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Monday  
October 20, 1997

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**Part IV**

**Environmental  
Protection Agency**

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**40 CFR Part 80  
Transitional and General Opt Out  
Procedures for Phase II Reformulated  
Gasoline Requirements; Final Rule**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 80**

[FRL-5903-3]

**Transitional and General Opt Out Procedures for Phase II Reformulated Gasoline Requirements**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the regulations for states to opt-out of the federal reformulated gasoline (RFG) program for areas where a state had previously voluntarily opted into the program. The previously published opt-out provisions provide that EPA-approved opt-out petitions become effective 90 days from approval. Under today's action, if a state has not submitted an opt-out petition to EPA by December 31, 1997, it must participate in the federal RFG program until December 31, 2003. The Agency believes this rule is necessary to ensure a smooth transition between the two phases of the reformulated gasoline program. The use of Phase II RFG will provide greater health benefits than Phase I by requiring further reductions from the refiners' 1990 gasoline baseline for volatile organic compounds (VOCs) and toxics by about 25% and 20% respectively. The requirements also include a nitrogen oxides (NO<sub>x</sub>) reduction of about 6%.

Effective January 1, 2004, the current opt-out procedures become effective again. States that want to end their involvement in the federal RFG program prior to December 31, 1999, and not participate in Phase II of the program, must submit a complete opt-out petition to EPA by December 31, 1997.

Today's action does not affect the regulations for opting in to the RFG program. In a separate action EPA will publish a final rule which would permit former ozone nonattainment areas to opt into the federal reformulated gasoline program.

**EFFECTIVE DATE:** This final rule is effective November 19, 1997.

**FOR FURTHER INFORMATION CONTACT:** Christine Hawk or Diane Turchetta at U.S. Environmental Protection Agency, Office of Air and Radiation, 401 M Street, SW (6406J), Washington, DC 20460, (202) 233-9000.

**SUPPLEMENTARY INFORMATION:** A copy of this action is available on the OAQPS Technology Transfer Network Bulletin Board System (TTNBBS) and on the Office of Mobile Sources' World Wide

Web site, <http://www.epa.gov/OMSWWW>. The TTNBBS can be accessed with a dial-in phone line and a high-speed modem (PH# 919-541-5742). The parity of your modem should be set to none, the data bits to 8, and the stop bits to 1. Either a 1200, 2400, or 9600 baud modem should be used. When first signing on, the user will be required to answer some basic informational questions for registration purposes. After completing the registration process, proceed through the following series of menus:

- (M) OMS
- (K) Rulemaking and Reporting
- (3) Fuels
- (9) Reformulated gasoline

A list of ZIP files will be shown, all of which are related to the reformulated gasoline rulemaking process. Today's action will be in the form of a ZIP file and can be identified by the following title: OPTOUT.ZIP. To download this file, type the instructions below and transfer according to the appropriate software on your computer:

<D>ownload, <P>rotocol, <E>xamine, <N>ew, <L>ist, or <H>elp Selection or <CR> to exit: D filename.zip

You will be given a list of transfer protocols from which you must choose one that matches with the terminal software on your own computer. The software should then be opened and directed to receive the file using the same protocol. Programs and instructions for de-archiving compressed files can be found via <S>ystems Utilities from the top menu, under <A>rchivers/de-archivers. Please note that due to differences between the software used to develop the document and the software into which the document may be downloaded, changes in format, page length, etc. may occur.

**Regulated Entities**

Entities potentially regulated by this action are those which produce, supply or distribute motor gasoline. Regulated categories and entities include:

Category	Examples of regulated entities
Industry .....	Petroleum refiners, motor gasoline distributors and retailers.
State governments .....	State departments of environmental protection.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by

this action. Other types of entities not listed in the table could also be regulated. To determine whether your business is regulated by this action, you should carefully examine the list of areas covered by the reformulated gasoline program in § 80.70 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**Extended Summary**

EPA published a Notice of Proposed Rulemaking on March 28, 1997, (62 FR 15077) proposing changes to the existing opt-out rule which provides criteria and general procedures for states to opt-out of the RFG program through December 31, 1997. This final rule promulgates the revisions as proposed by EPA with minor changes. 61 FR 35673 (July 8, 1996).

This final rule applies to areas where the state voluntarily opted into the federal RFG program and subsequently decides to withdraw from it referred to as "opt-out." This final rule establishes the criteria and procedures for states to opt-out from the RFG program after December 31, 1997. Today's rule does not change the process a state must follow to petition for removal from the program or the criteria used by EPA to evaluate a request. For example, the rule maintains the requirements that the governor, or the governor's authorized representative, submit an opt-out petition. This rule changes the time period before the opt-out becomes effective for opt-out petitions received from January 1, 1998, through December 31, 2003. This period includes the remaining two years of Phase I (January 1, 1998 to December 31, 1999) and the first four years of Phase II (January 1, 2000, to December 31, 2003).

This final rule specifies that for all opt-out petitions received on or before December 31, 1997, the previously published procedures (61 FR 35673) will apply and that the effective date that an area will no longer be a covered area as defined in 40 CFR section 80.70 will be 90 days (or more at a state's request) from the date of EPA's letter of notification to the Governor of the requesting state or from the effective date of an agency approval of a revision to the State Implementation Plan (SIP) where applicable. States which have opted in to the RFG program that do not submit a completed opt-out request by December 31, 1997 and subsequently submit an opt-out request before January 1, 2004, will be required to participate in the federal RFG program, including

Phase II of the program, until at least December 31, 2003. The opt-out request will be effective January 1, 2004 or 90 days from the Agency's written notification to the State approving the opt-out petition, whichever date is later, unless the Governor requests a later date.

The Agency may grant up to a five month extension to the December 31, 1997 deadline in limited circumstances. An extension can be granted where the State's Legislature has pending legislation on the use of federal RFG that was active prior to March 28, 1997, when this opt-out rule was proposed. The request for an extension must demonstrate that the legislation cannot reasonably be acted upon until after the December deadline. Such legislation must be related to either opting out of or remaining in the RFG program. The Governor must submit a request for an extension to EPA containing such information before December 31, 1997. The Agency can then grant an extension up to May 31, 1998.

Today's requirements will also cover those areas opting into the RFG program subsequent to December 31, 1997; areas opting-in during that time period must remain in the program at least until December 31, 2003. The opt-out procedures would revert back to the previously published rule (90 day requirements) as of January 1, 2004.

Today's action will help provide certainty to the industry as it makes decisions that are likely to affect the supply and cost of RFG, which in turn could affect the cost-effectiveness of Phase II RFG. Additionally, the action maintains the flexibility that states have in air quality planning to the degree possible and practicable.

### **I. Opt-out Petitions Received January 1, 1998 Through December 31, 2003; and After December 31, 2003**

#### **A. Background**

The federal reformulated gasoline (RFG) program is designed to reduce ozone levels and air toxics in areas of the country that are required to or volunteer to adopt the program. Reformulated gasoline reduces motor vehicle emissions of the ozone precursors, specifically volatile organic compounds (VOC), through fuel reformulation. RFG also achieves a significant reduction in air toxics. In Phase II of the program emissions of nitrogen oxides (NO<sub>x</sub>), another precursor of ozone, are also reduced. The Clean Air Act requires RFG in ten metropolitan areas with the highest

levels of ozone.<sup>1</sup> In section 211(k)(6), Congress provided the opportunity for states to opt-in to the RFG program for other areas classified under Subpart 2 of Part D of Title I as ozone nonattainment areas.

EPA issued final rules establishing requirements for RFG on December 15, 1993. 59 FR 7716 (February 16, 1994). During the development of the RFG rule, a number of states inquired as to whether they would be permitted to opt-out of the RFG program at a future date, or opt-out of certain requirements. This was based on their concern that the air quality benefits of RFG, given their specific needs, might not warrant the cost of the program, specifically focusing on the more stringent standards in Phase II of the program (starting in the year 2000). States with that concern wished to retain the flexibility to opt-out of the program. Other states indicated they viewed RFG as an interim strategy to help bring their nonattainment areas into attainment sooner than would otherwise be the case.

The regulation issued on December 15, 1993, did not include procedures for opting-out of the RFG program because EPA had not proposed and was not ready to adopt such procedures at that time. Since then, the Agency has adopted general procedures for future opt-outs. 61 FR 35673 (July 8, 1996). These procedures apply to opt-out petitions received through December 31, 1997.

Based upon EPA concerns regarding smooth implementation of Phase II of the RFG program and public comments that were received in response to the Notice of Proposed Rulemaking (60 FR 31269) published June 14, 1995, EPA is changing the regulations in this final rule for opt-out petitions received between January 1, 1998, through December 31, 2003. The previously published procedures in place today (61 FR 35673) will take effect again beginning January 1, 2004.

In the proposal to the previous opt-out rulemaking, EPA outlined its rationale for determining that it is appropriate to interpret section 211(k) as authorizing states to opt-out of the program. 60 FR 31269 (June 14, 1995). EPA concluded that any conditions on

<sup>1</sup> EPA recognizes that there are currently ten areas required to use Federal RFG and that these areas currently do not have an opt-out option. Those areas are: Los Angeles-Anaheim-Riverside, CA; San Diego County, CA; Hartford-New Haven-Meriden-Waterbury, CT; New York-Northern New Jersey-Long Island-Connecticut area; Philadelphia-Wilmington-Trenton-Cecil County, MD; Chicago-Gary-Lake County, IL-Indiana-Wisconsin area; Baltimore, MD; Houston-Galveston-Brazoria, TX; Milwaukee-Racine, WI; Sacramento, CA.

opting out should be focused on achieving a reasonable transition out of the program. There were two primary areas of concern to the Agency. The first was coordination of air quality planning. The second involved appropriate lead time for industry to transition out of the program.

Today's final rule addresses this lead time concern by changing the conditions for opting out during the period from January 1, 1998, to December 31, 2003. As the effective date for Phase II RFG (January 1, 2000) approaches, industry must make investment decisions based in part on anticipated demand for RFG. Unanticipated changes in demand, due to opt-outs, could make cost recovery of investment difficult. To avoid this, refiners would tend to minimize capital investments and rely on costly operational changes which may be more to meet the Phase II requirements. This approach to compliance requirements could lead to higher gasoline prices which would diminish the cost-effectiveness of EPA's RFG program. Thus, EPA believes it must consider these special circumstances which affect industry directly and consumers indirectly and make appropriate changes to the opt-out procedures. Therefore, EPA is requiring states to decide by December 31, 1997 if they intend for opt-in areas to participate in Phase I RFG up to December 31, 1999, and/or to participate in Phase II RFG, which begins on January 1, 2000. If a state has not submitted an opt-out petition by December 31, 1997, it must continue to participate in Phase I RFG through December 31, 1999, and participate in Phase II RFG until December 31, 2003. The Agency however may grant up to a five month extension to the December 31, 1997 deadline if the state meets specific criteria.

#### **B. Statutory Authority**

The statutory authority for the action in this rule is granted to EPA by section 211(c) and (k) and section 301(a) of the Clean Air Act as amended, 42 U.S.C. 7545 (c) and (k) and 7601(a). For a more complete discussion of statutory authority, see the proposal for general rules establishing criteria and procedures for states to opt-out of the RFG program. 60 FR 31271 (June 14, 1995).

As discussed there, EPA believes it is appropriate to interpret section 211(k) as authorizing states to opt-out of the RFG program, provided that a process is established for a reasonable transition out of the program. EPA believes allowing states to opt out is consistent

with the Act's recognition that states have the primary responsibility to develop a mix of appropriate control strategies needed to reach attainment with the NAAQS. Given this deference to state decision making, it follows that the conditions on opting out should be geared towards achieving a reasonable transition out of the RFG program, as compared to requiring a state to justify its decision.

EPA has identified two principal areas of concern in this regard. The first involves coordination of air quality planning. The second involves appropriate lead time for industry to transition out of the program. Today's rule addresses the latter concern. EPA's authority allows it the discretion to authorize opt-outs in a way that appropriately balances the interests of the parties affected by the regulations. The previous rule establishing opt-out criteria and procedures placed only limited conditions on the states, focusing on the information that must be submitted before EPA may approve an opt-out request. The previous rule also generally required a 90-day time period to pass before an EPA-approved opt-out became effective. Today, EPA is proposing to lengthen this time period for certain future opt-outs because it believes the circumstances affecting industry have changed enough to warrant an appropriate change.

### C. Need for a Required Participation Period

In the NPRM, EPA proposed a four year required participation period in Phase II for RFG opt-in areas. EPA solicited comments on the impact of future opt-outs during this time period, and the expected impacts on supply and cost from such opt-outs if they were allowed to occur. Two petroleum associations commented that they support the establishment of a minimum participation period for the Phase II RFG program which would provide market certainty and stabilization. One association specifically remarked that industry needs market certainty to not only ensure adequate planning and investments to satisfy RFG demand at the lowest cost, but to continue investments in RFG facilities by providing assurance that the program would be in effect for a reasonable time to allow a return on investment. It further commented that EPA must make every effort to guarantee a stable regulatory climate for the highly capital intensive RFG program. The other association remarked that it agreed with the U.S. Department of Energy's (DOE's) comments to the Agency's June 1995

NPRM, specifically the cost recovery issue. Several refiners/suppliers commented that they agree with the associations' comments. One company added that the Agency must take into account the long term impact on all parties, including small refiners and marketers when deciding RFG opt-ins or opt-outs. A state commented that consumers would benefit from a stable price market which would be encouraged by a long-term commitment to the program. The Agency did not receive any comments arguing against the need for a required participation period.

Based on these comments, EPA maintains its belief in the need for a required Phase II participation period as proposed. The proposed requirement was prompted by the concerns expressed by DOE in its comments during the previous opt-out rulemaking. Specifically, DOE commented that a short time frame to opt-out by states who originally intended to participate in Phase II of the RFG program makes it difficult for refiners to recover their investments in refinery facilities needed to comply with the requirements of Phase II RFG. (Air Docket A-94-68) The Department further explained in its comments that the ability to price gasoline at a level that recovers investments depends very heavily on marginal supply and demand. Small unanticipated changes in demand, whether due to market forces or changing regulatory requirements, can make cost recovery of investment difficult, and cause gasoline prices to rise or fall.

Refinery investments for Phase II RFG were originally estimated by the U.S. Department of Energy (DOE) to be about \$1 billion for East Coast refiners and about \$2 billion for Gulf Coast PADD III refiners. These estimates were included in DOE's December 1994 report, *Estimating the Costs and Effects of RFG. Using improved modeling and real-world RFG production volume data*, EPA worked closely with API and DOE to improve the DOE refinery model. This work was conducted in concert with EPA's review of the NO<sub>x</sub> waiver petition submitted by the American Petroleum Institute (API). Based on the over 200 improvements and changes to the refinery model, DOE released an updated report in 1997 entitled *Re-Estimation of the Refining Cost of RFG NO<sub>x</sub> Control*. The updated investment estimates in this report for 6.8% NO<sub>x</sub> reduction range from about \$0.2 to \$0.8 billion for PADD I and about \$0.0 to \$0.6 billion for PADD III.

The investment estimates decreased for several reasons but predominantly

because refiners are producing a lower volume of RFG than was originally anticipated in 1994 due to subsequent opt-outs, due to a smaller quantity of spillover than anticipated, and because the refinery models used have been revised to more accurately project capital investments by the refining industry. Although the investment estimates are lower, EPA agrees with DOE's assessment that the estimated investments remain significant and that a required participation period is still appropriate. Such a requirement will encourage refiners to make the appropriate investments which in turn will help keep RFG prices low.

Refiners who expect to be producing Phase II RFG starting January 1, 2000, and who need additional facilities to meet the requirements of that gasoline, are likely to begin making commitments to refinery investments in 1997, two years in advance of the Phase II start date. The decision to invest in the capital needed to comply with Phase II RFG is based on each refiner's product capabilities, desire to participate in the program, and likely anticipated demand.

Those refiners who chose to supply Phase II RFG are each uniquely situated to comply with the year 2000 Phase II requirements. Different levels of investment will be pursued by each refiner when investment is chosen or is necessary. The largest investments are expected to be made in the areas of desulfurization and alkylation to control sulfur and olefins. Some are expected to make early refinery changes to come into compliance with the complex model requirements in 1998. While the economic burden of Phase II compliance will fall disproportionately on some refiners, the Agency's main concern in this final rule is to provide a stable regulatory environment which will not unreasonably inhibit cost recovery, given that this could lead to supply problems and cost fluctuations that could diminish the appeal and cost-effectiveness of the RFG program.

### D. Four Year Required Participation Period From January 1, 2000 to December 31, 2003

In the NPRM, EPA proposed a four year required participation period to attempt to strike a balance between the potential adverse impacts if refiners have too little time to recoup their Phase II investments and the need of states for some flexibility in using RFG. The Agency solicited comments on the range of investment recovery periods needed by the refineries who plan to invest capital in refining equipment for Phase II RFG.

Several refiners and petroleum associations commented that a four year commitment period is not necessarily sufficient or is the minimum amount of time refiners would need to recover investments made to produce Phase II RFG. These commenters referenced DOE's comments that an eight year period is more adequate given the current competitive gasoline market, as well as EPA's statement that refiners would need a six year investment recovery period assuming a 10% real rate of return (62 FR 15077). Two refiners encouraged EPA to adopt a six year participation period while one suggested at least ten years based on the argument that manufacturing Phase II RFG is a long range project with expected pay outs of 10–20 years. Conversely, two states and two refiners/suppliers of RFG commented that a four-year period is adequate for several reasons including that it strikes a balance between sufficient certainty for RFG producers and flexibility for states to chose air quality control measures, markets tend to become more efficient over time, and that an extended required period may not provide additional cost recovery but instead create a disincentive to continue participation in the program.

The above comments do not represent any new information or compelling arguments to change the proposed four-year participation period beyond four years. Thus the EPA continues to believe that a four year period is the most appropriate. The Agency is not trying to assure that all refiners will recover investments made in Phase II RFG production in a given time period. EPA is instead seeking to structure the federal RFG program in a way that minimizes the potential abrupt decrease in demand that could occur to refiners, thereby making it difficult to recover investments associated with producing this product. The potential for such decreases in demand soon after the implementation of Phase II RFG could be a disincentive to refiners to invest in the kind of capital that would tend to reduce future supply problems and to sustain the cost-effectiveness of the program. This is because a refiner's decision to invest in Phase II RFG is based, in part, upon an opt-in state's decision to have EPA require the sale of Phase II RFG in a particular area. RFG market uncertainty is increased when opt-in states are not bound to remain in the RFG program and by the relatively simple process for states to opt out of the RFG program provided for in the previously published rule. Without greater assurance of the markets for

Phase II reformulated gasoline over a sufficient period of time, refiners may limit or delay investments and prepare for a smaller than currently-predicted RFG demand.

EPA is committed to ensuring that non-attainment areas around the country attain the National Ambient Air Quality Standards (NAAQS), including the ozone standard. EPA recognizes, however, that under the Clean Air Act the states play a primary role in attaining the NAAQS, including choosing those control measures they prefer to include in their plans to attain and maintain the NAAQS. EPA is committed to maintaining, if possible and practical, the flexibility that states have in air quality planning by establishing procedures to opt out and substitute alternative control measures where the state considers appropriate. The Agency believes that requiring RFG in opt-in states for a period greater than four years may create a disincentive for continued participation in those areas where this program is currently considered a cost-effective control measure for the control of ground-level ozone and toxics.

EPA believes that today's action achieves a balance between allowing states with voluntary RFG areas the flexibility to opt-out of the program and giving industry a certain level of assurance as to a predictable demand for Phase II RFG during the important investment recovery period of the program's early years. Today's action helps maintain a consistent market, adequate supplies and reasonable prices, thus maintaining the RFG program's cost-effectiveness.

#### *E. Effective Date for Approved Opt-Out Petitions*

In the NPRM, EPA proposed to change the date on which EPA-approved opt-out petitions become effective for opt-out petitions received January 1, 1998, through December 31, 2003. The EPA proposed that States which previously opted in to the RFG program that do not submit an opt-out request by December 31, 1997, and subsequently submit a completed opt-out request before January 1, 2004, will be required to participate in Phase II of the program until December 31, 2003. The opt-out request will be effective January 1, 2004 or 90 days from the Agency's written notification to the State approving the opt-out petition, whichever is later.

The Agency also proposed that if a state submits an opt-out request prior to December 31, 1997, the state can designate the opt-out to occur at any future date beyond the minimum 90-day

period required under current opt-out procedures as long as it is not a date beyond December 31, 1999. Areas opting into the RFG program subsequent to December 31, 1997, will be treated the same as areas opting in prior to that date and will also be included in Phase II of the program until December 31, 2003.

A state commented that the December 31, 1997 deadline should be extended if the Agency revises the National Ambient Air Quality Standards (NAAQS) in the summer of 1997. It stated that a change in the NAAQS would require analysis to verify the appropriateness of RFG as a control strategy and that the proposed opt-out deadline would not be sufficient for the state to make such a decision. The Agency understands this air quality planning concern for a revision to the NAAQS, but extending the opt-out deadline a few months would not be of any significant value to the states for purposes of making decisions on control strategies to meet the new ozone standard. Extending the deadline much beyond December 31, 1997 could jeopardize the intent of the rulemaking by not providing industry with sufficient lead time to make necessary investment decisions.

A representative of the state of Maine commented that the opt-out deadline should be extended at least until end of May 1998. The state discussed the controversy within that state surrounding the decision of whether or not to stay in the RFG program and expressed the importance of providing its legislature the opportunity to approve such decisions. The state's legislative session ended June 1997 and is not scheduled to reconvene until January 1998. In January 1997, a bill was introduced in Maine's Legislature to opt the state out of the RFG program. The Legislature did not act on this legislation and carried it over to the next legislative session beginning January 1998 for consideration. The EPA believes that a limited extension is justified under these circumstances and that a limited extension would not negate the intent of the rulemaking since only a small refining market would be affected. Thus in this final rule EPA is allowing a Governor, that requests an extension so the legislature can consider a decision, to submit a letter to EPA before December 31, 1997 to request an extension up to May 31, 1998. To be eligible for an extension, the State's Legislature must have pending RFG legislation that cannot reasonably be acted upon until after the December deadline. Such legislation must be related to either opting out of or

remaining in the RFG program and it must have been introduced prior to March 28, 1997, the date of the opt-out proposal. The Governor must submit a request for an extension to EPA containing such information before December 31, 1997. The Agency then may grant an extension up to May 31, 1998.

#### F. Return to Existing Procedures

EPA further proposed that, beginning on January 1, 2004, opt-out requests from states again be approved based on the opt-out provisions in effect before January 1, 1998. A petroleum association commented that opt-outs must follow formal rulemaking process as provided for under the CAA, and that approved opt-outs published by July 1 in a given year should be effective January 1 of the following year to provide adequate time for refiners to meet averaging requirement planning and survey programs.

EPA does not agree that a separate rulemaking must be conducted for each future opt-out request. The petition based process established in the previous opt-out rulemaking (61 FR 35673) addresses, on a case by case basis, future individual state requests to opt out of the federal RFG program. The regulations establish clear and objective criteria for EPA to apply in these future non-rulemaking actions. These criteria address when a state's petition is complete and the appropriate transition time under the regulations. This application of regulatory criteria on a case by case basis to future individual situations does not require notice and comment rulemaking, either under section 307(d) of the Clean Air Act or the Administrative Procedure Act.

The EPA believes the petition approach is the most appropriate as it will allow for expeditious and consistent Agency action on the individual opt-out requests presented by states. It also provides greater certainty in the market than individual rulemakings could provide. Lastly, it provides quick approval for opt-out requests while maintaining a sufficient transition period to minimize costly market disruptions. In certain cases, the affected parties will be able to comment on the state action. In those states where the RFG program is included as a part of an approved state implementation plan (SIP), affected parties that are concerned with the impacts of an opt-out would have the opportunity to comment on a state's revised plan that removes RFG as an air control measure.

At a state's request, the opt-out could be effective later than 90 days after approval of the petition or revised SIP.

In such a case, a state must indicate in its petition to the Agency the desired effective date for the opt-out. EPA recommends that a state consider an opt-out date which becomes effective on one of the RFG program's natural transition points. These natural transition points are identified as January 1, the start of the averaging season, and May 1 and September 15, the beginning and end, respectively, of the VOC control season. The Agency supports state efforts to accommodate these natural transition points.

#### G. Variations to Proposal

In the NPRM, EPA requested comments on two specific possible variations to the proposal in anticipation of interest in these options by outside parties:

(1) An area that reaches attainment of the ozone standard and is redesignated during the period of January 1, 1998, through December 31, 2003, would be allowed to submit an opt-out request to be approved by EPA using the same 90 day opt-out effective date applicable before December 31, 1997 (See 61 FR 35673, July 8, 1996). A petroleum association commented that it opposed this variation of allowing areas to opt out of the program if they redesignate to attainment. It specified that this variation would undercut, possibly negate, the opportunity for cost recovery, create investment uncertainties and instability that EPA is trying to avoid through this rulemaking, and is inconsistent with the rationale underlying the rest of the proposal. Most comments from industry agreed with the association's argument against the variation. One RFG supplier, however, commented that such a variation is important to state, local, and consumer involvement to have every incentive to reach attainment classification as soon as possible.

The EPA believes that this variation could jeopardize the intent of the rule and thus is not including it in the final rule. While the Agency agrees that states should have every incentive to reach attainment, EPA does not believe this variation provides an incentive great enough to outweigh the risk of undercutting the purpose of the rule. If some states have areas that are redesignated to attainment during the required participation period, their state implementation plans (SIP), if applicable, would need to be revised. Even if these processes were completed within the required period, it is likely that the state would need to remain RFG in its maintenance plan to remain in attainment. Thus this variation would not necessarily provide an additional

incentive to reach attainment of the ozone standard but instead would retain an element of market uncertainty which contradicts the purpose of the requirement.

(2) A similar participation period for areas first opting into the RFG program subsequent to December 31, 1999, requiring these areas to participate in Phase II of the program for at least four years from the date of their opt-in. This variation, referred to as a "rolling required period", would establish the effective date for the removal of an area from the program as January 1, 2004, or 90 days from the Agency's written notification approving the opt-out, or four years from the effective date of their opt-in, whichever date is later, for all opt-out requests received after January 1, 2000.

Several commenters supported a rolling period to avoid stranded investments. However, one supplier remarked that it may not be necessary to continue with a four year period beyond 2003. The EPA believes that with the information available today and with the uncertainty of the future, the Agency cannot conclude that there is a need for a rolling period to assure a continued cost-effective RFG program. The Agency did not receive a compelling argument or information to continue with a required period for new opt-in areas. The program which began in 1995 has remained very stable with only one new opt-in. If a few areas were to opt-in the future, they may well be located near a pipeline or appropriate infrastructure to meet the new demand without additional refinery investments. However, if new areas opt in remote locations or if there are numerous new areas, industry may need to make unanticipated investments which could impact the price of RFG. In this latter instance a rolling period may be necessary.

EPA believes that based on information available today there is not sufficient justification to include a rolling period in this final rule. However, since the Agency is committed to ensuring a cost-effective RFG program to achieve air quality goals, EPA will take any necessary action in the future if new information indicates a rolling period is warranted.

## II. Environmental Impact

If an area opts out of the RFG program, it will not receive the reductions in VOCs, oxides of nitrogen (NO<sub>x</sub>), and air toxics that are expected from this program. Instead, the areas would be subject to the federal controls on Reid vapor pressure for gasoline in the summertime, and would only

receive control of NOx and air toxics through the requirements of the conventional gasoline anti-dumping program. These latter requirements are designed to ensure that gasoline quality does not degrade from the levels found in 1990. These areas would be foregoing the air quality benefits obtained from the use of RFG.

In this final rule, EPA continues to recognize that states have the primary responsibility to develop the mix of control strategies needed to attain and maintain the NAAQS, and should have flexibility in determining the mix of control measures needed to meet their air pollution goals. However, the final rule also seeks to ensure through the required participation period that the potential for a state to decide to opt-out of Phase II of the RFG program does not cause adverse impacts on the market demand for Phase II RFG during the initial years of the program and thus maintains the cost-effectiveness of the RFG program. EPA expects that states will in fact act prudently in exercising their ability to opt-out under these rules. Any environmental impacts of opting out are, therefore, not expected to occur in isolation, but in a context of states exercising their responsibility and developing appropriate control strategies for their areas' air pollution goals.

### III. Executive Order 12866

Under Executive Order 12866,<sup>2</sup> the Agency must determine whether a regulation is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments of communities;

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

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.<sup>3</sup>

It has been determined that this rule is not a "significant regulatory action"

under the terms of Executive Order 12866 and is therefore not subject to OMB review.

### IV. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("UMRA"), P.L. 104-4, EPA must prepare a budgetary impact statement to accompany any general notice of final rulemaking or final rule that includes a Federal mandate which may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more. Under Section 205, for any rule subject to Section 202 EPA generally must select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Under Section 203, before establishing any regulatory requirements that may significantly or uniquely affect small governments, EPA must take steps to inform and advise small governments of the requirements and enable them to provide input.

EPA has determined that today's final rule does not trigger the requirements of UMRA. The rule does not include a Federal mandate that may result in estimated annual costs to State, local or tribal governments in the aggregate, or to the private sector, of \$100 million or more, and it does not establish regulatory requirements that may significantly or uniquely affect small governments.

### V. Economic Impact and Impact on Small Entities

The Administrator has determined that this rule will not have a significant impact on a substantial number of small entities. A regulatory flexibility analysis has therefore not been prepared. This final rule is not expected to result in any additional compliance cost to regulated parties and in fact is expected to decrease compliance costs and decrease costs to consumers in the affected areas by providing more certainty for regulated parties. This final rule imposes no new requirements on states.

With respect to the portion of today's action which requires participation until January 1, 2004, of opt-in areas unless they request to opt-out prior to January 1, 1998, today's final rule is not expected to result in any additional compliance cost to regulated parties. It does no more than maintain the status quo for those entities who have been supplying RFG to the RFG opt-in areas and imposes no additional requirements on parties that must comply with the RFG regulations.

With respect to the portion of today's final rule which would apply to opt-out requests applied for on or after January 1, 2004, the final rule is not expected to result in any additional compliance cost to regulated parties and in fact is expected to decrease compliance costs to those entities who previously supplied RFG to the area opting out. This rule also establishes a transition period which maximizes affected parties' ability to plan for smooth transition from the RFG program, minimizing disruption to the motor gasoline marketplace. This transition period is reasonably expected to allow parties to turn over existing stocks of RFG to conventional gasoline.

### VI. Paperwork Reduction Act

This action does not add any new requirements under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* The Office of Management and Budget (OMB) has approved the information collection requirements contained in the final FRG/anti-dumping rule and has assigned OMB control number 2060-0277 (EPA ICR No. 1591.03).

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

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

### VII. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted 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 General Accounting

<sup>2</sup> See 58 FR 51735 (October 4, 1993).

<sup>3</sup> *Id.* at section 3(f)(1)-(4).

Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

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

Environmental protection, Fuel additives, Gasoline, Imports, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: October 9, 1997.

**Carol M. Browner,**  
*Administrator.*

**Final Rulemaking**

Accordingly, 40 CFR part 80 is amended as follows:

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

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

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

2. Section 80.72 is amended by revising paragraphs (a) and (c) to read as follows:

**§ 80.72 Procedures for opting out of the covered areas.**

(a) In accordance with paragraph (b) of this section, the Administrator may approve a petition from a state asking for removal of any opt-in area, or portion of an opt-in area, from inclusion as a covered area under § 80.70. If the Administrator approves a petition, he or she shall set an effective date as provided in paragraph (c) of this section. The Administrator shall notify the state in writing of the Agency's action on the petition and the effective date of the removal when the petition is approved.

\* \* \* \* \*

(c)(1) For opt-out petitions received on or before December 31, 1997, except

as provided in paragraphs (c)(2) and (c)(3) of this section, the Administrator shall set an effective date for removal of an area under paragraph (a) of this section as requested by the Governor, but no less than 90 days from the Agency's written notification to the state approving the opt-out petition, and no later than December 31, 1999.

(2) For opt-out petitions received on or before December 31, 1997, except as provided in paragraph (c)(3) of this section, where RFG is contained as an element of any plan or plan revision that has been approved by the Agency, other than as a contingency measure consisting of a future opt-in, then the effective date under paragraph (a) of this section shall be the date requested by the Governor, but no less than 90 days from the effective date of Agency approval of a revision to the plan that removes RFG as a control measure.

(3)(i) The Administrator may extend the deadline for submitting opt-out petitions in paragraphs (c)(1) and (2) of this section for a state if:

(A) The Governor or his authorized representative requests an extension prior to December 31, 1997;

(B) The request indicates that there is active or pending legislation before the state legislature that was introduced prior to March 28, 1997;

(C) The legislation is concerning opting out of or remaining in the reformulated gasoline program; and

(D) The request demonstrates that the legislation cannot reasonably be acted upon prior to December 31, 1997.

(ii) The Administrator may extend the deadline until no later than May 31, 1998. If the deadline is extended, then opt-out requests from that state received during the extension shall be considered under the provisions of paragraphs (c)(1) and (2) of this section.

(4) For opt-out petitions received January 1, 1998 through December 31, 2003, except as provided in paragraph

(c)(5) of this section, the Administrator shall set an effective date for removal of an area under paragraph (a) of this section as requested by the Governor but no earlier than January 1, 2004 or 90 days from the Agency's written notification to the state approving the opt-out petition, whichever date is later.

(5) For opt-out petitions received January 1, 1998 through December 31, 2003, where RFG is contained as an element of any plan or plan revision that has been approved by the Agency, other than as a contingency measure consisting of a future opt-in, then the effective date for removal of an area under paragraph (a) of this section shall be the date requested by the Governor, but no earlier than January 1, 2004, or 90 days from the effective date of Agency approval of a revision to the plan that removes RFG as a control measure, whichever date is later.

(6) For opt-out petitions received on or after January 1, 2004, except as provided in paragraph (c)(7) of this section, the Administrator shall set an effective date for removal of an area as requested by the Governor, but no less than 90 days from the Agency's written notification to the state approving the opt-out petition.

(7) For opt-out petitions received on or after January 1, 2004, where RFG is contained as an element of any plan or plan revision that has been approved by the Agency, other than as a contingency measure consisting of a future opt-in, then the effective date for removal of an area under paragraph (a) of this section shall be the date requested by the Governor, but no less than 90 days from the effective date of Agency approval of a revision to the plan that removes RFG as a control measure.

\* \* \* \* \*