

**§ 80.612 Who is liable for violations of this subpart?**

(a) *Persons liable for violations of prohibited acts*—(1) *Standard, dye, marker, additives, used motor oil, heating oil, fuel introduction, and other product requirement violations.* (i) Any refiner, importer, distributor, reseller, carrier, retailer, wholesale purchaser-consumer who owned, leased, operated, controlled or supervised a facility where a violation of any provision of § 80.610(a) through (e) occurred, or any other person who violates any provision of § 80.610(a) through (e), is deemed liable for the applicable violation, except that distributors who receive diesel fuel or distillate from the point where it is taxed, dyed or marked, and retailers and wholesale purchaser-consumers are not deemed liable for any violation of § 80.610(b).

(ii) Any person who causes another person to violate § 80.610(a) through (e) is liable for a violation of § 80.610(f).

(iii) Any refiner, importer, distributor, reseller, carrier, retailer, or wholesale purchaser-consumer who produced, imported, sold, offered for sale, dispensed, supplied, offered to supply, stored, transported, or caused the transportation or storage of, diesel fuel or distillate that violates § 80.610(a), is deemed in violation of § 80.610(f).

(iv) Any person who produced, imported, sold, offered for sale, dispensed, supplied, offered to supply, stored, transported, or caused the transportation or storage of a diesel fuel additive which is used in motor vehicle diesel fuel or NRLM diesel fuel that is found to violate § 80.610(a), is deemed in violation of § 80.610(f).

(2) *Cause violating diesel fuel or additive to be in the distribution system.* Any refiner, importer, distributor, reseller, carrier, retailer, or wholesale purchaser-consumer or any other person who owned, leased, operated, controlled or supervised a facility from which distillate fuel or additive was released into the distribution system which does not comply with the applicable standards, marking or dye requirements of this Subpart I is deemed in violation of § 80.610(g).

(3) *Branded refiner/importer liability.* Any refiner or importer whose cor-

porate, trade, or brand name, or whose marketing subsidiary's corporate, trade, or brand name appeared at a facility where a violation of § 80.610(a) or (b) occurred, is deemed in violation of § 80.610(a) or (b), as applicable.

(4) *Carrier causation.* In order for a distillate fuel or diesel fuel additive carrier to be liable under paragraph (a)(1)(ii), (a)(1)(iii), or (a)(1)(iv) of this section, as applicable, EPA must demonstrate, by reasonably specific showing by direct or circumstantial evidence, that the carrier caused the violation.

(5) *Parent corporation.* Any parent corporation is liable for any violations of this subpart that are committed by any subsidiary.

(6) *Joint venture.* Each partner to a joint venture is jointly and severally liable for any violation of this subpart that occurs at the joint venture facility or is committed by the joint venture operation.

(b) *Persons liable for failure to comply with other provisions of this subpart.* Any person who:

(1) Fails to comply with the requirements of a provision of this subpart not addressed in paragraph (a) of this section is liable for a violation of that provision; or

(2) Causes another person to fail to comply with the requirements of a provision of this subpart not addressed in paragraph (a) of this section, is liable for causing a violation of that provision.

[66 FR 5136, Jan. 18, 2001, as amended at 69 FR 39204, June 29, 2004; 75 FR 22977, Apr. 30, 2010]

**§ 80.613 What defenses apply to persons deemed liable for a violation of a prohibited act under this subpart?**

(a) *Presumptive liability defenses.* (1) Any person deemed liable for a violation of a prohibition under § 80.612(a)(1)(i), (a)(1)(iii), (a)(2), or (a)(3), will not be deemed in violation if the person demonstrates all of the following, as applicable:

(i) The violation was not caused by the person or the person's employee or agent;

(ii) Product transfer documents account for fuel or additive found to be in

## Environmental Protection Agency

## § 80.613

violation and indicate that the violating product was in compliance with the applicable requirements when it was under the person's control;

(iii) The person conducted a quality assurance sampling and testing program, as described in paragraph (d) of this section, except for those persons subject to the provisions of paragraph (a)(1)(iv), (a)(1)(v), or (a)(1)(vi) of this section or § 80.614. A carrier may rely on the quality assurance program carried out by another party, including the party who owns the diesel fuel in question, provided that the quality assurance program is carried out properly. Retailers, wholesale purchasers-consumers, and ultimate consumers of diesel fuel are not required to conduct quality assurance programs;

(iv) For refiners and importers of diesel fuel subject to the 15 ppm sulfur standard under § 80.510(b) or (c) or § 80.520(a)(1), the 500 ppm sulfur standard under § 80.510(a) or § 80.520(c), and/or the 1,000 ppm sulfur standard under § 80.510(k), test results that—

(A) Were conducted according to an appropriate test methodology approved or designated under §§ 80.580 through 80.586, 80.2(w), or 80.2(z), as appropriate; and

(B) Establish that, when it left the party's control, the fuel did not violate the sulfur, cetane or aromatics standard, or the dye or marking provisions of §§ 80.510 or 80.511, as applicable;

(v) For any truck loading terminal or any other person who delivers heating oil for delivery to the ultimate consumer and is subject to the requirement to mark heating oil or LM diesel fuel under § 80.510(d) through (f), data which demonstrates that when it left the truck loading terminal or other facility, the concentration of marker solvent yellow 124 was equal to or greater than six milligrams per liter. In lieu of testing for marker solvent yellow 124 concentration, evidence may be presented of an oversight program, including records of marker inventory, purchase and additization, and records of periodic inspection and calibration of additization equipment that ensures that marker is added to heating oil or LM diesel fuel, as applicable, under § 80.510(d) through (f) in the required concentration;

(vi) Except as provided in § 80.614, for any person who, at a downstream location, blends a diesel fuel additive subject to the requirements of § 80.521(b) into motor vehicle diesel fuel or NRLM diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a) or § 80.510(b) or (c), except a person who blends additives into fuel tanker trucks at a truck loading rack subject to the provisions of paragraph (d)(2) of this section, test results which are conducted subsequent to the blending of the additive into the fuel, and which comply with the requirements of paragraphs (a)(1)(iv)(A) and (B) of this section; and

(vii) Any person deemed liable for a designation or volume balance provisions violation under § 80.610(b) and 80.612(a) will not be deemed in violation if the person demonstrates, through product transfer documents, records, reports and other evidence that the diesel fuel or distillate was properly designated and volume balance requirements were met.

(2) Any person deemed liable for a violation under § 80.612(a)(1)(iv), in regard to a diesel fuel additive subject to the requirements of § 80.521(a), will not be deemed in violation if the person demonstrates that—

(i) Product transfer document(s) account for the additive in the fuel found to be in violation, which comply with the requirements under § 80.591(a), and indicate that the additive was in compliance with the applicable requirements while it was under the party's control; and

(ii) For the additive's manufacturer or importer, test results which accurately establish that, when it left the party's control, the additive in the diesel fuel determined to be in violation did not have a sulfur content greater than or equal to 15 ppm.

(A) Analysis of the additive sulfur content pursuant to this paragraph (a)(2) may be conducted at the time the batch was manufactured or imported, or on a sample of that batch which the manufacturer or importer retains for such purpose for a minimum of two years from the date the batch was manufactured or imported.

(B) After two years from the date the additive batch was manufactured or imported, the additive manufacturer or

**§ 80.613**

**40 CFR Ch. I (7-1-13 Edition)**

importer is no longer required to retain samples for the purpose of complying with the testing requirements of this paragraph (a)(2).

(C) The analysis of the sulfur content of the additive must be conducted pursuant to the requirements of § 80.580.

(3) Any person who is deemed liable for a violation under § 80.612(a)(1)(iv) with regard to a diesel fuel additive subject to the requirements of § 80.521(b), will not be deemed in violation if the person demonstrates that—

(i) The violation was not caused by the party or the party's employee or agent;

(ii) Product transfer document(s) which comply with the additive information requirements under § 80.591(b), account for the additive in the fuel found to be in violation, and indicate that the additive was in compliance with the applicable requirements while it was under the party's control; and

(iii) For the additive's manufacturer or importer, test results which accurately establish that, when it left the party's control, the additive in the diesel fuel determined to be in violation was in conformity with the information on the additive product transfer document pursuant to the requirements of § 80.591(b). The testing procedures applicable under paragraph (a)(2) of this section, also apply under this paragraph (a)(3).

(b) *Branded refiner defenses.* In the case of a violation found at a facility operating under the corporate, trade or brand name of a refiner or importer, or a refiner's or importer's marketing subsidiary, the refiner or importer must show, in addition to the defense elements required under paragraph (a)(1) of this section, that the violation was caused by:

(1) An act in violation of law (other than the Clean Air Act or this Part 80), or an act of sabotage or vandalism;

(2) The action of any refiner, importer, retailer, distributor, reseller, oxygenate blender, carrier, retailer or wholesale purchaser-consumer in violation of a contractual agreement between the branded refiner or importer and the person designed to prevent such action, and despite periodic sampling and testing by the branded re-

finer or importer to ensure compliance with such contractual obligation; or

(3) The action of any carrier or other distributor not subject to a contract with the refiner or importer, but engaged for transportation of diesel fuel, despite specifications or inspections of procedures and equipment which are reasonably calculated to prevent such action.

(c) *Causation demonstration.* Under paragraph (a)(1) of this section for any person to show that a violation was not caused by that person, or under paragraph (b) of this section to show that a violation was caused by any of the specified actions, the person must demonstrate by reasonably specific showing, by direct or circumstantial evidence, that the violation was caused or must have been caused by another person and that the person asserting the defense did not contribute to that other person's causation.

(d) *Quality assurance and testing program.* To demonstrate an acceptable quality assurance program under paragraph (a)(1)(iii) of this section, a person must present evidence of the following:

(1) A periodic sampling and testing program to ensure the diesel fuel or additive the person sold, dispensed, supplied, stored, or transported, meets the applicable standards and requirements, including the requirements relating to the presence of marker solvent yellow 124.

(2) For those parties who, at a downstream location, blend diesel fuel additives subject to the requirements of § 80.521(b) into fuel trucks at a truck loading rack, the periodic sampling and testing program required under this paragraph (d) must ensure, by taking into account the greater risk of noncompliance created through use of a high sulfur additive, that the diesel fuel into which the additive was blended meets the applicable standards subsequent to the blending.

(3) On each occasion when diesel fuel or additive is found not in compliance with the applicable standard:

(i) The person immediately ceases selling, offering for sale, dispensing, supplying, offering for supply, storing or transporting the non-complying product.

(ii) The person promptly remedies the violation and the factors that caused the violation (for example, by removing the non-complying product from the distribution system until the applicable standard is achieved and taking steps to prevent future violations of a similar nature from occurring).

(4) For any carrier who transports diesel fuel or additive in a tank truck, the quality assurance program required under this paragraph (d) need not include its own periodic sampling and testing of the diesel fuel or additive in the tank truck, but in lieu of such tank truck sampling and testing, the carrier shall demonstrate evidence of an oversight program for monitoring compliance with the requirements of this subpart relating to the transport or storage of such product by tank truck, such as appropriate guidance to drivers regarding compliance with the applicable sulfur standard, product segregation and product transfer document requirements, and the periodic review of records received in the ordinary course of business concerning diesel fuel or additive quality and delivery.

(e) *Alternative defense requirements.* A person deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), may comply with the following alternative defense requirements in lieu of the requirements in paragraphs (a) through (d) of this section to the extent provided for, and subject to the conditions and limitations set forth in this paragraph (e):

(1) *Independent survey association.* To comply with the alternative defense requirements under this paragraph (e), a person must participate in the funding of a consortium which arranges to have an independent survey association conduct a statistically valid program of annual compliance surveys pursuant to a survey plan which has been approved by EPA, in accordance with the requirements of paragraphs (e)(2) through (e)(4) of this section.

(2) *General requirements.* The consortium survey program under this paragraph (e) must be:

(i) Planned and conducted by an independent survey association that meets the requirements in § 80.68(c)(13)(i);

(ii) Conducted at diesel fuel retail outlets nationwide; and

(iii) Representative of all motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) dispensed at diesel fuel retail outlets nationwide.

(3) *Independent survey association requirements.* The consortium described in paragraph (e)(1) of this section shall require the independent survey association conducting the surveys to:

(i) Submit to EPA for approval each calendar year a proposed survey plan in accordance with the requirements of paragraph (e)(4) of this section.

(ii) Obtain samples of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) in accordance with the survey plan approved under this paragraph (e), or immediately notify EPA of any refusal of retail outlets to allow samples to be taken;

(iii) Test, or arrange to be tested, the samples required under paragraph (e)(3)(ii) of this section for sulfur content as follows—

(A) Samples collected at retail outlets shall be shipped the same day the samples are collected via overnight service to the laboratory, and analyzed for sulfur content within twenty-four hours after receipt of the sample in the laboratory.

(B) Any laboratory to be used by the independent survey association for sulfur testing shall be approved by EPA and its sulfur test method shall comply with the provisions of §§ 80.584, 80.585 and 80.586.

(C) For purposes of the alternative defense requirements in this paragraph (e), test results shall be rounded to a whole number using ASTM E 29-02<sup>e1</sup>, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications, rounding method procedures. The Director of the Federal Register approved the incorporation by reference of ASTM E 29-02<sup>e1</sup> as prescribed in 5 U.S.C. 552(a) and 1 CFR part 51. Anyone

may purchase copies of this standard from ASTM International, 100 Barr Harbor Dr., West Conshohocken, PA 19428, (610) 832-9585. Anyone may inspect copies at the U.S. EPA, EPA Docket Center, Room 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC 20460, (202) 566-9744, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

(iv) Provide notice of samples with sulfur content greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), as follows:

(A) In the case of any test result that is one or two ppm greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), the independent survey association shall, within twenty-four hours after the laboratory receives the sample, send notification of the test result as follows: In the case of a sample collected at a retail outlet at which the brand name of a refiner or importer is displayed, to the refiner or importer, and EPA; and in the case of a sample collected at other retail outlets, to the retailer and EPA. This initial notification to a refiner shall include specific information concerning the name and address of the retail outlet, contact information, the brand, and the sulfur content of the sample.

(B) In the case of any test result that is three or more ppm greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), or for a test result that is one or two ppm greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), and the retail outlet has had an exceedance within the previous two years, the independent survey association shall, within the time limits specified in paragraph (e)(3)(iv)(A) of this section, provide notice to the parties described in paragraph (e)(3)(iv)(A) of this section. The notice to EPA must include the name and address of the retail outlet, and the telephone number, if known.

(C) The independent survey association shall provide notice to the identified contact person or persons for each party specified in paragraphs

(e)(3)(iv)(A) and (B) of this section in writing (*e.g.* e-mail or facsimile) and, if requested by the identified contact person, by telephone.

(v) Provide to EPA quarterly and annual summary survey reports which include the information specified in paragraph (e)(8) of this section.

(vi) Maintain all records relating to the surveys conducted under this paragraph (e) for a period of at least 5 years.

(vii) At any time permit any representative of EPA to monitor the conduct of the surveys, including sample collection, transportation, storage, and analysis.

(4) *Survey plan design requirements.* The proposed survey plan required under paragraph (e)(3)(i) of this section shall, at a minimum, include the following:

(i) *Number of surveys.* The survey plan shall include four surveys each calendar year. The four surveys collectively are called the survey series.

(ii) *Sampling areas.* The survey plan shall include sampling in three types of areas, called sampling strata, during each survey: Densely populated areas, transportation corridors and rural areas. These sampling strata shall be further divided into discrete sampling areas, or clusters. Each survey shall include sampling in at least 40 sampling areas in each stratum, randomly selected.

(iii) *No advance notice of surveys.* The survey plan shall include procedures to keep confidential from any regulated party, but not from EPA, the identification of the sampling areas that are included in any survey plan prior to the beginning of a survey in an area.

(iv) *Retail outlet selection.*

(A) The retail outlets to be sampled in a sampling area shall be selected from among all retail outlets in the sampling area that sell motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1), with probability of selection proportionate to the volume of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) sold at the retail outlets, and inclusion of retail outlets with different brand names and unbranded, if possible.

**Environmental Protection Agency**

**§ 80.613**

(B) In the case of any retail outlet from which a sample of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under §80.520(a)(1) was collected during a survey and determined to have a sulfur content that exceeds the 15 ppm sulfur standard under §80.520(a)(1), as adjusted under §80.580(d), that retail outlet shall be included in the subsequent survey.

(C) Only a single sample shall be collected at each retail outlet, except that where a retail outlet had a sample from the preceding survey with a test result that exceeds the 15 ppm standard under

§80.520(a)(1), as adjusted under §80.580(d), separate samples shall be taken that represent the diesel fuel contained in each storage tank containing motor vehicle diesel fuel subject to the 15 ppm sulfur standard under §80.520(a)(1), unless collection of separate samples is not practicable (for example, due to diesel piping arrangements or pump outages).

(v) *Number of samples.*

(A) The minimum number of samples to be included in the survey plan for each calendar year shall be calculated as follows:

$$n = \left\{ \left[ (Z_\alpha + Z_\beta) \right]^2 / \left( 4 * \left[ \arcsin(\sqrt{\phi_1}) - \arcsin(\sqrt{\phi_0}) \right]^2 \right) \right\} * St_n * F_a * F_b * Su_n$$

Where:

$n$  = minimum number of samples in a year-long survey series. However, in no case shall  $n$  be larger than 9,600 or smaller than 5,250.

$Z_\alpha$  = upper percentile point from the normal distribution to achieve a one-tailed 95% confidence level (5%  $\alpha$ -level). Thus,  $Z_\alpha$  equals 1.645.

$Z_\beta$  = upper percentile point to achieve 95% power. Thus,  $Z_\beta$  equals 1.645.

$\phi_1$  = the maximum proportion of stations selling non-compliant fuel for the fuel in a region to be deemed compliant. In this test, the parameter needs to be 5% or greater, i.e., 5% or more of the stations, within a stratum such that the region is considered non-compliant. For this survey,  $\phi_1$  will be 5%.

$\phi_0$  = the underlying proportion of non-compliant stations in a sample. For calendar year 2011,  $\phi_0$  will be 1.9%. For calendar years 2012 and beyond,  $\phi_0$  will be the average of the proportion of stations to be non-compliant over the previous four surveys.

$St_n$  = number of sampling strata. For purposes of this survey program,  $St_n$  equals 3.

$F_a$  = adjustment factor for the number of extra samples required to compensate for collected samples that cannot be included in the survey, based on the number of additional samples required during the previous four surveys. However, in no case shall the value of  $F_a$  be smaller than 1.1. For purposes of this adjustment factor, a sample shall be treated as one that can be included in the survey only if the fuel was offered for sale as motor vehicle diesel fuel subject to the 15 ppm sulfur

standard under §80.520(a)(1) at the retail outlet where the sample was collected and if an appropriate laboratory analysis of this fuel is conducted.

$F_b$  = adjustment factor for the number of samples required to resample each retail outlet with test results greater than 17 ppm (resampling), based on the rate of resampling required during the previous four surveys. However, in no case shall the value of  $F_b$  be smaller than 1.1.

$Su_n$  = number of surveys per year. For purposes of this survey program,  $Su_n$  equals 4.

(B) The number of samples obtained from the formula in paragraph (e)(4)(v)(A) of this section, after being incremented as necessary to allocate whole numbers of samples to each cluster, shall be distributed approximately equally for the surveys conducted during the calendar year. Within a survey, the samples shall be divided approximately equally for the three strata.

(5) *Sulfur test result that is one or two ppm Greater than the 15 ppm standard under §80.520(a)(1), as adjusted under §80.580(d).* The following provisions apply if the tested sulfur level of a diesel fuel sample collected by the independent survey association is one or two ppm greater than the 15 ppm standard under §80.520(a)(1), as adjusted under §80.580(d).

(i) *Branded refiner or importer.* Where the sample was collected at a retail outlet at which the brand name of a refiner or importer is displayed, the

branded refiner or importer will be deemed to have established its defense under this section, provided that the refiner or importer participates in a consortium as described in paragraph (e)(1) of this section, and provided that the refiner or importer also demonstrates the following:

(A) The sulfur content of the diesel fuel at the terminal(s) that most recently supplied the retail outlet was no greater than 15 ppm prior to adjustment under § 80.580(d) when dispensed for delivery to the retail outlet;

(B) Best efforts and accepted business practices are used by parties downstream from the refiner or importer to avoid diesel fuel contamination. These would include, for example, procedures for ensuring motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) is not contaminated in delivery trucks, and procedures for ensuring delivery truck drivers can identify retail outlet drop points for motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1).

(C) Upon receiving the notification required under paragraph (e)(3)(iv)(A) of this section, any pumps supplied by the retail storage tank where the non-compliant diesel fuel was found were shutdown until such time that the fuel at issue was retested and the sulfur content of the fuel was found to be no greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d). Prior to May 31, 2010, as an alternative to shutting down pumps supplied by the retail storage tank where the noncompliant diesel fuel was found, such pumps may be relabeled with the language required under § 80.571(b). The steps required in this paragraph (e)(5)(i)(C) must be taken as soon as practicable after receiving the notification required under paragraph (e)(3)(iv)(A) of this section, which normally will be within the same business day, but no longer than twenty-four hours after notification is received unless the refiner or importer demonstrates this timing is not possible.

(D) A root cause analysis is performed to determine the cause of the noncompliant diesel fuel and appropriate actions are taken to prevent future violations.

(E) The independent survey association samples and retests the diesel fuel at the retail outlet during its next survey, in addition to the scheduled sampling and testing under the approved survey program.

(F) The refiner or importer submits a report to EPA no later than 120 days following the date the sample was collected at the retail outlet, which includes the information specified in paragraph (e)(7) of this section.

(G) The refiner or importer supplies EPA with copies of the contracts with downstream parties specified in § 80.613(b)(2) or the specifications or inspections of procedures and equipment described in § 80.613(b)(3), as appropriate, which are designed to prevent the contamination of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1).

(ii) *Unbranded refiner or importer.* Any unbranded refiner or importer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section if the unbranded refiner or importer is a member of the consortium described in paragraph (e)(1) of this section and the refiner or importer meets the requirements of paragraphs (e)(5)(i)(A) through (F) of this section.

(iii) *Distributor or retailer.* Any distributor (*e.g.*, pipeline, terminal operator, marketer, truck carrier) or retailer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section, provided that, within two years prior to the time the diesel fuel sample was collected by the independent survey association, the retail outlet had no instances where the tested sulfur level of a diesel fuel sample was greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d); and

(A) Where the retailer displays the brand name of a refiner or importer, the requirements in paragraphs (e)(5)(i) of this section are met by the branded refiner or importer; or

(B) Where the branded refiner or importer has elected not to participate in a consortium as described in paragraph (e)(1) of this section, or where the retailer does not display the brand name of a refiner or importer, the distributor or retailer is a member of the consortium described in paragraph (e)(1) of this section and the distributor or retailer meets the requirements in paragraphs (e)(5)(i)(A) through (F) of this section.

(C) If within two years prior to the time the diesel fuel sample was collected by the independent survey association, the retail outlet had an instance where the tested sulfur level of a diesel fuel sample was greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), any distributor or retailer that is deemed liable for a violation under § 80.612 will be deemed to have established its defense under this section if the party meets the requirements under paragraph (e)(5)(iii)(A) or (B) of this section (in lieu of the requirement in paragraph (a)(1)(iii) of this section), and the party meets the requirements under paragraphs (a)(1)(i), (a)(1)(ii), and (c) of this section.

(6) *Sulfur test result that is three or more ppm Greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d).* The following provisions apply if the tested sulfur level of a diesel fuel sample collected by the independent survey association is three or more ppm greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d):

(i) *Branded refiner or importer.* Any branded refiner or importer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section if the refiner or importer meets the requirements under paragraph (e)(5)(i) of this section and meets

the requirements under paragraphs (a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), (b)(3), and (c) of this section.

(ii) *Unbranded refiner or importer.* Any unbranded refiner or importer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section if the refiner or importer meets the requirements under paragraph (e)(5)(ii) of this section and meets the requirements under paragraphs (a)(1)(i), (a)(1)(ii), (a)(1)(iv), and (c) of this section.

(iii) *Distributor or retailer.* Any distributor or retailer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section if the requirements under paragraph (e)(5)(iii)(A) or (B) of this section, as appropriate, are met, and the distributor or retailer meets the requirements under paragraphs (a)(1)(i), (a)(1)(ii), and (c) of this section. Distributors that blend a diesel fuel additive subject to the requirements of § 80.521(b) into motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a) must also meet the requirement under paragraph (a)(1)(iv) of this section.

(7) *Report regarding motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) with high sulfur content.* The report that is required to be submitted to EPA under paragraph (e)(5)(i)(F) of this section shall contain the following information:

(i) The name, address and contact information for the regulated party submitting the report;

(ii) The name, address and contact information for the retail outlet where the high sulfur diesel fuel was found;

(iii) The brand name of the refiner or importer displayed at the retail outlet, if any;



§ 80.613

40 CFR Ch. I (7-1-13 Edition)

(iv) The date of sampling, the analysis results, and the label that appeared on the pump where the sample was collected.

(v) For each of the most recent three deliveries (*i.e.*, the three deliveries that immediately preceded the taking of the violating sample) of diesel fuel to the retail outlet storage tank at issue, or the most recent five deliveries if the cause of the violation is not demonstrated following analysis of the most recent three deliveries:

(A) A copy of the product transfer documents for the delivery;

(B) The name, address and contact information for the terminal and truck distributor that supplied the diesel fuel;

(C) The date of delivery and the volume of diesel fuel delivered;

(D) The designation of the diesel fuel on the product transfer document;

(E) The test results (or other evidence of the diesel sulfur content) for the diesel fuel in the terminal tank from which the delivery truck was loaded, and copies of the test result reports; and

(F) A description of the procedures used by the truck distributor to avoid diesel contamination (*e.g.*, dedicated trucks).

(vi) A description of any actions taken to prevent sale of the noncompliant diesel fuel, including:

(A) The date and time the regulated party was notified of the high sulfur test result, the date and time the retailer was notified, and the date and time the sale of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) was suspended;

(B) A description of the actions taken to prevent sale of the noncompliant diesel fuel; and

(C) The date and time that sales of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) from the retail storage tank at issue were resumed, the results of the test used to establish the fuel met applicable standards, and a copy of the test result report.

(vii) A description of the root-cause analysis required in paragraph (e)(5)(i)(D) of this section, including:

(A) A description of the investigation conducted to determine the root-cause

of the noncompliant diesel fuel, and the conclusions reached as a result of this investigation; and

(B) A description of the steps taken to prevent future problems from the identified cause.

(8) *Summary survey reports.* The quarterly and annual summary survey reports required under paragraph (e)(3)(v) of this section shall include the following information:

(i) The identification of each sampling area included in a survey and the dates that the samples were collected in that area;

(ii) For each retail outlet sampled:

(A) The identification of the retail outlet;

(B) The refiner or importer brand name displayed, if any;

(C) The pump labeling; and

(D) The sample test result.

(iii) Sulfur level summary statistics by brand and unbranded for each sampling area, strata, survey and annual survey series. These summary statistics shall:

(A) Include the number of samples, and the average, median and range of sulfur levels; and

(B) Be provided separately for the diesel fuel samples from pumps labeled as dispensing motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1), motor vehicle diesel fuel subject to the 500 ppm sulfur standard under § 80.520(c), and pumps that are not labeled.

(iv) The quarterly reports required under this paragraph (e)(8) are due sixty days following the end of the quarter. The annual reports required under this paragraph (e)(8) are due sixty days following the end of the calendar year.

(v) The reports required under this paragraph (e)(8) shall be submitted to EPA in both electronic spreadsheet and hard copy form.

(9) *EPA inspections.* If EPA inspects any facility and determines that the sulfur content of diesel fuel exceeds the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), liability for such sulfur content violation under § 80.612 will be treated as provided in paragraph (e)(6) of this section for branded refiners or distributors that participate in the consortium under

this paragraph (e). Any other party deemed liable for a violation under § 80.612 must establish a defense under paragraphs (a) through (d) of this section, as applicable.

(10) *Procedures for obtaining approval of survey plan.* The procedure for obtaining EPA approval of a survey plan under this paragraph (e), and for revocation of such approval, is as follows:

(i) A survey plan that complies with the requirements of this paragraph (e) must be submitted to EPA no later than November 1 of the year preceding the calendar year in which the surveys will be conducted;

(ii) The survey plan must be signed by a responsible officer of the consortium which arranges to have an independent surveyor conduct the survey program;

(iii) The survey plan must be sent to the following address: Director, Compliance and Innovative Strategies Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Mail Code 6506J, Washington, DC 20460;

(iv) EPA will send a letter to the party submitting a survey plan under this section, either approving or disapproving the survey plan;

(v) EPA may revoke any approval of a survey plan under this section for cause, including an EPA determination that the approved survey plan has proved to be inadequate in practice or that it was not diligently implemented;

(vi) The approving official for a survey plan under this section is the Director of the Compliance and Innovative Strategies Division, Office of Transportation and Air Quality.

(vii) Any notifications or reports required to be submitted to EPA under this paragraph (e) must be directed to the official designated in paragraph (e)(10)(vi) of this section.

(11) *Independent surveyor contract.* (i) No later than December 1 of the year preceding the year in which the surveys will be conducted, the contract with the independent surveyor shall be in effect, and an amount of money necessary to carry out the entire survey plan shall be paid to the independent surveyor or placed into an escrow account with instructions to the escrow agent to pay the money to the inde-

pendent surveyor during the course of the conduct of the survey plan.

(ii) No later than December 15 of the year preceding the year in which the surveys will be conducted, EPA must receive a copy of the contract with the independent surveyor, proof that the money necessary to carry out the survey plan has either been paid to the independent surveyor or placed into an escrow account, and, if placed into an escrow account, a copy of the escrow agreement, to be sent to the official designated in paragraph (e)(10)(vi) of this section.

(12) *Failure to fulfill requirements.* A failure to fulfill or cause to be fulfilled any of the requirements of this paragraph (e) will cause the option to use the alternative quality assurance requirement under this paragraph (e) to be void *ab initio*.

[66 FR 5136, Jan. 18, 2001, as amended at 69 FR 39204, June 29, 2004; 70 FR 40899, July 15, 2005; 75 FR 22977, Apr. 30, 2010; 75 FR 26127, May 11, 2010]

**§ 80.614 What are the alternative defense requirements in lieu of § 80.613(a)(1)(vi)?**

Any person who blends a MVNRLM diesel fuel additive package into MVNRLM diesel fuel subject to the 15 ppm sulfur standards of § 80.510(b) or (c) or § 80.520(a) which contains a static dissipater additive that has a sulfur content greater than 15 ppm but whose contribution to the sulfur content of the MVNRLM diesel fuel is less than 0.4 ppm at its maximum recommended concentration, and/or red dye that has a sulfur content greater than 15 ppm but whose contribution to the sulfur content of the MVNRLM diesel fuel is less than 0.04 ppm at its maximum recommended concentration, and which contains no other additives with a sulfur content greater than 15 ppm must establish all the following in order to use this section as an alternative to the defense element under § 80.613(a)(1)(vi):

(a)(1) The blender of the additive package has a sulfur content test result for the MVNRLM diesel fuel prior to blending of the additive package that indicates that the additive package, when added, will not cause the