United States Environmental Protection Agency

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Analysis of and Action on Georgia's Request for a Waiver of the Reformulated Gasoline Program

I. Background.

The Atlanta area was originally classified as a Serious nonattainment area under the 1-hour National Ambient Air Quality Standard (NAAQS) for ozone. 59 FR 56694 (November 6, 1991; Clean Air Act Section 181(a). Based on its failure to achieve attainment of the standard by the date specified in the Act (i.e. November 15, 1999), Atlanta was later reclassified as a Severe 1-hour ozone nonattainment area, pursuant to Section 181(b), effective January 1, 2004. 68 FR 55469 (September 26, 2003). One year from the effective date of reclassification to Severe, Atlanta will become a "covered area" for purposes of the federal reformulated gasoline (RFG) program. Section 211(k)(10)(D). Therefore, as of January 1, 2005, only gasoline certified as meeting the RFG requirements may be sold in the 13 counties that comprise the Atlanta 1-hour ozone nonattainment area.

Federal RFG must meet a variety of performance and content requirements. This includes requirements that RFG reduce emissions from on-highway vehicles, compared to a baseline gasoline. These performance standards apply to emissions of oxides of nitrogen (NOx), volatile organic compounds (VOC) and toxics. RFG must also meet certain gasoline content requirements: it must contain a specified amount of oxygen (2% by weight), and must meet a cap on benzene (1.0 % by volume.)

Georgia has adopted certain state requirements for gasoline sold in the 13-county Atlanta 1-hour ozone nonattainment area and 32 surrounding counties. In the Atlanta area, Georgia regulations restrict the sulfur content of gasoline to 30 parts per million (ppm) annual average, and in the summertime the volatility of the fuel may not exceed 7.0 pounds per square inch (psi) Reid vapor pressure (RVP), except for gasoline blended with ethanol, which has a limit of 8.0 psi. EPA approved these state fuel requirements into the Georgia State Implementation Plan in 2002. 67 Fed. Reg. 8200 (February 22, 2002). As a result, as of January 1, 2005 gasoline sold in the Atlanta ozone nonattainment area is subject to both the federal RFG requirements and Georgia's gasoline requirements.

II. Georgia's Petition for a Waiver of the RFG Program.

On August 16, 2004, Georgia requested that EPA waive the requirement to use federal RFG in the Atlanta ozone nonattainment area.[1] The request states that the use of RFG would not

[1] Letter from Carol A. Crouch, Ph.D., Director, Environmental Protection Division, Georgia Department of Natural Resources, to Michael Leavitt, Administrator, EPA.

lower emissions of NOx, and instead would increase these emissions, resulting in higher ozone concentrations. Georgia claims that this adverse environmental impact would come at a significant economic cost, and could create serious gasoline supply and distribution problems. Georgia concludes that implementing the federal RFG program would be a pointless expenditure of effort, leading to absurd and futile results, and that EPA has the authority and should waive the RFG requirements for Atlanta.

Georgia's request includes a report titled "Evaluation of Air Quality and Other Impacts of Implementation of Federal Reformulated Gasoline in the Atlanta Area," ("Evaluation") with accompanying exhibits. The Evaluation was supplemented on September 16, 2004. Section 4 of the Evaluation addresses the environmental impact of the use of RFG in Atlanta. Georgia modeled the emissions impact of implementing the RFG requirement, looking separately at the emissions of on-highway vehicles and nonroad or off-highway equipment. While Georgia modeled the emissions from five different types of gasoline, the most relevant comparison for purposes of Georgia's request is the comparison of the gasoline that would be sold if there were no federal RFG requirement ("Georgia Gas" in the Evaluation), and the gasoline that would most likely be sold if federal RFG was required ("GA RFG (10% ethanol)" in the Evaluation).[2]

Georgia's modeling shows that GA RFG would not change the level of NOx emissions from on-highway vehicles. GA RFG would cause emissions of VOCs to decrease. Evaluation at p.8, Table 4.3. Georgia cautions that it expects the oxygen content requirement of GA RFG to cause an increase in NOx emissions, even though the EPA MOBILE model used by Georgia did not quantify this increase. Evaluation at p. 8.

Georgia's modeling shows that GA RFG would cause an increase in NOx emissions from nonroad equipment, but would cause a decrease in emissions of VOCs. Evaluation at p.8, Table 4.4. Georgia attributes both of these changes in emissions to the oxygen content requirement in GA RFG. Evaluation at p.9.

When the on-highway and nonroad results were combined, Georgia's analysis shows that GA RFG would cause an increase in NOx compared to the Georgia Gas that would be sold if there were no federal RFG requirement. Evaluation at pp.9,10 Tables 4.5, 4.6. The modeled emission increase is directly attributable to the oxygen content requirement, and the expectation that ethanol would be used to meet this requirement.

Georgia's modeling shows a decrease in VOCs compared to Georgia Gas that would be sold if there were no federal RFG requirement. However, Georgia also claims that the use of ethanol as the oxygenate for the RFG would cause an additional increase in emissions beyond that shown in their modeling. These additional emissions would occur from (1) the commingling

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[2] "GA RFG" is gasoline that meets both the federal RFG requirements as well as the Georgia gasoline requirements. 10% volume ethanol is the level of ethanol that is expected to be used in the Atlanta area to meet the oxygen content requirement of RFG.

of ethanol blends of RFG with non-ethanol blends of Georgia Gas, (2) degradation in the emissions performance of on-board vapor recovery equipment in vehicles over time, because of ethanol, (3) increased emissions of VOCs from permeation associated with the use of ethanol in gasoline, and (4) indirect emissions from the transport and storage of ethanol and ethanol blends of RFG. Evaluation at pp.12-15. In most cases, Georgia did not quantify these emissions, but in all cases claimed that the use of ethanol in GA RFG would cause significant additional increases in emissions. Finally, Georgia claims that there would be an even greater increase in emissions if implementation of the federal RFG program disrupted the Georgia state fuels program. In effect, federal RFG and its oxygen content requirement would cause an even greater increase in emissions if supply problems caused Georgia to waive the requirements associated with its state fuel program. Evaluation at p.12, Table 4.9.

Georgia did not model or otherwise present evidence or argument concerning emissions of toxic air pollutants or carbon monoxide (CO), or the impact RFG would have on these emissions.

Section 5 of the Evaluation addresses the economic impact of the use of RFG on Atlanta. Georgia calculated the direct cost of using RFG estimating an increase in cost of approximately 5 cents/gallon. This estimate is based on the costs associated with using ethanol to meet the oxygen content requirements in RFG in another area of the country. Georgia also raises concerns that price increases could be higher than this, based on uncertainty in the industry over whether RFG would be required in Atlanta. Evaluation at pp.15-17.

Georgia concludes that the use of RFG would cause ozone to increase, an environmental disbenefit, with no benefits to outweigh the sizeable adverse economic impact Georgia predicts. Evaluation at p. 17. Based on this, Georgia requests that EPA waive the RFG requirement for this area.

III. EPA's Technical Analyses in Evaluating Georgia's Petition.

EPA performed an analysis of the technical issues raised by Georgia. EPA's analysis focused on estimating the emissions impacts associated with the use of federal RFG in Atlanta, and assessing the ability of the affected industries to supply RFG to this area.

EPA's emissions analysis generally confirms that RFG would cause a net increase in emissions of NOx from on-highway vehicles and nonroad equipment, but of somewhat less magnitude than that estimated by Georgia. EPA estimates no basic change in net VOC emissions, although either a slight increase or decrease is possible.

RFG would also produce a reduction in emissions of CO, as well as a reduction in emissions of toxics, most notably emissions of benzene.

EPA's assessment of supply was based on surveys and individual contacts, addressing both refinery capacity, ethanol supply, and terminal modifications, with the majority of

responses received prior to Georgia's submission of a waiver request. EPA's assessment indicates that prior to Georgia submitting its request for an RFG waiver, refiners, terminals, and marketers have been preparing to produce and distribute a sufficient supply of gasoline to meet Atlanta's RFG needs and Georgia's requirements for the entire area subject to the state fuel requirements. However, EPA's assessment indicates that Georgia's application for a waiver and the resulting uncertainty about whether RFG would be required has caused various members of the industry to re-evaluate whether they will continue preparation to supply RFG to the Atlanta market, which could affect supply. EPA also obtained information on projected cost of RFG for Atlanta, indicating that Georgia's estimate is at the high end of the projected range of costs. Further discussion of this supply assessment can be found in the September 22, 2004 EPA memo "EPA Atlanta 2005 Gasoline Supply Assessment."

EPA's analysis uses emissions modeling as explained in the Technical Support Document, "Analysis of Emission Impacts of Implementation of Federal Reformulated Gasoline (RFG) In the Atlanta Area," September 27, 2004. The emissions difference considered is that between the non-RFG fuel (Georgia Gas) that would be sold in Atlanta if there were no RFG requirement, and the RFG that would be sold under such a requirement, including the oxygen content mandate (GA RFG).[3]

EPA's first step was to estimate the emissions-related qualities of the fuels that would be compared. For ease of reference, the "waiver scenario" refers to the gasoline that would be sold if no RFG requirement goes into effect in Atlanta, and the "no waiver scenario" refers to the RFG that would be sold to meet the RFG requirements. In both scenarios, the fuel would also meet Georgia state fuel requirements. For the waiver scenario, EPA determined the average qualities in 2003 of conventional gasoline produced by Gulf Coast refineries that also met Georgia's state fuel requirements. EPA then adjusted these 2003 averages to reflect the more stringent sulfur requirement in 2005 for Georgia state fuel. For the no waiver scenario, EPA determined the average qualities in 2003 of RFG produced by several refineries that indicated they would be supplying RFG to the Atlanta area in 2005. This 2003 average was then adjusted to reflect the level and type of oxygenate refiners expected to be used in Atlanta RFG, as well as the Georgia state fuel requirements applicable in 2005.

EPA used these fuel qualities to model the emissions impact for on-highway vehicles, comparing the waiver and no waiver scenarios. This analysis uses emissions models developed previously by EPA and as explained in the technical support document. The models determine the percentage reduction in emissions from the two fuels, for different types of vehicles in the

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[3] As discussed later in this section, Georgia did not submit a request for a waiver of the oxygen content requirement of RFG, and such a request would call for submission of additional and different information compared to that before the agency now. The emissions analyses performed in this case do not address or resolve the kinds of emissions and air quality issues that would be raised in an oxygen content waiver request.

on-highway fleet. This percentage reduction in emissions was determined for NOx.[4] EPA then used the percentage reductions in emissions to determine the impact in tons per day of emissions for the Atlanta area. This was derived using the same information Atlanta used in their MOBILE modeling, such as the distribution among types of vehicles in the Atlanta fleet, the average miles traveled, and similar emissions related information. EPA modeled emissions impacts for VOCs and CO using the MOBILE6.2 model. EPA also modeled the emissions impact for nonroad equipment between the waiver and no waiver scenarios, using the same NONROAD emissions model used by Georgia.

EPA also modeled the VOC emissions impacts associated with the commingling of ethanol blends of gasoline with non-ethanol blends, as well as the permeation emissions associated with ethanol blends. Georgia identified these emissions but only quantified commingling. Finally, EPA modeled the impact on toxics emissions between the waiver and no waiver scenarios, using the MOBILE emissions model. Further discussion of EPA's emissions analysis can be found in "Analysis of Emission Impacts of Implementation of Federal Reformulated Gasoline (RFG) In the Atlanta Area," September 27, 2004.

The net emissions impact predicted by EPA is shown in the following Table (from Table 9 of the technical support document):

	Total Tons Per Day			
	NOx	VOC	CO	Toxics
Ga Gasoline	346.34	217.56	2757.48	6.68
GA 10v% etoh RFG	348.61	217.36	2358.28	5.36
Net RFG Benefit	-2.28	0.2	399.19	1.32

The emissions impact estimated by Georgia is indicated in the following Table, Table 4.6 of Georgia's Evaluation. As noted before, the relevant comparison is between GA Gas and GA RFG (10% ethanol), given the expectation that ethanol would be blended at 10 percent volume.

[4] EPA did not model changes in particulate matter, however emissions of NOx are associated directionally with changes in particulate matter, based on transformations of NOx in the atmosphere.

Table 4.6 as presented in Georgia's Evaluation at p. 10:

Fuel	Emissions Impact of Requiring RFG in addition to Georgia Gas on 2005 Precursor Emissions Within 13-County Area			
	VOCs		NOx	
	Emissions tpd	Change in Emissions tpd	Emissions tpd	Change in Emissions tpd
Georgia Gas	221.86	n/a	355.03	n/a
Ga RFG (5.7% ethanol)	214.61	-7.25	356.61	+1.58
Ga RFG (10% ethanol)	215.61	-6.25	357.81	+2.78

EPA's estimate of the net increase in NOx emissions is generally consistent with Georgia's, although EPA's estimate is a somewhat smaller increase. EPA's estimate of no basic change in net VOC emissions (although either a slight increase or decrease is possible) appears to be consistent with Georgia's findings. EPA's analysis also shows a decrease in emissions of CO and of toxics, especially of benzene. Finally, EPA's analysis shows that the oxygen content of RFG is the major determinant in the modeled results for NOx, VOCs and CO. This impact stems in some cases from the weight percent of oxygen and in other cases from the use of ethanol as the oxygenate.

IV. Legal Analysis.

Georgia seeks a waiver of all of the RFG requirements on the basis that the use of RFG will cause an ozone disbenefit. This in turn is premised on the NOx and VOC emissions results expected from the use of oxygenates in RFG, specifically ethanol. Based on this disbenefit, Georgia argues that implementing the RFG program would produce trivial or de minimis benefits or absurd results, and requests that EPA waive the entire RFG program. As discussed below, EPA does not believe it has the authority to grant the relief sought by Georgia and is denying Georgia's request.[5]

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[5] On Friday, September 24, 2005, the Court in State of Georgia v. Leavitt, No. 1:04-CV-2778-CC (ND Ga., Atlanta Div.), indicated that it would issue a Temporary Restraining Order tolling the deadline for enforcement or implementation of the RFG requirement in Atlanta for the time period necessary for the Court to resolve plaintiff's Motion for a Preliminary Injunction. EPA's denial of Georgia's RFG waiver request is consistent with the anticipated Court Order, since it does not implement or enforce the RFG requirement in Atlanta and does not change the status quo with respect to the RFG requirement in Atlanta. The requirement will go into effect on January 1, 2005, or such later date as the Court may order.

A. Statutory Background.

Section 211(k) of the CAA establishes the requirements for the reformulated gasoline program. The Act specifies certain general requirements for RFG in section 211(k)(2), as well as emissions performance requirements in section 211(k)(3). Among the statutory requirements for RFG are: (1) that emissions of NOx from baseline vehicles when using RFG be no greater than the level of NOx emissions from such vehicles when using baseline gasoline;[6] (2) that RFG contain oxygen equal to or exceeding 2.0 percent by weight; (3) that the benzene content of RFG not exceed 1.0 percent by volume; (4) that RFG contain no heavy metals, including lead and manganese; (5) that the aggregate emissions of ozone-forming VOCs from baseline vehicles when using RFG be 15% (or 25% after the year 2000) below the aggregate emissions of ozone-forming VOCs from such vehicles when using baseline gasoline; and (6) that the aggregate emissions of toxic air pollutants from baseline vehicles when using the formulated gasoline shall be 15 % (25 % after the year 2000) below the aggregate emissions of toxic air pollutants from such vehicles when using baseline gasoline.

Congress specifically addressed the circumstances under which EPA may waive or delay RFG requirements:

1. If the limitation on NOx emissions is technically infeasible, EPA may adjust or waive entirely any of the general content requirements in Section 211(k)(2), including the oxygen content requirement or any of the formula requirements in Section 211(k)(3). Section 211(k)(2)(A). This provision does not envision a waiver of the VOC or toxics performance standards on the basis of NOx emissions.

2. If EPA finds that compliance with the oxygen content requirement will prevent or interfere with attainment of a primary NAAQS for an RFG area, EPA may waive the oxygen content requirement in whole or in part. Section 211(k)(2)(B).

3. If EPA determines that the addition of a heavy metal to RFG will not increase toxic air pollutant emissions from motor vehicles, on an aggregate mass or cancer-risk basis, EPA may waive the prohibition on heavy metals in RFG.

4. Congress specified one instance where the entire RFG program may be waived temporarily. Where EPA determines that there is insufficient domestic capacity to produce RFG, EPA may extend the effective date of the requirement to use RFG in opt-in areas by one year, with the possibility of two additional one-year

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[6] This provision prohibits an increase in NOx emissions compared to a baseline representative of 1990 gasoline. EPA's RFG requirements however require a significant reduction in NOx compared to this 1990 baseline level, hence the NOx increases discussed in this case do not raise any issue of noncompliance with this provision.

extensions. EPA is to issue such extensions for opt-in areas with a lower ozone classification before issuing any extensions for areas with a higher classification. Section 211(k)(6)(B).

Congress also addressed ways that EPA could modify the minimum standards set by Congress for emissions performance. EPA may adjust the VOC and toxics performance standards that apply after the year 2000 to provide for a lesser or greater reduction (but in no event less than 20%) based on technological feasibility, considering costs. Each performance standard must be considered separately. Section 211(k)(3)(B)(i), (ii).

B. Analysis.

EPA believes that it does not have authority (implied or otherwise) to grant Georgia's request for a waiver of the entire RFG program for Atlanta. Congress has specifically considered and addressed when EPA could waive or modify various RFG program requirements, and established criteria that must be met for each kind of waiver. Congress specifically addressed the issue of adverse emissions impacts from the use of oxygen in RFG. In section 211(k)(2)(B), Congress specified that EPA could waive the oxygen content requirement, in whole or in part, upon a determination that the oxygen content requirement prevents or interferes with attainment of a primary NAAQS. Congress provided this specific waiver authority to address the issue of adverse emissions impacts associated with the oxygen content of RFG, and detailed the criteria that must be met before EPA may issue such a waiver. Congress intended that this express mechanism would be the appropriate vehicle to address the kind of issues related to oxygen content that are raised by Georgia. It would be inconsistent with section 211(k)(2)(B) to interpret the Act as providing EPA an implied, additional authority to waive not just the oxygen content requirement, but the entire RFG program, using different criteria than that set out in section 211(k)(2)(B), as a way to address the same issues that Congress addressed in the express oxygen waiver provision.[7]

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[7] Georgia asserts that EPA has repeatedly acknowledged that it has authority to grant exceptions from the use of RFG to avoid absurd and futile results. 8/16/04 letter from Carol Couch at p.1. Georgia cites as examples EPA's preamble to a 1994 rulemaking and a statement in one of the briefs EPA filed in City of Baton Rouge v. EPA, No. 04-60408 (5th Cir.). EPA disagrees with Georgia's characterization of these statements. In the 1994 rule establishing the requirements for the RFG and conventional gasoline (CG) programs, EPA interpreted the CG provisions as allowing it discretion to grant baseline adjustments for refiners that produced JP-4 jet fuel in 1990, for purposes of their future compliance with the CG program. EPA relied in part on implied authority under Alabama Power for this narrow and limited modification of the requirements for a small group of refiners. The rule did not, as Georgia seems to allege, apply Alabama Power broadly or imply in any way that EPA had the authority to provide a wholesale waiver of all the applicable RFG requirements, as Georgia seeks here. In EPA's brief from the Baton Rouge litigation that Georgia cites, EPA specifically stated that in denying Baton Rouge's request for an RFG waiver EPA "did not need to decide whether or not it has the

Although Georgia has not requested a waiver of the oxygen content requirement of RFG, EPA notes that, if it wishes to do so in the future, it will need to submit additional and different information beyond that submitted in its request for a waiver of all RFG. In the context of the instant waiver request, both EPA and Georgia evaluated the emissions differences between non-RFG (Georgia Gas) and RFG subject to the oxygen content requirement. A central technical issue in evaluating a request for an oxygen content waiver is the emissions difference between RFG subject to the oxygen content requirement and RFG that is not subject to the requirement. Identifying this emissions difference requires information on the qualities of RFG that would be sold in an area with and without an oxygen content waiver. This includes the expected volume of RFG that would be oxygenated even if the oxygen content requirement were waived, the kind and level of oxygenate to be used with and without a waiver, and the various fuel qualities of both the oxygenated and non-oxygenated RFG. Refinery modeling can provide this kind of critical information. Other information also must be provided, for example information clearly demonstrating the impact of any emissions difference on attainment of all relevant NAAQS.

As discussed above, Georgia's request for a waiver is premised on the argument that the use of RFG will cause an ozone disbenefit, which in turn is premised on the emissions results expected from the use of oxygenates in RFG, specifically ethanol. Georgia arguably also claims that EPA should waive all of the RFG requirements on the ground that there is no benefit, whether or not there are any disbenefits. Arguably, Georgia is claiming that the absence of benefits is an adequate ground to waive the entire RFG program, based on authority to grant exemptions for requirements that produce trivial or de minimis benefits.[8]

It is clear, however that EPA could not waive the oxygen content requirement on the grounds that there are no or trivial benefits. The authority to waive the oxygen content requirement is limited to situations where there is a clear showing that the oxygen content requirement prevents or interferes with attainment of a primary NAAQS. The absence of a benefit does not by itself amount to interference with attainment of a NAAQS, and would not support the waiver of the oxygen content requirement under Section 211(k)(2)(B). Given that, EPA does not believe it has the implied authority to waive the entire RFG program, including the oxygen content requirement, based on the claim that there are no or trivial benefits associated with the implementation of RFG. This would be inconsistent with the criteria Congress set up for waiver of the oxygen content requirement. Given the criteria for waiver of the oxygen

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authority under Alabama Power, or any other authority, to delay or to waive completely the statutory RFG requirement" because it found non-de minimis benefits from the use of RFG in Baton Rouge. EPA's Opposition to Petitioner's Motion for Expedited Appeal, at fn. 8. Thus, the brief clearly states, contrary to Georgia's assertion, that at the time of the Baton Rouge decision and subsequent briefing in the case challenging that decision, EPA had not yet decided whether EPA has implied authority to waive the entire RFG program on de minimis or absurd results grounds.

[8] Georgia limited it's analysis of benefits to emissions of NOx and VOCs.

content requirement, as well as the criteria for the other waiver provisions in Sections 211(k), EPA does not believe it would be reasonable to imply authority to waive the entire RFG program premised on a determination that RFG produces no or trivial benefit.

In addition, even if EPA had the implied authority to waive the entire RFG program as suggested by Georgia, it would be inappropriate to exercise such implied authority without Georgia first seeking relief under the oxygen content waiver provision. This would limit the relief provided to no more than was needed and appropriate, and would avoid the unnecessary loss of any benefits associated with RFG.

Georgia also argues that EPA's conformity regulations require that it grant Georgia's request. Under Section 176(c) of the Clean Air Act, 42 U.S.C. § 7506(c), departments, agencies and other instrumentalities of the Federal Government are prohibited from engaging in, supporting in any way, providing financial assistance for, licensing, permitting, or approving any activity which does not conform to an approved state implementation plan. By letter of August 25, 2004, the Director of the Georgia Environmental Protection Division asserted that a decision by EPA to deny Georgia's request for a waiver of RFG in Atlanta would violate Section 176(c), and that EPA has a duty under its conformity regulations to preserve the status quo unless and until there has been an affirmative determination that RFG does conform to the state implementation plan for Atlanta. She further asserted that "at a minimum" EPA must conduct a conformity determination before implementing the RFG program in Atlanta, and that the program will be "implemented" through civil and criminal enforcement of a ban on the sale or distribution of non-RFG. EPA disagrees with these assertions.

EPA is not required to conduct a conformity determination to accompany a denial of Georgia's waiver request. Under EPA's conformity regulations, emissions are "caused by" a federal action, and may need to be addressed through a conformity analysis, if the "emissions would not otherwise occur in the absence of the Federal action." See 40 CFR §§ 93.152 (definitions of *"caused by," "direct emissions"* and *"indirect emissions")*, 93.153(b). The requirement to use RFG in Atlanta is not "caused by" EPA's denial of Georgia's waiver request. Instead, it is a self-implementing statutory requirement that follows from Atlanta having been reclassified as a matter of law to a severe ozone non-attainment classification. Thus, if Georgia had never submitted a request for a waiver, no EPA action would be required for the RFG requirements to apply in Atlanta. The fact that Georgia submitted a request for a waiver does not change the fact that the RFG requirements are "caused by" operation of the statute upon reclassification rather than by EPA action on this request.

Presumably Georgia is arguing that there will be an increase in emissions compared to what would occur if EPA were to grant the request and waive the RFG requirements. However, EPA's denial is the action at issue, not a grant that did not occur. The denial itself does not change the legal status quo and does not increase emissions compared to what would occur if EPA took no action. That is the correct comparison, not a comparison of emissions levels between the action EPA did take and another action that EPA did not take. Because any emissions related to RFG use in Atlanta will not be "caused by" EPA's action on Georgia's

waiver request, there are no "direct emissions" or "indirect emissions" resulting from the EPA action, and the denial of Georgia's waiver request is exempt from a conformity determination.[9] See 40 CFR 93.153(b).

EPA's action to deny Georgia's request for a waiver of the RFG requirements is not itself an enforcement action, and it is not necessary for purposes of this decision to respond to Georgia's assertions that potential, future EPA enforcement of RFG provisions will trigger the requirement for a conformity determination. However, EPA notes that it disagrees with this assertion. Enforcement actions are exempt from conformity determinations pursuant to 40 CFR 93. 153(c)(2)(v). *See* EDF v. EPA, 82 F.3d 451, 465-467 (D.C. Cir 1996).

Finally, Georgia notes that it was recently classified as a Marginal ozone nonattainment area for purposes of the 8-hour ozone NAAQS. Evaluation at p. 2. Georgia notes that in the recent Phase 1 rule to implement the 8-hour ozone NAAQS, EPA stated that a nonattainment area classified under subpart 2 for purposes of the 8-hour standard "will be subject to the control obligations associated with its classification." 69 Fed. Reg. 23951, 23958 (April 30, 2004) (Phase 1 rule). According to Georgia, this statement suggests that Atlanta's classification as Marginal for purposes of the 8-hour standard means that it will not be subject to the requirement to use RFG, which only applies to Severe and Extreme areas. Evaluation at p.2. Georgia does not appear to rely on this argument as a basis for it's waiver request, however, as Georgia only makes note of this in the background section of the Evaluation. Nonetheless, it is important to clarify that Georgia's suggestion is not accurate.

In the Phase 1 rule, EPA addressed many issues, including how to classify areas for the 8-hour standard and how to implement the transition from the 1-hour standard to the 8-hour standard. See Sections V.A. and C. of the preamble to the Phase 1 rule. In addressing the transition from the 1-hour standard to the 8-hour standard, EPA determined when the 1-hour standard would no longer apply (would be "revoked"), as well as decided what obligations that applied to an area for the 1-hour standard would continue to apply after revocation of the 1-hour standard. See Sections V.C.1, 2, and 5 of the preamble to the Phase 1 rule.

EPA decided that the 1-hour standard would continue to apply in an area until one year from the effective date of the 8-hour designation. Based on this decision, an area will have two classifications during this one year period, one for purposes of the 1-hour standard and one for purposes of the 8-hour standard. For example, Atlanta is currently classified as Severe for purposes of the 1-hour standard and Marginal for purposes of the 8-hour standard.

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[9] The conformity provisions of the Clean Air Act do not themselves constitute a grant of authority to agencies to take actions not otherwise within their statutory powers. The conformity provisions are designed to inform and constrain authorized federal action, not create new authorization for federal action. Thus, the conformity provisions do not authorize EPA to grant Georgia's waiver request.

In the Phase 1 rule, EPA neither stated nor implied that during the one year period prior to revocation of the 1-hour standard an area would be discharged in any way from the mandatory obligations associated with it's 1-hour classification. The statement cited by Georgia says no more than an area is subject to the subpart 2 requirements applicable to it's 8-hour classification. It does not say or imply anything about discharging an area from the requirements stemming from it's 1-hour classification. In addition, EPA did address the issue of whether certain mandatory obligations associated with an area's 1-hour classification would continue to apply after the 1 hour standard and associated classification are revoked. EPA determined that certain mandatory requirements under Title I of the Act, termed "applicable requirements" in the regulations, would continue to apply after revocation of the 1-hour standard. These ongoing mandatory requirements are tied to an area's 1-hour designation and classification at the time of the issuance of the Phase 1 rule. Thus, there is no basis for asserting that prior to the revocation of the 1-hour standard the Phase 1 rule, or the 8-hour classification for an area, relieves an area of any mandatory obligation associated with it's 1-hour classification.

The fact that an area is classified less than Severe for purposes of the 8-hour standard does not remove the RFG requirement that applies pursuant to its 1-hour classification. Under Section 211(k)(10)(D), one year after an area has been reclassified as Severe "such Severe area" shall be a covered area for purposes of the RFG program. As long as a reclassified area remains classified as Severe, it is clear that it becomes an RFG covered area by direct operation of Section 211(k)(10)(D). The fact that Atlanta is also classified as Marginal for purposes of the 8-hour standard does not change the fact that it is still classified as Severe for purposes of the 1-hour standard. Based on it's 1-hour classification, Atlanta will become a covered area one year from the effective date of that Severe classification.

This interpretation furthers the purposes of Section 211(k)(10)(D). Reclassification of an area to Severe is a result of the area failing to achieve attainment by the date specified for it's prior classification, which was less than Severe. Reclassification of an area occurs regardless of whether it either currently or previously had ozone levels exceeding the design value for Severe. Thus, reclassification occurs because the area has failed to achieve attainment by the date specified, even though the area may have made significant progress towards attainment in the interim. Atlanta was previously classified as a Serious area, and it did not achieve timely attainment. It was therefore reclassified as Severe, thereby becoming subject to various requirements applicable to a Severe area. Section 182(d). In addition, pursuant to Section 211(k)(10)(D), it becomes an RFG covered area one year after the effective date of the reclassification to Severe. The mandatory RFG requirement addresses the failure of the area to achieve attainment in a timely fashion. The evident purpose of requiring RFG in such areas is to address the prior failure to attain in a timely fashion, and is not limited to addressing ozone air quality problems in areas that are at the Severe design level.

Atlanta's 8-hour classification as Marginal does not change the fact that Atlanta has not been determined as attaining either the 1-hour or the 8-hour standard. Atlanta has made important and significant progress towards reducing the monitored levels of ozone for purposes of the 1-hour standard. In addition, the Marginal classification for the 8-hour standard indicates

that Atlanta is monitoring levels of ozone that are not significantly above the 8-hour standard. However, the 8-hour Marginal classification does not change that Atlanta is still in a situation that the reclassification provision was clearly designed to address - it did not achieve timely attainment in the past, and thus was reclassified to Severe and became subject to the more stringent planning and other requirements that apply to Severe areas, and it continues to be classified as Severe for purposes of the 1-hour standard. The Marginal classification for purposes of the 8-hour standard therefore provides no basis for removing the statutory obligation imposed by Section 211(k)(10)(D) based on the area's Severe classification for the 1-hour standard.

Georgia's statement notes that Atlanta currently has two classifications, Severe and Marginal. Georgia has not raised the issue, and EPA is not addressing here, a situation where Atlanta is no longer a Severe area.[10] It is clear, though, that while Atlanta is classified as a Severe area for purposes of the1-hour standard, it is subject to the requirements of Section 211(k)(10)(D), notwithstanding it's Marginal classification for purposes of the 8-hour standard.

V. Conclusion.

For the reasons discussed above, EPA denies Georgia's request for a waiver of the RFG program in the Atlanta area.

[10] EPA has not yet determined whether the Clean Air Act requires that RFG continue in those circumstances. See 69 Fed. Reg. 23951, 23973 (April 30, 2004).