

treatment cost relative to the use of solvent yellow 124. We furthermore seek comment on whether more than one marker could be selected, but which could all be detected using the same detection method. In this manner refiners would not be dependent on a sole supplier for the marker. Additional discussion of the rationale for our selection of solvent yellow 124 and the feasibility of its use is contained in Chapter 5 of the Draft RIA.

Since marked heating oil would be a relatively small volume product in many parts of the country, we anticipate that it will not be carried everywhere as a separate fungible product. In places where it is not carried as a separate fungible grade we anticipate that most shipments of marked heating oil will be from refinery racks or other segregated shipments directly into end-user tankage. In these areas any distillate supplied from the fungible supply system for heating oil purposes will therefore likely be spillover from 500 ppm NRLM supply. Clearly, in those parts of the country with high demand for heating oil, particularly the Northeast and Pacific Northwest, we anticipate that marked heating oil will in fact be carried by the distribution system as a separate fungible product. To the extent this is the case, it is entirely possible that heating oil will no longer be produced to diesel fuel cetane or aromatic specifications, reducing production costs. The most difficult to desulfurize streams in a refinery are in fact those that are low in cetane and high in aromatics. Shifting these streams to a unique heating oil product can therefore reduce desulfurization costs, while still producing a high quality heating oil (though we have not reflected this in our cost analysis in section V.)

ii. Non-highway Distillate Baseline Cap

As discussed above, we are proposing use of a marker in heating oil to effectively distinguish uncontrolled heating oil from NRLM fuel, so that the NRLM standards can be enforced throughout the distribution system and at the end-user. However, in order to allow for the fungible distribution of highway diesel fuel and NRLM, and continue to have enforceable highway diesel fuel standards in the absence of a NRLM dye requirement, we are proposing that a non-highway distillate baseline percentage be established for each refinery and importer in the country. This non-highway baseline would be defined as the volume percentage of all diesel fuel and heating oil (number 1 and number 2) that a refinery or importer produced or

imported during the specified baseline period that was dyed for non-highway purposes.

We propose that if a refiner chooses to fungibly distribute its NRLM and highway fuels, then under the first step of the nonroad program (June 1, 2007—June 1, 2010), the volume of diesel fuel represented by its non-highway baseline percentage would have to either meet the 500 ppm NRLM standard or be marked as heating oil. All the remaining production would have to meet the requirements of the highway fuel program (*i.e.*, 80 percent of this fuel would have to meet a 15 ppm sulfur cap). As we recognized in the highway rule, some variation in the production of highway and non-highway diesel fuel is normal from year to year. As a result, in any given year it may be possible that a refiner is unable to produce the amount of 15 ppm diesel fuel required to meet its highway requirement (80% of 100% minus the non-highway baseline) simply because of this normal variation. The provisions of the highway diesel rule already allow for a 5% shortfall in the production of 15 ppm fuel in a year as long as it is made up in the following year. We seek comment on whether any additional flexibility beyond that provided in the highway rule is appropriate to account for normal fluctuations in refinery output.

An example will help to explain the use of the baseline. Assume the baseline non-highway percentage has been established as discussed below and is 40%. That means 40% of the total diesel fuel production in the baseline years was non-highway fuel, dyed at the refinery gate. If the refinery then produced a total of 100,000,000 gallons of diesel fuel in 2008, 40,000,000 gallons would be its applicable non-highway baseline. If it then produced and marked 10,000,000 gallons as heating oil, 30,000,000 gallons of the remaining diesel fuel (dyed or undyed) would be subject to the NRLM standard of 500 ppm, and all the remaining diesel fuel, 60,000,000 gallons, would be considered highway diesel fuel and would have to meet the applicable 80/20 requirements.

We propose that a refiner, for each of its refineries, would need to choose either to continue to dye all of its NRLM fuel at the refinery gate, or to apply the non-highway baseline approach to all of its production. If a refinery's production could be split between these two options, the refiner could avoid the cap on NRLM imposed by the baseline percentage by dyeing additional volumes over its baseline, for example at their refinery rack or co-located terminal. The result could be a

diversion of extra 500 ppm fuel to the highway market while the dyed 500 ppm fuel was used to serve the nonroad market, resulting in little or no production of 15 ppm highway diesel fuel. Therefore, the choice of whether to dye all of their 500 ppm NRLM fuel at the refinery gate, or comply with the non-highway distillate baseline would have to be made in advance. We propose that compliance with the baseline be determined on an annual basis. We therefore also propose that the decision of whether to dye NRLM 500 ppm fuel at the refinery gate or comply with the baseline could also be made on an annual basis.

This approach allows a refinery's production of 500 ppm NRLM fuel and heating oil to remain flexible in response to market demand, while ensuring that the proportion of fuel they produce in the future to highway and non-highway requirements remains consistent with their historical baseline production. Since the non-highway baseline is set as a percentage of production, the actual volume needed for compliance with this baseline would rise and fall with the refinery's total production of diesel fuel. In this way, it would provide refineries with flexibility similar to that under the 80/20 volume percentage provisions of the highway rule. If total production of diesel fuel decreased, the absolute volume of diesel fuel which had to be produced to highway or NRLM specifications would decrease. If total production increased, the amount of diesel fuel subject to the 80/20 highway and the NRLM standards would also increase. A refiner wishing not to be limited to this non-highway distillate baseline percentage of production could elect to segregate and dye its NRLM diesel fuel at the refinery gate.

Like the current dye requirement, this approach would focus compliance with the highway and NRLM requirements on the refinery or importer. Once undyed 500 ppm or 15 ppm diesel fuel was produced or imported and accounted for under the baseline percentage approach, it could be mixed and shipped fungibly, and sold to either the highway or the NRLM diesel fuel market by anyone further down the distribution system. This would provide a significant degree of market flexibility to refiners and distributors and enable the efficient distribution of diesel fuel. Compliance with the non-highway baseline would be enforced at the refinery gate in the same manner as the current 2006 highway provisions. With the marker for heating oil, compliance with the 15 ppm and 500 ppm standards could also be enforced through to the