

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 80**

[OAR-2003-0217; FRL-8011-4]

RIN 2060-AK04

**Regulation of Fuel and Fuel Additives: Extension of California Enforcement Exemptions for Reformulated Gasoline to California Phase 3 Gasoline****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** This final rule exempts refiners, importers, and blenders of gasoline subject to the State of California's Phase 3 reformulated gasoline (CaRFG3) regulations from certain enforcement provisions in the Federal reformulated gasoline (RFG) regulations. We are taking this action because we believe that gasoline complying with the CaRFG3 regulations will provide emissions benefits equivalent to Federal Phase II RFG and because California's compliance and enforcement program will in practice be

sufficiently rigorous to assure that the standards are met. Since the Federal RFG program began in 1995, California refiners, importers and blenders have been continuously exempted from certain enforcement-related requirements such as recordkeeping and reporting, and certain sampling and testing requirements. This final rule extends those exemptions, which are applicable to California Phase 2 gasoline, to CaRFG3. It also restores the definition of "California gasoline" which was erroneously and accidentally deleted during a prior rulemaking.

**DATES:** This final rule is effective February 21, 2006.

**ADDRESSES:** EPA has established a docket for this action under OAR-2003-0217. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., CBI or other information the disclosure of which 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 in EDOCKET or in hard copy at the Air Docket in the EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Avenue, 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 Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. General Information**

Regulated categories and entities potentially affected by this final rule include:

| Category       | NAICSs codes <sup>a</sup> | SIC codes <sup>b</sup> | Examples of potentially regulated parties |
|----------------|---------------------------|------------------------|-------------------------------------------|
| Industry ..... | 324110                    | 2911                   | Petroleum refiners.                       |
| Industry ..... | 422710                    | 5171                   | Gasoline Marketers and Distributors.      |
| Industry ..... | 422720                    | 5172                   |                                           |

<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 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. History of the California Enforcement Exemptions**

Section 211(k) of the Federal Clean Air Act (the Act) directs the EPA to establish requirements for reformulated gasoline (RFG) to be used in specified ozone nonattainment areas, as well as "anti-dumping" requirements for conventional gasoline used in the rest of

the country. The areas covered by the Federal RFG program in California are San Joaquin Valley, Los Angeles, San Diego, and Sacramento.<sup>1</sup> The RFG provisions of the Act require EPA to promulgate regulations to reduce the emissions in RFG covered areas of ozone forming volatile organic compounds (VOCs) and toxic air pollutants through the use of RFG in gasoline-fueled motor vehicles. The Act also specifies that RFG use result in no increase in the emission of oxides of nitrogen (NO<sub>x</sub>) over baseline levels (under Phase I of the program). Finally, gasoline subject to the RFG

<sup>1</sup> See <http://www.epa.gov/otaq/rfgmap.jpg> for a map and list of RFG covered areas by state. A copy of the map and list has been placed in the docket for this rulemaking. The map and list are revised frequently—please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for updated information. Please be aware that the statutory requirement for RFG use in Atlanta and Baton Rouge that arose from their classification as severe non-attainment areas for the 1-hour ozone standard is currently stayed pursuant to court orders in pending litigation and, therefore, these areas do not currently appear on the map.

requirements must meet certain content standards for oxygen, benzene and heavy metals.

The RFG program was designed to be implemented in two phases. The Phase I program was in effect from January 1, 1995 through December 31, 1999. The Phase II program, which began on January 1, 2000 and is currently in effect, is similar to the Phase I program, but requires even greater reductions in emissions of VOC, toxics and NO<sub>x</sub>. The regulations for RFG and conventional gasoline may be found at 40 CFR part 80, subparts D, E, and F.

On September 18, 1992, the California Air Resources Board (CARB) adopted regulations establishing California's Phase 2 reformulated gasoline program ("California Phase 2 RFG"), which became effective March 1, 1996. These regulations established a comprehensive set of gasoline specifications designed to achieve reductions in emissions of VOCs, NO<sub>x</sub>, carbon monoxide (CO), sulfur dioxide, and toxic air pollutants

from gasoline-fueled motor vehicles.<sup>2</sup> The California Phase 2 RFG 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). These regulations also provide for the production and sale of alternative gasoline formulations, with certification under the CARB program based on a predictive model or on vehicle emission testing.

EPA previously adopted enforcement exemptions for California Phase 2 gasoline under the Federal Phase I RFG program.<sup>3</sup> In doing so, we concluded that:

(1) The emission reductions resulting from the California Phase 2 standards would be equal to or greater than the Federal Phase I RFG standards (*i.e.*, the standards that were applicable from January 1, 1995 through December 31, 1999),

(2) The content standard for benzene under California Phase 2 would be equivalent in practice to the Federal Phase I content standard and that the oxygen content standard of 2.0 weight percent would be achieved in Federal RFG areas, and

(3) CARB's compliance and enforcement program was designed to be sufficiently rigorous to ensure that Federal Phase I requirements would be met in practice.

Consequently, while the Federal Phase I RFG standards continued to apply in California, EPA exempted refiners, importers, and blenders of gasoline sold in California from many of the enforcement-related provisions of the Federal Phase I RFG regulations. The exemptions applied to the gasoline they sold for use in California and included, with some limitations, the following provisions in 40 CFR part 80:

| Requirement exempted              | Citation at 40 CFR 80.xx |
|-----------------------------------|--------------------------|
| Compliance Surveys. <sup>4</sup>  | 80.68                    |
| Independent Sampling & 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                    |
| Recordkeeping .....               | 80.74 and 80.104         |

<sup>2</sup> California's reformulated gasoline regulations, including Phase 2 and Phase 3, are at Title 13, California Code of Regulations (CCR), section 2250 *et seq.* (May 1, 2003). A copy of the regulations have been placed in the docket.

<sup>3</sup> See 59 FR 7758 (February 16, 1994) and 63 FR 34818 (June 26, 1998).

| Requirement exempted                                                                                              | Citation at 40 CFR 80.xx |
|-------------------------------------------------------------------------------------------------------------------|--------------------------|
| Reporting .....                                                                                                   | 80.75 and 80.105         |
| Product Transfer Documents.                                                                                       | 80.77                    |
| Parameter Value Reconciliation Requirements.                                                                      | 80.65(e)(2)              |
| Reformulated Gasoline and Reformulated Gasoline Blendstock for Oxygenate Blending (RBOB) Compliance Requirements. | 80.65(c)                 |
| Annual Compliance Audit Requirements.                                                                             | 80.65(h)                 |
| Compliance Attest Engagement Requirements.                                                                        | subpart F                |

California refiners, importers, and blenders were not granted exemptions from these Federal enforcement requirements with regard to gasoline delivered for use outside California, because the California Phase 2 standards and the CARB enforcement program do not apply to gasoline delivered for use outside of California.

The original California enforcement exemptions expired on December 31, 1999 when the Federal Phase II RFG started. The exemptions expired because they were based on a comparison of California Phase 2 gasoline and Federal Phase I RFG. An appropriate equivalency determination comparing California Phase 2 and Federal Phase II gasolines would have been premature in 1994, when the final RFG regulations were issued. However, on September 15, 1999, we published a direct final rule continuing the California enforcement exemptions beyond December 31, 1999.<sup>5</sup> We took this action after comparing California Phase 2 gasoline and Federal Phase II RFG. In brief, we concluded that:

(1) The emissions reductions resulting from the California Phase 2 RFG standards would be equal to or greater than the reductions from the Federal Phase II RFG standards;

(2) The content standards for benzene under California Phase 2 would be equivalent in practice to the Federal Phase II content standard and that the oxygen content standard of 2.0 weight percent would be achieved in Federal RFG areas, and

<sup>4</sup> Partial exemption from oxygen survey requirement. See 63 FR 34818, 34820–34822 (June 26, 1998). Also see fn. 9.

<sup>5</sup> See "Regulation of Fuels and Fuel Additives, Extension of California Enforcement Exemptions for Reformulated Gasoline Beyond December 31, 1999" Direct Final rule, 64 FR 49992 (September 15, 1999).

(3) CARB's compliance and enforcement program was designed to be sufficiently rigorous to ensure that Federal Phase II requirements would be met in practice.<sup>6</sup>

### III. Today's Action and Response to Comments on the Notice of Proposed Rulemaking

On August 11, 2004, EPA published a notice of proposed rulemaking for this rule in the **Federal Register**.<sup>7</sup> This section summarizes the analyses and conclusions that we used in developing the proposed and final rule. It also discusses comments we received in response to the notice of proposed rulemaking.

#### A. California's Phase 3 Gasoline Rulemaking Activities

On August 3, 2000, California first promulgated the CaRFG3 regulations, which included a prohibition on the use of methyl tertiary-butyl ether (MTBE) by December 31, 2002. On March 21, 2001, we received a written request from the California Air Resources Board (CARB) requesting extension of the California enforcement exemptions of 40 CFR 80.81 to CaRFG3. In that letter, CARB explains that its CaRFG3 regulations were adopted in response to Governor Gray Davis's issuance of Executive Order D–5–99, directing the phase-out of methyl tertiary-butyl ether (MTBE) as an additive in California gasoline by December 31, 2002.

Since March 21, 2001, CARB has completed a series of rulemakings that amended its CaRFG3 regulations. Many of these amendments were made necessary by a postponement of the MTBE phase-out and to accommodate the use of ethanol. The MTBE phase-out was delayed until December 31, 2003 by Governor Gray Davis's issuance of a second Executive Order D–52–02.<sup>8</sup> The CaRFG3 regulations and all standards discussed in this notice represent the May 1, 2003 version of the California Reformulated Gasoline Regulations, Title 13, California Code of Regulations, § 2250 *et seq.*

#### B. EPA's Analysis and Conclusions Regarding California's Phase 3 Gasoline Regulations

In developing the proposed rule and determining whether to apply the Federal enforcement exemptions of 40 CFR 80.81 to CaRFG3, we considered:

<sup>6</sup> See the Notice of Proposed Rulemaking (which accompanied the Direct Rule cited in footnote 5) at 64 FR 50036, 50038–50040 (September 15, 1999).

<sup>7</sup> See 69 FR 48827.

<sup>8</sup> A copy of the Executive Order has been placed in the docket.

(1) Whether the emissions reductions resulting from CaRFG3 would be equal to or greater than the reductions from Federal Phase II RFG standards;

(2) Whether the content standard for benzene under CaRFG3 would be equivalent in practice to the Federal Phase II content standard and whether the oxygen content standard of 2.0 weight percent would be met in Federal RFG areas;<sup>9</sup> and

(3) Whether CARB's compliance and enforcement program is designed to be sufficiently rigorous to ensure that the Federal Phase II requirements would be met in practice.

Considering these factors is appropriate and consistent with the analyses we used when we previously granted enforcement exemptions to refiners, importers, and blenders of California Phase 2 gasoline under both the Federal Phase I and Phase II RFG programs.<sup>10</sup>

To determine whether CaRFG3 emissions reductions are equivalent to or greater than Federal Phase II RFG, we have evaluated the CaRFG3 standards and the Federal Phase II complex model standards. We have also considered whether possible "real world" CaRFG3

formulations would comply with Federal Phase II RFG emissions reduction standards. Compliance with performance standards under the Federal RFG program is determined by using the Phase II Complex Model. The Complex Model predicts VOC, toxics and NO<sub>x</sub> emissions relative to the emissions of 1990 baseline gasoline.<sup>11</sup> These reduction percentages are compared to RFG performance standards. The Federal performance standards applicable to VOC-controlled RFG designated for VOC control region 1 apply to California areas covered by the Federal RFG program.<sup>12</sup>

California's Phase 2 RFG regulations established specifications for eight gasoline parameters: sulfur, benzene, olefins, aromatic hydrocarbons, oxygen, RVP, T50 and T90. Some parameters are expressed as flat limits and some parameters are expressed as averaging limits with caps. California's flat limit option requires refiners to meet parameter standards on an every-gallon, rather than an averaged basis. The California flat limits are somewhat analogous to the Federal RFG per-gallon standards. The CaRFG3 regulations revised certain of these specifications

and incorporated an updated version of the California predictive model.<sup>13</sup> Refiners may produce complying California gasoline using a "recipe" that meets these parameter specifications. Alternative specifications for complying gasoline can be established by using the California predictive model to demonstrate that emissions are equivalent to those of a gasoline meeting the established specifications. Six of the parameters are also input parameters for the EPA Complex Model. The remaining two, T50 and T90, are closely related to E200 and E300, the remaining two Complex Model inputs.<sup>14</sup>

If CaRFG3 provides emission benefits equivalent to Federal Phase II RFG, then a gasoline formulation meeting the CaRFG3 flat limit specifications should provide emission reductions, as calculated by the complex model, which meet Federal Phase II performance standards. The following table, which was prepared for the proposed rule, compares the emissions performance of the CaRFG3 "recipe," evaluated using the Federal Complex Model, to the Federal Phase II RFG performance standards:<sup>15</sup>

TABLE 1.— COMPARISON OF CARFG3 FLAT LIMIT RECIPE COMPLEX MODEL PERFORMANCE WITH FEDERAL PHASE II RFG STANDARDS

|                                       | VOC<br>(% reduction) | Toxics<br>(% reduction) | NO <sub>x</sub><br>(% reduction) |
|---------------------------------------|----------------------|-------------------------|----------------------------------|
| CaRFG3 Flat Limits with ethanol ..... | 27.7                 | 30.0                    | 14.5                             |
| CaRFG3 Flat Limits with MTBE .....    | 27.7                 | 32.2                    | 14.5                             |
| Federal per gallon standards .....    | 27.5                 | 20.0                    | 5.5                              |
| Federal averaged standards .....      | 29.0                 | 21.5                    | 6.8                              |

Table 1 shows two sets of results; one where the oxygenate was assumed to be MTBE and the other where the oxygenate was assumed to be ethanol. The specific oxygenate affects the toxics performance estimate. Two sets of Federal standards are shown, the per-gallon standards and the averaged standards. (These numerically more stringent averaged standards are

applicable if a refiner chooses to comply on average, rather than on a per gallon basis.) The emissions performance of the flat limit recipe gasoline is better than the Federal RFG per gallon standards for VOC, toxics and NO<sub>x</sub> reductions, and better than the Federal RFG averaged standards for toxics and NO<sub>x</sub> reduction. Thus, gasoline produced in compliance with the

CaRFG3 flat limits (which are somewhat analogous to Federal per-gallon standards) would achieve performance limits at least as stringent as the Federal Phase II RFG per-gallon standards for VOCs and at least as stringent as the averaged standards for toxics and NO<sub>x</sub>. Thus, CaRFG3 would meet Federal standards if every gallon were produced according to this recipe.

<sup>9</sup> Both oxygenated and nonoxygenated blends were considered in developing the notice of proposed rulemaking. At the time we issued the notice of proposed rulemaking, we did not know if California's request for a waiver of the oxygen content requirements for reformulated gasoline would be granted. We also did not know what the outcome would be with regard to the Energy Bill, H.R. 6, which addressed the elimination of the oxygen content requirement for reformulated gasoline. Since then, H.R. 6 was passed by both the House and Senate and was signed into law by President Bush. The Energy Policy Act of 2005, Pub.L. 109–58, Sec. 1504, amends section 211(k) of the Clean Air Act to eliminate the oxygen content requirement under that section. We plan to initiate rulemaking activity soon to amend 40 CFR part 80

to reflect changes to the Clean Air Act that were enacted in the Energy Policy Act.

<sup>10</sup> See 59 FR 7813 (February 16, 1994) as amended at 59 FR 36965 (July 20, 1994), 59 FR 39289 (August 2, 1994), 59 FR 60715 (November 28, 1994), 63 FR 34825 (June 26, 1998), 64 FR 49997 (September 15, 1999), and 66 FR 17263 (March 29, 2001).

<sup>11</sup> "Baseline gasoline" refers to a general set of properties representative of a refiner's fuel in 1990. The purpose of establishing a baseline is to prevent the quality of gasoline to degrade in areas in which reformulated gasoline is not required. For a discussion of baselines, please refer to the RFG and anti-dumping final rule, 59 FR 7798 (February 16, 1994).

<sup>12</sup> See 40 CFR 80.41 and 90.71.

<sup>13</sup> The California predictive model, like the Complex Model, is used to predict emissions performance of gasoline.

<sup>14</sup> There is a strong correlation between T50 (the 50% distillation temperature) and E200 (the percent distilled at 200F). Likewise, there is a strong correlation between T90 (the 90% distillation temperature) and E300 (the percent distilled at 300F). For the analysis in table 1, E200 and E300 were estimated from the flat limit T50 and T90 specifications using conversions found in EPA's complex model spreadsheet.

<sup>15</sup> Oxygen was assumed to be 2.0 wt%, the midpoint of the 1.8–2.2 wt% specification and RVP was 6.90, the RVP used with the evaporative compliance option in the predictive model.

However, as explained in the proposed rule, we anticipate that most refiners will use the CaRFG3 predictive model to certify alternative specifications with emissions equivalent to or better than the flat limit recipe. While there are similarities between the California Phase 3 predictive model and the Federal Phase II Complex Model, there are also substantial differences. Consequently, two recipes found to have equal emissions with the California predictive model may not have equal emissions when evaluated by the Federal Complex Model. In other words, a finding that the Complex Model emissions performance of the flat limit recipe is equal to or better than the Federal standards does not guarantee that the Complex Model emissions performance of all gasoline blends that may be produced in compliance with CaRFG3 will meet or surpass the Federal standards.

For purposes of determining whether or not CaRFG3 produced and certified under the predictive model would be equivalent to Federal Phase II RFG, we considered several reasonably likely "real world" CaRFG3 formulations. These formulations were developed in connection with California's 1999 request for a waiver from the Federal oxygen content requirement for reformulated gasoline.<sup>16</sup> The CaRFG3 formulations depicted in Tables 2 and 3 do not represent each and every possible gasoline formulation under the California's regulations, but we believe that they provide a representative sample of that universe of gasoline formulations that are likely to be produced under the CaRFG3 program.

This analysis is discussed in more detail in the following paragraphs.

In April 1999, California applied for a waiver of the Federal oxygen content requirement for reformulated gasoline. In order to complete an evaluation of the technical basis for this waiver request, we determined that additional refinery modeling was needed to forecast the likely composition of CaRFG3, after California's phase-out of methyl-tertiary-butyl-ether (MTBE), with and without an oxygen waiver.<sup>17</sup> Consequently, EPA commissioned MathPro to conduct this modeling, which estimated the composition of ethanol-oxygenated and non-oxygenated CaRFG3 under various scenarios.<sup>18</sup> These scenarios varied in terms of the continued or reduced use of MTBE outside of California, whether or not refiners avoid the patent held by Unocal on certain reformulated blends, and whether ethanol is used at 2.0 or 2.7 weight percent oxygen. Although these modeling results were intended for use in the waiver evaluation, they are also helpful when considering the appropriateness of extending the existing enforcement exemptions to CaRFG3. EPA believes that these modeling results are likely to be the most accurate and comprehensive forecasts of the likely properties of the CaRFG3 that will be sold in Federal RFG areas in California. For the purpose of this rule, we have considered both oxygenated and non-oxygenated CaRFG3 blends. (See footnote 9 for a discussion of the oxygen content requirement in light of the Energy Policy Act of 2005.)

Table 2, below and as prepared for the proposed rule, shows that oxygenated CaRFG3 produced under each of the

scenarios that EPA evaluated meets Federal RFG performance standards. All of these fuels had better performance than the Federal RFG per gallon standards. With one exception (underlined in Table 2), these fuels also met or surpassed the Federal RFG averaged standards. The one exception is a fuel that was estimated to provide a VOC reduction of 28.9%. Since the Federal per gallon standard is 27.5% and the averaged standard is 29.0%, this fuel would meet the Federal per gallon but not the averaged standard. However, we believe for purposes of today's analysis, that the Federal per gallon standard is a more appropriate reference point.

MathPro's modeling assumed that essentially all CaRFG3 is certified with the flat limit variant of the Predictive Model. Therefore, the formulations which they forecast have California predictive model emissions performance equivalent to, or better than, the flat limit recipe, but do not necessarily meet California predictive model averaged limit requirements. As previously noted, California's flat limit option requires refiners to meet parameter standards on an every-gallon, rather than averaged basis. The California flat limits are analogous to the Federal RFG per-gallon standards. In both cases, refiners elect to meet less stringent standards on an every-gallon basis, rather than more stringent standards, on average. Consequently, it is appropriate to expect the complex model performance of these CaRFG3 formulations to meet the Federal Phase II per-gallon performance standards, but not necessarily to meet the Federal Phase II averaged standards.

TABLE 2.—COMPLEX MODEL PERFORMANCE OF OXYGENATED CARFG3 USING MATHPRO GASOLINE PROPERTY ESTIMATES

| Ethanol<br>(wt% oxygen) | Sulfur<br>(ppm) | RVP<br>(psi) | E200<br>(%) | E300<br>(%) | Aromatics<br>(vol%) | Olefins<br>(vol%) | Benzene<br>(vol%) | VOC<br>(%) | Toxics<br>(%) | NO <sub>x</sub><br>(%) |
|-------------------------|-----------------|--------------|-------------|-------------|---------------------|-------------------|-------------------|------------|---------------|------------------------|
| 2.0 .....               | 15              | 6.66         | 47.20       | 87.60       | 24.10               | 4.40              | 0.64              | 30.2       | 32.9          | 14.8                   |
| 2.0 .....               | 10              | 6.74         | 46.40       | 88.70       | 23.30               | 3.90              | 0.57              | 29.6       | 34.1          | 15.4                   |
| 2.7 .....               | 10              | 6.85         | 46.90       | 88.10       | 23.20               | 3.80              | 0.70              | 29.0       | 32.8          | 15.4                   |
| 2.7 .....               | 9               | 6.84         | 46.60       | 88.00       | 23.30               | 3.80              | 0.68              | 29.0       | 32.9          | 15.4                   |
| 2.0 .....               | 17              | 6.60         | 46.80       | 88.30       | 26.50               | 3.40              | 0.62              | 30.1       | 32.0          | 14.3                   |
| 2.0 .....               | 17              | 6.60         | 45.20       | 90.60       | 19.10               | 4.60              | 0.77              | 30.8       | 33.8          | 16.4                   |
| 2.0 .....               | 13              | 6.62         | 46.20       | 87.70       | 24.30               | 3.70              | 0.60              | 30.1       | 33.2          | 15.0                   |
| 2.0 .....               | 12              | 6.60         | 46.10       | 88.20       | 28.60               | 2.90              | 0.51              | 29.6       | 32.1          | 14.2                   |
| 2.7 .....               | 10              | 6.76         | 46.20       | 88.60       | 25.70               | 2.80              | 0.66              | 29.1       | 32.1          | 14.9                   |
| 2.7 .....               | 12              | 6.60         | 44.90       | 87.70       | 22.40               | 2.80              | 0.71              | 30.2       | 32.9          | 15.7                   |

<sup>16</sup> The California waiver analysis considered the effect of changes in gasoline composition on the entire on-road and off-road gasoline-power fleet. The analysis for this rule considers only Complex Model performance, which considers a portion of the on-road gasoline-powered fleet, since the Model considers 1990s technology vehicles.

<sup>17</sup> One of the reasons for this determination was that earlier modeling was done before the CaRFG3 predictive model was finalized. This may have affected the estimates of CaRFG3 properties developed from these earlier studies. EPA's Technical Support Document for the waiver decision "Analysis of California's Reformulated Gasoline Oxygen Content Requirement for

California Covered Areas" discusses this in greater depth. A copy of this document has been placed in the docket.

<sup>18</sup> See "Analysis of the Production of California Phase 3 Reformulated Gasoline With and Without an Oxygen Waiver", MathPro, Inc. (January 19, 2001). A copy of this document has been placed in the docket.

TABLE 2.—COMPLEX MODEL PERFORMANCE OF OXYGENATED CARFG3 USING MATHPRO GASOLINE PROPERTY ESTIMATES—Continued

| Ethanol<br>(wt% oxygen) | Sulfur<br>(ppm) | RVP<br>(psi) | E200<br>(%) | E300<br>(%) | Aromatics<br>(vol%) | Olefins<br>(vol%) | Benzene<br>(vol%) | VOC<br>(%) | Toxics<br>(%) | NO <sub>x</sub><br>(%) |
|-------------------------|-----------------|--------------|-------------|-------------|---------------------|-------------------|-------------------|------------|---------------|------------------------|
| 2.7 .....               | 8               | 6.73         | 45.40       | 89.00       | 26.30               | 1.90              | 0.63              | 28.9       | 32.1          | 15.0                   |
| 2.7 .....               | 10              | 6.69         | 45.40       | 88.30       | 25.30               | 2.80              | 0.65              | 29.4       | 32.3          | 15.1                   |

Table 3, below, shows that non-oxygenated CaRFG3 produced under each of the scenarios that EPA evaluated meets Federal RFG performance standards. All of the fuels shown in

Table 3, which EPA believes to be reasonably representative of the fuel formulations that refiners would produce in California without an oxygen content requirement are predicted to

perform better than the Federal RFG per gallon and averaged standards. (See footnote 9 for a discussion of the oxygen content requirement in light of the Energy Policy Act of 2005.)

TABLE 3.—COMPLEX MODEL PERFORMANCE OF NON-OXYGENATED CARFG3 USING MATHPRO GASOLINE PROPERTY ESTIMATES

| Ethanol<br>(wt% oxygen) | Sulfur<br>(ppm) | RVP<br>(psi) | E200<br>(%) | E300<br>(%) | Aromatics<br>(vol%) | Olefins<br>(vol%) | Benzene<br>(vol%) | VOC<br>(%) | Toxics<br>(%) | NO <sub>x</sub><br>(%) |
|-------------------------|-----------------|--------------|-------------|-------------|---------------------|-------------------|-------------------|------------|---------------|------------------------|
| 0.0 .....               | 8               | 6.60         | 47.7        | 87.4        | 23.0                | 5.9               | 0.57              | 30.7       | 32.5          | 15.1                   |
| 0.0 .....               | 7               | 6.60         | 48.7        | 87.6        | 28.6                | 4.7               | 0.51              | 30.0       | 30.4          | 14.0                   |
| 0.0 .....               | 8               | 6.60         | 48.1        | 87.2        | 26.9                | 2.4               | 0.46              | 29.7       | 32.0          | 14.3                   |
| 0.0 .....               | 10              | 6.60         | 47.7        | 88.0        | 24.3                | 3.9               | 0.49              | 30.3       | 32.9          | 14.8                   |
| 0.0 .....               | 12              | 6.60         | 49.0        | 85.8        | 24.8                | 6.0               | 0.52              | 30.5       | 32.2          | 14.3                   |
| 0.0 .....               | 10              | 6.60         | 49.2        | 87.4        | 28.6                | 4.1               | 0.53              | 30.0       | 30.2          | 13.8                   |
| 0.0 .....               | 12              | 6.60         | 47.6        | 86.8        | 21.2                | 6.3               | 0.52              | 31.0       | 33.8          | 15.3                   |
| 0.0 .....               | 9               | 6.60         | 47.9        | 87.6        | 25.7                | 3.9               | 0.49              | 30.1       | 32.2          | 14.5                   |

Based upon a comparison of the CaRFG3 flat limit “recipe” and Federal Phase II Complex model standards, as well as a consideration of possible California fuel formulations certified using the California Phase 3 predictive model, we have concluded that the NO<sub>x</sub>, VOC and toxics emissions reductions resulting from the CaRFG3 standards would be equal to or greater than the Federal Phase II RFG standards.

The content standard for benzene for CaRFG3 is equivalent to or better than the Federal Phase II standards. The California flat limit benzene standard is 0.80 volume percent and the averaged standard is 0.70 volume percent with a 1.10 volume percent cap. By comparison, the Federal per gallon benzene standard is 1.00 volume percent and the averaged standard is 0.95 volume percent with a 1.30 volume percent cap. EPA retains the authority to sample and test California gasoline to make sure it meets all applicable Federal standards.

In developing the proposed rule, we considered the design and implementation of CARB’s enforcement program, which includes enforcement at refineries, import facilities, terminals, and service stations. CARB’s enforcement program is generally outlined in its regulations and includes requirements that refiners submit annual compliance plans,<sup>19</sup> which

outline how they will meet CaRFG3 requirements, and that refiners and importers conduct testing and maintain records of testing performed on batches of gasoline.<sup>20</sup> CARB staff summarized information on its actual enforcement activities in fiscal years 1999–2000 and 2000–2001, indicating that 6.6% and 6.5% of gasoline sold in California was inspected, during each respective period. In 1999–2000, the violation rate was 1.9% (based on volumes sampled) and 0.5% (based on the number of samples). In 2000–2001, the violation rate was 0.16% (based on volumes sampled) and 1.06% (based on the number of samples). We believe that, considering the presence of adequate enforcement provisions in its regulations and CARB’s actual enforcement activities, that the CARB enforcement program is sufficiently stringent to ensure that the California standards will be met. For all these reasons, we have determined that it is appropriate to apply the enforcement exemptions at 40 CFR 80.81 to refiners, importers, and blenders of CaRFG3.

#### C. Definition of California Gasoline

This rule restores the definition of “California gasoline,” which was previously included in § 80.81, but which was accidentally and erroneously removed from the Code of Federal Regulations. The definition is necessary

because it describes the gasoline to which the enforcement exemptions may apply.

#### D. Response to Comments

We received no adverse comments on the notice of proposed rulemaking. The only written comment received was from the Western States Petroleum Association and it was a positive one that urged us to finalize this rule as soon as possible.

### IV. Administrative Requirements

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

Under Executive Order 12866, 58 **Federal Register** 51,735 (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;

<sup>19</sup> Title 13, CCR section 2269.

<sup>20</sup> Title 13, CCR section 2270.

(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."

This rule is not a significant regulatory action within the meaning of the Executive Order. It would not have an annual effect on the economy of \$100 million or more and is not expected to have any adverse economic effects as described in the Order. This rule does not raise issues of consistency with the actions taken or planned by other agencies, does not materially alter the cited budgetary impacts, and does not raise any novel legal or policy issues as defined in the Order.

#### B. Paperwork Reduction Act

This rule does not impose any new information collection burden. Today's rule extends enforcement exemptions to refiners of CaRFG3 and would reduce burdens associated with overlapping Federal and state requirements, including recordkeeping and reporting requirements. However, the Office of Management and Budget (OMB), under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, has previously approved the information collection requirements contained in the final reformulated gasoline (RFG) and anti-dumping rulemaking and gasoline sulfur control rulemaking, and has assigned OMB control numbers 2060-0277 and 202-0308. A copy of the OMB approved Information Collection Request (ICR) may be obtained from the Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460.

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

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

#### C. Regulatory Flexibility Act (RFA)

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that has not more than 1,500 employees (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, I certify that this action would 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 rule on small entities." See 5 U.S.C. 603 and 604. Thus, an agency may certify 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.

Today's rule extends enforcement exemptions to refiners of CaRFG3 and would reduce burdens associated with overlapping Federal and state requirements, including recordkeeping and reporting requirements. We have therefore concluded that today's rule will relieve regulatory burden for all small entities.

#### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 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 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. The rule imposes no enforceable duty on any state, local or tribal governments or the private sector.

#### 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" are 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 rule does not have federalism implications. It does 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. Today’s rule extends enforcement exemptions to refiners of CaRFG3 and would reduce burdens associated with overlapping Federal and state requirements, including recordkeeping and reporting requirements. 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” are 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 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 refiners, importers and blenders of CaRFG3 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 section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045, entitled “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

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

This 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.

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

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub L. 104–113, 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. Today’s rule does not affect technical standards and raises no issues under the NTTAA.

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

Statutory authority for today’s rule comes from sections 211(c), 211(i) and 211(k) of the CAA (42 U.S.C. 7545(c) and (k)). Section 211(c) and 211(i)

allows EPA to regulate fuels that contribute to air pollution which endangers public health or welfare, or which impairs emission control equipment. Section 211(k) prescribes requirements for RFG and conventional gasoline and requires EPA to promulgate regulations establishing these requirements. Additional support for the fuels controls in today’s rule comes from sections 114(a) and 301(a) of the CAA.

#### *K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before the rule is published in the **Federal Register**. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

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

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

Dated: December 15, 2005.

**Stephen L. Johnson,**  
Administrator.

■ For the reasons set forth in the preamble, part 80 of title 40 of the Code of Federal Regulations 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).

#### **Subpart D—[Amended]**

- 2. Section 80.81 is amended by:
  - a. Revising paragraph (a).
  - b. Revising paragraph (c) introductory text.
  - c. Revising paragraph (e)(2) introductory text and (e)(3)(i).
  - d. Revising paragraph (g)(1) introductory text.
  - e. Revising paragraphs (h)(1) introductory text, (h)(1)(ii)(A), (h)(1)(ii)(C) and (h)(2)(i).

The revisions read as follows:

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

(a)(1) The requirements of subparts D, E, F, and J of this part are modified in accordance with the provisions contained in this section in the case of California gasoline.

(2) For purposes of this section, "California gasoline" means any gasoline that is sold, intended for sale, or made available for sale as a motor vehicle fuel in the State of California and that:

(i) Is manufactured within the State of California;

(ii) Is imported into the State of California from outside the United States; or

(iii) Is imported into the State of California from inside the United States and that is manufactured at a refinery that does not produce reformulated gasoline for sale in any covered area outside the State of California.

\* \* \* \* \*

(c) Any refiner, importer, or oxygenate blender of California gasoline that is manufactured or imported subsequent to March 1, 1996 and that meets the requirements of the California Phase 2 or Phase 3 reformulated gasoline regulations, as set forth in Title 13, California Code of Regulations, section 2250 *et seq.* (May 1, 2003), is with regard to such gasoline, exempt from the following requirements (in addition to the requirements specified in paragraph (b) of this section:

\* \* \* \* \*

(e) \* \* \*

(2) Such exemption provisions shall not apply to any refiner, importer, or oxygenate blender of California gasoline with regard to any gasoline formulation that it produces or imports and that is certified under Title 13, California Code of Regulations, section 2265 or 2266 (May 1, 2003), unless:

\* \* \* \* \*

(3)(i) Such exemption provisions shall not apply to any refiner, importer, or oxygenate blender of California gasoline who has been assessed a civil, criminal, or administrative penalty for violations of subpart D, E, or F of this part or for a violation of the California reformulated gasoline regulations set forth in Title 13, California Code of Regulations, section 2250 *et seq.* (May 1, 2003).

\* \* \* \* \*

(g)(1) Any refiner that operates a refinery located outside the State of California at which California gasoline is produced (as defined in paragraph (a)(2)(ii) or (iii) of this section) is produced shall, with regard to such gasoline, provide to any person to whom custody or title of such gasoline has transferred, and each transferee shall provide to any subsequent transferee, documents which include the following information:

\* \* \* \* \*

(h)(1) For the purposes of the batch sampling and analysis requirements contained in § 80.65(e)(1) and § 80.101(i)(1)(i)(A), 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, section 2250 *et seq.* (May 1, 2003), in lieu of any applicable methodology specified in § 80.46, with regard to:

\* \* \* \* \*

(ii) \* \* \*

(A) The gasoline must be produced by a refinery that is located in the state of California that produces California gasoline, or imported into California from outside the United States as California gasoline;

\* \* \* \* \*

(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, section 2250 *et seq.* (May 1, 2003) with the method specified in § 80.46, and such correlation must be adequately demonstrated to EPA upon request.

(2) \* \* \*

(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 the requirements prescribed in Title 13, California Code of Regulations, section 2250 *et seq.* (May 1, 2003); and

\* \* \* \* \*

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