further commented that Clark County's 3.5% oxygen requirement is preempted under the doctrine of field preemption. WSPA, however, does not elaborate on this claim.

A state program is preempted under field preemption where Congress has implicitly indicated an intent to occupy a given field to the exclusion of state law. ''Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where the object sought to be obtained by federal law and the character of obligations imposed by it * * * reveal the same purpose.'' *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1987) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Here, neither section 211(m) nor section 211 as a whole establishes a comprehensive federal presence. Instead, the fuels programs under section 211 provide a number of federal requirements but also explicitly preserve a role for the states in regulating fuels. Section 211(c)(4) explicitly preempts state action, but only under certain circumstances, and provides an exemption from preemption under section 211(c)(4)(C). Section 211(m) requires states, not the federal government, to adopt oxygenated gasoline programs. As discussed above, state programs requiring greater than 2.7% oxygen content are within the range of programs authorized under section 211(m), and Congress did not intend to prohibit them. Thus, federal regulation here is not so pervasive as to preclude supplementation by states, nor is the federal interest in the field sufficiently dominant to preempt state action.

State programs under section 211(m) requiring greater than 2.7% oxygen content are therefore not preempted based on either conflict or field preemption.

d. Preemption under 211(f). WSPA also appears to argue that EPA's authority to grant waivers from the substantially similar prohibition of section 211(f)(1), and its authority to control or ban fuel additives under section 211(c)(1), mean that only EPA can act to allegedly ban the use of a fuel additive such as MTBE, not states. In addition, WSPA claims that EPA must satisfy the requirements of section 211(c)(1) before it could approve Nevada's SIP provision.

[14] Issues concerning conflict with the requirements or goals of the federal reformulated gasoline program need not be addressed to evaluate the Clark County program.

EPA has explained above that the Clark County provision is neither expressly prohibited under section 211(c)(4), nor implicitly prohibited under conflict or field preemption. EPA's authority under sections 211(c)(1) and (f)(4) does not provide an additional basis for preemption of state fuel controls. Congress indicated expressly in section 211(c)(4) what state fuel controls are prohibited, and there is no reason to believe EPA's authority to act under section 211(c)(1) and (f)(4) indicates a Congressional intent to preempt state fuel controls not otherwise preempted under section 211(c)(4). In addition, EPA's authority to act on a state SIP submission is not based on or limited by section 211(c)(1). Nothing in section 211(c) or (m) or section 110 indicates that section 211(c)(1) applies to EPA's action on a state SIP submission involving a state oxygenated gasoline program. Such an interpretation would run counter to the central structure of the Act, by limiting a state's SIP measures to only those provisions that EPA could or would be able to adopt under it's own federal authority.

B. Regulatory Negotiation Agreement

WSPA commented that EPA's approval of Clark County's SIP revision ''violates the spirit, if not the letter * * *'' of an Agreement in Principle entered into in August 1991 between EPA, environmental groups, state and local agencies, and industry. WSPA claims the parties agreed that during the control periods for CO nonattainment areas the required oxygenate level in gasoline would be set at 2.7 percent by weight. WSPA also claims that EPA agreed on how to limit components in conventional gasoline areas and to invoke 211(c) to preempt state regulation of fuel. The 1991 Agreement in Principle was an agreement on the underlying principles to be proposed for implementation of the then-new provisions of sections 211(k) and 211(m). Nothing in the Agreement suggests that states subject to 211(m) are prohibited from requiring oxygen content levels greater than the statutory minimum. The Agreement outlines the minimum oxygen content levels to be proposed for reformulated gasoline (RFG) and describes the ranges of oxygen content that will be deemed to comply with NO_X standards in RFG areas. These provisions both applied to the ''simple model'' for certifying RFG. These provisions are not informative for this rulemaking because: (1) Las Vegas is not an RFG area; (2) nothing in the provisions states that higher oxygen content levels are prohibited; and, (3) the simple model described in these provisions has been replaced by the ''complex model'' throughout the country.[15] *See* 40 CFR 80.42(c)(2).

The Agreement also described the oxygenated gasoline guidelines that EPA would recommend. This section of the Agreement highlighted state flexibility by stating, ''While recognizing state discretion, EPA guidelines shall recommend a credit program. * * *'' The elements of the recommended credit program do not suggest that states be limited to the statutory minimum requirements of 211(m). Likewise nothing in the Agreement suggests that 211(c) preempts state compliance with 211(m) or that 211(c) would be used in any way beyond that provided by the statute.

C. Commerce Clause of the U.S. Constitution

Finally, WSPA commented that Clark County's 3.5% gasoline oxygen content requirement is barred by the Commerce Clause. WSPA argues that the Clark County Board of Health's purpose for enacting the requirement is unclear and that the Board may have enacted the requirement with the ulterior motive of ''protect(ing) economic interests of ethanol providers within the state. * * *'' The record clearly indicates that the Board's purpose in adopting the requirement is to address Clark County's carbon monoxide air quality problem and the attendant health risks which it poses to the local population. WSPA has not submitted any documentation to the contrary and there is no basis for EPA to believe that the Board's motives were other than those stated in the record. WSPA has also failed to submit documentation to support its assertion that the 3.5% oxygen content requirement imposes an unreasonable burden on interstate commerce. Fuel suppliers in Clark County have been complying with the 3.5% oxygen requirement for a number of years—first voluntarily and, since October 1997, pursuant to the Clark County rule.

IV. EPA Action

EPA is finalizing action to approve the above revisions for inclusion into the Nevada SIP. EPA is approving the submittal under section 110(k)(3) as meeting the requirements of section 110(a) and Part D of the CAA. This approval action will incorporate Clark County's revisions into the federally approved SIP. The intended effect of approving these revisions is to regulate emissions of CO in accordance with the requirements of the CAA.

V. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, Regulatory Planning and Review.

B. Executive Order 12875

Under Executive Order 12875, Enhancing the Intergovernmental Partnership, 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, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to 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 E.O. 12875 do not apply to this rule.

C. 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 E.O. 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

[15] The complex model includes ranges of fuel components that the model can accept for predicting the emissions that will result from use of a particular fuel. The range for oxygen content that the model can accept is 0.0 to 4.0 percent by weight. *See* 40 CFR 80.45(f)(1). Clark County's 3.5% requirement fits within the range limits of the model.

preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, 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, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to 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 officials 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. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements 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 not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

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**. This rule is not a ''major'' rule as defined by 5 U.S.C. 804(2).

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 2, 1999. 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 in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: May 19, 1999.

Laura Yoshii,

Acting Regional Administrator, Region IX.

Part 52, chapter I, title 40 of the Code of Federal Regulations 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 DD—Nevada

2. Section 52.1470 is amended by adding paragraph (c)(38)to read as follows:

§ 52.1470 Identification of plan.

* * * * *

(c) * * *

(38) On August 7, 1998, regulations for the following Health District were submitted by the Governor's designee.

(i) Incorporation by reference.

(A) Clark County Health District.

(*1*) Section 53 adopted on September 25, 1997.

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