

**§ 948.15 Approval of West Virginia regulatory program amendments.**

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Original amendment submission date	Date of publication of final rule	Citation/description
October 17, 2005, and amended November 4, 2005 .....	December 30, 2005 .....	CSR 38–2–11.3.a.3.

[FR Doc. 05–24643 Filed 12–29–05; 8:45 am]  
BILLING CODE 4310–05–P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 80**

[EPA–OAR–2005–0161; FRL–8017–1]

**Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Requirements for 2006**

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

**ACTION:** Direct final rulemaking.

**SUMMARY:** EPA is taking direct final action to interpret and clarify the 2006 default standard applicable under the Renewable Fuel Program set forth in the Energy Policy Act of 2005. The Act requires that 2.78 volume percent of gasoline sold or dispensed to consumers in the U.S. in 2006 be renewable fuel if EPA does not promulgate comprehensive regulations to implement the Renewable Fuel Program by August 8, 2006. Given the short timeframe available and the need to provide certainty to the regulated community, the Agency is finalizing a limited set of regulations for the default standard for 2006 that will provide for collective compliance by refiners, blenders, and importers to meet the 2.78 volume percent requirement, with compliance determined by looking at the national pool of gasoline sold in 2006. The Agency will develop and

promulgate the comprehensive program subsequent to this action.

**DATES:** This rule is effective on February 28, 2006 without further notice, unless EPA receives adverse comment by January 30, 2006. If we receive such comment on one or more distinct sections of this rule, we will publish a timely withdrawal in the **Federal Register** informing the public of the distinct provisions that will become effective and which distinct provisions of this rule will not take effect.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. OAR–2005–0161. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (202) 566–1742. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

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**SUPPLEMENTARY INFORMATION:** EPA is publishing this rule without prior proposal because we view this as a noncontroversial action and anticipate no adverse comment. However, in the “Proposed Rules” section of today’s **Federal Register** publication, we are publishing a separate document that will serve as the proposal if adverse comments are filed. This rule is effective on February 28, 2006 without further notice, unless EPA receives adverse comment by January 30, 2006. If EPA receives adverse comment on one or more distinct sections of this rule we will publish a timely withdrawal in the **Federal Register** indicating which provisions of this rule will become effective and which provisions are being withdrawn due to adverse comment. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on the proposal. Any parties interested in commenting must do so at this time.

**I. General Information**

*A. Does This Action Apply to Me?*

Entities potentially affected by this final action include those involved with the production, distribution and sale of gasoline motor fuel or renewable fuels such as ethanol and biodiesel. Regulated categories and entities include:

Category	NAICS <sup>1</sup> codes	SIC <sup>2</sup> codes	Examples of potentially regulated entities
Industry .....	324110	2911	Petroleum Refiners, Importers.

<sup>1</sup> North American Industry Classification System (NAICS).

<sup>2</sup> Standard Industrial Classification (SIC) system code.

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

listed in the table could also be affected. To decide whether your organization might be affected by this action, you should carefully examine today’s notice and the existing regulations in 40 CFR part 80. If you have any questions regarding the applicability of this action

to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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## I. Overview

Section 1501 of the Energy Policy Act of 2005 (Energy Act or the Act) amended the Clean Air Act by adding a new provision establishing a national renewable fuel program (also commonly known as the Renewable Fuel Standard program, or RFS program). This program is designed to significantly increase the volume of renewable fuels that are blended into gasoline, starting with calendar year 2006. The Act calls on EPA to issue implementing regulations by August 8, 2006, and provides that if EPA has not adopted such regulations by that date then 2.78 percent of the gasoline sold or dispensed to consumers for calendar year 2006 must be renewable fuel.

EPA does not believe that it can meet the August, 2006, statutory deadline. The issues that need to be resolved in adopting regulations to establish the

comprehensive compliance and credit trading program are complex, making it important for EPA to receive input from the various stakeholders. This effort will require significant amounts of time and effort. In addition, a comprehensive set of regulations implementing the RFS would constitute a major rulemaking effort, which typically requires a significant amount of analysis of important issues such as emissions inventory impacts, costs, feasibility, and benefits. This work cannot be completed in the context of a final rulemaking by August, 2006, which must be preceded by a notice and comment process. At the same time, it is critical that industry be informed of how to demonstrate compliance prior to August, 2006, since the program begins in January 2006. The default provisions in the Act are not self explanatory, neither identifying the responsible parties nor the method by which they must demonstrate compliance. EPA is therefore finalizing a limited set of regulations that will interpret and clarify the statutory default provision for 2006. The rule would provide certainty to the parties involved as to their responsibilities for 2006, and will help to provide a smooth transition to the long-term RFS program. This section summarizes the regulatory approach we are taking for 2006.

### A. What Is Being Finalized for 2006?

The Energy Policy Act of 2005 anticipated the possibility that a full RFS program might not be promulgated by the start of 2006, and so provided a default standard applicable to 2006 only. The default standard specifies that 2.78 volume percent of gasoline sold or dispensed to consumers in the U.S. in calendar year 2006 must be renewable fuel. The default standard is applicable if the Agency does not promulgate regulations to implement the full RFS program.

The Agency is interpreting the default standard for 2006 with regulations identifying the liable parties as refiners, importers, and blenders. Compliance with the default standard, however, will be determined on a collective, rather than an individual, basis. Under this approach, refiners, blenders, and importers will together be responsible for meeting the default 2.78 percent standard, and compliance with this standard will be calculated over the pool of gasoline sold to consumers. An individual refiner, blender, or importer will not be responsible for meeting the 2.78 percent standard for the specific gasoline it produces. The Agency will determine compliance following 2006 using data on gasoline and renewable fuel consumption available from the

Energy Information Administration, supplemented by other readily available information. If we determine that the default standard has not been met in 2006 on this collective basis, any deficit will be carried forward and applied as an adjustment to the standard for 2007. The regulations implementing the default standard for 2006 will not include any provisions for credit generation or trading, given the collective nature of the obligation.

### B. Why Is EPA Taking This Action?

The rulemaking required to implement the full RFS program, including both program design and the various analyses necessary, will require a substantial effort involving many stakeholders. For instance, it will require the Agency to undertake an analysis of small business impacts under the Small Business Regulatory Enforcement Flexibility Act (SBREFA), provide public notice through a proposed rule and an opportunity for comment including an opportunity for a public hearing, a Regulatory Impact Analysis, and ultimately produce a final rule. This process cannot occur by the time the RFS program begins in January 2006, nor does EPA anticipate that it can be completed by the one year deadline set in the Act. Therefore, we believe the default standard of 2.78 percent will apply to calendar year 2006.

However, the default standard provided in the Act will be difficult for the regulated community to interpret and implement without additional guidance from the Agency. Although the Act provided that the default standard of 2.78 percent would apply in 2006 in the event that the Agency did not promulgate regulations implementing the full renewable fuels program, the default standard provision does not specify the liable parties and the specific nature of their obligation. It also does not discuss compliance mechanisms, reporting requirements, or credit trading. The resulting uncertainty associated with the default standard will create confusion and risks a problematic initial implementation of the RFS program. In the extreme, allowing the default standard to go into effect without EPA guidance could result in significant disruptions in the gasoline and renewable fuel production, blending, and distribution systems.

The goal of today's action is to provide certainty to parties involved in the production and distribution of gasoline and renewable fuels regarding the Agency's approach to determining compliance with the default standard for 2006. Today's action provides a

compliance mechanism that is simple and straightforward to implement, explains that the default standard will be met on a collective basis, and can be finalized expeditiously.

In addition to meeting the need for clarity in the limited timeframe available, we believe that the collective approach to compliance for 2006 is reasonable given our expectation that the default standard will be met on a collective basis in 2006 even without imposition of any RFS obligations. Not only has the U.S. Department of Agriculture projected total ethanol production for 2006 to be above 4.0 billion gallons, but the Renewable Fuel Association has indicated that total ethanol production capacity already exceeds 4.1 billion gallons and that additional production capacity currently under construction exceeds 1.2 billion gallons. Production of biodiesel and cellulosic ethanol, as well as imports of ethanol, increase these estimates even further. It's clear that capacity in 2006 will be adequate to produce the renewable fuel needed to meet the 2.78 percent default standard. In addition, sustained high gasoline prices, state bans on MTBE, and continued gasoline demand growth in the face of limited refining capacity all support our conclusion that the default standard for 2006 will be met on a collective basis based on market forces alone. Section III.B provides more details regarding these projections. In the unlikely event that the default standard is not met on a collective basis for 2006, a deficit carryover provision will allow us to make up for any shortfall by adjusting the applicable standard in 2007 commensurately.

#### *C. When Will EPA Take Action for 2007 and Beyond?*

The default standard of 2.78 percent provided in the Act applies exclusively to calendar year 2006, and the collective compliance approach we are implementing through today's action will likewise apply only to 2006. For 2007 and beyond, the Agency will not only need to determine and publish the applicable renewable fuel standard for each year, but will also need to specifically identify liable parties, lay out the compliance program including recordkeeping and reporting requirements, and delineate all elements of the credit trading program including how credits are generated, how they can be transferred, and how they can be used for compliance purposes. All these and many other issues impacting the full RFS program will be addressed in a subsequent Agency action and are not

discussed in today's direct final rulemaking (DFRM).

## **II. Statutory Requirements for the Renewable Fuel Standard Program**

This section describes the Act's provision regarding the long-term RFS program, and the default standard that goes into effect automatically in the event that the Agency does not promulgate regulations before August 8, 2006 implementing the long-term program. It also describes the problems that may occur if the Agency does not clarify such things as liable parties, compliance mechanisms, and the role of credit trading under the default standard.

### *A. What is the Renewable Fuels Standard Program?*

Section 1501 of the Energy Policy Act of 2005 (the Act) describes the renewable fuel program, also known as the Renewable Fuel Standard (RFS) program. This provision was added to the Clean Air Act as Section 211(o), and requires EPA to establish a program to ensure that U.S. gasoline contains specific volumes of renewable fuel for each calendar year 2006 through 2012, as shown in Table II.A-1 below.

**TABLE II.A-1.—APPLICABLE VOLUMES OF RENEWABLE FUEL UNDER THE RFS**

Calendar year	Billion gallons
2006 .....	4.0
2007 .....	4.7
2008 .....	5.4
2009 .....	6.1
2010 .....	6.8
2011 .....	7.4
2012 .....	7.5

Starting with 2013, EPA is required to establish the applicable national volume which must require at least the same overall volume percentage of renewable fuel as was required in 2012.

In order to ensure the use of the renewable fuel volume specified for each year, the Agency must set a percentage standard for each year representing the percentage of gasoline sold or introduced into commerce which must be renewable fuel. The standard is to be set based on the renewable fuel volumes shown in Table II.A-1 and gasoline volume projections provided by the Energy Information Administration (EIA). The standard for each year must be published in the **Federal Register** by November 30 of the previous year.

Renewable fuels are defined in the Act primarily on the basis of the feedstock. In general, renewable fuels must be produced from plant or animal

products or wastes, as opposed to fossil fuel sources. The Act specifically identifies several types of motor vehicle fuels as being encompassed by the definition, including cellulosic biomass ethanol, waste-derived ethanol, biogas, and biodiesel.

The percentage standard is applicable to refineries, blenders, and/or importers, as appropriate. The percentage standard must be adjusted such that redundant obligations are avoided, and must take into account the fact that small refineries are exempted from the program through 2011.<sup>1</sup> For liable parties, the RFS standard must be met on an annual averaging basis and does not apply on a per-gallon basis.

The Act requires the Agency to promulgate a credit trading program for the RFS program. The credit trading program will serve two purposes. First, it will allow parties who are liable for the standard to comply through the purchase of credits if they cannot or do not wish to blend renewable fuels into gasoline themselves. Second, it will permit renewable fuels that are not blended into gasoline, such as biodiesel and biogas, to participate in the RFS program. The Agency must also determine who can generate credits and under what conditions, how credits may be transferred from one party to another, and in certain cases the appropriate value of credits from different types of renewable fuel.

The Agency envisions promulgation of facility registration, recordkeeping and reporting requirements, enforcement provisions, and various fuel tracking mechanisms to implement the program. These provisions will enable the credit trading program to function properly and will ensure adequate bases for Agency enforcement efforts.

The Act also contains several other provisions that could affect the comprehensive RFS program. For instance, the Energy Information Administration (EIA) is required to determine whether there is a continuing pattern of less than 25 percent of the renewable fuel pool being used in either summer or winter periods. If so, then EPA is required to promulgate regulations establishing a requirement for such minimum seasonal use of renewable fuel. The Act also provides for several kinds of waivers, including one for the initial year of the program in which the Department of Energy (DOE) may recommend that EPA waive

<sup>1</sup> Regulatory provisions promulgated by the Agency must also contain provisions allowing exempted small refineries to opt into the RFS program.

the RFS program in whole or in part. Another general waiver provision authorizes EPA to waive the program in whole or in part in response to a petition by a state or states.

Thus, the long-term RFS program envisioned in the Act presents many complex and varied implementation issues. There are a large number of parties that could potentially be affected by the program, including the parties in the gasoline and renewable fuels production and distribution systems. Credit generation, trading and use will be an integral aspect of the program, and this credit program presents many unique issues to address, as most of the blending and use of renewable fuels occurs by parties separate and distinct from the gasoline producers. Limited discussions with stakeholders have served to highlight the complexity. Because of the many disparate interests involved and the large potential impacts of the program, EPA wants to make sure that development of the long-term RFS program is done thoughtfully and with broad stakeholder involvement. In addition, significant actions such as this require us to perform analyses of cost, feasibility, emission inventory impacts, air quality, and impacts on small businesses. Consequently, EPA does not believe that it can meet the August 8, 2006 statutory deadline to issue final comprehensive regulations implementing the full program.

#### *B. What Is The Default Standard for 2006?*

If EPA fails to publish final regulations establishing the full RFS program by August 8, 2006, Section 211(o)(2)(a)(iv) of the amended Clean Air Act provides that “\* \* \* the percentage of renewable fuel in gasoline sold or dispensed to consumers in the United States, on a volume basis, shall be 2.78 percent for calendar year 2006.” However, the provision provides no details on how this requirement is to be implemented.

For instance, the default standard provision does not identify what parties are subject to this statutory requirement. There is a large network of refiners, importers, blenders, distributors, and retailers who arguably could be held responsible to meet this requirement. The statutory language also does not indicate whether the default standard is to be applied to each gallon of gasoline sold or dispensed in 2006, if it is to represent the annual average renewable fuel content for the gasoline sold or dispensed by each responsible party, or if instead it is to be an annual average for all parties acting collectively in the fuel production and distribution system.

Another aspect of the statutory language regarding the default standard that makes its implementation problematic is the absence of any explicit discussion of credit trading. Since producers of gasoline are generally not directly involved in the blending of renewable fuels, credit trading will be a critical component of the comprehensive RFS program. Without credit trading, if each party was individually liable to meet the default standard for their own gasoline, then a liable party would need to ensure that the gasoline it produces actually contains a minimum of 2.78 percent renewable fuel. This would be inconsistent with the direction provided in the Act for the long-term RFS program.

Finally, both the default standard and the annual standard to be met under the long-term program are expressed in the statute in terms of percent renewable fuel in gasoline. Although the definition of renewable fuel includes biodiesel, this particular renewable fuel is not blended into gasoline. While the long-term program will allow for biodiesel integration in the program through credit trading, the default standard provision does not specify the manner in which use of biodiesel is to be counted towards compliance. However, for the purposes of this rule we believe it is appropriate to include biodiesel in the pool of renewable fuel used to determine compliance with the default standard.

#### *C. What Happens if EPA Does Not Promulgate Default Regulations for 2006?*

The statutory language regarding the default standard for 2006 is ambiguous and problematic in several respects. As a result, starting in January 2006 there could be a great deal of uncertainty among parties whose business involves gasoline or renewable fuels if the Agency does not provide clarity. These parties will not know whether they are liable for the default standard, and if they are liable how to comply with it. The concern over potential individual liability and the lack of a credit trading program could lead some parties to attempt to procure and blend renewable fuels themselves, when under normal circumstances the logistics and economics of doing so would make such activities prohibitive. Others might attempt to ensure that every gallon of gasoline contains at least 2.78 percent renewable fuel. Still others could ignore the requirement entirely in the absence of explicit descriptions of how the Agency would enforce it. All of these activities could significantly disrupt the

supply and distribution system, potentially resulting in local supply shortages and/or price spikes, and yet provide no assurance that the desired amount of renewable fuel will be blended into gasoline.

Due to these concerns, the Agency has determined that it would be in the public interest, and would further the goals of the Act, to issue regulations interpreting and clarifying liability, the mechanism of compliance, and the role of credit trading under the 2006 default standard.

### **III. Collective Renewable Fuel Use and the Default Standard**

This section describes our reasons for believing that a collective compliance approach is a reasonable interpretation of the default standard for the RFS program. We also describe our reasons for believing that the default standard of 2.78 percent will be met in 2006 despite the absence of an RFS standard applicable to individual parties in the fuel production and distribution system.

#### *A. Liability Under The Default Standard*

##### *1. Who should be liable?*

EPA will identify parties who produce or import gasoline as the parties responsible for implementing the renewable fuel standard for 2006, including refiners, blenders, and importers, with an exemption for refiners that own only small refineries. The default provision itself is ambiguous with respect to liable parties, and could be interpreted as placing ultimate responsibility on a variety of parties in the gasoline production and distribution system, including the retailers who dispense gasoline to consumers. With respect to the long-term renewable fuel program, Congress directed EPA to establish regulations that make the renewable fuel obligation applicable to “refineries, blenders and importers, as appropriate,” [see Clean Air Act section 211(o)(2)(A)(iii)(I)], with an exemption until 2011 for “small refineries” [see Clean Air Act section 211(o)(9)(A)(i)]. Our interpretation of the default standard for 2006 is consistent with these statutory provisions for the long-term renewable fuel program.

EPA believes that refiners, blenders and importers are best positioned to ensure that an appropriate amount of renewable fuel is added to gasoline. Our regulation identifies blenders as a subset of refiners, consistent with our regulatory definition of “refiner” at 40

CFR 80.2(i).<sup>2</sup> In addition, EPA believes that retailers are not in the best position to guarantee the renewable fuel content of the gasoline they sell, and placing this responsibility on the many thousands of retailers, many of whom are small businesses, would likely be very burdensome for them and economically disruptive.

## 2. What is collective liability?

EPA is interpreting the default provision for 2006 as imposing a collective obligation on the regulated parties. This means that if the average volume percent of renewable fuel used in 2006 meets or exceeds 2.78 percent, then the standard is satisfied for all responsible parties, regardless of their individual efforts towards that goal. In light of the fact that industry on average will very likely use more than 2.78 percent renewable fuel in 2006 based solely on market forces (see further discussion below), EPA does not believe that it is necessary or appropriate to interpret the default standard for 2006 as imposing any greater degree of individual responsibility for liable parties. Such a system would require complex credit trading, recordkeeping, and reporting provisions that are not consistent with a default standard that Congress envisioned going into effect without a detailed regulatory program.

EPA is confident that this approach will achieve the statutory objective of

ensuring that 2.78 percent of gasoline sold in the United States in 2006 will be renewable fuel, and it will do so in an efficient manner that minimizes costs to industry and consumers. In the unlikely event that EPA's projections of renewable fuel use in 2006 prove inaccurate and the default standard is not met, EPA will adjust the volume obligation for industry in 2007 to reflect any volume deficit represented by the difference between the actual renewable fuel volume percentage in 2006 and 2.78 percent. This effectively means that if there is a deficit in renewable fuel use in 2006, that the applicable percent standard for 2007 could be higher than it would otherwise be. This deficit carryover provision is similar in concept to the provision required for the long-term renewable-fuel program, to allow individuals that cannot satisfy their renewable fuel obligation in a given year to fulfill any deficit in a subsequent year. See Clean Air Act (CAA) Section 211(o)(5)(D).

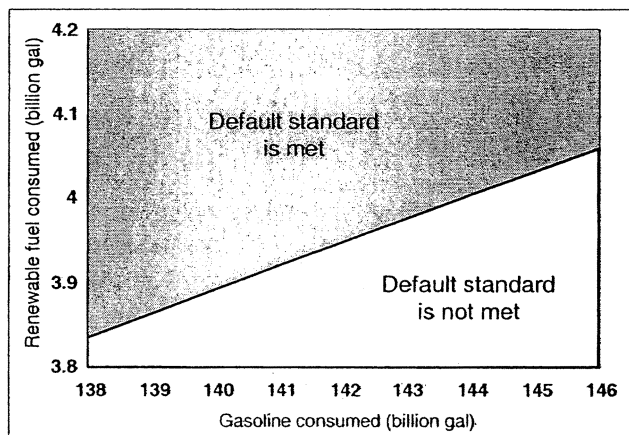
Thus under today's approach to compliance with the default standard, individual parties will still be considered to be in compliance even if they themselves blended little or no renewables, so long as the 2.78 percent requirement is met collectively nationwide in 2006. The carryover of any volume deficit will ensure that compliance with the default standard is ultimately achieved.

## B. Why We Believe That The Default Standard Will Be Met Collectively

In implementing a collective compliance approach to meeting the default standard in 2006, we are doing so with the expectation that normal business practices will actually result in the default standard being met. While we are including a deficit carryover provision to address the possibility of a failure to meet the default standard in 2006, we have high confidence that such a provision would not have to be used. This section provides our reasons for believing that the default standard of 2.78 percent will be met in 2006 through existing market forces.

Although the full RFS program specifies that EPA should set a percentage standard designed to ensure use of a renewable volume of at least 4.0 billion gallons, the provision describing the default standard directly sets the percentage as 2.78 percent and makes no reference to this volume. As a result, the actual volume of renewable fuel used in gasoline in 2006 could be greater than or less than 4.0 billion gallons when the default standard of 2.78 percent is met. This potential result is illustrated in Figure III.B-1, where the shaded region represents cases in which the default standard of 2.78 percent has been met.

Figure III.B-1: Impacts of gasoline consumption volumes on renewable fuel volumes under the default standard



A recent projection of the total gasoline consumption volume for 2006 is 141.6 billion gallons.<sup>3</sup> With this

gasoline volume, 3.94 billion gallons of renewable fuel would need to be consumed in order for the default

standard of 2.78 percent to be met. For simplicity we have focused in this section on our reasons for believing that

<sup>2</sup> Parties whose only activity involves adding oxygenates to gasoline would not be considered refiners under this definition.

<sup>3</sup> EIA Short-Term Energy Outlook, October 2005.

at least 4.0 billion gallons of renewable fuel will be sold in 2006.

Of all the renewable fuels that may play a role in meeting the default standard in 2006, ethanol is by far expected to represent the largest fraction. Therefore, our reasons for believing that at least 4.0 billion gallons of renewable fuel will be blended into gasoline in 2006 are based primarily on expectations regarding the production and sale of ethanol. Biodiesel volumes

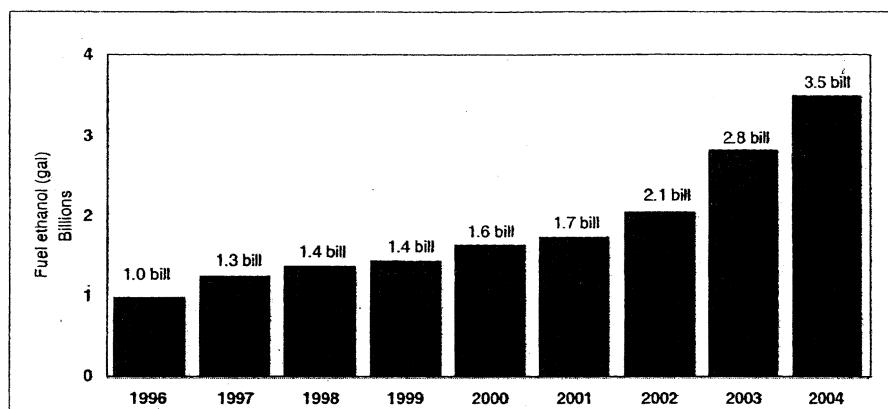
are also quickly rising and serve to provide added assurance that the default standard will be met in 2006. The recent excise tax credit for biodiesel and its value as a lubricity agent in ultra-low sulfur diesel also add to the attractiveness of biodiesel.

There are a variety of sources of information strongly suggesting that ethanol volumes will exceed 4.0 billion gallons in 2006. These include recent production trends, evaluations of

expanding ethanol production capacity, and analyses of future demand. Each of these information sources is discussed in this section.

For instance, recent trends indicate that fuel-grade ethanol consumption has steadily increased since it was first introduced into the gasoline market in the early 1980's. The most recent consumption levels are shown in Figure III.B-2.

Figure III.B-2: Recent ethanol consumption volumes



Source: EIA Monthly Energy Review, Table 10.1

Some of the recent growth in ethanol consumption appears to have resulted from state bans on the use of the gasoline additive methyl tertiary butyl ether (MTBE). For areas required to use reformulated gasoline (RFG), ethanol often represents the most cost-efficient alternative to MTBE to meet the current RFG oxygen mandate.<sup>4</sup> State bans on MTBE went into effect in 2004 for California, New York, and Connecticut, where approximately one-third of all RFG is sold. The amount of ethanol sold in these three states increased by approximately 1 billion gallons between

2002 and 2004. But ethanol use has increased steadily over the last five years in other RFG areas and in conventional gasoline as well for reasons not associated with MTBE bans. We believe that these increases in ethanol use are due primarily to the beneficial economics of blending ethanol into gasoline as gasoline prices have risen. If the market forces that led to the rising demand for ethanol over the last several years continue into the future, ethanol consumption could easily reach 4.0 billion gallons in 2006.<sup>5</sup>

In addition to ethanol consumption trends, import trends also suggest that

supply of ethanol will increase into 2006. According to EIA, imports of ethanol increased significantly in 2004, totaling nearly 150 million gallons.<sup>6</sup> This volume represents a more than ten-fold increase from each of the previous two years.

Biodiesel production has also risen significantly in the last several years, and further supports our belief that total renewable fuel volumes in 2006 will exceed 4.0 billion gallons. Figure III.B-3 shows the volumes of biodiesel production in the U.S. in recent years.

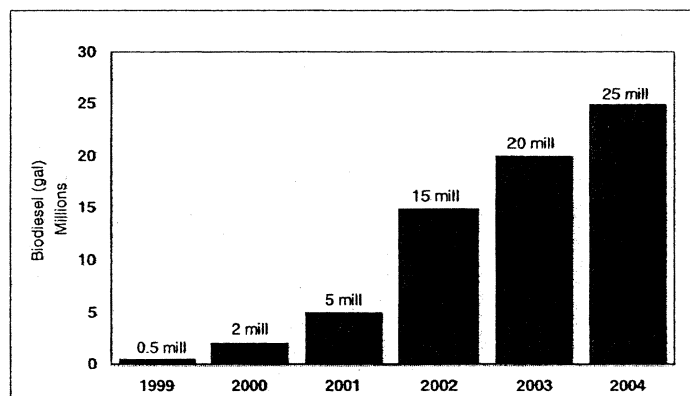
<sup>4</sup> The Energy Act contains a provision requiring the Agency to promulgate regulations eliminating the oxygen mandate for RFG by May 5, 2006.

<sup>5</sup> Data from EIA's Monthly Energy Review indicates that ethanol production in the first half of 2005 was 6.8% higher than the same period in 2004. Extrapolated through 2006, this trend would

result in just over 4.0 billion gallons produced in 2006.

<sup>6</sup> Petroleum Supply Annual 2004, vol. 2. Table 20.

Figure III.B-3: Recent biodiesel production volumes



Source: National Biodiesel Board

If the trends shown in Figure III.B-3 continue into 2006, there could be as much as 35 million gallons of biodiesel produced. If the ethanol import volumes of 150 million gallons per year continue into 2006, then an additional total of nearly 0.2 billion gallons of renewable fuel may be consumed in the U.S. in

2006 in addition to the ethanol production estimates. Thus the total projected volume of renewable fuel consumed in 2006 would be about 4.2 billion gallons instead of the 4.0 billion gallons we estimated above.

An evaluation of expanding ethanol production capacity also points towards

2006 ethanol volumes easily exceeding 4 billion gallons. For instance, Table III.B-1 shows data from the Renewable Fuels Association for existing and underway ethanol production capacity in the U.S. for the past several years.<sup>7</sup>

TABLE III.B-1.—U.S. ETHANOL PRODUCTION CAPACITY

	Number of production plants		Production capacity (million gal per year)	
	Existing	Underway	Existing	Underway
2003 (December) .....	72	15	3,101	598
2004 (December) .....	81	16	3,644	754
2005 (October) .....	89	21	4,159	1,249

The average new ethanol plant or plant expansion takes about 14 months to complete, though the time required can range from a few months to over two years.<sup>8</sup> Based on target construction completion dates in Ethanol Producer Magazine, we estimate that, of the 1,249 mgpy of production capacity underway as of October of 2005, 232 mgpy will be online by the end of 2005. At least another 895 mgpy will be online sometime in 2006. However, accounting for the fact that different facilities will come online at different points throughout 2006, the total annual increase in capacity will be roughly 352 mgpy. The total amount of ethanol production capacity for 2006 is thus expected to be 4,743 mgpy. Actual ethanol production has historically been a very large fraction of production

capacity as demand increased, generally exceeding ninety percent. As a result these figures strongly suggest that production in 2006 is very likely to be greater than 4 billion gallons.

Two other analyses support our expectation that 2006 ethanol production volumes will exceed 4 billion gallons. The EIA made its own projections of ethanol production in 2006 using its National Energy Modeling System, an annual forecasting tool.<sup>9</sup> In addition to evaluating various versions of the RFS program prior to enactment of the Energy Policy Act of 2005, the EIA also modeled a case in which no RFS program existed. In that event, EIA projected that total annual ethanol consumption in 2006 would be 4.6 billion gallons.

The U.S. Department of Agriculture has also made projections of ethanol production under a scenario in which no RFS program is assumed. Their most recent "Baseline Projections" apply to all years between 2006 and 2014, and are based on an analysis of the major forces and uncertainties affecting future agricultural markets.<sup>10</sup> This analysis included such factors as trade, farm income, food prices, weather, international developments, and other macroeconomic conditions affecting the production of corn and other crops used for the production of ethanol. In association with this analysis, total ethanol production in 2006 was projected to be 4.18 billion gallons. Again, considering ethanol imports and biodiesel production, actual renewable

<sup>7</sup> 2003 source: Ethanol Industry Outlook 2004, RFA, February 2004. 2004 source: Ethanol Industry Outlook 2005, RFA, February 2005. 2005 source: "U.S. Fuel Ethanol Production Capacity",

Renewable Fuels Association. Update September 2005. [http://www.ethanolrfa.org/eth\\_prod\\_fac.html](http://www.ethanolrfa.org/eth_prod_fac.html).

<sup>8</sup> "Ethanol Plant Construction", Ethanol Producer Magazine, October 2005. Page 30.

<sup>9</sup> "Renewable Fuels Legislation Impact Analysis", Energy Information Administration, July 2005. <http://www.eia.doe.gov/oiaf/servicert/jeffords/>.

<sup>10</sup> "USDA Agricultural Baseline Projections to 2014," February 2005 (OCE-2005-1).

fuel consumption could be as high as 4.4 billion gallons in this scenario.

There are other important, though less quantitative, indicators of growth in the ethanol industry. For instance, in response to increasing trading volume, the Chicago Board of Trade recently announced that it is expanding the number of ethanol futures contracts available.<sup>11</sup> Also, the New York Mercantile Exchange will now offer a New York Harbor ethanol blendstock (RBOB) gasoline futures contract that will replace the MTBE-blended gasoline based contract.

In addition to simple volume projections from past years, we also believe that ethanol production will exceed 4 billion gallons in 2006 due to the favorable economics currently associated with it. Historically the 51 ¢/gal federal excise tax credit and various state and local credits have provided sufficient economic incentive to overcome the higher production costs of ethanol compared to the production costs of the gasoline it displaces. As a result, demand for ethanol has steadily increased over the years, aided by the RFG oxy mandate and state MTBE bans. However, the increase in crude oil prices in recent years has dramatically increased the production cost of gasoline. Although the price of natural gas used in ethanol production has also risen in recent years, ethanol production costs have remained relatively stable in comparison to gasoline and thus the economic incentive to blend ethanol into gasoline has risen significantly. A similar incentive also now exists for biodiesel in the wake of its recently enacted excise tax subsidy. As long as crude prices remain high, this incentive to blend ethanol and biodiesel into conventional fuels is anticipated to continue. Other factors that have historically been important such as octane, and even the RFG oxygen mandate, are expected to be much less important in 2006. Ethanol's value simply as a extender for gasoline volume is sufficient to keep demand high. Also, with refineries operating at or near capacity and the demand for gasoline increasing in the U.S., the phaseout of MTBE could result in a potential reduction of gasoline volume. We expect that many refiners will use ethanol to replace the lost octane and volume associated with the phaseout of MTBE.

As a result of these favorable economics, despite the removal of the oxy mandate for RFG as required by the Act, we do not anticipate any overall

reduction in demand for ethanol next year. The Act provides for immediate elimination in California of the statutory requirement for oxygen in RFG, and 270 days after enactment for the rest of the country.<sup>12</sup> Although the elimination of the oxygen requirement has the potential to reduce ethanol use in some RFG areas, given the strong economic incentive to blend ethanol, its use is expected to rise in others, offsetting any impact. State-mandated ethanol requirements will only solidify this conclusion. Currently, three states mandate the use of ethanol in all gasoline through a state renewable fuels standard: Minnesota, Hawaii, and Montana. Other states may follow in the future—currently state legislators in Illinois, Missouri and Michigan have been discussing introducing similar legislation in those states.

#### IV. Program Description for 2006

For calendar year 2006, we are promulgating a collective approach to compliance that implements the default 2.78 percent standard. This section describes our 2006 program in detail, including the definition of liable parties under the standard and the mechanism for addressing any potential failure to meet the 2.78 percent collectively

##### A. Liable Parties

For calendar year 2006, the Act states that if EPA fails to issue comprehensive regulations establishing the renewable fuel program then “the percentage of renewable fuel in gasoline sold or dispensed to consumers in the United States on a volume basis, shall be 2.78 percent for calendar year 2006.” The default standard goes into effect independently; that is, no regulations are required to implement the default standard. EPA believes, however, that regulations are nevertheless necessary to clarify how the standard is to be interpreted and implemented.

While the Act provides that the renewable fuel obligation determined pursuant to the long-term RFS program shall “be applicable to refineries, blenders, and importers, as appropriate,” the Act does not provide this level of specificity for the default RFS standard for 2006. We have determined that compliance with the default standard will be determined based on the efforts of the collective

refining, importing and blending industries. Small refineries will be excluded from liability in the 2006 collective compliance determination. However, since the statutory language regarding the default standard indicates that compliance should be based on gasoline sold or dispensed to consumers in the United States, the gasoline produced by small refiners as well as the ethanol used in gasoline produced by small refineries will be counted in performing the compliance calculations.

The regulations will provide that refiners, blenders and importers have collectively met the standard if the volume of renewable fuels used in gasoline sold in the U.S. in calendar year 2006 is equal to or greater than 2.78 percent. Thus if the standard is achieved collectively, then every individual refiner, blender or importer will be in compliance with the standard. This means that an individual refiner may use less than 2.78 percent in the gasoline it refines, imports or blends, but will not be in violation of the standard as long as the 2.78 percent is met or exceeded in the aggregate by all parties in these industries. If the 2.78 percent default standard is not met collectively, then our regulations provide for a deficit carryover to 2007 that would apply collectively to all liable parties in 2007. There will be no other consequence for collective failure to meet the 2.78 percent standard in 2006.

##### B. How Will Compliance Be Determined?

This section describes the activities that will be required of liable parties under the default standard, the types of renewable fuels that will be counted, and the mechanism through which the Agency will determine compliance with the default standard for 2006.

##### 1. Activities Required of Liable Parties

For the collective compliance determination, EPA will calculate the actual volume percent of renewable fuel for 2006 using gasoline and ethanol consumption volumes reported by EIA for 2006, supplemented by readily available information on consumption volumes for other renewable fuels. Thus, individual refiners, importers and blenders will not be required to demonstrate compliance with the default standard. EPA will evaluate whether the default standard has been met collectively by use of readily available information. Individual companies will not be required to keep records of volumes of ethanol purchased for purposes of compliance with this rule.

<sup>11</sup> Renewable Fuel News, Hart Energy Publishing, September 26, 2005. Page 4.

<sup>12</sup> Although the Act provides for the elimination of oxygen from RFG, EPA is still required to revise the appropriate sections of the CFR to allow RFG without oxygen to be sold. For purposes of this analysis, we are assuming that such regulatory revision would occur no later than March, 2006 for California, and by May, 2006 (i.e., by 270 days from enactment) for the rest of the U.S. We expect to put out a rule in early 2006 addressing this issue.



## 2. Renewable Fuels Accounting for Compliance Purposes

Under our regulations, EPA will calculate the total volume of renewable fuel to account for all ethanol and non-ethanol renewable fuels used in motor fuel in 2006, including ethanol made from cellulosic or waste feedstocks and biodiesel. We will use information on the volumes of these renewable fuels that can be obtained from available sources. We will count one gallon of cellulosic biomass or waste-derived ethanol as 2.5 gallons of renewable fuel, following the prescription in Section 211(o)(4) of the Clean Air Act as amended by the Energy Policy Act of 2005.

Although the statutory language regarding the default standard indicates that compliance should be based on renewable fuel in gasoline, we believe that biodiesel should also be included even though it is not blended into gasoline. Not only is biodiesel included within the definition of renewable fuel, but in the context of the long-term RFS program biodiesel can be counted as a component of the renewable fuel pool for use in compliance calculations even though the RFS standard is also based on the percentage use of renewable fuel in gasoline. We will count one gallon of biodiesel as one gallon of renewable fuel in the context of 2006 compliance with the default standard. We will revisit the credit value of biodiesel and other renewable fuels in the context of the comprehensive rulemaking implementing the full RFS program, and our approach in this rulemaking is not intended to establish a precedent for our decision there.

## 3. EPA Determination of Collective Compliance With the Default Standard

Our regulations provide that the default standard has been met if the volume percent of renewable fuel used in gasoline sold in the U.S. in 2006 is collectively greater than or equal to 2.78 percent. While small refineries are not considered liable parties under the collective compliance approach, we will include the volume of gasoline produced by small refineries as well as the amount of ethanol used in such gasoline in determining whether the 2.78 percent default standard has been met. We believe that including volumes of gasoline and ethanol from small refineries is consistent with the plain language of the default standard, which calls for 2.78 percent renewable fuel in "gasoline sold or dispensed to consumers."

We will primarily use data published by EIA in determining compliance with

the default standard. We have identified the Monthly Energy Review as the most appropriate source.<sup>13</sup> Ethanol is available in Table 10.1,<sup>14</sup> while gasoline volumes are available under "Product Supplied" in Table 3.4. Volumes of other renewable fuels that may not be available through EIA publications will be estimated based on information from other readily available and reliable sources.

If the default standard has been met on a collective basis, all refiners, importers and blenders will be deemed to be in compliance whether or not they individually used 2.78 percent ethanol in gasoline. If the default standard has not been met on a collective basis, we will carry forward an appropriate volume of renewable fuel to the 2007 volume obligation which will then be implemented and enforced under the full RFS rule. The additional renewable fuel that is carried forward is termed the "deficit carryover". In such an instance, no individual refiner, blender or importer is held liable for the default 2006 standard not being met. Rather, the RFS standard for 2007 will be adjusted to account for any deficit carryover.

Today's rule will provide that a deficit carryover will be required if the 2.78 percent standard is not met. The size of the deficit will be determined with respect to the 2.78 percent default standard. As a result, the minimum necessary volume of renewable fuel consumed in 2006 and the size of any deficit carryover volume will be dependent upon the volume of gasoline consumed. The following examples illustrate how the standard will work, and how the deficit carryover will be calculated.

### (A) Renewable volume percent is greater than 2.78%:

Actual 2006 gasoline volume: 136.8 bill gal

Actual 2006 renewable volume: 3.90 bill gal

Calculated percent: Actual renewable volume/actual gasoline volume =  $3.9/136.8 = 2.85\%$

Result: Standard has been met; no deficit carryover to 2007

### (B) Renewable volume percent is less than 2.78%:

Actual 2006 gasoline volume: 139.8 bill gal

Actual 2006 renewable volume: 3.8 bill gal

Calculated percent: Actual renewable volume/actual gasoline volume =

$3.8/139.8 = 2.72\%$

Result: Standard has not been met.

Amount of renewable fuel needed to achieve 2.78%:  $(2.78\% - 2.72\%) \times (\text{actual gasoline used}) = 0.06\% \times 139.8 \text{ bill gallon} = 0.08 \text{ billion gallons}$ . The 0.08 billion gallons is added to the RFS goal for 2007, resulting in a modified goal of 4.78 billion gal/yr of renewable fuel

Although the Act requires EPA to publish the standard applicable to 2007 by November 30, 2006, the data on actual gasoline and renewable fuel volumes consumed in all of 2006 will not be available at that time. As a result, the addition of any deficit carryover to 2007, if one is necessary, could occur no sooner than early 2007. Under these circumstances, we expect that we will adjust the 2007 standard to account for a carryover from 2006, if necessary, at such time as the data for 2006 are available and in a manner consistent with the regulations that will apply to 2007.

## C. No Role for Credit Trading

The Act provides for the regulations implementing the long term RFS to allow for credit generation and trading, and we will develop a credit trading program under the full RFS program rule. Today's rule allows for the industry to comply with the default standard on a collective basis, providing no basis for setting set up an individual credit generation and trading program, as will be done for the long term RFS program. For the default standard in 2006, companies do not have an individual standard to meet, so there is no basis for determining that they have done more or less than is required of them individually, which is the basis for generating or needing credits. Therefore, under today's rule, individual companies that exceed the 2.78 percent default standard do not generate credits, and there are no credits to trade or sell to other companies. Also, no credits are generated that can be used toward compliance with RFS requirements after 2006.

## V. Administrative Requirements

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

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

<sup>13</sup> The Monthly Energy Review for March 2007 is expected to contain data through December 2006.

<sup>14</sup> Fuel ethanol consumption in trillion Btu must be converted into gallons using the higher heating value of 3.539 million Btu per barrel, per Table A1.

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

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

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

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order."

It has been determined that this rule will not have an annual effect on the economy of \$100 million or more, and that it is not otherwise a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review. EPA has estimated that renewable fuel use in 2006 will be sufficient to meet the default standard of 2.78 percent. Therefore, individual refiners, blenders, and importers are already on track to meet rule obligations through normal market-driven incentives.

#### *B. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* There would not be a burden on liable parties because the Agency would determine compliance immediately following 2006 using data on gasoline and renewable fuel consumption available from the Energy Information Administration and other information that may be readily available.

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

An agency may not conduct or sponsor, and a person is not required to

respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

#### *C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.*

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

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

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. EPA proposes that the default provision for 2006 be interpreted as imposing a collective obligation on the regulated parties. This means that if the average volume percent of renewable fuel used in 2006 meets or exceeds 2.78 percent, then the standard is satisfied for all responsible parties, regardless of their individual efforts towards that goal. In light of the fact that refiners, blenders, and importers would together be responsible for meeting the default 2.78 percent standard and industry on average will very likely use more than 2.78 percent renewable fuel in 2006 based solely on market forces, there will be no significant economic impact on small entities. No individual refiner, blender, or importer would be responsible for establishing compliance with the default standard for the specific gasoline it produces in 2006, and any deficit carryover to 2007 would be minimal if there is one at all. We continue to be interested in the potential impacts of our proposed rules on small entities and welcome

comments on issues related to such impacts.

#### *D. Unfunded Mandates Reform Act*

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

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

This rule contains no federal mandates for state, local, or tribal governments as defined by the provisions of Title II of the UMRA. The rule imposes no enforceable duties on any of these governmental entities. Nothing in the rule would significantly or uniquely affect small governments.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for the private sector in any one year. EPA has estimated that renewable fuel use in 2006 will be sufficient to meet the default standard of 2.78 percent. Therefore, individual refiners, blenders, and importers are

already on track to meet rule obligations through normal market-driven incentives. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

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

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

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule reflects a nationwide program that does not impose directives specific to any particular State or region. Thus, Executive Order 13132 does not apply to this rule.

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

Executive Order 13175, entitled "Consultation and Coordination With Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

This proposed rule does not have tribal implications as specified in Executive Order 13175. This rule would be implemented at the Federal level and collectively apply to refiners, blenders, and importers. EPA expects these entities to meet the standards on a collective basis in 2006 even without imposition of any RFS obligations on any individual party. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045: "Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that:

(1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This proposal is not subject to Executive Order 13045 because it is not economically significant and is not based on health or safety risks.

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

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We believe that the normal practices of liable parties will result in the default RFS standard being met collectively.

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

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

#### *J. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective February 28, 2006.

#### **VI. Legal Authority**

Statutory authority for the rules finalized today can be found in 42 U.S.C. 7401-7671q.

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

Environmental protection, Fuel additives, Gasoline, Imports, Reporting and recordkeeping requirements.

Dated: December 22, 2005.

**Stephen L. Johnson,**  
*Administrator.*

■ For the reasons set forth in the preamble, we amend part 80 of title 40 of the Code of Federal Regulations to read as follows:

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

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

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

■ 2. Subpart K is added to read as follows:

#### **Subpart K—Renewable Fuel Standard**

##### **§ 80.1100 How is the statutory default requirement for 2006 implemented?**

(a) *Definitions.* (1) *Renewable fuel.* (i) Renewable fuel means motor vehicle fuel that is used to replace or reduce the quantity of fossil fuel present in a fuel mixture used to operate a motor vehicle, and which:

(A) Is produced from grain, starch, oil seeds, vegetable, animal, or fish materials including fats, greases, and oils, sugarcane, sugar beets, sugar components, tobacco, potatoes, or other biomass, or

(B) Is natural gas produced from a biogas source, including a landfill,

sewage waste treatment plant, feedlot, or other place where decaying organic material is found.

(ii) The term "renewable fuel" includes cellulosic biomass ethanol, waste derived ethanol, biodiesel, and any blending components derived from renewable fuel.

(2) *Cellulosic biomass ethanol* means ethanol derived from any lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis, including dedicated energy crops and trees, wood and wood residues, plants, grasses, agricultural residues, fibers, animal wastes and other waste materials, and municipal solid waste. The term also includes any ethanol produced in facilities where animal wastes or other waste materials are digested or otherwise used to displace 90 percent or more of the fossil fuel normally used in the production of ethanol.

(3) *Waste derived ethanol* means ethanol derived from animal wastes, including poultry fats and poultry wastes, and other waste materials, or municipal solid waste.

(4) *Small refinery* means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(5) *Biodiesel* means a diesel fuel substitute produced from nonpetroleum renewable resources that meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under section 211 of the Clean Air Act. It includes biodiesel derived from animal wastes (including poultry fats and poultry wastes) and other waste materials, or biodiesel derived from municipal solid waste and sludges and oils derived from wastewater and the treatment of wastewater.

(b) *Renewable Fuel Standard for 2006*. The percentage of renewable fuel in the total volume of gasoline sold or dispensed to consumers in 2006 in the United States shall be a minimum of 2.78 percent on an annual average volume basis.

(c) *Responsible parties*. Parties collectively responsible for attainment of the standard in paragraph (b) of this section are refiners (including blenders) and importers of gasoline. However, a party that is a refiner only because he owns or operates a small refinery is exempt from this responsibility.

(d) *EPA determination of attainment*. EPA will determine after the close of 2006 whether or not the requirement in paragraph (b) of this section has been

met. EPA will base this determination on information routinely published by the Energy Information Administration on the annual domestic volume of gasoline sold or dispensed to U.S. consumers and of ethanol produced for use in such gasoline, supplemented by readily available information concerning the use in motor fuel of other renewable fuels such as cellulosic biomass ethanol, waste derived ethanol, biodiesel, and other non-ethanol renewable fuels.

(1) The renewable fuel volume will equal the sum of all renewable fuel volumes used in motor fuel, provided that:

(i) One gallon of cellulosic biomass ethanol or waste derived ethanol shall be considered to be the equivalent of 2.5 gallons of renewable fuel; and

(ii) Only the renewable fuel portion of blending components derived from renewable fuel shall be counted towards the renewable fuel volume.

(2) If the nationwide average volume percent of renewable fuel in gasoline in 2006 is equal to or greater than the standard in paragraph (b) of this section, the standard has been met.

(e) *Consequence of nonattainment in 2006*. In the event that EPA determines that the requirement in paragraph (b) of this section has not been attained in 2006, a deficit carryover volume shall be added to the renewable fuel volume obligation for 2007 for use in calculating the standard applicable to gasoline in 2007.

(1) The deficit carryover volume shall be calculated as follows:

$$DC = V_{\text{gas}} \bullet (R_s - R_a)$$

Where:

DC = Deficit carryover in gallons of renewable fuel.

$V_{\text{gas}}$  = Volume of gasoline sold or dispensed to U.S. consumers in 2006, in gallons.

$R_s$  = 0.0278.

$R_a$  = Ratio of renewable fuel volume divided by total gasoline volume determined in accordance with paragraph (d)(2) of this section.

(2) There shall be no other consequence of failure to attain the standard in paragraph (b) of this section in 2006 for any of the parties in paragraph (c) of this section.

[FR Doc. 05-24611 Filed 12-29-05; 8:45 am]

BILLING CODE 6560-50-P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 572

[Docket No. NHTSA-2004-18075]

RIN 2127-AJ79

### Anthropomorphic Test Devices; Hybrid III 6-year-old Weighted Child Test Dummy

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Final rule, response to petition for reconsideration.

**SUMMARY:** This notice responds to a petition submitted by First Technology Safety Systems (FTSS) asking the agency to reconsider several aspects of a July 16, 2004 final rule that added a new subpart S to 49 CFR part 572. Subpart S specifies a Hybrid III 6-year-old weighted child test dummy. The agency is granting the petition in part and denying it in part.

**DATES:** This final rule is effective January 30, 2006. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the **Federal Register** as of January 30, 2006. Petitions for reconsideration must be received no later than 45 days after the date of publication and should refer to this docket and the notice number of this document and be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590

#### FOR FURTHER INFORMATION CONTACT:

For technical issues: Mr. Sean Doyle, NHTSA Office of Crashworthiness Standards. Telephone: (202) 366-1740. Facsimile: (202) 493-2739.

For legal issues: Ms. Deirdre Fujita, NHTSA Office of Chief Counsel. Telephone: (202) 366-2992. Facsimile: (202) 366-3820.

Both officials can be reached by mail at the National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:** On July 16, 2004, NHTSA published a final rule that amended 49 CFR part 572 by adding a new subpart S describing a weighted version of the current Hybrid III 6-year-old child size (HIII-6C) dummy (69 FR 42595; NHTSA Docket 18075). The weighted dummy is used in Federal Motor Vehicle Safety Standard (FMVSS) No. 213 (49 CFR 571.213) to