

the Administrator's authority to enforce any provisions of the Act; except that any violation with respect to which the Administrator has commenced and is diligently prosecuting an action under this paragraph (c), or for which the Administrator has issued a final order not subject to further judicial review and for which the violator has paid a penalty assessment under this paragraph shall not be the subject of a civil penalty action under paragraph (b) of this section.

(ii) No action by the Administrator under this paragraph (c) shall affect a person's obligation to comply with a section of this part.

(4) *Finality of order.* An order issued under this paragraph (c) is to become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (c)(5) of this section.

(5) *Judicial review.* A person against whom a civil penalty is assessed in accordance with this paragraph (c) may seek review of the assessment in the United States District Court for the District of Columbia or for the district in which the violation is alleged to have occurred, in which such person resides, or where the person's principal place of business is located, within the 30-day period beginning on the date a civil penalty order is issued. The person shall simultaneously send a copy of the filing by certified mail to the Administrator and the Attorney General. The Administrator shall file in the court within 30 days a certified copy, or certified index, as appropriate, of the record on which the order was issued. The court is not to set aside or remand any order issued in accordance with the requirements of this paragraph (c) unless substantial evidence does not exist in the record, taken as a whole, to support the finding of a violation or unless the Administrator's assessment of the penalty constitutes an abuse of discretion, and the court is not to impose additional civil penalties unless the Administrator's assessment of the penalty constitutes an abuse of discretion. In any proceedings, the United States may seek to recover civil penalties assessed under this section.

(6) *Collection.* (i) If any person fails to pay an assessment of a civil penalty imposed by the Administrator as pro-

vided in this part after the order making the assessment has become final or after a court in an action brought under paragraph (c)(5) of this section has entered a final judgment in favor of the Administrator, the Administrator shall request that the Attorney General bring a civil action in an appropriate district court to recover the amount assessed (plus interest at rates established pursuant to section 6621(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 6621(a)(2)) from the date of the final order or the date of final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of the penalty is not subject to review.

(ii) A person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in paragraph (c)(6)(i) of this section shall be required to pay, in addition to that amount and interest, the United States' enforcement expenses, including attorney's fees and costs for collection proceedings, and a quarterly nonpayment penalty for each quarter during which the failure to pay persists. The nonpayment penalty is an amount equal to ten percent of the aggregate amount of that person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

[63 FR 18998, Apr. 16, 1998, as amended at 70 FR 40457, July 13, 2005]

§ 92.1107 Warranty provisions.

(a) The manufacturer or remanufacturer of each locomotive or locomotive engine must warrant to the ultimate purchaser and each subsequent purchaser or owner that the locomotive or locomotive engine is designed, built, and equipped so as to conform at the time of sale or time of return to service following remanufacture with applicable regulations under section 213 of the Act, and is free from defects in materials and workmanship which cause such locomotive or locomotive engine to fail to conform with applicable regulations for its warranty period (as determined under § 92.10).

(b) For the purposes of this section, the owner of any locomotive or locomotive engine warranted under this

part is responsible for the proper maintenance of the locomotive and the locomotive engine. Proper maintenance includes replacement and/or service, as needed, at the owner's expense at a service establishment or facility of the owner's choosing, of all parts, items, or devices which were in general use with locomotives or locomotive engines prior to 1999. For diesel engines, this would generally include replacement or cleaning of the fuel delivery and injection system.

§ 92.1108 In-use compliance provisions.

(a) Effective with respect to locomotives and locomotive engines subject to the requirements of this part:

(1) If the Administrator determines that a substantial number of any class or category of locomotives or locomotive engines, although properly maintained and used, do not conform to the regulations prescribed under section 213 of the Act when in actual use throughout their useful life period (as defined under § 92.2), the Administrator shall immediately notify the manufacturer or remanufacturer of such nonconformity and require the manufacturer or remanufacturer to submit a plan for remedying the nonconformity of the locomotives or locomotive engines with respect to which such notification is given.

(i) The manufacturer's or remanufacturer's plan shall provide that the nonconformity of any such locomotives or locomotive engines which are properly used and maintained will be remedied at the expense of the manufacturer or remanufacturer.

(ii) If the manufacturer or remanufacturer disagrees with such determination of nonconformity and so advises the Administrator, the Administrator shall afford the manufacturer or remanufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing. Unless, as a result of such hearing, the Administrator withdraws such determination of nonconformity, the Administrator shall, within 60 days after the completion of such hearing, order the manufacturer or remanufacturer to provide prompt notification of such nonconformity in accordance with paragraph (a)(2) of

this section. The manufacturer or remanufacturer shall comply in all respects with the requirements of subpart G of this part.

(2) Any notification required to be given by the manufacturer or remanufacturer under paragraph (a)(1) of this section with respect to any class or category of locomotives or locomotive engines shall be given to ultimate purchasers, subsequent purchasers (if known), and dealers (as applicable) in such manner and containing such information as required in Subparts E and H of this part.

(3)(i) The certifying manufacturer or remanufacturer shall furnish with each new locomotive or locomotive engine written instructions for the proper maintenance and use of the engine by the ultimate purchaser as required under § 92.211.

(ii) The instruction under paragraph (a)(3)(i) of this section must not include any condition on the ultimate purchaser's using, in connection with such locomotive or locomotive engine, any component or service (other than a component or service provided without charge under the terms of the purchase agreement) which is identified by brand, trade, or corporate name. Such instructions also must not directly or indirectly distinguish between service performed by the franchised dealers of such manufacturer or remanufacturer, or any other service establishments with which such manufacturer or remanufacturer has a commercial relationship, and service performed by independent locomotive or locomotive engine repair facilities with which such manufacturer or remanufacturer has no commercial relationship.

(iii) The prohibition of paragraph (a)(3)(ii) of this section may be waived by the Administrator if:

(A) The manufacturer or remanufacturer satisfies the Administrator that the locomotive or locomotive engine will function properly only if the component or service so identified is used in connection with such engine; and

(B) The Administrator finds that such a waiver is in the public interest.

(iv) In addition, the manufacturer or remanufacturer shall indicate by