

EC-P-1998-41
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 8 1994

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Interim Diesel Civil Penalty Policy
FROM: Mary T. Smith, Director
Field Operations and Support Division
TO: Field Operations and Support Division Personnel

I. INTRODUCTION

This memorandum describes the Field Operations and Support Division's (FOSD) policy for determining penalties for violations of the diesel desulfurization regulations. See 40 CFR sections 80.29 and 80.30 (promulgated at 57 FR 19535 (May 7, 1992)). This policy also provides penalties for any person that violates section 211(g)(2) of the Clean Air Act. The policy follows the guidelines of the Agency's Policy on Civil Penalties and A Framework for Statute-Specific Approaches to Penalty Assessments (EPA General Enforcement Policies # GM - 21 and 22) (the "EPA Policy").

Parties covered by these regulations include refiners, importers, carriers, resellers, distributors, retailers, wholesale purchaser-consumers and individuals.

II. OVERVIEW

A. The Framework of the EPA Policy

The EPA Policy establishes deterrence as the primary goal of penalty assessment. In addition, it recognizes that penalty assessment should provide for fair and equitable treatment of the regulated community and for swift resolution of environmental problems.

The EPA Policy specifies that penalties should be established and adjusted based upon a number of factors, including the gravity of the violation and economic benefit to the violator; the violator's degree of cooperation and willfulness; history of noncompliance and ability to pay; and other factors unique to the case. Under the EPA Policy, penalties are set by first calculating the "initial penalty target figure" (the penalty assessed in the Notice of Violation (NOV)), which is based upon those factors which are appropriate for consideration prior to the beginning of case negotiations. Each of the above factors may be considered during case

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negotiations, which yields the "adjusted penalty target figure" - the Agency's final settlement figure.

B. General Application of the EPA Policy to Diesel Regulations

FOSD prosecutes violations of the diesel regulations by issuing a Notice of Violation which includes a proposed penalty. The proposed penalty is analogous to the initial penalty target figure under the EPA Policy. Following issuance of the NOV, settlement negotiations are conducted with the violator to reach a final settled penalty. The final settled penalty is analogous to the adjusted penalty target figure under EPA Policy. If no settlement is reached, litigation is initiated either by the filing of an administrative complaint or referral to the U.S. Department of Justice, where additional settlement negotiations may take place. Complaints filed either by EPA or the Department of Justice in court generally seek the statutory penalty.

The proposed penalty for diesel violations is based upon the gravity of the violation, adjusted for the number of prior violations of the diesel desulfurization regulations, the economic benefit derived from the violation, and in certain cases, for business size. Following initiation of the enforcement action, the proposed penalty may be reduced up to forty percent based upon the following factors: actions taken by the violator both to remedy the violation and ensure future violations will not occur; and the violator's degree of cooperation during the investigation and in settlement negotiations. Unlimited adjustments are possible for financial hardship and special circumstances.

III. CALCULATING THE PROPOSED PENALTY

The proposed penalty for diesel violations is based upon the magnitude of the violation (the number of gallons of diesel fuel which are in violation), the severity of the violation (the degree to which the diesel fuel exceeds the appropriate standard), adjusted for prior violations, and the economic benefit derived from the violation. For certain cases where the magnitude and severity of the violation is not known or where the penalty calculated based upon the violation's magnitude is not sufficiently large to constitute an appropriate deterrent (generally for violations found at retail outlets and wholesale purchaser-consumer facilities), the penalty is derived from a table which takes into account the severity of the violation, the history of prior violations, and the violator's business size.

A. Gravity of the Violation

Since the reduction of sulfur in diesel fuel and maintaining a minimum cetane index/maximum aromatics percentage are crucial

components of the Agency's effort to control and prevent excess particulate emissions, all violations of the regulations will be considered serious. The severity of the violation(s) will be a function of the amount by which the sulfur content of the fuel and or cetane index/aromatics percentage exceeds the standard(s). Thus, the larger the excess over the standard(s), the greater will be the environmental harm.

B. History of Prior Violations

As provided in the EPA Policy, this policy provides higher penalties for companies with a history of prior violations of the diesel desulfurization regulations. For the purposes of this policy, prior violations include any NOV resolved where the case was not dropped, or any judicial resolution where there was not a dismissal or judgment in favor of the defendant. Previous violations will include any violation of the regulations by a particular company, regardless of the EPA region in which it occurred.

C. Business Size of the Violator

Penalties under this policy are generally calculated based upon the number of gallons of diesel fuel in violation. As a result, a specific adjustment to reflect the size of the violator's business is generally not necessary. A penalty which is exactly proportional to the magnitude of the violation is appropriate in most cases, and need not be adjusted for the size of the violator's business.

In those cases where the penalty is derived from a penalty table which does not reflect the gallons in violation (normally for violations found at retail outlets or wholesale purchaser-consumer facilities), penalties are different for different-sized businesses. These distinctions are appropriate because the business size of potential violators may range from very small businesses to major national corporations, and the appropriate level of deterrence will differ. For the purposes of this policy, the size of a business entity is expressed in terms of the violator's gross income (i.e., total business revenues from the business entity which gave rise to the violation or annual operating revenues for municipalities) for the prior fiscal year.

D. Penalty Formula

Penalties are calculated in a manner which removes the economic benefit the violator may have received from violating the diesel regulations, and in addition, includes a deterrent to discourage future violations. This policy assigns the amounts of economic benefit which are appropriate for different levels of noncompliance (Tables 1 and 2). The amount of these benefits are

based upon the most data which reflects the cost of compliance with the diesel regulations.

Table 1. Economic benefit resulting from the production of diesel fuel which exceeds the diesel sulfur standard.¹

Sulfur Content	Assigned Economic Benefit Value (per gallon of noncomplying diesel fuel)
0.0550 - 0.0999	\$.01
0.1000 - 0.1499	\$.02
0.1500 - 0.1999	\$.03
0.2000 and over	\$.04

Table 2. Economic benefit resulting from the production of diesel fuel which exceeds the diesel cetane/aromatics standard.

Cetane Index (aromatics percentage)	Assigned Economic Benefit Value (per gallon of noncomplying diesel fuel)
38.0 - 39.4 (35.1% - 36.7%)	\$.01
36.5 - 37.9 (36.8% - 38.1%)	\$.02
35.0 - 36.4 (38.2% - 39.5%)	\$.03
34.9 and less (39.5% and over)	\$.04

The economic benefit component (EBC) of the proposed penalty is calculated by multiplying the number of gallons of diesel fuel which are in violation by the appropriate economic benefit value

¹ EPA recognizes that, as of October 1, 1993, there will be a 24.4 cent per gallon federal tax on low sulfur diesel fuel. The new tax law does not affect this policy and is not used to calculate economic benefit.

from the applicable tables.² If both standards have been violated, the penalty calculation is to be performed as if there are two separate violations, with the penalty amounts aggregated. Except as described below, the gravity component (GC) is equal to the economic benefit component. The proposed penalty (PP) is equal to the sum of the economic benefit and the gravity component. Thus, the proposed penalty is calculated using the following formula:

$$PP = EBC + GC$$

In order to reflect the history of violations, the gravity component will be increased where the violator has a history of prior violations. Thus, the formula for calculating the proposed penalty for a violator who has a history of prior violations is as follows:

<u>Number of Prior Violations</u>	<u>Formula</u>
1	PP = EBC + (GC • 1.5)
2	PP = EBC + (GC * 2.0)
3	PP = EBC + (GC * 3.0)

In certain cases, the number of gallons of diesel fuel in violation will be so small that the penalty calculated as described above will not constitute a sufficient deterrent to achieve the goals of the diesel regulations. For this reason, minimum proposed penalties are provided in Table 3 of this policy, based on the degree of non-compliance, business size and history of compliance with the diesel regulations. The penalties from Table 3 should be used when the penalty calculated as described above using Tables 1 and/or 2 is less than the penalty in Table 3. In other words, the proposed penalty should be the greater of the calculated penalty or the penalty from Table 3.

Section 211(d) of the Clean Air Act provides for a maximum civil penalty of \$25,000 per day of violation, plus the economic benefit or savings resulting from the violation. Where the calculated penalty amount exceeds that amount, there must be a reasonable basis that there were an appropriate number of violations and/or that the violation occurred for the appropriate number of days (e.g., at least three violations and/or three days of violation for a \$75,000 proposed penalty, before the economic benefit is added).

² EPA recognizes that the price difference between high and low sulfur diesel fuel fluctuates. On November 1, 1993, the price difference was as much as 40 cents per gallon. As such, EPA will reassess economic benefit periodically and adjust the economic benefit numbers accordingly.

Table 3. Minimum penalty amounts for diesel violations, adjusted for business size, gravity of the violation, and number of prior violations.

Number of Prior Violations	Business Size		
	I	II	III

Sulfur amount between 0.0550 and 0.0999 OR
Cetane index between 38.0 and 39.4

0	\$1,000	\$1,500	\$3,000
1	1,500	2,250	4,500
2	2,000	3,000	6,000
3	3,000	4,500	9,000

Sulfur amount between 0.1000 and 0.1499 OR
Cetane index between 36.5 and 37.9

0	1,500	2,250	4,500
1	2,250	3,375	6,750
2	3,000	4,500	9,000
3	4,500	6,750	13,500

Sulfur amount between 0.1500 and 0.1999 OR
Cetane index between 35.0 and 36.4

0	2,000	3,000	6,000
1	3,000	4,500	9,000
2	4,000	6,000	12,000
3	6,000	9,000	18,000

Sulfur amount of 0.2000 or more OR
Cetane index of 34.9 or less

0	3,000	4,500	8,000
1	4,500	6,750	12,000
2	6,000	9,000	16,000
3	12,000	13,500	24,000

Size of business categories as defined for this policy

Size I	0 to \$1,000,000
Size II	\$1,000,001 to \$10,000,000
Size III	\$10,000,001 and greater.

IV. MISFUELING VIOLATIONS

Section 211(g)(2) of the Clean Air Act states "no person shall introduce or cause or allow the introduction into any motor vehicle of diesel fuel which such person knows or should know contains a concentration of sulfur in excess of 0.05 percent (by weight) or which fails to meet a cetane index minimum of 40 or such equivalent alternative aromatic level as prescribed by the Administrator" (determined to be no greater than 35 volume percent). The proposed penalty for violations of section 211(g)(2) will be calculated using the first grid under Table 3 (penalty amounts ranging from \$1,000 to \$7,000). EPA will not consider how much the fuel exceeds the standard(s) when calculating the proposed penalty for misfueling violations. Individuals will be treated as business size I, and the proposed penalty determined by the number of prior violations, if any. Each introduction will be treated as a separate violation.

V. ADJUSTMENTS TO THE PROPOSED PENALTY

The EPA policy specifies that penalties should be evaluated for adjustment based upon degree of cooperation/noncooperation, ability to pay and other unique factors specific to the case. This policy provides for these adjustments. Violators bear the burden of justifying any adjustments in their favor. When the penalty formula is used for the NOV amount, the adjustments only should apply to the gravity component, and not to the economic benefit component. Therefore, the adjusted penalty target figure will include the sum of the economic benefit and the adjusted gravity component. When Table 3 is used, appropriate adjustments are based on the full proposed penalty.

A. Degree of Cooperation/Noncooperation and Actions to Remedy the Violation

This policy allows mitigation of the proposed penalty of up to forty percent as an incentive for the violator to cooperate in the investigation and negotiations, and to correct the violation promptly. The greatest mitigation should be given where the violator cooperates fully and corrects all violations immediately upon discovery by the violator. In general, the earlier and more complete the cooperation and corrective action, the larger the penalty reduction which is appropriate.

For diesel violations, correction generally means capturing the noncomplying diesel fuel and either having it reblended to conform to the diesel standards, or redesignating it for use for off-highway purposes only by adding the requisite blue dye. This action should also include implementing a procedure to prevent

such violations from occurring in the future, if such a procedure is not already in place. The degree of penalty mitigation will be related to the extent to which the violation, and the conditions which caused the violation, are corrected.

The violator's cooperation during the investigation, negotiation and settlement phases of a case may result in a penalty adjustment. A violator is expected to provide access to records and premises and to not interfere with the investigation. In addition, the violator should identify and provide information about other parties who were involved in the diesel violation. Failure to cooperate in an investigation, attempting to hide records or evidence of violations, or not cooperating in any continuing investigation should be reflected in the adjustment for this factor.

B. Financial Hardship Adjustment

The Agency generally will not seek penalties which are clearly beyond the means of the violator. However, it is important that the regulated community not view the violation of environmental requirements as a way of aiding a financially troubled business. Furthermore, some violations are so outrageous so as to render any mitigation inappropriate. For example, it is unlikely that FOSD would reduce a penalty based upon financial hardship where a violator refuses to correct its violation or take steps to prevent future violations. The same would be true for a violator with a long history of previous violations of environmental laws, or where there are indications that many more violations exist than those alleged in the NOV. Therefore, FOSD reserves the option, in appropriate circumstances, of not reducing the final penalty as a result of financial hardship even though that penalty may put a company out of business.

A financial hardship claim normally will require a significant amount of financial information from the violator. The burden of demonstrating inability to pay, like all mitigating factors, rests on the violator. If the violator fails to provide sufficient information in a timely manner, then the prosecution team cannot give full consideration to this factor.

Where a financial hardship claim is adequately established, FOSD may, at its discretion and based upon its review of all the equities of the case, including the financial hardship, further adjust the penalty. The preferred approach to such an adjustment is allowing a delayed payment schedule. However, as a last resort, FOSD may agree to an extraordinary penalty reduction for this factor.

A case may arise in which equity cannot be served by adjusting the penalty within the normal limits of this policy. In

such a case, FOSD may grant extraordinary mitigation. The burden of establishing the need for extraordinary adjustment of the penalty rests on the violator. In order to meet this burden, the violator must present evidence of: (1) the facts of the case; (2) why the adjusted penalty is inequitable; (3) why the criteria for adjustment are insufficient; and (4) how the public interest is protected or served by an extraordinary adjustment in the penalty.

VI. ALTERNATIVE PAYMENTS

It is FOSD's policy to allow violators to resolve a portion of their penalties by making payments to support programs which educate the public regarding motor-vehicle-caused air pollution and the laws for its control. Such credit projects encourage compliance with these laws, advancing program goals beyond the mere deterrent effect of paying penalties into the federal treasury. The Agency's supplemental environmental projects program is currently undergoing review and is therefore subject to change. Any use of alternative payments should conform with the Agency policy on the use of Supplemental Environmental Projects in EPA settlements.

VII. PENALTY AFTER INITIATION OF LITIGATION

When an NOV is issued and a violator fails to settle the case, the Agency generally will either file an administrative complaint or refer the matter to the United States Department of Justice for prosecution in federal district court. When either of these steps are taken, the normal recommendation is to prosecute for the statutory penalty of \$25,000 per day, plus the economic benefit or savings resulting from the violation.

VIII. MISCELLANEOUS

The policies and procedures set out in this document are intended solely for the guidance of governmental personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

This policy applies to civil enforcement of the diesel regulations and does not apply in any way to potential criminal enforcement.

IX. PENALTY EXAMPLE CALCULATIONS

Following are examples of application of this policy to hypothetical factual situations.

EXAMPLE A.

EPA determines that a branded retail outlet dispensed 10,000 gallons of diesel fuel with a sulfur content of 0.1111, and a cetane index of 40.9. The retail outlet is a Size I business and it has no history of prior violations.

Under the penalty formula, the penalty calculations would be as follows:

$$\begin{aligned} PP &= EBC + GC \\ EBC &= 10,000 \text{ gals} \times \$0.02 = \$200 \\ GC &= EBC = \$200 \\ PP &= \$200 + \$200 = \$400 \end{aligned}$$

Under Table 3, the penalty amount for this retail outlet would be \$1,500. Because the penalty amount from Table 3 is larger than the calculated penalty amount, the penalty amount from Table 3 (\$1,500) should be assessed against this retail outlet.

Various parties upstream from the retail outlet also may be liable for the violation. If the retail outlet is one displaying the corporate, trade, or brand name of a diesel refiner or any of its marketing subsidiaries, the refiner whose corporate, trade, or brand name is displayed would be liable for the violation. In addition, the distributor, carrier and/or reseller, would be liable for the violation.

In this example, because the retail outlet displayed the brand name of a refiner, EPA may assess that refiner a penalty under Table 3 according to its business size and history of prior violations. If, for example, the refiner is a Size III business and it has a history of one prior violation, the calculated penalty would be:

$$\begin{aligned} EBC &= 10,000 \times \$0.02 = \$200 \\ GC &= (\$200 \times 1.5) = \$300 \\ PP &= \$200 + \$300 = \$500 \end{aligned}$$

The penalty under Table 3 would be \$5,000, however, so this larger penalty would apply to the refiner. The distributor, if any, or a carrier who caused the violation, similarly may be assessed a penalty.

EXAMPLE B.

EPA determines that an unbranded retail outlet dispensed 25,000 gallons of diesel fuel with a sulfur content of 0.2222, and a cetane index of 37.1. The retail outlet is a Size I business and it has no history of prior violations.

In cases where there is a violation of both the sulfur and cetane standards, the penalty amounts are aggregated. Under the penalty formula, the penalty calculations would be as follows:

$$\begin{aligned} PP &= EBC + GC \\ EBC &= (25,000 \text{ gals} \times \$0.04) + (25,000 \text{ gals} \times \$0.02) = \\ &\quad 1,000 + 500 = \$1,500 \\ GC &= \$1,500 \\ PP &= \$1,500 + \$1,500 = \$3,000 \end{aligned}$$

Under Table 3, the penalty amount for this retail outlet would be \$3,000 for the sulfur violation and \$1,500 for the cetane index violation, for a total of \$4,500. Because the penalty amount for Table 3 is larger than the calculated penalty amount, the penalty amount from Table 3 should be assessed against this retail outlet.

EXAMPLE C.

EPA detects a violation at a unbranded distributor facility involving 1,000,000 gallons of diesel fuel with a sulfur amount of 0.1666, and a cetane index of 39.5. The distributor is a Size III business and it has no history of prior violations. Under the penalty formula, the penalty calculations would be as follows:

$$\begin{aligned} PP &= EBC + GC \\ EBC &= 1,000,000 \text{ gals} \times \$0.03 = \$30,000 \\ GC &= EBC = \$30,000 \\ PP &= \$30,000 + \$30,000 = \$60,000^3 \end{aligned}$$

The calculated penalty of \$60,000 is applicable in this case because it is larger than the penalty derived from Table 3.

Parties upstream from the distributor also may be deemed in violation. If the distributor is operating under the corporate, trade, or brand name of a diesel refiner or any of its marketing subsidiaries, the refiner under whose corporate, trade, or brand

³ The \$60,000 proposed penalty assumes EPA can prove a sufficient number of days of violation or sufficient economic benefit to conform to the statutory maximum.

name the distributor is operating would be liable for the violation. If the distributor is not operating under a refiner's corporate, trade, or brand name, the refiner at whose refinery the diesel fuel was produced, the importer at whose import facility the diesel fuel was imported, or a carrier who caused the violation is also deemed in violation.

In this example, because the distributor was not operating under a refiner's corporate, trade, or brand name, the refiner who produced the diesel fuel would be liable for the penalty amount as calculated above according to the penalty formula (because it is larger than the penalty derived from Table 3). If EPA determines that a carrier caused the violation, it would be liable for the calculated penalty amount.

EXAMPLE D.

EPA detects a violation at a refinery involving 3,000,000 gallons of diesel fuel with a sulfur content of 0.2222, and a cetane index of 40.1. The refiner is a Size III business and it has no history of prior violations. The penalty calculations are as follows:

$$\begin{aligned} \text{PP} &= \text{EBC} + \text{GC} \\ \text{EBC} &= 3,000,000 \text{ gals} \times \$0.04 = \$120,000 \\ \text{GC} &= \text{EBC} = \$120,000 \\ \text{PP} &= \$120,000 + \$120,000 = \$240,000^4 \end{aligned}$$

This calculated penalty is larger than the penalty under Table 3 and would therefore apply.

⁴ The \$240,000 proposed penalty assumes EPA can prove a sufficient number of days of violation or sufficient economic benefit to conform to the statutory maximum.