

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[FRL-5812-2]

Fuels and Fuel Additives; Amendments to the Enforcement Exemptions for California Gasoline Refiners

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In this action, EPA is proposing to amend certain requirements of the reformulated gasoline (RFG) regulations which are applicable to California gasoline refiners, importers and oxygenate blenders. These amendments will reduce the burden associated with the overlapping California and federal regulations of gasoline refiners and oxygenate blenders located in California and importers of California gasoline. The first proposed amendment would allow California gasoline refiners, importers, and oxygenate blenders to substitute the California RFG test methods for federal RFG test methods for their production of gasoline used in California and conventional gasoline used outside of California. The second proposed amendment would allow California gasoline refiners, importers and oxygenate blenders to retain the current exemption from various federal recordkeeping, reporting, and other enforcement-related provisions if they produce California RFG, using one of the California "alternative" certification methods and containing less oxygen than the federal RFG oxygen standard, if it is supplied to areas within California that are not required to receive federal RFG. The California gasoline refiners, importers and oxygenate blenders would conduct an annual gasoline quality survey for the federally-covered RFG areas of California to ensure the gasoline in each federally-covered RFG area is in compliance with the federal oxygen standard. The third proposed amendment would correct an omission in existing 40 CFR 80.81(e)(1). The fourth proposed amendment would permit a refiner of California gasoline to sample and test at off-site tankage that is approved by the California Air Resources Board (CARB) as part of the refiner's "production facility" if certain conditions are met. EPA believes that these proposed changes will grant refiners flexibility without any anticipated adverse environmental impact.

DATES: Comments on this proposed rule must be received by May 16, 1997. EPA does not plan to hold a public hearing on this proposed rule, unless one is requested. If a request by May 1, 1997, a public hearing will be held. If such a hearing is held, comments must be received within 30 days of the date of such hearing.

ADDRESSES: Written comments on this proposed action should be addressed to Public Docket No. A-97-06, Waterside Mall (Room M-1500), Environmental Protection Agency, Air Docket Section, 401 M Street, SW, Washington, D.C. 20460. Documents related to this rule have been placed in public dockets A-97-06 and may be inspected between the hours of 8:00 a.m. to 5:30 p.m., Monday through Friday. A reasonable fee may be charged for copying docket material. Those wishing to notify EPA that they request an opportunity for a public hearing on this action should contact Anne-Marie C. Pastorkovich, U.S. Environmental Protection Agency, Office of Air and Radiation, (202) 233-9013.

FOR FURTHER INFORMATION CONTACT: Anne-Marie Cooney Pastorkovich, U.S. Environmental Protection Agency, Office of Air and Radiation, (202) 233-9013.

SUPPLEMENTARY INFORMATION:

I. Regulated Entities

Regulated categories and entities potentially affected by this action include:

Category	Examples of regulated entities
Industry	Refiners, importers and oxygenate blenders in California.

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 an entity is regulated by this action, one should carefully examine the RFG provisions at 40 CFR part 80, particularly § 80.81 dealing specifically with California gasoline. 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.

II. Background

A. RFG Standards and California Covered Areas

Section 211(k) of the Clean Air Act (the Act) requires EPA to establish requirements for reformulated gasoline (RFG) to be used in specified ozone nonattainment areas (federally-covered areas), as well as "anti-dumping" requirements for non-reformulated, or conventional, gasoline used in the rest of the country, beginning in January 1995. The RFG covered areas in California are Los Angeles and San Diego, and Sacramento. The Act requires that RFG reduce ozone forming volatile organic compound (VOC) and toxics emissions from motor vehicles, not increase emission of oxides of nitrogen (NO_x), and meet certain content standards for oxygen, benzene and heavy metals. The relevant regulations for RFG and conventional gasoline may be found at 40 CFR part 80, subparts D, E, and F.¹

B. Exemptions Specifically Related to California Gasoline

On September 18, 1992, the California Air Resources Board (CARB) adopted regulations requiring reformulation of California gasoline. The CARB regulations established a comprehensive set of gasoline specifications designed to achieve reductions in emissions of VOCs, NO_x, carbon monoxide (CO), sulfur dioxide, and toxic air pollutants from gasoline-fueled vehicles.² The CARB regulations set standards for eight gasoline parameters—sulfur, benzene, olefins, aromatic hydrocarbons, oxygen, Reid vapor pressure (RVP), and distillation temperatures for the 50 percent and 90 percent evaporation points (T-50 and T-90, respectively)—applicable starting March 1, 1996 for all gasoline in the California distribution network (except for gasoline being exported from California). The CARB regulations also provide for the production and sale of alternative gasoline formulations, with certification under the CARB program based on a predictive model or vehicle emission testing.³

During the federal RFG rulemaking, and in response to comments by California refiners, EPA concluded (1) that VOC and toxics emission reductions resulting from the California Phase 2 standards would be equal to or more stringent than the federal Phase I RFG standards (applicable from January

¹ See 59 FR 7812 (February 16, 1994).

² See Title 13, California Code of Regulations sections 2250-2272 (as amended January 26, 1996).

³ *Id.*, sections 2265 and 2266.

1, 1995 through December 31, 1999), (2) that the content standards for oxygen and benzene under California Phase 2 would in practice be equivalent to the federal content standards, and (3) that the CARB's compliance and enforcement program is designed to be sufficiently rigorous.⁴ As a result, 40 CFR 80.81 exempts certain refiners, importers and oxygenate blenders of California Phase 2 gasoline (hereafter referred to as "refiners") from a number of federal RFG and conventional gasoline provisions intended to demonstrate compliance with the federal standards.⁵ While the federal RFG and conventional gasoline standards continue to apply in California, refiners of gasoline sold in California are exempt in most cases from various enforcement-related provisions. California refiners are not exempt from these federal enforcement requirements with regard to gasoline that is delivered for use outside California, because the California Phase 2 standards and the CARB enforcement program do not cover gasoline exported from California.

In letters of June 15, August 3 and November 10, 1995, the Western States Petroleum Association (WSPA), on behalf of gasoline refiners in California, petitioned EPA to revise the exemption provisions at 40 CFR 80.81 to provide additional flexibility. The three principle areas discussed in the petition are the gasoline testing methods, the standard for Reid vapor pressure (RVP), and production of gasoline not meeting the federal standard for oxygen content. In February 1996, EPA notified WSPA that EPA would initiate rulemaking to address these issues.⁶ Since the California Phase 2 program was scheduled to begin March 1, 1996, EPA

announced that it would grant California refiners temporary relief through specific exemptions from enforcement related to test methods, oxygen content of gasoline not used in the RFG areas, and RVP until the rulemakings could be completed.

A final rule related to the RVP standard was published as a direct final rule in the **Federal Register** on May 8, 1996, and became effective on July 8, 1996.⁷

Today's proposal addresses the remaining two issues: gasoline testing methods and the use in conventional gasoline areas of gasoline certified by California that does not meet the federal RFG standard for oxygen content. EPA is proposing changes similar to the temporary enforcement exemptions granted to the California refiners in its February 1996 letter.

III. Description of Proposed Action

A. Testing Methods

Both the federal RFG and the California Phase 2 programs specify testing methods to demonstrate compliance with the standards applicable under each programs. However, in the case of the tests for four parameters (benzene, sulfur, oxygen, and aromatics) the methods⁸ specified under the two programs are different.

The 40 CFR 80.81(h) exemption in the federal RFG regulation allows California refiners to use the California test methods prescribed in Title 13, California Code of Regulations, sections 2260 *et seq.*, instead of the federal test methods prescribed at 40 CFR 80.46, when producing California Phase 2 gasoline that is used in California. Therefore, California refiners may use either the federal or CARB methods for gasoline used within the state. However, under existing federal regulations, California refiners are still required to use the federal test methods prescribed at 40 CFR 80.46 for gasoline that is used outside California, including conventional gasoline subject to the anti-dumping standards specified at 40 CFR 80.101.⁹

WSPA, on behalf of California refiners, has requested that EPA extend the test method exemption at 40 CFR 80.81(h) to also cover the gasoline produced by California refiners that is

exported from California to other states. WSPA asked for this change because a refiner who is utilizing the flexibility of the CARB testing methods for gasoline sold within California, would have to implement federal test methods to certify the same gasoline for export to surrounding states.

EPA believes that WSPA has raised a valid concern and that, under certain conditions, it may be appropriate to allow the use of non-federal test methods for gasoline exported from California. Absent such relief, California refiners who export gasoline to other states are required to certify such gasoline using federal testing methods. Both "downgraded" RFG and conventional gasoline are exported from California. If a California refiner chooses to utilize the flexibility of the CARB testing methods, they must also implement the federal test methods in order to certify gasoline for distribution outside California.

EPA believes that the standards under the California Phase 2 program are expected to result in lower emissions than will result from federal RFG and, as discussed below, there may be emissions benefits for areas receiving "downgraded" California RFG. Moreover CARB is expected to enforce these standards in a comprehensive, aggressive manner that will result in high compliance. The Agency does not believe that any environmental detriment would occur from allowing the use of the CARB test methods for gasoline produced in California, but shipped out of state for use in non-RFG areas. Because some of the gasoline shipped out of California as conventional gasoline may be "downgraded" RFG or gasoline meeting California Phase 2 standards, an environmental benefit may be expected for areas receiving such gasoline exported from California. Thus, allowing flexibility in testing method for California refiners might actually produce an environmental benefit to surrounding areas, because such flexibility would make it easier and more economical for California refiners to export cleaner gasoline.

In its February 29, 1996 response to WSPA, EPA indicated its intention to change the federal RFG regulations to allow additional testing flexibility for California refiners and immediately gave California refiners additional flexibility for a limited time. In that letter, EPA stated that it will not enforce the requirement at 40 CFR 80.65(e)(1) and 40 CFR 80.101(i)(1)(i)(A) to test gasoline using the federal test methods specified under 40 CFR 80.46 for benzene, sulfur, oxygen or aromatics,

⁴ See 59 FR 7758, 7759 (February 16, 1994).

⁵ Specifically, the federal RFG regulations at § 80.81 provide that, subsequent to March 1, 1996 (the start of the California Phase 2 program), the specified parties are exempt from meeting the enforcement requirements dealing with: compliance surveys (§ 80.68), independent sampling and testing (§ 80.65(f)), designation of gasoline (§ 80.65(d)), marking of conventional gasoline (§§ 80.65(g) and 80.82), downstream oxygenate blending (§ 80.69), record keeping (§§ 80.74 and 80.104), reporting (§§ 80.75 and 80.105), product transfer documents (§ 80.77), parameter value reconciliation requirements (§ 80.65(e)(2)), reformulated gasoline and RBOB compliance requirements (§ 80.65(c)), annual compliance audit requirements (§ 80.65(h)), and compliance attest engagement requirements (subpart F). Various restrictions apply to the exemptions, and the exemptions do not apply after December 31, 1999.

⁶ See letter from Mr. Steve Herman, Assistant Administrator for Enforcement and Compliance Assurance, EPA, to Mr. Douglas Henderson, Executive Director, Western States Petroleum Association, dated February 29, 1996. A copy of this letter has been placed in the docket at the location listed in the ADDRESSES section.

⁷ "Fuels and Fuel Additives—Reformulated Gasoline Sold in California; Reid Vapor Pressure lower limit adjustment—Direct Final Rule," 61 FR 20736 (May 8, 1996).

⁸ See 40 CFR 80.46(a), (e), (f) and (g) for Federal RFG test method requirements.

⁹ EPA estimates that the portion of gasoline exported from California and used in neighboring states is about twelve percent of the total California gasoline production and imports.

with regard to gasoline that is produced in or imported into California but that is used outside California.

In order to qualify for this enforcement relief, the refiner or importer must meet certain conditions, designed to ensure that only gasoline produced by refiners or importers subject to CARB enforcement, and that is sold in Federal conventional gasoline areas outside California, is covered by this flexibility and to ensure that only gasoline meeting RFG standards will actually be sold in Federal RFG areas. Furthermore, it is necessary to establish equivalency between CARB and Federal test method results, since the methods themselves are not necessarily equivalent and therefore different methods (if not correlated) would yield different results. In the absence of correlation, the possibility of one fuel having more than one value associated with it could cause disruption and confusion in the distribution system. EPA believes that the conditions, as described in the next paragraph, are necessary to protect the environmental benefits associated with the Federal RFG and anti-dumping program.

To qualify, the gasoline must be produced at a refinery located in California at which gasoline meeting the California Phase 2 standards and requirements is produced, or the gasoline must be imported into California from outside the United States as California Phase 2 gasoline (i.e., gasoline that meets the standards and requirements of the California Phase 2 program). When exported from California, such gasoline must be classified as federal conventional gasoline, and may not be classified as federal RFG. Furthermore, the refiner must correlate the results from any non-federal test method to the method specified under 40 CFR 80.46 for any gasoline that is used outside California, and such correlation must be demonstrated to EPA upon request.

The temporary enforcement flexibility described above and in EPA's February 29, 1996 letter will expire at the conclusion of this rulemaking (i.e. upon the effective date of the final rule).

EPA is proposing today to amend 40 CFR 80.81 to incorporate the enforcement flexibility regarding test methods that EPA temporarily granted in its February 29, 1996 letter to WSPA. EPA is proposing this action because the Agency believes that it may result in lower compliance costs and greater flexibility for California refiners and because there is no expected adverse environmental impact from this proposed action.

B. Standard for Oxygen

Section 211(k) of the Clean Air Act requires that the RFG standard of 2.0 weight percent (wt%) minimum oxygen must be met in each federally-covered RFG area. When EPA promulgated the California enforcement exemptions at 40 CFR 80.81, the statewide standards for California Phase 2 gasoline would have been equal to or more stringent than all federal RFG standards. With regard to oxygen content, the California Phase 2 standards included a statewide flat limit of 1.8 to 2.2 wt% oxygen that EPA considered, in practice, to be equivalent to the federal standard of 2.0 wt% minimum. As a result, EPA did not need to distinguish between California Phase 2 gasoline used in the federally-covered RFG areas within California from the California Phase 2 gasoline used in the other areas of California, in order to have confidence that RFG standards would be met in each federally covered RFG area in California.

The final California Phase 2 requirements were changed, however, and now allow gasoline that does not meet the federal RFG standard for oxygen. Under two alternative California certification methods, the California predictive model and the vehicle emissions testing method, there is no minimum oxygen content requirement for summertime California Phase 2 gasoline.¹⁰ Under 40 CFR 80.81(e)(2), certain enforcement exemptions are withdrawn if a California refiner uses one of the alternative California certification methods, unless within 30 days of receiving the California certification it notifies EPA and demonstrates that its gasoline meets all federal RFG per-gallon standards, including the 2.0 weight % oxygen standard.

Therefore, in order to retain the enforcement exemptions, 40 CFR 80.81(e)(2) currently requires that all California Phase 2 gasoline produced by a refiner, regardless of whether it is sold in a federally-covered RFG area, must meet the federal RFG standard for oxygen content. Because neither of the two alternative California certification methods ensure that the federal oxygen content standard will be met, except during designated winter months, a refiner that uses an alternative California certification method must either additionally notify and demonstrate to EPA that its gasoline meets the federal RFG standard for

oxygen content or lose its eligibility for certain federal exemptions under 40 CFR 80.81. This loss of eligibility applies even if the gasoline not meeting the federal RFG standard for oxygen content is being distributed only to those areas of California that are not federally-covered RFG areas.

In its petition, WSPA asked EPA to amend the enforcement exemption provisions to allow California refiners to supply California Phase 2 gasoline containing less than 2.0 wt% oxygen to markets within California that are not federally-covered RFG areas without having to comply with the notification and demonstration requirements of 40 CFR 80.81(e)(2) and without losing the federal enforcement exemptions. In its February 29, 1996 response to WSPA, EPA said it is appropriate to amend 40 CFR 80.81, provided that annual gasoline quality surveys for oxygen content are conducted in each federally-covered RFG area, in order to ensure the gasoline in each federally-covered RFG area in California is in compliance with the federal oxygen content standard. EPA reached these conclusions because the statewide California Phase 2 standards, with the exception of oxygen content, are more stringent than the standards for federal RFG, including any gasoline formulation certified using the alternative methods. In addition, EPA believes that these standards will be appropriately enforced by CARB. EPA believes that the California Phase 2 program provides emission reductions that equal or exceed that of the federal Phase I RFG program, except for the oxygen content requirements. EPA concluded that the federal RFG oxygen requirements do not have to be met in areas of California that are not subject to the federal RFG standards, in order to ensure compliance with the oxygen requirements for areas that are subject to the federal RFG standards. The annual compliance survey is a more appropriate mechanism to ensure such compliance under these circumstances.

Consistent with, and as described in, the February 29, 1996 letter, EPA is proposing to amend 40 CFR 80.81 to allow refiners to produce California Phase 2 gasoline containing less than 2.0 wt% oxygen for use outside the federally-covered RFG areas in California, provided appropriate annual gasoline quality surveys for oxygen are conducted in each federally-covered RFG area in California. These surveys must show an average oxygen content in each covered area of at least 2.0 wt%. While EPA could require that all gasoline batches being produced for the federally-covered RFG areas be tested for oxygen content at the refinery, or

¹⁰ See Title 13, California Code of Regulations, section 2262.5 for the oxygen standards, section 2265 for the alternative predictive model method, and section 2266 for the alternative vehicle emission testing method.

prior to importation as applicable, such testing would not ensure that all gasoline being sold in the federally-covered RFG areas contains at least 2.0 wt% oxygen. Even though each refinery might meet its refinery gate standard for oxygen on average, some areas might still receive RFG with relatively low oxygen content while others might receive RFG with relatively high oxygen content. The surveys are designed to ensure that all Federal RFG program areas receive RFG that meets at least the minimum required oxygen standard.

As in the federal RFG program outside of California, the compliance surveys appear to be the most practical method to assure that, on average, the federally-covered RFG areas in California receive gasoline that meets the federal standard for oxygen content. The federal RFG program at 40 CFR 80.67 allows refiners, importers, and oxygenate blenders to meet certain federal RFG standards on average, rather than on a per-gallon basis for each batch of gasoline. The requirement must then be met on average, over the entire production, without any averaging for each specific covered area to which the gasoline is distributed.

Refiners, importers and oxygenate blenders producing gasoline to meet standards on average are allowed to produce some batches of gasoline that are less stringent than the averaging standards (within the limits of a per-gallon minimum or maximum standard, as applicable). But they must also produce some batches of gasoline that are more stringent than the averaging standards, such that on average, the applicable averaging standard is met. The averaging standards are somewhat more stringent than the per-gallon standard (e.g., the oxygen content averaging standard is 2.1 wt%, and the per-gallon standard is 2.0 wt%). It is expected that, if all refiners meet either the per-gallon standards or the averaging standards, the covered areas receiving their gasoline should achieve an average oxygen content no lower than would occur without the allowance for such averaging, based on the extensive fungible distribution system for gasoline products.

Because many gasoline distribution systems are fungible, some uncertainty exists as to where each batch of gasoline from each supplier is ultimately distributed, and what batches, or portions of batches, from each supplier that each covered area actually receives. For example, under the averaging program, the possibility still exists that one or more covered areas may receive too many batches of RFG that have a relatively low oxygen content (e.g.,

greater than or equal to 1.5 wt%, but less than 2.0 wt%), so that the required oxygen levels will not have been achieved in that area.

Consequently, the federal RFG program at 40 CFR 80.67 requires compliance surveys under 40 CFR 80.68 for refiners that elect to meet the standards on average under 40 CFR 80.41(b), (d) or (f), as applicable, rather than to meet the per-gallon standards for each batch of gasoline under 40 CFR 80.41(a), (c), or (e), as applicable. In general, the compliance surveys are to ensure that each covered area receives gasoline that cumulatively (from all suppliers and across time) has the same oxygen content it would have if averaging was not allowed. However, the federal RFG regulations at 40 CFR 80.81(b)(1) exempts refiners of California gasoline (with respect to California gasoline) from the compliance survey provisions at 40 CFR 80.68, for the reasons described earlier.

In response to the WSPA request concerning oxygen content requirements in California and the changes in California Phase 2 standards regarding oxygen content, EPA has reconsidered the limited use application of the compliance survey provisions. EPA believes that a yearly survey program, such as that required under 40 CFR 80.68 for averaging under the federal RFG program, along with other program requirements (such as compliance by each refinery separately), provides the most flexible alternative to refiners and the most assurance to EPA that complying gasoline is actually being sold in the federally-covered RFG areas.

As stated in its February 29, 1996 response to WSPA, EPA decided to allow California refiners to produce gasoline that contains less than 2.0 wt% oxygen for use outside the federally-covered RFG areas, until appropriate amendments to the RFG requirements were published in the **Federal Register** and become effective. In particular, EPA said it will not enforce the requirement at 40 CFR 81(e)(2) that California refiners must demonstrate that federal RFG per-gallon standards are met on each occasion California Phase 2 gasoline is certified under Title 13, California Code of Regulations, section 2265 (dealing with gasoline certification based on the California predictive model), provided that two conditions are met. First, a program of gasoline quality surveys must be conducted in each RFG covered area in California each year to monitor annual average oxygen content. Second, the surveys must be conducted in accordance with each requirement

specified under 40 CFR 80.68(b) and (c), dealing with surveys for RFG quality, and 40 CFR 80.41(o) through (r), dealing with the effects of survey failures, except that the surveys need only evaluate for oxygen content and a minimum of four surveys (a survey series) must be conducted in each covered area each calendar year.

EPA proposes to retain as an option the existing 30-day notification and demonstration provisions at 40 CFR 80.81(e)(2).

Under the existing provision, gasoline certified using an alternative California certification method and not meeting the federal standard for oxygen content may not be marketed anywhere in California without losing the enforcement exemptions listed in paragraph (e)(1). This is because EPA cannot allow non-complying fungible gasoline in California, unless there are adequate enforcement procedures to ensure compliance of the gasoline in the federally-covered RFG areas with the federal standards.

EPA considered whether it should simply eliminate the exemption for compliance surveys at 40 CFR 80.81(b)(1) for California gasoline. However, such an action would impact all refiners of California gasoline, even for those that choose to not certify using one of the alternative California certification procedures, and those that produce, import or blend only California gasoline that meets the federal oxygen content standard. Instead, EPA proposes to offer the compliance surveys as an option for refiners of California gasoline that do not choose the existing notification and demonstration option at 40 CFR 80.81(e)(2), and that do not want to meet the federal oxygen content standard for gasoline being used in areas of California that are not federally-covered RFG areas. Further, EPA proposes some exceptions to the compliance surveys as specified for federally-covered RFG areas outside of California.

First, EPA proposes that surveys conducted under the proposed compliance survey option of the exemption provisions at 40 CFR 80.81(e)(2) not be considered for the purposes of determining the required number of surveys that must be conducted for compliance with the federal RFG program at 40 CFR 80.68. Under 40 CFR 80.68(b), the required number of compliance surveys required in a year for federally-covered RFG areas outside of California depends partly on the number of areas required to be surveyed in the year, the number of surveys conducted the previous year,

and the survey results from the previous year.

EPA believes that the proposed optional surveys for federally-covered RFG areas in California should not impact the required surveys for federally-covered RFG areas outside of California. This is because of the differences in the purpose, scope and desired consequences between the two survey programs. The federal RFG compliance surveys required at 40 CFR 80.68 are designed to detect and apply remedial actions to geographical and temporal noncompliance that may occur due to the combination of averaging and refinery based standards. Parameters for all standards being averaged are required to be measured, and the ultimate consequence of multiple failures of the survey series is to effectively disallow the use of averaging. In contrast, the proposed optional surveys under 40 CFR 80.81(e)(2) are designed to detect and apply remedial actions to geographical and temporal noncompliance with the oxygen content standard that may occur due to the absence of California oxygenate standards and other enforcement requirements intended to ensure the delivery of RFG into RFG areas, such as product transfer documents. The ultimate consequence of multiple failures of the survey series is to either withdraw certain federal enforcement exemptions, or require refiners to produce California gasoline that meets the federal oxygen content standard for all areas within California (see fourth issue of this section).

Second, EPA proposes a fixed number of surveys for the proposed compliance survey option, similar to the temporary enforcement flexibility granted in the February 29, 1996 letter to WSPA. Under 40 CFR 80.68(b), a formula is used to determine the number of surveys required in a year, which depends on a specified schedule, the number of surveys required the previous year, gasoline volume supplied to the covered areas, and results of the survey the previous year. However, EPA believes that a minimum four surveys each year for each federally-covered RFG area is adequate to determine whether the average oxygen content is adequate. Therefore, EPA is proposing that 40 CFR 80.81(e)(2) require only a minimum of four surveys each year for each federally-covered RFG area in California. As with the surveys required under 40 CFR 80.68 for federally-covered areas outside of California, EPA will determine when these optional surveys conducted in California under 40 CFR 80.81(e)(2) shall be conducted.

Third, the proposed consequences of passing and failing an optional survey series in a federally-covered RFG area in California under 40 CFR 80.81(e)(2) is different than the existing consequences of passing and failing a required survey series in federally-covered RFG areas outside of California under 40 CFR 80.68. A failure of an oxygen content compliance survey required at 40 CFR 80.68 for a federally-covered RFG area outside of California will result in the "ratcheting" of the minimum per-gallon oxygen standard to be more stringent (i.e., to be closer to the averaging standard) for the following year. As a consequence, the allowable range, and thus the flexibility, for averaging will be reduced. For example, the per-gallon minimum standard under averaging for oxygen content is 1.5 wt%. Under 40 CFR 80.41(o), if a covered area fails the survey series for a year, the per-gallon minimum oxygen content standard for the following year will be increased by 0.1 wt% to 1.6 wt%. If the covered area fails the survey series in a subsequent year, the per-gallon minimum oxygen content standard for the following year will be increased by 0.1 wt% to 1.7 wt%, and so on. If the covered area fails the survey series any five years (consecutive or non-consecutive), the per-gallon minimum oxygen content standard for the years following the fifth failure will be equal to the federal per-gallon oxygen standard of 2.0 wt%. However, a one-time relaxation of the per-gallon minimum standard by 0.1 wt% is allowed following two consecutive years of survey series passes for oxygen content.

For this survey option, EPA proposes that only one year of passing the survey series in a covered area will be needed to initiate relaxation of the minimum oxygen content standard for the following year. EPA proposes that the minimum oxygen content standard be relaxed by 0.1 wt% for each year following a year in which the survey series passes in a federally-covered RFG area in California. However, EPA will not allow the minimum oxygen content standard to be less than 1.5 wt%, the minimum oxygen content standard for federal RFG under averaging. As with failures of survey series required under 40 CFR 80.68 in federally-covered RFG areas outside of California in accordance with 40 CFR 80.41(q)(4), adjusted standards under the compliance survey option of 40 CFR 80.81(e)(2) apply to all averaged gasoline produced by a refiner for use in any federally-covered RFG area. However, the proposed procedures and consequences of the oxygen surveys contained in this notice differ somewhat

from the survey coincidences under 40 CFR 80.68. The surveys proposed today are much smaller in scope than the existing, "general" survey provisions and the consequences for successive failures, as discussed in greater detail in this section, may be the subject of future Agency rulemaking action to remove some or all of the California enforcement exemptions.

EPA proposes that the ultimate consequence of multiple failures of the optional compliance surveys be withdrawal of the survey option, rather than the effective withdrawal of the averaging option, as with the required compliance surveys conducted under 40 CFR 80.68 for federally-covered RFG areas outside of California. The compliance survey option provides refiners of California gasoline additional flexibility under the federal exemption provisions, conditioned on the premise that those refiners will control the oxygen content of the gasoline being distributed to the federally-covered RFG areas within California. If the refiners do not control the oxygen content of the gasoline going to those areas as determined by the results of the surveys, EPA believes that it may be reasonable to remove the flexibility provided under this option. Consequently, EPA proposes that a failure of a survey series in one federally-covered RFG area in California for three consecutive years, or an equivalent "net" failure of three years over any number of years (i.e., number of years the survey series failed subtracted from the number of years the survey series passed), the compliance survey option will no longer be applicable for any federally-covered RFG area in California. In practice, this situation will occur if a survey series fails for a covered area in a year in which the minimum oxygen content standard had been raised to 1.7 wt% due to a survey series failure in that covered area the previous year.

Consistent with the existing compliance survey requirements for federally-covered RFG areas outside of California, EPA proposes to allow the optional compliance survey under 40 CFR 80.81(e)(2) to be conducted either by individual refiners under 40 CFR 80.68(a) or as a group of refiners under 40 CFR 80.68(b). The temporary enforcement flexibility granted by the February 29, 1996 response to WSPA omitted the individual survey option of 40 CFR 80.68(a), because that survey option is not currently being used and is not expected to be used for practical reasons. Under either 80.68(a) or (b), covered refiners are required to actively participate in a survey program. The consequences of any survey failure will

apply to all suppliers serving the failed area.

It should be noted that the California Phase 2 gasoline that does not meet the federal RFG standards, including the oxygen standard, is classified under the federal regulations as conventional gasoline. In addition, the flexibility allowed by today's proposed amendments does not alter the prohibitions under section 211(k)(5) of the Clean Air Act, and 40 CFR 80.78(a)(1) against selling or dispensing conventional gasoline to ultimate consumers in federally-covered RFG areas, and against selling conventional gasoline for resale in federally-covered RFG areas unless the gasoline is segregated and marked as "conventional gasoline, not for sale to ultimate consumers in a covered area." Nothing in today's proposal would change the requirement that refiners and importers in California meet all other Federal RFG standards, including the oxygen standard, for gasoline produced or imported for use in Federal RFG covered areas in California. These standards must be met separately for each refinery and by each importer.

The proposed amendments to 40 CFR 80.81 are generally consistent with the February 29, 1996 letter to WSPA.

C. Correction to 80.81(e)(1)

EPA proposes to correct 40 CFR 80.81(e)(1), which erroneously omits one provision, paragraph (f), from the list of enforcement exemption provisions that would not apply under the conditions of paragraphs (e)(2) or (e)(3). Paragraph (e)(2) specifies that the exemption provisions listed in paragraph (e)(1) do not apply if a refiner certifies California gasoline under one of the alternative California certification procedures, unless the refiner notifies EPA of that alternative certification and demonstrates to EPA that its gasoline meets all federal per-gallon standards. (This proposal adds a compliance survey option to section (e)(2)(ii).) Paragraph (e)(3) specifies that the exemption provisions listed in paragraph (e)(1) do not apply in the case of a refiner of California gasoline that has been assessed a civil, criminal or administrative penalty for certain violations of federal or California regulations, except upon a showing of good cause.

Paragraph (f) specifies that for California phase 2 gasoline (California gasoline that is sold or made available for sale after March 1, 1996) the following federal RFG enforcement requirements are waived: the oxygenated fuels provisions of 80.78(a)(1)(iii), the product transfer

provisions of 80.78(a)(1)(iv), the oxygenate blending provisions contained in 80.78(a)(7), and the segregation of simple and complex model certified gasoline provision of 80.78(a)(9). Under the conditions of either paragraph (e)(2) or (e)(3), EPA would need those enforcement provisions to ensure that gasoline being used in federally-covered RFG areas in California complies with the federal standards. Therefore, EPA proposes to amend paragraph 40 CFR 80.81(e)(1) to include paragraph (f) in the list of enforcement exemptions that would become inapplicable under the conditions of paragraphs (e)(2) or (e)(3).

D. Proposed Amendment to Sampling and Testing Requirements for California refiners

Under 40 CFR 80.65(e)(1), a refiner must determine the properties of each batch of RFG it produces prior to the gasoline leaving the refinery.¹¹ Under the California RFG program, refiners may obtain approval to sample and test gasoline for compliance with California RFG standards at off-site "production" tankage. This approval would have to be obtained under Title 13, Section 2260(a)(28) of the California Code of Regulations, which states:

(28) "Production facility" means a facility in California at which gasoline * * * is produced. Upon request of a producer, the executive director [of CARB] may designate, as part of the producer's production facility, a physically separate bulk storage facility which (A) is owned or leased by the producer, and (B) is operated by or at the direction of the producer, and (C) is not used to store or distribute gasoline * * * that is not supplied from the production facility."

It is EPA's understanding that the third requirement, (C), is interpreted by CARB to require that the gasoline must be transported to the off-site tankage served via a dedicated pipeline.

In this notice, EPA is proposing amendments to 40 CFR 80.81(h), which would allow California refiners who have obtained approval from the State of California to conduct sampling and testing at off-site tankage served by a dedicated pipeline to use this approach under the federal RFG program as well. Specifically, the proposed rule would allow a California refiner who has obtained approval from the State of California to conduct sampling and testing at off-site tankage under California Code of Regulations Title 13, Section 2260(a)(28), to conduct sampling and testing at such approved off-site tankage for purposes of the

¹¹ Under 40 CFR 80.2 (h), a "refinery" is "a plant where gasoline or diesel fuel is produced."

federal RFG program. The gasoline must be sampled and tested under the terms of a current, valid protocol agreement between the refiner and CARB. The refiner must provide a copy of the current, valid protocol agreement specifying the off-site tankage as part of the production facility, to the EPA Administrator or the Administrator's designated agent, upon request.

EPA believes that this proposed approach is justified because of the unique situation that exists in the case of refiners subject to the California RFG requirements, including the enforcement sampling and testing program that is carried out by the State of California at refineries producing California RFG. EPA also believes that this proposed approach will minimize any unnecessary inconsistencies between the federal and California RFG requirements which do not result in differences in environmental or public health impacts.

IV. Statutory Authority

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

V. Environmental Impact

This rule is expected to have no negative environmental impact. These amendments are intended to eliminate duplicative enforcement requirements, and do not relax the federal standards. EPA has determined that the statewide California Phase 2 program is equal to or more stringent than the federal Phase I RFG program, except for the oxygen standard. In fact, as described above, the California Phase 2 program is designed to, and may result in, greater emissions reductions than the federal RFG program. The additional testing flexibility allowed certain refiners of California gasoline under today's proposed regulation may, in fact, result in an environmental benefit because it would give California refiners flexibility to sell gasoline meeting California Phase 2 standards as federal conventional gasoline in other areas. It is reasonable to expect that such gasoline would be "cleaner" than other conventional gasoline and could result in an environmental benefit to the areas receiving it.

VI. Economic Impact

Today's proposed regulation is expected to give refiners of California gasoline additional operational flexibility and is not expected to result in additional compliance costs for regulated parties, including small entities.

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that Federal Agencies examine the impacts of their regulations on small entities. The act requires an Agency to prepare a regulatory flexibility analysis in conjunction with notice and comment rulemaking, unless the Agency head certifies that the rule will not have a significant impact on a substantial number of small entities. 5 U.S.C. 605(b). The Administrator certifies that this rule will not have a significant impact on a substantial number of small entities. This rule is not expected to result in any additional compliance cost to regulated parties and may be expected to reduce compliance cost. Specifically, the additional flexibility allowed by permitting use of CARB testing methods for California gasoline exported to surrounding areas, the proposed oxygen survey option, and the proposed off-site sampling and testing allowance would grant all California refiners (regardless of size), additional compliance flexibility and would permit them options that could significantly lower compliance costs. The changes proposed today are expected to be beneficial for all affected industry parties, including affected small entities.

VII. Executive Order 12866

Under Executive Order 12866,¹² 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.¹³

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.

VIII. 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 proposed 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 the rule proposed today does not include a federal mandate as defined in 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.

IX. Paperwork Reduction Act

The information collection requirements in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An information Collection Request (ICR) document has been prepared by EPA (ICR NO. 1591.07) covering this and related collections. OMB has approved the remainder of the information collection requirements for the Standards for Reformulated Gasoline Regulations and has assigned OMB control number 2060–0277. A copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., S.W.; Washington, DC 20460 or by calling (202) 260–2740.

Today’s proposal rule includes optional oxygen surveys applicable in RFG program areas located within the state of California. This survey option is necessary to ensure that the environmental and public health benefits of the RFG program are met in California RFG areas and is designed to preserve the California enforcement

exemptions contained in 40 CFR 80.81. Specifically, today’s proposed rule allows refiners to produce California Phase 2 gasoline containing less than 2.0 weight% oxygen for use outside federally covered areas provided appropriate annual gasoline quality surveys for oxygen are conducted in each covered area in California.

EPA estimates the cost of all the required RFG surveys to be approximately 2.3 million for 1997 and approximately \$6.0 million for 1998 and beyond (when complex model standards apply). The vast majority of the cost is attributable to the comprehensive surveys required under 40 CFR 80.68.

Section 80.68 surveys are applicable in all Federal RFG covered areas outside California and cover a broader range of parameters than the proposed California surveys, which are designed to monitor annual average oxygen content only. The proposed California surveys are limited in their number. Four surveys are proposed to be conducted each year in each of three California Federal RFG covered areas, for a total of 12 surveys. Industry has generally welcomed this California survey option, since it grants flexibility and potentially reduces compliance burdens.

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, utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing 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.

Comments are requested on the Agency’s need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., S.W., Washington March 17, 1997 C 20460 and to the

¹² 58 FR 51736 (October 4, 1993).

¹³ *Id.* at section 3(f)(1)–(4).

Office of Information and Regulatory Affairs; Office of Management and Budget, 725 17th St., N.W. Washington, DC 20503, marked "Attention" Desk Officer for EPA. Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after April 16, 1997, a comment to OMB is best assured of having its full effect, if OMB receives it by May 16, 1997. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, California exemptions, Gasoline, Reformulated gasoline, Motor vehicle pollution.

Dated: April 9, 1997.

Carol M. Browner,
Administrator.

40 CFR part 80 is proposed to be 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 80.81 is amended by revising paragraphs (e)(1), (e)(2) and (h) to read as follows:

§ 80.81 Enforcement exemptions for California gasoline.

* * * * *

(e)(1) The exemption provisions contained in paragraphs (b)(2), (b)(3), (c), and (f) of this section shall not apply under the circumstances set forth in paragraphs (e)(2) and (e)(3) of this section.

(2) Such exemption provisions shall not apply to any refiner, importer, or oxygenate blender of California gasoline with regards to any gasoline formulation that it produces or imports is certified under Title 13, California Code of Regulations, section 2265 or section 2266, unless:

(i)(A) *Written notification option.* The refiner, importer, or oxygenate blender, within 30 days of the issuance of such certification:

(I) Notifies the Administrator of such certification;

(2) Submits to the Administrator copies of the applicable certification order issued by the State of California and the application for certification submitted by the regulated party to the State of California; and

(3) Submits to the Administrator a written demonstration that all gasoline formulations produced, imported or blended by the refiner, importer or oxygenate blender for use in California meets each of the complex model per-gallon standards specified in § 80.41(c).

(B) If the Administrator determines that the written demonstration submitted under paragraph (e)(2)(i)(A) of this section does not demonstrate that all certified gasoline formulations meet each of the complex model per-gallon standards specified in § 80.41(c), the Administrator shall provide notice to the party (by first class mail) of such determination and of the date on which the exemption provisions specified in paragraph (e)(1) of this section shall no longer be applicable, which date shall be no earlier than 90 days after the date of the Administrator's notification; or

(ii) *Compliance survey option.* The compliance survey requirements of § 80.68 are met for each covered area in California for which the refiner, importer or oxygenate blender supplies gasoline for use in the covered area, except that:

(A) The survey series must determine compliance only with the oxygen content standard of 2.0 weight-percent;

(B) The survey series must consist of at least four surveys a year for each covered area;

(C) The surveys shall not be included in determining the number of surveys under § 80.68(b)(2);

(D) In the event a survey series conducted under this paragraph (e)(2)(ii) fails in accordance with § 80.68(c)(12), the provisions of §§ 80.41(o), (p) and (q) are applicable, except that if the survey series failure occurs in a year in which the applicable minimum oxygen content is 1.7 weight percent, the compliance survey option of this section shall not be applicable for any future year; and

(E) Notwithstanding § 80.41(o), in the event a covered area passes the oxygen content series in a year, the minimum oxygen content standard for that covered area beginning in the year following the passed survey series shall be made less stringent by decreasing the minimum oxygen content standard by

0.1%, except that in no case shall the minimum oxygen content standard be less than that specified in § 80.41(d).

* * * * *

(h)(1) For the purposes of the batch sampling and analysis requirements contained in § 80.65(e)(1), any refiner, importer or oxygenate blender of California gasoline may use a sampling and/or analysis methodology prescribed in Title 13, California Code of Regulations, sections 2260 *et seq.*, in lieu of any applicable methodology specified in § 80.46, with regards to

(i) Such gasoline; or

(ii) That portion of its gasoline produced or imported for use in other areas of the United States, provided that

(A) The gasoline must be produced by a refinery that is located in the state of California that produces California gasoline, or imported by an importer of California gasoline;

(B) The gasoline must be classified as conventional gasoline upon exportation from the California, or upon release or shipment from the refinery if the refinery is located outside of California; and

(C) The refiner or importer must correlate the results from the applicable sampling and /or analysis methodology prescribed in Title 13, California Code of Regulations, sections 2260 *et seq.*, with the method specified at § 80.46, and such correlation must be adequately demonstrated to EPA upon request.

(2) Notwithstanding the requirements of § 80.65(e)(1) regarding when the properties of a batch of reformulated gasoline must be determined, a refiner of California gasoline may determine the properties of gasoline as specified under § 80.65(e)(1) at off site tankage provided that:

(i) The samples are properly collected under the terms of a current and valid protocol agreement between the refiner and the California Air Resources Board with regard to sampling at the off site tankage and consistent with requirements prescribed in Title 13, California Code of Regulations, sections 2260 *et seq.*; and

(ii) The refiner provides a copy of the protocol agreement to EPA upon request.

* * * * *

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