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

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MEMORANDUM

SUBJECT: Volatility Civil Penalty Policy

FROM: Marc R. Hillson, Acting Director
           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

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[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).

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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:

Number of Prior Violations	Formula
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 vola-
tility violations, adjusted
for business size, gravity of the
violation, and number of prior
violations.

Number of	Business Size		
Prior Violations	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 re-
sort, FOSD may agree to an extraordinary penalty reduction for
this factor.

A case may arise in which equity cannot be served by adjust-
ing 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 vio-
lator 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 penal-
ty.

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 pol-
lution and the laws for its control. Such credit projects en-
courage 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 vio-
lator could reasonably be expected to do as part of sound busi-
ness 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 State 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:

$$EBC = 3,000 \times \$0.02 = \$60$$

$$GC = (\$60 \times 1.5) = \$90$$

$$PP = \$60 + \$90 = \$150$$

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:

$$PP = EBC + GC$$

$$EBC = 1,000,000 \text{ gals} \times \$.03 = \$30,000$$

$$GC = EBC = \$30,000$$

$$PP = \$30,000 + \$30,000 = \$60,000$$

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:

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

$$EBC = 100,000 \text{ gals} \times \$.01 = \$1,000$$

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

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

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:

$$PP = EBC + GC$$

$$EBC = 3,000,000 \text{ gals} \times \$.04 = \$120,000$$

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

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

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.