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**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 80**

[EPA-HQ-OAR-2007-1158; FRL-9147-4]

RIN 2060-AO71

**Regulation of Fuels and Fuel Additives: Alternative Affirmative Defense Requirements for Ultra-Low Sulfur Diesel and Gasoline Benzene Technical Amendment****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Direct final rule.

**SUMMARY:** EPA is issuing a direct final rule to amend the diesel sulfur regulations to allow refiners, importers, distributors, and retailers of highway diesel fuel the option to use an alternative affirmative defense if the Agency finds highway diesel fuel samples above the specified sulfur standard at retail facilities. This alternative defense consists of a comprehensive program of quality assurance sampling and testing that would cover all participating companies that produce and/or distribute highway diesel fuel if certain other conditions are met. The sampling and testing program would be carried out by an independent surveyor. The program would be conducted pursuant to a survey plan approved by EPA that is designed to achieve the same objectives as the current regulatory quality assurance requirement. This rule also amends the gasoline benzene regulations to allow disqualified small refiners the same opportunity to generate gasoline benzene credits as that afforded to non-small refiners.

**DATES:** This rule is effective on July 12, 2010 without further notice, unless EPA receives adverse comment by June 10, 2010. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule, or the relevant provisions of this rule, will not take effect. The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of July 12, 2010.

**Hearings:** If EPA receives a request from a person wishing to speak at a public hearing by May 26, 2010, a public hearing will be held at a time and location to be announced in a

subsequent **Federal Register** notice. To request to speak at a public hearing, send a request to the contact in **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2007-1158, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.
- *E-mail:* [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).
- *Fax:* (202) 566-9744.
- *Mail:* Air and Radiation Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, Room 3334, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Air Docket ID No. EPA-HQ-OAR-2007-1158. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-HQ-OAR-2007-1158. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will automatically be captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information

about EPA's public docket, visit the EPA

Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Jaimee Dong, Compliance and Innovative Strategies Division, Office of Transportation and Air Quality, Office of Air and Radiation, Environmental Protection Agency, Mail Code 6405J, 1200 Pennsylvania Avenue, Washington, DC 20460; telephone number: (202) 343-9672; fax number: (202) 343-2800; e-mail address: [Dong.Jaimee@epa.gov](mailto:Dong.Jaimee@epa.gov).

**SUPPLEMENTARY INFORMATION:****Why is EPA using a direct final rule?**

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, we are publishing a separate document that will serve as the proposed rule to amend the diesel sulfur regulations and the gasoline benzene regulations if adverse comments are received on this direct final rule. We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment on a distinct provision of this rulemaking, we will publish a timely withdrawal in the **Federal Register** indicating which provisions we are withdrawing. The provisions that are not withdrawn will become effective on the date set out above, notwithstanding adverse comment on any other provision. We will address all public comments in any subsequent final rule based on the proposed rule.

**Does this action apply to me?**

Entities potentially affected by this action include those involved with the

production, importation, distribution, marketing, or retailing of diesel fuel and

production of gasoline. Categories and entities affected by this action include:

Category	NAICS codes <sup>a</sup>	SIC codes <sup>b</sup>	Examples of potentially regulated entities
Industry .....	324110	2911	Petroleum Refiners.
Industry .....	422710	5171	Diesel Fuel Marketers and Distributors.
Industry .....	484220	4212	Diesel Fuel Carriers.

<sup>a</sup> North American Industry Classification System (NAICS).  
<sup>b</sup> Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action; however, other types of entities not listed in the table could also be affected. To determine whether your entity is affected by this action, you should examine the applicability criteria of parts 79 and 80 of title 40 of the Code of Federal Regulations. If you have any question regarding applicability of this action to a particular entity, consult the person in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**What should I consider as I prepare my comments for EPA?**

**A. Submitting CBI.** Do not submit this information to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the information that you claim to be CBI. For CBI information on a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

**B. Tips for Preparing Your Comments.** When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.

- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
  - Provide specific examples to illustrate your concerns, and suggest alternatives.
  - Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
  - Make sure to submit your comments by the comment period deadline identified.
- C. Docket Copying Costs.** You may be charged a reasonable fee for photocopying docket materials, as provided by 40 CFR part 2.

**Outline of This Preamble**

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**I. Background**

The diesel sulfur regulations were designed to ensure widespread availability of highway diesel fuel containing 15 parts per million (ppm) sulfur or less by October 2006. Almost all highway diesel engines produced beginning in 2007 will be equipped with emissions control systems that are sensitive to sulfur. These vehicles should be fueled with diesel fuel

produced to contain no more than 15 ppm sulfur (called Ultra-Low Sulfur Diesel or ULSD highway diesel fuel) in order for the emissions control systems to function properly, and to prevent damage to the emissions control systems.

The diesel sulfur regulations require refiners, importers, distributors and retailers who produce, import, sell, store or transport ULSD highway diesel fuel to meet the standards specified in the diesel sulfur regulations. Where a violation of the standards is identified at a retail outlet, the retailer responsible for dispensing the noncompliant fuel is deemed liable, as well as the refiner(s), importer(s) and distributor(s) of such fuel. See 40 CFR 80.612(a). In addition, where the corporate, trade or brand name of a refiner appears at a retail outlet found to be in violation, that branded refiner is also deemed liable for the violation. See 40 CFR 80.612(a)(3).

The diesel sulfur regulations further provide, however, that any person deemed liable can rebut this presumption by establishing an affirmative defense that includes, among other things, showing that it conducted a quality assurance sampling and testing program as prescribed by the regulations. See 40 CFR 80.613(a)(1) and 40 CFR 80.613(d). Branded refiners and importers are not liable if they can establish, among other things, that the violation was caused by the action of a third-party distributor or retailer who violated product handling procedures that were contractually required by the refiner, despite periodic sampling and testing to ensure compliance with the contractual obligation.

**II. Need for Action**

EPA received questions from several large branded refiners of ULSD highway diesel fuel regarding how EPA would enforce violations of the downstream sulfur standard in instances where a ULSD highway diesel fuel sample test result exceeded the downstream standard by an amount less than the 2

ppm adjustment factor.<sup>1</sup> These questions led to discussions between EPA and the refiners about establishing an optional nationwide sampling and testing program in which refiners could participate to satisfy the affirmative defense requirements under § 80.613. This program, which would be generally modeled on the reformulated gasoline (RFG) survey program set forth in 40 CFR 80.68, would be conducted by an independent survey organization following a survey plan approved annually by EPA, and funded by a consortium of refiners, importers and distributors.

For the reasons discussed below, EPA believes it is appropriate to provide branded refiners or importers who sell ULSD highway diesel fuel at retail stations with an alternative means of meeting the affirmative defense requirements in § 80.613. We also believe it is appropriate to provide this alternative to unbranded refiners and importers, as well as distributors and retailers. As a result, this rule amends the diesel sulfur regulations to provide an optional alternative means of meeting the defense requirements in § 80.613, which will be available to any refiner, importer, distributor or retailer of ULSD highway diesel fuel.

We believe that the use of the new alternative quality assurance compliance program will result in a quality assurance program equivalent to that currently required under the diesel sulfur regulations. The provisions in this rule are equivalent to those in an existing program that was implemented by EPA's Office of Enforcement and Compliance Assurance in October, 2006 through enforcement discretion, and which has efficiently provided significant amounts of statistically valid information on a nationwide basis. Sampling results from the program (aggregated on a quarterly basis) are available on the Web site of the Clean Diesel Fuel Alliance at [http://www.clean-diesel.org/pump\\_survey.html](http://www.clean-diesel.org/pump_survey.html). This rule will not have any adverse

environmental impact and will provide refiners, importers and distributors additional flexibility in complying with the diesel sulfur regulations.

### III. This Action

This action provides refiners, importers, distributors and retailers of ULSD highway diesel fuel the option of an alternative defense to liability that consists in part of a nationwide program of sampling and testing designed to provide oversight of all retail stations that sell ULSD highway diesel fuel. Under this option, a refiner, importer, distributor or retailer must participate in an organization that arranges to have an independent surveyor conduct a program of compliance surveys pursuant to a survey plan designed to achieve the same quality assurance objectives as the current regulatory requirement. A detailed survey plan must be submitted to EPA for approval by November 1 of the year preceding the year in which the alternative quality assurance sampling and testing program would be implemented. The survey plan must include a methodology for determining when the survey samples will be collected, the locations of the retail outlets where the samples will be collected, the number of samples to be included in the survey, and any other elements that EPA determines are necessary to achieve the same level of quality assurance as the current requirement.

Under this alternative quality assurance program, the independent surveyor is required to collect samples of ULSD highway diesel fuel at retail stations and have the samples tested for sulfur content. This nationwide sampling and testing program would be designed to ensure comprehensive geographic coverage of regulated highway diesel fuel sold at retail outlets, would provide proportionate coverage of such fuel in three sampling strata, and would be done in accordance with the provisions in 40 CFR 80.580. These three strata generally refer to: (1) densely populated areas, which include Metropolitan Statistical Areas and the reformulated gasoline control areas; (2) transportation corridors, which are based on interstate highways outside the densely populated areas. Transportation corridors include areas immediately adjacent to the highways themselves and a swath within several miles on each side of the highway. For any given survey, a certain length of any specific highway may be deemed appropriate as a sampling unit or cluster; (3) rural areas, which include all areas not included in the previous two strata. These areas are subdivided into clusters,

generally based on groupings of counties. The specific criteria used for selecting sampling areas for each survey plan is subject to EPA approval.

The surveyor would generate and report summary sulfur content statistics to EPA each calendar quarter. In addition, where the survey finds noncompliant samples of ULSD highway diesel fuel, the liable parties would be responsible for identifying and addressing the root cause of the violation to prevent future violations.

EPA recognizes that any alternative quality assurance program must result in the same level of consistency in meeting the ULSD standard for highway fuel as the current quality assurance requirements. A sampling and testing program that accomplishes this must both accurately estimate the proportion of retail stations that sell non-compliant ULSD highway diesel fuel and provide a credible deterrent to deliberate or inadvertent violations of downstream enforcement standards.

While not mutually exclusive, the two overall objectives differ significantly in how an adequate number of samples for an alternative quality assurance program is calculated. The amount of sampling needed to satisfy either objective depends on a number of considerations which pose separate difficulties for the two objectives. On the one hand, the amount needed to estimate the proportion of retail stations that sell non-compliant ULSD highway diesel fuel varies as a function of the expected underlying proportion of stations selling non-compliant fuel, the proportion of stations needed to be non-compliant to determine that fuel is non-compliant, the selected confidence level, and various sample design parameters. Thus, arriving at the sampling requirement for determining the proportion of retail stations that sell non-compliant ULSD highway diesel relies on determining tolerable levels of non-compliance and confidence that would provide a suitable degree of accuracy.

On the other hand, the amount of sampling needed to maintain adequate deterrence rests on sound judgment by experienced field enforcement personnel based on the attractiveness/profitability of deliberate violations, the likelihood of inadvertent violations, the nature of penalty policies, and the speed with which information about enforcement actions and their outcomes is disseminated throughout the regulated community. Therefore, deciding how much sampling is needed for effective deterrence is a less deterministic process.

<sup>1</sup> The diesel sulfur regulations at § 80.580(d) provide for an adjustment factor to be subtracted from test results for samples taken downstream of the refinery gate, to account for test variability. The adjustment factor was 3 ppm prior to October 15, 2008, and is now 2 ppm as of October 15, 2008. Thus, ULSD highway diesel fuel downstream of the refinery gate would be deemed to be compliant beginning October 15, 2008 if a test result showed it contained no more than 17 ppm sulfur. For ease of reference, this preamble uses the term "downstream sulfur standard" to refer to the 15 ppm standard plus the adjustment factor, i.e. 17 ppm, beginning October 15, 2008. The term ULSD means diesel fuel subject to the 15 ppm standard applicable at the refinery gate, and subject to the downstream sulfur standard of 15 ppm plus the 2 ppm adjustment factor.

For the reasons discussed above, no single statistical formula can be used exclusively to determine the size of an acceptable sampling program if both objectives are to be met. The use of a rigorous survey sampling methodology serves both principal objectives. For non-compliance estimation purposes, the need for such statistical rigor is necessary for an accurate measure of the proportion of retail stations selling non-compliant ULSD highway diesel fuel. Another benefit from the use of such methodology is that it makes the most efficient use of limited resources by distributing sampling in a way that no regulated party can be confident that it will not be sampled and tested.

When a violation occurs, today's rule allows branded refiners that participate in the consortium to establish a defense for themselves, and also establish a defense for distributors and retailers that operate under the branded refiners' trade or brand name under new provisions in § 80.613(e). Unbranded refiners and distributors that do not operate under the trade or brand name of a refiner, as well as distributors that operate under a refiner's trade or brand name but the refiner has elected to not participate in the consortium, also may use these new defense provisions by independently participating in the consortium. In certain situations, a distributor's operations may be partially under the brand name of a participating refiner and partially under the brand name of a non-participating refiner or partially not under the brand name of a refiner. Such distributors, if they seek to use the alternative defense discussed here, must participate independently in the consortium to meet their defense requirements under § 80.613(e) for their operations that are under the brand name of a non-participating refiner, or operations not under the brand name of a refiner.

Where the survey association finds a sample of ULSD highway diesel fuel that exceeds the downstream sulfur standard, participants in the consortium have different requirements for establishing their defense under § 80.613(e), depending on the amount of the exceedance. For exceedances of up to 2 ppm over the downstream standard, consortium participants will be deemed to have met all of their defense requirements under § 80.613(e) provided they demonstrate to EPA that diesel fuel last supplied to the retail station contained no more than 15 ppm sulfur prior to subtracting the 2 ppm adjustment factor when dispensed at the supplying terminal, and take several actions, described in further detail below, to stop distribution of the

violating fuel, to determine why the violation occurred, and to provide a report to EPA explaining how such violations will be avoided in the future. However, for exceedances of more than 2 ppm over the downstream standard, consortium participants must also meet additional defense requirements as described in further detail below.

EPA chose 2 ppm as a threshold based on past sulfur testing experience in order to provide an incentive for regulated parties to participate in the consortium while encouraging participants to take appropriate steps to comply. Exceedances of more than 2 ppm over the downstream standard indicate that a regulated party may not have taken appropriate steps to comply, and that more analysis is required to determine the cause of the exceedance. The exceedance threshold of 2 ppm is equal to the 2 ppm adjustment factor allowed for downstream parties in the diesel sulfur regulations. Due to variability in sulfur test methods, downstream parties are allowed to subtract 2 ppm from their sulfur test result to determine compliance with the 15 ppm sulfur standard, which means that a downstream sulfur test result of 17 ppm is considered to be compliant with the 15 ppm sulfur standard. However, a test variability of 2 ppm means actual sulfur content may also be 2 ppm greater than the test result, so if diesel fuel containing 17 ppm sulfur is tested twice for sulfur, one test result may be 15 ppm and one test result may be 19 ppm. Thus, if a terminal has a sulfur test result of 15 ppm for their diesel fuel prior to subtracting the 2 ppm adjustment factor, it is possible for another party to test the same diesel fuel and obtain a test result of 19 ppm. Requiring the supplying terminal to demonstrate that their diesel fuel when tested contained no more than 15 ppm sulfur prior to subtracting the 2 ppm adjustment factor means that a retail test result of 19 ppm would show noncompliance but would still be consistent with other test results that show compliance under the regulations.

When the survey association finds a sample of ULSD highway diesel fuel which exceeds the downstream standard by 2 ppm or less, branded refiners that participate in the consortium must take several actions to meet all of their defense requirements under § 80.613(e). These include demonstrating to EPA that diesel fuel last supplied to the retail station contained no more than 15 ppm sulfur when dispensed at the supplying terminal, and that best efforts and accepted business practices are used by downstream parties to avoid diesel fuel

contamination. Also, following notification to the branded refiner by the survey association of the test result, appropriate steps must be taken within 24 hours to ensure the diesel fuel is not dispensed into motor vehicles until remedial action is taken to ensure the fuel sulfur content is no greater than the applicable downstream standard. This action may include either shutting down the pumps which supply the diesel fuel, or placing new labels on the pumps stating they dispense 500 ppm highway diesel fuel rather than 15 ppm highway diesel fuel (prior to June 1, 2010). Lastly, the branded refiner must submit a report to EPA within 120 days of the exceedance, which explains the circumstances and root cause of the exceedance and steps taken to prevent distribution of noncompliant fuel, and lists actions that will be taken to prevent future exceedances. The refiner must also provide EPA with copies of contracts which include the procedures in place to prevent contamination of ULSD highway diesel fuel. The survey association must also retest ULSD highway diesel fuel dispensed at the retail station during its next survey, in addition to its scheduled sampling.

Unbranded refiners, distributors and retailers that participate in the consortium have slightly different requirements from branded refiners for establishing their defense when the survey association finds a retail sample which exceeds the downstream standard by 2 ppm or less. Participating unbranded refiners will be deemed to have met all of their affirmative defense requirements under § 80.613(e) if they carry out all of the actions listed previously for branded refiners (except for providing EPA with copies of contracts that include procedures in place to prevent contamination of ULSD highway diesel fuel). Participating distributors and retailers will be deemed to have met all of their defense requirements under § 80.613(e) if they carry out all of the actions listed previously for branded refiners (except for providing EPA with copies of contracts that include procedures in place to prevent contamination of ULSD highway diesel fuel). Additionally, the retail outlet at which the sample was collected must have had no previous instances of a tested sample of ULSD highway diesel fuel exceeding the downstream standard for two years prior to the exceedance. If a tested sample of ULSD highway diesel fuel exceeded the downstream standard within the prior two years, participating distributors and retailers must also meet

the defense elements under § 80.613(a)(1)(i) and (ii), and § 80.613(c).

When the survey association finds a sample that exceeds the downstream sulfur standard by more than 2 ppm, under § 80.613(e) branded refiners must carry out the actions listed previously for branded refiners. In addition, such branded refiners must also meet the defense elements in § 80.613(b), such as showing they did not cause the violation, or that the violation was caused by another person. Similarly, under § 80.613(e), unbranded refiners, distributors and retailers must carry out all of the actions listed previously for branded refiners (except for providing EPA with copies of contracts that include procedures in place to prevent contamination of ULSD highway diesel fuel). In addition, such distributors must also meet the defense elements under § 80.613(a)(1)(i) and (ii), and § 80.613(c).

Use of this alternative affirmative defense and participation in this quality assurance program is optional, and refiners, importers, distributors, and retailers may choose to conduct their own quality assurance program as provided currently in the regulations instead of participating in this nationwide program. A refiner that does not participate in the consortium will continue to be subject to the sampling and testing defense provisions under § 80.613, as will distributors that operate under such a refiner's trade or brand name unless such a distributor independently participates in the consortium.

Today's rule also makes one minor correction to the gasoline benzene regulations clarifying when a small refiner who loses their small refiner status may generate gasoline benzene credits. Disqualified small refiners are allowed a grace period of up to 36 months after the date of the disqualifying event to begin meeting the gasoline benzene standards applicable to non-small refiners. The gasoline benzene regulations currently prohibit disqualified small refiners from generating either early or standard gasoline benzene credits at any of their refineries during this grace period. This results in limitations on credit generation for disqualified small refiners that are more stringent than limitations on credit generation for non-small refiners, which was not EPA's intent. Today's rule amends the gasoline benzene regulations at § 80.1339(e)(4) to allow disqualified small refiners the same opportunity to generate gasoline benzene credits during the grace period as that afforded to non-small refiners.

#### IV. Statutory and Executive Order Reviews

##### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

##### B. Paperwork Reduction Act

The information collection requirements in this direct final rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2364.03.

This direct final rule provides refiners, importers and distributors of ULSD highway diesel fuel with additional flexibility to comply with the diesel sulfur regulations. The flexibility afforded under this rule is optional. Modest information collection requirements in the form of reports for noncompliant diesel sulfur samples are required for those parties who avail themselves of the flexibility provided in this rule. The information under this rule will be collected by EPA's Transportation and Regional Programs Division, Office of Transportation and Air Quality, Office of Air and Radiation (OAR), and by EPA's Air Enforcement Division, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance (OECA). The information collected will be used by EPA to evaluate compliance with the requirements under the diesel sulfur program. This oversight by EPA is necessary to ensure attainment of the air quality goals of the diesel sulfur program.

The estimated hourly burden per respondent for the diesel surveys is 16 hours. The estimated annual hourly burden is 320 hours for all respondents (assuming 20 respondents per year). The estimated hourly cost is \$71 per hour. The total estimated cost per respondent is \$1,136. The total estimated cost for all respondents is \$22,270. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control

numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA-HQ-OAR-2007-1158. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Comments must be submitted on or before July 12, 2010.

##### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small

entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

Today's final rule provides additional flexibility to refiners, importers, and distributors of diesel fuel by amending the diesel sulfur regulations to allow a voluntary nationwide sampling and testing program to be used as an alternative means of meeting the sampling and testing defense elements under 40 CFR 80.613. Participation in the program should reduce regulatory burden on all participants. Any small entities may choose whether or not to join the program. Today's rule also amends the gasoline benzene regulations to allow disqualified small refiners the same opportunity to generate gasoline benzene credits as that afforded to non-small refiners. We have therefore concluded that today's final rule will relieve the regulatory burden for all affected small entities.

#### *D. Unfunded Mandates Reform Act*

This rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule provides refiners, distributors, and importers of diesel fuel with additional flexibility in complying with regulatory requirements. As a result, this rule will have the overall effect of reducing the burden of the diesel sulfur regulations on these regulated parties. These requirements also codify existing practices designed to ensure that ULSD highway diesel fuel meets downstream standards. Today's rule also amends the gasoline benzene regulations to allow disqualified small refiners the same opportunity to generate gasoline benzene credits as that afforded to non-small refiners, relieving burden on small refiners. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The action imposes no enforceable duty on any State, local or tribal governments.

#### *E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule

provides refiners, distributors, and importers of diesel fuel with additional flexibility in complying with regulatory requirements. These requirements also codify existing practices designed to ensure that ULSD highway diesel fuel meets downstream standards. Today's rule also amends the gasoline benzene regulations to allow disqualified small refiners the same opportunity to generate gasoline benzene credits as that afforded to non-small refiners. The requirements of the rule will be enforced by the Federal government at the national level. Thus, Executive Order 13132 does not apply to this rule.

#### *F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule applies to refiners, distributors, and importers of diesel fuel. This action contains certain modifications to the federal requirements for diesel sulfur, and will not impose any enforceable duties on communities of Indian tribal governments. Today's rule also amends the gasoline benzene regulations to allow disqualified small refiners the same opportunity to generate gasoline benzene credits as that afforded to non-small refiners, and will not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

#### *G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

#### *H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This is a rule amendment that does not relax the control measures on sources regulated by the rule and therefore will not cause emissions increases from these sources.

#### *K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a

report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective July 12, 2010.

#### L. Clean Air Act Section 307(d)

This rule is subject to Section 307(d) of the CAA. Section 307(d)(7)(B) provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to the EPA should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Director of the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20004.

#### V. Statutory Provisions and Legal Authority

Regulation of Fuels and Fuel Additives: Alternative Affirmative Defense Requirements for Ultra-low Sulfur Diesel and Gasoline Benzene Technical Amendment.

Statutory authority for the fuel controls set in this direct final rule comes from sections 211 and 301(a) of the CAA.

#### List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Diesel, Gasoline, Imports, Incorporation by reference, Labeling, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: May 3, 2010.

**Lisa P. Jackson**,  
Administrator.

■ For the reasons set out in the preamble, part 80 Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

#### PART 80—REGULATION OF FUEL AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

**Authority:** 42 U.S.C. 7414, 7542, 7545, and 7601(a).

■ 2. Section 80.613 is amended by adding paragraph (e) to read as follows:

#### § 80.613 What defenses apply to persons deemed liable for a violation of a prohibited act under this subpart?

\* \* \* \* \*

(e) *Alternative defense requirements.* A person deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), may comply with the following alternative defense requirements in lieu of the requirements in paragraphs (a) through (d) of this section to the extent provided for, and subject to the conditions and limitations set forth in this paragraph (e):

(1) *Independent survey association.* To comply with the alternative defense requirements under this paragraph (e), a person must participate in the funding of a consortium which arranges to have an independent survey association conduct a statistically valid program of annual compliance surveys pursuant to a survey plan which has been approved by EPA, in accordance with the requirements of paragraphs (e)(2) through (e)(4) of this section.

(2) *General requirements.* The consortium survey program under this paragraph (e) must be:

(i) Planned and conducted by an independent survey association that meets the requirements in § 80.68(c)(13)(i);

(ii) Conducted at diesel fuel retail outlets nationwide; and

(iii) Representative of all motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) dispensed at diesel fuel retail outlets nationwide.

(3) *Independent survey association requirements.* The consortium described in paragraph (e)(1) of this section shall require the independent survey association conducting the surveys to:

(i) Submit to EPA for approval each calendar year a proposed survey plan in accordance with the requirements of paragraph (e)(4) of this section.

(ii) Obtain samples of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) in accordance with the survey plan approved under this paragraph (e), or immediately notify EPA of any refusal of retail outlets to allow samples to be taken;

(iii) Test, or arrange to be tested, the samples required under paragraph (e)(3)(ii) of this section for sulfur content as follows—

(A) Samples collected at retail outlets shall be shipped the same day the samples are collected via overnight service to the laboratory, and analyzed for sulfur content within twenty-four hours after receipt of the sample in the laboratory.

(B) Any laboratory to be used by the independent survey association for sulfur testing shall be approved by EPA and its sulfur test method shall comply with the provisions of §§ 80.584, 80.585 and 80.586.

(C) For purposes of the alternative defense requirements in this paragraph (e), test results shall be rounded to a whole number using ASTM E 29–02<sup>e1</sup>, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications, rounding method procedures. The Director of the Federal Register approved the incorporation by reference of ASTM E 29–02<sup>e1</sup> as prescribed in 5 U.S.C. 552(a) and 1 CFR part 51.

Anyone may purchase copies of this standard from ASTM International, 100 Barr Harbor Dr., West Conshohocken, PA 19428, (610) 832–9585. Anyone may inspect copies at the U.S. EPA, EPA Docket Center, Room 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC 20460, (202) 566–9744, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

(iv) Provide notice of samples with sulfur content greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), as follows:

(A) In the case of any test result that is one or two ppm greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), the independent survey association shall, within twenty-four hours after the laboratory receives the sample, send notification of the test result as follows: In the case of a sample collected at a retail outlet at which the brand name of

a refiner or importer is displayed, to the refiner or importer, and EPA; and in the case of a sample collected at other retail outlets, to the retailer and EPA. This initial notification to a refiner shall include specific information concerning the name and address of the retail outlet, contact information, the brand, and the sulfur content of the sample.

(B) In the case of any test result that is three or more ppm greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), or for a test result that is one or two ppm greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), and the retail outlet has had an exceedance within the previous two years, the independent survey association shall, within the time limits specified in paragraph (e)(3)(iv)(A) of this section, provide notice to the parties described in paragraph (e)(3)(iv)(A) of this section. The notice to EPA must include the name and address of the retail outlet, and the telephone number, if known.

(C) The independent survey association shall provide notice to the identified contact person or persons for each party specified in paragraphs (e)(3)(iv)(A) and (B) of this section in writing (e.g. e-mail or facsimile) and, if requested by the identified contact person, by telephone.

(v) Provide to EPA quarterly and annual summary survey reports which include the information specified in paragraph (e)(8) of this section.

(vi) Maintain all records relating to the surveys conducted under this paragraph (e) for a period of at least 5 years.

(vii) At any time permit any representative of EPA to monitor the conduct of the surveys, including sample collection, transportation, storage, and analysis.

(4) *Survey plan design requirements.* The proposed survey plan required under paragraph (e)(3)(i) of this section shall, at a minimum, include the following:

(i) *Number of surveys.* The survey plan shall include four surveys each calendar year. The four surveys collectively are called the survey series.

(ii) *Sampling areas.* The survey plan shall include sampling in three types of areas, called sampling strata, during each survey: Densely populated areas, transportation corridors and rural areas. These sampling strata shall be further divided into discrete sampling areas, or clusters. Each survey shall include sampling in at least 40 sampling areas in each stratum, randomly selected.

(iii) *No advance notice of surveys.* The survey plan shall include procedures to keep confidential from any regulated party, but not from EPA, the identification of the sampling areas that are included in any survey plan prior to the beginning of a survey in an area.

(iv) *Retail outlet selection.*

(A) The retail outlets to be sampled in a sampling area shall be selected from among all retail outlets in the sampling

area that sell motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1), with probability of selection proportionate to the volume of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) sold at the retail outlets, and inclusion of retail outlets with different brand names and unbranded, if possible.

(B) In the case of any retail outlet from which a sample of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) was collected during a survey and determined to have a sulfur content that exceeds the 15 ppm sulfur standard under § 80.520(a)(1), as adjusted under § 80.580(d), that retail outlet shall be included in the subsequent survey.

(C) Only a single sample shall be collected at each retail outlet, except that where a retail outlet had a sample from the preceding survey with a test result that exceeds the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), separate samples shall be taken that represent the diesel fuel contained in each storage tank containing motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1), unless collection of separate samples is not practicable (for example, due to diesel piping arrangements or pump outages).

(v) *Number of samples.*

(A) The minimum number of samples to be included in the survey plan for each calendar year shall be calculated as follows:

$$n = \left\{ \left[ (Z_{\alpha} + Z_{\beta}) \right]^2 / \left( 4 * \left[ \arcsin(\sqrt{\phi_1}) - \arcsin(\sqrt{\phi_0}) \right]^2 \right) \right\} * St_n * F_a * F_b * Su_n$$

Where:

$n$  = minimum number of samples in a year-long survey series. However, in no case shall  $n$  be larger than 9,600 or smaller than 5,250.

$Z_{\alpha}$  = upper percentile point from the normal distribution to achieve a one-tailed 95% confidence level (5%  $\alpha$ -level). Thus,  $Z_{\alpha}$  equals 1.645.

$Z_{\beta}$  = upper percentile point to achieve 95% power. Thus,  $Z_{\beta}$  equals 1.645.

$\phi_1$  = the maximum proportion of stations selling non-compliant fuel for the fuel in a region to be deemed compliant. In this test, the parameter needs to be 5% or greater, i.e., 5% or more of the stations, within a stratum such that the region is considered non-compliant. For this survey,  $\phi_1$  will be 5%.

$\phi_0$  = the underlying proportion of non-compliant stations in a sample. For calendar year 2011,  $\phi_0$  will be 1.9%. For calendar years 2012 and beyond,  $\phi_0$  will be the average of the proportion of

stations to be non-compliant over the previous four surveys.

$St_n$  = number of sampling strata. For purposes of this survey program,  $St_n$  equals 3.

$F_a$  = adjustment factor for the number of extra samples required to compensate for collected samples that cannot be included in the survey, based on the number of additional samples required during the previous four surveys. However, in no case shall the value of  $F_a$  be smaller than 1.1. For purposes of this adjustment factor, a sample shall be treated as one that can be included in the survey only if the fuel was offered for sale as motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) at the retail outlet where the sample was collected and if an appropriate laboratory analysis of this fuel is conducted.

$F_b$  = adjustment factor for the number of samples required to resample each retail outlet with test results greater than 17

ppm (resampling), based on the rate of resampling required during the previous four surveys. However, in no case shall the value of  $F_b$  be smaller than 1.1.

$Su_n$  = number of surveys per year. For purposes of this survey program,  $Su_n$  equals 4.

(B) The number of samples obtained from the formula in paragraph (e)(4)(v)(A) of this section, after being incremented as necessary to allocate whole numbers of samples to each cluster, shall be distributed approximately equally for the surveys conducted during the calendar year. Within a survey, the samples shall be divided approximately equally for the three strata.

(5) *Sulfur test result that is one or two ppm Greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d).* The following provisions apply if the tested sulfur level of a

diesel fuel sample collected by the independent survey association is one or two ppm greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d).

(i) *Branded refiner or importer.* Where the sample was collected at a retail outlet at which the brand name of a refiner or importer is displayed, the branded refiner or importer will be deemed to have established its defense under this section, provided that the refiner or importer participates in a consortium as described in paragraph (e)(1) of this section, and provided that the refiner or importer also demonstrates the following:

(A) The sulfur content of the diesel fuel at the terminal(s) that most recently supplied the retail outlet was no greater than 15 ppm prior to adjustment under § 80.580(d) when dispensed for delivery to the retail outlet;

(B) Best efforts and accepted business practices are used by parties downstream from the refiner or importer to avoid diesel fuel contamination. These would include, for example, procedures for ensuring motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) is not contaminated in delivery trucks, and procedures for ensuring delivery truck drivers can identify retail outlet drop points for motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1).

(C) Upon receiving the notification required under paragraph (e)(3)(iv)(A) of this section, any pumps supplied by the retail storage tank where the noncompliant diesel fuel was found were shutdown until such time that the fuel at issue was retested and the sulfur content of the fuel was found to be no greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d). Prior to May 31, 2010, as an alternative to shutting down pumps supplied by the retail storage tank where the noncompliant diesel fuel was found, such pumps may be relabeled with the language required under § 80.571(b). The steps required in this paragraph (e)(5)(i)(C) must be taken as soon as practicable after receiving the notification required under paragraph (e)(3)(iv)(A) of this section, which normally will be within the same business day, but no longer than twenty-four hours after notification is received unless the refiner or importer demonstrates this timing is not possible.

(D) A root cause analysis is performed to determine the cause of the noncompliant diesel fuel and appropriate actions are taken to prevent future violations.

(E) The independent survey association samples and retests the diesel fuel at the retail outlet during its next survey, in addition to the scheduled sampling and testing under the approved survey program.

(F) The refiner or importer submits a report to EPA no later than 120 days following the date the sample was collected at the retail outlet, which includes the information specified in paragraph (e)(7) of this section.

(G) The refiner or importer supplies EPA with copies of the contracts with downstream parties specified in § 80.613(b)(2) or the specifications or inspections of procedures and equipment described in § 80.613(b)(3), as appropriate, which are designed to prevent the contamination of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1).

(ii) *Unbranded refiner or importer.* Any unbranded refiner or importer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section if the unbranded refiner or importer is a member of the consortium described in paragraph (e)(1) of this section and the refiner or importer meets the requirements of paragraphs (e)(5)(i)(A) through (F) of this section.

(iii) *Distributor or retailer.* Any distributor (e.g., pipeline, terminal operator, marketer, truck carrier) or retailer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section, provided that, within two years prior to the time the diesel fuel sample was collected by the independent survey association, the retail outlet had no instances where the tested sulfur level of a diesel fuel sample was greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d); and

(A) Where the retailer displays the brand name of a refiner or importer, the requirements in paragraphs (e)(5)(i) of this section are met by the branded refiner or importer; or

(B) Where the branded refiner or importer has elected not to participate in a consortium as described in paragraph (e)(1) of this section, or where

the retailer does not display the brand name of a refiner or importer, the distributor or retailer is a member of the consortium described in paragraph (e)(1) of this section and the distributor or retailer meets the requirements in paragraphs (e)(5)(i)(A) through (F) of this section.

(C) If within two years prior to the time the diesel fuel sample was collected by the independent survey association, the retail outlet had an instance where the tested sulfur level of a diesel fuel sample was greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), any distributor or retailer that is deemed liable for a violation under § 80.612 will be deemed to have established its defense under this section if the party meets the requirements under paragraph (e)(5)(iii)(A) or (B) of this section (in lieu of the requirement in paragraph (a)(1)(iii) of this section), and the party meets the requirements under paragraphs (a)(1)(i), (a)(1)(ii), and (c) of this section.

(6) *Sulfur test result that is three or more ppm Greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d).* The following provisions apply if the tested sulfur level of a diesel fuel sample collected by the independent survey association is three or more ppm greater than the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d):

(i) *Branded refiner or importer.* Any branded refiner or importer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section if the refiner or importer meets the requirements under paragraph (e)(5)(i) of this section and meets the requirements under paragraphs (a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), (b)(3), and (c) of this section.

(ii) *Unbranded refiner or importer.* Any unbranded refiner or importer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section if the refiner or importer meets the requirements under paragraph (e)(5)(ii) of this section and meets the requirements under

paragraphs (a)(1)(i), (a)(1)(ii), (a)(1)(iv), and (c) of this section.

(iii) *Distributor or retailer.* Any distributor or retailer that is deemed liable under § 80.612(a) for a violation of § 80.610(a)(1), concerning diesel fuel that is sold, offered for sale, or dispensed at a retail outlet and that does not meet the applicable sulfur content standard under § 80.520(a)(1), as adjusted under § 80.580(d), will be deemed to have established its defense under this section if the requirements under paragraph (e)(5)(iii)(A) or (B) of this section, as appropriate, are met, and the distributor or retailer meets the requirements under paragraphs (a)(1)(i), (a)(1)(ii), and (c) of this section. Distributors that blend a diesel fuel additive subject to the requirements of § 80.521(b) into motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a) must also meet the requirement under paragraph (a)(1)(iv) of this section.

(7) *Report regarding motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) with high sulfur content.* The report that is required to be submitted to EPA under paragraph (e)(5)(i)(F) of this section shall contain the following information:

- (i) The name, address and contact information for the regulated party submitting the report;
- (ii) The name, address and contact information for the retail outlet where the high sulfur diesel fuel was found;
- (iii) The brand name of the refiner or importer displayed at the retail outlet, if any;
- (iv) The date of sampling, the analysis results, and the label that appeared on the pump where the sample was collected.

(v) For each of the most recent three deliveries (*i.e.*, the three deliveries that immediately preceded the taking of the violating sample) of diesel fuel to the retail outlet storage tank at issue, or the most recent five deliveries if the cause of the violation is not demonstrated following analysis of the most recent three deliveries:

- (A) A copy of the product transfer documents for the delivery;
- (B) The name, address and contact information for the terminal and truck distributor that supplied the diesel fuel;
- (C) The date of delivery and the volume of diesel fuel delivered;
- (D) The designation of the diesel fuel on the product transfer document;
- (E) The test results (or other evidence of the diesel sulfur content) for the diesel fuel in the terminal tank from which the delivery truck was loaded, and copies of the test result reports; and

(F) A description of the procedures used by the truck distributor to avoid diesel contamination (*e.g.*, dedicated trucks).

(vi) A description of any actions taken to prevent sale of the noncompliant diesel fuel, including:

(A) The date and time the regulated party was notified of the high sulfur test result, the date and time the retailer was notified, and the date and time the sale of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) was suspended;

(B) A description of the actions taken to prevent sale of the noncompliant diesel fuel; and

(C) The date and time that sales of motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1) from the retail storage tank at issue were resumed, the results of the test used to establish the fuel met applicable standards, and a copy of the test result report.

(vii) A description of the root-cause analysis required in paragraph (e)(5)(i)(D) of this section, including:

(A) A description of the investigation conducted to determine the root-cause of the noncompliant diesel fuel, and the conclusions reached as a result of this investigation; and

(B) A description of the steps taken to prevent future problems from the identified cause.

(8) *Summary survey reports.* The quarterly and annual summary survey reports required under paragraph (e)(3)(v) of this section shall include the following information:

(i) The identification of each sampling area included in a survey and the dates that the samples were collected in that area;

(ii) For each retail outlet sampled:

(A) The identification of the retail outlet;

(B) The refiner or importer brand name displayed, if any;

(C) The pump labeling; and

(D) The sample test result.

(iii) Sulfur level summary statistics by brand and unbranded for each sampling area, strata, survey and annual survey series. These summary statistics shall:

(A) Include the number of samples, and the average, median and range of sulfur levels; and

(B) Be provided separately for the diesel fuel samples from pumps labeled as dispensing motor vehicle diesel fuel subject to the 15 ppm sulfur standard under § 80.520(a)(1), motor vehicle diesel fuel subject to the 500 ppm sulfur standard under § 80.520(c), and pumps that are not labeled.

(iv) The quarterly reports required under this paragraph (e)(8) are due sixty

days following the end of the quarter. The annual reports required under this paragraph (e)(8) are due sixty days following the end of the calendar year.

(v) The reports required under this paragraph (e)(8) shall be submitted to EPA in both electronic spreadsheet and hard copy form.

(9) *EPA inspections.* If EPA inspects any facility and determines that the sulfur content of diesel fuel exceeds the 15 ppm standard under § 80.520(a)(1), as adjusted under § 80.580(d), liability for such sulfur content violation under § 80.612 will be treated as provided in paragraph (e)(6) of this section for branded refiners or distributors that participate in the consortium under this paragraph (e). Any other party deemed liable for a violation under § 80.612 must establish a defense under paragraphs (a) through (d) of this section, as applicable.

(10) *Procedures for obtaining approval of survey plan.* The procedure for obtaining EPA approval of a survey plan under this paragraph (e), and for revocation of such approval, is as follows:

(i) A survey plan that complies with the requirements of this paragraph (e) must be submitted to EPA no later than November 1 of the year preceding the calendar year in which the surveys will be conducted;

(ii) The survey plan must be signed by a responsible officer of the consortium which arranges to have an independent surveyor conduct the survey program;

(iii) The survey plan must be sent to the following address: Director, Compliance and Innovative Strategies Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Mail Code 6506J, Washington, DC 20460;

(iv) EPA will send a letter to the party submitting a survey plan under this section, either approving or disapproving the survey plan;

(v) EPA may revoke any approval of a survey plan under this section for cause, including an EPA determination that the approved survey plan has proved to be inadequate in practice or that it was not diligently implemented;

(vi) The approving official for a survey plan under this section is the Director of the Compliance and Innovative Strategies Division, Office of Transportation and Air Quality.

(vii) Any notifications or reports required to be submitted to EPA under this paragraph (e) must be directed to the official designated in paragraph (e)(10)(vi) of this section.

(11) *Independent surveyor contract.* (i) No later than December 1 of the year preceding the year in which the surveys

will be conducted, the contract with the independent surveyor shall be in effect, and an amount of money necessary to carry out the entire survey plan shall be paid to the independent surveyor or placed into an escrow account with instructions to the escrow agent to pay the money to the independent surveyor during the course of the conduct of the survey plan.

(ii) No later than December 15 of the year preceding the year in which the surveys will be conducted, EPA must receive a copy of the contract with the independent surveyor, proof that the money necessary to carry out the survey plan has either been paid to the independent surveyor or placed into an escrow account, and, if placed into an escrow account, a copy of the escrow agreement, to be sent to the official designated in paragraph (e)(10)(vi) of this section.

(12) *Failure to fulfill requirements.* A failure to fulfill or cause to be fulfilled any of the requirements of this paragraph (e) will cause the option to use the alternative quality assurance requirement under this paragraph (e) to be void *ab initio*.

■ 3. Section 80.1339 is amended by revising paragraph (e)(4) to read as follows:

**§ 80.1339 Who is not eligible for the provisions for small refiners?**

\* \* \* \* \*

(e) \* \* \*

(4) During the period provided under paragraph (e)(2) of this section, and any extension provided under paragraph (e)(3) of this section, the refiner may not generate gasoline benzene credits under § 80.1275(b)(3) for any of its refineries where under § 80.1342 the refiner was previously allowed to defer compliance with the standards in §§ 80.1230(a) and 80.1230(b).

\* \* \* \* \*

[FR Doc. 2010-10915 Filed 5-10-10; 8:45 am]

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 300**

[EPA-HQ-SFUND-2009-0654; FRL-9146-8]

**National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) Region II is publishing a

direct final Notice of Deletion of the Asbestos Dump Superfund Site (Site), located in Long Hill Township and Harding Township, New Jersey, from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final deletion is being published by EPA with the concurrence of the State of New Jersey, through the New Jersey Department of Environmental Protection (NJDEP), because EPA has determined that all appropriate response actions under CERCLA, other than operation, maintenance, and five-year reviews, have been completed. However, this deletion does not preclude future actions under Superfund.

**DATES:** This direct final deletion is effective July 12, 2010 unless EPA receives adverse comments by June 10, 2010. If adverse comments are received, EPA will publish a timely withdrawal of the direct final deletion in the **Federal Register** informing the public that the deletion will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-SFUND-2009-0654, by one of the following methods:

- <http://www.regulations.gov>. Follow on-line instructions for submitting comments.

- *E-mail:* [hwilka.theresa@epa.gov](mailto:hwilka.theresa@epa.gov): Theresa Hwilka, Remedial Project Manager; [seppi.pat@epa.gov](mailto:seppi.pat@epa.gov): Pat Seppi, Community Involvement Coordinator.

- *Fax:* 212-637-4429.

- *Mail:* Theresa Hwilka, Remedial Project Manager, U.S. Environmental Protection Agency, Region II, Emergency & Remedial Response Division, 290 Broadway, 19th Floor, New York, NY 10007; or Pat Seppi, Community Involvement Coordinator, U.S. Environmental Protection Agency, Region II, Public Affairs Division, 290 Broadway, 26th Floor, New York, NY 10007.

- *Hand delivery:* U.S. Environmental Protection Agency, Region II, Emergency & Remedial Response Division, 290 Broadway, 19th Floor, New York, NY 10007. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-HQ-SFUND-2009-0654. EPA's policy is that all comments received will be included in the public

docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

**Docket**

All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at: U.S. Environmental Protection Agency, Region II, Superfund Records Center, 290 Broadway, Room 1828. (212) 637-4308.

*Hours:* 9 a.m. to 5 p.m., Monday through Friday; and at Long Hill Township Public Library, 917 Valley Road, Gillette, New Jersey 07933. (908) 647-2088.

*Hours:* 10 a.m. to 9 p.m., Monday through Thursday. 10 a.m. to 5 p.m., Friday and Saturday. 1 p.m. to 5 p.m., Sunday (Closed on Sundays in July and August).

**FOR FURTHER INFORMATION CONTACT:** Theresa Hwilka, Remedial Project Manager, U.S. Environmental Protection Agency, Region II, 290 Broadway, New