



**ENFORCEMENT OF THE VOLATILITY REGULATIONS
QUESTIONS AND ANSWERS – 1990**

PREFACE

This 1990 edition of the Enforcement of Volatility Regulations -- Questions and Answers responds to numerous questions we received both in 1989 and 1990 concerning the manner in which the United States Environmental Protection Agency intends to implement and enforce the gasoline volatility regulations at 40 CFR §§ 80.27 - 28. It was prepared by the Field Operations and Support Division of the Office of Mobile Sources, United States Environmental Protection Agency, and supersedes the 1989 edition of this document.

Regulated parties may use this document to aid in achieving compliance with the volatility regulations. It does not alter the requirements of the volatility regulations, however.

We will attempt to respond in writing to any additional questions on this subject. Please send any such questions in writing to Director, Field Operations and Support Division (EN-397F), United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

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Washington, D.C.
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A. LEAD TIME ISSUES

1. Question: Can a refiner ship or a pipeline transport higher RVP fuel in the summer to be used in the winter?

Answer: The regulations prohibit the sale, supply, offering for sale or supply, dispensing or transport of gasoline whose volatility exceeds the applicable standard. "Applicable standard" is defined in the regulations as the standard for the geographical area and time period in which the gasoline is intended to be dispensed to motor vehicles. Where the area and time period cannot be determined, the applicable standard will be assumed to be the lowest standard for that year (i.e., 9.0 psi in 1990).

The issue of what is the applicable standard will only arise when gasoline is moving through the distribution system. Once gasoline is delivered to a service station or fleet dispensing facility, the applicable standard will be the RVP standard for the area in which the facility is located and the time period in which the gasoline is being sold, offered for sale or dispensed. For gasoline in other parts of the distribution network, the Agency anticipates that refiners, importers, distributors, ethanol blenders, resellers, and carriers will clearly designate the volatility class of gasoline and the location and time period in which it is intended to be dispensed to vehicles. Where this is not done and this information cannot be determined, the Agency will assume that the lowest standard is applicable.

Therefore, gasoline that is not intended to be dispensed to motor vehicles until after the close of the volatility control period on September 15 may be lawfully shipped prior to that date. However, the burden will be on the parties involved in the sale and distribution of such product to demonstrate that it will in fact be dispensed at a later date and to assure that it is not dispensed during the control period. Particularly at a facility directly supplying retail and fleet facilities (e.g., a terminal or bulk plant), product intended for later use would have to be kept carefully segregated from low volatility product being shipped to such facilities, until after September 15. Should such high RVP fuel actually end up at a retail station or fleet facility prior to the close of the control period, this will constitute a violation of the regulations for which responsible parties will be liable. The Agency encourages additional oversight testing when "winter" gasoline is in the system.

In order to determine if particular product is intended for dispensing after the control period, the Agency will generally rely on certifications or disclaimers contained in documents accompanying the product which clearly state the intended use of the product, as well as any other evidence showing the status or intended use of the product.

2. Question: When a volatility standard changes in the middle of the control period (e.g., from 10.5 psi to 9.5 psi in Georgia on July 1), where does the new standard apply on that date? When must the refiner stock lower volatility gasoline in its market tanks?

Answer: When an applicable standard changes, gasoline being sold or dispensed at service stations and fleets on that date must be in compliance with the new standard. Upstream and midstream parties must also assure that gasoline moving through the distribution network prior to (and after) that date that will be dispensed to motor vehicles on or after that date is also in compliance with the new standard.

The refiner must stock the lower volatility product in its market tanks as of the first day that the lower applicable standard is effective.

Moreover, refiners are also potentially liable for high RVP gasoline remaining in the distribution system after the first day of the lower applicable standard. Accordingly, the prudent refiner should anticipate when its high RVP product placed in the distribution system might be subject to a change of applicable standard in the middle of a control period.

3. Question: What should a retailer do if, due to low turnover, he still has non-complying gasoline in his tanks when he receives complying gasoline from the distributor at the beginning of the compliance period? If he has a large tankful, does he have to hold it all summer? May a terminal close and seal off tankage that does not meet specifications?

Answer: The regulations provide a two-date system for the start of the volatility control period. Retail stations should begin receiving lower RVP fuel from their distributors even before the effective date of the distributor's compliance period (as the distributor brings his facility into compliance) and by such date at the latest the retailer should begin receiving product that fully meets the applicable RVP standard. Thus, retail stations should receive at least a month's deliveries of complying fuel plus an additional quantity of fuel with a lower volatility than was in its tanks initially. Should a violation occur and a party is able to demonstrate a particular hardship, EPA will take this into account in determining whether (and in what amount) to mitigate the penalty.

In the case of a terminal which has product that exceeds the applicable RVP standard, the regulations require that this product not be sold, supplied, offered for sale or supply, dispensed, or transported. The alternatives available are: a) store and seal the product until a time period when the product can be distributed, provided it is clearly designated as product not intended to be sold, supplied, offered for sale or supply, dispensed, or transported; b) transport the product to a geographic area where the product can be used, provided that such transportation is only for the purpose of correcting the high RVP; c) blend lower volatility product with the higher RVP product to bring its volatility within the standard.

4. Question: Some vehicle and engine manufacturers blend test fuels for the purpose of testing vehicles on a wide range of fuel volatility. If the volatility of the blended fuel exceeds the standard, what provisions will EPA extend for such testing? Would the

Agency relax these reporting requirements for the production, storage, shipping and use of test fuels with high RVPs in amounts less than ten thousand gallons?

Answer: EPA may exercise its discretion to not enforce violations of the volatility standards in the case of high RVP gasoline blended for the purpose of conducting tests on vehicles, provided the party provides written notification to EPA in advance, which includes information concerning the nature and purpose of the tests and the fuel (e.g., supplier, RVP level, amount). If the gasoline is to be used in an ozone non-attainment area, the party should justify why the test cannot be performed in an ozone attainment area. If EPA determines that the test program has a valid purpose and will have no significant adverse impact on the environment, EPA will, as a matter of enforcement policy, take no action.

The Agency does not plan to relax further its enforcement discretion nor the above notification requirements for test fuels produced in small volumes.

B. ESTABLISHING THE CLASSIFICATION OF PRODUCT AND APPLICABLE RVP STANDARD

1. **Question:** The California Air Resources Board RVP rules allow a refinery to designate a tank as "finished and ready for shipment" after the tank is certified by laboratory tests. Only then is it considered finished gasoline and subject to RVP regulations. Will EPA grant the same flexibility?

Answer: If, at a refinery or import facility, a tank blend is above the applicable RVP limit and the refinery/import facility intends to re-blend it until it meets the regulatory standard before introducing it into the distribution system, the product should be clearly designated as product not intended for shipment, and documentation should support this classification. The product then would not be considered finished gasoline that is subject to the regulations.

2. **Question:** How will an upstream facility establish at the time of inspection that a product is intended to be blendstock rather than finished product?

Answer: With regard to product being shipped out of the refinery, in the absence of evidence to the contrary, if a product's characteristics are such that the product meets the regulatory definition of gasoline ("any fuel sold in any State for use in motor vehicles and motor vehicle engines, and commonly or commercially known or sold as gasoline") EPA will treat it as finished gasoline subject to the volatility regulations. However, as a matter of enforcement policy, EPA will not hold a party liable for product that arguably meets the regulatory definition of gasoline if: a) the product is clearly labeled as blendstock and documentation supports this classification; b) the label clearly states that the product may not comply with federal RVP standards; c) some aspect of the product's quality other than RVP supports the party's claim that it intended the product to be further blended before being sold, supplied, etc., as finished product (e.g., the octane is higher or lower than product typically sold as regular or premium grade gasoline); d) the party has obtained a written certification from the buyer/recipient of the product that he understands that the product may be nonconforming and that he will not sell or supply the product as finished gasoline unless or until it is blended to meet federal RVP standards, or he receives the equivalent certification from a subsequent buyer; and e) the party has **no knowledge** or reason to believe that the product will not be further blended to **comply with the applicable RVP standard** before being sold, supplied, or transported as **finished product**.

3. **Question:** How will an upstream facility establish at the time of inspection that a product is intended for storage or export rather than for sale?

Answer: EPA will assume that all gasoline found in the United States is intended for domestic sale and thus is subject to the RVP standards unless the product is clearly documented to be for export only and the evidence (e.g., normal commercial documents)

supports this classification. The label should further clearly state that the product may not comply with federal RVP standards. Similarly, regarding product in storage at a refinery or importer facility, EPA will not hold a party liable for product that does not comply with the applicable standard if the evidence shows that the product is being stored and is not being sold, offered for sale, supplied, offered for supply, transported or dispensed. The Agency will generally rely on certifications or disclaimers contained in documents accompanying the product which clearly state the intended use of the product, as well as any other evidence showing the status or intended use of the product.

4. Question: How can a party establish the time and place the gasoline is to be sold for purposes of determining the applicable RVP standard? How can it protect itself? Where no indication exists regarding intended destination or time of delivery, how will EPA determine the applicable RVP standard?

Answer: EPA will look at commercial documents, such as shipping documents and contracts of sale, for evidence of destination and expected time of dispensing to motor vehicles. If the intended destination and expected time of dispensing are unknown, the party should provide documentation of the type of gasoline the product is and where it is being shipped. In the absence of any indication concerning intended destination or expected time of dispensing, the most stringent RVP standard will apply (i.e., 9 psi applied in 1990).

5. Question: What type of labeling of products will be required? Must a party physically label tankage, or will it be sufficient that records concerning blendstocks or exports be clearly marked as such?

Answer: The regulations do not require that labels be physically affixed to tanks of gasoline. Records concerning blendstocks or exports that are clearly marked as such should be sufficient. However, a party may wish to label its tanks to further protect itself.

6. Question: Will EPA move an RVP boundary to relieve a hardship or reduce costs to consumers? (For example, an area with a lower RVP standard (e.g., Texas west of 99 degree longitude) is supplied from a point with a higher RVP standard, and no lower RVP supply point is available.) If not, what does the Agency recommend? Will EPA allow flexibility regarding volatility boundary lines? Would the Agency consider moving boundaries away from the current ASTM classification scheme toward historical and geographic distribution patterns?

Answer: The Agency intends to apply the volatility rule strictly with regard to the geographic boundaries. Moreover, the RVP boundaries cannot be changed without amending the regulations. It should be noted that intra-state RVP "boundaries" (e.g., the 99 degree longitude line in Texas) were modeled on the ASTM classification

scheme. During the current Phase II rulemaking, the Agency is considering all alternative schemes suggested.

7. Question: What flexibility will ASTM have in changing the boundaries of volatility classes in the future? Will EPA approval be required?

Answer: ASTM boundaries and EPA regulations are two completely different things. ASTM actions have no legal effect on EPA. Federal geographical boundaries can only be changed by amending the volatility regulations.

8. Question: Should the volatility rule be changed to one having standards for the different geographic areas which remain unchanged during the compliance period (i.e., eliminate the month-to-month changes within a particular area)?

Answer: Little if any comment was received on this issue. The Agency understands the concern which the month-to-month changes create for compliance and enforcement efforts. The suggested change will be considered as part of the Phase II rulemaking.

9. Question: If product type at a retail facility is in the process of being changed to an alcohol blend, the product coming from the pump nozzle may not initially satisfy the alcohol content requirement at 40 CFR § 80.27(d)(2). Will the retail facility still be eligible for the special provision for alcohol blends at 40 CFR § 80.27(d)(1) of the regulations?

Answer: In order to be eligible for the special provision at 40 CFR § 80.27(d)(1), which provides for an additional one pound per square inch allowance, the product coming from the pump nozzle must satisfy the alcohol content requirement. This would apply when product type is being changed at a retail outlet.

10. Question: Must the label required at 40 CFR § 80.27(d)(3)(i) state the precise percentage concentration of ethanol?

Answer: A label stating that the gasoline contains between 9 and 10 percent ethanol would satisfy the requirement of 40 CFR § 80.27(d)(3)(i).

11. Question: Will Phase II of the volatility regulations, to be implemented in 1992, continue to permit a one pound RVP allowance for ethanol blends?

Answer: Phase II regulations have not been promulgated. A final decision concerning continuation of the ethanol tolerance has not been made.

12. Question: Are territories and possessions like Puerto Rico covered under the regulations?

Answer: Only gasoline intended to be dispensed in the 48 states in the continental U.S. is subject to the regulations. Product shipped to such states from places like Puerto Rico (or Alaska or Hawaii) will be treated like imported gasoline.

C. CLASSIFICATION OF REGULATED PARTIES

1. Question: What is the classification of a party who receives and stores, but does not own the gasoline? What if he blends the gasoline at the owner's discretion?

Answer: Under the regulations, "distributor" means any person who transports or stores or causes the transportation or storage of gasoline at any point between any gasoline refinery or importer's facility and any retail outlet or wholesale purchaser-consumer's facility. Thus, ownership is not necessary to render a party a distributor under the regulations. A distributor who transports or stores or causes the transportation or storage of gasoline without taking title to or otherwise having any ownership of the gasoline and without altering either the quality or quantity of the gasoline is a "carrier" under the regulations. Any person who blends gasoline, however, is classified as a refiner and is subject to refiner liability and defenses. A person who adds ethanol to gasoline (and meets the other elements of the definition) is classified as an ethanol blender and is subject to ethanol blender liability and defenses.

2. Question: Will a trader who buys and sells gasoline only in "back-to-back" transactions, thereby taking legal title but not more than instantaneous physical custody of such products, be considered a "distributor" under 40 CFR § 80.2?

Answer: Yes, the regulations provide for distributor liability on the part of any person who transports or stores or causes the transportation or storage of gasoline at "any point" between any gasoline refinery or importer's facility and any retail outlet or wholesale purchaser-consumer's facility. A party who takes legal title to the product transports or stores or causes the transportation or storage of the gasoline during the time it is in that party's custody and, thus, is covered as a distributor under the regulations.

3. Question: Will a blender of gasoline be considered a "refiner" under 40 CFR § 80.2?

Answer: Yes. However, if the party meets the definition of an ethanol blender, he will be subject to ethanol blender liability and defenses rather than refiner liability and defenses.

4. Question: Assume that an ethanol blender uses raffinate as a fuel component. In the event of an RVP violation detected downstream, must the blender to meet the defense requirements of a refiner or of an ethanol blender as described in 40 CFR § 80.28(g)?

Answer: The Agency interprets the definition of "ethanol blender" strictly as any person operating a refinery at which gasoline is produced solely through the addition of ethanol to gasoline, and at which the quality or quantity of gasoline is not altered in any

other manner. A blender that uses raffinate as a fuel component thus could not be classified as an "ethanol blender," but rather would be classified as a "refiner" and would be required to meet the defense requirements of a refiner in the event a violation is detected downstream.

5. Question: Often, fuel terminals offering ethanol and gasoline for blending are automated or otherwise unsupervised, allowing a truck driver to create a load of blended fuel without direct supervision from the component supplier. The fuel is either blended in line while feeding the truck or actually splash blended in the truck. Accordingly, in the latter circumstance, are there two ethanol blenders, one the terminal operator responsible for testing the RVP of the component gasoline, and the second being the truck operator creating the newly blended fuel and responsible for testing the RVP thereof?

Answer: This hypothetical describes three potentially responsible parties. Where ethanol and gasoline are "splash" blended in a truck operated by a common carrier, usually there are two "ethanol blenders" subject to the volatility regulations: the common carrier company and the company that hired the common carrier. The regulations define an "ethanol blender" as any person who owns, leases, operates, controls, or supervises an ethanol blending plant. In the situation described, EPA would consider the truck as the ethanol blending plant. The company that owned and/or operated the truck would thus meet the definition of "ethanol blender," and in the event of a violation would be responsible for meeting the defense for an "ethanol blender" found at 40 CFR § 80.28(g)(6) of the regulations.

The company that hired the truck in most situations would meet the definitions both of "ethanol blender" and "distributor," 40 CFR § 80.2(l), for "caus[ing] the transportation or storage of gasoline at any point between any gasoline refinery or importer's facility and any retail outlet or wholesale purchaser-consumer's facility," and in the event of a violation would be required to meet the defenses at 40 CFR §§ 80.28(g)(3) and (g)(6).

Under the regulations, where a violation is detected at an ethanol blending plant, the distributor, carrier, and refiner or importer of the gasoline which was blended with ethanol are **deemed** to be in violation, in addition to the ethanol blender. 40 CFR § 80.28(d)(1). **The** company that operated the terminal and provided the component gasoline would meet the definition of a gasoline distributor and in the event of a violation would be liable unless it is able to establish the defense for distributors found at 40 CFR § 80.28(g)(3).

D. LIABILITY OF REGULATED PARTIES

1. Question: Where one refiner supplies gasoline to its branded retail outlet which was obtained in exchange from a terminal operated by another refiner, and a violation is detected at the retail outlet, who is liable?

Answer: The regulations provide for presumptive liability on the part of both parties to the exchange, one party as the "branded" refiner and the other as a distributor.

2. Question: For violations found at branded or unbranded distributor facilities, will EPA seek to hold liable only the distributor in custody of the product at the time of the violation or will all distributors in the prior chain of title be considered vicariously liable?

Answer: All distributors will be presumed liable.

3. Question: For violations found at branded or unbranded retail outlets or wholesale-purchaser consumer facilities, will EPA hold liable all distributors in the prior chain of title to that product?

Answer: Yes.

4. Question: As to mere storage of gasoline at refineries or import terminals, does EPA's enforcement policy exemption apply to only the actual importer or refiner of such product, or to any person who owns or took title to such product while it remained in storage at the import or refinery terminal?

Answer: The policy regarding gasoline in storage will apply to any person who owns or takes title to the gasoline so long as the person can show that the product is in fact being stored and is not being sold, offered for sale, supplied, offered for supply, transported or dispensed. If the product is moved out of storage and put into the chain of distribution, the owner of the product is subject to liability for nonconforming gasoline as set forth in the regulations.

5. Question: If a refiner ships product to its own terminal via a fungible pipeline and can show that only product with correct volatility was put into the pipeline by the refiner, but that product having high volatility is discovered at the terminal, is the refiner liable? If the refiner removes the high volatility product from distribution, how can the refiner show that it has done so?

Answer: In order to establish a defense in this situation, the refiner would have to satisfy the elements of the refiner's defense at 40 CFR § 80.28(g)(4).

The **refiner** can establish it has removed the high volatility product from distribution by placing disclaimers or certifications on the paperwork relating to this product which clearly state the product is not in distribution or that it is to be distributed to an area where it will be in compliance. If the product is further distributed as non-complying fuel, this will constitute a violation.

6. Question: In a situation where a violation is detected at a branded retail outlet which is supplied from a branded distributor which, in turn, receives gasoline through a pipeline which transports the commingled production of the refiner whose brand appears, plus one or more other refiners, are all the refiners liable? How could the refiners establish a defense?

Answer: The refiner whose brand name appears at the retail outlet would be liable; in order to establish a defense, it would have to show each of the elements of the refiner's branded facility defense in 40 CFR § 80.28(g)(4). The other refiner(s) whose commingled product was delivered to the retail outlet may be liable if they meet the definition of another regulated party (e.g., distributor).

7. Question: If a violation is found at a terminal, where the terminal operator does not own the gasoline, who would be liable?

Answer: The owner or operator of a terminal which stores gasoline without taking title to or otherwise owning the gasoline and without altering either the quality or the quantity of the gasoline, is defined by the regulations as a "carrier" (see 40 CFR § 80.2(t)). As a carrier, this party would be presumed liable because the gasoline having high volatility was found at that carrier's facility. In addition, the refiner, importer, or ethanol blender who produced or imported the gasoline would be presumed liable.

8. Question: What should a carrier do if it would be in breach of a contract with the company supplying the product by refusing to transport or store product having excessive volatility?

Answer: Where gasoline having excessive volatility is found at a carrier facility (including a terminal which does not take title to the product), the carrier is presumed liable for violating the regulations. We believe carriers can, and should, negotiate contracts which are drafted in such a way that the carrier is not obligated to transport or store product in violation of the regulations.

9. Question: In a case where more than one party is presumed liable for a violation, and more than one of the parties is unable to establish a defense, is each party liable for a separate penalty?

Answer: Each party who is liable for a violation, and who is unable to establish a defense, is liable for a separate penalty.

10. Question: If a finished product tank at a refinery is analyzed by the refiner using a regulatory-approved method and is found to be 0.2 psi below the applicable RVP standard and is released for sale, and a day later the tank is retested by the refiner and found to be 0.1 psi over the applicable RVP standard, is the refinery out of compliance?

Answer: In this scenario the second test would indicate that the product is out of compliance, unless the refiner has good reason to believe the second test is anomalous. At a minimum it would seem prudent to conduct additional testing on this product. If a subsequent EPA test were to find the RVP of the product exceeds the applicable standard, the refiner's testing described in this scenario would not prove the product was in compliance.

E. DEFENSES

1. Question: What kind of documentation or other evidence must a party provide to establish that it (or his employees or agents) did not cause a violation?

Answer: All factors cannot be listed because factual circumstances differ and because EPA cannot anticipate all the types of evidence that may show non-causation. For all parties, however, in meeting the non-causation portion of their defense, the regulations provide that the party must show, by reasonably specific showings, by direct or circumstantial evidence, that the party (or the party's employee or agent) did not cause the violation. In many instances the cause of the violation will be evident from the inspection results and related documentation.

In the case of a refiner or importer, providing results of the sampling and testing of the gasoline in question before it left the refinery or importer's facility would be a strong factor in determining whether the refiner or importer caused the violation. However, because the refiner or importer could have caused the violation despite acceptable test results, additional evidence may be required. For example, a refiner could ship to its own downstream terminal two products with different volatilities intended for different geographical areas or different time periods. If these products become commingled after leaving the refinery, the product intended for the lower volatility area or time period could be in non-compliance. The refiner thus could have "caused" this violation even though the product was in compliance when it left the refinery.

For distributors, resellers, ethanol blenders and carriers, the best evidence to show they did not cause the violation is evidence of who caused the violation and how. Other strong evidence would be test results showing the particular gasoline in question met the standards when it was delivered from these parties to the next person in the distribution chain. Evidence consisting of the other defense elements (e.g., receipt of product which was in compliance, an oversight program with periodic test results, and evidence of blending no more than 10% ethanol in the case of ethanol blenders) would assist in showing the violation must have been caused by another, but this is not necessarily conclusive. Where no cause can be established for a violation, and no person in the distribution chain will accept responsibility, the showing necessary for each person in the chain to establish it did not cause the violation will be more difficult.

It is not sufficient for a distributor to show that it did not handle the gasoline, because there are ways to cause a violation without actually touching the gasoline (e.g., by misrouting high RVP gasoline to a low RVP area). Moreover, other elements of the defense still must be met.

In the case of a retailer, the following types of evidence are examples of relevant factors relating to whether the retailer caused a violation:

- 1) records evidencing whether or not all gasoline purchased by the retailer after the compliance date for upstream parties complied with the applicable standard;
- 2) any evidence regarding whether the retailer knew or had reason to believe that the gasoline did not meet the standard;
- 3) any evidence regarding alteration of gasoline stored in his tanks by the retailer;
- 4) turnover rate; and
- 5) any evidence that the retailer may have received gasoline from an unidentified supplier(s).

2. Question: What criteria will EPA use to evaluate oversight programs; is sampling and testing required, and if so how much? What type of service station monitoring is considered acceptable? Is there a minimum percentage of shipments which must be tested? As part of its oversight program, must a branded refiner perform periodic sampling and testing at their non-owned terminals which supply the branded refiner's dealers pursuant to an exchange agreement, where the non-owned terminals carry out their own periodic sampling and testing program?

Answer: In order for a defense to be established by a distributor, reseller, ethanol blender, or carrier (when the violation is found at the carrier facility), these parties must show (in addition to other elements) an oversight program such as periodic sampling and testing to monitor the product being sold, supplied, or transported by that party. This program would thus monitor the quality of product in the possession or ownership of the party, and not of product which has passed downstream. The volatility regulations do not require that an oversight program consist of sampling and testing, but EPA is not aware of an effective oversight program which would not include some periodic sampling and testing.

The frequency of periodic testing which would satisfy this requirement will depend upon several factors, including the following: a) the results of previous sampling; b) the volume of product in a particular batch (the larger the volume, the greater the justification for sampling and testing that batch); c) the degree of confidence in the quality of the product which was received; d) the opportunity for increased volatility while the product is in the possession of the party (e.g., higher volatility product present which could be commingled); and e) the opportunity to deliver product to a geographic region or in a time period requiring a lower volatility.

In the case of refiners, two types of sampling and testing are required (in addition to other requirements) in order to establish a defense where a violation is found downstream and they are presumed liable. The refiner is required to show through sampling and testing that the gasoline determined to be in violation was in compliance with the applicable standard when transported from the refinery. This generally would require that all product be tested. In addition, when the violation is found at a branded

facility downstream, the refiner also must show a quality assurance program at its downstream branded facilities, such program to include periodic sampling and testing. The frequency of periodic sampling and testing which would satisfy this requirement will depend upon factors such as the following: a) the volume of product being handled at a particular facility; b) the opportunity for violations to occur (e.g., the presence of higher volatility product which could cause a violation through commingling); c) the results of previous sampling at that facility and at facilities upstream and downstream from the facility found in violation; d) if there is reason to believe relevant facilities do not comply with the contractually imposed requirements designed to prevent violations; and e) the results of sampling and testing in the market area where the violation occurred. A branded refiner may use other parties to conduct periodic sampling and testing downstream. However, if the branded refiner is to meet the oversight portion of its defense, it cannot simply rely on another party's oversight; the refiner must have an appropriate contract with the party and maintain oversight with regard to that party's program. If the other party's sampling or testing is inadequate the branded refiner will not be able to meet its defense.

3. Question: What constitutes an acceptable RVP oversight program where ethanol is blended into trucks? Since the fuel in the truck may be stratified immediately after "blending" can the truck blender satisfy the oversight portion of its defense by hand-blending samples of base products with ethanol, duplicating the truck ratios of gasoline to ethanol?

Answer: The basic requirements for ethanol blender oversight programs for RVP are referred to in the answer to question E-2. In the case of truck blenders, sampling and testing from locations in addition to the trucks may be useful or necessary. For example, samples could be taken after the product is dropped, if it is dropped into a relatively empty storage tank, or samples could be taken directly from truck compartments. However, because of the possibility that product carried in the different truck compartments is not homogeneous (this is particularly true in the case of truck splash blending), the oversight program needs to include periodic sampling and testing of product carried in each of the truck's compartments separately, and not only of the truck as a whole.

Hand-blending a small amount of gasoline product with ethanol and then testing may be one facet of such an oversight program but we doubt whether it would be reliable enough to substitute for taking representative samples of finished blended product from storage tanks.

4. Question: What constitutes an acceptable oversight program for pipeline and motor carriers; is testing required?

Answer: Both pipeline carriers and motor carriers are presumptively liable for violations detected at their facilities. To rebut this presumption, both types of carriers have to demonstrate (in addition to the other defense elements) an oversight program

concerning the product which is carried. Such an oversight program does not necessitate testing each load or batch of gasoline but envisions a program such as periodic sampling and testing. The frequency of testing would depend on factors such as the size of the loads or batches, and larger loads or batches would justify more frequent testing. The oversight requirement applies to commingled product, as well as product received from a single source.

In particular, motor carriers could have a valid oversight program without actually testing the product themselves. For example, they could arrange with the owner of the product to do periodic testing of the gasoline immediately before or after delivery and could use these test results as a basis for oversight. Such an alternative oversight program may be particularly appropriate for a carrier who delivers product that does not pass through a facility owned or operated by him.

Pipeline carriers, on the other hand, normally transport batches of gasoline through their own facilities which are very large, so that testing of every batch by the pipeline operator may be necessary. Factors relative to the appropriate frequency of sampling for a pipeline include the following: a) the results of previous sampling (the discovery of gasoline having excessive volatility would necessitate increased sampling frequency); b) the volume of product being moved (the larger the volume of a batch, the greater the justification for sampling and testing that batch); c) the degree of confidence the pipeline has in the representations made by the company providing gasoline to the pipeline; and d) the opportunity for increased volatility due to commingling with higher volatility product in the pipeline.

5. Question: Did EPA anticipate that some pipelines would require RVP to be 0.5 psi below the standard? Why can a common carrier set a lower standard than EPA?

Answer: EPA anticipated that regulated parties would take action to assure product they sell, dispense or transport complies with the volatility standard. EPA has not anticipated the particular levels which would be used. Pipelines and other businesses are free to establish whatever criteria they choose as part of the operation of their business as long as the criteria established does not require noncompliance with the federal standard. EPA assumes that such lower standards have been set in order to assure that product sampled by EPA is not found to be in violation, and are thus a prudent effort by the pipelines to comply with the standards in light of EPA's statements that regulated parties must take test variability into account in producing and marketing their product.

6. Question: What must a refiner do to meet the "contract defense," as set forth in 40 CFR § 80.28(g)(4)?

Answer: The defenses set forth in 40 CFR § 80.28(g)(4) relate to violations discovered at branded distributor, reseller or ethanol blender facilities (40 CFR §

80.28(c)) and at branded retail outlets and wholesale purchaser-consumer facilities (40 CFR § 80.28(e)).

In such cases the refiner must meet all the elements of the defense in 40 CFR §§ 80.28(g)(4)(i) and (ii), and must meet one of the additional elements in 40 CFR § 80.28(g)(4)(iii). 40 CFR §§ 80.28(g)(4)(iii)(B), (C), (D) and (F) set forth the "contract defense."

First, the refiner must demonstrate the existence of a contract with the appropriate entity. This contract must have been designed to prevent the specific circumstances which caused the particular violation.

Second, there must be an adequate oversight program, such as periodic sampling and testing, to ensure compliance with the contractual obligation. This oversight defense element has been discussed in response to other questions in this section.

With regard to the contract itself, we feel it is inappropriate for EPA to set forth specific requirements regarding the necessary provisions of such contracts. Rather, such contracts will be evaluated on a case-by-case basis. However, the following is a partial list of broad areas that a contract should address:

1) The amount of sampling and testing that must be done by the entity with whom the contract is in place (e.g., distributor).

2) Specific procedures and other specific requirements to assure that gasoline or blend stock is not commingled with gasoline that is to be marketed in geographical areas or time periods having lower RVP requirements, and to assure that gasoline is not shipped to such areas or time periods having lower RVP requirements. The specific requirements must be aimed at the circumstances as they exist with each entity. They must be more than mere recitals that the entity must avoid violating the volatility regulation.

3) Required training regarding the regulations and the procedures and requirements outlined in the contract to prevent violations.

4) Appropriate responses if gasoline having excessive volatility is identified by periodic sampling and testing or by any other means, including (where appropriate) reporting, corrective actions, steps to prevent future violations, steps to identify the cause of the violation, resampling and testing, increased sampling and testing, retraining, etc.

5) Appropriate responses if it is discovered that a person with whom a contract is in place is not in compliance with the contract provisions. Such responses should include affirmative actions which are reasonably calculated to compel the person to comply with the contract provisions.

7. Question: When a violation is found at a retail outlet, when is the carrier who delivered the gasoline to the retail outlet liable, and how may the carrier establish a defense?

Answer: When a violation is found downstream from a carrier (i.e., not at the carrier's facility), the carrier is liable only if EPA is able to show that the carrier caused the gasoline to violate the standard. The only defense available to the carrier in such a case is to show that it did not cause the violation or that no violation occurred. The carrier defense at 40 CFR § 80.28(g)(1) applies only to violations found at carrier facilities.

8. Question: What records are required for purposes of establishing a defense, and for how long should these records be kept? What types of documents should be kept on site?

Answer: The regulations do not require a party to keep test records, nor most other records. The exception is that there are specific minimum time period requirements for keeping certain documents related to ethanol blend product. See 40 CFR § 80.27(d)(2)(ii) (at least one year). However, in order to establish a defense, certain records will normally be needed by parties. The types of records are generally specified in the regulations (e.g., test results showing gasoline in compliance when delivered to the next party downstream).

The statute of limitations for prosecuting violations under the Clean Air Act is five years from the date of discovery of the violation. A party therefore may wish to keep records related to establishing a defense for five years to protect itself.

The regulations do not require that records be kept on site. EPA inspections will be facilitated, however, if documents relating to product classification are made available to EPA inspectors on site. This would be of particular importance when a company believes the product is not subject to the volatility regulations (e.g., the product is blendstock, for export, or in storage). In addition, the applicable RVP standard for the product will depend upon the intended time and place of dispensing the gasoline to motor vehicles. In the absence of documents that provide this information (or other satisfactory evidence), the most stringent RVP standard will be assumed. Having such documentation readily available to EPA inspectors will facilitate this determination.

9. Question: Can a party rely on tests done by another party? How long must regulated parties maintain physical gasoline samples taken in conjunction with an oversight program?

Answer: The Agency will evaluate the adequacy of an oversight program on the basis of records of sampling and testing, rather than by evaluation of samples of gasoline. A retained sample could conceivably be useful in resolving a discrepancy between a company's and EPA's test results. Of course, the volatility of a sample is

reduced by opening the container for the first test and may be reduced by mere storage, so that the ultimate usefulness of retained samples is questionable.

10. Question: Can a party rely on tests done by another party or by an independent laboratory? Will a third party company assume any liability if their actions lead to violations?

Answer: Under certain circumstances tests performed by another party or laboratory may be acceptable, especially where the reliability of the tests is high (e.g., where a carrier contracts to have a supplier sample and test product immediately after delivery). Liability is not transferred to the third party who conducts the tests, however; the burden remains on the regulated party to demonstrate that any testing is performed in accordance with the regulatory requirements, and that sampling methods and frequency are adequate.

11. Question: Where a single organization such as a co-op owns and operates a refinery, pipeline, and bulk plants which receive no product from outside this system, and where retail outlets and wholesale purchaser-consumers purchase all of their product from the organization, can a single oversight program satisfy the requirements of the RVP rule?

Answer: In order for a refiner, carrier, or distributor to establish a defense under the regulations, these parties must demonstrate an oversight program which includes periodic sampling and testing. An oversight program performed by someone other than the regulated party would satisfy this requirement so long as the sampling and testing is carried out in a manner which adequately monitors product quality at all appropriate places along the distribution network. In the scenario described in the question, the refiner must demonstrate testing of all product leaving the refinery, as well as periodic sampling at the remaining places along the distribution network (pipeline, bulk plants, retail outlets, etc.). The results of the downstream sampling program may justify a program of less frequent sampling, but it is unlikely that downstream sampling could be eliminated altogether. It is difficult or impossible for EPA to state a specific sampling frequency that is necessary. The frequency of sampling at the bulk terminals would depend in part on whether the system is truly closed. Moreover, the regulated parties are familiar with their system, equipment, personnel, history of problems with quality assurance, etc. Each of the separate regulated parties in the distribution network could agree to use a sampling program conducted by the parent organization, but if a violation is found by EPA and this oversight program is found to be deficient, the regulated parties will not be able to establish the oversight element of the defense.

12. Question: If a party has adjacent facilities (different divisions of the same company), or a company pipeline delivers gasoline to tankage owned by the same company, do they have to test continuously at both?

Answer: An appropriate sampling and testing program will depend upon the specific factual situation involved. If product is shipped from both facilities, testing should be done at both facilities. If product is transferred from one facility to the other through a pipeline used by the company to transport product exclusively between the facilities (i.e., a "tight system") before being shipped out, testing product just prior to its leaving the second facility may be sufficient to assure that the product complies with the applicable RVP standard when it leaves the party's facility.

13. Question: What type of evidence will EPA accept regarding the ethanol content of gasoline?

Answer: In order for an ethanol blender to establish a defense for a violation found at or downstream from the ethanol blender's facility, the ethanol blender must demonstrate (in addition to other defense elements) that the gasoline determined to be in violation contained between 9% and 10% ethanol (by volume) when it was delivered to the next party. The best evidence that the ethanol content of the gasoline contains at least 9% ethanol but no more than 10% ethanol, is the result of an alcohol test conducted in accordance with the procedures specified in Appendix F to the regulations.

In addition to test results on the gasoline in question, or in the absence of such test results, the Agency will consider the following evidence in evaluating whether the gasoline had the proper ethanol content when it left the blender's facility: a) the results of a periodic testing program carried out by the ethanol blender; b) evidence of a quality control program carried out by the blender; c) records reflecting the actual blending of the gasoline in question, showing the amounts and types of products blended together; d) records maintained for the purpose of the IRS tax exemptions for ethanol use; e) records regarding the bulk volumes of alcohol and gasoline blendstock purchased; and f) evidence that any party downstream from the blender added, or had an opportunity to add, additional alcohol or gasoline to the product. Where a violation is found at the ethanol blender's facility based upon insufficient or excessive ethanol content, it will be very difficult for the blender to establish a defense. Where the violation is found downstream from the blender's facility, the evidence described above will be considered.

14. Question: Is it necessary for retailers and wholesale purchaser-consumers to receive and keep certificates showing the gasoline they receive complies with the applicable RVP standard?

Answer: In order for a retailer or wholesale purchaser-consumer to establish a defense for a violation found at their facility, there is no requirement that these parties have certificates showing receipt of in-compliance product. These parties must show, however, that they did not cause the violation, and an in-compliance certificate would be evidence for such a showing.

15. Question: Is there any preferable terminology to be printed on bills of lading, invoices, or certificates concerning RVP compliance with the applicable standard (e.g., must the exact RVP be stated)? May the certification be contained on a pipeline shipment nomination document? Do certifications which refer to unspecified future shipments ("blanket certifications") satisfy the defense elements relating to such representations; and can "blanket certifications" satisfy the labeling requirement for blendstock? Will the refusal by a supplier to provide certification remove the requirement of the distributor who receives product that it obtain a certification of compliance?

Answer: In order to establish a defense, distributors, resellers, ethanol blenders and carriers (for violations at the carrier's facility) must (in addition to other elements) demonstrate through bills of lading, invoices, delivery tickets, loading tickets or other documents which represent that the gasoline in question conformed to the standard. This defense element generally would be satisfied if an appropriate representation is contained in a pipeline shipment nomination document.

This requirement clearly envisions a separate representation for each delivery of product. A document stating that all product delivered in the future conforms to the volatility standards (i.e., a "blanket certificate") or a general published product specification statement would not satisfy this requirement. This defense element does not require that the document state the exact volatility of the gasoline, although such a statement would be preferable (where available). Refusal of a supplier to provide certification of compliance does not excuse the party who receives product from said supplier from the defense requirement that it receive certification.

"Blanket certifications" similarly would be inappropriate for certifying that product is being shipped as blendstock. If a refiner or importer believes that a particular product with high volatility is so clearly not gasoline that there is no conceivable way it could be used as gasoline, that party may decide to ship the product without labeling the product as blendstock. Such a decision would be at the risk of the refiner or importer, however; if someone downstream in fact sells, offers for sale, dispenses, supplies, offers for supply or transports the product as gasoline, the refiner or importer would not be able to take advantage of the blendstock defense if the product was not properly labeled as blendstock.

16. Question: If a motor gasoline cargo is transported in more than one compartment, what are the test requirements to demonstrate compliance for the full cargo?

Answer: Oversight programs would need to provide for periodic sampling and testing of the various products handled. For a carrier or distributor oversight program, there would be no requirement to test each compartment of each truck for every delivery. However, because of the possibility that product carried in the different truck compartments is not homogeneous (particularly if gasoline was splash blended in the truck), the oversight program needs to include periodic sampling and testing of product

carried in each of the truck's compartments separately, and not only of the truck as a whole.

17. If a facility blends finished gasoline with raffinate and ethanol either in-line just prior to delivery to the purchaser's truck or splash blends the components in the truck itself, what will the RVP testing requirements be for this facility for purposes of meeting its defenses?

Answer: A party that obtains finished gasoline or gasoline blending stock and blends that product with any component other than ethanol (such as raffinate) will be subject to the refiner liability and defense provisions. Thus, it must test each batch of product that leaves its facility. If gasoline is blended in trucks, each truck compartment would have to be sampled and tested separately. Branded refiners would need to conduct additional oversight sampling and testing downstream.

Where both raffinate and ethanol are blended into the gasoline at the facility, with the ethanol blended in-line or splash blended into trucks, the refiner would not be relieved of its requirement to test each batch under the provisions of the current regulations. Obviously, testing each batch of blended product would be much easier if all components were blended and mixed prior to being released from the tanks. In the alternative, each batch of fuel containing all components other than ethanol could be blended and the resultant fuel tested and ethanol could be added at a separate ethanol blender's facility. The ethanol blender's facility would then be subject only to the liability and defense provisions relative to ethanol blenders. Obviously, if the would-be refiner facility in this scenario purchases finished gasoline and elects to add only ethanol, then only the ethanol blender liability and defense provision would apply.

18. **Question:** Where a branded retail outlet is supplied directly by the branded refiner and an appropriate contract is imposed by the refiner on such retailer, would a program of reconciling deliveries to the retail outlet with pump meter readings (and the RVP of delivered product is included on the delivery documents) be an acceptable alternative to a sampling and testing program?

Answer: Since the refiner must test each batch of gasoline before it leaves the refinery, and since, in the above scenario, the refiner maintains control of the product until it reaches the retailer, an adequate oversight program might be developed which would include minimal sampling at the retail level. Nevertheless, in determining the sampling frequency at the retail outlets, a number of factors should be taken into consideration. These would include such matters as the opportunity for RVP to change between refinery and retail outlet, prior history of problems with individual retailers, and other factors discussed in this chapter.

19. **Question:** May distributors and resellers without bulk facilities establish an adequate oversight program that does not involve sampling and testing, but that does

involve careful monitoring of amounts of product ordered, picked up, and dropped, and includes making oversight contracts with retailers and monitoring retailers' gasoline delivery records?

Answer: Contracts with retailers (and contractual oversight), monitoring gasoline delivery information, training, and other quality assurance measures may be useful elements of an oversight program. However, we believe periodic sampling and testing is necessary. If the distributor or reseller obtains product directly from the refiner and no commingling of product can take place, the distributor or reseller may be able to rely on the sampling and testing of the refiner, especially if a branded refiner's oversight program includes periodic downstream sampling and testing. If the product is received from a terminal a trucker may be able to arrange for testing to be performed by the terminal immediately before or after delivery.

In any event, a distributor's or reseller's sampling program only needs to include periodic sampling, not sampling of all product delivered to it.

20. Question: May distributors or resellers with bulk facilities, but who do not manufacture, blend or alter product, establish an adequate oversight program by sampling and testing once at the beginning of the season? Must all retail outlets be sampled over the course of the season?

Answer: Distributors and resellers with bulk facilities but who do not alter the quality or quantity of gasoline, must conduct periodic sampling of the fuel in their possession or ownership. Sampling once at the beginning of the season would be inadequate. However, there is no regulatory requirement that such distributors conduct sampling at the retail outlets which ultimately receive the fuel (although such sampling may be required as part of the branded refiner's oversight program).

F. SAMPLING AND TESTING

1. Question: Which testing methods will EPA accept for purposes of testing compliance with the applicable RVP standard by importers, refiners and all upstream parties?

Answer: The regulations prescribe two methods for purposes of testing compliance with the applicable RVP standard: the manual tank and gauge method and the Herzog method. The Herzog method includes both an analog and a digital version, however. For purposes of this document, therefore, the regulatory approved methods will be referred to as "the three approved methods" in order to allow proper distinction between the two versions of the Herzog method. The three approved methods include: (1) Dry RVP measurement method utilizing manual tank and gauges, (2) Herzog semi-automatic analog method, and (3) Herzog semi-automatic digital method.

Importers and refiners are required to utilize one of the three approved methods in order to establish that gasoline was in compliance with the applicable RVP standard when it was delivered to the next party in the distribution system.

All upstream parties (i.e., importers, refiners, distributors, resellers, and carriers) in order to establish a defense under the regulations, are required to conduct an oversight program to monitor compliance with the applicable RVP standard of the gasoline while it is in their possession or once it has been delivered to parties further down the distribution system. The oversight program allows utilization of one of the three approved methods, as well as any other method, provided the application of the other method is supported by appropriate correlation data. The adequacy of such an alternative method will be weighted based on the validity and results of such correlation data. However, more weight will be given to the three approved methods.

2. Question: It appears that use of alternative test methods with proper correlation with the EPA laboratory would be acceptable as part of an oversight program downstream of refineries, but that refineries must use one of the two published methods. Is this accurate? If so, why not have a consistent policy?

Answer: Yes, this is accurate. In drafting the regulations, EPA tried to impose reasonable requirements on regulated parties. Requiring use of approved methods at refineries is something EPA believes refiners can reasonably do and the means which provides the most accurate results. On the other hand, EPA attempted to give parties more flexibility in designing their oversight programs. These provisions affect a wider group of regulated parties of different sizes and circumstances. EPA has tried to balance its goal of assuring that product is in compliance at all points at which its volatility could be altered (which could be achieved more effectively by requiring testing each time product changes hands) with the resources and capabilities of such parties. Allowing such parties to do oversight rather than "every batch" testing and to use other test methods (with proper correlation) is consistent with this balancing. As indicated

above, EPA may add additional test methods in future rulemakings if other methods are found to be as accurate and effective as the promulgated methods.

3. Question: Has EPA approved any new methods for testing compliance with the applicable RVP standard for the 1990 enforcement season?

Answer: At this time, EPA has not approved any additional testing methods besides the three approved methods prescribed in the regulations. However, EPA is preparing a Notice of Proposed Rulemaking (NPRM) which, among other things, will address the test methods to be used during the 1991 enforcement season. The proposals being considered include the ASTM Emergency Standard 14 and ASTM Emergency Standard 15, and some of the new automated RVP test methods.

4. Question: What is EPA's position on the Grabner RVP analyzer, the Herzog Mini Reid Vapor Pressure Apparatus, and ASTM D 323?

Answer: At this time, EPA has not approved the use of the Grabner RVP analyzer, the Herzog Mini Method, nor ASTM D 323. However, test equipment which is not prescribed in the regulations may be used for oversight programs (except for the defense requirement for refiners at 40 CFR § 80.28(g)(2)(ii)) provided the method and the application of the method by the party are supported by appropriate correlation data.

5. Question: Is the ASTM D 323 method the same as the Dry RVP measurement method utilizing tank and gauges that is described in the regulations?

Answer: There appears to be much confusion in the industry as to whether ASTM D 323 is the same as the Dry RVP measurement method utilizing tank and gauges that is described in the regulations as an approved method. ASTM D 323 and the Dry manual method are not interchangeable as approved methods, unless modifications are made to the ASTM D 323 equipment and the respective procedures in order to enable it to have the same specifications as the approved method. Such modifications are described in ASTM D 4953.

6. Question: Which testing method does EPA utilize to determine compliance with the applicable RVP standard?

Answer: EPA utilizes the Herzog Digital Method, as described in Appendix E of the regulations, for testing of samples to determine compliance with the applicable RVP.

7. Question: Data presented by EPA in a slide presentation at the public meeting on April 28, 1989, concerning chemical standards shows the EPA lab to have a consistent

bias on the high side of the nominal value. Since "nominal values" are inherent to the chemicals used, why does the EPA lab show this consistent bias?

Answer: EPA presented a slide which showed some results that indicated a small offset from the published values. However, the term "bias" is not appropriate. The results were obtained using the Herzog method, while the nominal values shown in the slide were "true" vapor pressure.

The table was intended to show the average values and standard deviation which EPA obtained in its application of one of the official methods on a pure component of known quality. This information can be useful to regulated parties as they evaluate their own practices for the 1989 season. The important values from this table are:

Name of Product	Number of Samples	Mean Pressure (psi)	Std Dev (psi)
3-methylpentane	30	6.29	0.16
2,2-dimethylbutane*	48	9.92	0.12
3,3-dimethylbutene-1	30	13.07	0.12
n-pentane	57	15.43	0.11

*also known as "neo-hexane"

The results on the cyclopentane which were presented at the public meeting have been dropped because the batch analyzed was later found to contain impurities. The results on 2-methylbutene-2 and iso-octane also are not shown because of the small number of samples.

The remaining slides presented at the public meeting are included as an attachment to this document.

8. Question: Does EPA have an enforcement tolerance for evaluating the compliance of a given sample for the 1990 enforcement season?

Answer: As stated in the preamble to the volatility regulations,

EPA has determined that gasoline refiners and other regulated parties will be expected to meet applicable RVP standards in use. In other words, they must take test variability into account in producing (and marketing) gasoline and cannot rely on the Agency to automatically provide an enforcement tolerance in addition to the RVP standard.

54 Fed.Reg. 11877 (March 22, 1989).

9. Question: Does EPA plan to test true vapor pressure of gasoline, rather than RVP? Is it true that true vapor pressure measurements are higher than RVP measurements?

Answer: EPA is continuing to evaluate test devices which measure true vapor pressure. However, no standard tests or standard conditions are available for true vapor pressure measurement of petroleum products at this time. Therefore, EPA will continue to measure vapor pressure by the RVP standard.

In theory true vapor pressure of gasoline should be higher than RVP due to the dissolved gases and the lack of two-phase (liquid/vapor) equilibria for some of the lighter petroleum fractions under the conditions of the RVP standard.

10. Question: Where can parties get RVP testing done? Will EPA accredit independent laboratories for RVP testing?

Answer: ASTM publishes a directory of testing laboratories every year, which may be obtained from ASTM at 1916 Race Street, Philadelphia, Pennsylvania 19103-1187.

EPA has no plans to accredit independent laboratories for RVP testing. However, EPA will establish a record, that will be available to the public, of correlation with a laboratory.

11. Question: Can a company who owns all stages of the refining and distribution chain use their in-house lab if they work with EPA to ensure a quality assurance/quality control program for their lab?

Answer: A company may use their in-house lab for sampling and testing for a quality assurance/quality control program if they use the procedures outlined in the regulations or, for purposes of oversight testing, another method that is supported by appropriate correlation data.

12. Question: Assume a distributor/carrier is using a third party laboratory to perform testing for an oversight program, and that this third party lab plans to use the Herzog method as published in the EPA regulations. In order to protect the distributor/carrier, must the third party lab prove correlation with the EPA lab? Will the third party lab be liable if they do not follow the correct test method? Is correlation only required if the third party lab intends to use other test methods?

Answer: Correlation testing with the EPA lab is not required. However, for any test method used, such correlation would serve to strengthen a party's defense to a RVP violation. Note, however, that appropriate correlation data must be provided when other test methods are used in an oversight program. A third party lab is not liable for RVP violations under the regulations.

13. Question: Can a dead weight tester be used in place of a mercury manometer for calibrating the Bourdon pressure gauge?

Answer: Although the regulations only provide details regarding the use of the mercury manometer for calibration of the pressure gauge, EPA does not intend to preclude the use of other calibration methods, such as the dead weight tester. As such, a dead weight tester, with a suitable range (0-15 psi) and accuracy (+/- 0.05 psi), is an acceptable calibration methodology if used in a manner consistent with good engineering practice. EPA will use its enforcement discretion to allow use of other methods that provide equal or better results than the mercury manometer.

14. Question: To what decimal place must test results be reported for the Herzog digital method?

Answer: The regulations require that test results be reported to the nearest 0.05 psi for the Herzog analog method and the Dry manual method. For the Herzog digital method, two decimal places must be reported.

15. Question: Is the acetone wash of the bomb in the dry manual method required? Is this an environmentally unsound method for washing these instruments? Can a more compatible wash solvent be used?

Answer: At this time, EPA will be using the acetone wash as specified in the regulations, for the cleaning of the test apparatus. However, EPA believes other cleaning methods are acceptable, and is preparing a proposal to amend the regulations to allow utilization of an n-pentane cleaning method. In the interim, EPA will allow industry use of any appropriate cleaning method.

16. Question: What ASTM distillation specifications apply to the 10.5 RVP limit? The 9.5 RVP limit?

Answer: EPA does not have a requirement regarding what distillation specification should be used for the RVP limits.

17. Question: Does EPA plan to use a field test for on-site RVP analysis during the 1990 compliance inspections? If so, what instrument will be used? Will it be considered an approved method under the regulations?

Answer: The Grabner Instruments model CCA-VPS will be used for field screening purposes only for inspections during the 1990 volatility control season. This method has provided excellent correlation to the Herzog semi-automatic digital method, which EPA uses for enforcement testing.

The Grabner apparatus is a fully automatic, portable analyzer utilizing a 4 to 1 vapor to liquid ratio chamber with pressure measurement available at 100 F. It is similar to other RVP mini methods. The apparatus automatically draws 9 ml of sample to determine the vapor pressure of the liquid. The apparatus requires the chilling of a 100 ml sample to 40 F and introduction of the sample to the apparatus with an aspirator tube.

Because EPA inspectors will be using the Grabner analyzers for field screening purposes only, any samples taken for enforcement purposes will be collected and analyzed according to the procedures outlined in the regulations.

18. Question: Will EPA utilize the November 1988 ASTM RVP correlation in conjunction with the mobile field test instrument? The correlation was published June 1989 by ASTM D2, Subcommittee 8 on Volatility.

Answer: EPA will use a correlation equation developed using EPA's data obtained from the same study. EPA performed those analyses using the digital version of the Herzog method, the Setavap, and the laboratory model of the Grabner vapor pressure analyzer. The last two instruments can now be used under ASTM ES 15 Emergency Standard Test for Vapor Pressure of Petroleum Products (Mini Method). EPA's dry vapor pressure equivalent (EPA DVPE) is:

$$\text{EPA DVPE (psi)} = (0.956 * X) - 0.347$$

X = pressure measured in psi using Grabner analyzer

19. Question: What sampling procedures are authorized by EPA?

Answer: Generally, EPA restricts sampling procedures to one of the procedures prescribed in the regulations. However, the regulations provide that "alternative sampling procedures may be used if a mutually satisfactory agreement has been reached by the party[ies] involved and EPA and such agreement has been put in writing and signed by authorized officials." 40 CFR Part 80, Appendix D, §11.1. If the volatility sample collected by any of the prescribed procedures is found to exceed the standard, then the sample will be considered in violation.

20. Question: Does EPA have a sampling method preference?

Answer: There are a number of sampling methods specified in the regulations. The ideal method that should be used for a given storage tank depends upon the conditions presented by the tank configuration, level of product, and sampling equipment.

An all-levels sample is the preferred method of collecting a sample from a storage tank. If an all-levels sample cannot be obtained due to the storage tank configuration or equipment problems, then the following types of samples (listed in order of preference) are also appropriate: running, middle, or tap sample taken from a height nearest to the middle of the tank contents. Due to difficulty in obtaining an all-levels sample for storage tank volumes of less than 8 feet of sampling height, including tank trucks and tank cars, a middle sample is an appropriate substitute for an all-levels sample. In circumstances where it is necessary to determine tank stratification, spot samples should be taken at the upper, middle and lower levels of the tank contents. If tap sampling is used to determine tank stratification, a sample should be taken from each tap which is below the level of the tank contents.

21. Question: What level does EPA prefer a sample be taken from a tank equipped with operating mixers?

Answer: EPA's first preference is to use an all levels sample where feasible. However, the regulations allow samples to be taken at a single level, i.e., upper, middle, or lower, rather than at all three levels. EPA does not prefer this sample method, although it is an acceptable method pursuant to the regulations. If a spot sample is taken by company personnel from a tank with mixers, its validity will be evaluated in light of supporting correlation data, evidence of mixer use, and other relevant factors.

22. Question: Although continuous sampling is required for pipelines, the regulations are vague on what a continuous sample represents. One interpretation is that the sample should be representative of the product flowing past the probe at the time the sample is taken. Another interpretation is that the sample is representative of the entire batch. Which interpretation is correct?

Answer: Generally, EPA would consider a sample collected continuously during the entire time the batch moved past the sampling probe to be representative of the entire batch, as we do with a running sample of a tank.

23. Question: What are the maximum number of samples a party can send to the EPA lab for testing in order to assure the accuracy and repeatability of the respective test results?

Answer: EPA will accept up to three samples on a bi-weekly basis from any party as long as the samples are accompanied by the following: lab test results, description of the method of analysis, and name of a contact person that will receive the test results. Other and more extensive correlation programs can be arranged by writing:

Dr. Bruce Kolowich, Manager
US EPA
2565 Plymouth Road
Ann Arbor, MI 48105

24. Question: Can refineries participate in correlation programs with EPA if they are using methods other than the prescribed methods?

Answer: Yes. However, this does not relieve parties of their obligation to use approved test methods when required to do so by the regulations.

25. Question: Does EPA intend to verify industry compliance with proper sampling procedures as part of the volatility enforcement program?

Answer: In general, EPA does not plan to verify sampling procedures used by industry. However, in the context of an investigation as to the cause of an apparent violation, it is likely that EPA will evaluate the sampling procedures used to determine the validity of the test results presented by the alleged violator. Furthermore, during on-site inspections, if EPA notes incorrect procedures used by industry personnel, then it generally will inform industry personnel of such improper procedures.

26. Question: Will EPA issue a report or test results from a collected sample if no violation is found?

Answer: No, but EPA will accept requests for results of specific tests.

27. Question: Is EPA considering new sample size requirements?

Answer: For the 1990 volatility season, EPA will continue to use one quart glass containers.

28. Question: If EPA collects a sample at a facility that has a lab, will they perform or witness testing at that facility or will all samples be shipped elsewhere for testing?

Answer: For the 1990 season, all samples for purposes of enforcement will be shipped to Ann Arbor for testing.

29. Question: Is there an EPA approved video tape for sampling procedure training?

Answer: EPA does not endorse training materials relating to the volatility regulations. EPA is aware of one industry produced training tape on volatility sampling procedures available from Caleb Brett U.S.A., Inc. in Essington, PA.

30. Question: Will EPA take multiple samples for analysis, do duplicate analyses of samples, or take joint samples with facility operators?

Answer: For the 1990 control season, EPA plans to take one sample of a particular product for field screening and, when necessary, take one sample for laboratory analysis. Field screening analysis will consist of performing one test of each sample (additional analysis will be performed on some samples during screening and in the laboratory for quality control purposes). For larger volumes of gasoline EPA may take additional samples. For quality control purposes, additional samples may be taken at some fixed percentage of facilities. Facility operators may wish to take a duplicate sample for their own purposes. If requested, the EPA inspectors will provide assistance in obtaining such duplicate samples.

31. Question: What happens if EPA test results of a particular sample of gasoline reflect a higher RVP than the respective regulated party's test results of the same gasoline? Is a party safe from liability if it conducts single or multiple tests or performs correlation testing with EPA?

Answer: In the context of an enforcement proceeding, any party may challenge the accuracy of EPA's test results. A party may present test results to EPA in order to show that a violation did not occur or to satisfy a required element of a defense that requires presentment of test results determined through the use of appendices D and E of the volatility regulations.

Whether a party's test results will satisfy a required element of a defense will be determined on a case by case basis. In evaluating such evidence, EPA will look at the quality of the party's testing program to determine how much weight to give test results in a particular case. For example, EPA will place a higher value on test results if: 1) multiple samples (rather than a single sample) have been taken from a batch and tested; 2) the party's laboratory has run correlation tests with EPA's laboratory, an independent laboratory, or a national exchange program; and/or 3) a party's testing program includes regular verification using a standard of known RVP. Absent any indication of an irregularity in EPA's sampling and testing procedures with respect to the specific violation, EPA's test results will be presumed to be correct in any enforcement proceeding.

During the 1989 season, if a refiner or importer had a test result which was at least 0.5 psi below the standard, and the violation was not more than 0.5 psi above the standard, and if there was no reason to believe the party's result was invalid, then the result was deemed to meet the element of the defense which relates to showing the

gasoline in question was in compliance when it was transported from a refinery (40 CFR § 80.28(g)(4)(i)) or when it was delivered to the next party in the distribution system (40 CFR § 80.28(g)(2)(ii)). EPA believes that this policy has been helpful in encouraging prudent industry compliance measures. Thus, EPA intends to continue this policy during the 1990 volatility season.

32. Question: Has EPA's testing experience demonstrated any differences in RVP test results using the different regulatory approved methods?

Answer: EPA test results, along with some industry data, indicate that the Herzog semi-automatic digital method generally yields RVP results which are higher than the manual tank and gauge method when testing the same product. This difference is probably due to differences in the volume and location of the pressure measurement devices. EPA will rely on the test results provided by the digital Herzog method for enforcement purposes, however.

G. REMEDIAL ACTION

1. Question: What should a party do if it discovers product having excess volatility during the course of an oversight program? How may a party remedy such a violation? Can the high volatility gasoline be transported or sold? Will EPA allow or require reblending? Will EPA close the facility? Will EPA initiate an enforcement action based upon the violation? Is the party required to notify EPA? What if the product is already downstream?

Answer: The company should promptly take steps to remedy both the violation and the conditions which caused the violation. The violation can be remedied in one of several ways, including the following: a) reduce the volatility by blending lower volatility product with the high volatility gasoline; b) transport the gasoline to a geographic area having a volatility standard with which the gasoline complies; c) store the gasoline until a time period in which the gasoline complies, or until the compliance period ends; d) transport the gasoline to a refinery or other facility. Transportation is appropriate only for the purpose of correcting the high volatility; and storage is appropriate only when high volatility gasoline was discovered through an oversight program, the stored gasoline is sealed until a time when the product can be distributed, and the gasoline is clearly designated as product that is not intended to be sold, supplied, dispensed, transported or distributed.

EPA has no authority to require any of these remedial actions, or to close a facility. EPA will, however, exercise its discretion and will not initiate an enforcement action on the basis of high volatility gasoline discovered by a company, providing the following conditions are met: a) the violation was the result of an accident or a mistake (i.e., was not based on a decision to sell, dispense, supply or transport high volatility gasoline, or an action in disregard of the regulations); b) the company completely corrected the violation (e.g., upon discovery the company took all steps possible to assure the high volatility gasoline which was on hand or which had already been distributed downstream was immediately corrected); c) the company took appropriate action to ensure future violations will not occur (e.g., where a refiner discovers high volatility product caused by a reseller's failure to comply with product handling procedures contractually imposed by the refiner on the reseller, the refiner took steps to compel compliance with the contract); and d) the remedial actions are not the result of an EPA inspection or investigation.

Any sale, supply, offering for sale or supply, dispensing, or transport (other than transport only to correct a violation) would constitute continued additional violations of the regulations. EPA is unwilling to grant a waiver to allow use of high volatility product.

2. Question: What should a company do if it is notified that EPA has discovered a violation? Will any remedial action affect the penalty?

Answer: The company should immediately take remedial actions to correct the violation and the conditions which caused the violation (as described in the previous question). Such actions will be considered by EPA in mitigating any penalty imposed because of the violation.

3. Question: What will the Agency's procedure be for allowing (or not allowing) gasoline sales when high gasoline RVP is indicated by the field test instrument.

Answer: In the event EPA inspectors inform a company that a volatility field test shows gasoline has excess volatility, the Agency views this as notice to the company of a possible violation of the regulations. While the regulations do not give EPA the authority to stop the sale of non-complying product, if the EPA laboratory confirms the gasoline has excess volatility, the company will be entitled to penalty mitigation only if appropriate remedial action was taken as soon as the company was told of the failed field test.

4. Question: What is the procedure to verify that a tank is back in compliance once corrective action has been taken?

Answer: A determination of the RVP of the tank following EPA sampling and testing methodology is recommended.

H. INSPECTIONS

1. Question: Where will EPA focus its enforcement efforts; how will EPA target particular facilities for inspection; and who will conduct EPA sampling this summer?

Answer: EPA will be conducting inspections at all regulated party facilities, including refineries, importer facilities, ethanol blending plants, bulk terminals and plants, distributors, resellers, pipelines and other carriers, retail outlets, and wholesale purchaser-consumers. Inspections will be conducted primarily by EPA staff and authorized contractor personnel.

2. Question: Will EPA conduct audits of upstream facilities, including pipeline terminals? Will refineries be audited first?

Answer: The Agency will initially concentrate on actual fuel sampling and testing by EPA and its contractors as the primary means of determining whether violations have occurred. EPA may later supplement the sampling and testing program with audits of any regulated facilities or other information gathering techniques to identify the full extent of violations.

3. Question: How will inspections be conducted at retail outlets? At distributor, carrier, and pipeline facilities? At refiner and importer facilities?

Answer: At any of the regulated facilities, EPA may take as many samples as necessary to determine compliance for any or all of the gasoline products available at that facility. The authorized EPA inspectors will clearly identify themselves, present their appropriate credentials and state the purpose and nature of the inspection before beginning their procedure. In addition, EPA may review records to determine compliance of gasoline sold, dispensed, or transported during the compliance period, but prior to the date of the inspection.

At retail outlets and fleet facilities, samples will be taken from pump nozzles using the procedures set forth in the regulations. At refineries, import facilities, and bulk terminals, inspections will be conducted by obtaining either "all-levels samples" or "running samples" from bulk storage tanks containing finished gasoline (product shipping tanks). Sampling will be from the gauge tube or roof hatch. If the gauge tube on a fixed roof or internal floating roof tank is not perforated, EPA will tap the sample from the side of the tank. At carrier facilities, samples will be taken from pipelines, tank trucks, or tank cars only in accordance with the procedures described in the regulations. Alternate sampling procedures may be used when agreed upon by the parties as described in paragraph 11.1 of Appendix D to the volatility regulations. EPA inspectors will adhere to any additional safety requirements for that facility, if requested.

4. Question: What information can refiners and other regulated parties provide to expedite inspections?

Answer: At the start of an inspection, a party can advise EPA concerning applicable safety requirements for obtaining samples from the storage tanks. It can also provide information concerning the type of storage tanks in which the finished product is stored (e.g., floating roof tank or fixed roof tank) and the type of gauge tubes that are used (perforated or solid). At the time of the inspection, a party should provide documentation indicating whether product is blendstock or finished gasoline and the destination and expected time of dispensing of the gasoline. This documentation should be that which is generally accepted commercially within the industry to describe the nature and status of such product.

5. Question: How will EPA inspect unmanned terminals that are entered with "keys" by various purchasers lifting products from common storage?

Answer: EPA will coordinate with the terminal owner/ operator to gain access to the terminal and records relating to product stored at the terminal.

I. NOTIFICATION OF VIOLATIONS

1. Question: What procedure will EPA follow to notify companies of violations; to resolve violations?

Answer: EPA generally will inform all identifiable parties who have potential liability when a field test indicates gasoline has excess volatility. EPA subsequently will issue a Notice of Violation to the liable party(s) identifying the violation and setting forth a proposed penalty amount. A party then may present evidence to establish that the violation did not occur or to support a defense as set forth in the regulations. If the party is able to make such a showing, EPA generally will drop the action. If it is not, EPA will attempt to negotiate a settlement with the party. If negotiations for settlement fail, EPA will refer the case to the Department of Justice with a recommendation that a complaint be filed in federal district court to recover the statutory forfeiture.

2. Question: How quickly will EPA notify parties of violations?

Answer: EPA will contact parties as soon as possible after the field test results indicate that a violation has occurred. The Notice of Violation is usually issued within a month of the laboratory verification of the violation.

3. Question: What are the penalties for an RVP violation? Will the amount of a penalty take into account the RVP level and volume of product in violation?

Answer: The statutory penalty for violations of § 211 of the Clean Air Act, under the authority of which the volatility regulations are promulgated, is forfeiture of \$10,000 per day per violation. Under EPA's volatility penalty policy, proposed penalties are based upon the gravity of the violation (RVP exceedance and volume of product in violation), adjusted for prior violations and, in certain cases, business size. A copy of the penalty policy is attached.

J. STATE VOLATILITY PROGRAMS

1. Question: What is the effect of EPA's regulations on state volatility regulations? Will EPA preempt state regulations?

Answer: EPA's regulations preempt state and local volatility regulations unless one of the following exceptions apply:

- a. The state control is identical to the federal control.
- b. The state regulation has been approved by EPA as a State Implementation Plan (SIP) amendment which is necessary to achieve a national ambient air quality standard.
- c. The control was prescribed by a state which received a section 209(b) waiver. (Only California has received such a waiver.)
- d. The state control is not done for the purpose of motor vehicle emission control.

2. Question: What is the current status of state SIPs and their approval by EPA? How much lead time for compliance will EPA grant?

Answer: EPA has finalized approval of the Massachusetts, Connecticut, Rhode Island, New York and New Jersey SIP revisions and has proposed to approve the Maine SIP revision. EPA has received requests for SIP approval from Maryland, Delaware, Illinois and the Dallas/Fort Worth area. It is impossible to estimate when reviews of these requests will be completed. The issue of lead time will be handled on an individual basis based upon the facts in each individual case.

3. Question: Will EPA modify the Texas SIP allowing 9.0 psi maximum RVP gasoline in the requested areas surrounding the Dallas-Fort Worth metroplex? Will EPA modify the RVP maximum for the entire state of Texas to 9.5 psi except for the El Paso area, which would remain 9.0 psi, as was considered during 1989?

Answer: EPA is currently analyzing the Dallas volatility SIP request, which includes the ~~nine~~ county Dallas/Fort Worth area. EPA does not anticipate modifying the SIP but instead will prepare a proposal based upon the SIP as submitted by Texas. EPA sent a letter to the State of Texas requesting input as to the advisability of proposing a single standard of 9.0 psi for Texas. In a letter dated March 28, 1990, the Governor of Texas stated that he would support a single standard of 9.0 psi.

4. Question: Will EPA delegate enforcement authority to the states? Are states going to do any testing?

Answer: EPA cannot delegate its enforcement authority to the states. In some instances, states with their own approved volatility standards may inspect for violations of state RVP standards and enforce them themselves.

5. Question: In states in which EPA has approved a SIP that calls for more stringent RVP specifications than the federal standard, will EPA relinquish enforcement of volatility controls entirely to such states? If not, will EPA test facilities for compliance with the federal RVP specification or the lower state RVP level? Will a facility tested by EPA to be 10.0 RVP be in violation if found in a state that has a SIP approved 9.0 RVP level?

Answer: Both the federal and state standards are enforceable where there is an overlap of jurisdiction, such as in any state or area that has had final approval of a SIP revision and in states having standards that were promulgated for purposes other than motor vehicle emission control. Therefore, where both state and federal standards are in place, the regulated industry is required to comply with both standards. EPA will test regulated facilities in such states and will enforce the federal standard.

6. Question: To the extent that any aspect of an approved state regulation is less stringent or less comprehensive than the EPA rules, will the more stringent portion of the federal rules continue to apply?

Answer: As discussed above, where a state volatility regulation has been approved, the regulated industry is required to comply with both the state and federal regulations. Generally, the approved state standards are more stringent than the federal standard. However, there are several situations in which the state regulations are less stringent or comprehensive than the federal regulations. For example, the NESCAUM regulations: 1) do not apply to as many parties, such as retail outlets (except for New Jersey), as the federal rules; 2) exempt gasoline containing 10% or more of any type of alcohol; 3) allow waivers at the discretion of state officials to alleviate potential supply disruptions. In all of these situations, although the state standard may not be enforced, the federal standard and associated requirements will be enforced. Similarly, where a preexisting state standard is less stringent than the federal standard, the federal standard will be enforced.

7. Question: Several states have regulated gasoline to meet ASTM specifications for several years for reasons not related to the environment. In these states, will the EPA rule preempt state ASTM specifications if the ASTM limit is more restrictive?

Answer: As indicated in the answers to questions above, the federal standard does not preempt the state standard in this situation. However, even where the state standard is more stringent, EPA can enforce a violation of its less stringent standard.

8. Question: Will states with unapproved SIPs, or pending SIP requests for approval, be allowed to sample, test and enforce state RVP regulations?

Answer: Those state regulations which were passed for the purpose of motor vehicle emission control are preempted by the federal regulation unless EPA approves a SIP amendment by finding that the control is "necessary to achieve" an ambient air quality standard or the state standard is identical to the federal standard (or one of the other preemption exceptions described in answer to Question J.1 is satisfied). Therefore, states whose regulations are for the purpose of emission control cannot enforce their regulations unless they are approved by EPA.

9. Question: Will states with approved SIP revisions be enforcing their regulations using testing procedures that differ from EPA's?

Answer: As part of the SIP approval process, EPA requires states to use an EPA approved method of testing. Currently two methods are approved by EPA, the ASTM Annex 2 Modification of Method D-323 and the Herzog Semi-Automatic Method. EPA will be reviewing other test methods to determine their acceptability. If any other methods are found to be acceptable, EPA will publish a notice in the Federal Register to include them on the list of EPA approved test methods. Until that time, the states must use one of the two EPA approved test methods.

10. Question: Why does the EPA not develop a cooperative effort with the state petroleum inspection programs. This would be an effective method of enforcement that is already in place.

Answer: EPA would be willing to work with the states to develop state enforcement programs and to train state inspectors.

11. Question: EPA has recognized that the first phase of the 2-phase control program will probably not require capital investments. However, further reductions in RVP by many individual states through the SIP process will require new capital investment and substantially longer lead times to assure compliance. How will EPA advise states to handle lead time issues as more and more states consider reduced RVP as part of their SIPs.

Answer: The states have handled the lead time issue by considering that issue as part of their regulatory and public comment process. We would encourage states to continue to do so.

12. Question: Will EPA's pump labeling requirement for ethanol blends preempt state labeling requirements?

Answer: EPA's pump labeling requirement for ethanol blends is not intended to preempt state requirements. A regulated party must comply with EPA's requirement, and we believe this would not interfere with compliance with state labeling requirements.

13. Question: Is there a vehicle in the federal volatility regulations that would allow EPA to control the state RVP regulations such that the patchwork of state and city regulations could be eliminated resulting in a consistent set of regulations for contiguous states in a logistical region?

Answer: EPA evaluates the state volatility SIP requests individually. The Agency's determination is based upon whether the state regulation is "necessary to achieve" a national ambient air quality standard. EPA is not able to use the SIP review process to effect changes to the state regulations which do not impact the "necessary to achieve" determination.

14. Question: New Jersey allows for a testing tolerance while several other northeastern states do not. Does EPA plan to require consistency in the testing tolerance area in states that deviate from the federal levels through the SIP process?

Answer: EPA will leave the issue of testing tolerance to each state.

15. Question: Control dates for states in the northeast vary considerably. Does EPA plan to require consistency in this area?

Answer: The NESCAUM states control dates are identical. However, the issue of control dates will be reviewed only in the context of the "necessary to achieve" test.

ATTACHMENTS



Correlation with EPA

- EPA endorses good correlation
- EPA will support producers in this area
- Producers must show a "good faith" effort



What EPA will do

- We will share our data
- We will document our procedures
- We will provide guidance
- We will participate in programs
- We will analyze outside samples
- We may send out "standards"



What is "Good Faith"

- Complete familiarity with req'ts
- Strict adherence to procedures
- Uniformity among operators
- Careful oversight by QA/QC
- Coordination in the organization
- Participation in outside efforts
- Relationships with the regulators



Application Format

- Facilities
- Equipment
- Personnel
- Procedures
- Miscellaneous factors, e.g., QA practices, correlation experience



Correlation

Unleaded Test Gasoline analyzed by ASTM D 323

Batch	1/89	11/89	6/90	6/90	3/90	12/87
EPA	9.0	9.0	9.0	9.1	9.2	9.2
Vendor	9.0	9.0	9.0			
GM	9.1	9.0	9.1	9.1	9.2	9.2
Ford	9.1	9.1	9.0	9.1	9.1	9.2
Chrysler1	8.8	8.9	9.0	8.8	9.1	
Chrysler2		8.8				
Std. Dev.	0.1	0.1	0.1	0.2	0.1	0.0
Range	0.3	0.3	0.1	0.3	0.1	0.0



EPA's Test Results

Pure compounds analyzed by the Herzog Method

Name of Product	No. of Samples	Mean Result	Std. Dev.
3-methylpentane	30	6.29	0.16
2,2-dimethylbutane*	48	9.92	0.12
3,3-dimethylbutane-1	30	13.07	0.12
n-pentane	57	15.43	0.11

* Also known as "neo-hexane"



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

DEC - 1 1989

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Volatility Civil Penalty Policy

FROM: Marc R. Hillson, Acting Director *Marc R. Hillson*
Field Operations and Support Division

TO: Field Operations and Support Division Personnel

I. INTRODUCTION

This memorandum describes the Field Operations and Support Division's (FOSD) policy for determining penalties for violations of the volatility regulations for gasoline and alcohol blends. See 40 CFR sections 80.27 and 80.28 and Appendices D, E, and F (promulgated at 54 FR 11868 (March 22, 1989) and modified at 54 FR 27016 (June 27, 1989) and 54 FR 33218 (August 14, 1989)).¹ The policy follows the guidelines of the Agency's Policy on Civil Penalties and A Framework for Statute-Specific Approaches to Penalty Assessments (EPA General Enforcement Policies # GM - 21 and 22) (the "EPA Policy").

Parties covered by these regulations include refiners, importers, alcohol blenders, carriers, resellers, distributors, retailers, and wholesale purchaser-consumers.

II. OVERVIEW

A. The Framework of the EPA Policy

The EPA Policy establishes deterrence as the primary goal of penalty assessment. In addition, it recognizes that penalty assessment should provide for fair and equitable treatment of the

¹ These regulations establish phase I volatility standards effective starting in 1989. The Agency has also proposed phase II standards to be effective starting in 1992. See 52 FR 31274, 31315-6 (August 19, 1987). EPA expects to finalize these phase II standards soon, and reserves the right to modify this penalty policy to account for any relevant differences between such standards and the phase I standards (e.g., different economic benefits of violations).

regulated community and for swift resolution of environmental problems.

The EPA Policy specifies that penalties should be established and adjusted based upon a number of factors, including the gravity of the violation and economic benefit to the violator; the violator's degree of cooperation and willfulness, history of noncompliance and ability to pay; and other factors unique to the case. Under the EPA Policy, penalties are set by first calculating the "initial penalty target figure" (the penalty assessed in the Notice of Violation (NOV)), which is based upon those factors which are appropriate for consideration prior to the beginning of case negotiations. Each of the above factors may be considered during case negotiations, which yields the "adjusted penalty target figure" - the Agency's final settlement figure. The EPA Policy also provides that penalties may be adjusted to reflect environmentally beneficial expenditures made by a violator in lieu of more severe penalties.

B. General Application of the EPA Policy to Volatility Regulations

FOSD prosecutes violations of the volatility regulations by issuing a Notice of Violation which includes a proposed penalty. The proposed penalty is analogous to the initial penalty target figure under the EPA Policy. Following issuance of the NOV, settlement negotiations are conducted with the violator to reach a final settled penalty. The final settled penalty is analogous to the adjusted penalty target figure under EPA Policy. If no settlement is reached, the case normally is referred to the Department of Justice, where additional settlement negotiations may take place. Complaints filed by the Department of Justice in court generally seek the statutory penalty.

The proposed penalty for volatility violations is based upon the gravity of the violation, adjusted for prior violations and, in certain cases, for business size. Following initiation of the enforcement action, the proposed penalty may be reduced up to forty percent based upon the following factors: actions taken by the violator both to remedy the violation and insure future violations will not occur; and the violator's degree of cooperation in the investigation and in settlement negotiations. Unlimited adjustments are possible for financial hardship and special circumstances. FOSD also allows violators to resolve a portion of the proposed penalty by making certain types of environmentally beneficial expenditures.

III. CALCULATING THE PROPOSED PENALTY

The proposed penalty for volatility violations is based upon the magnitude of the violation (the number of gallons of gasoline which are in violation) and the severity of the violation (the degree to which the gasoline exceeds the appropriate standard), adjusted for prior violations. For certain cases where the magnitude of the violation is not known or where the penalty calculated based upon the violation's magnitude is not sufficiently large to constitute an appropriate deterrent (generally for violations found at retail outlets and wholesale purchaser-consumer facilities), the penalty is derived from a table which takes into account the severity of the violation, the history of prior violations, and the violator's business size.

A. Gravity of the Violation

Since the reduction of fuel volatility is a crucial component of the Agency's effort to control and prevent excess volatile organic compounds, all violations of the regulations will be considered serious. The severity of the violation will be a function of the amount by which the volatility of the fuel (measured in pounds per square inch) exceeds the standard. Thus, the larger the excess over the standard, the greater will be the environmental harm. This will also include any violations of section 80.27(d), which covers the alcohol blends having a one pound per square inch additional allowance.

B. History of Prior Violations

As provided in the EPA Policy, this policy provides higher penalties for companies with a history of prior violations of the volatility regulations. For the purposes of this policy, prior violations include any NOV resolved where the case was not dropped, or any judicial resolution where there was not a dismissal or judgment in favor of the defendant. Previous violations will include any violation of the regulations by a particular company, regardless of the EPA region in which it occurred.

C. Business Size of the Violator

Penalties under this policy are generally calculated based upon the number of gallons of gasoline in violation. As a result, a specific adjustment to reflect the size of the violator's business is generally not necessary. A penalty which is exactly proportional to the magnitude of the violation is appropriate in most cases, and need not be adjusted for the size of the violator's business.

In those cases where the penalty is derived from a penalty table which does not reflect the gallons in violation (normally for violations found at retail outlets or wholesale purchaser-consumer facilities), penalties are different for different-sized businesses. These distinctions are appropriate because the business size of potential violators may range from very small businesses to major national corporations, and the appropriate level of deterrence will differ. For the purposes of this policy, the size of a business entity is expressed in terms of the violator's gross income (i.e., total business revenues from the business entity which gave rise to the violation) for the prior fiscal year. When the violator is an individual, size is expressed in terms of the individual's gross income from the prior fiscal year. Where the prior fiscal year is not representative of the violator's historical business size, revenues or income from the prior three to five years should be evaluated.

D. Penalty Formula

Penalties are calculated in a manner which removes the economic benefit the violator may have received from violating the volatility regulations, and in addition, includes a deterrent to discourage other violations. This policy assigns the amounts of economic benefit which are appropriate for different levels of noncompliance (Table 1). The amount of these benefits are based upon analyses which were carried out as part of the regulatory impact analysis for the volatility regulations.

Table 1. Economic benefit resulting from the production of gasoline which exceeds the volatility standards.

Amount Standard Exceeded	Assigned Economic Benefit Value (per gallon of noncomplying gasoline)
0 to 0.5 psi	\$.01
0.5 to 1.0 psi	\$.02
1.0 to 2.0 psi	\$.03
over 2.0 psi	\$.04

The economic benefit component (EBC) of the proposed penalty is calculated by multiplying the number of gallons of gasoline which are in violation by the appropriate economic benefit value from Table 1. Except as described below, the gravity component (GC) is equal to the economic benefit component. The proposed penalty (PP) is equal to the sum of the economic benefit and the gravity component. Thus, the proposed penalty is calculated using the following formula:

$$PP = EBC + GC$$

In order to reflect the history of violations, the gravity component will be increased for cases where the violator has a history of prior violations. Thus, the formula for calculating the proposed penalty for a violator who has a history of prior violations is as follows:

<u>Number of Prior Violations</u>	<u>Formula</u>
1	$PP = EBC + (GC * 1.5)$
2	$PP = EBC + (GC * 2.0)$
3	$PP = EBC + (GC * 3.0)$

In certain cases, the number of gallons of gasoline in violation will be so small that the penalty calculated as described above will not constitute a sufficient deterrent to achieve the goals of the volatility regulations. For this reason, minimum proposed penalties are provided in this policy (see Table 2). The penalties from Table 2 should be used when the penalty calculated as described above is less than the penalty derived from Table 2. In other words, the proposed penalty should be the greater of the calculated penalty and the penalty from Table 2.

Section 211(d) of the Clean Air Act provides for a mandatory forfeiture of \$10,000 per day of violation. Thus, any penalty calculated under this policy may not exceed \$10,000 per day of violation. Where the calculated penalty amount exceeds \$10,000, there must be a reasonable basis that there were an appropriate number of violations and/or that the violation occurred for the appropriate number of days (e.g., at least three violations and/or three days of violation for a \$30,000 proposed penalty).

Table 2. Minimum penalty amounts for volatility violations, adjusted for business size, gravity of the violation, and number of prior violations.

Number of Prior Violations	Business Size		
	I	II	III

Exceed Standard by 0 to 0.5 psi			
0	\$1,000	\$1,500	\$3,000
1	1,300	1,900	4,000
2	1,750	3,000	5,500
3	2,000	4,000	7,000
Exceed Standard by 0.51 to 1.0 psi			
0	1,500	2,250	4,500
1	2,000	3,000	5,000
2	2,500	4,000	6,000
3	3,000	5,500	8,000
Exceed Standard by 1.1 to 2.0 psi			
0	2,000	3,000	6,000
1	3,000	4,000	7,000
2	4,000	6,000	8,500
3	6,000	7,500	10,000
Exceed Standard by more than 2.0 psi			
0	3,000	4,500	8,000
1	4,000	6,000	9,000
2	6,500	8,000	10,000
3	8,500	9,250	10,000

Size of business categories as defined for this policy are:

Size I 0 to \$1,000,000
 Size II \$1,000,000 to \$10,000,000
 Size III \$10,000,000 and greater.

E. Violations Caused by Mislabeling

The regulations allow an additional 1.0 psi RVP for ethanol blends under certain conditions. These conditions are: the gasoline must contain at least 9.0% ethanol (also, the concentration in unleaded gasoline may not exceed 10.0%); the pump stand from which the gasoline is dispensed must be labeled as containing ethanol and with the ethanol concentration; and each document which accompanies the gasoline (e.g., invoices, loading tickets, etc.) must contain a statement that the product contains ethanol. See 40 CFR section 80.27(d).

If a pump stand or accompanying document is not labeled in accordance with the regulations, the ethanol blend must meet the RVP standard applicable to gasoline (e.g., 9.0 psi in a Class A area). If this standard is exceeded, there is a violation of the volatility regulations.

EPA will treat as a special type of violation the situation where an ethanol blend would have been entitled to the additional 1.0 psi allowance (and would have met the applicable RVP standard which included this allowance) if it had satisfied the ethanol labeling requirements. In instances where such a violation caused by mislabeling does not lead to a subsequent violation, this policy establishes a penalty of \$300 for such violations. This penalty will be applied for each retail outlet or wholesale purchaser-consumer facility having one or more pump stand not properly labeled (and not separately for each pump stand), or each load of gasoline delivered without the proper document statements. EPA will not adjust the penalty for violations caused by mislabeling as discussed in the next section, except under extraordinary circumstances. This policy will not apply to upstream parties, retail outlets or wholesale purchaser-consumer facilities which have had prior violations of this type.

IV. ADJUSTMENTS TO THE PROPOSED PENALTY

The EPA policy specifies that penalties should be evaluated for adjustment based upon degree of cooperation/noncooperation, ability to pay and other unique factors specific to the case. This policy provides for these adjustments. Violators bear the burden of justifying any adjustments in their favor. When the penalty formula is used for the NOV amount, the adjustments only should apply to the gravity component, and not to the economic benefit component.

A. Degree of Cooperation/Noncooperation and Actions to Remedy the Violation

This policy allows mitigation of the proposed penalty of up to forty percent as an incentive for the violator to cooperate in the investigation and negotiations, and to correct the violation promptly. The greatest mitigation should be given where the violator cooperates fully and corrects all violations immediately upon discovery by the violator. In general, the earlier and more complete the cooperation and corrective action, the larger the penalty reduction which is appropriate.

For volatility violations, correction generally means capturing the noncomplying gasoline and either storing it until the end of the control period, rerouting it to an area where it would be in compliance, or reblending the gasoline so that it comes into compliance with the appropriate volatility standard. This action should also include implementing a procedure to prevent such violations from occurring in the future, if such a procedure is not already in place. The degree of penalty mitigation will be related to the extent to which the violation, and the conditions which caused the violation, are corrected.

The violator's cooperation during the investigation, negotiation and settlement phases of a case may result in a penalty adjustment. A violator is expected to provide access to records and premises and to not interfere with the investigation. In addition, the violator should identify and provide information about other parties who were involved in the volatility violation. Failure to cooperate in an investigation, attempting to hide records or evidence of violations, or not cooperating in any continuing investigation should be reflected in the adjustment for this factor.

B. Financial Hardship Adjustment

The Agency generally will not seek penalties which are clearly beyond the means of the violator. However, it is important that the regulated community not view the violation of environmental requirements as a way of aiding a financially troubled business. Furthermore, some violations are so outrageous so as to render any mitigation inappropriate. For example, it is unlikely that FOSD would reduce a penalty based upon financial hardship where a violator refuses to correct its violation or take steps to prevent future violations. The same would be true for a violator with a long history of previous violations of environmental laws, or where there are indications that many more violations exist than those alleged in the NOV. Therefore, FOSD reserves the option, in appropriate circumstances, of not reducing the final penalty as a result of financial hardship even though that penalty may put a company out of business.

A financial hardship claim normally will require a significant amount of financial information from the violator. The burden of demonstrating inability to pay, like all mitigating factors, rests on the violator. If the violator fails to provide sufficient information in a timely manner, then the prosecution team cannot give full consideration to this factor.

Where a financial hardship claim is adequately established, FOSD may, at its discretion and based upon its review of all the equities of the case, including the financial hardship, further adjust the penalty. The preferred approach to such an adjustment is allowing a delayed payment schedule, or granting an unusually favorable alternative payments package. However, as a last resort, FOSD may agree to an extraordinary penalty reduction for this factor.

A case may arise in which equity cannot be served by adjusting the penalty within the normal limits of this policy. In such a case, FOSD may grant extraordinary mitigation. The burden of establishing the need for extraordinary adjustment of the penalty rests on the violator. In order to meet this burden, the violator must present evidence of: (1) the facts of the case; (2) why the adjusted penalty is inequitable; (3) why the criteria for adjustment are insufficient; and (4) how the public interest is protected or served by an extraordinary adjustment in the penalty.

V. ALTERNATIVE PAYMENTS

It is FOSD's policy to encourage violators to resolve a portion of their penalties by making payments to support programs which educate the public regarding motor-vehicle-caused air pollution and the laws for its control. Such credit projects encourage compliance with these laws, and therefore advance program goals beyond the mere deterrent effect of paying penalties into the federal treasury.

A credit project may take many forms. However, several conditions must be met in order to prevent abuse of the program. First, no credits may be given for activities that are current legal requirements or likely to be such in the foreseeable future (e.g., through upcoming rulemaking). Next, the majority of the project's environmental benefit should accrue to the general public rather than to the violator or any particular governmental unit. Finally, the project may not be something which the violator could reasonably be expected to do as part of sound business practices.

VI. PENALTY AFTER INITIATION OF LITIGATION

When an NOV is issued and a violator fails to settle the case, the Agency generally will refer the matter to the United States Department of Justice (DOJ) for prosecution in federal district court. When a case is referred to DOJ, the normal recommendation is to prosecute for the statutory penalty of \$10,000 per day per violation.

VII. MISCELLANEOUS

The policies and procedures set out in this document are intended solely for the guidance of governmental personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

This policy applies to civil enforcement of the gasoline volatility regulations and does not apply in any way to potential criminal enforcement.

VII. PENALTY EXAMPLE CALCULATIONS

Following are examples of application of this policy to hypothetical factual situations.

EXAMPLE A.

EPA determines that a branded retail outlet dispensed 3,000 gallons of gasoline with an RVP of 10.2 psi in a geographical area and during a regulatory control period having an applicable standard of 9.5 psi. The gasoline, therefore, exceeded the standard by .7 psi. The retail outlet is a Size I business and it has no history of prior violations.

Under the penalty formula, the penalty calculations would be as follows:

$$PP = EBC + GC$$

$$EBC = 3,000 \text{ gals} \times \$0.02 = \$60$$

$$GC = EBC = \$60$$

$$PP = \$60 + \$60 = \$120$$

Under Table 2, the penalty amount for this retail outlet would be \$1,500. Because the penalty amount from Table 2 is larger than the calculated penalty amount, the penalty amount from Table 2 (\$1,500) should be assessed against this retail outlet.

Various parties upstream from the retail outlet also may be liable for the violation. If the retail outlet is one displaying the corporate, trade, or brand name of a gasoline refiner or any of its marketing subsidiaries, the refiner whose corporate, trade, or brand name is displayed would be liable for the violation. In addition, the distributor and/or reseller, a carrier who caused the violation, or the ethanol blender at whose ethanol blending plant the gasoline was produced would be liable for the violation.

In this example, because the retail outlet displayed the brand name of a refiner, EPA may assess that refiner a penalty under Table 2 according to its business size and history of prior violations. If, for example, the refiner is a Size III business and it has a history of one prior violation, the calculated penalty would be:

$$\text{EBC} = 3,000 \times \$0.02 = \$60$$

$$\text{GC} = (\$60 \times 1.5) = \$90$$

$$\text{PP} = \$60 + \$90 = \$150$$

The penalty under Table 2 would be \$5,000, however, so that this larger penalty would apply to the refiner. The distributor, if any, a carrier who caused the violation, or an ethanol blender who produced the gasoline similarly may be assessed a penalty.

EXAMPLE B.

EPA detects a violation at a unbranded distributor facility involving 1,000,000 gallons of gasoline exceeding the applicable standard by 1.1 psi. The distributor is a Size III business and it has no history of prior violations. Under the penalty formula, the penalty calculations would be as follows:

$$\text{PP} = \text{EBC} + \text{GC}$$

$$\text{EBC} = 1,000,000 \text{ gals} \times \$0.03 = \$30,000$$

$$\text{GC} = \text{EBC} = \$30,000$$

$$\text{PP} = \$30,000 + \$30,000 = \$60,000$$

The calculated penalty of \$60,000 is applicable in this case because it is larger than the penalty derived from Table 2, assuming that there are at least six violations and/or six days of violation.

Parties upstream from the distributor also may be deemed in violation. If the distributor is operating under the corporate, trade, or brand name of a gasoline refiner or any of its marketing subsidiaries, the refiner under whose corporate, trade, or brand name the distributor is operating would be liable for the violation. If the distributor is not operating under a refiner's corporate, trade, or brand name, the refiner at whose refinery the gasoline was produced, the importer at whose import facility the gasoline was imported, or an ethanol blender at whose plant the gasoline was produced would be liable for the violation. A carrier who caused the violation is also deemed in violation.

In this example, because the distributor was not operating under a refiner's corporate, trade, or brand name, the refiner (importer and/or ethanol blender) who produced the gasoline would be liable for the penalty amount as calculated above according to the penalty formula (because it is larger than the penalty derived from Table 2). If EPA determines that a carrier caused the violation, it would be liable for the calculated penalty amount.

EXAMPLE C

EPA detects a violation at a carrier facility involving 100,000 gallons of gasoline exceeding the applicable standard by .4 psi. The carrier is a Size II business and it has a history of two prior violations. The calculated penalty is as follows:

$$PP = EBC + (GC \times 2.0)$$

$$EBC = 100,000 \text{ gals} \times \$0.01 = \$1,000$$

$$GC = EBC = \$1,000$$

$$PP = \$1,000 + (\$1,000 \times 2.0) = \$3,000$$

The calculated penalty is \$3,000, and the penalty under Table 2 is \$3,000 for a size II business having a history of prior violations. The proposed penalty, therefore, would be \$3,000.

The refiner at whose refinery the gasoline was produced, the importer at whose import facility the gasoline was imported, and/or the ethanol blender at whose ethanol blending plant the gasoline was produced also may be deemed in violation. For these parties, the penalty amount in Table 2 would be applied if it exceeds the calculated penalty of \$3,000.

EXAMPLE D.

EPA detects a violation at a refinery involving 3,000,000 gallons of gasoline exceeding the applicable standard by 2.1 psi. The refiner is a Size III business and it has no history of prior violations. The penalty calculations are as follows:

$$PP = EBC + GC$$

$$EBC = 3,000,000 \text{ gals} \times \$0.04 = \$120,000$$

$$GC = EBC = \$120,000$$

$$PP = \$120,000 + \$120,000 = \$240,000$$

This calculated penalty is larger than the penalty under Table 2 and would therefore apply, assuming that there are at least 24 violations and/or 24 days of violation.