

Environmental Protection Agency

§ 80.613

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]

§ 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 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 purchaser-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), or the 500 ppm sulfur standard under § 80.510(a) or 80.520(c), 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—

§ 80.613

40 CFR Ch. I (7-1-08 Edition)

(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 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 require-

ments 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 refiner 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.

[66 FR 5136, Jan. 18, 2001, as amended at 69 FR 39204, June 29, 2004; 70 FR 40899, July 15, 2005]

§ 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 MVNRLM diesel fuel sulfur content to exceed 15 ppm sulfur.

(2) In cases where the storage tank that contains MVNRLM diesel fuel prior to additization contains multiple fuel batches, the blender of the additive package must have sulfur test results on each batch of MVNRLM diesel fuel that was added to the storage tank during the current and previous volumetric accounting reconciliation (VAR) periods, which indicates that the additive package, when added to the component MVNRLM diesel fuel batch in the storage tank with the highest sulfur level would not cause that component batch to exceed 15 ppm sulfur.

(b) The VAR standard is attained as determined under the provisions of this section. The VAR reconciliation standard is attained when the actual concentration of the additive package used per the VAR formula record under paragraph (f) of this section is less than the concentration that would have caused any batch of MVNRLM diesel fuel to exceed a sulfur content of