

(whether or not such testing was required by this rule), along with supporting documentation such as date of sampling and testing, batch number, tank number, and volume of product. Business records regarding actions taken in response to any violations discovered would also be required to be maintained for 5 years.

All records required to be maintained by refiners or importers participating in the generation or use of credits, hardship options (or by importers of diesel fuel produced by a foreign refiner approved for the temporary compliance option or a hardship option), including small refiner options, would also be covered by the retention requirement.

G. Liability and Penalty Provisions for Noncompliance

1. General

The liability and penalty provisions of the proposed NRLM diesel sulfur rule would be very similar to the liability and penalty provisions found in the highway diesel sulfur rule, the gasoline sulfur rule, the RFG rule and other EPA fuels regulations.³⁴² Regulated parties would be subject to prohibitions which are typical in EPA fuels regulations, such as prohibitions on selling or distributing fuel that does not comply with the applicable standard, and causing others to commit prohibited acts. Liability would also arise under the NRLM diesel rule for prohibited acts specific to the diesel sulfur control program, such as introducing nonroad diesel fuel not meeting the 15 ppm sulfur standard into model year 2011 or later nonroad equipment. In addition, parties would be liable for a failure to meet certain requirements, such as the recordkeeping, reporting, or PTD requirements, or causing others to fail to meet such requirements.

Under this proposal, the party in the diesel fuel distribution system that controls the facility where a violation occurred, and other parties in that fuel distribution system (such as the refiner, reseller, and distributor), would be presumed to be liable for the violation.³⁴³ As in the Tier 2 gasoline

sulfur rule and the highway diesel fuel rule, the proposed rule would explicitly prohibit causing another person to commit a prohibited act or causing non-conforming diesel fuel to be in the distribution system. Non-conforming includes: (1) diesel fuel with sulfur content above 15 ppm incorrectly designated as appropriate for model year 2011 or later nonroad equipment or other engines requiring 15 ppm fuel; (2) diesel fuel with sulfur content above 500 ppm incorrectly designated as appropriate for nonroad equipment or locomotives or marine engines after the applicable date for the 500 ppm standard for these pieces of equipment; or (3) distillates not containing required markers or otherwise not complying with the requirements of this proposal. Parties outside the diesel fuel distribution system, such as diesel additive manufacturers and distributors, would also be subject to liability for those diesel rule violations which could have been caused by their conduct.

This proposal also would provide affirmative defenses for each party presumed liable for a violation, and all presumptions of liability would be rebuttable. In general, in order to rebut the presumption of liability, parties would be required to establish that: (1) the party did not cause the violation; (2) PTD(s) exist which establish that the fuel or diesel additive was in compliance while under the party's control; and (3) the party conducted a quality assurance sampling and testing program. As part of their affirmative defense diesel fuel refiners or importers, diesel fuel additive manufacturers, and blenders of high sulfur additives into diesel fuel, would also be required to provide test results establishing the conformity of the product prior to leaving that party's control. Branded refiners would have additional affirmative defense elements to establish. The proposed defenses under the nonroad diesel sulfur rule are similar to those available to parties for violations of the highway diesel sulfur, RFG, gasoline volatility, and the gasoline sulfur regulations. This proposed rule would also clarify that parent corporations are liable for violations of subsidiaries, in a manner consistent with the gasoline sulfur rule and the highway diesel sulfur rule. Finally, the proposed NRLM diesel sulfur rule mirrors the gasoline sulfur rule and the highway diesel sulfur rule by clarifying that each partner to a joint venture would be jointly and severally liable for the violations at the joint venture facility or by the joint venture operation.

As is the case with the other EPA fuels regulations, the proposed diesel sulfur rule would apply the provisions of section 211(d)(1) of the Clean Air Act (Act) for the collection of penalties. These penalty provisions currently subject any person that violates any requirement or prohibition of the diesel sulfur rule to a civil penalty of up to \$31,500 for every day of each such violation and the amount of economic benefit or savings resulting from the violation. A violation of a NRLM diesel sulfur standard would constitute a separate day of violation for each day the diesel fuel giving rise to the violation remains in the fuel distribution system. Under the proposed regulation, the length of time the diesel fuel in question remains in the distribution system is deemed to be twenty-five days unless there is evidence that the fuel remained in its distribution system a lesser or greater amount of time. This is the same time presumption that is incorporated in the RFG, gasoline sulfur and highway diesel sulfur rules. The penalty provisions would also be similar to the penalty provisions for violations of these regulations.

EPA has included in this proposal two prohibitions for "causing" violations: (1) causing another to commit a violation; and (2) causing non-complying diesel fuel to be in the distribution system. These causation prohibitions are like similar prohibitions included in the gasoline sulfur and the highway diesel sulfur regulations, and, as discussed in the preamble to those rules, EPA believes they are consistent with EPA's implementation of prior motor vehicle fuel regulations. See the liability discussion in the preamble to the gasoline sulfur final rule, at 65 FR 6812 *et seq.*

The prohibition against causing another to commit a violation would apply where one party's violation is caused by the actions of another party. For example, EPA may conduct an inspection of a terminal and discover that the terminal is offering for sale nonroad diesel fuel designated as complying with the 15 ppm sulfur standard, while it, in fact, had an actual sulfur content greater than the standard.³⁴⁴ In this scenario, parties in the fuel distribution system, as well as parties in the distribution system of any diesel additive that had been blended into the fuel, would be presumed liable

³⁴² See section 80.5 (penalties for fuels violations); section 80.23 (liability for lead violations); section 80.28 (liability for gasoline volatility violations); section 80.30 (liability for highway diesel violations); section 80.79 (liability for violation of RFG prohibited acts); section 80.80 (penalties for RFG/CG violations); section 80.395 (liability for gasoline sulfur violations); section 80.405 (penalties for gasoline sulfur regulations); and section 80.610-614 (prohibited acts, liability for violations, and penalties for highway diesel sulfur regulations).

³⁴³ An additional type of liability, vicarious liability, is also imposed on branded refiners under the proposal.

³⁴⁴ At downstream locations the violation would occur if EPA's test result showed a sulfur content of greater than 17 ppm, which takes into account the two ppm adjustment factor for testing reproducibility for downstream parties.