



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C., 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Mobile Source Fuels Civil Penalty Policy – Part 1090 Fuels Standards Requirements

FROM: Mary E. Greene, Director **Greene,**
Air Enforcement Division **Mary E**

Digitally signed by
Greene, Mary E
Date: 2024.01.28
18:00:19 -05'00'

TO: Mobile Source Enforcement Personnel

Attached is the final Clean Air Act Mobile Source Fuels Civil Penalty Policy for 40 C.F.R. Part 1090 (hereafter the “Policy” or “Fuels Penalty Policy”). This Policy is intended to be used by the United States Environmental Protection Agency (EPA) in calculating the penalty that the EPA will seek in settlement of administrative enforcement actions for violations of certain fuels regulations under Title II of the Act and may serve as the basis for calculating penalties in settlement of certain judicial actions. This Policy, however, does not constrain EPA’s ability to pursue the statutory maximum penalty in judicial actions. It will be available to the public on the agency’s website.

This Policy establishes a framework the EPA expects to use in determining an appropriate settlement amount for violations of such cases. It is immediately effective and applies to violations of 40 C.F.R. Part 1090. The Clean Air Act Mobile Source Fuels Civil Penalty Policy – 40 C.F.R. Part 80 Fuels Standards Requirements (Feb. 3, 2016), is also effective and applies to violations of 40 C.F.R. Part 80, with the same exceptions as noted for this Policy in FN 2.

The EPA is publishing this Policy to address changes to the fuels regulations made in the Fuels Regulatory Streamlining Rule at 40 C.F.R. Part 1090. The Fuels Regulatory Streamlining Rule updated many of EPA’s existing gasoline, diesel, and other fuel quality programs to improve overall compliance assurance and maintain environmental performance, while reducing compliance costs for industry and the EPA. The rule removed expired provisions, eliminated redundant compliance provisions, removed unnecessary and out-of-date requirements, and replaced them with a single set of provisions and definitions that applies to all gasoline, diesel, and other fuel quality programs.

This Policy applies to all enforcement actions initiated after this date, and all pending actions in which the government has not yet transmitted a proposed settlement penalty amount. This Policy may be applied in pending cases in which penalty negotiations have commenced, at the discretion of the case team.

If you have any questions about this policy, please contact Sparsh Khandeshi, khandeshi.sparsh@epa.gov, in the Air Enforcement Division of the Office of Civil Enforcement.

cc: Tom Mariani, Chief, DOJ-EES
Environmental Appeals Board
David Smith-Watts, OCE, OECA

Attachment: Mobile Source Fuels Civil Penalty Policy – Part 1090 Fuels Standards Requirements

Clean Air Act

Mobile Source Fuels Civil Penalty Policy

Title II of the Clean Air Act

40 C.F.R. Part 1090 Fuels Standards Requirements

U.S. Environmental Protection Agency

January 2024

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ACRONYMS/GLOSSARY

| | |
|-----------------|--|
| ABT | Averaging, Banking and Trading |
| Act | Clean Air Act |
| BBB | Beyond BEN Economic Benefit |
| BEN | Economic Benefit Derived from Delayed or Avoided Costs |
| CG | Conventional Gasoline |
| DOJ | U.S. Department of Justice |
| EPA | U.S. Environmental Protection Agency |
| LM | Locomotive and Marine |
| NO _x | Nitrogen Oxides |
| NRLM | Nonroad, Locomotive, and Marine |
| PM | Particulate Matter |
| ppm | Parts Per Million |
| psi | Pounds Per Square Inch |
| PTD | Product Transfer Document |
| RFG | Reformulated Gasoline |
| RVP | Reid Vapor Pressure |
| SO _x | Sulfur Oxides |
| ULSD | Ultra-Low Sulfur Diesel |
| VOC | Volatile Organic Compounds |

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I. INTRODUCTION AND APPLICABILITY

This document sets forth the United States Environmental Protection Agency (EPA) policy for assessing civil penalties for violations of certain Clean Air Act (Act) provisions concerning fuel standards for mobile sources under 40 C.F.R. Part 1090 (hereafter the Policy or Fuels Penalty Policy). This Policy adheres to the EPA *Policy on Civil Penalties* (EPA General Enforcement Policy #GM-21, February 16, 1984, recodified as PT.1-1) and *A Framework for Statute-Specific Approaches to Penalty Assessments* (EPA General Enforcement Policy #GM-22, February 16, 1984, recodified as PT.1-2), collectively referred to in this Fuels Penalty Policy as the *Policy on Civil Penalties*. Accordingly, the purposes of this Policy are to deter potential violations, to ensure that the EPA assesses fair and equitable civil penalties, and to expedite the resolution of claims arising from certain categories of non-compliance with the Act.

This Policy applies to violations of certain fuels requirements of Title II of the Act, Section 211,¹ and the fuels regulations at 40 C.F.R. Part 1090.² These regulations establish standards for the composition of gasoline and diesel fuel that are intended to reduce air pollution emissions from the fuels themselves, and from the vehicles and engines that use the fuels. These regulations also impose a number of sampling, testing, reporting, recordkeeping, and other requirements that are designed to facilitate the EPA's ability to monitor compliance with the standards and requirements of the program. This Policy applies to two categories of violations of the regulations at 40 C.F.R Part 1090:

- Violations of standards relating to the composition of gasoline and diesel fuel (standards violations).
- Violations of sampling, testing, reporting, recordkeeping, and other requirements that are designed to facilitate the EPA's ability to monitor compliance with the fuels standards and other requirements of the program (programmatic violations).

In cases involving both standards violations and programmatic violations, assessment of penalties for both violations may be appropriate.

Section 211(d)(1) of the Act sets forth the maximum penalty amount for violations of the fuels regulations.³ This maximum penalty amount is increased annually for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461. Consult 40 C.F.R. § 19.4 for current maximum penalty amounts.

For violations of standards based on averaging periods, a separate day of violation exists for each day in the averaging period.⁴ For per-gallon violations, a separate day of violation exists for each day that the

¹ 42 U.S.C. § 7545.

² This Policy does not cover violations of the fuel standards covering fuel used in Emission Control Areas; the Gasoline Deposit Control Standards at 40 C.F.R. § 1090.260; the Gasoline Additive Standards at 40 C.F.R. § 1090.265; the Renewable Fuel Standard regulations at 40 C.F.R. Part 80, Subpart M; the standards set forth in the Additional Requirements for Gasoline-Ethanol Blends at 40 C.F.R. § 1090.230; the Regulation of Fuels and Fuel Additives regulations at 40 C.F.R. Part 79; or the Substantially Similar Requirements in Section 211(f) of the Act. The January 18, 2021, Clean Air Act Mobile Source Civil Penalty Policy – Vehicle and Engine Certification Requirements addresses violations of the mobile source regulations applicable to vehicles and engines (<https://www.epa.gov/sites/default/files/2021-01/documents/caatitleiivehicleenginepenaltypolicy011821.pdf>).

³ 42 U.S.C. § 7545(d)(1).

⁴ 40 C.F.R. § 1090.1710(b)(1)

fuel is in the distribution system.⁵ The Part 1090 regulations include an explicit provision stating that fuel violating per-gallon standards will be deemed to remain in the distribution system for 25 days, unless it can be demonstrated that the fuel remained in the system for fewer than or more than 25 days.⁶ The 25-day presumption is a conservative estimate based on typical periods that gasoline and diesel fuel remain in the distribution system as the fuel travels through pipelines, and is stored in terminal tanks and retail outlet tanks.

- Section 211(d) also specifies that civil penalties must be assessed in accordance with Sections 205(b) and (c) of the Act.⁷ The factors that a court should take into account when determining the amount of any penalty in a civil action under Title II of the Act are set forth in Section 205(b) of the Act:⁸

In determining the amount of any civil penalty to be assessed [in a civil action] the court shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with [Title II of the Act], action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require.

- Section 205(c)(2) specifies that these same factors should be taken into account in an administrative penalty assessment for violation of requirements under Title II of the Act.
- Section 205(c)(1) of the Act specifies that, in lieu of referring a case to the United States Department of Justice (DOJ) to commence a civil action in district court, the EPA may enforce the violation through an administrative penalty assessment, provided the penalty amount is less than \$200,000, unless the EPA and the DOJ agree that a matter with a larger penalty is appropriate for administrative penalty assessment. This penalty cap on administrative actions is increased annually for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461. Consult 40 C.F.R. § 19.4 for current penalty caps.

This Policy should be used to calculate proposed penalties and settlement amounts for cases that are resolved through an administrative settlement and in certain judicial actions resolved by settlement. This Policy also should be used to calculate the appropriate penalty to assess under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits.⁹ This Policy, however, does not control the penalty amount requested in judicial actions, nor does it constrain EPA's ability to pursue the statutory maximum penalty in appropriate circumstances. It is the EPA's policy, in judicial actions, to assert a claim for up to the maximum penalty allowable under the Act. Therefore, after a case has been referred to the DOJ, use of this Policy is limited to agreements reached with defendants through negotiated settlements.

This Policy adheres to the EPA *Policy on Civil Penalties* (EPA General Enforcement Policy #GM-21, February 16, 1984) and *A Framework for Statute-Specific Approaches to Penalty Assessments* (EPA

⁵ 40 C.F.R. § 1090.1710(c)(1).

⁶ 40 C.F.R. § 1090.1710(c)(2).

⁷ 42 U.S.C. § 7524(b)-(c).

⁸ 42 U.S.C. § 7524(b).

⁹ 40 C.F.R. pt. 22.

General Enforcement Policy #GM-22, February 16, 1984), collectively referred to in this Fuels Penalty Policy as the *Policy on Civil Penalties*. Accordingly, the purposes of this Policy are to deter potential violations, to ensure that the EPA assesses fair and equitable civil penalties, and to expedite the resolution of claims arising from certain categories of non-compliance with the Act. The procedures set forth in this document are intended solely for the guidance of government personnel. They are not intended, and cannot be relied upon, to create rights, substantive or procedural, that would be enforceable by any party in litigation with the United States. The EPA reserves the right to act at variance with this Policy and to change it at any time without public notice. This Fuels Penalty Policy is effective immediately with respect to all cases in which the first penalty offer has not yet been transmitted to the opposing party.

This Policy first describes how to calculate the *preliminary deterrence amount for standards violations* and then describes how to calculate the *preliminary deterrence amount for programmatic violations*. For both of these categories of violations, the preliminary deterrence amount is calculated by adding the **economic benefit penalty component** and the **gravity penalty component**. This Policy then discusses adjustment factors that are applied to the gravity component to arrive at an **initial penalty target figure**, which is the penalty amount that may be used at the beginning of negotiations with a violator. Finally, the Policy describes the process for any further adjustments to the initial penalty target figure during negotiations with the violator, which results in the penalty amount that is appropriate for resolving the case, called the **adjusted target figure**.

II. THE PRELIMINARY DETERRENCE AMOUNT - VIOLATIONS OF FUELS STANDARDS

The regulations at 40 C.F.R. Part 1090 establish standards for the composition of gasoline and diesel fuel that are intended to reduce air pollution emissions caused by the fuels, and by the vehicles and engines that use the fuels. The regulations include requirements that apply to fuel manufacturers, as well as to persons throughout the fuel distribution system.

This Policy addresses violations of the following fuels standards:

- Gasoline Benzene Average Standard and Gasoline Maximum Benzene Average Standards.¹⁰
- Gasoline Sulfur Average Standard and Gasoline Sulfur Per-gallon Standards.¹¹
- Gasoline Reid Vapor Pressure (RVP) Standards.¹²
- Diesel Sulfur Standards.¹³
- Improper Generation, Transfer, and Use of Credits under the Gasoline Benzene and Gasoline Sulfur Programs named above.

This section describes the methodology for calculating the preliminary deterrence amount by first determining the economic benefit component and the gravity component.

¹⁰ 40 C.F.R. § 1090.210(a)-(b).

¹¹ 40 C.F.R. § 1090.205(a)-(d).

¹² 40 C.F.R. § 1090.215.

¹³ 40 C.F.R. §§ 1090.305, 1090.320 and 1090.325.

A. The Economic Benefit Component

Reliable and consistent economic benefit calculation methods ensure fair and equitable treatment of the regulated community and that penalties obtained in settlement provide sufficient deterrence by, at a minimum, recovering any economic benefit of noncompliance. This section sets out guidelines for computing the economic benefit component by discussing three potential categories of economic benefit: delayed costs, avoided costs, and the economic benefit from competitive advantage gained as a result of the violation. The economic benefit derived from delayed or avoided costs is sometimes referred to as **BEN**. The economic benefit from competitive advantage gained is referred to as **beyond BEN benefit** or **BBB**. This section also describes a “simplified approach”¹⁴ which may be used in certain cases as an alternative to the BEN model. The “simplified approach” is designed to be applied under a particular set of circumstances that cover some of the most common violations of the fuels regulations. This Policy also includes a discussion of situations in which the economic benefit simplified approach may be inappropriate. The case team should consider the appropriate method for determining the economic benefit on a case-by-case basis.

1. Economic Benefit from Delayed Costs

In some instances, an economic advantage is derived from noncompliance by delaying expenditures necessary to achieve compliance. Delayed costs fall into two categories: **capital expenses** and **one-time non-depreciable costs** necessary to achieve compliance with the relevant environmental requirement. Capital expenses are expenses for items such as equipment that depreciates over time (i.e., buildings, vehicles, machines used for more than one year) and needs replacement.¹⁵ One-time non-depreciable expenses do not involve things that wear out and are thus nonrecurring.¹⁶ A company would achieve an economic benefit by deferring either of these costs until it comes into compliance, voluntarily or as required as a result of an EPA enforcement action.

Examples of violations that may result in savings from deferred capital expenses include the following:

- Failure of a refiner to install refinery equipment (such as hydrotreaters) necessary to produce fuel that meets the applicable standards but the refiner later installs the refinery equipment to come into compliance.
- Failure of a terminal operator or retailer to install storage tanks and route pipes in a way that is designed to prevent inappropriate mixing of fuels, such as contaminating ultra-low sulfur diesel (ULSD) with higher sulfur diesel fuel but the terminal operator or retailer later comes into compliance by installing tanks and re-routing pipes.

An example of a violation that may result in savings from deferred one-time non-depreciable expenses includes a failure to timely incur the costs associated with fuel registration.

¹⁴ The simplified approach for calculating the economic benefit of noncompliance is an approach that adheres with the Policy on Civil Penalties, EPA General Enforcement Policy #GM-21 (Feb. 16, 1984) and is synonymous with the “rule of thumb” method mentioned in the companion document, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy on Civil Penalties, EPA General Enforcement Policy #GM-22, at 6–9 (Feb. 16, 1984).

¹⁵ The distinction between these categories of delayed costs is appropriate because of the different tax treatment they receive, and, as a consequence, the potential benefit gained by a violator.

¹⁶ In addition, if one-time non-depreciable expenses are tax deductible, then the tax benefit from that expense is enjoyed in the year the company makes that expenditure. In contrast, a firm with the depreciable expenditure may deduct all or only a portion of that piece of equipment’s cost every year until the deduction is complete.

In many circumstances, fuels violations may not implicate any substantial economic benefit from delayed costs. To the extent economic benefit from delayed costs are present in mobile source fuels cases, these costs should be computed using the EPA’s BEN model.¹⁷

2. *Economic Benefit from Avoided Costs*

Some types of violations enable a violator to avoid certain costs associated with compliance. Avoided costs can include costs directly related to the production of noncompliant fuel and costs related to avoided management oversight and quality assurance measures.¹⁸ Unlike delayed costs, avoided costs occur when the violator is out of compliance and has not come back into compliance to date or they missed a compliance time period altogether. Examples of benefits from avoided costs in mobile source fuels cases include:

- Failure to purchase the feedstock or blending components necessary to produce fuel that meets the mobile source fuels requirements.
- Cost savings from operation and maintenance of equipment that was not installed or was not operating.
- Failure to operate a fuel manufacturing facility so that standards are met or, in the alternative, to purchase valid credits to meet standards.
- Failure to conduct management oversight and associated activities at a fuel manufacturing facility necessary to ensure fuel is produced to meet applicable per-gallon and average standards.
- Failure to conduct management oversight and quality assurance measures at a distributor necessary to assure the properties of mobile source fuel are not degraded through contamination as the fuel moves through the distribution system.

The economic benefit from avoided costs should be computed as avoided costs in the EPA’s BEN model for each year of non-compliance.

3. *Beyond BEN Benefit*

The **beyond BEN benefit** or **BBB** reflects the benefits to the violator from business transactions that could not occur but for the illegal conduct, or the competitive advantage the violator obtained in the marketplace as compared to companies that complied with the fuels laws and regulations, or both. Cases that involve selling a product that is not registered and thus could not be legally sold are good cases to consider the BBB approach to calculating economic benefit. To adequately remove the economic

¹⁷ The EPA has five financial models that are used in the context of civil enforcement actions:

- BEN – Calculates a violator’s economic benefit from delayed or avoided costs and can address both one-time and annually recurring costs.
- INDIPAY – Evaluates an individual’s ability to afford penalties and compliance costs.
- ABEL – Evaluates a corporation’s or partnership’s ability to afford penalties and compliance costs.
- PROJECT – Calculates the actual cost of supplemental environmental projects to violators.
- MUNIPAY – Evaluates a municipality’s ability to afford penalties and compliance costs.

Information about these models is available at: <https://www.epa.gov/enforcement/penalty-and-financial-models>.

¹⁸ The case team may rely on case-specific information or industry-wide cost estimates to evaluate the avoided costs directly related to the production of compliant fuel. An example of case specific information includes the avoided cost of buying “clean” blendstocks at the time and place of the violation. Examples of industry-wide cost estimates include industry studies on the cost of producing compliant gasoline, information from Regulatory Impact Analyses and published studies regarding the cost of reducing RVP, sulfur, or benzene levels.

incentive for violations that include BBB, normally it is appropriate to base the economic benefit penalty component on the illegal profits made from the improper transactions.¹⁹

The BEN model is not designed to calculate the economic benefit resulting from BBB. Where this category of benefit is present, the case team should use a case-specific method of calculating the economic benefit, which they should describe in the case documents. For assistance in developing a case-specific method, the case team may contact the Penalty and Financial Helpline. The contact information is found at the bottom of this website: <https://www.epa.gov/enforcement/penalty-and-financial-models>.

4. *Simplified Approach Estimate of Economic Benefit – Avoided Management Costs*

In its enforcement of the fuels requirements of the Act, the EPA has developed substantial experience determining the economic benefit that results from producing, selling, or distributing non-compliant fuels. The EPA believes that in most cases there are substantial cost savings from the failure to produce or distribute compliant fuel in accordance with the regulations.

The EPA has determined that most mobile source fuels violations are preventable through robust oversight and quality assurance measures by the regulated party. This Fuels Penalty Policy adopts a simplified approach to determine the economic benefit arising from the avoided cost of adequate management oversight necessary to have prevented the violation for both fuel manufacturers and downstream parties. The simplified approaches that apply to fuel manufacturers and to downstream parties differ slightly, but both estimate avoided management oversight costs that may play a role in causing the violation to occur. These methods are discussed separately for fuel manufacturers and for downstream parties. The case team should describe the method selected and the calculation in the case documents.

To calculate economic benefit relating to management oversight practices, the case team should only apply the simplified approach calculation once for each facility, for each year there is a violation or multiple violations, even if there are both programmatic and standards violations.

The EPA reserves the right to use an alternative approach to calculating the economic benefit arising from the avoided cost of adequate management oversight and to calculate additional economic benefit where appropriate. When the simplified approach is not appropriate, the economic benefit of avoided costs should generally be computed using the BEN model. In some cases, the simplified approach for determining the avoided management oversight costs may be appropriate and avoided costs directly related to the production of noncompliant fuel or other actual benefits may also be calculated.²⁰

There may be instances where neither the simplified approach nor the BEN model is appropriate for calculating the actual economic benefit of noncompliance. In those instances, the case team should develop and use a case-specific method of calculating economic benefit, which they should describe in the case documents.

¹⁹ While the illegal profit would be the normal measure of economic benefit in these situations, the agency reserves the right to calculate the economic benefit resulting from BBB using any other measure that is appropriate to the situation.

²⁰ For example, if a refinery generates or sells invalid sulfur credits, it may be possible to determine the market price for credits during the relevant time period. In such situations, case teams should use profits from the sale of the invalid credits in addition to the simplified approach for avoided management oversight costs.

a. Fuel Manufacturer Standards Violations – Avoided Management Costs

The simplified approach for determining the economic benefit of noncompliance resulting from a fuel manufacturer-level gasoline or diesel standard violation is based on the avoided cost of adequate management oversight necessary to prevent violations. This approach is appropriate for standards violations because most fuel manufacturer violations are preventable through robust oversight and quality assurance measures by the regulated party. The simplified approach estimate includes the half-time wages and benefits for one petroleum worker plus \$35,000 to account for the cost of computer and other systems necessary to track fuel quality. The labor estimate is derived from the United States Department of Labor, U.S. Bureau of Labor Statistics, Office of Employment and Unemployment Statistics, for refinery operators (SOC 51-8093). *See, e.g.,* <https://www.bls.gov/oes/tables.htm>. The case team should use the most current data for the time period of the violations. The mean annual wages for refinery operators are multiplied by 1.5 to account for employee benefits and overhead costs.²¹ Normally, case teams should add this avoided management benefit amount for each year in which fuel manufacturer-level gasoline standards violations are committed at each facility, regardless of the number of violations during the year. The case team has the discretion to apply this benefit amount on a company-wide basis if a fuel manufacturer has similar types of violations that occur at a number of different facilities and applying the benefit amount for each facility would result in excessive penalties.

b. Downstream Fuel Standards Violations – Avoided Management Costs

The EPA’s fuels regulations impose presumptive liability on the operator of any facility where noncompliant fuel is located and on any distributor that stored or transported the gasoline that was supplied to that downstream facility. In the case of violations found at facilities where the brand name of a fuel manufacturer is displayed, the EPA’s regulations provide that the branded fuel manufacturer is also presumptively liable.

Most downstream violations occur, at least in part, because the company (or companies) that caused the violation used inadequate quality assurance measures. For example, gasoline truck loading terminals are required to transition from “winter” to “summer” gasoline by May 1st each year. Violations that occur because the terminal failed to complete this transition would be preventable if the terminal operator invested the resources needed to monitor the transition from winter to summer gasoline. This cost could simply involve management oversight, but in some cases making the seasonal transition on time could require expenditures to physically manage tank inventory. This discussion only deals with management oversight costs.

The simplified approach for calculating economic benefit for downstream parties is similar to the simplified approach for fuel manufacturers; it is based on avoided management oversight costs.

The simplified approach for downstream parties follows the same methodology outlined for fuel manufacturers but assumes a lesser avoided cost of 20 percent of the annual wages and benefits of one

²¹ In May 2021, the mean annual wages for a refinery operator were \$80,500. This figure is multiplied by 1.5 to account for benefits and overhead costs and equals \$120,750. The simplified approach estimates the *half-time* mean annual wages plus benefits and overhead costs, or \$60,375, plus \$35,000 for the cost of computer and other systems that track fuel quality. In 2021, this amount was calculated to be \$95,375.

petroleum industry worker, plus \$6,400 per year for an adequate sampling, testing, and oversight program.²²

Note that if a facility that would normally be considered a downstream facility conducts fuel manufacturing operations (e.g., a truck loading terminal produces gasoline, thus making itself subject to requirements that apply to fuel manufacturers), the facility is subject to the fuel manufacturer-level simplified approach for avoided management costs for any violations involving fuel manufacturing operations as discussed in Section II.A.4.a. This management oversight benefit normally only applies to distributors²³ and not to retailers or wholesale purchaser-consumers that are smaller businesses.²⁴ The case team has the discretion, however, to apply the simplified approach to violations at retail facilities or wholesale purchaser-consumers where appropriate.

5. *Simplified Approach Calculation Examples*

This section contains several examples for calculating economic benefit using the simplified approach for avoided management discussed above. Each example includes a discussion of potential economic benefit that the case team may consider in addition to the simplified economic benefit approach.

Example #1: Gasoline Sulfur Invalid Credit Economic Benefit Calculation

Scenario:

A fuel manufacturer reports that it generated 1 billion gasoline sulfur credits (1 billion ppm-gallons) at its fuel manufacturing facility in 2021. The credits are found to be invalid.

Calculation:

- **Calculate avoided management oversight cost at the fuel manufacturing facility:**

Reference the simplified approach for avoided management oversight costs.

Mean half-time annual wage plus benefits for refinery operator (SOC 51-8093, May 2021)

$$= (\$80,500 * 1.5) / 2 = \$60,375.$$

The cost of computer and other systems necessary to track fuel quality for fuel manufacturers is \$35,000 per year.

$$\text{Avoided management oversight cost} = \$60,375 + \$35,000 = \$95,375 \text{ (2021 dollars).}$$

- **Calculate the economic benefit of selling invalid credits:** Multiply the number of invalid credits by the market price for sulfur credits during the relevant time period (generally stated in dollars per million credits). Assume the price during the relevant time period is \$1,900 per million credits (2021 dollars). Thus, the amount is: \$1,900,000 [(1 billion/1 million) * \$1,900].
- Calculate total economic benefit component: $\$95,375 + \$1,900,000 = \$1,995,375$.

²² In May 2021, the mean annual wages for a refinery operator were \$80,500. This figure is multiplied by 1.5 to account for benefits and overhead costs and equals \$120,750. The simplified approach estimates 20 percent of the mean annual wages plus benefits and overhead costs, or \$24,150, plus \$6,400 for the cost of implementing an adequate sampling, testing, and oversight program. In 2021, this amount was approximately \$30,550.

²³ A distributor is a regulated party that stores or transports gasoline or diesel fuel between the refinery and a retail outlet. 40 C.F.R. § 1090.80.

²⁴ A wholesale purchaser-consumer is a regulated party that operates a fleet fueling facility. 40 C.F.R. § 1090.80.

Example #2: ULSD Simplified Approach Economic Benefit Calculation

Scenario:

In 2021, a fuel manufacturer releases 1,000,000 gallons of ULSD-designated diesel fuel to a proprietary pipeline and the fuel is shipped 50 miles downstream to a truck loading terminal owned by the refiner. The fuel is tested and is determined to have a sulfur content of 32 ppm, in violation of the 15 ppm ULSD standard.

The EPA determined that if the fuel manufacturer had conducted timely testing at the terminal, it could have learned of the problem in time to have the product returned back to the fuel manufacturing facility for re-processing or to sell it at a loss as heating oil. Instead, most of the product was sold prior to the testing.

Calculation:

- **Calculate avoided management oversight cost at the fuel manufacturing facility:**

Reference the simplified approach for avoided management costs.

Mean half-time annual wage plus benefits for refinery operator (SOC 51-8093, May 2021)
 $= (\$80,500 * 1.5) / 2 = \$60,375.$

Avoided management oversight cost = $\$60,375 + \$35,000 = \$95,375$ (2021 dollars).

- Calculate, if possible, either the avoided cost of returning fuel to the fuel manufacturing facility, or in the alternative, the avoided cost of selling the fuel as heating oil: Assuming that the cost of returning fuel to a fuel manufacturing facility by truck costs about \$1,000 per truck load (2021 dollars), where the distance to the fuel manufacturing facility is less than 100 miles, and each truck carries about 8,500 gallons of fuel, the avoided cost would be about \$0.12 per gallon.

Avoided Cost = $\$0.12/\text{gallon} * 1,000,000 \text{ gallons} = \$120,000.$

- **Calculate total economic benefit component:** $\$95,375 + \$120,000 = \$215,375.$

Example #3: Distribution/Sale of Conventional Gasoline (CG) in a Reformulated Gasoline (RFG) Area Economic Benefit Calculation

Scenario:

Product transfer documents (PTDs) establish that a distributor made three 9,000-gallon truckload deliveries, totaling 27,000 gallons of CG to a retail outlet located in an RFG area in the summer of 2021 (under the Part 1090 regulations, both the distributor and the retailer are considered presumptively liable for the violation).

Although the PTDs indicated that the gasoline was CG, the retailer did not adequately check the PTDs before accepting delivery and did not lock out its pump prior to offering the gasoline for sale.

The distributor charged the retailer in the RFG area the price for CG, not RFG.

The retailer sold the CG to customers at the price of RFG.

Calculation:

Based on these facts, both the distributor and the retailer are liable for the violation. The economic benefit for each is different:

Distributor:

- **Calculate avoided management oversight cost at the distributor:** Adequate oversight and management would have prevented the mis-delivery of CG in an RFG area. Reference the simplified approach for avoided management costs.

Twenty percent of mean annual wage plus benefits for refinery operator (SOC 51-8093, May 2021).

$$= (\$80,500 * 1.5) * 0.20 = \$24,150.$$

The cost for a downstream party to implement an adequate sampling, testing, and oversight program is \$6,400 per year.

$$\text{Avoided management oversight cost} = \$24,150 + \$6,400 = \$30,550 \text{ (2021 dollars).}$$

- The distributor only charged the retailer for the price of CG and not the price for RFG so there is no additional benefit for the difference in price between compliant product and the non-compliant product.

Retailer:

- The retailer's economic benefit is the difference in the price between the amount paid for CG and sold as RFG. For the purpose of this example, assume the difference is \$0.05/gallon.

$$\text{Economic benefit} = \$0.05/\text{gallon} * 27,000 \text{ gallons} = \$1,350 \text{ (2021 dollars).}$$

- Depending on the circumstances surrounding the violation, the case team may apply the simplified approach for determining the retailer's economic benefit related to management oversight in addition to the economic benefit derived from the difference in prices.

6. *Situations Where Use of the Simplified Approach is Inappropriate*

The simplified approach described in this Policy may not adequately recover the economic benefit of noncompliance. For this reason, use of these simplified approach is not appropriate in situations where the actual costs are readily accessible, or where a detailed analysis of the economic benefit of noncompliance is needed for a particular case. In particular, case teams generally should not use this simplified approach if:

- There are unique factors in the case that vary from the assumptions underlying the use of a particular simplified approach estimate.
- The case team has reason to believe the simplified approach will produce a substantially inaccurate estimate.

B. Gravity Component

1. Background

The *Policy on Civil Penalties* specifies that for a penalty to achieve deterrence it should, in addition to recovering any economic benefit of noncompliance, recover an additional amount to reflect the seriousness of the violation. Similarly, Sections 205(b) and (c)(2) of the Act specify that penalties for violations of Title II of the Act must take into account the gravity of the violations.²⁵ This section of this Policy establishes a method that quantifies the gravity component of the penalty for violations of the fuels standards under 40 C.F.R. Part 1090.

The factors used in the gravity portion of the Policy are designed to measure the seriousness of the violation and reflect the considerations described in the *Policy on Civil Penalties*. The seriousness of the violation is based on the potential excess emissions that may result from the violation and the toxicity or other harm that may result from those emissions. The factors that are considered in determining the seriousness or gravity of a violation are: 1) actual or potential harm; 2) the importance of the violated provision to the regulatory scheme; and 3) business size. These factors are used to calculate the “unadjusted” gravity penalty. Then, the case team should apply the most recent inflation multiplier to the unadjusted gravity penalty to account for inflation.²⁶ After inflation has been applied, the case team should add the amount of economic benefit, resulting in the “preliminary deterrence amount.”

a. Actual or Potential Harm

The penalty calculation approach for actual or potential harm is similar for violations of each of the standards covered by this Policy, but calculated penalties may differ depending on the degree of actual or potential harm based on the following environmental factors:

²⁵ The Act provides that “in determining the amount of any civil penalty assessed under this subsection, the Administrator shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator’s business, the violator’s history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator’s ability to continue in business, and such other factors as justice may require.” 42 U.S.C. § 7524.

²⁶ The following website contains the most recent Amendments to the EPA’s Civil Penalty Policies to Account for Inflation which will contain the applicable multiplier for this Policy: <https://www.epa.gov/enforcement/enforcement-policy-guidance-publications#penalty>.

- Volume of fuel in violation.²⁷
- Extent of deviation from the applicable standard.
- Toxicity or other harmful effects associated with the emissions.
- Potential to increase emissions in the near term and into the future (e.g., by damaging or decreasing the efficiency of emissions control devices).

b. Importance to the Regulatory Scheme

Even in the absence of actual or potential environmental harm from the sale or distribution of noncompliant fuel, any standards violation, regardless of volume or extent, is harmful to the regulatory program. This is because hundreds of thousands of businesses are involved in fuel production and distribution. The cumulative effect of many violations can be substantial. Moreover, even small volumes of noncompliant fuel can potentially result in substantial harm. For instance, vehicle emission controls may be damaged through a single use of non-compliant fuel. Therefore, deterrence is important regardless of the extent of the violation or the business size of the violator.

Compliance with per-gallon standards is also important to protect the integrity of the fuels programs throughout the distribution system and to avoid localized areas of higher emissions, even though the volumes involved are smaller than for average standard violations. Compliance with average standards is vital to achieving the overall emissions reduction goals of the fuels programs. Thus, the EPA considers all violations of the fuels standards to be serious. Given that fuel manufacturer compliance with averaging standards is very important to achieve the emissions reduction goals of the fuels programs, this Policy includes minimum penalties to assure adequate deterrence even for violations involving smaller volumes of fuel. Because average standards apply only to fuel manufacturers, the business size of the violator is also generally large. Therefore, the minimum penalties for average violations are based on large businesses. Minimum penalties for violations of per-gallon standards are lower for small businesses than for large businesses. For purposes of this Policy, small businesses are businesses having gross annual revenues under \$100,000,000. The \$100,000,000 threshold is sufficient to assure that most truck distributors and small independent retailers will be treated as small businesses whose minimum penalties will be smaller than large refiners or other large businesses.²⁸

c. Business Size

Under the *Policy on Civil Penalties*, the first goal of penalty assessment is deterrence. The size of the violator's business is relevant to determining whether the penalty will have a sufficient deterrent effect; it is also one of the considerations that Section 205(b) of the Act specifies should be considered when calculating a civil penalty. This Policy considers business size for certain minimum penalties that apply to violations of per-gallon standards, which typically involve smaller volumes of fuel. Because violations of standards that apply on an annual average basis typically involve large volumes of fuel and larger businesses, a business size factor is not required.

²⁷ The volume of fuel in violation is a direct indicator of the seriousness of the violation when considered with the deviation from a standard and, for purposes of calculating an initial target figure for settlement, is used by this Policy rather than the duration of the violation. The EPA reserves the right, however, to also consider the duration of the violation in the assessment of penalties.

²⁸ This threshold is solely for determining applicable penalties under the Mobile Source Fuels Civil Penalty Policy. This amount does not impair or alter any rights or obligations under the Small Business Regulatory Enforcement Fairness Act or any other applicable law.

2. *Calculating the Unadjusted Gravity Component*

This Policy considers the following items in calculating the unadjusted gravity penalty component:

- Deviation from the applicable standard.
- Volume of fuel in violation.
- Business size, for violations of per gallon standards.

This section explains how to calculate the unadjusted gravity component of penalties for the types of standards violations listed below:

- Gasoline benzene average.
- Gasoline benzene credits.
- Gasoline sulfur average.
- Gasoline sulfur credits.
- Gasoline per-gallon sulfur.
- RVP.
- Provision for “Mis-delivery” of gasoline failing to meet RVP standards.
- Diesel per-gallon sulfur.

A given volume of gasoline may violate more than one standard. In these situations, case teams should calculate penalties for each violation and add them together to arrive at the unadjusted gravity penalty.

The following steps are used to calculate the unadjusted gravity penalty for gasoline and diesel per-gallon and average standards violations:

1. Determine the gravity penalty that applies to each gallon in violation based on the deviation from the standard.
2. Multiply the gravity penalty that applies to each gallon in violation by the number of gallons in violation.
3. Compare the calculated penalty to any applicable minimum penalties. If the minimum penalty exceeds the calculated penalty, the minimum penalty must be used.

It would generally be inappropriate to reduce the penalty below the minimum penalty applicable to small businesses. The minimum penalties for certain very small volume violations, however, may be determined to be excessive in some cases and a lesser penalty amount may be applied. Where there are many repeated violations of a per-gallon standard involving relatively small batches of fuel, the sum of the minimum penalties that apply to each batch may be so disproportionate to the calculated penalty as to be inappropriate. In these cases, the case team may also make a downward adjustment to the minimum penalty sum. In addition, in the event that a business with gross annual revenues under \$100,000,000 violates an annual average standard and the volume in violation is very small (e.g., where a importer imports only 10 truckloads of gasoline in a year), the case team may reduce the gravity penalty below the minimum provided in the tables below.

a. Gasoline Benzene Average Standards

Background

In calculating the unadjusted gravity component, keep in mind that fuel manufacturers are subject to two separate gasoline benzene average standards under the gasoline benzene program. First, for all gasoline produced or imported, each fuel manufacturer must meet a benzene average standard of 0.62 volume percent, after application of valid credits and after allowance for a deficit carry forward.²⁹ Second, each fuel manufacturer must meet a maximum benzene average standard of 1.30 volume percent without the use of deficit carry forwards or credits.³⁰ As more fully set forth below, fuel manufacturers may be in violation of one or both of these standards.

Violations of the gasoline benzene standards are considered to be extremely serious. Benzene, a carcinogen, is the dominant toxic substance in gasoline and the dominant toxic pollutant in both evaporative emissions and tailpipe emissions. The gravity penalties in this Policy reflect the seriousness of excess benzene in gasoline.

As discussed above, the parties subject to the benzene average standards are generally large businesses that produce or import large volumes of fuel; thus, there are no separate minimums for small businesses. The benzene concentration values in the tables below are absolute benzene concentrations and not the range of deviation from the standard.

Violation of the 0.62 Volume Percent Annual Average Benzene Standard

Penalties for violation of the benzene 0.62 volume percent average standard are calculated by multiplying the total number of gallons produced or imported during an averaging period by one of the gravity penalty multiplier values in Table II-1, which are based on the severity of the violation. The gravity value for each of the violation categories is based on a range of deviation from the standard. For example, the first category starts at 0.620 volume percent and ends at 0.631 volume percent. As explained above, minimum penalty amounts apply to each category to assure adequate deterrence for smaller volumes; the minimum penalty applies if it is larger than the calculated gravity component penalty.

The Part 1090 regulations allow fuel manufacturers who do not meet the 0.62 volume percent benzene standard to carry a deficit forward, but the fuel manufacturer must make up the deficit in the following year.³¹ If a fuel manufacturer carries a deficit forward and fails to make up the deficit in the following year, the penalty will be calculated based on the total volume of gasoline produced or imported during the two-year period and the calculated net average benzene concentration (B_{NET}), defined at 40 C.F.R. § 1090.745(d), of the gasoline produced or imported during the second year, after accounting for any credit use and deficits. The second year B_{NET} is used because it will reflect deficits and credits over the two-year period.³²

²⁹ 40 C.F.R. §§ 1090.210(a), 1090.700(b), 1090.715.

³⁰ 40 C.F.R. § 1090.210(b).

³¹ 40 C.F.R. § 1090.700(b)(2)(ii).

³² This Policy uses B_{NET} for the purposes of calculating the gravity component of the penalty, but compliance with the benzene average standards is determined by applying the formula at 40 C.F.R. § 1090.700(b).

Table II-1. Penalty for Exceeding the 0.62 Volume Percent Benzene Average Standard

| Benzene Concentration ^a (Volume Percent) | | Penalty Multiplier (\$/Gallon) | Minimum Penalty (\$/Year) |
|--|-------------------|--|------------------------------|
| Minimum Increment | Maximum Increment | | |
| >0.620 | <=0.631 | 0.00487 | 260,000 |
| >0.631 | <=0.643 | 0.00681 | 363,000 |
| >0.643 | <=0.654 | 0.00876 | 467,000 |
| >0.654 | <=0.676 | 0.01071 | 571,000 |
| >0.676 | <=0.733 | 0.01265 | 675,000 |
| >0.733 | | 0.01265 + 0.00195 for every additional 0.056 volume % or fraction thereof | 779,000 |

a – For the purpose of determining the appropriate increment, rounding does not apply to the calculated benzene level.

Beginning at a benzene concentration level greater than 0.733 volume percent, increase the gravity component penalty by \$0.00195/gallon for every 0.056 percent over the standard (e.g., the penalty is \$0.01460/gallon from 0.7331 volume percent to 0.7890 volume percent, \$0.01655/gallon from 0.7891 volume percent to 0.8450 volume percent).

The following examples demonstrate how to calculate penalties in 1 for violations of the 0.62 volume percent benzene standard.

Example #4: Violation of 0.62 Volume Percent Benzene Average Standard

Scenario:

A fuel manufacturing facility is in violation of the standard over a two-year period.

Calculation:

Assume that the average benzene content over the two years is 0.64 volume percent (after application of valid credits), and the total volume over the two-year period is 1,000,000,000 gallons. Because the benzene level falls in the 0.631% - 0.643% range, the penalty would be calculated by multiplying the total volume in violation by \$0.00681/gallon, and the calculated penalty would then be compared to the minimum penalty of \$363,000/year.

- Calculated gravity component penalty = 1,000,000,000 gallons * \$0.00681/gallon = \$6,810,000.
- The minimum penalty is \$363,000/year. Because the calculated value is greater than the minimum penalty, assess the calculated gravity component penalty of \$6,810,000.

Example #5: Violation of 0.62 Volume Percent Benzene Average Standard (Smaller Volume)

Scenario:

A blending manufacturer is in violation of the standard over a two-year period with a benzene average concentration of 0.70 volume percent (after application of valid credits).

Calculation:

Assume the volume produced during this period is 10,000,000 gallons.

- Calculated gravity component penalty = 10,000,000 gallons * \$0.01265/gallon = \$126,500.
- The minimum is \$675,000/year. Because the calculated penalty is smaller than the minimum penalty, assess the minimum penalty of \$675,000 for the gravity component.

Violation of the 1.30 Volume Percent Maximum Benzene Average

In addition to the 0.62 average volume percent benzene average standard, the rule prohibits any fuel manufacturer from producing gasoline that exceeds the 1.30 volume percent maximum benzene average standard. Fuel manufacturers must meet the 1.30 volume percent standard each compliance year. The deficit carry-forward provisions do not apply, and credits may not be used to meet this standard.

The 1.30 volume percent standard is designed to minimize regional variations in gasoline benzene concentrations and provide a degree of geographic uniformity of gasoline benzene concentrations across all parts of the nation. Violations of the 1.30 volume percent maximum benzene average standard will be treated as very serious.

Violations Only of the 1.30 Volume Percent Maximum Benzene Average Standard When in Compliance with 0.62 Volume Percent Benzene Average Standard

Fuel manufacturers who violate the 1.30 volume percent maximum benzene average standard may or may not also be in violation of the 0.62 volume percent benzene average standard. If a party produces or imports gasoline during any calendar year that exceeds the 1.30 volume percent maximum benzene average but acquires sufficient credits to meet the 0.62 volume percent benzene average standard or is able to avoid a violation of the 0.62 volume percent benzene average standard by carrying a deficit forward, they would be in violation of the 1.30 volume percent maximum benzene standard but be in compliance with the 0.62 volume percent benzene average standard.

Table II-2 includes penalties for violation of the 1.30 volume percent maximum benzene average standard that should be applied when the fuel manufacturer has complied with the 0.62 volume percent benzene average standard by either using credits or the deficit carry forward provisions. To calculate the gravity component penalty, the total number of gallons produced or imported during an averaging period is multiplied by the gravity penalty multiplier values in Table II-2, which are based on the extent of the violation. As explained above, minimum penalty amounts apply to each category to assure adequate deterrence for smaller volumes; the minimum penalty applies if it is larger than the calculated penalty.

Table II-2. Penalty for Violations of the 1.30 Volume Percent Maximum Benzene Average Standard When in Compliance with 0.62 Volume Percent Benzene Average Standard

| Benzene Concentration ^a (Volume Percent) | Penalty Multiplier (\$/Gallon) | Minimum Penalty if No Violation of the 0.62% Standard for the Same Volume (\$/Year) |
|--|---|---|
| 1.31 – 1.35 | 0.0013 | 260,000 |
| 1.36 – 1.40 | 0.0026 | 363,000 |
| 1.41 – 1.45 | 0.0039 | 467,000 |
| 1.46 – 1.55 | 0.0052 | 571,000 |
| 1.56 – 1.75 | 0.0078 | 675,000 |
| >1.75 | 0.0078 + 0.0026 for every additional 0.20 volume % or fraction thereof | 779,000 |

a – The rounding methods at 40 C.F.R. § 1090.50 apply to determining the benzene level for the maximum benzene average standard.

Beginning at a benzene concentration of 1.76 volume percent, increase the gravity penalty by \$0.0026/gallon for every 0.20 percent over the volume percent (e.g., the penalty is \$0.0104/gallon from 1.76 volume percent to 1.95 volume percent, \$0.0130/gallon from 1.96 volume percent to 2.15 volume percent).

In situations where the violating gasoline was distributed to a localized area and caused disproportionate localized harm, the case team should increase the gravity component as appropriate.

Example #6: Violation of 1.30 Volume Percent Maximum Benzene Average Standard, Compliance with 0.62 Volume Percent Benzene Average Standard

Scenario:

A fuel manufacturer produced 350,000,000 gallons of gasoline during a calendar year with an actual average benzene content of 1.35 volume percent, but the fuel manufacturer purchased sufficient valid credits to meet the 0.62 volume percent standard.

Calculation:

Because the fuel manufacturer met the 0.62 volume percent standard by purchasing sufficient valid credits, there would be no penalty calculation under Table II-1. Because the fuel manufacturer exceeded the 1.30 volume percent maximum average standard, the penalty would only be calculated under Table II-2.

- Calculated gravity component penalty for the violation of the 1.30 volume percent standard = 350,000,000 gallons * \$0.0013/gallon = \$455,000.
- Because the calculated gravity component penalty is larger than the minimum penalty of \$260,000/year, assess the calculated gravity component penalty of \$455,000.

Example #7: Violation of 1.30 Volume Percent Maximum Benzene Average Standards, Compliance with 0.62 Volume Percent Benzene Average Standard (Smaller Volume)

Scenario:

A blending manufacturer produces 5,000,000 gallons of gasoline with a benzene average concentration of 1.35 volume percent during one year, and 7,000,000 gallons of gasoline with a benzene average concentration of 1.38 volume percent in the following year. The fuel manufacturer complied with the 0.62 volume percent standard by carrying a deficit forward from the first year to the second year, and then purchased sufficient valid credits to make up the deficit and meet the 0.62 volume percent standard during the second year.

Calculation:

Because the fuel manufacturer met the 0.62 volume percent benzene average standard, there would be no penalty calculation under Table II-1. Because the fuel manufacturer exceeded the 1.30 volume percent maximum benzene average standard two separate years, the penalty would be calculated separately for each year under Table II-2.

- Calculated penalty for the violation of the 1.30 volume percent standard during Year 1 = 5,000,000 gallons * \$0.0013/gallon = \$6,500.

Because the calculated penalty is smaller than the minimum penalty of \$260,000/year, assess the minimum penalty of \$260,000 for Year 1.

- Calculated penalty for the violation of the 1.30 volume percent standard during Year 2 = 7,000,000 gallons * \$0.0026/gallon = \$18,200.

Because the calculated penalty is smaller than the minimum penalty of \$363,000/year, assess the minimum penalty of \$363,000 for Year 2.

- The total gravity component penalty for the two violations is \$623,000 [\$260,000 + \$363,000].

Violations of Both 0.62 Volume Percent Benzene Average and 1.30 Volume Percent Benzene Standards

When a fuel manufacturer violates both the 0.62 volume percent benzene average and 1.30 maximum benzene average standards, the penalty is calculated using Table II-1 for the violation of the 0.62 volume percent standard and Table II-3 for the violation of the 1.30 volume percent standard. These penalties are then added together to determine the total calculated gravity component penalty for the violations of the benzene average standards.

If the fuel manufacturer violated the 1.30 volume percent maximum benzene average standard and the 0.62 volume percent benzene average standard, a smaller minimum penalty will apply to the violation of the 1.30 volume percent maximum benzene average standard, because this minimum will be in addition to the penalty that applies to the violation of the 0.62 volume percent benzene average standard.

Table II-3. Penalty for Violating the 1.30 Volume Percent Maximum Benzene Average Standard and the 0.62 Volume Percent Benzene Average Standard

| Benzene Concentration^a (Volume Percent) | Penalty Multiplier (\$/Gallon) | Additional Minimum Penalty if Violation of the 0.62% Standard for the Same Volume (\$/Year) |
|---|--|--|
| 1.31 – 1.35 | 0.0013 | 65,000 |
| 1.36 – 1.40 | 0.0026 | 91,000 |
| 1.41 – 1.45 | 0.0039 | 117,000 |
| 1.46 – 1.55 | 0.0052 | 143,000 |
| 1.56 – 1.75 | 0.0078 | 169,000 |
| >1.75 | 0.0078 + 0.0026 for every additional 0.20 volume % or fraction thereof | 195,000 |

a – The rounding methods at 40 C.F.R. § 1090.50 apply to determining the benzene concentration for maximum benzene average standard violations.

Beginning at a benzene concentration of 1.76 volume percent, increase the gravity penalty by \$0.0026/gallon for every 0.20 percent over the volume percent (e.g., the penalty is \$0.0104/gallon from 1.76 volume percent to 1.95 volume percent, \$0.0130/gallon from 1.96 volume percent to 2.15 volume percent).

In situations where the violating gasoline was distributed to a localized area and caused disproportionate localized harm, the case team should increase the gravity component as appropriate.

Example #8: Violation of 0.62 Volume Percent Benzene Average and 1.30 Volume Percent Maximum Benzene Average Standards

Scenario:

A fuel manufacturer produces 500,000,000 gallons of gasoline per year for two consecutive years with a benzene average concentration of 1.35 volume percent each year. They purchase enough credits in Year 2 to bring their benzene average concentration down to 0.64 volume percent at the end of Year 2 but did not purchase enough credits to meet the 0.62 volume percent standard.

Calculation:

The fuel manufacturer is in violation of the 1.30 volume percent maximum benzene average standard for each year. Because the fuel manufacturer did not purchase enough credits at the end of Year 2, they would also be in violation of the 0.62 volume percent standard. Because the fuel manufacturer was able to carry a deficit forward to determine compliance with the 0.62 volume percent standard from Year 1 to Year 2, a penalty would be assessed for one violation of the 0.62 volume standard based on the total combined volume of gasoline produced during both years. Because the 1.30 volume percent standard applies on an annual basis without the ability to carry a deficit forward, the fuel manufacturer would be assessed two separate penalties for violations of the 1.30 volume percent standard during two separate years.

- Calculated penalty for the violation of the 0.62 volume percent standard = Total combined volume of 1,000,000,000 gallons * \$0.00681/gallon = \$6,810,000 (from Table II-1).

Because the calculated penalty is larger than the minimum penalty of \$363,000/year, assess the calculated gravity component penalty of \$6,810,000 for violation of the 0.62 volume percent benzene average standard.

- Calculated penalty for each annual violation of the 1.30 volume percent standard = 500,000,000 gallons * \$0.0013/gallon = \$650,000 (Table II-3).

Because the calculated penalty is larger than the minimum penalty, assess the calculated gravity component penalty of \$650,000 for violation of the 1.30 volume percent maximum benzene average standard.

Because the fuel manufacturer produced 500,000,000 gallons in two separate years, the total additional penalty for the 1.30 volume percent standard is \$1,300,000 [$\$650,000/\text{year} * 2 \text{ years}$].

- Thus, the calculated gravity component penalty for all benzene violations is \$8,110,000 [$\$6,810,000 + \$1,300,000$].

Example #9: Violation of 0.62 Volume Percent Benzene Average And 1.30 Volume Percent Maximum Benzene Average Standards (Smaller Volume)

Scenario:

A blending manufacturer produces 10,000,000 gallons of gasoline in Year 1 with a benzene average concentration of 1.40 volume percent, and 10,000,000 gallons of gasoline with a benzene average concentration of 1.20 volume percent in Year 2. The fuel manufacturer did not purchase any credits to meet the 0.62 volume percent standard in Year 1 and carried a deficit forward into Year 2. The fuel manufacturer failed to purchase any credits to make up the deficit in Year 2.

Calculation:

A penalty would be assessed for one violation of the 0.62 volume percent standard based on the total combined volume of 20,000,000 gallons with a benzene average concentration over the two-year period of 1.30 volume percent.

Because the benzene average concentration of the gasoline that the fuel manufacturer produced in Year 1 was above the 1.30 volume percent standard, and the average benzene content of the gasoline produced during Year 2 was below 1.30 volume percent, the fuel manufacturer only exceeded the 1.30 volume percent standard for 10,000,000 gallons produced during Year 1.

- Calculated penalty for the violation of the 0.62 volume percent standard = 20,000,000 gallons * \$0.03605/gallon = \$721,000 (from Table II-1).

Because the calculated penalty is smaller than the minimum penalty of \$882,000/year, assess the minimum penalty of \$882,000 for the violation of the 0.62 volume percent benzene average standard.

- Calculated penalty for the annual violation of the 1.30 volume percent standard = 10,000,000 gallons * \$0.0026/gallon = \$26,000 (from Table II-3).

Because the calculated penalty is smaller than the minimum penalty of \$91,000/year, assess the minimum penalty of \$91,000.

- Thus, the calculated gravity component penalty is \$973,000 [\$882,000 + \$91,000].

b. Gasoline Benzene Credit Violations

The Part 1090 program includes a nationwide Averaging, Banking and Trading (ABT) program that was designed to provide fuel manufacturers with the flexibility to choose the most economical compliance strategy. Under the ABT program, fuel manufacturers who produce gasoline with benzene levels below the 0.62 volume percent standard are able to generate benzene credits based on the margin of over compliance with the standard. Each gasoline benzene credit is expressed as a unit of one gallon benzene.³³ Thus, each credit represents one gallon of benzene reduction that is achieved by a fuel manufacturer where its gasoline benzene average is less than 0.62 volume percent. These credits may be banked or traded, and ultimately used by a fuel manufacturer to demonstrate compliance with the 0.62 volume percent benzene standard.³⁴

³³ 40 C.F.R. § 1090.725.

³⁴ 40 C.F.R. §§ 1090.210, 1090.720.

To ensure that the EPA obtains the environmental benefits of the Part 1090 program, parties who take advantage of the ABT program must fully comply with all requirements relating to the generation, transfer, banking, or use of benzene credits. The failure to comply with any requirement of the ABT program will have a negative impact on the integrity of the Part 1090 program and could have a direct and significant environmental impact.

Fuel manufacturers who choose to use credits to meet the 0.62 volume percent benzene standard must assure that they are fully complying with all requirements relating to the use of these credits to demonstrate compliance. The EPA will consider any failure to properly report the use of credits to be a violation of the 0.62 volume percent benzene standard, regardless of whether the fuel manufacturer had sufficient credits available for use or could have acquired sufficient credits.

When a fuel manufacturer uses invalid credits, the fuel manufacturer must adjust its compliance calculations to remove the invalid credits.³⁵ The EPA will then determine if the fuel manufacturer met the 0.62 volume percent standard without the use of the invalid credits. If they failed to meet the 0.62 volume percent standard, then the EPA will determine the penalty for failing to meet the standard by applying Table II-1.

Because the improper generation of credits can result in the production of gasoline that exceeds the benzene standards, the EPA considers any violation relating to the improper generation of credits to be a serious violation. This policy considers violations relating to the improper generation of credits to be similar to violations of the gasoline benzene standards. Accordingly, the EPA will generally apply the penalty approach set forth in Table II-1 to violations relating to the improper generation of credits. The case team may, however, reduce the penalty if the person who improperly generated the credits can demonstrate that the credits accurately reflect real gasoline benzene reductions, even though they were not properly generated.

c. Gasoline Annual Average and Per-Gallon Sulfur Standards

Background

Each fuel manufacturer is subject to two separate gasoline sulfur standards:

1. All gasoline produced or imported must meet a sulfur average standard of 10 ppm, after application of valid credits.³⁶
2. All gasoline produced or imported must comply with a maximum sulfur per-gallon standard of 80 ppm, without the application of credits.³⁷

In addition, downstream parties are subject to a sulfur per-gallon standard of 95 ppm.³⁸ Like benzene standard violations, violations of the gasoline sulfur standards are considered to be extremely serious. A violation of the gasoline sulfur standard increases sulfur concentrations. More sulfur in the fuel can coat the surface of catalytic converters and constrain the ability of catalysts to reduce nitrogen oxide (NO_x)

³⁵ The credit trading provisions of the fuels regulations provide that invalid credits cannot be used to achieve compliance with the gasoline benzene standards, regardless of the transferee's good-faith belief that the gasoline benzene credits were valid. 40 C.F.R. § 1090.735

³⁶ 40 C.F.R. §§ 1090.205(a), 1090.700(a), 1090.720.

³⁷ 40 C.F.R. § 1090.205(b).

³⁸ 40 C.F.R. § 1090.205(c).

and Volatile Organic Compounds (VOCs, including benzene), thereby increasing emissions. The gravity penalties under this Policy reflect these concerns.

Gasoline Sulfur Penalty Tables

The approach for gravity penalties for sulfur average standard violations is similar to that for benzene average standard violations. Table II-4 applies to sulfur average standard violations. The Part 1090 regulations allow fuel manufacturers who do not meet the 10 ppm annual average sulfur standard to carry a deficit forward, but the fuel manufacturer must make up the deficit in the following year.³⁹ If a fuel manufacturer carries a deficit forward and fails to make up the deficit in the following year, the penalty will be calculated based on the total volume of gasoline produced or imported during the two-year period and the calculated net average sulfur concentration (S_{NET}), defined at 40 C.F.R.

§ 1090.745(c), of the gasoline produced or imported during the second year, after accounting for any credit use and deficits. The second year S_{NET} is used because it will reflect deficits and credits over the two-year period.⁴⁰

Table II-4. Penalty for Violation of the Gasoline Sulfur Average Standard

| Sulfur Concentration ^a (ppm) | | Penalty Multiplier (\$/Gallon) | Minimum Penalty (\$/Year) |
|--|-------------------|--|------------------------------|
| Minimum Increment | Maximum Increment | | |
| >10.00 | <=10.50 | 0.00487 | 260,000 |
| >10.50 | <=11.00 | 0.00681 | 363,000 |
| > 11.00 | <= 11.50 | 0.00876 | 467,000 |
| > 11.50 | <=12.50 | 0.01071 | 571,000 |
| > 12.50 | <=15.00 | 0.01265 | 675,000 |
| >15.00 | | 0.01265 + 0.00195 for every additional 2.5 ppm or fraction thereof | 779,000 |

a – For the purpose of determining the appropriate increment, rounding does not apply to the calculated sulfur level.

Beginning at a sulfur concentration of 15.01 ppm, increase the penalty by \$0.00195/gallon for every 2.5 ppm over the standard (e.g., the penalty is \$0.0146/gallon from 15.01 ppm to 17.50 ppm, \$0.01655/gallon from 17.51 ppm to 20.00 ppm).

³⁹ 40 C.F.R. § 1090.700(a)(2)(ii).

⁴⁰ This penalty policy uses S_{NET} for the purposes of calculating the gravity component of the penalty, but compliance with the sulfur average standards is determined by applying the formula at 40 C.F.R. § 1090.700(a).

Example #10: Gasoline Sulfur Average Standard Violation Calculation

Scenario:

During a fuel manufacturing facility audit, the EPA determined that a fuel manufacturing facility exceeded the gasoline sulfur average standard for 500,000,000 gallons. The calculated sulfur average after the application of valid credits was determined to be 11.00 ppm.

Calculation:

- Multiply the volume of gasoline by the per gallon gravity penalty from Table II-4:
Calculated gravity component penalty: 500,000,000 gallons * \$0.00681/gallon = \$3,405,000.
- Because the calculated penalty is larger than the minimum penalty of \$363,000/year for a fuel manufacturer that exceeds the annual average gasoline sulfur standard, assess the calculated gravity component penalty of \$3,405,000.

Example #11: Gasoline Sulfur Average Standard Violation Calculation

Scenario:

A blending manufacturer produces 50,000,000 gallons of gasoline in Year 1 with a sulfur average content of 12.0 ppm, and 50,000,000 gallons of gasoline with a sulfur average content of 10.0 ppm in Year 2. The fuel manufacturer did not purchase any credits to meet the 10.0 ppm standard in Year 1 and carried a deficit forward into Year 2. The fuel manufacturer failed to purchase any credits to make up the deficit in Year 2.

Calculation:

If the blending manufacturer failed to purchase sufficient credits in Year 2 to make up the deficit and meet the 10.0 ppm standard, a penalty would be assessed for one violation of the 10.0 ppm standard based on the total combined volume of 100,000,000 gallons with a sulfur average content over the two-year period of 11.0 ppm.

- Calculated gravity component penalty for the violation of the 10.0 ppm sulfur standard = 100,000,000 gallons * \$0.00681/gallon = \$681,000 (from Table II-4).
- Because the calculated penalty is larger than the minimum penalty of \$363,000/year, assess the calculated gravity component penalty of \$681,000 for the violation of the 10.0 ppm standard.

The approach for sulfur per-gallon violations is different in two ways: First, it takes into account that smaller businesses, including downstream parties, as well as larger businesses, may violate the per-gallon standard. To assure that excessively large penalties will not be assessed against small businesses, the minimum unadjusted gravity penalty applicable to violations of the per-gallon standard is less for businesses with gross annual revenues under \$100,000,000 than for large businesses.

Second, the penalties for per-gallon standard violations are greater for each gallon in violation than penalties for annual average standard violations of the same magnitude (i.e., at the extent of deviation from the standard). This is because: (1) the regulations set the per-gallon caps at a level that is high compared to the average standard and, thus, there is greater concern about the sulfur concentrations

involved even if the violation is only slightly above the maximum per-gallon standard; and (2) per-gallon violations generally involve much smaller volumes than annual average violations, therefore, the deterrent effect of the penalty would be insufficient if the same per-gallon amounts were used as are used for the sulfur average violations.

Table II-5 applies to violations of the per-gallon standards (both the upstream 80 ppm and downstream 95 ppm standards). Minimum penalties based on minimum volumes and business size may apply. For purposes of Table II-5, a large business is one having gross annual revenues of at least \$100,000,000.

Table II-5. Penalty for Violation of the Sulfur Per-gallon Standards

| Sulfur Concentration in Excess of the Applicable Standard ^a (ppm) | | Penalty Multiplier (\$/Gallon) | Minimum Penalty for Small Business (\$/Batch) | Minimum Penalty for Large Business (\$/Batch) |
|--|--|---|---|---|
| Sulfur Concentration Range for Upstream Facilities | Sulfur Concentration Range for Downstream Facilities | | | |
| 81 – 83 | 96 – 98 | 0.078 | 39,000 | 78,000 |
| 84 – 86 | 99 – 101 | 0.110 | 39,000 | 104,000 |
| 87 – 92 | 102 – 107 | 0.149 | 39,000 | 130,000 |
| 93 – 104 | 108 – 119 | 0.195 | 39,000 | 156,000 |
| >104 | >119 | 0.195 + 0.065 for every additional 12 ppm or fraction thereof | 39,000 | 182,000 |

a – The rounding methods at 40 C.F.R. § 1090.50 apply to determining sulfur content for gasoline per-gallon sulfur content standard violations.

Beginning at a sulfur concentration of 105 ppm for upstream facilities or 120 ppm for downstream facilities, increase the penalty by \$0.065/gallon for every 12 ppm over the standard (e.g., for upstream facilities the penalty is \$0.26/gallon from 105 ppm to 116 ppm, \$0.325/gallon from 117 ppm to 128 ppm).

Example #12: Gasoline Sulfur Per-Gallon Standard Violation Calculation

Scenario:

A fuel manufacturing facility reports that it produced one batch of gasoline containing 3,000,000 gallons with a sulfur concentration of 82 ppm. The fuel manufacturing facility is a large business.

Calculation:

- Multiply the number of gallons per batch (3,000,000) by the penalty per gallon for upstream facilities that exceed the sulfur per-gallon standard by 2 ppm from Table II-5, or \$0.078/gallon:
Calculated Gravity Component Penalty: 1 batch * 3,000,000 gallons/batch * \$0.078/gallon = \$234,000.
- Because the calculated gravity component penalty is larger than the minimum penalty of \$78,000/year for a large business, assess the calculated gravity component penalty of \$234,000.

Example #13: Gasoline Sulfur Per-Gallon Standard Violation Calculation

Scenario:

A fuel manufacturing facility produced 5 batches of gasoline with each batch containing 3,000,000 gallons that exceeded the maximum sulfur per-gallon standard. The sulfur concentration is 82 ppm for 2 batches and 88 ppm for 3 batches. The fuel manufacturing facility is a large business.

Calculation:

- Determine the volume of gasoline at each sulfur concentration and multiply each volume by the corresponding per-gallon gravity penalty multiplier for upstream facilities from Table II-5:
Calculated Gravity Component Penalty (82 ppm): 2 batches * 3,000,000 gallons/batch * \$0.078/gallon = \$468,000.
Calculated Gravity Component Penalty (88 ppm): 3 batches * 3,000,000 gallons/batch * \$0.149/gallon = \$1,341,000.
Total Calculated Gravity Component Penalty: \$468,000 + \$1,341,000 = \$1,809,000.
- Because the calculated gravity component penalty for each batch that violated the standard is larger than the minimum penalties for large businesses of \$78,000 for each batch that exceeded the standard by 2 ppm, and \$130,000 for each batch that exceeded the standard by 8 ppm, assess the calculated gravity component penalties.

d. Gasoline Sulfur Credit Violations

The gasoline sulfur program includes a nationwide ABT program that was designed to provide fuel manufacturers with the flexibility to choose the most economical compliance strategy. Under the ABT program, refiners who produce gasoline with sulfur levels below the 10 ppm standard are able to generate sulfur credits based on the margin of over compliance with the standard. Each gasoline sulfur

credit is expressed as a unit of one ppm-gallon.⁴¹ In other words, one credit represents one gallon of gasoline having a sulfur content that has been reduced by 1 ppm from the 10 ppm annual average standard. These credits may be banked or traded and are ultimately applied to a fuel manufacturer's actual sulfur average concentration to meet the 10 ppm sulfur average standard.⁴²

To ensure that the EPA obtains the environmental benefits of the gasoline sulfur program, parties who take advantage of the ABT program must fully comply with all requirements relating to the generation, transfer, banking, or use of gasoline sulfur credits. The failure to comply with any requirement of the ABT program will have a negative impact on the integrity of the gasoline sulfur program and could have a direct and significant environmental impact.

Fuel manufacturers who choose to use credits to meet the gasoline sulfur average standard must assure that they are fully complying with all requirements relating to the use of these credits to demonstrate compliance. The EPA will consider any failure to properly report the use of credits to be a violation of the gasoline sulfur average standard, regardless of whether the fuel manufacturer had sufficient credits available for use or could have acquired sufficient credits.

When a fuel manufacturer uses invalid credits, the fuel manufacturer must adjust its compliance calculations to remove the invalid credits.⁴³ The EPA will then determine if the fuel manufacturer met the 10 ppm sulfur average standard without the use of the invalid credits. If they failed to meet the standard, then the EPA will determine the penalty for failing to meet the standard by applying Table II-4.

Because the improper generation of credits can result in the production of gasoline that exceeds the sulfur standards, the EPA considers any violation relating to the improper generation of credits to be a serious violation. This policy considers violations relating to the improper generation of credits to be similar to violations of the gasoline sulfur average standards. Accordingly, the EPA will generally apply the penalty approach set forth in Table II-4 to violations relating to the improper generation of credits. The case team may, however, reduce the penalty if the person who improperly generated the credits can demonstrate that the credits accurately reflect real gasoline sulfur reductions, even though they were not properly generated.

e. Conventional and Reformulated Gasoline RVP Standards

Background

CG and RFG RVP standards regulate gasoline volatility. The primary purpose of the RVP standards is to reduce both evaporative and tailpipe VOC emissions that contribute to ground level ozone. Violations of these standards increase emissions of multiple pollutants in addition to VOCs.

RVP standards apply during the “summer season,” also known as the “high ozone season.”⁴⁴ The “summer season” is May 1 through September 15 for regulated parties upstream of the retail level, and

⁴¹ 40 C.F.R. § 1090.725(c).

⁴² 40 C.F.R. § 1090.720.

⁴³ The credit trading provisions of the fuels regulations provide that invalid credits cannot be used to achieve compliance with the gasoline sulfur standards, regardless of the transferee's good-faith belief that the credits were valid. 40 C.F.R. § 1090.735

⁴⁴ 40 C.F.R. § 1090.215(a).

June 1 through September 15 for all regulated parties within the fuel distribution system, including the retail level.⁴⁵

The Part 1090 CG volatility regulations set different RVP requirements for different geographic areas.⁴⁶ The standards are either 7.8 or 9.0 pounds per square inch (psi) on a per-gallon basis.⁴⁷ Summer RFG is subject to an RVP standard of 7.4 psi.⁴⁸

Because violations of the RVP standards that occur in ozone nonattainment areas are more serious than RVP violations that occur in ozone attainment areas, the case team should increase the penalty amounts in Table II-6 by up to 20 percent for violations of the RFG and CG RVP standards that occur in ozone nonattainment areas.

Gasoline Volatility Penalty Table

Table II-6 provides the penalties for RVP per-gallon violations. RVP values in the table represent deviations from the applicable standard and do not represent the tested RVP levels.

The minimum amount that applies to any per-gallon violation, regardless of volume, is set at a lower amount for small businesses (businesses with gross annual revenues below \$100,000,000) than for large businesses (businesses with gross annual revenues of at least \$100,000,000).

Table II-6. Penalty for Conventional and Reformulated Gasoline RVP Standard Violations

| RVP Exceedance ^a (psi) | Penalty Multiplier (\$/Gallon) | Minimum Penalty for Small Businesses (\$/Batch) | Minimum Penalty for Large Businesses (\$/Batch) |
|--------------------------------------|--|---|---|
| 0.1 – 0.3 | 0.065 | 32,000 | 65,000 |
| 0.4 – 0.6 | 0.097 | 32,000 | 91,000 |
| 0.7 – 1.0 | 0.130 | 32,000 | 117,000 |
| 1.1 – 1.5 | 0.162 | 32,000 | 143,000 |
| 1.6 – 2.5 | 0.195 | 32,000 | 169,000 |
| >2.5 | 0.195 + 0.032 for every additional 1.0 psi or fraction thereof | 32,000 | 195,000 |

a – The rounding methods at 40 C.F.R. § 1090.50 apply to determining the RVP exceedance for per-gallon RVP standard violations.

Beginning at an RVP exceedance of 2.5 psi, the gravity penalty increases by \$0.032/gallon for every 1.0 increase in psi (e.g., the penalty is \$0.227/gallon from 2.6 psi to 3.5 psi, and \$0.259/gallon from 3.6 psi to 4.5 psi).

⁴⁵ 40 C.F.R. § 1090.80.

⁴⁶ 40 C.F.R. § 1090.215(a)(1)-(2).

⁴⁷ *Id.*

⁴⁸ 40 C.F.R. § 1090.215(a)(3)

Example #14: Gasoline RVP 7.8 psi Standard Violation Calculation

Scenario:

A fuel manufacturing facility violates the CG RVP standard of 7.8 psi for three batches of gasoline that were each 3,000,000 gallons. The gasoline was sold in an ozone nonattainment area, and the RVP was determined to be 9.0 psi. The fuel manufacturing facility is a large business.

Calculation:

- Multiply the volume of gasoline in each batch by the per gallon penalty from Table II-6:

Calculated Penalty: 3,000,000 gallons/batch * \$0.162/gallon = \$486,000/batch.

Because the calculated penalty is larger than the minimum penalty of \$143,000/batch for large businesses with an RVP 1.2 psi over the standard, assess the calculated penalty of \$486,000 for each violation (i.e., each batch). Thus, \$486,000/batch * 3 batches = \$1,458,000.

Because the violation occurred in an ozone nonattainment area, increase the total gravity component by 20 percent, resulting in a gravity component penalty of \$1,749,600 [$\$1,458,000 * 1.2$].

Example #15: Reformulated Gasoline RVP 7.4 psi Standard Violation Calculation

Scenario:

A fuel manufacturing facility produced 8,000,000 gallons of Summer RFG in two batches. The first batch was 5,000,000 gallons and was determined to have an RVP of 8.0 psi. The second batch was 3,000,000 gallons and was determined to have an RVP of 7.6. The fuel manufacturing facility is a large business.

Calculation:

- The RVP exceedance for the first batch is 0.6 psi (8.0 psi – 7.4 psi). According to Table II-6, the per-gallon penalty is \$0.097/gallon.

Calculated penalty for first batch: 5,000,000 gallon * \$0.097/gallon = \$485,000.

- The calculated penalty is greater than the minimum penalty of \$91,000. Therefore, the unadjusted gravity penalty is \$485,000 for the first batch.

- The RVP exceedance for the second batch is 0.2 psi (7.6 psi – 7.4 psi). According to Table II-6, the per-gallon penalty is \$0.065/gallon.

Calculated penalty for second batch: 3,000,000 gallon * \$0.065/gallon = \$195,000.

- The calculated penalty for the second batch is greater than the minimum penalty of \$65,000. Therefore, the unadjusted gravity penalty is \$195,000 for the second batch.
- Combined, the gravity component penalty for both batches is \$680,000 [$\$485,000 + \$195,000$].

f. Provision for “Misdelivery” of Gasoline Failing RVP Standards

Distributors and carriers are prohibited from selling or delivering gasoline to a location when the gasoline does not meet the applicable RVP standard in that location.⁴⁹ This Policy refers to violations of the RVP standards at 40 C.F.R. § 1090.215 that arise from delivering summer gasoline that is designated for use in an area subject to a higher RVP standard to an area subject to a lower RVP standard as “misdelivery violations.” Misdelivery violations are normally documented through business records showing gasoline deliveries. For example, gasoline delivery PTDs may show that gasoline designated as 9.0 psi Summer CG was delivered to a retail station located in an area subject to the 7.4 psi RVP standard. In this case, the EPA may not have an opportunity to collect a sample of the gasoline in question. The volume of gasoline that was misdelivered normally could be established through business records. This Policy establishes a simplified approach of a per-gallon gravity penalty for misdelivery violations. The gravity penalty for such violations is \$0.39 per gallon. This value is based on harm to the program and level playing field considerations. Case teams should use this gravity component to assess the gravity component for mis-delivery violations in lieu of the gravity components from Table II-6.

g. Diesel Per-Gallon Sulfur Standard

Background

This section provides gravity penalty calculation instructions for violations of the ULSD 15 ppm sulfur content standard applicable to motor vehicle and nonroad locomotive and marine (NRLM) diesel fuels at both the fuel manufacturer level and downstream locations.

All motor vehicle diesel fuel is subject to the 15 ppm ULSD sulfur standard at the fuel manufacturer level.⁵⁰ NRLM diesel fuel is also subject to the ULSD standard except that transmix processors are allowed to continue to produce locomotive and marine (LM) fuel that meets the 500 ppm sulfur standard if certain conditions are met.⁵¹ Facilities at downstream locations are not considered to be in violation of the ULSD standard unless the sulfur content exceeds 17 ppm.⁵²

The sulfur reductions required by this rule provide important health and welfare benefits associated with the reduced generation of sulfate, particulate matter (PM), and sulfur oxide (SO_x). ULSD also enables the emission control technology to reduce emissions to ensure in-use vehicles and engines meet standards. Sulfur levels above the ULSD standard are detrimental to the effectiveness of the emissions controls. Therefore, the per-gallon penalties for violations of the ULSD standard reflect the seriousness of the violation.

Violation of the ULSD Standard

Unadjusted gravity penalties for violations of the diesel sulfur 15 ppm ULSD per-gallon standard (17 ppm for facilities at downstream locations) are based on a per-gallon amount for each violation category as shown in Table II-7. The values in the table are deviations from the standard or from the standard with the 2 ppm downstream adjustment, as applicable. The per-gallon penalty is then multiplied by the number of gallons in violation. The EPA does not expect that there will be many violations where the deviation from the standards is substantially higher than the deviations identified in Table II-7. In the event that there is a violation where the sulfur levels are substantially higher than the deviations in Table

⁴⁹ 40 C.F.R. §§ 1090.160 and 1090.215.

⁵⁰ 40 C.F.R. § 1090.305(b).

⁵¹ 40 C.F.R. § 1090.320(b).

⁵² 40 C.F.R. § 1090.1355(c).

II-7 (e.g., heating oil or diesel fuel subject to the 500 ppm sulfur standard is sold as ULSD), the case team may make appropriate adjustments to the gravity penalty. This Fuels Penalty Policy also provides for minimum penalties to assure adequate deterrence for violations. To account for the business size of violators, this Policy provides a lower minimum for small businesses (gross annual revenues under \$100,000,000) than large businesses (gross annual revenues greater than \$100,000,000).

Table II-7. Penalty for Violations of the ULSD Standard

| Sulfur Content Deviation from the Standard ^a (ppm) | Penalty Multiplier (\$/Gallon) | Minimum Penalty for Small Businesses (\$/Batch) | Minimum Penalty for Large Businesses (\$/Batch) |
|---|---|---|---|
| 1 – 3 | 0.078 | 39,000 | 78,000 |
| 4 – 6 | 0.110 | 39,000 | 104,000 |
| 7 – 12 | 0.149 | 39,000 | 130,000 |
| 13 – 24 | 0.195 | 39,000 | 156,000 |
| > 24 | 0.195 + 0.065 for every additional 12 ppm or fraction thereof | 39,000 | 182,000 |

a – The rounding methods at 40 C.F.R. § 1090.50 apply to determining sulfur content for diesel per-gallon sulfur content standard violations.

Beginning at a sulfur content deviation of 25 ppm, increase the gravity penalty by \$0.065/gallon for every 12 ppm increase (e.g., the penalty is \$0.260 per gallon from 25 ppm to 36 ppm, \$0.325/gallon from 37 ppm to 48 ppm).

Violation of the 500 ppm Per-Gallon Diesel Sulfur Standard

The regulations provide for limited production of 500 ppm sulfur content diesel fuel for LM use. Only transmix processors are allowed to produce 500 ppm LM diesel and production and distribution is subject to a number of conditions. Transmix processors and other parties handling 500 ppm LM are required to meet a number of PTD, recordkeeping, and reporting requirements to ensure that the 500 ppm fuel is segregated from other diesel fuel and is used only in LM engines without sulfur sensitive equipment. In light of the limited number of parties eligible to use this option, this Policy does not include specific gravity penalties for violation of the 500 ppm sulfur standard. Nevertheless, the EPA considers compliance with these requirements to be critical and will evaluate appropriate penalties on a case-by-case basis.

C. Applying Inflation to Gravity-Based Penalty

After the gravity-based penalty has been calculated, the case team should incorporate inflation to bring the gravity-based penalty into present day dollars. The case team should find the applicable inflation multiplier from Table A of the most recent Amendments to EPA’s Civil Penalty Policies to Account for Inflation that can be found here: <https://www.epa.gov/enforcement/enforcement-policy-guidance-publications#penalty>. Case teams should simply multiply the gravity-based penalty by the inflation multiplier.

D. Calculate Preliminary Deterrence Amount for All Fuels Standards Violations

Under this Policy, the preliminary deterrence amount is the sum of the economic benefit and the gravity component, calculated as described above. To calculate the preliminary deterrence amount for all fuel standards violations, add the economic benefit of all fuel standards violations to the gravity component of all fuel standards violations.

III. THE PRELIMINARY DETERRENCE AMOUNT - PROGRAMMATIC VIOLATIONS

Fuel content standards are the primary requirements of the mobile source gasoline and diesel fuel programs. Each fuels program also includes additional programmatic requirements and prohibitions to ensure the fuel standards are met, and, for certain fuels, that the fuel is used in the proper location, at the proper time, and in the proper type of vehicle. The failure of a regulated party to complete any of these programmatic requirements constitutes a violation of the regulation, with the same potential Clean Air Act statutory penalties as violations of the fuel content standards.

For example, most gasoline and diesel programs include requirements for the fuel to be sampled and tested using prescribed test methods for the relevant parameters when it is produced at a fuel manufacturing facility, and for fuel manufacturers to keep records of this testing and to submit periodic reports to the EPA demonstrating compliance with the applicable standards. In the case of fuels programs that include credits and credit trading, regulated parties are required to submit reports to the EPA on the creation, transfer, and use of credits. Some gasoline programs also include requirements for the geographic locations or time periods for the use of certain fuels categories. When regulated parties violate programmatic requirements of the fuels regulations, such as the sampling, testing, PTDs, recordkeeping, and reporting requirements, it makes it difficult or impossible to verify compliance with fuel standards. Thus, programmatic violations are considered serious violations.

A. Economic Benefit

The economic benefit associated with programmatic violations can vary greatly and case teams should evaluate it on a case-by-case basis. In cases involving significant noncompliance, the case team should consider delayed costs, avoided costs, and the potential benefit from competitive advantage gained as a result of the violation. Delayed and avoided costs may include the costs of equipment and labor relating to sampling, testing, and management oversight.

Most mobile source fuels violations are preventable through robust oversight and quality assurance measures by the regulated party. Section II.A.4 of this Policy sets forth a simplified approach for determining the economic benefit associated with violations of the fuels standards. The case team should generally apply this simplified approach for determining the economic benefit derived from the avoided cost resulting from inadequate management oversight necessary to prevent programmatic violations. Case teams should use the simplified approach in cases when there are multiple programmatic violations by fuel manufactures, and when there are multiple programmatic violations that arise at terminals and distributors of gasoline and ULSD (i.e., those “upstream” of retailers and wholesale consumer-purchasers). The case team may increase or reduce this figure depending on an assessment of the extent that management practices and systems were insufficient. This benefit amount would be added for each year in which violations are committed, regardless of the number of violations during the year.

Example #16: Fuel manufacturing facility PTD, Sampling and Testing Violations Economic Benefit Calculation

Scenario:

During a fuel manufacturing facility audit, the EPA determined that a fuel manufacturing facility failed to properly sample the gasoline it produced and failed to properly apply the correction equation at 40 C.F.R. § 1090.1355(a) to its RVP test results. The fuel manufacturing facility also failed to include required information in its PTDs. These violations occurred over a two-year period in 2021 and 2022.

Calculation:

- **Calculate avoided management oversight cost at the fuel manufacturing facility:**

Reference the simplified approach for avoided management oversight costs.

Mean half-time annual wage plus benefits for refinery operator in 2021 (SOC 51-8093, May 2021)

$$= (\$80,500 / 2) * 1.5 = \$60,375.$$

Mean half-time annual wage plus benefits for refinery operator in 2022 (SOC 51-8093, May 2022)

$$= (\$84,140 / 2) * 1.5 = \$63,105.$$

Avoided management oversight cost = \$60,375 + 63,140 [\$60,375 for 2021 and \$63,140 for 2022] + \$70,000 [\$35,000 * 2] = \$193,515.

B. Gravity

1. Classification as Minor, Moderate, or Major Violations

Under this Policy, violations of programmatic requirements are classified as Minor, Moderate, or Major violations based on the following factors:

- The impact of the violation on the EPA’s ability to determine whether the fuel met an applicable standard.
- The likelihood the violation will result in the fuel being used in an inappropriate location, time period, or vehicle type, with increased emissions as a consequence.
- The overall impact of the violation on the program.

Major violations are characterized as violations that create a large potential for increased emissions or a large overall impact on the program. Examples of violations that should be classified as Major violations include the following:

- Failure of a fuel manufacturer to sample and test a batch of gasoline or diesel fuel to determine compliance with an applicable standard when the fuel is produced or imported.⁵³

⁵³ 40 C.F.R. § 1090.1310.

- Testing gasoline or diesel fuel by a fuel manufacturer using a test method that is not allowed under the applicable regulation or failure to follow prescribed procedures for an approved test method, where the test method used, or the incorrect procedure, results in uncertainty whether the fuel at issue met an applicable standard, or where the determination that the fuel met the applicable standards required substantial government resources.⁵⁴
- Failure to comply with the National Fuels Survey Program.
- Failure of a regulated party to follow core attest procedures prescribed by the applicable regulation.⁵⁵
- Failure to maintain records for the required time-period or to deliver the records to the EPA on request, where the records include substantive information necessary for the EPA to determine compliance with an applicable standard.⁵⁶
- Failure to submit required reports to the EPA or submitting required reports more than thirty days late.⁵⁷
- Failure to comply with the PTD requirements, where a consequence of the violations could be use of the fuel in an inappropriate location, time period, or type of vehicle, with consequential increased emissions.⁵⁸

Moderate violations are characterized as violations that: do not compromise the EPA’s ability to know whether the fuel at issue met an applicable standard; do not result in a large potential for increased emissions as a result of fuel being used in an inappropriate location, time, or vehicle type; and do not have a large overall impact on the program. As a result, significant recordkeeping violations that do not rise to the magnitude of the violations described as Major violations in the examples above should be classified as Moderate violations, except those violations that fall into the Minor violation category as described below. Examples of Moderate violations include:

- Testing gasoline or diesel fuel by a fuel manufacturer using the proper test method but without following that method’s prescribed procedures, where use of the improper procedure creates little uncertainty of the test result. Certain sampling and testing violations may fall into either the Major category or Moderate category depending on whether the accuracy of the test results, and the absence of any standards violations, can be determined by the EPA with confidence and without use of substantial resources.
- Failure to follow requirements for independent sampling and testing or attest engagements, where, because of the nature of the requirement not followed or the extent of the violation, there only is a small likelihood of causing, or failing to discover, a fuel standard violation and the failure has only a modest impact on the program.
- Submitting required reports after the due date but no later than thirty days after the due date.

⁵⁴ 40 C.F.R. § 1090.1335

⁵⁵ 40 C.F.R. § 1090.1800.

⁵⁶ 40 C.F.R. § 1090.1200.

⁵⁷ 40 C.F.R. § 1090.900.

⁵⁸ 40 C.F.R. § 1090.1100.

- Failure to comply with the product transfer requirements, where the violation is unlikely to result in use of the fuel in an inappropriate location, time period, or vehicle type.

Minor violations are generally ministerial in nature and generally involve a minor error in just one aspect of reporting or recordkeeping. In some cases, the case team will have to exercise discretion to determine whether to classify a violation as Minor or Moderate. Examples of Minor violations include:

- Failure to state the address of the transferee on a PTD;
- A single transcription error that results in the wrong value being reported for one parameter on one batch report where that one error clearly has no effect on meeting standards;
- The volume of product set forth on a PTD is incorrect by a *de minimis* amount.

The case team should classify each programmatic violation as either Major, Moderate, or Minor using these principles and examples, and assign the appropriate penalties under Table III-1.

Table III-1. Penalty for Violations Other Than Gasoline or Diesel Fuel Standards

| Violation Level | Penalty (\$/Violation) |
|-----------------|------------------------|
| Major | 19,500 |
| Moderate | 9,700 |
| Minor | 3,200 |

2. Calculations Where Violations Continue for a Period of Time

The same programmatic violations may continue for an extended period of time. This is common in fuels cases because some fuel manufacturers produce batches of fuel nearly every day. Similarly, distributors may transport multiple loads of fuel per day. If a regulated party makes an error, it is not unusual for that error to be repeated several times before it is discovered and corrected. For example, a fuel manufacturer that uses an incorrect test method may use that same incorrect method hundreds of times in a year. Similarly, a distributor that fails to include certain required information in its PTDs may commit this violation hundreds or thousands of times per year. In these examples, the regulated party has committed a separate violation each time the incorrect test method is used, or each time fuel is transferred without PTDs. Penalties for these violations could become very large if a separate penalty is included for each violation, and in some cases, while we may know the violations result in harm to the program, there may be no harm to the environment.

As a result, in a case that includes multiple violations of the same programmatic requirement over time, the case team may apply a penalty calculation based on the length of time the violations continue. This penalty is in addition to the penalty calculated for the first five violations using the penalties in Table III-1, and begins with the calendar month after the first five violations occur.

This method should only be applied after a consideration of the actual or potential serious or widespread harm caused by the violations and the culpability of the violator. This penalty approach should not be used in cases involving highly culpable violators or violations that caused actual serious or widespread harm to human health or the environment. In cases involving violations that present *potential* serious or widespread harm to human health or the environment, the EPA should decide whether application of the continuing violations penalty calculation is appropriate based on the circumstances of the individual

case. The method generally will be appropriate for Moderate and Minor violations and may be appropriate for those Major violations where the defendant has demonstrated that any fuel that is the subject of the recordkeeping at issue met the applicable standards and was used in the appropriate location, time period, or vehicle type.

In no case is this continuing penalty calculation method mandated and the EPA maintains its statutory right to assess penalties up to the statutory maximum for each violation, when appropriate. For highly culpable parties, the penalty may be calculated at the full value for all violations. Moreover, even when the continuing violations penalty approach is used, the case team may exercise flexibility to increase or decrease the penalty amount based on the number of individual violations of a particular provision that arise from common facts or on the egregiousness of the violations.⁵⁹ After considering the factors described above and determining that the continuing violation penalty method is appropriate, the EPA may calculate the penalty in accordance with Table III-2 below and then adjust the penalty as described.

Table III-2. Penalty for Violations in Months Subsequent to 5th Violation

| Category of Continuing Violations | Penalty per Additional Month (\$/Month) |
|-----------------------------------|---|
| Major | 13,000 |
| Moderate | 6,500 |
| Minor | 1,900 |

For example, five repeated Major violations of the same type and arising from the same factual circumstances would result in a penalty of $\$19,500 * 5 = \$97,500$ (Table III-1). If the violations continue, the additional monthly penalty assessment would be triggered. For each month after the initial five violations occur, an additional penalty of \$13,000 would be added to the initial assessment of \$97,500 (Table III-2). The \$13,000 per month penalty could be increased if there are many violations per month or if the violations are egregious.

In summary, case teams should calculate penalties for continuing violations separately for each type of violation. Case teams should use the following steps to calculate penalties:

1. Determine if the violation is a Major, Minor, or Moderate violation.
2. Apply the appropriate penalty from Table III-1 for each of the first five violations arising from a common set of facts.
3. Calculate the continuing penalty assessment separately for each violation that continues, by using the appropriate figure from Table III-2, as adjusted, for each month the violation continues.

⁵⁹ If more than five of the same type of programmatic violations occur during one month and the violations do not continue into subsequent months, the case team may calculate penalties for each individual violation or exercise flexibility to decrease the penalty amount to account for level of egregiousness of the violations and the number of individual violations of a particular provision that arise from common facts.

Example #17: Programmatic Violations Using Continuing Violations Approach**Scenario:**

A fuel manufacturer failed to use the regulatory test method to test a particular parameter for forty batches of gasoline over a three-month period. Assume the first five violations all take place in the first month.

Calculation:

Because the fuel manufacturer's failure to use the regulatory test method reduces the EPA's ability to know whether the fuel at issue met the applicable standards, the violation would qualify as a **Major** violation.

The EPA would then consider the circumstances of the individual case to evaluate the culpability of the fuel manufacturer and whether the fuel manufacturer's failure to use the regulatory test method may have resulted in actual or potential serious or widespread harm. If the case specific circumstances demonstrate a low level of culpability and that the fuel at issue met the applicable standards and was used in the appropriate location, time period, or vehicle type, the EPA may apply this Policy as follows:

- **Violations 1-5:** $5 * \$19,500 = \$97,500$.

Violations of the same provision arising from the same factual circumstances for each month after the first month: \$13,000 per month, which may be adjusted upward due to the egregiousness of the violation (and the resources required to determine that no environmental harm resulted from the violations).

- **Total:** $\$97,500 + (\$13,000/\text{month} * 2 \text{ months}) = \$123,500$.

The application of the continuing violations penalty approach may not be appropriate for all cases, and case teams should not use this approach when it would fail to provide a sufficient deterrent. As discussed above, case teams should not apply this approach to cases involving highly culpable violators or to violations that caused an actual serious or widespread harm to human health or the environment. The graduated penalty approach also may not be appropriate for violations that present *potential* serious or widespread harm to human health or the environment. The EPA should evaluate these violations on a case-by-case basis to determine if it would be appropriate to apply the continuing violations penalty approach.

Examples of cases where it would generally not be appropriate to apply the continuing violations penalty approach include, but are not limited to: (1) fuel manufacturers or other large companies whose violations arise from a gross failure to adequately invest in compliance assurance measures; (2) regulated parties that fail to file their attest engagement reports or annual reports; and (3) regulated parties with a substantial pattern and history of similar violations.

Example #18: Programmatic Violations Using Continuing Violation Approach

Scenario:

A fuel manufacturer uses the proper test method, but without following that method's prescribed procedures. Assume that the use of the improper procedures creates little uncertainty of the test result. The fuel manufacturer produced 150 batches of gasoline over a period of six months and failed to follow proper test procedures.

Calculation:

The fuel manufacturer would be subject to penalties for 150 violations for each of its batches. If the EPA determined that the fuel at issue met the applicable standards, this would be a **Moderate** violation. If the EPA further determined that the case specific circumstances demonstrate a low level of culpability, the agency may apply the continuing violations penalty approach to this violation.

- Violations 1-5: $5 * \$9,700 = \$48,500$.
- Violations in months 2-6: $5 * \$6,500 = \$32,500$.
- Total: $\$48,500 + \$32,500 = \$81,000$ if there is no adjustment.

3. Accounting for Ancillary Violations in Penalty Calculations

The EPA anticipates that certain activities in violation of fuels regulations will constitute violations of several different requirements. In these cases, often one requirement that has been violated is more central to the environmental goals of the fuels program at issue than the other requirements. The violation that is more central can be considered the core violation, and the other violations are ancillary to the core violation.

Consider, for example, a fuel manufacturer that reports to the EPA that the average benzene content of its gasoline meets the gasoline benzene standard when, in fact, the average benzene content of this gasoline exceeds the standard. This fuel manufacturer would have violated the gasoline benzene standard. In addition, the fuel manufacturer would have violated the reporting provision of the regulations which requires accurate reporting, and also may have violated the recordkeeping requirements. In this example, the violation of the gasoline benzene standard would be the core violation, and the reporting and recordkeeping violations would be ancillary.

The presumption in each case is that penalties for all violations will be included when calculating penalties. A penalty that includes separate amounts for each of the ancillary violations, however, could be larger than is necessary to deter future violations. Therefore, in a case involving ancillary violations, and to the extent penalties for the core violation or violations are adequate to deter future violations, the case team should consider adjusting the penalty for the case by excluding or reducing the penalty for some or all of the ancillary violations when calculating the penalty. Any significant adjustments must be approved by management of the Air Enforcement Division and the case team should document it in the case file.

C. Business Size Adjustment

Under the *Policy on Civil Penalties*, the first goal of penalty assessment is deterrence. The size of the violator's business is relevant to determining whether the penalty will have a sufficient deterrent effect and is one of the considerations that Section 205(b) of the Act specifies should be taken into account

when calculating a civil penalty. Under this Policy, the gravity component for programmatic violations should be reduced by up to 25 percent if the violator is a business with gross annual revenues under \$100,000,000.

D. Applying Inflation to Gravity-Based Penalty

After the gravity-based penalty has been calculated, the case team should incorporate inflation to bring the gravity-based penalty into present day dollars. The case team should find the applicable inflation multiplier from Table A of the most recent Amendments to EPA’s Civil Penalty Policies to Account for Inflation that can be found here: <https://www.epa.gov/enforcement/enforcement-policy-guidance-publications#penalty>. The case team should simply multiply the gravity-based penalty by the inflation multiplier.

E. Calculate Preliminary Deterrence Amount for All Programmatic Violations

Under this Fuels Penalty Policy, the preliminary deterrence amount is the sum of the economic benefit and the gravity component, calculated as described above. To calculate the preliminary deterrence amount for all programmatic violations, add the economic benefit of all programmatic violations to the gravity component for all programmatic violations.

IV. THE INITIAL PENALTY TARGET FIGURE

As discussed above, the *Policy on Civil Penalties* provides that the preliminary deterrence amount is the sum of the economic benefit penalty component and the gravity penalty component for any fuel standard violation plus the sum of the economic benefit penalty component and the gravity penalty component for any programmatic violation, each calculated as described in this Policy.

In addition to deterrence, however, another goal of the *Policy on Civil Penalties* is the equitable treatment of the regulated community. Penalty policies must have enough flexibility to account for the unique facts of each case and, at the same time, produce results that are consistent with similar violations. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for adjusting either the gravity component or the economic benefit, keeping in mind that it is general Agency policy not to settle for less than economic benefit.⁶⁰ Applying these adjustments prior to commencement of negotiation yields the initial penalty target figure. During the course of negotiations, the case team may further adjust this figure to yield the adjusted penalty target figure.

Consistent with the *Policy on Civil Penalties*, this section of the Fuels Penalty Policy discusses the application of adjustment factors to promote flexibility while maintaining consistency. These factors are: degree of willfulness or negligence, degree of cooperation or non-cooperation, the violator’s history of noncompliance, and other unique factors.⁶¹ These adjustment factors apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose based on these factors. Adjustments to the economic benefit component of the penalty are discussed in Section IV.E.

⁶⁰ A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES (1984)

⁶¹ In addition, the violator's ability to pay, additional litigation risk, or other unique case-specific factors may also bear upon the final penalty. These factors are discussed in Sections V and VI.

This Policy specifies the maximum percentage by which the penalty can be adjusted for each factor. The case team has discretion to select the adjustment percentage for each factor, within the specified ranges, based on the facts unique to each case. In some cases, the case team may determine it is not appropriate to adjust the gravity component of the penalty for any or all of these factors. The case team should describe the rationale for the application of these factors in the case documents.

Adjustments that are greater than the maximum percentages are possible in the case of unusual circumstances and must be approved by the Director of the Air Enforcement Division.

A. Degree of Willfulness or Negligence

The Clean Air Act is a strict liability statute for civil actions, so willfulness, or lack thereof, is irrelevant to the determination of liability. Nevertheless, case teams should consider a violator's willfulness or negligence in the evaluation of the gravity-based portion of the penalty. Because the Act is a strict liability statute, a violator's willfulness or negligence can only result in an increase, not a decrease, in the gravity component of a penalty.

In assessing the degree of willfulness or negligence, case teams should consider all the following factors:

- The degree of control the violator had over the events constituting the violation.
- The foreseeability of the events constituting the violation.
- The level of sophistication within the industry in dealing with compliance issues (e.g., most refiners would be considered sophisticated; sole proprietors of retail outlets may not be sophisticated).
- The extent to which the violator knew of the legal requirement that was violated.

Lack of knowledge of the legal requirement should never be used as a basis to reduce the gravity-based portion of the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty.

Under this Policy, the case team has the discretion to increase the gravity-based portion of the penalty by up to 20 percent to reflect degree of willfulness or negligence. Case teams should describe the basis for the level of this adjustment in the case documents.

B. Degree of Cooperation

The *Policy on Civil Penalties* provides that penalties should reflect the degree of cooperation or non-cooperation of the violator in remedying the violation. Specifically, the extent to which a violator remedies the violation should be considered in determining the adjusted gravity component of a penalty, particularly where the environmental problem is corrected immediately upon discovery of the violation by the regulated entity. Adjustments are based on both the goals of equitable treatment and swift resolution of environmental problems.

In general, penalties should be smaller for violators that take effective steps to promptly remedy any violation upon discovery of the noncompliance. In the context of violations of the mobile source fuels requirements, the resulting excess emissions often depend on whether, and how much of, the noncompliant fuel is dispensed into vehicles. Examples of actions that show cooperation or steps to remedy a violation include, but are not limited to:

1. Implementing remedial measures that prevent or limit the distribution of noncompliant fuel before it is completely dispensed (e.g., by locking pumps at a retail outlet preventing further sale of the fuel).
2. Implementing remedial measures to remove noncompliant gasoline from retail outlets and vehicles where possible (or to re-blend the gasoline so that it meets standards) and taking actions to assure that no further noncompliant fuel is distributed.
3. Taking steps to correct the conditions that gave rise to the violation and steps to prevent future violations.

The gravity penalty component may be mitigated in instances where appropriate, effective remedial actions are taken promptly, including actions to stop on-going violations and to prevent future violations. Overall, the gravity portion of the penalty may be reduced by up to 20 percent if prompt remedial action was taken (including removing noncompliant gasoline from the distribution system, where possible), strong efforts to prevent future violations were made, and where the violator is fully cooperative.

The gravity component may be mitigated if a violator promptly reports its noncompliance to the EPA where there is no legal obligation to promptly report. If the violator meets all the conditions of the EPA Audit Policy, the violations should be resolved pursuant to that policy.⁶² In cases where the violator does not meet all the conditions of the EPA Audit Policy, self-reporting can still be considered under this Policy.

The gravity penalty may be increased due to aggravating factors such as failure to take appropriate action after the violation is discovered or failure to negotiate in good faith. The litigation team may increase the gravity component by up to 20 percent when appropriate remedial action is not taken or if the remedial action is ineffective.

C. History of Noncompliance

This factor may be used only to increase a penalty. Evidence that a party has previously violated requirements under Title II of the Act indicates that the party was not sufficiently deterred by the previous government enforcement response. This is particularly true if the previous violation was recent and if the previous violation was of a similar or related requirement. In determining the size of the adjustment, the case team should consider the following points:

- Similarity of the violation in question to the prior violation.
- Time elapsed since the prior violation.
- The number of prior violations.
- Violator's response to the prior violation in taking steps to correct the previous violations and taking steps to prevent future violations.

⁶² The EPA policy "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," allows for a reduction in the gravity component of a civil penalty if the violator meets specific requirements for self-disclosure. 65 Fed. Reg. 19,618 (Apr. 11, 2000) (Audit Policy).

In the case of violations of the fuels regulations, a “similar” violation is one that involves any violation of the fuels requirements under Title II of the Act or the regulations implementing those requirements.

For purposes of this section, a “prior violation” includes any act or omission resulting in an enforcement response from the EPA (e.g., notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or judicial order or judgment) unless subsequently dismissed or withdrawn on the grounds that the party was not liable.⁶³ It also includes any act or omission for which the violator has previously been given written notification, however informal, that the agency believes a violation existed. In cases where several similar violations have occurred but there has been no previous enforcement response, the case team would not normally increase the penalty for prior violations but would assign the appropriate penalty to each of the violations. The case team may consider that the presence of multiple similar violations may indicate willfulness or negligence.

In the case of a large business with many divisions, subsidiaries, or affiliates, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustment for previous violations. In general, the case team should begin with the assumption that if the same parent entity controlled both the organization with the prior violation and the organization with the current violation, the adjustment for history of noncompliance should apply, unless the violator can demonstrate there was no control or oversight of the organization in question. Under this Policy, the case team has discretion to increase the gravity-based portion of the penalty up to 35 percent for one prior violation, and up to 70 percent for more than one prior violation. The case team should evaluate the considerations discussed above, such as how similar the prior violation was and how long ago it occurred, when determining the percentage that is appropriate in any particular case. The case team should describe the basis for this adjustment in the case documents.

D. Other Unique Factors

A case may present other factors that the case team believes justify a further increase or decrease of the gravity component of a penalty. For example, a case may have particular strengths or weaknesses that the case team believes have not been adequately captured in other areas of this Policy. For example, if the facts of the case or the nature of the particular regulatory requirement at issue reduce the strength of the agency’s case, this could justify an additional penalty reduction. Under this Penalty Policy, the case team has discretion to increase or decrease the gravity component of the penalty by up to 10 percent to reflect litigation risk or other unique factors.

The case team should describe the basis for the level of this adjustment in the case documents. Adjustments greater than 10 percent are possible based upon considerations such as those discussed above, but larger adjustments must be approved by the Director of the Air Enforcement Division.

There may be other circumstances in which the facts of a particular case warrant consideration of other factors or adjustments to the penalty need to be made in a manner not specifically identified or discussed in this Policy.

E. Settling Cases for Less Than the Economic Benefit of Noncompliance

Resolving a case for an amount that does not remove the economic benefit of noncompliance can encourage noncompliance. For this reason, it is general Agency policy not to settle for less than this

⁶³ “Prior violations” also include self-disclosures, regardless of whether the EPA initiates any enforcement response.

amount.⁶⁴ In the rare situation where settling for less than economic benefit may be appropriate, the case team must detail those reasons in the case file. Any proposed penalty that would not recover the economic benefit of noncompliance from a violator must be approved by the OECA Assistant Administrator.

V. ABILITY TO PAY

This Fuels Penalty Policy incorporates the EPA's policies and models regarding ability to pay and ability to continue in business.⁶⁵ The EPA's policies and procedures regarding the evaluation of an ability to pay claim are set forth in the *Policy on Civil Penalties* and are expanded upon in PT.2-1: Guidance on Determining a Violator's Ability to Pay a Civil Penalty (December 16, 1986) (Previously codified as GM 56), and *Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action* (June 29, 2015) (collectively, the Ability to Pay Policies). The case team should consult the Ability to Pay Policies early in the case development process to identify and evaluate any potential inability to pay issues.⁶⁶

When EPA determines that a violator cannot afford the penalty, the following options may be considered:

- **Delayed Payment Schedule:** A violator may not have the financial resources necessary to pay the full penalty amount as a one-time payment, but would be able to pay this amount over a period of months or years. Administration of payments over time is a burden on the agency, so case teams should only consider this option if the Agency is convinced it is not possible for the violator to obtain the funds necessary to pay the full penalty through borrowing money or the sale of assets. If payments over time are used, the violator should pay the largest possible amount of the penalty at the time the case is resolved to reduce the amount of the delayed payments, and the duration of the payments over time should be no longer than is necessary. In any case where payments over time are used, the amount of any delayed payments should be increased to include interest on the delayed payments. Case teams can request their contact in the Accounts Receivable Branch within the Office of the Chief Financial Officer calculate inflation.
- **Penalty Reductions:** Case teams should offer penalty reduction as a last resort and only after conducting a detailed analysis of the violator's finances. Case teams should include a justification for the reduction in the case file.

VI. ADJUSTMENTS TO THE INITIAL PENALTY TARGET FIGURE AFTER NEGOTIATIONS HAVE BEGUN

During the course of settlement negotiations, the case team may learn information that will cause the team to reevaluate the facts used to calculate the initial penalty target figure for the case. If this occurs, case teams should recalculate the penalty to reflect this new information. This new information could

⁶⁴ The rare situations where the EPA will settle a case for less than the economic benefit are set forth in A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, EPA General Enforcement Policy #GM-22, at 11–13 (Feb. 16, 1984).

⁶⁵ The EPA models for determination of ability to pay can be found at: <https://www.epa.gov/enforcement/penalty-and-financial-models>.

⁶⁶ The violator's inability to pay the civil penalty may be an appropriate reason to settle for less than the economic benefit. *See* A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, EPA General Enforcement Policy #GM-22, at 12 (Feb. 16, 1984).

affect the following areas: ability to pay, adjustments used in calculating the initial penalty target figure, and preliminary deterrence amount to reflect continued periods of noncompliance not reflected in the original calculation.

A case may present additional litigation risk or other unique factors that the case team believes justify adjustments to the initial penalty target. For example, as described in the *Policy on Civil Penalties*, there may be cases where the agency cannot realistically obtain a penalty in litigation that would remove the economic benefit due to: applicable precedent; competing public interest consideration; or case-specific facts, equities, or evidentiary issues. For example, a case might present a substantial risk of creating precedent that will have a significant adverse effect on the agency's ability to enforce the law. Any additional adjustments for litigation risk or other unique factors under this section—which may be applied to the economic benefit portion of the penalty—must be approved by the Air Enforcement Division Director.

The initial penalty target figure, when further adjusted during negotiations based on this new information or to account for additional litigation risk, would generate an adjusted penalty target figure.