

Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely makes a determination based on air quality data and results in the suspension of certain Federal requirements, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it determines that air quality in the affected area is meeting Federal standards.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply because it would be inconsistent with applicable law for EPA, when determining the attainment status of an area, to use voluntary consensus standards in place of promulgated air quality standards and monitoring procedures that otherwise satisfy the provisions of the Clean Air Act. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). Under Executive Order 12898, EPA finds that this rule involves a determination of attainment based on air quality data and will not have disproportionately high and adverse human health or environmental effects on any communities in the area, including minority and low-income communities.

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).

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 December 15, 2008. 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 to reclassify the HGB area as a severe ozone nonattainment area and to adjust applicable deadlines 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, Incorporation by reference, Intergovernmental relations, Nitrogen dioxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 8, 2008.

**Richard E. Greene,**

*Regional Administrator, Region 6.*

■ 40 CFR part 52 is amended as follows:

#### PART 52—[AMENDED]

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

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

#### Subpart SS—Texas

■ 2. Section 52.2275 is amended by adding paragraph (f) to read as follows:

#### § 52.2275 Control strategy and regulations: Ozone.

\* \* \* \* \*

(f) Determination of Attainment. Effective November 17, 2008 EPA has determined that the Dallas/Fort Worth (DFW) 1-hour ozone nonattainment area has attained the 1-hour ozone standard. Under the provisions of EPA's Clean Data Policy, this determination suspends the requirements for this area to submit an attainment demonstration or 5% increment of progress plan, a reasonable further progress plan, contingency measures, and other State Implementation Plans related to attainment of the 1-hour ozone NAAQS for so long as the area continues to attain the 1-hour ozone NAAQS.

[FR Doc. E8-24592 Filed 10-15-08; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 80

[EPA-HQ-2005-0036; FRL-8729-7]

RIN 2060-A089

### Control of Hazardous Air Pollutants From Mobile Sources: Early Credit Technology Requirement Revision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to revise the February 26, 2007 mobile source air toxics rule's requirements that specify which benzene control technologies a refiner may utilize to qualify to generate early benzene credits. This action will allow another specific benzene control technology, benzene alkylation, in addition to the four operational or technological changes specified in the current rule. This action also includes a general provision that allows a refiner to submit a request to EPA to approve other benzene-reducing operational changes or technologies for the purpose of generating early credits.

**DATES:** This final rule is effective on December 15, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-2005-0036. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Eastern Standard Time, Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Christine Brunner, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood, Ann Arbor, MI 48105; telephone number: (734) 214-4287; fax

number: (734) 214-4816; e-mail address: *brunner.christine@epa.gov*. Alternative contact: Assessment and Standards Division Hotline, telephone number: (734) 214-4636; e-mail address: *asinfo@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Does This Action Apply to Me?**

This action may affect you if you produce gasoline. The following table gives some examples of entities that may have to follow the regulations.

Category	NAICS <sup>1</sup> codes	SIC <sup>2</sup> codes	Examples of potentially regulated entities
Industry .....	324110	2911	Petroleum Refiners.

<sup>1</sup> North American Industry Classification System (NAICS).

<sup>2</sup> Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To decide whether your organization might be affected by this action, you should carefully examine today's action and the existing regulations in 40 CFR part 80. If you have any questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**Outline of This Preamble**

- I. Background
- II. Response to Comments
- III. This Action
- IV. Environmental and Economic Impact
- V. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132: Federalism
  - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  - G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks
  - H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
  - I. National Technology Transfer and Advancement Act
  - J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
  - K. Congressional Review Act
- VI. Statutory Provisions and Legal Authority

**I. Background**

The Control of Hazardous Air Pollutants From Mobile Sources final rule (also known as the Mobile Source Air Toxics rule or MSAT2) was published on February 26, 2007 (72 FR 8428). That rule requires that refiners and importers produce gasoline that has an annual average benzene content of 0.62 volume percent (vol%) or less,

beginning in 2011. (See § 80.1230(a).) The rule also requires that no refiner or importer have an actual average gasoline benzene level greater than 1.3 vol%. After achieving an actual annual average benzene level of 1.3 vol%, refiners and importers may use benzene credits to reduce their average benzene level to 0.62 vol%. Refiners may generate benzene credits for their own use or to sell to others, in two ways. Once the program begins in 2011, a refiner generates credits (known as standard credits) when its average annual gasoline benzene level is less than 0.62 vol%.

Refiners may also generate credits prior to 2011. These credits are called early credits, and are the subject of this final rule. The MSAT2 rule allows early benzene credits to be generated in any annual averaging period prior to 2011 (i.e., 2008, 2009, and 2010), as well as for the partial year period June 1–December 31, 2007. Early credits are generated on a refinery basis. In order to generate early credits, a refinery must meet several requirements:

- (1) Establish a benzene baseline based on the average benzene level of the gasoline produced at the refinery during the two-year period 2004–05. (See § 80.1285.)
- (2) Achieve an annual average benzene level at least 10% lower than its baseline level. (See § 80.1275(a).)
- (3) Make operational changes or improvements in benzene control technology that will result in real benzene reductions. (See § 80.1275(d).)

Any refining or operational changes may be utilized to comply with the average benzene content requirement. However, in order to generate early credits, the rule specifies four types of operational changes and benzene control technology improvements that would allow a refinery to qualify if it implemented the changes/improvements after 2005 (and if it also met the other related requirements). § 80.1275(d)(1). These operational changes and technology improvements are:

- (1) Treating the heavy straight run naphtha entering the reformer using light naphtha splitting and/or isomerization.
  - (2) Treating the reformat stream exiting the reformer using benzene extraction or benzene saturation.
  - (3) Directing additional refinery streams to the reformer for treatment as described in (1) and (2) above.
  - (4) Directing reformat streams to other refineries with treatment capabilities as described in (2) above.
- A refinery needs to implement at least one of these listed changes/improvements in order to generate early credits.

This list includes all the strategies we thought would reduce fuel benzene (and thus benzene emissions) and be cost-effective. The provision was intended to preclude refineries from generating early credits solely by benzene reductions achieved through ethanol blending.

The final rule does not provide a way for EPA to consider alternative means of reducing fuel benzene and generating early credits, no matter how effective the alternative. Soon after the rule was finalized, it was brought to our attention that at least one refinery had plans to install benzene alkylation technology (also known as reformat alkylation). Benzene alkylation involves converting benzene into other aromatic compounds by the addition of alkyl groups to the benzene ring. Xylene, toluene and cumene are typical products formed by benzene alkylation. Benzene alkylation is not one of the four operational or technological changes enumerated in the final rule. Although EPA regarded benzene alkylation as a legitimate benzene reduction technology, and one which can be used to comply with the standard, we did not include it in the list of technologies for generation of early credits merely because we did not expect refiners to use it. (See the Regulatory Impact Analysis (EPA420-R-07-002, February 2007), Chapter 6, page 36.)

We therefore considered a request to include benzene alkylation on the list of

early credit-generating technologies to have merit, and on March 12, 2008, we published a direct final rulemaking and a parallel proposal that would have revised the February 26, 2007 MSAT2 requirement regarding the benzene control technologies that qualify a refiner to generate early benzene credits to allow benzene alkylation in addition to the four operational or technological changes allowed by the MSAT2 rule. The direct final rule would have also allowed a refiner to submit a request to EPA to approve other benzene-reducing operational changes or technologies for the purpose of generating early credits.

We stated that if we received adverse comment by April 11, 2008, the direct final rule would not take effect and we would publish a timely withdrawal in the **Federal Register**. Commenters did in fact submit significant adverse comment and we accordingly published a withdrawal of the direct final rule on May 9, 2008. (See 73 FR 26325.) We stated in the direct final rule and the parallel proposed rule that we would address comments in any subsequent final action, which would be based on the parallel proposed rule, without a second comment period on the action. Today's action is based on the parallel proposed rule, and finalizes that proposal, so that refiners using benzene alkylation may generate early credits, and refiners can make site-specific demonstrations to EPA which may result in other technologies being eligible to generate early credits.

## II. Response to Comments

We received comments from the Northeast States for Coordinated Air Use Management (NESCAUM) and the New York State Department of Environmental Conservation (NYDEC). The commenters expressed several concerns with the rule. First, they were concerned that the rule continued the 2007 rule's focus on gasoline benzene content rather than benzene vehicle emissions. Second, commenters expressed the related concern that although benzene alkylation reduces gasoline benzene levels, it may not reduce benzene vehicle emissions. One commenter suggested that early credits be discounted to account for vehicular benzene emissions attributable to reformed benzene. Commenters also expressed concern about increased aromatics emissions from vehicles. Finally, commenters opposed allowing other future refinery operational changes to be approved after petition to and review by EPA for the purpose of generating early credits.

As will be discussed below, benzene alkylation meaningfully reduces

gasoline benzene levels and thus directly reduces benzene emissions. For this reason, we believe that allowing refiners to qualify to generate early credits through the use of benzene alkylation is consistent with the intent of technology requirement associated with the early credit provisions. Use of benzene alkylation will not have the adverse effects of concern to the commenters: benzene vehicle emissions will be reduced, and there will not be appreciable increases in aromatics emissions from vehicles.

Fuel aromatics and fuel benzene levels both affect vehicle benzene emissions, but not to anywhere near the same degree. Fuel benzene has more than a 20-fold<sup>1</sup> greater impact on benzene emissions from vehicles than other fuel components, including fuel aromatics levels. In the March 29, 2006 proposed rule, we discussed how non-benzene aromatics account for about 30% by volume of gasoline and contribute about 30% of benzene emissions while benzene constitutes only about one volume percent of the fuel but is responsible for about 25% of the benzene emissions. (The remaining benzene emissions are formed from other (non-aromatic) compounds. See 71 FR 15864.) Based on evaluations using the Complex Model, we concluded there that a 20% reduction in aromatics would be needed to achieve the same level of benzene emissions reductions as the 0.62 vol% standard. (See 71 FR 15864.)<sup>2</sup> Thus, in the 2007 final rule, we concluded that fuel benzene control is the most effective means of reducing benzene and overall MSAT emissions because it offers measurable and certain benzene reductions that are not affected by "changes in fuel composition or vehicle technology." (See 72 FR 8477.)

Reducing fuel benzene through alkylation or any other benzene reduction technology results in greater than 95% reduction in benzene exhaust emissions compared to the benzene emissions caused by the fuel benzene removed. We estimate that there is less than a 1% difference among benzene reduction technologies in their

<sup>1</sup> Based on mg/mi benzene emissions per volume fraction of the fuel component (benzene, aromatics, other) in gasoline.

<sup>2</sup> Though this effect can be seen through Complex Model runs (which is based on 1990 vehicle technology), in the 2007 rulemaking, we found that tailpipe benzene emissions from Tier 2 vehicles have a similar response, in that significantly greater reductions in fuel aromatics levels are needed to get the same benzene reduction emissions impact that results from the MSAT2 benzene standard. See Control of Hazardous Air Pollutants from Mobile Sources, Regulatory Impact Analysis, Chapter 6, "Feasibility of the Benzene Control Program," February 2007.

effectiveness at reducing benzene emissions.<sup>3</sup> Because benzene emissions reductions are significant regardless of the fuel benzene reduction technology, there is no reason to discourage the use of one technology over another. For the same reason, we do not agree with the suggestion to discount early credits generated by use of benzene alkylation to account for vehicular emissions.

The commenters' concern about increases in vehicle non-benzene aromatic emissions is also somewhat misplaced. Again, given the small amount of benzene in gasoline (1 vol%) relative to total aromatics (20–40 vol%), the additional contribution of aromatics attributable to alkylating the benzene is minimal, as would be any increase in aromatic emissions. In addition, as we discussed in the 2007 rule, fuel aromatics levels are expected to decrease because of increased ethanol use, so aromatics emission levels should be dropping in any event.

Thus, based on the analyses in the 2007 rule of the impacts of fuel benzene and aromatics reductions on emissions, the slight increase in fuel aromatics content that could result from refineries using benzene alkylation for the purposes of generating early credits under this rule should reduce benzene emissions that would otherwise not be reduced at this time. No deleterious vehicle emissions impacts are expected. It thus is appropriate for refiners using benzene alkylation to reduce fuel benzene levels to be eligible to generate early credits.

With respect to the other portion of today's rule, we continue to believe that allowing a refiner to petition us to use

<sup>3</sup> Data collected from a recent test program (described in Chapter 6.11 of the Regulatory Impact Analysis of the 2007 MSAT rule) suggest that a typical Tier 2 vehicle emits approximately 3.10 mg/mi of benzene when burning gasoline with 1 vol% benzene and 30 vol% aromatics. Simulations done using the Complex Model for gasoline compliance (described in 40 CFR 80.45) suggest that approximately 25 wt% of exhaust benzene emission is due to benzene in the fuel (typically about 1 vol%), about 30 wt% of exhaust benzene emission is due to aromatics in the fuel (typically about 30 vol%), and the remaining 45 wt% of exhaust benzene emission is from the rest of the fuel (i.e., non-aromatic compounds). Given this information, and making the assumption that alkylation would be used to convert 0.4 vol% of benzene to 0.4 vol% aromatics (to take pool benzene from 1.0 vol% to 0.60 vol%, slightly overcomplying with the new standard), we can estimate that a vehicle's tailpipe benzene emissions would be reduced from 3.10 mg/mi to 2.80 mg/mi if alkylation were used to reduce fuel benzene, compared to 2.79 mg/mi if another method of benzene reduction were used that did not create additional aromatics. This difference is less than 1%, and is relatively insensitive to the original emission level of the vehicle or the amount of fuel benzene reduction occurring. The difference is even smaller if one includes evaporative benzene emission, which is reduced by an identical amount for any method of benzene reduction.

an operating change not currently listed in order to qualify to generate early benzene credits is appropriate. A refiner would have to show in the petition that the operating change would reduce fuel benzene levels which, as just discussed, is the best means of reducing benzene vehicle emissions. The MSAT2 program encourages early fuel benzene reductions in order to get early benzene emissions reductions. This action is not about permitting a refinery to implement a new technology or make an operating change—those actions can happen at any time within or outside of the early credit generation window, regardless of the refinery's intent vis-a-vis generating early credits. Today's action requires the petitioner to show that the change they intend to make reduces fuel benzene levels which directly and significantly reduces benzene vehicle emissions more than any other fuel compositional change. The petition process has the added value of being more timely than a rulemaking, which is important since early credits can only be generated through 2010, and refiners must apply to generate early credits before the start of the annual averaging period in which they first want to generate early credits.

### III. This Action

We published a Questions and Answers document related to the MSAT2 program on August 16, 2007. (<http://epa.gov/otaq/regs/toxics/420f07053.pdf>) In that document, we specifically addressed benzene alkylation and indicated that benzene alkylation meets the intent of the technology requirement for early credits. As discussed in the preamble of the final rule, early credits are generated based on innovations in gasoline benzene control technology that result in real benzene reductions prior to the start of the program in 2011. (See 72 FR 8486.) The use of benzene alkylation directly results in lower gasoline benzene levels.

Today's action revises § 80.1275(d)(1) to include benzene alkylation in the list of acceptable reduction operational and technological strategies. We have also included a general provision that allows a refiner to petition EPA to use an operational or technological change that is not listed in the regulation for the purpose of generating early credits. The refiner must demonstrate that the benzene control technology improvement or operational change results in a net reduction in the refinery's average gasoline benzene level, exclusive of benzene reductions due simply to blending practices. The petition must be submitted to EPA prior

to the start of the first averaging period in which the refinery plans to generate early credits. EPA expects it would act on such a petition before the end of that averaging period. The refiner must also provide additional information requested by EPA.

The other requirements for generating early credits are unchanged. These include submitting a benzene baseline, reducing the refinery's baseline benzene level by at least 10% in a given averaging period, and not moving gasoline or blendstock streams between refineries for the purpose of generating early credits. (See 72 FR 8486.)

### IV. Environmental and Economic Impact

This action allows companies that have alternative means or strategies for reducing gasoline benzene to request EPA approval to use them for the purpose of generating early benzene credits. Average gasoline benzene levels from such refiners will decrease faster and earlier than if they had not generated early credits leading to lower benzene emissions than would have been achieved otherwise. Such credits will also help provide for a robust credit pool when the program starts in 2011. Vehicle benzene emissions will be reduced and there will not be significant increases in vehicle emissions of other aromatics.

### V. Statutory and Executive Order Reviews

#### A. Executive Order 12866: Regulatory Planning and Review

This action revises the February 26, 2007 mobile source air toxics rule's requirements that specify the benzene control technologies that qualify a refiner to generate early benzene credits. It allows another specific benzene control technology, benzene alkylation, to be used for the purpose of generating early credits, and allows a refiner to submit a request to EPA to approve other benzene-reducing operational changes or technologies for the purpose of generating early credits. This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

#### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, because the amendments in this rule do not change the information collection requirements of the underlying rule.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

#### C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A petroleum refining company with fewer than 1,500 employees or a petroleum wholesaler or broker with fewer than 100 employees, based on the North American Industrial Classification System (NAICS); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule, I certify that this action will not have a significant economic impact on a substantial number of small entities.

#### D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–

1538 for State, local, or tribal governments or the private sector. EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's action simply modifies the original rule in a limited manner, and does not significantly change the original rule. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action only applies to parties that produce gasoline.

#### *E. Executive Order 13132: Federalism*

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

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule amends existing regulatory provisions applicable only to producers of gasoline and does not alter State authority to regulate these entities. The amendments will impose no direct costs on State or local governments. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as

specified in Executive Order 13175. This rule amends existing regulatory provisions applicable only to producers of gasoline and will impose no direct costs on tribal governments. Thus, Executive Order 13175 does not apply to this action.

#### *G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks*

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

This rule is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined in Executive Order 12866.

#### *H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 (66 FR 18355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not

consider the use of any voluntary consensus standards.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This rule provides additional means for refiners to qualify to generate early credits by implementing a benzene reducing technology or operational mode. This in turn will reduce vehicle benzene emissions.

#### *K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This final rule will be effective on December 15, 2008.

## **VI. Statutory Provisions and Legal Authority**

The statutory authority for the fuels controls in today's final rule can be found in sections 202(l) and 211(c) of the Clean Air Act (CAA), as amended. Support for any procedural and enforcement-related aspects of the fuel controls in today's rule, including

recordkeeping requirements, comes from sections 114(a) and 301(a) of the CAA.

#### List of Subjects in 40 CFR Part 80

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Fuel additives, Gasoline, Imports, Labeling, Motor vehicle fuel, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: October 9, 2008.

**Stephen L. Johnson,**  
Administrator.

■ For the reasons set forth in the preamble, 40 CFR part 80 is amended as set forth below:

#### PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

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

**Authority:** 42 U.S.C. 7414, 7542, 7545 and 7601(a).

■ 2. Section 80.1275 is amended as follows:

- a. By adding paragraph (d)(1)(v).
- b. By redesignating paragraph (d)(2) as paragraph (d)(3).
- c. By adding paragraph (d)(2).

#### § 80.1275 How are early benzene credits generated?

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(v) Providing for benzene alkylation.

(2)(i) A refiner may petition EPA to approve, for purposes of paragraph (d)(1) of this section, the use of operational changes and/or improvements in benzene control technology that are not listed in paragraph (d)(1) of this section to reduce gasoline benzene levels at a refinery.

(ii) The petition specified in paragraph (d)(2)(i) of this section must be sent to: U.S. EPA, NVFEL-ASD, Attn: MSAT2 Early Credit Benzene Reduction Technology, 2000 Traverwood Dr., Ann Arbor, MI 48105.

(iii) The petition specified in paragraph (d)(2)(i) of this section must show how the benzene control technology improvement or operational change results in a net reduction in the refinery's average gasoline benzene level, exclusive of benzene reductions due simply to blending practices.

(iv) The petition specified in paragraph (d)(2)(i) of this section must be submitted to EPA prior to the start of the first averaging period in which the refinery plans to generate early credits.

(v) The refiner must provide additional information as requested by EPA.

\* \* \* \* \*

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#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

#### Centers for Disease Control and Prevention

#### 42 CFR Part 73

RIN 0920-AA09

#### Possession, Use, and Transfer of Select Agents and Toxins

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This document completes the biennial review and republication of the lists of biological agents and toxins regulated by the U.S. Department of Health and Human Services (HHS), as well as those biological agents and toxins regulated by both HHS and the U.S. Department of Agriculture (USDA). Because USDA has chosen to no longer regulate ten biological agents and toxins which HHS still believes have the potential to pose a severe threat to public health and safety, we have moved those ten biological agents and toxins from the overlap select agents and toxins section to the HHS select agents and toxins section of the select agent regulations.

In a companion document published in this issue of the **Federal Register**, the USDA has established corresponding final rules regarding the select agents and toxins regulated only by the USDA, as well as those overlap select agents and toxins regulated by both agencies.

**DATES:** The final rule is effective November 17, 2008.

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**SUPPLEMENTARY INFORMATION:** The *Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Subtitle A of Public Law 107-188 (42 U.S.C. 262a) (the Bioterrorism Preparedness Act)*, requires the HHS Secretary to establish by regulation a list of each biological agent and each toxin that has the potential to pose a severe

threat to public health and safety. In determining whether to include an agent or toxin on the list, the HHS Secretary considers the effect on human health of exposure to an agent or toxin; the degree of contagiousness of the agent and the methods by which the agent or toxin is transferred to humans; the availability and effectiveness of pharmacotherapies and immunizations to treat and prevent illnesses resulting from an agent or toxin; the potential for an agent or toxin to be used as a biological weapon; and the needs of children and other vulnerable populations. The Bioterrorism Preparedness Act requires that the HHS Secretary review and republish the list of select agents and toxins on at least a biennial basis.

The HHS Secretary promulgated the current select agents and toxins lists in a final rule, published on March 18, 2005, and made effective on April 18, 2005. The select agents and toxins lists found in Part 73 are found in two sections. The biological agents and toxins listed in section 73.3 (HHS select agents and toxins) are those biological agents and toxins regulated only by HHS. The biological agents and toxins listed in section 73.4 (Overlap select agents and toxins) are those biological agents and toxins regulated both by HHS and USDA under the provisions of the Agricultural Bioterrorism Protection Act of 2002.

The *Agricultural Bioterrorism Protection Act of 2002, Subtitle B of Public Law 107-188 (7 U.S.C. 8401) (the Agricultural Bioterrorism Protection Act)*, requires the USDA Secretary to establish by regulation a list of each biological agent and each toxin that the Secretary determines has the potential to pose a severe threat to animal or plant health or animal or plant products. In determining whether to include an agent or toxin on the list, the USDA Secretary considers the effect of exposure to the agent or toxin on animal or plant health, and on the production and marketability of animal or plant products; the pathogenicity of the agent or the toxicity of the toxin and the methods by which the agent or toxin is transferred to animals and plants; the availability and effectiveness of pharmacotherapies and prophylaxis to treat and prevent any illness caused by the agent or toxin; and the potential of an agent or toxin for use as a biological weapon. The USDA Secretary is also required to conduct a biennial review of the USDA select agents and toxins list.

To assist with the biennial review, HHS reviewed recommendations provided by subject matter experts and the Intragovernmental Select Agents and