

(ii) Every manufacturer, remanufacturer, owner, or operator of locomotives or locomotive engines exempted from the standards or requirements of this part must establish and maintain records, perform tests, make reports and provide information the Administrator may reasonably require regarding the emissions of such locomotives or locomotive engines.

(2) For purposes of enforcement of this part, an officer or employee duly designated by the Administrator, upon presenting appropriate credentials, is authorized:

(i) To enter, at reasonable times, any establishment of the manufacturer or remanufacturer, or of any person whom the manufacturer or remanufacturer engaged to perform any activity required under paragraph (a)(1) of this section, for the purposes of inspecting or observing any activity conducted pursuant to paragraph (a)(1) of this section; and

(ii) To inspect records, files, papers, processes, controls, and facilities used in performing an activity required by paragraph (a)(1) of this section, by the manufacturer or remanufacturer or by a person whom the manufacturer or remanufacturer engaged to perform the activity.

(b) *Exemption provision.* The Administrator may exempt a new locomotive or new locomotive engine from § 92.1103 upon such terms and conditions as the Administrator may find necessary for the purpose of export, research, investigations, studies, demonstrations, or training, or for reasons of national security, or for other purposes allowed by subpart J of this part.

(c) *Importation provision.* (1) A new locomotive or locomotive engine, offered for importation or imported by a person in violation of § 92.1103 is to be refused admission into the United States, but the Secretary of the Treasury and the Administrator may, by joint regulation, provide for deferring a final determination as to admission and authorizing the delivery of such a locomotive or locomotive engine offered for import to the owner or consignee thereof upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that the locomotive or locomotive

engine will be brought into conformity with the standards, requirements, and limitations applicable to it under this part.

(2) If a locomotive or locomotive engine is finally refused admission under this paragraph (c), the Secretary of the Treasury shall cause disposition thereof in accordance with the customs laws unless it is exported, under regulations prescribed by the Secretary, within 90 days of the date of notice of the refusal or additional time as may be permitted pursuant to the regulations.

(3) Disposition in accordance with the customs laws may not be made in such manner as may result, directly or indirectly, in the sale, to the ultimate consumer, of a new locomotive or locomotive engine that fails to comply with applicable standards of the Administrator under this part.

(d) *Export provision.* A new locomotive or locomotive engine intended solely for export, and so labeled or tagged on the outside of the container if used and on the engine, shall be subject to the provisions of § 92.1103, except that if the country that is to receive the locomotive or locomotive engine has emission standards that differ from the standards prescribed under subpart A of this part, then the locomotive or locomotive engine must comply with the standards of the country that is to receive the locomotive or locomotive engine.

(e) *Recordkeeping.* Except where specified otherwise, records required by this part must be kept for eight (8) years.

#### **§ 92.1105 Injunction proceedings for prohibited acts.**

(a) The district courts of the United States have jurisdiction to restrain violations of § 92.1103(a).

(b) Actions to restrain violations of § 92.1103(a) must be brought by and in the name of the United States. In an action, subpoenas for witnesses who are required to attend a district court in any district may run into any other district.

#### **§ 92.1106 Penalties.**

(a) *Violations.* A violation of the requirements of this subpart is a violation of the applicable provisions of the Act, including sections 213(d) and 203,

and is subject to the penalty provisions thereunder.

(1) A person who violates §92.1103 (a)(1), (a)(4), or (a)(5), or a manufacturer, remanufacturer, dealer or railroad who violates §92.1103(a)(3)(i) or (iii) is subject to a civil penalty of not more than \$32,500 for each violation.

(2) A person other than a manufacturer, remanufacturer, dealer, or railroad who violates §92.1103(a)(3)(i) or any person who violates §92.1103(a)(3)(ii) is subject to a civil penalty of not more than \$2,750 for each violation.

(3) A violation with respect to §92.1103(a)(1), (a)(3)(i), (a)(3)(iii), (a)(4), or (a)(5) constitutes a separate offense with respect to each locomotive or locomotive engine.

(4) A violation with respect to §92.1103(a)(3)(ii) constitutes a separate offense with respect to each part or component. Each day of a violation with respect to §92.1103(a)(5) constitutes a separate offense.

(5) A person who violates §92.1103(a)(2) is subject to a civil penalty of not more than \$32,500 per day of violation.

(6) The maximum penalty values listed in this section are shown for calendar year 2004. Maximum penalty limits for later years may be adjusted based on the Consumer Price Index. The specific regulatory provisions for changing the maximum penalties, published in 40 CFR part 19, reference the applicable U.S. Code citation on which the prohibited action is based.

(b) *Civil actions.* The Administrator may commence a civil action to assess and recover any civil penalty under paragraph (a) of this section.

(1) An action under this paragraph (b) may be brought in the district court of the United States for the district in which the defendant resides or has the Administrator's principal place of business, and the court has jurisdiction to assess a civil penalty.

(2) In determining the amount of a civil penalty to be assessed under this paragraph (b), the court is to 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.

(3) In any such action, subpoenas for witnesses who are required to attend a district court in any district may run into any other district.

(c) *Administrative assessment of certain penalties—(1) Administrative penalty authority.* In lieu of commencing a civil action under paragraph (b) of this section, the Administrator may assess any civil penalty prescribed in paragraph (a) of this section, except that the maximum amount of penalty sought against each violator in a penalty assessment proceeding shall not exceed \$270,000, unless the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment. Any such determination by the Administrator and the Attorney General is not subject to judicial review. Assessment of a civil penalty shall be by an order made on the record after opportunity for a hearing held in accordance with the procedures found at part 22 of this chapter. The Administrator may compromise, or remit, with or without conditions, any administrative penalty which may be imposed under this section.

(2) *Determining amount.* In determining the amount of any civil penalty assessed under this paragraph (c), 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 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.

(3) *Effect of administrator's action.* (i) Action by the Administrator under this paragraph (c) does not affect or limit 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

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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 provided 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.

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### § 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