

*Response #3:* EPA is primarily concerned with the sell through of averaged coatings because it may make certain compliance determinations difficult or impossible. In order to determine compliance for an averaged coating, an inspector would have to be able to associate the emissions from that particular can of coating with a particular compliance year. While a can of coating may have been manufactured within a certain compliance period, a manufacturer may not necessarily include it among the averaged emissions for that year. It is therefore important that each can of coating in an averaging plan be specifically attributable to a particular compliance year. The date code and other labeling on a coating does not provide this information. EPA notes, contrary to SW and CARB's claims, that several of these rules were not written such that the volume of coating used as the basis for emissions calculations is, in fact, the volume of coating sold [see sections A1 of the CARB's Suggested Control Measure (SCM) and all rules, section A.3.3 of SCM, section 8.4.3 of SJVUAPCD Rule 4601, section AA.3.6 of VCAPCD Rule 74.2, section A.3.3 of SBCAPCD Rule 323, and section A.3.3 of MBUAPCD Rule 426]. If at the end of a compliance period, a manufacturer finds that they have exceeded the allowable emissions, they may argue that some emissions from a coating that did not sell in the current compliance year should be advanced into the next compliance year because of sell through. Alternatively, if a manufacturer determined that more high-VOC products were sold than projected in their averaging plan, they could argue that they were sold under the sell-through provision.

*Comment #4:* EM comments that the jurisdictional issue created by CARB approving, disapproving, renewing, modifying or terminating averaging programs could be seen as an extension of their advisory role to local air pollution control districts. VCAPCD, BAAQMD, and CARB comment that CARB is merely providing administrative functions. CARB notes that they are assuming some administrative functions at the request of the California Air Pollution Control Officers Association (CAPCOA). SJVUAPCD and CARB state CARB's involvement simplifies the implementation of averaging programs and that CARB's purely administrative role is clarified in a draft Memorandum of Understanding (MOU) between the districts and CARB. SJVUAPCD, BAAQMD, and CARB also note that the

districts retain ultimate enforcement authority.

*Response #4:* As currently written, these rules give CARB many decision making powers that have not been delegated to it. A draft MOU clarifying the responsibilities of the districts and CARB is unenforceable. If districts and CARB do not fulfill an enumerated responsibility described in the MOU, no agency, including EPA could take action to require the districts or CARB to perform that duty. Furthermore, while districts and CAPCOA may wish and agree to release these powers to the CARB, we have received no legal assurances that the CARB may assume these powers without an act of the State Legislature. EPA's recommendation to the districts to resolve this deficiency was to scale CARB's involvement to a more advisory role by structuring the program so that CARB would be responsible for making recommendations which each district would then formally adopt or reject. In this way, the districts, not CARB, maintain their authority as the decision making and regulatory body. Alternatively, we would consider a certification by the State Attorney General that CARB has these authorities. Furthermore, the district's ability to enforce an averaging program could be hampered if it was not the entity that originally approved the program.

*Comment #5:* EM believes that the problem of not specifying exactly what records are being used to calculate emissions is resolved if manufacturers commit before implementing their averaging programs to use only one form of distribution as the basis for calculating emissions under an averaging program.

*Response #5:* According to various provisions of these rules, averaging is a provision that operates on a statewide basis by a statewide agency, CARB. It is therefore most consistent to require that emissions calculations also rely on statewide data. Allowing manufacturers to choose to use either district-specific or statewide data gives them the ability to manipulate emissions calculations by choosing the data type that shows fewer emissions. We note, additionally, that the existing rules do not require manufacturers to select one form of distribution as the basis for calculating emissions.

*Comment #6:* EM, VCAPCD, SJVUAPCD, BAAQMD, and CARB comment that under an averaging program, an exceedance occurs when the entire program shows on the whole that the actual emissions exceed the allowable emissions. The excess

emissions cannot be attributable to any one product in the program.

*Response #6:* It is precisely because excess emissions cannot be attributed to any one product that it must be assumed that all products under an averaging program that were sold with a VOC content greater than the effective VOC limit contributed to the exceedance. For example, if an averaging program balances the emissions from three coatings that exceed the limits of the rule against the emissions of two super-compliant coatings, then all three non-compliant coatings were partially responsible for the exceedance and a violation for each of these coatings should be assessed for each day of the compliance period.

*Comment #7:* SW comments that EPA's proposed language for clarifying how violations of averaging provisions are determined would result in penalties that are too large and not in balance with the damage done to the environment. CARB comments that the magnitude of potential penalties under the current rule language is a sufficient disincentive for willful violations. BAAQMD states that any difficulties with enforcement and assessment of penalties can be corrected during the following compliance period.

*Response #7:* EPA's proposed language would clarify that violations could be assessed for any coating that was sold above the limits of the rule. The benefits of allowing manufacturers to continue to sell coatings that do not meet the limits of the rule under an averaging program must be balanced by significant deterrents against non-compliance. These rules currently limit the violations that can be assessed to only one per day. By clarifying the language in the rule, agencies may assess larger penalties, however, they are also in no way precluded from using their enforcement discretion to weigh the significance of the overall environmental damage to assess a penalty that is appropriate based on the overall circumstances of the violation.

*Comment #8:* VCAPCD, SJVUAPCD, BAAQMD and CARB comment that the typographical errors in the rules should not be considered a deficiency, but a rule improvement issue, since the correct language can be determined.

*Response #8:* We concur that the correct language can ultimately be surmised despite the typographical errors. As a result, we are not finalizing this issue as a deficiency.

*Comment #9:* VCAPCD, BAAQMD, and CARB comment that all deficiencies associated with averaging become moot after 2005 when the averaging provisions of these rules sunset. CARB