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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 80**

[EPA-HQ-OAR-2005-0170; FRL-8167-5]

**Regulation of Fuels and Fuel Additives: Removal of Reformulated Gasoline Oxygen Content Requirement**

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

**ACTION:** Final Rule.

**SUMMARY:** In the Energy Policy Act of 2005 (Energy Policy Act), Congress amended section 211(k) of the Clean Air Act (CAA) to remove the oxygen content requirement for reformulated gasoline (RFG). On February 22, 2006, EPA published a direct final rule to amend regulations to remove the oxygen content standard and associated compliance requirements from the RFG regulations. We stated in the direct final rule that if EPA received adverse comment, we would publish a timely withdrawal of the provisions on which

we received adverse comment and address the adverse comments in a subsequent final rule based on a parallel notice of proposed rulemaking also published on February 22, 2006. We received adverse comment on the amendments to remove the oxygen content standard in the direct final rule. As a result, in a separate action we are withdrawing those amendments from the direct final rule. This final action addresses the adverse comments we received and finalizes the removal of the oxygen content standard and associated compliance requirements from the RFG regulations.

**DATES:** This final rule is effective on May 5, 2006.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2005-0170. All documents in the docket are listed on the <http://www.regulations.gov> Web site. 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 form. Publicly available docket materials are

available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket is (202) 566-1742.

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

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

**A. Does This Action Apply to Me?**

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

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

<sup>a</sup>North American Industry Classification System (NAICS).  
<sup>b</sup>Standard Industrial Classification (SIC) system code.

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

*B. Outline of This Preamble*

- I. General Information
- II. Direct Final Rule/Notice of Proposed Rulemaking

- III. Response to Comments and Discussion
- IV. Conclusion
- V. Action
- VI. Statutory and Executive Order Reviews
- VII. Statutory Provisions and Legal Authority

**II. Direct Final Rule/Notice of Proposed Rulemaking**

In the Energy Policy Act, Congress amended section 211(k) of the CAA to remove the 2.0 weight percent oxygen content requirement for RFG.<sup>1</sup> Congress specified that the effective date for the removal of the oxygen content requirement in the CAA is 270 days from enactment of the Energy Policy Act for gasoline sold in all states except California.<sup>2</sup> To be consistent with the

current CAA section 211(k), on February 22, 2006, EPA published a direct final rule designed to remove the oxygen content standard and associated compliance requirements from the RFG regulations in 40 CFR part 80, effective on May 5, 2006 (270 days from enactment of the Energy Policy Act).<sup>3</sup> 71

Policy Act. In a direct final rule published on February 22, 2006, EPA removed the oxygen content requirement from the RFG regulations for California gasoline, effective April 24, 2006. 71 FR 8965. Thus, this rule does not address California requirements.

<sup>3</sup> The direct final rule also amended the regulations at 40 CFR part 80 to revise a prohibition against commingling ethanol-blended VOC-controlled RFG with non-ethanol-blended VOC-controlled RFG, and implemented a provision of the Energy Policy Act which allows retailers to commingle ethanol-blended RFG with non-ethanol-blended RFG under certain limited circumstances. Energy Policy Act of 2005, Public Law 109-58 (HR6), section 1513, 119 STAT 594, 1088-1090 (2005). We did not receive adverse comment on the

<sup>1</sup> Energy Policy Act of 2005, Public Law No. 109-58 (HR6), section 1504(a), 119 STAT 594, 1076-1077 (2005).

<sup>2</sup> Congress removed the oxygen content requirement in CAA section 211(k) for California gasoline effective upon enactment of the Energy

FR 8973. We stated in the direct final rule that if EPA received adverse comment, we would publish a timely withdrawal of the provisions on which we received adverse comment and address all public comments in a subsequent final rule based on a parallel notice of proposed rulemaking also published on February 22, 2006. We received adverse comment on the removal of the oxygen content standard in the direct final rule. As a result, in a separate action we are withdrawing those amendments from the direct final rule. This final action addresses the adverse comments we received and finalizes the amendments which remove the oxygen content standard and associated compliance requirements from the RFG regulations in 40 CFR part 80.

As discussed below, Congress considered the issue of lead-time regarding the transition to an RFG program that does not mandate an oxygen requirement, and specifically determined that 270 days from enactment of the Energy Policy Act provides an appropriate amount of lead-time. We believe it is appropriate to effect the removal of the oxygen content standard from the RFG regulations in a manner that is consistent with Congress' clear determination regarding lead-time. Therefore, this final rule is effective May 5, 2006. Although the Administrative Procedures Act generally requires that publication of a rule in the **Federal Register** take place thirty days before its effective date, this requirement is not applicable where, as here, a rule relieves a restriction.

### III. Response to Comments and Discussion

We received adverse comments on the direct final rule from three parties. Two of the parties stated that the removal of the RFG oxygen content requirement will result in the discontinued use of MTBE because refiners believe that the oxygen requirement provides a legal defense in leaking underground storage tank lawsuits involving MTBE. These commenters believe that refiners will attempt to replace MTBE with ethanol to meet the RFG performance standards, but argue that supplies of ethanol are inadequate to provide the volumes needed to replace MTBE in 2006. The commenters acknowledge that Congress eliminated the oxygen content requirement to provide refiners with greater flexibility to make RFG;

amendments to the commingling prohibition or on the retailer commingling provisions during the 30-day comment period. The effective date for those amendments and provisions is May 5, 2006.

nevertheless, they believe that an abrupt shift from MTBE-blended RFG to ethanol-blended RFG will cause a shortage in gasoline supplies, higher gasoline prices, and distribution problems relating to rail, barge and terminal availability. These commenters also believe that the removal of the oxygen content requirement will result in an increase in aggregate ozone-causing emissions, since, relative to MTBE-blended RFG, ethanol-blended RFG has a higher Reid Vapor Pressure causing VOC emissions to increase, and yields higher emissions of air toxics, NO<sub>x</sub> and VOC emissions associated with permeation. To mitigate the impacts of removing the oxygen content standard, these commenters urge EPA to issue a transition rule. The commenters suggest that in developing such a transition rule, EPA should examine the dynamics of gasoline production and assess any adverse impacts on gasoline supplies and cost, determine the feasibility of transporting increased quantities of ethanol and ascertain whether an adequate delivery infrastructure exists to prevent gasoline shortfalls, and quantify the effect of additional permeation emissions and take these into account. They believe that the transition rule should expressly preempt future state common law product defect claims regarding EPA-approved fuels or fuel additives and affirm that MTBE is not a defective product. They also believe that EPA should increase the RFG VOC reduction requirement to address backsliding that they believe will occur if MTBE-blended RFG is replaced with ethanol-blended RFG or non-oxygenated RFG. One of the commenters believes that EPA should include a VOC control season oxygen content standard under its CAA 211(c) authority.

EPA believes that it should revise the RFG regulations in a way that is consistent with Congress' decision in enacting the Energy Policy Act provisions to repeal the oxygenate requirement for RFG. During the course of its consideration and final action to approve the Energy Policy Act, Congress specifically determined that there should not be an oxygen content requirement in the RFG provisions in section 211(k) of the CAA, and determined how much lead-time should be provided for the transition to a program where the CAA did not mandate an oxygen content standard. In the legislative provisions it drafted and approved on this matter, Congress explicitly struck all oxygenate content requirements for RFG from the CAA and provided precise applicability dates for

the removal of this requirement in California and the rest of the United States. Given Congress' clear decision that the oxygen content mandate is removed from the RFG provisions in the CAA in California as of August 8, 2005 and in all other states as of May 5, 2006, EPA believes that it is appropriate to revise the RFG regulations in a manner that conforms to this specific decision by Congress. As discussed below, EPA does not believe that the current circumstances warrant any different course of action. In fact, it is notable that Congress had before it many of the issues involving MTBE that are raised by the commenters, yet it did not act to condition removal of the oxygenate requirement based on any finding or interpretation by EPA with respect to these matters.

With respect to comments received with regard to promulgation of a transition rule to mitigate the impacts of removing the oxygen content requirement, EPA adopted the RFG regulations, including the oxygen content requirement, in 1994. EPA noted that it was adopting the regulations pursuant to its authority under section 211(k) of the CAA, and explained that it was also appropriate to issue the regulations under section 211(c)'s general authority to regulate fuels and fuel additives. EPA issued the RFG rules under both parts of section 211 for a limited reason, so that the express preemption provision in section 211(c)(4)(A) would apply to the federal fuel program issued under section 211(k). See 59 FR 7716, 7809 (February 16, 1994). Now that Congress has amended section 211(k) to remove the oxygen content requirement, it is fully consistent with Congress' decision and with the reasoning of EPA's prior rulemaking to remove this requirement from the current RFG regulations.

We believe that delaying the removal of the oxygen content requirement from the RFG regulations and issuing a transition rule is likely to be more disruptive to the production and distribution of RFG than removal by May 5 of the oxygen requirement from the regulations. It is not likely to provide solutions to the concerns raised by commenters. First, because of the refiner liability concerns discussed above, and Congress' removal of the oxygen content requirement from section 211(k) of the CAA and related adoption of a renewable fuels mandate in the Energy Policy Act, the shift from MTBE-blended RFG to ethanol-blended RFG will likely occur regardless of when EPA removes the RFG oxygen content requirement from the regulations. It is therefore uncertain

whether there would be any significant difference in MTBE use even if EPA were to adopt a transition rule. In fact, major suppliers for months have been planning and investing in a transition away from MTBE and to ethanol before the 2006 summer driving season and they have in many, perhaps most cases, already completed that transition.<sup>4</sup> Second, some refiners and distributors have indicated that uncertainty is of the greatest concern to the RFG production and distribution industry, and have urged EPA to finalize the removal of the oxygen requirement from the regulations as soon as possible. These refiners and distributors believe that certainty regarding the effective date of the removal of the oxygen requirement is needed by refiners and distributors to minimize potential supply impacts. No refiners or other parties in the distribution system have indicated that the immediate removal of the oxygen requirement would cause additional supply or distribution problems, or would solve or reduce any difficulties in making the transition. Many assumed that Congress's May 5 date was a certain date for elimination of the oxygen content requirement.<sup>5</sup> A transitional delay in this program would create more uncertainty for those planning on May 5 as the certain date and could clearly disrupt potential plans for gasoline manufacturers who were considering the use of non-oxygenated RFG. EPA believes that, if anything, delaying the removal would disrupt the production and distribution of RFG and would not solve or alleviate any of the economic or supply concerns raised by commenters. Last, with regard to the commenters' air quality concerns, the removal of the oxygen content requirement from the regulations does not change any of the emissions performance standards that RFG must meet. To the extent the commenters are raising concerns about the underlying emissions performance standards for RFG, we believe that this

rulemaking is not the appropriate action in which to address these concerns. We intend to conduct a broad analysis of the impact of ethanol-blended gasoline on air quality in the context of a separate rulemaking to implement the renewable fuels mandate in the Energy Policy Act. In addition Congress mandated that within two years of enactment of the Energy Policy Act, that EPA conduct a study of the effects on public health related to substitutes (such as ethanol) for MTBE in gasoline. See amended CAA section 211(b)(4). EPA believes it is not appropriate to try to resolve the questions raised by commenters prior to the development of the information expected through these analyses, and that EPA should not delay removal of the oxygen content requirement for the reasons described above. For these reasons, we believe that the benefits of finalizing the removal of the oxygen requirement from the regulations and the likely adverse impact of a transition rule clearly outweigh the uncertain benefits of a transition rule.

A third commenter expressed concern that use of non-oxygenated RFG may result in increased air toxics and other harmful air pollutants. This commenter believes that the rule removing the oxygen content requirement should require non-oxygenated RFG to maintain the air quality benefits derived from the oxygen requirement. The commenter is particularly concerned that over-compliance with the air toxics standards may not be maintained with the introduction of non-oxygenated RFG.

First, we note that, although refiners will have the flexibility to produce RFG without oxygen, they nevertheless must meet all other standards and requirements for RFG, including the VOC, NO<sub>x</sub> and toxics emissions performance standards. In addition, the Mobile Source Air Toxics (MSAT) rule imposes baseline requirements designed to maintain 1998–2000 levels of over-

compliance with the toxics emissions performance standards.<sup>6</sup> We believe, and discussions with refiners confirm, that many, probably the vast majority of refiners and importers will continue to use oxygenates in order to meet these standards. In the Energy Policy Act, Congress considered the need for even more stringent controls on air toxics, and addressed this need by requiring EPA to revise the baseline years for toxics compliance.<sup>7</sup> Finally, EPA recently proposed additional controls on benzene and other air toxics, which we believe will meet or exceed the additional controls mandated by the Energy Policy Act.<sup>8</sup> We believe that these controls are appropriate and will ensure that there will be no loss in air quality benefits resulting from the removal of the RFG oxygen content requirement. In summary, first, Congress considered the need for increased toxics controls in association with other measures in the Energy Policy Act and EPA will defer to the decisions made by Congress and, second, EPA has already proposed other methods of controlling toxics under its authority in section 211 of the Clean Air Act.

**IV. Conclusion**

EPA concludes that it is appropriate to remove the oxygen content requirement from the RFG regulations at this time. This is consistent with Congress' recent decision on this issue, and a delay in making this change to the RFG regulations would not be appropriate under current circumstances.

**V. Action**

This action finalizes, as proposed, the amendments to 40 CFR part 80 which remove the oxygen content standard and associated compliance requirements from the RFG regulations. The affected sections are listed in the following table:<sup>9</sup>

§ 80.2(ii) .....	Removes oxygen in the definition of "reformulated gasoline credit." With the removal of the oxygen standard, there is no basis for the generation of oxygen credits.
§ 80.41(e) and (f) <sup>10</sup> .....	Removes the per-gallon and averaged oxygen standards for Phase II Complex Model RFG.
§ 80.41(o) .....	Removes the provisions relating to oxygen survey failures. With the removal of the oxygen standard, oxygen surveys will no longer be needed.
§ 80.41(q) .....	Removes reference to § 80.41(o). Also removes reference to oxygenate blenders since oxygenate blenders were subject only to adjusted standards in the case of an oxygen survey failure and not any other survey failure.

<sup>4</sup>Memorandum to Docket from Chris McKenna (April 24, 2006); Energy Information Administration, "Eliminating MTBE in Gasoline in 2006" (February 22, 2006).

<sup>5</sup>Letter to William Wehrum, USEPA, from Edward Murphy, American Petroleum Institute, Bob Slaughter, National Petrochemical and Refiners Association, Gregory M. Scott, Society of

Independent Gasoline Marketers Association, John Eichberger, National Association of Convenience Stores, Joe Sparano, Western Petroleum Association, dated December 9, 2005.

<sup>6</sup>66 FR 17230 (March 29, 2001).

<sup>7</sup>Energy Policy Act of 2005, Public Law No. 109–58 (HR6), § 1504(b), 119 STAT, 1077–1078 (2005).

<sup>8</sup>71 FR 15804 (March 29, 2006).

<sup>9</sup>This final action also lifts a stay, previously published on November 28, 1994 (59 FR 60715), which was in effect regarding § 80.65(d)(2)(vi) and § 80.129(a), (d)(3)(iii), (d)(3)(iv), and (d)(3)(v). The stay is no longer appropriate in light of today's amendments to these sections.

§ 80.65 heading .....	Removes oxygenate blenders from the heading since oxygenate blenders were only responsible for demonstrating compliance with the oxygen standard which has been removed.
§ 80.65(c) .....	Removes requirements relating to compliance with the oxygen standard which have been removed.
§ 80.65(d) .....	Removes the designation requirement relating to oxygen content, removes the RBOB designation categories of "any oxygenate" and "ether only," and adds a requirement for RBOB to be designated regarding the type and amount of oxygenate required to be added.
§ 80.65(h) .....	Removes the requirement for oxygenate blenders to comply with the audit requirements under subpart F since they will no longer be required to demonstrate compliance with the oxygen standard.
§ 80.67(a) .....	Removes the option to comply with the oxygen standard on average for oxygenate blenders since there no longer is an oxygen standard. Also removes provisions for refiners and importers to use gasoline that exceeds the average standard for oxygen to offset gasoline which does not achieve the average standard for oxygen.
§ 80.67(b) .....	Removes requirements relating to oxygenate blenders who meet the oxygen standard on average, since there no longer is an oxygen standard.
§ 80.67(f) .....	Removes requirements relating to compliance with the oxygen standard on average since there no longer is an oxygen standard.
§ 80.67(g) .....	Removes requirements relating to compliance calculations for meeting the oxygen standard on average, since there no longer is an oxygen standard. Also removes requirements relating to the generation and use of oxygen credits. Specifies two compliance calculation options for average oxygen content for 2006.
§ 80.67(h) .....	Removes requirements relating to the transfer of oxygen credits.
§ 80.68(a) and (b) .....	Removes references to oxygenate blenders since, with the removal of the requirement for oxygen survey, they are no longer subject to survey requirements. Also removes reference to oxygen regarding consequences of a failure to conduct a required survey.
§ 80.68(c) .....	Removes general survey requirements relating to oxygen surveys.
§ 80.73 .....	Clarifies the applicability of this section to oxygenate blenders.
§ 80.74(c) .....	Removes recordkeeping requirements for oxygenate blenders who comply with the oxygen standard on average, since they no longer will be required to demonstrate compliance with an oxygen standard. Also removes reference to "types" of credits, since there now is only one type of credit ( <i>i.e.</i> , benzene.)
§ 80.74(d) .....	Revises this paragraph to clarify recordkeeping requirements for oxygenate blenders.
§ 80.75 heading and paragraph (a) .....	Removes reporting requirements for oxygenate blenders since they no longer will be required to demonstrate compliance with an oxygen standard.
§ 80.75(f) .....	Removes requirement for submitting oxygen averaging reports since there no longer is a requirement to comply with the oxygen standard.
§ 80.75(h) .....	Removes credit transfer report requirements for oxygen credits, since oxygen credits will no longer be generated.
§ 80.75(i) .....	Removes requirement for oxygenate blenders to submit a report identifying each covered area that was supplied with averaged RFG, since they no longer will be required to demonstrate compliance with an oxygen standard.
§ 80.75(l) .....	Removes reporting requirement for oxygenate blenders who comply with the oxygen standard on a per-gallon basis, since they are no longer required to demonstrate compliance with an oxygen standard.
§ 80.75(m) .....	Removes requirement for oxygenate blenders to submit a report of the audit required under § 80.65(h), since oxygenate blenders will no longer be required to comply with the audit requirement.
§ 80.75(n) .....	Removes requirement for oxygenate blenders to have reports signed and certified, since they no longer will be required to submit reports under this section.
§ 80.76(a) .....	Clarifies registration requirements for oxygenate blenders.
§ 80.77(g) .....	Removes product transfer documentation requirement for oxygen content.
§ 80.77(i) .....	Removes requirement for RBOB to be identified on product transfer documents as suitable for blending with "any-oxygenate," "ether-only," since these categories have been removed.
§ 80.78(a) .....	Removes the prohibition against producing and marketing RFG that does not meet the oxygen minimum standard since the oxygen standard has been removed. Also removes requirements to meet the oxygen minimum standard during transition from RBOB to RFG in a storage tank. (Today's rule also removes the provision in § 80.78(a)(1) regarding compliance with the maximum oxygen standard in § 80.41 for simple model RFG. See footnote 3.)
§ 80.79 .....	Removes quality assurance requirement to test for compliance with the oxygen standard.
§ 80.81(b) .....	Removes exemptions for California gasoline survey and independent analysis requirements for oxygenate blenders since they are no longer subject to these requirements.
§ 80.125(a), (c) and (d) .....	Removes attest engagement auditor requirements for (c) and (d) oxygenate blenders, since they are no longer required to conduct attest engagement audits.
§ 80.126(b) .....	Revises attest engagement definition of credit trading records to remove reference to oxygen credits.
§ 80.128(e) .....	Removes reference to RBOB designations of "any-oxygenate" and "ether-only" with regard to refiner and importer contracts with downstream oxygenate blenders, since these designations have been removed from the regulations.
§ 80.129 .....	Removes and reserves this section which provided for alternative attest engagement procedures for oxygenate blenders, since they are no longer required to conduct attest audits.
§ 80.130(a) .....	Removes requirement for a certified public accountant or an internal auditor certified by the Institute of Internal Auditors, Inc. to issue an attest engagement report to blenders, since they are no longer required to conduct attest audits. Removes requirement for blenders to provide a copy of the auditor's report to EPA.

§ 80.133(h) .....	Removes references to “any-oxygenate” and “ether-only” RBOB under § 80.69(a)(8) since this section has been removed.
§ 80.134 .....	Removes this section which provides attest procedures for oxygenate blenders since they are no longer required to conduct attest audits.

Today’s rule also modifies the provisions for downstream oxygenate blending in § 80.69. Under the current regulations, some refiners and importers produce or import a product called “reformulated gasoline blendstock for oxygenate blending,” or RBOB, which is gasoline that becomes RFG upon the addition of an oxygenate. The refiner or importer of the RBOB determines the type(s) and amount (or range of amounts) of oxygenate that must be added to the RBOB. The RBOB is then transported to an oxygenate blender downstream from the refiner or importer who adds the type and amount of oxygenate designated for the RBOB by the refiner or importer. The RBOB refiner or importer includes the designated amount of oxygenate in its emissions performance compliance calculations for the RBOB; however, it is the oxygenate blender who actually adds the oxygenate to the RBOB to comply with the 2.0 weight percent oxygen standard for the RFG that is produced by blending oxygenate into the RBOB. The regulations require oxygenate blenders to conduct testing for oxygen content to ensure that each batch of RFG complies with the oxygen standard. With the removal of the oxygen standard, the current requirement for oxygenate blenders to conduct testing to ensure compliance with the oxygen standard will no longer be necessary. Accordingly, the provisions for oxygenate blenders in § 80.69 have been modified to remove the requirement for oxygenate blenders to test RFG for compliance with the oxygen standard.

Although there will no longer be an oxygen content requirement for RFG, we believe that many refiners and importers will want to continue to include oxygenate blended downstream in their emissions performance compliance calculations. As a result, the category of RBOB is being retained and RBOB refiners and importers will continue to be required to comply with the contract and quality assurance (QA) oversight

<sup>10</sup> The regulations also include oxygen minimum standards for simple model RFG and Phase I complex Model RFG, and an oxygen maximum standard for simple model RFG. See §§ 80.41(a) through (d), and (g). These standards are no longer in effect and today’s rule does not modify the regulations to remove these standards or compliance requirements relating to these standards, except where such requirements are included in provisions requiring other changes in today’s rule.

requirements in § 80.69.<sup>11</sup> Because oxygenate blenders will no longer be conducting testing to ensure compliance with the oxygen standard, we believe that RBOB refiner or importer compliance with the contract and QA oversight requirements will be necessary for RBOB designated to be blended with any amount of oxygenate, including an amount of oxygenate that would result in RFG containing 2.0 weight percent (or less) oxygen. As a result, the generic categories of oxygenate in § 80.69(a)(8) are eliminated by today’s rule and RBOB refiners and importers will be required to comply with the contract and QA oversight requirements in § 80.69 for any RBOB produced or imported. This approach is consistent with the oversight requirements in § 80.101(d)(4) for refiners and importers of conventional gasoline who wish to include oxygen added downstream from the refinery or importer in anti-dumping emissions compliance calculations.

Although oxygenate blenders will no longer be subject to the oxygen standard and associated testing requirements, we believe that the current requirements for oxygenate blenders to be registered with EPA, to add the specific type(s) and amount (or range of amounts) of oxygenate designated for the RBOB, and to maintain records of their blending operation continue to be necessary in order to ensure compliance with, and facilitate enforcement of, the emissions performance standards for the RFG produced by blending oxygenate with RBOB downstream. As a result, these oxygenate blender requirements are being retained.

The effective date for the removal of the oxygen requirement will occur during 2006. As a result, refiners,

<sup>11</sup> EPA intends to promulgate a rule which will allow RBOB refiners and importers to use an alternative method of quality assurance (QA) oversight of downstream oxygenate blenders in lieu of the contract and QA requirements in §§ 80.69(a)(6) and (a)(7). This alternative method consists of a QA sampling and testing survey program carried out by an independent surveyor pursuant to a survey plan approved by EPA. EPA is currently allowing use of this alternative QA method under a grant of enforcement discretion that is scheduled to expire when the rule is promulgated, or December 31, 2007, whichever is earlier. See Letter to Edward H. Murphy, Downstream General Manager, American Petroleum Institute, dated December 22, 2005, from Grant Y. Nakayama, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency.

importers and oxygenate blenders will be subject to the oxygen standard for the months in 2006 prior to the effective date of this rule. The current regulations allow parties to demonstrate compliance either on a per-gallon basis or on an annual average basis. Since the oxygen content standard is being removed during an annual averaging period, EPA has modified the regulations to reflect this change and to clarify how parties would demonstrate compliance with the average oxygen content standard for 2006. Parties may demonstrate compliance based on the average oxygen content of RFG during the months prior to the effective date for the removal of the oxygen content requirement. In addition, any refiner, importer or oxygenate blender may demonstrate compliance based on all of the oxygenated RFG it produces or imports during 2006. This means a refiner or importer has two options to show compliance with the average oxygen content standard for 2006. The first option looks only at the RFG produced or imported from January 1, 2006 through the effective date of this rule. During this time period, the per-gallon minimum was in place for RFG, so all of the RFG would have been oxygenated. The refiner or importer would be in compliance if they could show that they meet the 2.1% average standard based on the volume and oxygen content of all of the RFG produced or imported during this time period. The second option looks at the RFG produced or imported from January 1, 2006 through December 31, 2006. Since there is no per gallon minimum for oxygen content starting from the effective date of this rule, some but not necessarily all of the RFG produced during the year would have been oxygenated. The refiner or importer would be in compliance if they could show that they meet the 2.1% average standard based on the RFG volume and oxygen content of all of the oxygenated RFG produced or imported during this time period, *i.e.*, the entire year. Any non-oxygenated RFG produced or imported after the effective date of the rule may be excluded from compliance calculations.

## VI. Statutory and Executive Order Reviews

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

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this direct final rule does not satisfy the criteria stated above. As a result, this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review. Today's final rule removes certain requirements applicable to refiners, importers and oxygenate blenders of RFG. As such this rule is expected to reduce overall compliance costs for all refiners, importers and oxygenate blenders.

### B. Paperwork Reduction Act

This action does not impose any new information collection burden. This rule will have the effect of reducing the burdens on certain regulated parties under the reformulated gasoline regulations. All parties currently subject to the requirement to submit an annual oxygen averaging report will no longer be required to submit such report. Oxygenate blenders currently subject to the following requirements will no longer be subject to these requirements and associated burdens: RFG batch reports, RFG annual reports, RFG survey reports, and RFG attest engagement reports. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 80 under the provisions of the Paperwork Reduction Act, 44 U.S.C.

3501 *et seq.* and has assigned OMB control number 2060-0277, EPA ICR number 1591. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566-1672.

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

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

### C. Regulatory Flexibility Act

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this rule.

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

After considering the economic impacts of today's rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to

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

This final rule removes certain requirements applicable to all refiners, importers and oxygenate blenders of RFG, including small business refiners, importers and oxygenate blenders. Specifically, this rule removes the burden on refiners, importers and oxygenate blenders to comply with the RFG oxygen requirement and associated compliance requirements. Although in certain situations some refiners and importers, including some small refiners and importers, may be required to conduct some additional oversight of oxygenate blenders, we believe that the burden of any additional oversight will be of minor significance compared to the relief from the burden of complying with the oxygen requirement. We have therefore concluded that today's final rule will relieve regulatory burden for all small entities subject to the RFG regulations.

### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes

any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or tribal governments or the private sector that will result in expenditures of \$100 million or more. This rule affects gasoline refiners, importers and oxygenate blenders by removing the oxygen content requirement for RFG and associated compliance requirements. As a result, this rule will have the overall effect of reducing the burden of the RFG regulations on these regulated parties. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

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

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

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule removes the oxygen standard for RFG. The requirements of the rule will be enforced by the Federal government at the national level. Thus, Executive Order 13132 does not apply to this rule.

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

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

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

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

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

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under the Order has the potential to influence the regulation. This final rule

is not subject to Executive Order 13045 because it is not economically significant and does not establish an environmental standard intended to mitigate health or safety risks.

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

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

#### *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 final rule does not establish new technical standards within the meaning of the NTTAA. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

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

K. Clean Air Act Section 307(d)

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

VII. Statutory Provisions and Legal Authority

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

List of Subjects in 40 CFR Part 80

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

Dated: May 2, 2006. Stephen L. Johnson, Administrator.

40 CFR part 80 is amended as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

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

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

2. The stay on § 80.65(d)(2)(vi) and § 80.129(a), (d)(3)(iii), (d)(3)(iv), and (d)(3)(v), published on November 28, 1994 (59 FR 60715) is lifted.

Subpart A—[Amended]

3. Section 80.2 is amended by revising paragraph (ii) to read as follows:

§ 80.2 Definitions.

\* \* \* \* \*

(ii) Reformulated gasoline credit means the unit of measure for the paper transfer of benzene content resulting from reformulated gasoline which contains less than 0.95 volume percent benzene.

\* \* \* \* \*

Subpart D—[Amended]

4. Section 80.41 is amended by:

a. In the table in paragraph (e), removing the entry "Oxygen content (percent, by weight) (does not apply to gasoline subject to the provisions in § 80.81) \* \* \* ≥2.0 ;"

b. In the table in paragraph (f), removing the entry "Oxygen content (percent by weight) (does not apply to gasoline subject to the provisions in § 80.81): Standard \* \* \* ≥2.1 Per-Gallon Minimum ≥1.5"

b. Removing and reserving paragraph (o); and

c. Revising paragraph (q) heading and introductory text and (q)(1) to read as follows:

§ 80.41 Standards and requirements for compliance.

\* \* \* \* \*

(o) [Reserved]

\* \* \* \* \*

(q) Refineries and importers subject to adjusted standards. Standards for average compliance that are adjusted to be more or less stringent by operation of paragraphs (k), (l) (m) or (n) of this section apply to average reformulated gasoline produced at each refinery or imported by each importer as follows:

(1) Adjusted standards for a covered area apply to averaged reformulated gasoline that is produced at a refinery if:

(i) Any averaged reformulated gasoline from that refinery supplied the covered area during any year a survey was conducted which gave rise to a standards adjustment; or

(ii) Any averaged reformulated gasoline from that refinery supplies the covered area during any year that the standards are more stringent than the initial standards; unless

(iii) The refiner is able to show that the volume of averaged reformulated gasoline from a refinery that supplied the covered area during any years under paragraphs (q)(1)(i) or (ii) of this section was less than one percent of the reformulated gasoline produced at the refinery during that year, or 100,000 barrels, whichever is less.

\* \* \* \* \*

5. Section 80.65 is amended by:

- a. Revising the heading;
b. Revising paragraphs (c)(1)(ii) and (c)(3), removing paragraph (c)(1)(iii) and removing and reserving paragraph (c)(2);
c. Removing and reserving (d)(2)(v)(D); revising paragraph (d)(2)(vi) and (d)(3); and
d. Revising paragraph (h) to read as follows:

§ 80.65 General requirements for refiners and importers.

\* \* \* \* \*

(c) \* \* \*
(1) \* \* \*

(ii) Those standards and requirements it designated under paragraph (d) of this section for average compliance on an average basis over the applicable averaging period.

(2) [Reserved]

(3)(i) For each averaging period, and separately for each parameter that may be met either per-gallon or on average, any refiner shall designate for each refinery, or any importer shall designate its gasoline or RBOB as being subject to the standard applicable to that parameter on either a per-gallon or average basis. For any specific averaging period and parameter all batches of gasoline or RBOB shall be designated as being subject to the per-gallon standard, or all batches of gasoline and RBOB shall be designated as being subject to the average standard. For any specific averaging period and parameter a refiner for a refinery, or any importer may not designate certain batches as being subject to the per-gallon standard and others as being subject to the average standard.

(ii) In the event any refiner for a refinery, or any importer fails to meet



the requirements of paragraph (c)(3)(i) of this section and for a specific averaging period and parameter designates certain batches as being subject to the per-gallon standard and others as being subject to the average, all batches produced or imported during the averaging period that were designated as being subject to the average standard shall, *ab initio*, be redesignated as being subject to the per-gallon standard. This redesignation shall apply regardless of whether the batches in question met or failed to meet the per-gallon standard for the parameter in question.

(d) \* \* \*

(2) \* \* \*

(v) \* \* \*

(D) [Reserved]

\* \* \* \* \*

(vi) In the case of RBOB, the gasoline must be designated as RBOB and the designation must include the type(s) and amount(s) of oxygenate required to be blended with the RBOB.

(3) Every batch of reformulated or conventional gasoline or RBOB produced or imported at each refinery or import facility shall be assigned a number (the "batch number"), consisting of the EPA-assigned refiner or importer registration number, the EPA facility registration number, the last two digits of the year in which the batch was produced, and a unique number for the batch, beginning with the number one for the first batch produced or imported each calendar year and each subsequent batch during the calendar year being assigned the next sequential number (e.g., 4321-54321-95-000001, 4321-543321-95-000002, etc.)

\* \* \* \* \*

(h) *Compliance audits.* Any refiner and importer of any reformulated gasoline or RBOB shall have the reformulated gasoline and RBOB it produced or imported during each calendar year audited for compliance with the requirements of this subpart D, in accordance with the requirements of subpart F, at the conclusion of each calendar year.

\* \* \* \* \*

- 6. Section 80.67 is amended by:
  - a. Revising paragraphs (a)(1) and (a)(2)(i)(A);
  - b. Removing and reserving paragraph (b)(3);
  - c. Removing and reserving paragraph (f);
  - d. Revising paragraphs (g) introductory text, (g)(3), (g)(5) introductory text, (g)(6) introductory text, removing and reserving paragraphs (g)(5)(i) and (g)(6)(i); adding paragraph (g)(7); and
  - e. Revising paragraphs (h)(1) introductory text, (h)(1)(iv), (h)(1)(v) and

(h)(3)(ii), and removing paragraphs (h)(1)(vi), (h)(1)(vii) and (h)(1)(viii), to read as follows:

#### § 80.67 Compliance on average

\* \* \* \* \*

(a) \* \* \*

(1) Any refiner or importer that complies with the compliance survey requirements of § 80.68 has the option of meeting the standards specified in § 80.41 for average compliance in addition to the option of meeting the standards specified in § 80.41 for per-gallon compliance; any refiner or importer that does not comply with the survey requirements must meet the standards specified in § 80.41 for per-gallon compliance, and does not have the option of meeting standards on average.

(2)(i)(A) A refiner or importer that produces or imports reformulated gasoline that exceeds the average standard for benzene (but not for other parameters that have average standards) may use such gasoline to offset reformulated gasoline which does not achieve this average standard, but only if the reformulated gasoline that does not achieve this average standard is sold to ultimate consumers in the same covered area as was the reformulated gasoline which exceeds the average standard; provided that:

\* \* \* \* \*

(b) \* \* \*

(3) [Reserved]

\* \* \* \* \*

(f) [Reserved]

(g) *Compliance calculation.* To determine compliance with the averaged standards in § 80.41, any refiner for each of its refineries at which averaged reformulated gasoline or RBOB is produced, and any importer that imports averaged reformulated gasoline or RBOB shall, for each averaging period and for each portion of gasoline for which standards must be separately achieved, and for each relevant standard, calculate:

\* \* \* \* \*

(3) For the VOC, NO<sub>x</sub>, and toxics emissions performance standards, the actual totals must be equal to or greater than the compliance totals to achieve compliance.

\* \* \* \* \*

(5) If the actual total for the benzene standard is greater than the compliance total, credits for this parameter must be obtained from another refiner or importer in order to achieve compliance:

(i) [Reserved]

\* \* \* \* \*

(6) If the actual total for the benzene standard is less than the compliance totals, credits for this parameter are generated.

(i) [Reserved]

\* \* \* \* \*

(7) In 2006 only, compliance with the oxygen standards in § 80.41 may be based on the volume and oxygen content of all reformulated gasoline produced or imported during the period January 1, 2006, through May 5, 2006 or the volume and oxygen content of all oxygenated reformulated gasoline produced or imported during the 2006 annual averaging period (January 1 through December 31).

(h) \* \* \*

(1) Compliance with the averaged standards specified in § 80.41 for benzene (but for no other standards or requirements) may be achieved through the transfer of benzene credits provided that:

\* \* \* \* \*

(iv) The credits are transferred, either through inter-company or intra-company transfers, directly from the refiner or importer that creates the credits to the refiner or importer that uses the credits to achieve compliance; and

(v) Benzene credits are not used to achieve compliance with the maximum benzene content standards in § 80.41.

\* \* \* \* \*

(3) \* \* \*

(ii) No refiner or importer may create, report, or transfer improperly created credits; and

\* \* \* \* \*

■ 7. Section 80.68 is amended by revising paragraphs (a) introductory text, (a)(3), (b) introductory text, (b)(4)(i), (b)(4)(ii), (c)(3), (c)(4)(i), and (c)(13)(v)(L), and removing and reserving paragraph (c)(12) to read as follows:

#### § 80.68 Compliance surveys.

(a) *Compliance survey option 1.* In order to satisfy the compliance survey requirements, any refiner or importer shall properly conduct a program of compliance surveys in accordance with a survey program plan which has been approved by the Administrator of EPA in each covered area which is supplied with any gasoline for which compliance is achieved on average that is produced by that refinery or imported by that importer. Such approval shall be based upon the survey program plan meeting the following criteria:

\* \* \* \* \*

(3) In the event that any refiner or importer fails to properly carry out an approved survey program, the refiner or

importer shall achieve compliance with all applicable standards on a per-gallon basis for the calendar year in which the failure occurs, and may not achieve compliance with any standard on an average basis during this calendar year. This requirement to achieve compliance per-gallon shall apply *ab initio* to the beginning of any calendar year in which the failure occurs, regardless of when during the year the failure occurs.

(b) *Compliance survey option 2.* A refiner or importer shall be deemed to have satisfied the compliance survey requirements described in paragraph (a) of this section if a comprehensive program of surveys is properly conducted in accordance with a survey program plan which has been approved by the Administrator of EPA. Such approval shall be based upon the survey program plan meeting the following criteria:

\* \* \* \* \*

(4) \* \* \*

(i) Each refiner or importer who supplied any reformulated gasoline or RBOB to the covered area and who has not satisfied the survey requirements described in paragraph (a) of this section shall be deemed to have failed to carry out an approved survey program; and

(ii) The covered area will be deemed to have failed surveys for VOC and NO<sub>x</sub> emissions performance, and survey series for benzene and toxic and NO<sub>x</sub> emissions performance.

(c) \* \* \*

(3)(i) A VOC survey and a NO<sub>x</sub> survey shall consist of any survey conducted during the period June 1 through September 15;

(ii) A sample of gasoline taken at a retail outlet or wholesale purchaser-consumer facility that has within the past 30 days commingled ethanol blended reformulated gasoline with non-ethanol blended reformulated gasoline in accordance with the provisions in § 80.78(a)(8) shall not be used in a VOC survey required under this section.

(4)(i) A toxics and benzene survey series shall consist of all surveys conducted in a single covered area during a single calendar year.

\* \* \* \* \*

(12) [Reserved]

(13) \* \* \*

(v) \* \* \*

(L) The average toxics emissions reduction percentage for simple model samples and the percentage for complex model samples, the average benzene percentage, and for each survey conducted during the period June 1 through September 15, the average VOC

emissions reduction percentage for simple model samples and the percentage for complex model samples, and the average NO<sub>x</sub> emissions reduction percentage for all complex model samples;

\* \* \* \* \*

■ 8. Section 80.69 is amended by:

■ a. Revising paragraphs (a)(6)(ii) and (iii), (a)(10) introductory text, removing and reserving paragraphs (a)(8) and (a)(9), and removing paragraph (a)(6)(iv);

■ b. Revising paragraph (b);

■ c. Removing and reserving paragraph (c);

■ d. Revising paragraph (d); and

■ e. Revising paragraph (e), to read as follows:

**§ 80.69 Requirements for downstream oxygenate blending.**

\* \* \* \* \*

(a) \* \* \*

(6) \* \* \*

(ii) Allow the refiner or importer to conduct the quality assurance sampling and testing required under this paragraph (a); and

(iii) Stop selling any gasoline found not to comply with the standards under which the RBOB was produced or imported.

\* \* \* \* \*

(8) [Reserved]

(9) [Reserved]

(10) Specify in the product transfer documentation for the RBOB each oxygenate type or types and amount or range of amounts which, if blended with the RBOB will result in reformulated gasoline which:

\* \* \* \* \*

(b) *Requirements for oxygenate blenders.* For all RBOB received by any oxygenate blender, the oxygenate blender shall:

(1) Add oxygenate of the type(s) and amount (or within the range of amounts) specified in the product transfer documents for the RBOB; and

(2) Meet the recordkeeping requirements specified in § 80.74.

(c) [Reserved]

(d) *Requirements for distributors dispensing RBOB into trucks for blending.* Any distributor who dispenses any RBOB into any truck which delivers gasoline to retail outlets or wholesale purchase-consumer facilities, shall for such RBOB so dispensed:

(1) Transfer the RBOB only to an oxygenate blender who has registered with the Administrator or EPA as such; and

(2) Obtain from the oxygenate blender the oxygenate blender's EPA registration number.

(e) *Additional requirements for oxygenate blenders who blend oxygenate in trucks.* Any oxygenate blender who obtains any RBOB in any gasoline delivery truck shall on each occasion it obtains RBOB from a distributor, supply the distributor with the oxygenate blender's EPA registration number.

■ 9. Section 80.73 is amended by revising the introductory text to read as follows:

**§ 80.73 Inability to produce conforming gasoline in extraordinary circumstances.**

In appropriate extreme and unusual circumstances (e.g., natural disaster or Act of God) which are clearly outside the control of the refiner, importer, or oxygenate blender and which could not have been avoided by the exercise of prudence, diligence, and due care, EPA may permit a refiner, importer, or oxygenate blender, for a brief period, to distribute gasoline which does not meet the requirements for reformulated gasoline, or does not contain the type(s) and amount(s) of oxygenate required under § 80.69(b)(1), if:

\* \* \* \* \*

■ 10. Section 80.74 is amended by revising paragraph (c) introductory text, (c)(2), and (d) introductory text to read as follows:

**§ 80.74 Recordkeeping requirements.**

\* \* \* \* \*

(c) *Refiners and importers of averaged gasoline.* In addition to other requirements of this section, any refiner or importer who produces or imports any reformulated gasoline for which compliance with one or more applicable standard is determined on an average shall maintain records containing the following information:

\* \* \* \* \*

(2) For any credits bought, sold, traded or transferred pursuant to § 80.67(h), the dates of the transactions, the names and EPA registration numbers of the parties involved, and the number of credits transferred.

(d) *Oxygenate blenders.* Any oxygenate blender who blends any oxygenate with any RBOB shall, for each occasion such blending occurs, maintain records containing the following:

\* \* \* \* \*

■ 11. Section 80.75 is amended as follows:

■ a. By revising the introductory text;

■ b. By revising paragraph (a) introductory text and removing and reserving paragraph (a)(2);

■ c. By removing and reserving paragraph (f); and

■ d. By revising paragraphs (h), (i), (l), (m), and (n)(2).

The revisions read as follows:

**§ 80.75 Reporting requirements.**

Any refiner or importer shall report as specified in this section, and shall report such other information as the Administrator may require.

(a) *Quarterly reports for reformulated gasoline.* Any refiner or importer that produces or imports any reformulated gasoline or RBOB shall submit quarterly reports to the Administrator for each refinery at which such reformulated gasoline or RBOB was produced and for all such reformulated gasoline or RBOB imported by each importer.

\* \* \* \* \*

(2) \* \* \*

(vii) [Reserved]

\* \* \* \* \*

(f) [Reserved]

\* \* \* \* \*

(h) *Credit transfer reports.* As an additional part of the fourth quarterly report required by this section, any refiner or importer shall, for each refinery or importer, supply the following information for any benzene credits that are transferred from or to another refinery or importer:

(1) The names, EPA-assigned registration numbers and facility identification numbers of the transferor and transferee of the credits;

(2) The number(s) of credits that were transferred; and

(3) The date(s) of the transaction(s).

(i) *Covered areas of gasoline use report.* Any refiner that produced any reformulated gasoline that was to meet any reformulated gasoline standard on average (“averaged reformulated gasoline”) shall, for each refinery at which such averaged reformulated gasoline was produced submit to the Administrator, with the fourth quarterly report, a report that contains the identity of each covered area that was supplied with any averaged reformulated gasoline produced at each refinery during the previous year.

\* \* \* \* \*

(l) *Reports for per-gallon compliance gasoline.* In the case of reformulated gasoline or RBOB for which compliance with each of the standards set forth in § 80.41 is achieved on a per-gallon basis, the refiner or importer shall submit to the Administrator, by the last day of February of each year beginning in 1996, a report of the volume of each designated reformulated gasoline or RBOB produced or imported during the previous calendar year for which compliance is achieved on a per-gallon basis, and a statement that each gallon

of this reformulated gasoline or RBOB met the applicable standards.

(m) *Reports of compliance audits.*

Any refiner or importer shall cause to be submitted to the Administrator, by May 31 of each year, the report of the compliance audit required by § 80.65(h).

(n) \* \* \*

(2) Signed and certified as correct by the owner or a responsible corporate officer of the refiner or importer.

\* \* \* \* \*

■ 12. Section 80.76 is amended by revising paragraph (a) to read as follows:

**§ 80.76 Registration of refiners, importers or oxygenate blenders.**

(a) Registration with the Administrator of EPA is required for any refiner and importer that produces or imports any reformulated gasoline or RBOB, and any oxygenate blender that blends oxygenate into RBOB.

\* \* \* \* \*

■ 13. Section 80.77 is amended by removing and reserving paragraph (g)(2)(ii) and revising paragraph (i)(2) to read as follows:

**§ 80.77 Product transfer documentation.**

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \*

(ii) [Reserved]

\* \* \* \* \*

(i) \* \* \*

(2) The oxygenate type(s) and amount(s) that are intended for blending with the RBOB;

\* \* \* \* \*

■ 14. Section 80.78 is amended by removing and reserving paragraph (a)(1)(ii) and revising paragraph (a)(11)(iv) to read as follows:

**§ 80.78 Controls and prohibitions on reformulated gasoline.**

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(ii) [Reserved]

\* \* \* \* \*

(11) \* \* \*

(iv) When transitioning from RBOB to reformulated gasoline, the reformulated gasoline must meet all applicable standards that apply at the terminal subsequent to any oxygenate blending;

\* \* \* \* \*

■ 15. Section 80.79 is amended by revising paragraph (c)(1) to read as follows:

**§ 80.79 Liability for violations of the prohibited activities.**

\* \* \* \* \*

(c) \* \* \*

(1) Of a periodic sampling and testing program to determine if the applicable

maximum and/or minimum standards for benzene, RVP, or VOC emission performance are met.

\* \* \* \* \*

■ 16. Section 80.81 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

**§ 80.81 Enforcement exemptions for California gasoline.**

\* \* \* \* \*

(b)(1) Any refiner or importer of gasoline that is sold, intended for sale, or made available for sale as a motor fuel in the State of California is, with regard to such gasoline, exempt from the compliance survey provisions contained in § 80.68.

(2) Any refiner or importer of California gasoline is, with regard to such gasoline, exempt from the independent analysis requirements contained in § 80.65(f).

\* \* \* \* \*

**Subpart F—[Amended]**

■ 17. Section 80.125 is amended by revising paragraphs (a), (c) and (d) introductory text, to read as follows:

**§ 80.125 Attest engagements.**

(a) Any refiner and importer subject to the requirements of this subpart F shall engage an independent certified public accountant, or firm of such accountants (hereinafter referred to in this subpart F as “CPA”), to perform an agreed-upon procedures attestation engagement of the underlying documentation that forms the basis of the reports required by §§ 80.75 and 80.105.

\* \* \* \* \*

(c) The CPA may complete the requirements of this subpart F with the assistance of internal auditors who are employees or agents of the refiner or importer, so long as such assistance is in accordance with the Statements on Standards for Attestation Engagements.

(d) Notwithstanding the requirements of paragraph (a) of this section, any refiner or importer may satisfy the requirements of this subpart F if the requirements of this subpart F are completed by an auditor who is an employee of the refiner or importer, provided that such employee:

\* \* \* \* \*

■ 18. Section 80.126 is amended by revising paragraph (b) to read as follows:

**§ 80.126 Definitions.**

\* \* \* \* \*

(b) *Credit Trading Records.* Credit trading records shall include worksheets and EPA reports showing actual and complying totals for benzene; credit calculation worksheets; contracts; letter

agreements; and invoices and other documentation evidencing the transfer of credits.

\* \* \* \* \*

■ 19. Section 80.128 is amended by revising paragraph (e)(2) to read as follows:

§ 80.128 Alternative agreed upon procedures for refiners and importers.

\* \* \* \* \*

(e) \* \* \*

(2) Determine that the requisite contract was in place with the downstream blender designating the required blending procedures;

\* \* \* \* \*

§ 80.129 [Removed]

■ 20. Section 80.129 is removed and reserved.

■ 21. Section 80.130 is amended by revising paragraph (a) to read as follows:

§ 80.130 Agreed upon procedures reports.

(a) Reports. (1) The CPA or CIA shall issue to the refiner or importer a report summarizing the procedures performed in the findings in accordance with the attest engagement or internal audit performed in compliance with this subpart.

(2) The refiner or importer shall provide a copy of the auditor's report to the EPA within the time specified in § 80.75(m).

\* \* \* \* \*

■ 22. Section 80.133 is amended by revising paragraphs (h)(1) and (h)(4) to read as follows:

§ 80.133 Agreed upon procedures for refiners and importers.

\* \* \* \* \*

(h) \* \* \*

(1) Obtain from the refiner or importer the oxygenate type and volume, and oxygen volume required to be hand blended with the RBOB, in accordance with § 80.69(a)(2).

\* \* \* \* \*

(4) Perform the following procedures for each batch report included in paragraph (h)(4)(i)(B) of this section:

(i) Obtain and inspect a copy of the executed contract with the downstream oxygenate blender (or with an intermediate owner), and confirm that the contract:

(A) Was in effect at the time of the corresponding RBOB transfer; and

(B) Allowed the company to sample and test the reformulated gasoline made by the blender.

(ii) Obtain a listing of RBOB blended by downstream oxygenate blenders and the refinery's or importer's oversight test results, and select a representative

sample, in accordance with the guidelines in § 80.127, from the listing of test results and for each test selected perform the following:

(A) Obtain the laboratory analysis for the batch, and agree the type of oxygenate used and the oxygenate content appearing in the laboratory analysis to the instructions stated on the product transfer documents corresponding to a RBOB receipt immediately preceding the laboratory analysis and used in producing the reformulated gasoline batch selected within the acceptable ranges set forth at § 80.65(e)(2)(i);

(B) Calculate the frequency of sampling and testing or the volume blended between the test selected and the next test; and

(C) Agree the frequency of sampling and testing or the volume blended between the test selected and the next test to the sampling and testing frequency rates stated in § 80.69(a)(7).

\* \* \* \* \*

§ 80.134 [Removed]

■ 23. Section 80.134 is removed.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 030221039-6155-31; I.D. 042606G]

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP)

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the ALWTRP's implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,615 to 1,881 nm<sup>2</sup> (5,539 to 6,452 km<sup>2</sup>), east of Boston, MA, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours May 10, 2006, through 2400 hours May 24, 2006.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978-281-9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301-713-2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP Web site at <http://www.nero.noaa.gov/whaletrp/>.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15-day period; (2)