ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[FRL–5821–5]

RIN 2060–AH48

Regulation of Fuels and Fuel Additives: Baseline Requirements for Gasoline Produced by Foreign Refiners

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would revise the requirements for imported gasoline. The Agency is proposing that a foreign refiner could choose to petition EPA to establish an individual baseline reflecting the quality and quantity of gasoline produced at a foreign refinery in 1990 that was shipped to the United States. The foreign refiner would be required to meet the same requirements relating to the establishment and use of individual refinery baselines as are met by domestic refiners. Additional requirements are also being proposed to address issues that are unique to refiners and refineries located outside the United States, related to tracking the movement of gasoline from the refinery to the United States border, monitoring compliance with the requirements that apply to parties outside the United States, and imposition of appropriate sanctions for violations. EPA is also proposing that it would monitor the quality of imported gasoline, and if it exceeded a specified benchmark, EPA would apply appropriate remedial action. EPA is proposing that the baseline for gasoline imported from refiners without an individual baseline would be adjusted to remedy the exceedance.

EPA believes the proposed rulemaking would be consistent with the Agency's commitment to fully protect public health and the environment, and with the U.S. commitment to ensure that the regulation is consistent with the obligations of the United States under the World Trade Organization.

DATES: The Agency will hold a public hearing on today's proposal if one is requested by May 13, 1997. If a public hearing is held, it will take place on May 20, 1997. If a public hearing is held on today's proposal, comments must be received by June 19, 1997. If a hearing is not held, comments must be received by June 5, 1997.

ADDRESSES: To request a hearing or to find out if and where a hearing is being held, please call Karen Smith at (202) 233–9674. Send comments to Public Docket A–97–26 at the address below. It is also requested that two duplicate copies of comments be sent to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document. Materials relevant to this NPRM are contained in Public Dockets A–91–02 and A–92–12, A–94–25 and A–96–33 located at Room M–1500, Waterside Mall (ground floor), U.S. Environmental Protection Agency, 401 M Street S.W., Washington, DC 20460. The docket may be inspected from 8 a.m. until 5:30 p.m. Monday through Friday. A reasonable fee may be charged by EPA for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Karen Smith, Fuels and Energy Division, U.S. EPA (6406J), 401 M Street, SW., Washington, DC 20460, Telephone: (202) 233–9674.

SUPPLEMENTARY INFORMATION: *Regulated entities.* Entities potentially regulated by this action are those foreign refiners and importers which produce, import or distribute gasoline for sale in the United States. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Foreign Refiners, Importers.

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

Copies of this proposed rule are available on the Internet at www.epa.gov., and also on the OAQPS Technology Transfer Network Bulletin Board System (TTNBBS). The TTNBBS can be accessed with a dial-in phone line and a high-speed modem (PH# 919–541–5742). The parity of your modem should be set to none, the data bits to 8, and the stop bits to 1. Either a 1200, 2400, 9600, or 14400 baud modem should be used. When first signing on, the user will be required to answer some basic informational questions for registration purposes. After completing the registration process, proceed through the following series of menus:

(T) GATEWAY TO TTN TECHNICAL AREAS (Bulletin Boards)
(M) OMS
(K) Rulemaking and Reporting
(3) Fuels
(9) Reformulated gasoline

A list of ZIP files will be shown, all of which are related to the reformulated gasoline rulemaking process. The individual foreign refinery baseline proposed rule is identified by the title: ''FORBASE.ZIP.'' To download this file, type the instructions below and transfer according to the appropriate software on your computer: <D>ownload, <P>rotocol, <E>xamine, <N>ew, <L>ist, or <H>elp Selection or <CR> to exit: D FORBASE.ZIP

You will be given a list of transfer protocols from which you must choose one that matches with the terminal software on your own computer. Then go into your own software and tell it to receive the file using the same protocol. Programs and instructions for de-archiving compressed files can be found via <S>ystems Utilities from the top menu, under <A>rchivers/de-archivers.

I. Background

A. Current Requirements for Imported Gasoline

On December 15, 1993, EPA issued the final regulations that establish requirements for reformulated gasoline (RFG) and conventional gasoline (CG) (together the Gasoline Rule), as prescribed by section 211(k) of the Clean Air Act (the Act). See 59 FR 7716 (February 16, 1994). Under the Gasoline Rule, compliance by refiners and importers with the CG requirements and certain RFG requirements is measured against baselines that are intended to reflect a refinery or importer's 1990 gasoline quality. Domestic refiners are required to establish individual refinery baselines of the quality and quantity of the gasoline produced at each refinery in 1990. Domestic refinery baselines are calculated using, in hierarchical order based on the availability of data, 1990 gasoline test data (Method 1), 1990 blendstock test data (Method 2), or post-1990 blendstock and/or gasoline test data (Method 3). Under the Gasoline Rule domestic blenders of gasoline and importers of foreign-produced gasoline are treated differently than domestic refiners in that they are required to establish baselines of the quality and quantity of gasoline they produced or imported in 1990 using Method 1 data,

if available. However, almost all blenders and importers lack the actual 1990 test data necessary to establish a baseline using Method 1 data. As a result, blenders and importers are assigned the statutory baseline, a baseline established by EPA in 1993 to approximate average gasoline quality in the United States in 1990,[1] with the consequence that almost all gasoline produced at foreign refineries is evaluated using the statutory baseline.[2] The baseline-setting scheme is specified in 40 CFR 80.91 through 80.93, and is discussed in the Preamble to the final rule at 59 FR 7791 (February 16, 1994).

In preparing the Gasoline Rule, EPA focused on three major issues regarding the use of individual baselines for foreign refiners in the RFG and CG programs. EPA's overriding consideration was the ultimate environmental consequences of the baseline-setting scheme. The three issues that EPA focused on were: (1) The technical difficulty of using baseline-setting Methods 2 and 3 to accurately predict the quality of the subset of a foreign refinery's gasoline that was exported to the U.S. in 1990; (2) the ability of the Agency to adequately verify and enforce the use of individual foreign refinery baselines, including problems identifying the refinery of origin of imported gasoline and enforcing gasoline content requirements against a foreign refiner; and (3) the risk of adverse environmental effects from providing refiners or importers with options in establishing baselines.

In developing the Gasoline Rule, EPA considered but did not go forward with allowing foreign refiners the option of petitioning EPA to establish individual baselines using Methods 1, 2, and 3, or defaulting to the statutory baseline. EPA's reasons for not adopting the option at that time are discussed at 59 FR 7785–88 (February 16, 1994). When EPA issued the final rule on December 15, 1993, however, it was not fully satisfied that the baseline-setting scheme applicable to importers and foreign refiners was the optimum solution and continued to consider the issue.

B. May 1994 Proposal

In May 1994, EPA proposed to amend the Gasoline Rule to define criteria and procedures by which foreign refiners would be allowed to establish individual refinery baselines that reflected the properties and volume of the gasoline that was produced at a foreign refinery in 1990 and exported for use within the United States. Under this proposal, if a foreign refiner made the requisite showing through a petition process EPA would establish an individual foreign refinery baseline. U.S. importers of RFG produced at the foreign refinery would have used the individual foreign refinery baseline values to demonstrate compliance with the limited number of RFG requirements that are based on individual baselines. Importers would not have been allowed to use individual foreign refinery baselines for the CG requirements. Foreign refinery baselines would have been used only during the period 1995 through 1997[3] and only up to a volume of gasoline each year that equaled the foreign refinery's 1990 baseline volume. The proposal also included detailed enforcement and verification procedures.

Subsequent to the May 1994 proposal, Congress included limitations on EPA's appropriations related to the May 1994 proposal. Based on this EPA did not conclude the rulemaking process.

C. The WTO Dispute Settlement Proceeding

In 1995, the governments of Venezuela and Brazil initiated dispute settlement proceedings before the World Trade Organization (WTO), challenging as discriminatory the different treatment applied by the Gasoline Rule to imported gasoline and that produced by U.S. refiners. Among other defenses, the United States argued that the rule was justified by the difficulties associated with implementing and enforcing individual baseline requirements with respect to foreign refiners and by the environmental risk resulting from providing foreign refiners the choice of employing individual baselines. The initial dispute settlement panel reviewing the matter found the regulation discriminatory under the General Agreement on Tariffs and Trade 1994 (GATT) and that the United States had not shown that the GATT's health, environment, or conservation exceptions applied. The WTO Appellate Body, reviewing the U.S. arguments regarding the GATT conservation exception, recognized that the United States had legitimate concerns, but concluded the rule did not satisfy all the requirements for this exception. The Appellate Body based this conclusion on its views that (1) the United States had not adequately explored options available to deal with its concerns, in particular international cooperative arrangements and (2) the United States had been concerned about the costs of the various regulatory options to domestic refiners but not to foreign refiners. The Appellate Body recommended that the United States bring EPA's regulations into conformity with WTO obligations, leaving the United States to determine how it would comply.

On June 19, 1996 after the Administration had consulted with Congress, the United States advised the WTO that the United States intended to meet U.S. obligations with respect to the results of the WTO dispute settlement proceedings, that the EPA had initiated an open process to examine any and all options for compliance, and that a key criterion in evaluating options would be fully protecting public health and the environment. On June 28, 1996, EPA issued an invitation for public comment in the **Federal Register** (61 FR 33703), seeking input and suggestions from all interested parties. The comment period closed on September 26, 1996.

D. Invitation for Public Comment

The invitation for public comment was an attempt to identify any and all options available to the Agency to meet U.S. international obligations in response to the WTO decision. EPA's goal was to identify all feasible options that are consistent with EPA's commitment to fully protect public health and the environment, and at the same time are consistent with the obligations of the United States under the WTO.

Specifically, EPA invited comment on: (1) How to accurately establish a reliable and verifiable individual baseline for a foreign refinery; (2) how EPA could adequately monitor compliance with and enforce any baseline requirements; (3) how EPA could effectively determine the refinery of origin of imported gasoline, so as to determine the appropriate baseline to apply to the imported gasoline; (4) the potential environmental impacts from

[1] The statutory baseline is calculated pursuant to section 211(k)(10)(B) of the Act which specifies the properties of summertime statutory baseline gasoline, and instructs the EPA to establish the average properties of 1990 wintertime gasoline. The Gasoline Rule specifies the properties of 1990 wintertime gasoline in § 80.45(b)(2), and the combined summer and winter, or annual, statutory baseline gasoline properties in § 80.91(c)(5).

Importers are required to meet various conventional gasoline requirements by comparing the annual average quality of the gasoline they import against the statutory baseline. An individual batch of imported conventional gasoline is not subject to any requirements, only the annual average of gasoline imported by the importer. Foreign refiners are not subject to the requirements of the current Gasoline Rule.

[2] Only one importer had the Method 1 data necessary to establish an individual baseline.

[3] Individual refinery baselines are used to set certain content requirements for RFG only through 1997. See 40 CFR 80.41.

implementing any suggested options; and (5) a method by which EPA could better quantify or characterize potential environmental impacts of any options proposed. EPA also requested that commenters provide information and analysis on the public health, environmental and economic impact associated with any option presented.

EPA received sixteen comments from various interested parties during the comment period.

Many comments stated that EPA's action on the WTO dispute could impact the requirements only for CG and not for RFG, because beginning in January 1998, individual baselines cease having any relevance for RFG requirements, and it would be difficult to implement any rule change before January 1998.

Comments by domestic refiners and certain domestic refiner associations highlighted four major concerns:

(1) The necessity for adequate compliance, audit, and enforcement requirements. The comments questioned EPA's ability to establish reliable and verifiable baselines, and to effectively monitor compliance by foreign refiners with requirements and enforce violations that are documented.

(2) The technical difficulties associated with establishing a foreign refinery's baseline that would reflect the quality only of the subset of the refinery's gasoline that was exported to the U.S. in 1990, because the quality of this subset may differ from the refinery's overall average gasoline quality.

(3) The possibility that the quality of imported gasoline would decline if foreign refiners are given the option of establishing individual refinery baselines because foreign refiners whose 1990 gasoline was dirtier than the statutory baseline would have an incentive to seek an individual baseline, whereas refineries whose 1990 gasoline was cleaner than the statutory baseline would not have such an incentive. This concern, according to some commenters, should be avoided by requiring all foreign refiners to establish individual refinery baselines. This scenario is often called ''gaming''.

(4) The U.S. does not impose requirements on gasoline produced at a foreign refinery that is not exported to the U.S. Domestic refiners must produce clean gasoline for RFG areas without degrading the CG sold elsewhere in the United States, essentially controlling all gasoline produced at a domestic refinery. Foreign refiners have the flexibility to produce clean gasoline for the U.S. market by disposing of dirty components in gasoline sold into markets outside the U.S., according to the comments.

One domestic refiner proposed that a single national baseline replace individual baselines for conventional gasoline.

Venezuelan and Brazilian refiners affirmed their ability to accurately establish reliable and verifiable individual baselines in the same manner as domestic refiners, and commented that EPA's gaming concern has no merit particularly if all foreign refiners establish individual refinery baselines.

A European refiner urged EPA to allow foreign refineries to establish individual baselines if they have the necessary supporting data.

Independent gasoline marketers in the U.S. strongly urged quick compliance with the WTO decision to increase competition in the gasoline market. State and local air management districts asked EPA to commit to adopt measures that would protect public health and the environment.

EPA received additional comments from representatives of independent refiners and representatives of independent importers and blenders following the close of the comment period. The independent refiners suggested that foreign refiners should be required to establish individual baselines and should not be allowed to default to the statutory baseline. Foreign refiners that do not establish an individual baseline should be excluded from the U.S. market. Foreign refiners should be subject to the full range of compliance and enforcement measures necessary to secure compliance by foreign parties. Importers should no longer be allowed to use the statutory baseline, but would have to use the individual baseline applicable to the gasoline they imported, to avoid gaming by foreign refiners with clean individual baselines.

Independent importers and blenders suggested that all market participants that are similarly situated should be treated in the same manner, that it is important to preserve the ability of independent importers to reblend and reclassify imported CG as RFG, that the use of individual baselines should not restrict the ability to import other gasoline under the importer's statutory baselines, that liability for the use of an individual baseline should fall on the foreign refiner not the importer, and that mandatory use of individual baselines by foreign refiners should not be imposed as it would limit gasoline supplies coming to the United States.

E. Requiring Individual Baselines for Foreign Refiners

In preparing this proposal EPA attempted to identify any and all options available to the Agency to meet U.S. international obligations in response to the WTO decision. EPA's goal was to identify all feasible options that are consistent with EPA's commitment to fully protect public health and the environment, and at the same time are consistent with the obligations of the United States under the WTO. Comments submitted to EPA during and after the public comment period, and EPA's prior investigations on this issue, identified two broad approaches for consideration involving individual baselines for foreign refineries.[4]

One approach would require the use of individual baselines (IB) by foreign refiners. It would be mandatory, not optional. Under this approach, EPA would apply basically the same requirements that apply to domestic refiners to foreign refiners.

This approach would require foreign refiners who market gasoline to the U.S. to submit petitions to establish an individual refinery baseline, using the same methods and procedures currently in the regulations. Once an IB was assigned for a refinery, that IB would be used in developing a volume weighted compliance baseline. Under one approach, the foreign refiner would meet the exhaust toxics and NO_x requirements for CG exported to the U.S. by that foreign refinery, in the same manner as domestic refiners. Under an alternative approach the domestic importer would establish a volume weighted compliance baseline reflecting the quantity and IBs of gasoline imported from various foreign refineries, and the domestic importer would meet the applicable CG requirements. In either case, the use of a foreign refinery IB would be subject to a volume cap, as for domestic refiners. Foreign refiners would be subject to audits and inspections to verify the IB and to verify the quantity and quality of gasoline sent to the U.S. from that foreign refinery.

Significant additional requirements would also need to be imposed on gasoline imported under a foreign refiner's IB. For domestic refiners, almost all gasoline is produced for the U.S. market and the very small volume that is exported can be readily tracked and subtracted from the domestic refiner's compliance calculations. The domestic refiner then bases its CG compliance calculations on the quality and quantity of finished gasoline when it leaves the refinery. At that point it has entered the U.S. gasoline market, and there is no need to track the gasoline or

[4] The discussion in the preamble will focus on imports of CG, as compared to imports of RFG. After January 1, 1998, individual baselines have no application in the RFG program. For CG, however, individual baselines will continue to be used in setting the compliance requirement for all CG. The application of the proposal to RFG prior to January 1, 1998 is discussed separately in this notice at section II.F.

to segregate it from gasoline produced by another refinery.

For a foreign refiner, only a portion of the refinery's total production is likely to be sent to the U.S., ranging from a very small percentage to a significant minority of production. The gasoline also may travel through a long and complicated distribution system from the point it leaves the refinery gate to the point it enters the U.S. market. However the IB for a specific foreign refinery would properly apply only to gasoline produced at that foreign refinery, and would not apply to gasoline produced at a different foreign refinery.

Several facts would therefore need to be clearly established to properly apply a foreign refinery's IB to a batch of imported gasoline. First, the refinery that produced the specific batch of imported gasoline must be identified. Second, it must be demonstrated that this batch of gasoline has not been mixed with gasoline produced by a different foreign refinery with a different IB, from the point it left the refinery-of-origin to the point it entered the U.S. market. Third, the total amount of CG and RFG produced by the foreign refinery and sent to the U.S. market must be determined, to establish when the volume cap is exceeded. As with domestic refiners, it would also be important to track blendstocks produced and sent to the U.S. from a foreign refinery, so a foreign refiner could not avoid a stringent IB by shipping blendstocks instead of finished gasoline. Tracking and segregation requirements would need to be adopted to implement this.

A certain amount of gasoline is imported from fungible gasoline supplies, where the refinery of origin is not known. This occurred in 1990, and would be expected to continue to occur in the future. It would be reasonable to allow the practice to continue, and gasoline imported from such sources would continue to be subject to the statutory baseline (SB). However a mechanism would need to be imposed so that this supply of fungible gasoline could not be used as a way to avoid a more stringent IB.

Under this approach, EPA would need to establish IBs for all foreign refineries, most of which sent only a small volume of gasoline to the U.S. in 1990. The methods used to set IBs for domestic refiners could still be used to establish the quality and quantity of gasoline sent to the U.S. by a foreign refiner in 1990. Given the large number of foreign refineries involved and the potential for widely varying technical and other ability to establish IBs, it is not clear that all foreign refiners would have the information necessary to establish an accurate IB for gasoline sent to the U.S. in 1990.

The Department of Energy (DOE) has advised EPA that this approach could seriously affect the supply and price of gasoline in the U.S. market. Currently gasoline is imported into the U.S. market from a free moving and fungible distribution system for imported gasoline. The volume of imported gasoline, while small compared to the total U.S. gasoline supply, can have a significant impact on gasoline prices. Imported gasoline tends to moderate price increases by increasing the sources of gasoline to meet U.S. demand, whether in response to a trend of increasing demand over time, or a short term supply problem based on local or temporary changes in domestic supply or demand.

The approach outlined above would significantly change the way gasoline is imported to the U.S. market, greatly increasing the complexity and making it more likely that gasoline could not be quickly and readily diverted to the U.S. market to meet demand. This would make it more likely that imported gasoline would not play the same role that it currently does in moderating price increases. The long term supply implications are harder to predict.

The increase in complexity from this approach is based on the need to ensure that the right IB is applied to a batch of imported gasoline, that an IB is only used up to the applicable volume cap, and that parties do not circumvent the appropriate IB by shifting gasoline or blendstocks through other parties. Modifying the tracking and monitoring restrictions described above to try and resolve the supply concerns would increase the risk of adverse environmental effect from this approach.

EPA is also concerned that this approach might produce incentives that would tend to reduce the average quality of imported CG. For example, gasoline from refiners with cleaner IBs would be measured against a more stringent baseline than under the current rules, while gasoline from refiners with dirtier IBs would be measured against a less stringent baseline than under the current rules. Additional costs would be associated with segregation, tracking, and other requirements described above. To the extent these changes put refiners with clean IBs at an economic disadvantage compared to refiners with either the SB or an IB dirtier than the SB, it could potentially push the supply of gasoline away from refiners with clean IBs.

After evaluating this approach, EPA has decided to not propose it. While it appears generally neutral in requiring individual baselines for both domestic and foreign refiners, upon full consideration this approach presents too great a risk of adverse effects on gasoline supply and prices. EPA also has questions as to its environmental neutrality. The Agency is instead proposing the optional use of individual baselines, with specific provisions for monitoring gasoline quality and remedying any adverse environmental effects.

II. Description of Proposal

A. Introduction

Today's proposed approach involves the use of optional IBs for foreign refiners. Specific regulatory provisions would be implemented to ensure that the optional use of an IB would not lead to adverse environmental impacts. This would involve monitoring the average quality of imported gasoline, and if a specified benchmark is exceeded, remedial action would be taken. The remedial action proposed is that the requirements for imported gasoline would be made more stringent. This would ensure the environmental neutrality of this approach.

Under this approach, the procedures and methods for setting an IB, as well as the tracking, segregation and other compliance related provisions described below would all apply. However, they would only apply where a foreign refiner chose to apply for an IB.

Under this approach, the volume of gasoline that could be imported under the IB for a foreign refinery would be limited in the same manner as for domestic refiners, relative to a refinery's 1990 baseline volume. Since the foreign refiner sought an IB in order to specifically produce gasoline for the U.S. market, the tracking and segregation requirements noted above should not have a significant impact on the ready availability of gasoline for import. The current requirements for imported gasoline would continue to apply for all of the other gasoline imported into the U.S. DOE does not believe this approach has the potential to adversely impact gasoline supply and prices.

There is however some concern about the possible environmental impact of such an approach. A foreign refiner may seek an IB only if it would be less stringent than the SB. Gasoline produced by this foreign refiner would then be measured against this less stringent IB. Other imported gasoline would be measured against the SB. As

compared to the situation in 1990, there would be the potential for the quality of imported gasoline to degrade from an emissions perspective.

The size and amount of this impact, however, is difficult to quantify. It would depend on the number of foreign refiners that received an IB, the specific emissions levels of the IBs assigned, and the volume of gasoline included in the IB.[5] It would also depend on the source and amount of CG and RFG imported into the U.S. in a specific year. It is also hard to quantify to what extent, if any, foreign refiners who produced gasoline in 1990 that was cleaner that the SB would ship gasoline that is dirtier than what they shipped in 1990. These circumstances, as well as the existence of a volume cap on the use of IB's, and the large variation in the total levels of CG and RFG imports each year make it difficult to assess in advance the risk of an adverse environmental impact.

EPA is proposing to address the potential environmental concerns with this approach by (1) establishing a benchmark for the quality of imported gasoline that would reasonably identify when the factors identified above have led to an adverse environmental impact, (2) monitoring imported gasoline to determine whether the benchmark has been exceeded, and (3) if an exceedance of the benchmark occurs, imposing a remedy that compensates for the adverse environmental impact.[6]

As discussed below, the proposed benchmark for imported gasoline quality would be the volume-weighted average of the IBs for domestic refiners. As discussed below, EPA is proposing a benchmark for exhaust NO_X set at the volume weighted average for domestic baselines. No benchmark would be set at this time for toxics, as there does not appear to be the same potential for environmental degradation that there could be for NOx.

EPA would monitor the quality of imported gasoline based on the annual compliance reports filed by importers and foreign refiners producing gasoline that is exported to the U.S. Each year EPA would evaluate the volume weighted annual average quality of the three prior years and compare it to the benchmark. If the average quality of imported gasoline exceeded the benchmark, NOx requirements for gasoline imported from refiners without an IB (currently set at the SB) would increase in stringency the following year by an amount equivalent to the exceedance. This would occur each time the annual monitoring indicated that the benchmark was exceeded. If the amount of an exceedance either increased or decreased, the amount of the remedy would be correspondingly adjusted. If the annual monitoring showed that imported gasoline did not exceed the benchmark, the compliance requirements would be reduced to the SB for the following year. The more stringent requirement would apply to all imported gasoline except for gasoline produced by foreign refiners with an IB.

EPA's proposed approach meets the goals announced in the Invitation for Public Comment, and avoids the potential supply, price and environmental consequences of the alternative approaches considered by EPA.

B. Requirements for Foreign Refiners with Individual Refinery Baselines

1. Establish Refinery Baselines

Under this proposal, a foreign refiner would have the option of submitting an individual refinery baseline petition to EPA. The refinery baseline would reflect the quality and quantity of gasoline produced at the foreign refinery in 1990 that was exported to the U.S.

The procedures for establishing individual refinery baselines are listed in §§ 80.90 through 80.93. These procedures were used by domestic refiners to predict their overall gasoline quantity and quality for 1990. The procedures require the use of data from 1990 gasoline or gasoline blendstocks where available. If this data is not available, post-1990 gasoline must be sampled and tested. The refiner must then compare its 1990 and post-1990 refinery operations, and identify all changes in operations that could cause the 1990 and post 1990 fuel parameters to differ in quality or volume. The refiner must then adjust the post-1990 data to account for these differences, thereby deriving the quality and volume of the gasoline produced in 1990.

EPA is proposing that foreign refiners that elect to develop individual refinery baselines would also follow these procedures. Additionally, EPA is proposing that foreign refiners would use these procedures to determine the quality and quantity of gasoline they produced in 1990 that was exported to the U.S. Specifically, in today's proposed regulations, EPA has included requirements that baseline submittals for foreign refineries would have to include information that would estimate the refinery's overall 1990 gasoline quantity and quality, and the quantity and quality of the subset of the refinery's gasoline that was exported to the United States in 1990. Under § 80.92 baseline petitions would have to be supported by the report of an EPA-approved baseline auditor.

i. *Required Information.* The requirements for establishing individual foreign refinery baselines would be basically the same as the baseline establishment requirements for domestic refineries. EPA is proposing additional requirements for foreign refineries that address the unique circumstances associated with establishing the quality and quantity only of gasoline sent to the U.S. in 1990.

The procedures for developing individual refinery baselines, set forth in §§ 80.90 through 80.93, are highlighted below and discussed with respect to foreign refineries. Comments are requested on EPA's extension of the baseline development procedures to foreign refineries, especially where modifications have been proposed to account for the unique circumstances associated with foreign refinery baselines.

- A foreign refinery's individual baseline (i.e., quality and quantity information) would be calculated using, in hierarchical order based on the availability of data, 1990 gasoline test data (Method 1), 1990 blendstock test data (Method 2), or post-1990 blendstock and/or gasoline test data (Method 3) for its total 1990 gasoline production in the same manner required of domestic refiners. Foreign refineries have the additional requirement of using these methods to determine the quality and quantity of the subset of gasoline exported to the United States in 1990.
- All data collected beginning in 1990 and through the last date of any data collection under § 80.91(d)(1)(I)(B) must be used in the development of both the overall refinery baseline and the baseline of the gasoline exported to the U.S. in 1990.
- Baseline petitions would have to be submitted in the same manner as is

[5] To date, only a limited number of foreign refineries have indicated an interest in establishing an IB. However, under the proposal any foreign refiner could apply for an IB.

[6] EPA has adopted an analogous approach in the RFG program. Domestic refiners may chose to meet certain RFG requirements on average, instead of meeting the RFG per-gallon requirements. However a refiner who chooses the averaging requirements must implement a compliance survey for the covered areas involved. In a compliance survey the emissions quality of the retail gasoline in a covered area is tested, and the average gasoline quality is compared to a preestablished benchmark. If the average quality falls short of the benchmark, the compliance requirements for RFG used in that covered area are increased in stringency by a specified amount. Surveys are conducted each year, and the requirements are increased in stringency each time the area fails an annual compliance survey. The stringency of the requirements can be reduced if the area does not fail a compliance survey for a specified number of years. See 40 CFR 80.41, 80.68.

required of domestic refiners under § 80.93, except that EPA is proposing that baseline petitions would have to be submitted before January 1, 2002. This would allow for the collection of both summer and winter data and the preparation of a baseline petition subsequent to June 1, 2000, the scheduled date EPA would announce the average quality of imported gasoline for the first monitoring period of 1998 and 1999. EPA would require the same type and quality of information and level of accuracy in establishing a baseline no matter when a foreign refiner applies for a baseline. Comments are requested on the appropriateness of this deadline.

- EPA is also proposing that in order for a refinery to receive an approved baseline, the refinery would have to commit to give EPA's auditors full access to the foreign refinery to conduct announced and unannounced inspections and audits related to the baseline development and submission. EPA baseline audits could occur at any time after a baseline petition has been submitted, either before or after EPA approves a refinery baseline.
- Under § 80.93(b)(1)(I) foreign refiners would have to provide any additional information requested by EPA to support a baseline submittal or petition, as is true for domestic refiners.
- Under § 80.93(c) a separate baseline would be established for each foreign refinery. However, as is the case of U.S. refiners a foreign refiner could petition EPA for a single refinery baseline for two closely integrated facilities under § 80.91(e)(1). In addition, as is the case for U.S. refiners a foreign refiner who operates more than one refinery with individual baselines would be able to aggregate the baselines of some or all of its refineries under § 80.101(h).
- EPA is proposing that all documentation included in a baseline submission or petition would have to be in the English language or include an English language translation.

EPA requests comments on any aspects of the baseline development regulations, §§ 80.90 through 80.93, relative to the development of foreign refinery baselines, particularly concerning any unique aspects of developing or verifying foreign refinery baselines for a refinery's total 1990 gasoline production and for the subset of gasoline exported to the U.S. in 1990.

ii. *EPA Action on Baseline Submissions.* As for the domestic refiner baseline approval process, EPA would subject foreign refinery baseline submissions to an in-depth analysis and review. EPA would also reserve the right to inspect, audit and review all records or facilities used to generate data submitted to the Agency prior to acting on a baseline submission or petition.

After conducting its review of the data and analysis in a baseline submission, EPA would assign an individual baseline that represents the quality and quantity of gasoline exported to the U.S. in 1990. EPA will consider all information submitted and the analysis performed by the refiner and the baseline auditor in assigning a foreign refinery baseline. EPA expects the refiner's submission to consider all relevant factors in determining the quality and quantity of the subset of gasoline sent to the U.S. in 1990. This would include consideration of the grades of gasoline sent to the U.S., the season for which the gasoline was produced, the types of crude oil and blendstocks used, the effect of fuel requirements in the U.S. in 1990, and any other factors that would affect how the quality and quantity of a refinery's U.S. market gasoline might vary from other gasoline produced at that refinery.

EPA believes individual refinery baselines can be established for foreign refineries for which individual baselines are sought to the same degree of confidence as the baselines established for domestic refineries, through use of all available data, and the ability to use current data and operating conditions to estimate 1990 gasoline quality and quantity.

The baseline approval process is an iterative one, beginning with the submission of the baseline or a baseline petition. EPA, any EPA contractors, representatives of the foreign refinery knowledgeable of the refinery's baseline development, and the refinery's baseline auditor will all be closely involved throughout. EPA expects that its questions regarding the baseline submission or petition will receive quick and adequate response from the refinery's representatives. To this end, EPA believes it would be useful to have an English-speaking foreign refinery representative knowledgeable about the baseline development of the refinery as the main contact.

EPA would not assign an individual refinery baseline where an individual refinery baseline submission is significantly incomplete, or inadequate to establish an accurate baseline, and the refiner fails to cure the defect after a request for more information. In such a case the refinery would not receive an individual baseline.

2. Compliance with CG Exhaust Toxics and NO_X Requirements

EPA is proposing that foreign refiners who obtain individual foreign refinery baselines would have to meet the exhaust toxics and NO_X emissions performance requirements for CG produced at the foreign refinery that is exported to the United States. In addition, foreign refiners with an individual refinery baseline would be required to meet all requirements used to demonstrate compliance with the CG performance requirements. These are the same requirements that apply to domestic refiners, and include the following:

- To register with EPA, § 80.103.
- To designate each batch of CG or RFG, § 80.65(d).
- To determine the volume and properties of each CG batch through sampling and testing, § 80.101(I).
- To determine the volume of each RFG batch in order to complete the CG compliance baseline calculation in § 80.101(f).
- To prepare product transfer documents for RFG and CG, §§ 80.77 and 80.106.
- To keep certain records for five years, §§ 80.74 and 80.104.
- To submit reports to EPA on each batch of RFG and CG, on the volume of RFG, and on the annual average quality of CG, §§ 80.75 and 80.105.
- To comply with an annual cap on the volume of specified blendstocks that are transferred to others and used to produce gasoline for the U.S., § 80.102.
- To have an independent audit performed of refinery operations each year to review certain activities related to the RFG and CG requirements, §§ 80.125 through 80.130. However, the audit procedures for RFG would be limited to the procedures that evaluate the quantity of RFG, and audits would not be required to include procedures intended to verify information about RFG that is unrelated to the compliance baseline calculation, such as RFG quality or VOC-control designations.
- To not combine CG with RFG and classify the mixture as RFG, § 80.78(a)(10).

Certain adjustments to these provisions are specified in the proposed regulations to apply them to foreign refiners.

EPA believes that foreign refiners with individual baselines should be able to meet these requirements as do domestic refiners, and EPA would intend to monitor compliance with, and enforce violations of these requirements with regard to foreign refiners just as for domestic refiners.

Under § 80.101(f) a compliance baseline for exhaust toxics and NO_X compliance is calculated for each calendar year averaging period based on a refinery's 1990 baseline volume and baseline exhaust toxics and NO_X values, and the total gasoline volume (CG and RFG[7]) produced at the refinery during the averaging period.[8] As a result, a foreign refiner with an individual refinery baseline would be required to establish the volume of U.S. market gasoline that is RFG in order to calculate the refinery's compliance baseline for the exhaust toxics and NO_X CG requirements.[9]

Therefore, a foreign refiner with an individual refinery baseline would be required to designate each batch of U.S. market gasoline as CG or RFG, to establish the volume and properties of U.S. market batches that are designated as CG, and to establish the volume of U.S. market batches that are designated as RFG. The CG and RFG produced at a foreign refinery with an individual baseline is called ''Foreign Refiner Gasoline,'' or ''FRGAS,'' in this proposal.

All foreign refiners with individual refinery baselines would be required to submit annual reports to EPA that demonstrate the average exhaust toxics and NO_X emissions for CG FRGAS meets the refinery's compliance baseline for the averaging period.

Additional requirements, described below, would allow EPA to monitor that the specific barrels of gasoline identified by the foreign refiner as U.S. market gasoline actually is delivered for use in the United States, and to conduct enforcement audits and inspections of foreign refinery operations.

Under today's proposal, CG FRGAS would be treated basically under the same rules as gasoline produced for the U.S. market at a domestic refinery. The CG FRGAS would be subject to the same CG requirements as the CG produced by domestic refiners. Starting in 1998 a refinery's annual average CG exhaust toxics and NO_X emissions could not exceed its individual baseline for these fuel characteristics. In order to evaluate compliance, however, CG FRGAS would need to be designated as such at the point of production, and would need to be tracked to determine that it in fact is exported to the U.S.

In order to determine compliance with the CG requirements for FRGAS, the quality and quantity of each batch of CG must be determined. The volume of RFG FRGAS also would have to be determined, because the compliance baseline applicable to a refinery depends on the total volume of gasoline produced at a refinery for the U.S. market, including both CG and RFG. To determine the quality and/or quantity of this gasoline, a foreign refiner would have to designate FRGAS when it is produced. It also is important that gasoline used in a foreign refinery's compliance calculation all be designated as FRGAS and actually imported into the U.S.

EPA expects foreign refiners would be able to determine how much FRGAS they intend to produce, and would be able to institute reasonable distribution and marketing changes to implement the proposed requirements. A foreign refiner of FRGAS would need to monitor the gasoline quality to ensure it meets the CG requirements, and this gasoline normally would be subject to emissions requirements that are different from those in other markets. The additional requirements proposed today all flow from this and could be implemented in a reasonable fashion.

However, a major change could occur in a foreign refiner's ability to change the destination of FRGAS after the gasoline has left the foreign refinery and has entered the distribution system. Under the current regulations, such gasoline could at any time be sent to the U.S. market, including after it has left the foreign refinery. Gasoline currently may be taken from a fungible distribution system and sent to the U.S., as long as the importer's annual average meets their compliance baseline. This would not be possible for FRGAS under the requirements discussed above. Unless a foreign refiner designates FRGAS at the point of production, it would not meet the requirements described above for export of FRGAS to the U.S.

EPA requests comment on whether foreign refiners with individual baselines should be allowed to divert to non-U.S. markets gasoline shipments that originally were intended for the U.S. market where the foreign refiner can demonstrate the gasoline in fact was not imported into the U.S., and if so, the type of showing that should be required.

EPA also requests comment on whether a foreign refiner with an individual refinery baseline should be given the option of classifying CG as FRGAS or as non-FRGAS. If this option were allowed a foreign refiner could have two categories of CG: CG that is classified as FRGAS, and CG that is not classified as FRGAS.

In the case of CG that is classified as FRGAS the foreign refiner would include the gasoline in the refinery CG compliance calculations, and would meet the refinery tracking requirements, described below. CG that is not classified as FRGAS would be excluded from the refinery CG compliance calculations, and the refiner would not be required to meet the refinery tracking requirements.

However, the foreign refiner would continue to be required to include all RFG produced in compliance baseline calculations and to meet the refinery tracking requirements for all RFG, i.e., all RFG would have to be classified as FRGAS. This distinction between RFG and CG is necessary in order to prevent adverse environmental effects. As in the case of domestic refiners, all RFG must be included in a refinery's compliance baseline calculation because a larger RFG volume results in a larger volume of CG that is subject to the statutory baseline. In contrast, there is no adverse environmental effect if a refiner classifies CG as non-FRGAS, because the non-FRGAS CG would be subject to the statutory baseline by default.

Under the option of allowing foreign refiners to elect to classify CG as FRGAS, the U.S. importer would meet

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[7] The compliance baseline equation at § 80.101(f) requires a refiner to include the volumes of all gasoline used in the U.S., including CG, RFG, RFG blendstock for oxygenate blending (RBOB), and California gasoline under § 80.81. Thus, a foreign refiner would be required to include each of these products in the compliance baseline calculations, and to meet the refinery of origin tracking requirements that are described below. However, for ease of discussion this preamble will collectively refer to all non-CG products as RFG.

[8] Under § 80.101(f) compliance baselines are calculated for a refinery each calendar year using an equation that caps use of individual refinery baselines based on the refinery's total gasoline production (RFG and CG) during an averaging period, as compared to the refinery's 1990 baseline volume. Thus, where a foreign refinery's volume of gasoline for the U.S. (CG and RFG) during an averaging period is equal to or less than the refinery's 1990 baseline volume, the refinery's compliance baseline emission values for CG for the averaging period would be the refinery's 1990 baseline emission values. However, where a refinery's gasoline volume during an averaging period exceeds the refinery's 1990 baseline volume, the refinery's compliance baseline emission values for the averaging period would move in the direction of the statutory baseline emission values. In the case of foreign refiners, these calculations would use only the volumes of gasoline that were exported to the U.S. in 1990 and during the averaging period.

Section 80.101(b) requires use of compliance baselines only for the simple model requirements that apply before 1998. However, in another rulemaking EPA will be proposing to require use of compliance baselines for the complex model requirements that apply beginning in 1998, and EPA believes any change to the compliance baseline provision will be final before 1998. As a result, this foreign refiner proposal assumes that compliance baselines will be required for exhaust toxics and NO_X compliance. In any case, the same provision would apply to both domestic and foreign refiners.

[9] EPA is proposing that if a foreign refiner begins using an individual refinery baseline on a date other than on January 1, the compliance baseline calculation for the initial year would use a reduced baseline volume to reflect the portion of the year the individual refinery baseline is in use.

the tracking requirements, described below, only for the CG batches that are identified as FRGAS. EPA would be able to monitor foreign refinery compliance by comparing the volume of each refinery's gasoline identified as FRGAS as reported by U.S. importers, with the volume reported by the foreign refiner.

Requirements for Tracking Refinery of Origin

The proposed requirements concerning CG FRGAS are premised on foreign refiners accurately identifying the gasoline (both CG and RFG) that is exported to the U.S. There is the potential for adverse environmental results if a foreign refiner includes in CG compliance calculations gasoline that is not exported to the U.S. In addition, there is environmental risk if a foreign refiner fails to include in CG compliance calculations gasoline that is exported to the U.S.

For this reason EPA is proposing requirements to ensure that gasoline is properly identified as FRGAS at the U.S. port of entry, and that all gasoline designated as FRGAS by a foreign refiner is in fact delivered to the U.S. These proposed requirements also would give U.S. importers the information necessary to demonstrate that imported CG is in fact FRGAS in order to exclude the gasoline from the importer's CG compliance calculations. EPA would be provided the information necessary to monitor compliance by foreign producers of FRGAS.

Test results at the U.S. port of entry, in the absence of additional information, are inadequate to distinguish between gasoline that is FRGAS, and other gasoline. In addition, without additional requirements EPA would have scant ability to know if all the gasoline included in a foreign refiner's CG compliance calculations in fact was delivered to the U.S.

The requirements proposed today to address this issue involve segregation of FRGAS produced at each foreign refinery; documentation prepared by the foreign refiner certifying that FRGAS is being included in the foreign refinery's compliance calculations; sampling and testing at the load port and the port of entry; independent attest engagements by the foreign refiner to verify the volumes claimed by the foreign refiner; and determinations by an independent party of the volume, quality and refinery of origin of FRGAS loaded onto a ship.

i. *Segregation of FRGAS.* In the absence of restrictions, FRGAS from multiple foreign refineries could be stored, transported, combined and recombined, and sold and resold, by parties other than the foreign refiner in locations other than those controlled by the foreign refiner, and in countries other than those where the foreign refinery is located. EPA would have to rely on assertions and records of third party owners or custodians that gasoline imported into the U.S. as FRGAS contains only FRGAS. EPA is concerned that it would be unable to routinely conduct the types of inspections and audits of these third parties that would be necessary to ensure that non-FRGAS is not mixed with FRGAS, and that FRGAS is not diverted to non-U.S. markets.

The factors giving rise to these concerns are not present in the case of gasoline produced at domestic U.S. refineries, because there is little question of which gasoline produced at domestic refineries is used in the U.S. Gasoline produced at U.S. refineries is sampled and tested before leaving the refinery, and almost all then immediately enters U.S. commerce. Gasoline to be exported from the U.S. normally is identified at the time of production, and always is identified when actually leaving the U.S. As a result, and in contrast to the situation for foreign refineries, EPA can enforce the requirements for CG produced at domestic refineries based on refinery gate testing and reporting, with no need to track the gasoline after leaving the refinery.

EPA is proposing that the FRGAS produced at each foreign refinery must remain physically segregated from the FRGAS produced at other foreign refineries, from the foreign refinery to the U.S. port of entry. As a result of this requirement, when a foreign refiner loads FRGAS onto a ship for transport to the U.S. the foreign refiner must know the gasoline is exclusively FRGAS that is being included in the refinery compliance calculations, or compliance baseline calculations in the case of RFG.

This segregation requirement would not prohibit a foreign refiner from combining batches of CG FRGAS, or combining batches of RFG FRGAS, that are produced at a single refinery into larger volumes for shipment. In addition, EPA is proposing that the FRGAS produced at multiple refineries that have been aggregated under § 80.101(h) could be combined, because aggregated refineries must be operated by the same refiner.

EPA requests comment on whether a foreign refiner with more than one refinery should be allowed to mix FRGAS produced at its different refineries prior to shipment to the U.S.

Under today's proposal there is no need to track gasoline produced at foreign refineries after the gasoline leaves the U.S. port of entry, and foreign-produced gasoline then could be fungibly mixed in the same manner as gasoline produced at domestic refineries.

ii. *Foreign Refiner Certification of FRGAS.* EPA is proposing that foreign refiners of FRGAS would be required to prepare a certification, signed by an appropriate foreign refiner official, for FRGAS when it is loaded onto a ship for transport to the U.S. This certification would identify the gasoline as being FRGAS, the foreign refinery where the FRGAS was produced, the volume and properties of the FRGAS being transported, and a declaration that CG FRGAS is being included in the CG exhaust toxics and NOx compliance calculations for the foreign refinery. The volume and properties of CG, and the volume of RFG, contained in each ship compartment would have to be separately identified.

The foreign refiner certification would have to be supported by an inspection by an independent, EPA-approved third party such as an independent laboratory. The independent party would review documents that reflect the transportation and storage of the FRGAS in question from the point of production at the foreign refinery to the point of ship loading. The inspector thus would confirm the refinery of origin and that there was no fungible mixing of the FRGAS with any gasoline produced at any other refinery. The independent party also would be required to confirm the volume and properties of the CG FRGAS, and the volume of RFG FRGAS, loaded onto the ship, through inspection of the ship prior to loading, and measurement and sampling of the gasoline contained in each ship compartment subsequent to loading.

The independent party would prepare a report on these inspections that would become a part of the foreign refiner's certification. EPA is proposing that the independent party also would submit an inspection report to EPA.

iii. *U.S. Importer Receipt of FRGAS.* A U.S. importer would classify imported CG as FRGAS if the gasoline is accompanied by a foreign refiner certification that is properly supported by an independent party's report. In addition, the volume and properties of the CG measured by the U.S. importer at the U.S. port of entry would be compared with the load port volume and property measurements, and this comparison would have to indicate that the FRGAS loaded onto the ship was not mixed with other gasoline or otherwise changed en route to the U.S. The same

would apply for RFG FRGAS, but only the volume would be reviewed.[10]

The proposed regulations include criteria for comparing the load port and port of entry testing. The test results would have to agree, for each relevant Complex Model parameter, within the limits used for comparing domestic refiner and independent laboratory test results in § 80.65(e). EPA also is proposing that the two volume determinations, corrected for temperature and density, would have to agree within one percent. EPA believes this level of volume correlation is appropriate because it is well within the level of correlation normally expected in commercial transactions. EPA understands that protests normally are initiated if ship volume determinations in commercial dealings differ by 0.5%.

EPA requests comment on the proposed requirements for comparing load port and port of entry testing, and on any other approach for these comparisons that would be preferable to those proposed. In particular, EPA requests comment on whether load port and port of entry testing could rely on a subset of the properties listed in § 80.65, and whether the test-to-test differences allowed in § 80.65 are more or less stringent than necessary.

Importers would be required to include in their CG compliance calculations any imported CG for which the importer does not obtain a certificate by the foreign refiner supported by a report prepared by an independent third party.

In the case of CG for which the importer obtains a properly supported foreign refiner certificate, but where the volume and/or parameter results from the load port and port of entry do not meet the correlation requirements, the gasoline nevertheless would be imported as FRGAS. However, the *foreign refiner* would have to adjust its CG compliance calculations to reflect the exhaust toxics and NO_X emissions of the FRGAS as tested at the U.S. port of entry if these emissions results, in grams per mile, are higher than at the load port, and based on the larger of the two volume measurements if the volumes do not properly correlate. If the parameter results correlate but the volumes do not, the *foreign refiner* would have to adjust its CG compliance calculations to reflect the volume measured at the U.S. port of entry.

EPA is proposing that U.S. importers would report to EPA on each batch of FRGAS imported, that would identify the foreign refinery, whether the FRGAS is CG or RFG, the volume and properties of CG FRGAS, and the volume of RFG FRGAS.

iv. *Attest Engagement Requirements. Under today's proposal* foreign refiners of FRGAS would be required to meet the independent attest engagement requirements in §§ 80.125 through 80.130, the same as domestic refiners, although the attest requirements for RFG are limited to those related to the volume of RFG produced at a foreign refinery.[11] EPA is proposing additional attest requirements that relate to the FRGAS requirements. These attest requirements would supplement the requirements regarding an independent party determination of the refinery that produced FRGAS loaded onto a ship. The focus of the attest requirements would be on the foreign refinery operations while the independent party's primary focus would be on the transportation and storage of gasoline from the refinery to the point of ship loading.

Under the proposed procedures, the auditor would be required to confirm the overall production for the refinery in question, and that the gasoline claimed to be RFG and CG FRGAS was part of that overall production. The attester would confirm the transfer of FRGAS from the refinery to ships and would identify the ships. In addition, the auditor would use commercial publications that list vessel sailings to confirm that ships used to transport FRGAS traveled to the U.S.

EPA is proposing that the attest requirements would be fulfilled either by auditors who are independent under § 80.65(f)(2)(ii), and who either are U.S. certified public accountants (CPA's) or who are approved by EPA. EPA approval would be based on the ability to perform the required work as demonstrated through a petition process.

Independent auditors would have to agree to allow EPA inspections and audits relative to their work under the Gasoline Rule for the foreign refiner in a manner similar to the commitments required by foreign refiners, described below.

v. *Requirements for Third Parties.* EPA is proposing that FRGAS sampling, testing, volume determinations and determinations of refinery of origin at the loading port would have to be performed by an independent party. The proposed criteria for independence would be the same criteria that apply for the independent sampling and testing requirement for domestic refiners and importers, and that are specified at § 80.65(f)(2)(ii). In addition, EPA is proposing that persons performing this work would have to be EPA approved. EPA approval would be based on the ability to perform the required work as demonstrated through a petition process.

EPA also is proposing that independent parties would have to agree to allow EPA inspections and audits relative to their work under the Gasoline Rule for the foreign refiner that are similar to the commitments required by foreign refiners, described below.

4. Measures Related to Monitoring Compliance and Enforcement

i. *Introduction.* EPA believes the proposed requirements for foreign refiners with individual refinery baselines must be subject to strong measures for monitoring compliance and enforcing violations. However, there are a number of unique problems associated with monitoring compliance and enforcing requirements for parties and transactions that occur overseas. EPA is proposing a range of provisions designed to address these concerns in a comprehensive manner. These provisions are intended to promote EPA's ability to monitor compliance with the requirements related to foreign refinery baselines, to conduct enforcement actions when violations of these requirements are found, and to impose sanctions that would constitute a deterrent to future violations.

The purpose of the proposed provisions is to assure EPA's compliance and enforcement activities with regard to foreign refiners will be on the same footing as domestic refiners, in order to assure achievement of the environmental objectives of the gasoline programs.

ii. *Inspections and audits.* EPA would intend to inspect and audit foreign refineries with individual baselines and other facilities located overseas to determine compliance with requirements related to establishing a baseline, identifying refineries or origin, and other requirements proposed today. Foreign refiner inspections and audits would be like domestic refiner inspections and audits with regard to types of facilities visited, types of information reviewed, and types of persons who conduct the inspections and audits. In addition, the inspections

[10] However, an importer of RFG is required under § 80.65 to determine the volume and properties of imported RFG.

[11] ''Attest engagement'' is a term of art used by auditors to describe the conduct of specified audit procedures—the auditor attests to the conduct and results of the specified audit, or attest, procedures completed during the attest engagement. The requirements in §§ 80.125 through 80.130 consist of specified attest procedures dealing with the Gasoline Rule and instructions for the conduct of these procedures.

and audits would be both announced and unannounced, as with domestic inspections and audits.

Inspections and audits would be conducted at foreign refineries with individual baselines, at laboratories where the foreign refineries' gasoline is tested, at offices of pipelines, terminals and other third parties who had title or custody to gasoline between its production and arrival in the U.S., and at offices of independent third parties and independent auditors who have tested the refineries' gasoline or audited the refineries' operations under EPA requirements. The inspections and audits would be conducted by EPA employees and by contractors to EPA.

Refinery baseline audits would include reviews of records that were used to prepare baseline petitions, including refinery production, testing and shipment records that are relevant to baseline establishment, reviews of independent baseline auditor work papers, and interviews with refinery employees and others with knowledge about these records.

Inspections and audits for compliance with requirements such as those related to identifying the source refinery for gasoline exported to the U.S. would focus on the sampling and testing requirement, and on gasoline movements from the foreign refinery to the foreign load port. Sampling and testing would be evaluated by reviewing sampling and testing records, observing samples being collected and analyzed, by interviewing persons involved in sampling and testing, and by collecting gasoline samples for analysis by EPA. Source refinery assertions would be audited by reviewing records related to gasoline production, storage and transport at all locations from the foreign refinery to the foreign load port, and by interviewing persons at these locations. In addition, EPA would review the work papers of the independent third party, and the independent auditor, who verify the source refinery identification, and would interview these individuals.

EPA is proposing that foreign refiners would have to agree to allow full and complete access to EPA employees and contractors to conduct inspections and audits as a condition to establishment of a baseline, and would have to use independent third parties and independent auditors who agree to give EPA full and complete access as well.

The agreements would have to specify that EPA inspections and audits may be either announced or unannounced, and may be conducted by any authorized representative of EPA, including EPA employees and contractors. The foreign refiner, third parties, and auditors would have to agree to supply documents requested by an EPA inspector or auditor, and to make available for interview, within a reasonable time, any employee identified by EPA. The foreign refiner would have to agree to supply English language translations of documents requested during an audit, and to supply English language translators and/or interpreters to assist the EPA employees and contractors. The cost of supplying the English language translations, translators and interpreters would have to be borne by the foreign refiner.

The foreign refiner agreement would have to be signed by the president or owner of the foreign refiner, and in the case of independent third parties and auditors by the president or owner of these companies.

The foreign refiner would have to agree that authorized representatives of EPA would be allowed to enter the relevant facilities for the purpose of inspecting and auditing foreign refineries that export gasoline to the U.S., and facilities where gasoline exported to the U.S. are analyzed. These inspections could be for the following purposes:

- The inspection of gasoline production facilities;
- The collection of gasoline samples;
- The inspection of records related to gasoline production, sale, transfers, transport, storage, and sampling and testing; and
- The taking of testimony or statements of persons.

The foreign refiner and third party commitments also would specify that EPA representatives would not be subject to civil liability that would result from any actions by the EPA representatives within the scope of their audit and inspection work, including any findings or conclusions regarding compliance or noncompliance by the foreign refiner with requirements that are the subject of the audits and inspections.

The refiner agreement also would include a limited waiver of sovereign immunity with regard to refineries that are state owned, and with regard to any employees of state owned refineries. This waiver of sovereign immunity would include both civil and criminal liability, and would be limited to violations of Clean Air Act section 211(k) and the regulations promulgated thereunder at 40 CFR Part 80, subparts D, E and F, and other relevant laws and regulations including but not limited to Clean Air Act sections 113, 114, 211 (c) and (d), and Title 18 United States Code. This waiver of sovereign immunity also will apply to any employee or agent of a refinery owned or operated by the foreign government.

Where a foreign refiner failed to abide by the terms of the foreign refiner agreement, or a foreign government failed to allow entry for the purpose of EPA inspections and audits, EPA could withdraw or suspend the refiner's individual refinery baseline.

iii. *Civil and criminal enforcement actions.* A foreign refiner with an individual refinery baseline who submits false documents to EPA or who fails to meet other requirements would be subject to civil, and in certain cases criminal, enforcement, and EPA is proposing requirements that would facilitate prosecution of such violations. These requirements would consist of certain waivers and agreements by the foreign refiner that would be included in the agreement submitted to EPA, discussed above.

EPA is proposing that each foreign refiner seeking an individual refinery baseline would be required to identify an agent for service in the U.S. and agree that service on this agent constitutes service on the foreign refiner and its employees. EPA also is proposing that the agent for service must be located in the District of Columbia.

EPA is proposing that foreign refiners would have to agree that the forum for civil enforcement actions would be governed by Clean Air Act (CAA) section 205. CAA section 205(b) specifies that the venue for district court actions is either the district where the violation occurred or where the defendant resides or in the Administrator's principal place of business. However, EPA believes that the U.S. district court for the District of Columbia would be the appropriate court for violations related to the requirements proposed today that are committed by defendants who reside outside the U.S. Administrative assessment of civil penalties is allowed under CAA section 205(c) where the penalty amount does not exceed $200,000, or where the EPA Administrator and the Attorney General jointly determine that a case involving a larger penalty is appropriate for administrative penalty assessment.

EPA is proposing that foreign refiners of FRGAS would have to agree that civil and criminal enforcement actions would use the same U.S. civil and criminal substantive and procedural laws that apply in enforcement actions against domestic refiners.

iv. *Sanctions for civil and criminal violations.* The sanctions for civil and

criminal violations committed by foreign refiners with individual refinery baselines or employees of such foreign refiners would include the sanctions specified in the Clean Air Act. Under CAA section 211(d) the penalty for civil violations of the RFG and conventional gasoline requirements is up to $25,000 per day of violation plus the amount of economic benefit or savings resulting from the violation. Injunctive authority is included under section 211(d)(2) as well. CAA section 113(c) specifies that the criminal penalty for first violations of knowingly making false statements or reports is a fine pursuant to title 18 of the U.S. Code, or imprisonment for up to 5 years, or both. The period of maximum imprisonment and the maximum fine are doubled for repeat convictions.

EPA is proposing that foreign refiners seeking an individual refinery baseline would be required to post a bond with the U.S. Treasury that would be available to satisfy any civil penalty or criminal fine that is imposed against the refiner or its employees. The amount of this bond would be $0.01 per gallon of conventional gasoline exported by the refiner to the U.S. per year, based on the maximum annual volume of conventional gasoline exports during the most recent five year period during which the foreign refiner exported conventional gasoline to the U.S. using an individual refinery baseline. However, the initial bond amount would be based on the volume of conventional gasoline produced at a foreign refinery that was exported to the U.S. during the year immediately preceding the year the baseline petition is submitted.[12] The foreign refiner would be required to submit with its baseline petition a bond to reflect this volume, and to include with its baseline petition information necessary to accurately establish the conventional gasoline volume for the preceding year. The foreign refiner then each year would take into account in its bond amount calculation the conventional gasoline volume for an additional year until there is a five year history, at which time the conventional gasoline volume review would include only the most recent five years.

As an alternative to posting the bond with the U.S. Treasury, a foreign refiner could meet the bond requirement by obtaining a bond in the proper amount from a third party surety agent that would be payable to satisfy U.S. administrative or judicial judgments against the foreign refiner, provided EPA agrees in advance as to the third party and the nature of the surety agreement.

As with domestic refiners, any violation of a regulatory requirement by a foreign refiner could result in the imposition of penalties. For foreign refiners with individual refinery baselines the assessment of a penalty also could result in the forfeiture of a bond to satisfy the penalty. This would, for example, include a failure to allow EPA inspections and audits; failure to submit required audit reports prepared by an independent auditor; or failure to properly identify the source refinery for FRGAS.

EPA is proposing that if a foreign refiner with an individual refinery baseline fails to meet the requirements proposed today, including those that apply to all refiners under the current regulations, and/or the additional requirements that would apply only to foreign refiners, then EPA could administratively withdraw or suspend its individual refinery baseline.

EPA is proposing that withdrawal or suspension of an individual refinery baseline could be imposed for all of the refineries operated by a foreign refiner, or for a subset of a foreign refiner's refineries where appropriate. EPA would impose this sanction in a particular case only after evaluating the circumstances and exercising its discretion based on factors such as egregiousness, willfulness and prior violations. The withdrawal or suspension could be imposed for a limited time.

C. Baseline Adjustment for Imported Gasoline that is Not FRGAS

1. Introduction

Allowing foreign refiners to choose whether to establish an IB creates a potential for adverse environmental impact. This would be addressed by monitoring the quality of imported gasoline, comparing it to a benchmark, and taking remedial action if the benchmark is exceeded. The details of this proposal are described below.

2. Monitoring

Under the current regulations, importers submit an annual report concerning the quality of the CG they import. See 40 CFR 80.105. Importers submit an annual report after the end of the calendar year, comparing the quality of the gasoline they imported against the applicable annual average requirements. Starting in 1998, these requirements are for exhaust toxics and NO_X emission performance, determined under the Complex Model.

Under the current rules, the annual report is due by the last day of February following the end of the annual averaging period. An attest engagement report is due by May 30th. The importer's report must include the total gallons of CG imported, the annual average compliance baseline, and the annual average for the gasoline imported that calendar year. The importer must also include the volume, grade and qualities for each batch of imported gasoline.

Under today's proposal, importers would continue to submit the reports described above for CG produced by foreign refiners without an IB. For gasoline produced by a foreign refiner with an IB, both the importer and the foreign refiner would submit reports to EPA. In combination these reports would contain all of the information submitted for gasoline produced by refiners without an IB.

These annual reports submitted by importers and foreign refiners would provide EPA with batch by batch information for all CG imported during that year. From these, EPA could determine the volume weighted average quality for all imported CG. This would be a simple and straightforward way to monitor imported gasoline quality. Additional sampling and testing by EPA would be duplicative, as the importer must sample and test each batch of imported gasoline. 40 CFR 80.101(I).

3. An Appropriate Benchmark

The purpose of the benchmark is to reasonably determine when allowing foreign refiners the option to use an IB or to not use an IB has caused degradation of the quality of imported gasoline from 1990 quality of imported gasoline.

Ideally, EPA would use the volume weighted average of the quality of gasoline sent to the U.S. by foreign refineries in 1990. EPA does not have this information, but does have information on the volume weighted average baselines for domestic refineries. This average accounts for approximately 95% of the U.S. gasoline market in 1990, and reflects a wide diversity in types and kinds of refineries. There is no available data indicating that gasoline imported from foreign refineries was not consistent with this average, and absent evidence to the contrary it is not unreasonable to assume that average foreign gasoline quality in 1990 was generally equivalent to domestic gasoline quality. Also it would not be reasonable to measure overall quality for gasoline produced by

[12] A foreign refinery's 1990 baseline volume would not be appropriate for setting the bond amount, because in 1990 the Gasoline Rule was not in effect, so there was no gasoline identified as conventional or RFG.

foreign refiners using stricter criteria than that applied to domestic refiners, in the absence of evidence indicating otherwise.

The benchmark should be set at a point such that an exceedance of the benchmark reasonably indicates that the average quality of imported gasoline has degraded from 1990 levels because of the option provided to foreign refiners in using or not using an IB. Many additional factors also affect the average quality of imported gasoline. For example, there is a wide variety in the level of imports from year to year. The source and volume of imports from specific countries and refineries also varies significantly from year to year. Despite general trends in amount and source of imported gasoline, there remains a lot of year to year variability. A change in average gasoline quality during any particular year therefore might indicate the effects of allowing the option for IBs, or it might reflect the unique circumstances of that year, which may well change the next year.

Since the existence of an exceedance of the benchmark is designed to detect a multi-year trend, EPA is proposing that a three year average be compared against the benchmark. This would be a rolling average; e.g. the average for years 1 through 3 would be compared to the benchmark one year, the next year the average for years 2 through 4 would be compared, and so on.

EPA is proposing to set a benchmark for exhaust NO_X at the volume weighted baseline average for domestic refiners. This would be 1465 mg/mile for NO_X.[13]

For toxics, the evidence to date tends to show there would not likely be an adverse impact from allowing the option to use IBs. In 1995, the volume weighted annual average of imported gasoline for exhaust toxics was 86.64 mg/mile. This was cleaner than both the statutory baseline (104.5 mg/mile) and the volume weighted average for domestic baselines (97.34 mg/mile).[14] In addition, one foreign refiner that is a major supplier to the U.S. market has submitted detailed information to EPA on their expected IB, and the information submitted by the foreign refiner to date indicates that their IB for exhaust toxics would be cleaner than the SB.[15] EPA believes the present circumstances may not lead to a risk of adverse environmental impact, and a benchmark and provisions for remedial action may not be needed for exhaust toxics. Instead, EPA would monitor the average quality of imported gasoline for exhaust toxics as it would for NO_X, and if an adverse trend were to occur EPA would develop a benchmark and remedial provisions analogous to that proposed for NO_X.

At the start of the program, EPA is proposing that the volume weighted average for 1998 and 1999 be compared to the benchmark, and then the average for 1998, 1999 and 2000, to start the three year rolling average. A one year average for 1998 alone would not by itself appear adequate to detect a multi-year trend, while a two year average would be more effective in this regard. The effects of imports in 1998 would be still be fully accounted for, in the two year average including 1999. Since an IB might start to be used in 1997, EPA also is proposing to include with the 1998 imports all gasoline imported in 1997 after the date any gasoline subject to an IB is imported in 1997.

EPA invites comment on an alternative involving comparing the 1998 average to the benchmark, then the 1998 and 1999 combined average, and then the three year average starting with 1998, 1999 and 2000.

4. Remedial Action Upon an Exceedance

If a volume weighted three year annual average for imported CG exceeds the benchmark for NO_X then EPA would take remedial action. Under the proposal, the remedial action would be an adjustment applied to the compliance baseline for CG not included in the CG compliance calculations of a foreign refiner with an IB. EPA is proposing an adjustment to the baseline that would equal the amount of the exceedance of the benchmark.

This would be reevaluated each year by comparing the average for the three prior years to the benchmark. If there were no exceedance, then a prior adjustment would be terminated. If there were an exceedance, then a new adjustment would be imposed that equals the amount of the current exceedance. For example, if the three year annual average exceeded the NO_X benchmark by 5 mg/mile, then the compliance baseline for NO_X would be adjusted by 5 mg/mile. If there were no exceedance in the next years comparison, then the adjustment would be dropped.[16]

EPA also invites comment on whether there should be some minimum level of an exceedance above the benchmark before remedial action is taken. Such a level would need to be set at a point where the benefits from taking a remedial action are de minimis, given the likelihood that the next year's comparison to the benchmark would in all likelihood show whether or not there is a clear exceedance of the benchmark, and any appropriate action would be taken at that point.

5. Imported Gasoline Subject to the Remedial Action

A foreign refiner using an IB would follow the same procedures as a domestic refiner—the quality of its CG would be measured against the IB of the refiner that produced it. Foreign refiners without an IB would have chosen to have their gasoline measured against the SB instead of an IB, and reasonably could be expected to include refiners whose IB would have been more stringent than the SB. It is the use of IBs by some refiners, and the degradation below 1990 quality in CG produced by foreign refiners without an IB, that causes the average CG quality to be adversely affected when other refiners are at their IB. Since the foreign refiner with an IB would be acting no differently than domestic refiners with an IB, it is appropriate to only apply the remedial action to CG imported from refiners without an IB.

D. Requirements for U.S. Importers

Under today's proposal U.S. importers would be required to meet exhaust toxics and NO_X requirements for all imported CG that is not designated as FRGAS, and would exclude from importer CG compliance calculations all CG that is designated as FRGAS. A mechanism is proposed by which U.S. importers would demonstrate that imported CG is FRGAS. The baseline that would apply to U.S. importers would be the statutory baseline or any adjusted baseline as discussed in section II.C above. EPA is not proposing to change the current requirement that U.S. importers meet all requirements for imported RFG.

EPA also is requesting comment on an option where U.S. importers would meet the exhaust toxics and NO_X requirements for CG produced at a foreign refinery with an individual refinery baseline using the foreign refinery's baseline, taking into account

[13] This value applies under the Phase 2 Complex Model.

[14] In 1995 the volume weighted average for NO_X for imported gasoline was 1415.9 mg/mile, while the SB was 1461 mg/mile, and the volume weighted average for domestic baselines was 1465 mg/mile.

[15] See 59 FR 22809 (May 3, 1994).

[16] For the initial years of the program, EPA is proposing that an exceedance for 1998 and 1999 lead to a remedial adjustment that equals the exceedance, but no more than 1% of the SB for NO_X. This would also apply if EPA were to compare 1998 separately to the benchmark. The 1% cap is designed to avoid imposing an unnecessarily stringent adjustment that could result from the absence of data from a complete three year cycle.

the volume cap on use of the foreign refinery's individual baseline.

1. Imported CG FRGAS

Imported CG FRGAS would be excluded from the U.S. importer's CG compliance calculations. This would prevent the double counting that would result if FRGAS were included in the CG compliance calculations of both the foreign refiner and the U.S. importer. However, the U.S. importer would determine the quality and quantity of CG FRGAS at the U.S. port of entry, which the importer would report to the foreign refiner and to EPA in order to be compared with the foreign load port testing.

A U.S. importer would classify an imported CG batch as FRGAS if the gasoline is accompanied by a certification prepared by the foreign refiner that identifies the gasoline as FRGAS to be included in the foreign refinery CG compliance calculations, and a report on the FRGAS batch prepared by an independent third party. These procedures are described in greater detail in section II.B.3 of this preamble. In this way the U.S. importer would act like a domestic distributor and would not be responsible for meeting the exhaust toxics and NO_X requirements for CG. The U.S. importer would not be responsible for whether the foreign refiner meets the annual exhaust toxics and NO_X requirements for CG, including whether the foreign refiner properly calculates the refinery's compliance baseline each year.

However, the U.S. importer would be responsible for ensuring the foreign refiner certification was in fact prepared by the foreign refiner named on the certificate, and that the foreign refinery has been assigned an individual refinery baseline by EPA. If a CG FRGAS certification was not prepared by the named foreign refiner, for example if it is a forgery, the U.S. importer would be required to include the CG in the importer's CG compliance calculations. Similarly, if the certificate accompanying a batch of CG FRGAS names a foreign refinery that has not been assigned an individual baseline, the U.S. importer would be required to include the CG in the importer's CG compliance calculations. It is necessary to make U.S. importers responsible for accounting for imported CG in these situations, because otherwise EPA would be unable to enforce the CG requirements. EPA would have great difficulty enforcing requirements with regard to a foreign party who may have created fraudulent FRGAS certification documents, or a foreign refiner who does not have an individual refinery baseline.

EPA believes U.S. importers can easily protect themselves against this type of liability. EPA would publish on the RFG computer bulletin board the identity of foreign refineries that have been assigned individual baselines, that could be used by importers to identify legitimate foreign refiners of FRGAS. Importers can avoid relying on false certificates by selecting reliable business partners, or by contacting the foreign refiner to ensure the authenticity of the certificate for any particular FRGAS batch.

The U.S. importer would use an independent laboratory to determine information about each CG FRGAS batch. The batch quality and quantity would be determined through sampling and testing prior to off loading the ship, that could be compared with the quality and quantity determined at the load port after the ship was loaded. The independent lab also would use the product transfer documents to determine the identity of the foreign refinery where the FRGAS was produced. The importer would submit a report to the foreign refiner and to EPA containing the batch information.

U.S. importers would not be able to classify CG FRGAS as ''gasoline treated as blendstock,'' (GTAB), because to do so would result in the same CG being included in two compliance calculations.[17] In addition, U.S. importers could not use GTAB procedures to convert FRGAS that is CG into RFG, for the same reason that domestic regulated parties are not allowed to convert CG into RFG. Conversion of CG into RFG is prohibited because of concern such conversions could result in degradation of the CG gasoline pool. For example, in the absence of this constraint a refiner could produce very clean CG that in fact meets the RFG requirements, include this gasoline the refiner's CG compliance calculations to offset other dirty CG, and then convert this gasoline into RFG. The effect of this form of gaming would be degradation in the average quality of the refiner's CG. This same effect would be possible if importers could convert CG FRGAS into RFG.

2. Imported CG That Is Not FRGAS

U.S. importers would meet all current requirements for imported CG that is not FRGAS, including requirements for annual average exhaust toxics and NO_X. However, the baseline used by importers would be the baseline described in section II.C of this preamble. In the case of CG that is not FRGAS, importers would have no requirements related to tracking the refinery of origin. In addition, importers would be able to use the current GTAB procedures to reblend or reclassify imported CG that is not FRGAS.

3. Imported RFG

U.S. importers would include all imported RFG in the importers' RFG compliance calculations as is currently required, including imported RFG FRGAS and imported RFG that is not FRGAS. However, in the case of imported RFG FRGAS the importer would have to meet additional requirements related to tracking the refinery of origin. The importer would have an independent laboratory determine the volume of each RFG FRGAS batch, and report this volume to the foreign refiner and to EPA to be compared with the load port volume. The volume of RFG produced at a foreign refinery with an individual baseline is used to calculate the refinery's CG compliance baseline, which constitutes a volume cap on use of an individual refinery baseline.

U.S. importers would be able to use GTAB procedures for imported RFG that is both FRGAS and non-FRGAS, because foreign refiners would not have included the RFG in RFG compliance calculations. As a result, an importer could use GTAB procedures to blend additional blendstocks with RFG or to reclassify RFG as CG.

4. Alternative Option of U.S. Importer Accounting for FRGAS

EPA requests comment on an alternative option where U.S. importers, and not foreign refiners, would meet the exhaust toxics and NO_x requirements for CG produced at foreign refineries with an individual baseline. The importer would use the baseline that applies to the foreign refiner for this gasoline. This alternative would require the foreign refiner to specify the baseline values that apply to each CG batch, based on the volume of CG and RFG produced at the foreign refinery for the U.S. market each year as compared to the refinery's

[17] EPA has issued guidance under the current regulations that allows importers to classify imported gasoline as blendstock, called GTAB, that the importer must use to produce gasoline at a refinery operated by the importer-company. The purpose of the GTAB procedures is to enable importers to conduct remedial blending of imported gasoline, or to reclassify gasoline with regard to RFG or CG, before imported gasoline is introduced into U.S. commerce. This puts importers on a more equal footing with refiners, who are able to reblend or reclassify gasoline prior to shipping gasoline from the refinery.

baseline volume.[18] In addition, the U.S. importer and foreign refiner would be required to track the refinery of origin for the CG produced at foreign refineries with individual baselines using procedures similar to those described in section II.B.3 of this preamble.

Under this alternative U.S. importers would calculate an annual compliance baseline for exhaust toxics and NO_x, based on the volume-weighted baselines of all CG imported during the year—the assigned baseline values for CG produced at foreign refineries with individual baselines, and the statutory baseline for other CG.

Under this alternative foreign refiners with individual refinery baselines, and U.S. importers, would be required to track movements of blendstock produced at foreign refineries with individual baselines, to ensure the foreign refiner abides by the blendstock transfer requirements specified in § 80.102. However, under § 80.102 blendstock tracking is required only of refiners with a baseline parameter that is more stringent than the statutory baseline for that parameter. As a result, blendstock tracking would be required for any foreign refinery with an individual baseline value for either exhaust toxics or NO_x that is more stringent than the statutory baseline values for exhaust toxics or NO_x.

U.S. importers would be allowed to use the GTAB procedures for CG produced at a foreign refinery with an individual baseline under this alternative, because the foreign refiner would not have included the gasoline in refinery CG compliance calculations. In this way, imported CG could be reblended or reclassified as RFG. Like under current GTAB procedures the baseline applicable to each imported CG batch, i.e., the baseline assigned by the foreign refiner, would be carried over to the importer-company's refinery for that batch.

Under this alternative, the U.S. importer would be responsible for using the proper baseline for each imported CG batch. If a foreign refiner assigns an improper baseline to a batch and the U.S. importer uses the improper baseline values, the U.S. importer would be required to recalculate its CG compliance using the proper baseline. This recalculation would be necessary regardless of when the improper baseline values are discovered, and if the recalculation results in a violation of the exhaust toxics and NO_x requirements the importer would be liable for the violation. Similarly, if the foreign refinery for imported CG is improperly identified and the U.S. importer uses the improper baseline values, the U.S. importer would be required to recalculate its compliance baseline using the proper baseline values, and would be liable for any resulting penalties.

E. Early Use of Individual Foreign Refinery Baselines

EPA is proposing that a foreign refiner who submits a petition for an individual refinery baseline could begin using the individual baseline prior to EPA approval of the baseline petition, provided EPA makes a preliminary finding the baseline petition is complete, and the foreign refiner also has completed certain requirements proposed today. However, any gasoline imported under a requested IB would be subject to the actual IB assigned by EPA.

EPA would conduct a completeness evaluation as the first step in baseline review process, and would notify a foreign refiner of the results of the completeness review on request. However, the initial completeness review would not bar EPA from requiring a foreign refiner to submit additional information later in the baseline review process.

The additional requirements a foreign refiner would have to complete in order to use an individual baseline early are related to ensuring EPA's ability to monitor and enforce compliance by the foreign refiner with all applicable requirements during the early use period. The particular requirements that would have to be met are: (1) The commitments regarding EPA inspections and the forum for enforcement actions, and (2) the requirements related to bond posting.

If these conditions are met, the foreign refiner could begin classifying CG and RFG as FRGAS, and could use the individual refinery baseline to demonstrate compliance with the CG parameter and emissions requirements.[19] However, EPA is proposing that a foreign refiner would be required to meet the CG requirements for FRGAS using the refinery baseline values that ultimately are approved by EPA. Thus, if a foreign refiner elects to use an individual refinery baseline early, and uses baseline values that are less stringent than the baseline values ultimately approved by EPA, the refiner's compliance with the CG exhaust toxics and NO_x requirements will nevertheless be measured relative to the approved baseline values. If this evaluation results in a violation of the CG requirements, the foreign refiner will be held liable.

F. Requirements for RFG Before 1998

The focus of this proposal is on the requirements for CG, because the CG requirements rely on refinery baselines both now and in the future. The RFG requirements for sulfur, T–90 and olefin content also rely on individual refinery baselines, but only until the Complex Model applies beginning in January, 1998. EPA believes an approach similar to that proposed for CG could be used to allow foreign refiners to use individual refinery baselines for these RFG requirements until January, 1998. However, the comments received during the comment period indicated that there is little if any interest in this matter given that the complex model will apply in the very near future.

EPA requests comment on whether the provisions for this rule should include the provisions necessary to allow use of foreign refinery baselines for the RFG requirements, and whether any foreign refiner believes it would be able to take advantage of these requirements if they were promulgated.

III. Public Participation

EPA believes these proposed requirements would be consistent with the Agency's commitment to fully protect public health and the environment, and with the U.S. commitment to ensure that the Gasoline Rule is consistent with the obligations of the U.S. under the WTO. EPA invites comment on all aspects of today's notice and also seeks comment on whether or not the proposal meets the goal stated above. EPA invites comment on the need for the proposed provisions, the environmental impact of the provisions, and the costs for all parties, foreign and domestic, who would be affected by the proposed changes to the Gasoline Rule. The Agency invites any alternative approaches to regulating imported gasoline that would achieve the same goal.

IV. Administrative Designation and Regulatory Analysis

A. Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore

[18] For example, foreign refiners could be required to assign the individual refinery baseline to CG batches that are produced at a foreign refinery each year before the refinery's total volume of U.S. market gasoline (RFG plus CG) equals the refinery's baseline volume, and to assign the adjusted statutory baseline to subsequent CG batches.

[19] During 1997, under § 80.101(b)(1) the CG requirements are for sulfur, T–90, olefins and exhaust benzene emissions. Beginning in 1998 the CG requirements are for exhaust toxics and NO_x emissions.

subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

(3) Materially alter the budgetary impact of entitlement, 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.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action,'' as such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) general requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements 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 not-for-profit enterprises, and small governmental jurisdictions. This proposed rule would not have a significant impact on a substantial number of small entities because only a limited number of domestic entities would be affected by this proposal and would be small entities. In addition, today's proposal would not significantly change the requirements applicable to importers of gasoline produced by foreign refineries.

Of the entire population of importers currently reporting to the EPA, somewhat less than 100 importers that would be subject to today's proposed rule are small entities. Under 40 CFR. 80.65 and 80.101 the requirements for imported CG must currently be met by the importer. The current requirements are based on the statutory baseline while today's proposed rule would require either foreign refiners or importers to meet the CG requirements using the baselines of the various foreign refineries. Other importers would continue to meet the CG requirements using the statutory baseline or an adjusted baseline. This would not, however, have a significant impact on the importer, as the importer would continue to only import gasoline that allows it to meet the annual average requirements, and such gasoline would continue to be available from the foreign refineries. The provision generally corresponds with existing requirements. This proposal would continue the requirement that importers be responsible for sampling and testing for foreign gasoline imported into the U.S. Importers will be responsible for this activity at the port of entry in the U.S. Importers would rely on the foreign refiners and the independent party's to establish refinery of origin. Importers can accomplish this by making private arrangements with the importing foreign refiner and the independent party. The Agency believes that, in general, exercising good business practices with reputable foreign refiners would tend to eliminate any impact on the importer. The impact of today's proposal would therefore either not increase an importers cost, or would do so only marginally.

The issue of baselines for imported gasoline is discussed generally in section VII–C of the Regulatory Impact Analysis that was prepared to support the Final Rule for gasoline. A copy of this document may be found in the RFG docket, number A–92–12, at the location identified in the **ADDRESSES** section of this document.

Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

C. The Paperwork Reduction Act

The information collection requirements in this proposed rule has been 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. 1591.08) and a copy may be obtained from Sandy Farmer, Regulatory Information Division; U.S. Environmental Protection Agency (2136); 401 M St., S.W.; Washington, DC 20460 or by calling (202) 260–2740.

This proposal would allow foreign refiners to establish individual baselines to demonstrate compliance with the Agency's gasoline rule. The information collected would enable EPA to evaluate imported gasoline in a manner similar to gasoline produced at domestic refineries. Section 211(k) specifically recognizes the need for recordkeeping, reporting and sampling/testing requirements for enforcement of this program. Because of the complex nature of the gasoline rule, EPA cannot determine compliance merely by taking samples of gasoline at various facilities.

For purposes of this document, EPA expects that at most approximately three foreign refiners will petition the agency annually.[20] The EPA estimates that approximately 66 batches of CG would be imported into the United States annually subject to an individual baseline. These batches of CG must be sampled and tested by an independent laboratory making the total cost burden shared by the independent importers approximately $24,000 a year. The collection of information has an estimated recordkeeping and reporting burden averaging 4.1 hours per respondent, or a total estimated burden of 812 hours shared by all respondents annually. This estimate includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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.

The Agency requests comments on the 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

[20] To date, only a limited number of foreign refiners have indicated an interest in establishing an IB. However, under the proposal any foreign refiner could apply for an IB.

collection techniques. Send comments on the ICR to the Director, Regulatory Information Division; U.S. Environmental Protection Agency (2136); 401 M St., S.W.; Washington, DC 20460; and to the 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 May 6, 1997, a comment to OMB is best assured of having its full effect if OMB receives it by June 5, 1997. The final rule will respond to any OMB or public comments on the information collection request.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's 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.

V. Statutory Authority

The statutory authority for the rules proposed today is granted to EPA by sections 114, 211 (c) and (k), and 301 of the Clean Air Act, as amended, 42 U.S.C. 7414, 7545 (c) and (k), and 7601.

List of Subjects in 40 CFR Part 80

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

Dated: April 29, 1997.

Carol M. Browner,

Administrator.

40 CFR Part 80 is proposed to be amended as follows:

PART 80—REGULATIONS OF FUELS AND FUEL ADDITIVES

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

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

2. Section 80.94 is proposed to be added to subpart E to read as follows:

§ 80.94 Requirements for gasoline produced at foreign refineries.

(a) *Definitions.* (1) *A foreign refinery* means a refinery that is located outside the United States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (collectively referred to in this section as ''the United States'').

(2) A *foreign refiner* means a refiner of a foreign refinery.

(3) *FRGAS* means gasoline produced at a foreign refinery that has been assigned an individual refinery baseline, and that is included in the foreign refinery's conventional gasoline compliance calculations, or compliance baseline calculations.

(b) *Baseline establishment.* Any foreign refiner may submit to EPA a petition for an individual refinery baseline, under §§ 80.90 through 80.93, for any foreign refinery that produced gasoline in 1990 that was exported to the United States.

(1) The provisions for baselines as specified in §§ 80.90 through 80.93 shall apply to a foreign refinery, except where provided otherwise in this section.

(2) The baseline for a foreign refinery shall reflect only the volume and properties of gasoline produced in 1990 that was imported into the United States.

(3) A baseline petition shall establish the volume of conventional gasoline produced at a foreign refinery and exported to the United States during the calendar year immediately preceding the year the baseline petition is submitted.

(4) In making determinations for foreign refinery baselines EPA will consider all information supplied by a foreign refiner, and in addition may rely on any and all appropriate assumptions necessary to make such a determination.

(5) Where a foreign refiner submits a petition that is incomplete or inadequate to establish an accurate baseline, and the refiner fails to cure this defect after a request for more information, then EPA shall not assign an individual refinery baseline.

(6) Baseline petitions under this paragraph (b) must be submitted before January 1, 2002.

(c) *General requirements for foreign refiners with individual refinery baselines.* Any foreign refiner of a refinery that has been assigned an individual baseline under paragraph (b) of this section shall designate all gasoline produced at the foreign refinery that is exported to the United States as FRGAS.

(1)(i) In the case of conventional gasoline FRGAS the foreign refiner shall meet all requirements that apply to refiners under subparts D, E and F of this part.

(ii) If the foreign refinery baseline is assigned, or a foreign refiner begins early use of a refinery baseline under paragraph (q) of this section, on a date other than January 1, the compliance baseline for the initial year shall be calculated under § 80.101(f) using an adjusted baseline volume, as follows:

$$AV_{1990}=(D/365)xV_{1990}$$

where:

AV_{1990}=Adjusted 1990 baseline volume;

D=Number of days remaining in the year beginning with the day the foreign refinery baseline is approved or the day the foreign refiner begins early use of a refinery baseline;

V_{1990} = Foreign refinery's 1990 baseline volume.

(2) In the case of reformulated gasoline and RBOB FRGAS, the foreign refiner shall meet the following requirements:

(i) The designation requirements in § 80.65(d)(1);

(ii) The recordkeeping requirements in §§ 80.74(a), (b)(1) and (b)(3);

(iii) The reporting requirements in §§ 80.75(a), (m), and (n);

(iv) The registration requirements in § 80.76;

(v) The product transfer document requirements in §§ 80.77 (a) through (f), and (j);

(vi) The prohibition in §§ 80.78(a)(10), (b) and (c); and

(vii) The independent audit requirements in §§ 80.125 through 80.127, 80.128 (a) through (c), and (g) through (i), and § 80.130.

(d) *Designation, product transfer documents, and foreign refiner certification.* (1) Any foreign refiner of a foreign refinery that has been assigned an individual baseline shall designate each batch of FRGAS as such at the time the gasoline is produced, in addition to the designations required in § 80.65(d).

(2) On each occasion when any person transfers custody or title to any FRGAS prior to its being imported into the United States, the following information shall be included as part of the product transfer document information in §§ 80.77 and 106:

(i) Identification of the gasoline as FRGAS; and

(ii) The name and EPA refinery registration number of the refinery where the FRGAS was produced.

(3) On each occasion when FRGAS is loaded onto a vessel or other transportation mode for transport to the United States, the foreign refiner shall prepare a certification for each batch of the FRGAS that meet the following requirements:

(i) The certification shall include the following information:

(A) The identification of the gasoline as FRGAS;

(B) The volume of FRGAS being transported, in gallons;

(C) In the case of conventional gasoline FRGAS, the exhaust toxics and NOx emissions performance in mg/mile;

(D) A declaration that the FRGAS is being included in the compliance calculations under § 80.101(g) for the refinery that produced the FRGAS; and

(E) The name and EPA registration number of the refinery that produced the FRGAS;

(ii) The certification shall be signed by the president or owner of the foreign refiner company, or by that person's immediate designee, with a declaration as to the truth and accuracy of the certification; and

(iii) The certification shall be made part of the product transfer documents for the FRGAS.

(e) *Contracts for sale or transfer.* Any foreign refiner shall include as part of each contract for sale or transfer of any FRGAS:

(1) The following requirements:

(i) Delivery of the FRGAS is restricted to the United States;

(ii) The FRGAS may not be combined with any other gasoline, except that, subject to the segregation restrictions in § 80.78(a), FRGAS may be combined with other FRGAS produced at the same refinery or at other refineries that are aggregated under § 80.101(h); and

(iii) Any subsequent transfers of custody or title to FRGAS must include these restrictions; and

(2) Commercial penalties for any violations of the FRGAS requirements that are sufficiently large to ensure compliance with the requirements.

(f) *Load port independent sampling, testing and refinery identification.* (1) On each occasion FRGAS is loaded onto a vessel for transport to the United States a foreign refiner shall have an independent third party:

(i) Inspect the vessel prior to loading;

(ii) Collect a representative sample of the FRGAS subsequent to loading on the vessel and prior to departure of the vessel from the port serving the foreign refinery;

(iii) Analyze the sample for each property specified in § 80.65(e)(1) using the methodologies specified in § 80.46;

(iv) Determine the volume of FRGAS loaded onto the vessel;

(v) Review original documents that reflect movement and storage of the FRGAS from the refinery to the load port, and from this review determine:

(A) The refinery at which the FRGAS was produced; and

(B) That the FRGAS remained segregated from:

(*1*) Non-FRGAS; or

(*2*) Other FRGAS produced at a different refinery, except that FRGAS may be combined with other FRGAS produced at refineries that are aggregated under § 80.101(h);

(vi) Obtain the EPA-assigned registration number of the foreign refinery;

(vii) Determine the name and country of registration of the ship used to transport the FRGAS to the United States; and

(viii) Determine the date and time the ship departs the port serving the foreign refinery.

(2) The requirements of paragraph (f)(1) of this section must be met separately for each quantity of FRGAS that is not homogenous with regards to properties specified in § 80.65(e)(1).

(3) The independent third party shall submit a report to the Administrator containing the information required under paragraph (f)(1) of this section, within thirty days following the date of the independent laboratory's inspection. This report shall include a description of the method used to determine the identity of the refinery at which the gasoline was produced, that the gasoline was not mixed with gasoline produced at any other refinery, and a description of the gasoline's movement and storage between production at the source refinery and ship loading.

(4) A third person my be used to meet the requirements in this paragraph (f) only if:

(i) The person is approved in advance by EPA, based on a demonstration of ability to perform the procedures required in this paragraph (f);

(ii) The person is independent under the criteria specified in § 80.65(f)(2)(iii); and

(iii) The person signs a commitment that contains the provisions specified in paragraph (i) of this section with regard to activities, facilities and documents relevant to compliance with the requirements of this paragraph (f).

(g) *Comparison of load port and port of entry testing.* (1) Any foreign refiner of CG FRGAS shall compare the results from the load port testing under paragraph (f)(1) of this section, with the port of entry testing as reported under paragraph (n)(4) of this section, and if the port of entry results differ by more than the amounts allowed under § 80.65(e)(1) the foreign refiner shall adjust the foreign refinery's compliance calculations under § 80.101(g) to reflect the port of entry results.

(2) The foreign refiner shall compare the volume from the load port testing with the volume from the port of entry testing, and if these results, corrected for temperature and density, differ by 1% or more the foreign refiner shall:

(i) In the case of reformulated gasoline or RBOB FRGAS, adjust the foreign refinery's compliance baseline calculations under § 80.101(f) to reflect the port of entry volume; and

(ii) In the case of conventional gasoline FRGAS adjust the foreign refinery's compliance calculations under § 80.101(g) to reflect the port of entry volume, using the properties as determined at the foreign refinery.

(h) *Attest requirements.* The following additional procedures shall be carried out by any foreign refiner of FRGAS as part of the attest engagement for each foreign refinery under subpart F of this part:

(1) Obtain separate listings of all tenders of reformulated and conventional gasoline FRGAS that is loaded onto ships for transport to the United States. Agree the total volume of tenders from the listings to the gasoline inventory reconciliation analysis in § 80.128(b), and to the volumes determined by the independent laboratory under paragraph (f)(1)(iv) of this section.

(2) Report as a finding the name and country of registration of each ship, and

the volumes of FRGAS loaded onto each ship, identified in paragraph (h)(1) of this section.

(3) Select a sample from the list of ships identified in paragraph (h)(1) of this section, in accordance with the guidelines in § 80.127, and for each ship selected perform the following:

(i) Obtain the report of the independent laboratory, under paragraph (f)(3) of this section, and of the United States importer under paragraph (n)(4) of this section.

(A) Agree the information in these reports with regard to ship identification, gasoline volumes and test results.

(B) Identify, and report as a finding, each occasion the load port and port of entry emissions and/or volume results differ by more than the amounts allowed in paragraph (g) of this section, and determine whether the foreign refiner adjusted its refinery calculations as required in paragraph (g) of this section.

(ii) Obtain copies of the contracts for sale and transfer of the FRGAS, and determine whether the contract provisions required in paragraph (e) of this section are included.

(iii) Obtain a commercial document of general circulation that lists vessel arrivals and departures, and that includes the port and date of departure of the ship, and the port of entry and date of arrival of the ship. Agree the ship's departure and arrival locations and dates from the independent laboratory and United States importer reports to the information contained in the commercial document.

(iv) Obtain the documents used by the independent laboratory to determine transportation and storage of the FRGAS from the refinery to the load port, under paragraph (f)(1)(v) of this section. Obtain tank activity records for any storage tank where the FRGAS is stored, and pipeline activity records for any pipeline used to transport the FRGAS, prior to being loaded onto the ship. Use these records to determine whether the FRGAS was produced at the refinery that is the subject of the attest engagement, and whether the FRGAS was mixed with any non-FRGAS gasoline or any FRGAS produced at a different refinery.

(4) In order to complete the requirements of this paragraph (h) an auditor shall:

(i) Be independent under the criteria specified in § 80.65(f)(2)(iii);

(ii) Be licensed as a Certified Public Accountant in the United States and a citizen of the United States, or be approved in advance by EPA based on a demonstration of ability to perform the procedures required in §§ 80.125 through 80.130 and this paragraph (h); and

(iii) Sign a commitment that contains the provisions specified in paragraph (i) of this section with regard to activities and documents relevant to compliance with the requirements of §§ 80.125 through 80.130 and this paragraph (h).

(i) *Foreign refiner commitments.* Any foreign refiner shall commit to and comply with the provisions contained in this paragraph (i) as a condition to being assigned an individual refinery baseline.

(1) Any United States Environmental Protection Agency inspector or auditor will be given full, complete and immediate access to conduct inspections and audits of the foreign refinery.

(i) Inspections and audits may be either announced in advance by EPA, or unannounced.

(ii) Access will be provided to any location where:

(A) Gasoline is produced;

(B) Documents related to refinery operations are kept;

(C) Gasoline or blendstock samples are tested or stored; and

(D) FRGAS is stored or transported between the foreign refinery and the United States, including storage tanks, ships and pipelines.

(iii) Inspections and audits may be by EPA employees or contractors to EPA.

(iv) Any documents requested that are related to matters covered by inspections and audits will be provided to an EPA inspector or auditor on request.

(v) Inspections and audits by EPA may include review and copying of any documents related to:

(A) Refinery baseline establishment, including the quantity and quality, and transfers of title or custody, of any gasoline or blendstocks, whether FRGAS or non-FRGAS, produced at the foreign refinery during the period January 1, 1990 through the date of the refinery baseline petition or through the date of the inspection or audit if no baseline petition has been submitted, and any work papers related to refinery baseline establishment;

(B) The quality and quantity of FRGAS;

(C) Transfers of title or custody to FRGAS;

(D) Sampling and testing of FRGAS;

(E) Worked performed or reports prepared by independent laboratories or by independent auditors under the requirements of this section, including work papers; and

(F) Reports prepared for submission to EPA, and any work papers related to such reports.

(vi) Inspections and audits by EPA may include taking samples of gasoline or blendstock, and interviewing employees.

(vii) Any employee of the foreign refiner will be made available for interview by the EPA inspector or auditor, on request, within a reasonable time period.

(viii) English language translations of any documents will be provided to an EPA inspector or auditor, on request, within 10 working days.

(ix) English language interpreters will be provided to accompany EPA inspectors and auditors, on request.

(2) An agent for service of process located in the District of Columbia will be named, and service on this agent constitutes service on the foreign refiner or any employee of the foreign refiner.

(3) The forum for any civil or criminal enforcement action related to the provisions of this section for violations of the Clean Air Act or regulations promulgated thereunder shall be governed by the Clean Air Act, including the EPA administrative forum where allowed under the Clean Air Act.

(4) United States substantive and procedural laws apply to any civil or criminal enforcement action against the foreign refiner or any employee of the foreign refiner related to the provisions of this section.

(5) The foreign refiner, or its agents or employees, will not seek to detain or to impose civil or criminal remedies against EPA inspectors or auditors, whether EPA employees or EPA contractors, for actions performed within the scope of EPA employment related to the provisions of this section.

(6) In the case of foreign refineries that are owned or operated by a foreign government, the foreign refiner will waive sovereign immunity with regard to prosecution by the United States of civil and criminal violations of Clean Air Act section 211(k) and the regulations promulgated thereunder at subparts D, E and F of this part and other relevant laws and regulations including but not limited to Clean Air Act sections 113, 114, 211(c) and (d), and Title 18 United States Code. This waiver of sovereign immunity also will apply to any employee or agent of a refinery owned or operated by the foreign government.

(7) The commitment required by this paragraph (i) shall be signed by the owner or president of the foreign refiner business. In the case of foreign refineries that are state owned or operated, the commitment shall be signed by an official of the government at the cabinet secretary level or higher who has responsibility for the foreign refinery.

(8) In any case where FRGAS produced at a foreign refinery is stored or transported by another company between the refinery and the ship that transports the FRGAS to the United States, the foreign refiner shall obtain from each such other company a commitment that meets the requirements specified in paragraphs (i)(1) through (7) of this section, and these commitments shall be included in the foreign refiner's baseline petition.

(j) Bond posting. Any foreign refiner shall meet the requirements of this paragraph (j) as a condition to being assigned an individual refinery baseline.

(1) The foreign refiner shall post a bond of the amount calculated using the following equation:

Bond = G x $ 0.01

where:
Bond = amount of the bond in U.S. dollars;
G = the largest volume of conventional gasoline produced at the foreign refinery and exported to the United States, in gallons, during the most recent of the following calendar years up to a maximum of five calendar years: the calendar year immediately preceding the date the baseline petition is submitted, the calendar year the baseline petition is submitted, and each succeeding calendar year.

(2) Bonds shall be posted by:

(i) Paying the amount of the bond to the Treasurer of the United States; or

(ii) Obtaining a bond in the proper amount from a third party surety agent that would be payable to satisfy U.S. administrative or judicial judgments against the foreign refiner, provided EPA agrees in advance as to the third party and the nature of the surety agreement.

(3) If the bond amount for a foreign refinery increases the foreign refiner shall increase the bond to cover the shortfall within 90 days of the date the bond amount changes. If the bond amount decreases, the foreign refiner may reduce the amount of the bond beginning 90 days after the date the bond amount changes.

(4) Bonds posted under this paragraph (j) shall be used to satisfy:

(i) Any judgment against the foreign refiner or against any employee or agent of the foreign refiner for violation of the Clean Air Act or regulations promulgated thereunder;

(ii) Any judgment against any other party for a violation that is caused by the foreign refiner.

(5) On any occasion a foreign refiner bond is used to satisfy any judgment, the foreign refiner shall increase the bond to cover the amount used within 90 days of the date the bond is used.

(k) *Blendstock tracking.* For purposes of blendstock tracking by any foreign refiner under § 80.102 by a foreign refiner with an individual refinery baseline, the foreign refiner may exclude from the calculations required in § 80.102(d) the volume of applicable blendstocks for which the foreign refiner has sufficient evidence in the form of documentation that the blendstocks were used to produce gasoline used outside the United States.

(l) *English language reports.* Any report or other document submitted to EPA by any foreign refiner shall be in English language, or shall include an English language translation.

(m) *Prohibitions.* No person may combine FRGAS produced at a foreign refinery with any non-FRGAS produced at that foreign refinery, or with any gasoline or blendstock produced at any other refinery, prior to the FRGAS being imported into the United States.

(n) *United States importer requirements.* Any United States importer shall meet the following requirements:

(1) Each batch of imported gasoline shall be classified by the importer as being FRGAS, or as not being FRGAS.

(2) Gasoline shall be classified as FRGAS where the product transfer documents include a foreign refiner FRGAS certification for the gasoline, as required in paragraph (d)(3) of this section, that was prepared by the foreign refiner of the FRGAS and that is supported by a report of an inspection of the gasoline at the foreign load port prepared by an independent third party as required in paragraph (f) of this section.

(3) For each gasoline batch classified as FRGAS, any United States importer shall perform the following procedures:

(i) In the case of both reformulated and conventional gasoline FRGAS, have an independent laboratory:

(A) Determine the batch volume;

(B) Use the foreign refiner's FRGAS certification to determine the name and EPA-assigned registration number of the foreign refinery that produced the FRGAS;

(C) Determine the name and country of registration of the ship used to transport the FRGAS to the United States; and

(D) Determine the date and time the ship arrives at the United States port of entry.

(ii) In the case of conventional gasoline FRGAS, have an independent laboratory:

(A) Collect a representative sample of the gasoline subsequent to the ship's arrival at the United States port of entry and prior to off loading any gasoline from the ship; and

(B) Analyze the sample for each property specified in § 80.65(e)(1) using the methodologies specified in § 80.46.

(4) Any importer shall submit a report to the Administrator, and to the foreign refiner, containing the information determined under paragraph (n)(3) of this section, within thirty days following the date any ship transporting FRGAS arrives at the United States port of entry.

(5)(i) Any United States importer shall meet the requirements specified for conventional gasoline in § 80.101 for any imported conventional gasoline that is not classified as FRGAS under paragraph (n)(2) of this section.

(ii) The baseline applicable to a United States importer who has not been assigned an individual importer baseline under § 80.91(b)(4) shall be the baseline specified in paragraph (o) of this section.

(o) *Importer baseline.* (1) Each calendar year starting in 2000, the Administrator shall calculate the volume-weighted average for exhaust NOx under the Phase II Complex Model for conventional gasoline imported into the United States during the prior three calendar years, except as provided otherwise in this paragraph (o). The calculation shall be based on the reports submitted under this section and § 80.105. The calculation shall consider:

(i) Imported conventional gasoline that is not classified as FRGAS, and included in the conventional gasoline compliance calculations of U.S. importers for each year; and

(ii) Imported conventional gasoline that is classified as FRGAS, and included in the conventional gasoline compliance calculations of a foreign refiner for each year.

(2) In 2000 the calculation shall be for the 1998 and 1999 averaging periods. The calculation in 2000 shall also include all conventional gasoline classified as FRGAS and included in the conventional gasoline compliance calculations of a foreign refiner for 1997, and all conventional gasoline batches that are imported during 1997 beginning on the date the first batch of FRGAS arrives at a United States port of entry.

(3)(i) The Administrator shall determine whether the volume-weighted average calculated in paragraph (o)(1) and (2) of this section is greater than the following value: Exhaust NO_X-1465 mg/mile.

(ii) If the volume-weighted average for exhaust NO_X is greater than 1465 mg/mile, the Administrator shall calculate an adjusted baseline for the exhaust

NO_X according to the following equation:

$$AB_i = B_i—(MYA_i—B_i)$$

where:
AB_i = Adjusted baseline;
I = Exhaust NO_X;
B_i = Value in paragraph (o)(3)(i) of this section;
MYA_i = Multi-year average.

(4)(i) Notwithstanding the provisions of § 80.91(b)(4)(iii), the baseline exhaust NO_X emissions values applicable to any United States importer who has not been assigned an individual importer baseline under § 80.91(b)(4) shall be the more stringent of the statutory baseline value for exhaust NO_X under § 80.91(c)(5), or the adjusted baseline value for exhaust NOx calculated under paragraph (o)(3) of this section.

(ii) On or before June 1 of each calendar year, the Administrator shall publish a notice in the **Federal Register** providing the baseline that applies to importers under this paragraph (o). If the baseline is an adjusted baseline, it shall be effective for any conventional gasoline imported beginning 60 days following the publication of the notice. If the baseline is the statutory baseline, it shall be effective upon publication of the notice. A baseline shall remain in effect until the effective date of a subsequent change to the baseline pursuant to this paragraph (o).

(p) *Withdrawal or suspension of a foreign refinery's baseline* EPA may withdraw or suspend a baseline that has been assigned to a foreign refinery where:

(1) A foreign refiner fails to meet any requirement of this section;

(2) A foreign government fails to allow EPA inspections as provided in paragraph (i)(1) of this section; or

(3) A foreign refiner fails to pay a civil or criminal penalty that is not satisfied using the foreign refiner bond specified in paragraph (j) of this section.

(q) *Early use of a foreign refinery baseline.* (1) A foreign refiner may begin using an individual refinery baseline before EPA has approved the baseline, provided that:

(i) A baseline petition has been submitted as required in paragraph (b) of this section;

(ii) EPA has made a provisional finding that the baseline petition is complete;

(iii) The foreign refiner has made the commitments required in paragraph (i) of this section;

(iv) The persons who will meet the independent third party and independent attest requirements for the foreign refinery have made the commitments required in paragraphs (f)(4)(iii) and (h)(4)(iii) of this section; and

(v) The foreign refiner has met the bond requirements of paragraph (j) of this section.

(2) In any case where a foreign refiner uses an individual refinery baseline before final approval under paragraph (q)(1) of this section, and the foreign refinery baseline values that ultimately are approved by EPA are more stringent than the early baseline values used by the foreign refiner, the foreign refiner shall recalculate its compliance, *ab initio*, using the baseline values approved by EPA, and the foreign refiner shall be liable for any resulting violation of the conventional gasoline requirements.

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