

Department of Environmental Conservation, Mr. Langdon Marsh, to remove Jefferson County, New York, from the list of areas covered by the requirements of the reformulated gasoline program. EPA understands that Commissioner Marsh is acting for Governor Cuomo on this matter. The Administrator responded to the State's request in a letter to Commissioner Marsh dated December 12, 1994, stating EPA's intention to grant New York's request as of January 1, 1995, and to conduct rulemaking to implement the opt-out. The Administrator also announced that effective January 1, 1995, and until the rulemaking to remove Jefferson County from the list of covered areas is completed, EPA would not enforce the reformulated gasoline requirements in Jefferson County. This decision was based on the particular circumstances that apply in Jefferson County.

C. The Buffalo and Albany Areas of New York

On December 23, 1994, Commissioner Marsh of New York's Department of Environmental Conservation wrote to request opt-out of the Albany and Buffalo areas which include the counties of Albany, Greene, Montgomery, Rensselaer, Saratoga, Schenectady, Erie and Niagara. The Assistant Administrator for Air and Radiation, Mary Nichols, responded to the state's request in a letter to Commissioner Marsh dated December 28, 1994, stating EPA's intention to grant New York's request as of January 1, 1995, and to conduct rulemaking to implement the opt-out. The December 28, letter also indicated EPA's intent to stay the RFG requirements effective from January 1, 1995 until July 1, 1995, while the Agency completes rulemaking to appropriately change the regulations.

D. Pennsylvania Counties

Twenty-eight counties in Pennsylvania were included as covered areas in EPA's reformulated gasoline regulations based on Governor Robert P. Casey's request dated September 25, 1991 (56 FR 57986, November 15, 1991). See 40 C.F.R. 80.70(j)(11) (i) through (xxviii). The counties referred to are listed as follows: Adams, Allegheny, Armstrong, Beaver, Berks, Blair, Butler, Cambria, Carbon, Columbia, Cumberland, Dauphin, Erie, Fayette, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Mercer, Monroe, Somerset, Northampton, Perry, Washington, Westmoreland, Wyoming and York. On December 1, 1994, EPA received a petition from Governor Casey to remove these twenty-eight counties

from the list of areas covered by the requirements of the reformulated gasoline program. Based on the state of Pennsylvania's opt-out request of December 1, 1994, the EPA Administrator formally responded to the State's request in a letter to Governor Casey dated December 12, 1994. In this letter, the Administrator indicated that effective January 1, 1995, and until the formal rulemaking to remove the twenty-eight counties from the list of covered areas is completed, EPA would not enforce the reformulated gasoline requirements in these twenty-eight counties. This decision was based on the particular circumstances that apply in these twenty-eight counties.

E. Hancock and Waldo Counties in Maine

Hancock and Waldo counties were included as a covered areas in EPA's reformulated gasoline regulation based on Governor John R. McKernan's request of June 26, 1991, that these counties be included under the Act's opt-in provision for ozone nonattainment areas (56 FR 46119, September 10, 1991). See 40 CFR 80.70(j)(5) (viii) and (ix). On December 27, 1994, EPA received a petition from the Acting Commissioner of Maine's Department of Environmental Protection, Ms. Deborah Garrett, to remove Hancock and Waldo Counties in Maine from the list of areas covered by the requirements of the reformulated gasoline program. EPA understands that Commissioner Garrett is acting for Governor McKernan in this matter. The Assistant Administrator for Air and Radiation, Mary Nichols, responded to the state's request in a letter to Commissioner Garrett, dated December 27, 1994, stating EPA's intention to grant Maine's request, and conduct rulemaking to implement the opt-out. The December 28 letter also indicated EPA's intent to stay the reformulated gasoline requirements effective from January 1, 1995, until July 1, 1995, while the Agency completes rulemaking to appropriately change the regulations.

II. EPA's Proposal To Grant New York's, Pennsylvania's, and Maine's Request To Remove Selected Opt-In Areas From the Requirements of the Reformulated Gasoline Program

EPA believes that it is reasonable to construe section 211(k) as authorizing the Agency to establish procedures and requirements for states to opt out of the reformulated gasoline program. This would only apply to areas that have previously opted in under section 211(k)(6); the mandatory covered areas

would not be allowed to opt out of the program.

In section 211(k)(6), Congress expressed its clear intention regarding state opting in to this program. That paragraph establishes that "upon the application of the Governor of a State, the Administrator shall apply the prohibition set forth in paragraph (5) in any (ozone nonattainment) area in the State * * *. The Administrator shall establish an effective date for such prohibition * * *." ¹ However, with respect to opting out, "the statute is silent or ambiguous with respect to the specific issue" and the question is whether EPA's interpretation "is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In addition, "[i]f Congress has explicitly left a gap for the Agency to fill, there is an express delegation of authority to the Agency to elucidate a specific provision of the statute by regulation." *Id.* at 843-44. If the delegation is implicit, the Agency may adopt a reasonable interpretation of the statute. *Id.* at 844.

Section 211(k)(1) provides that EPA is to promulgate "regulations establishing requirements for reformulated gasoline." This provision therefore delegates to EPA the authority to define the requirements for reformulated gasoline. Clean Air Act section 301(a)(1) also delegates to EPA the general authority to promulgate "such regulations as are necessary" for EPA to carry out its function under the Act. Given these delegations of legislative rulemaking authority, EPA's interpretation of section 211(k) with respect to opting out should be upheld unless manifestly contrary to the Act. *Chevron*, 467 U.S. at 843-44.

EPA believes that it is appropriate to interpret section 211(k) as authorizing states to opt-out of this program, with the requirements focusing on a reasonable transition out of the program.² There are really two aspects

¹ Paragraph 5 of section 211(k) prohibits the sale of conventional, or non-reformulated gasoline, in covered areas.

² The preamble to the December 15, 1993, final regulations failed to provide a clear discussion of EPA's views on this issue. While EPA noted that it "may pursue a separate action in the future that would allow states to opt out of the RFG program, provided sufficient notice is given," the preamble also indicated there were concerns over whether EPA had authority to allow states to opt-out. 59 FR 7808 (February 16, 1994). The context for these statements, however, makes it clear that EPA's concerns were based on issues surrounding questions of opting-in for only Phase I of the reformulated gasoline program. See 59 FR 7809. As noted above, EPA believes that it does have authority to establish requirements that allow states to opt-out of this program.