

end-user. But most importantly, this approach would maintain the health benefits and fuel availability needs of the highway diesel fuel program, because the overall volume of highway diesel fuel produced to the 15 ppm cap would be maintained.

iii. Setting the Non-highway Distillate Baseline

The purpose of the non-highway baseline is to identify a historical level of non-highway production occurring prior to implementation of the provisions of this proposal, for use as a baseline after such implementation. We propose to determine the non-highway baseline percentage for each refinery by averaging the volume of dyed diesel fuel and heating oil (number 1 and number 2, excluding jet fuel and exported fuel) that it produced or imported annually over the three year period from January 1, 2003, through December 31, 2005, and dividing that volume by the average of all diesel fuel and heating oil (number 1 and number 2, excluding jet fuel and exported fuel) it produced or imported annually over the same period (and then multiplied by 100).²⁴² By using a multi-year average, variations that might otherwise occur from year to year in a refinery's production will get averaged out. Importers would establish a separate baseline for each area of importation.²⁴³

Selecting a baseline period prior to finalization of the final rule would help to prevent the possibility of entities inappropriately adjusting their operations solely for the purpose of modifying their baseline. At the same time, setting a baseline period as close to the implementation date as possible helps to capture the most recent changes in the industry's production patterns. The proposed period of January 1, 2003, through December 31, 2005, is split roughly equally between production

prior to the final rule and production after the final rule to appropriately balance these competing objectives. One advantage of ending the baseline period on December 31, 2005, is that it allows the opportunity for refiners to generate credit for the early production of 500 ppm NRLM fuel after that date, and at the same time avoid having to dye it at the refinery gate. The three year period serves to limit any potential actions to inappropriately adjust the baseline that a refinery might otherwise attempt. A refiner or importer would have to dye and sell a greater fraction of its fuel to the non-highway market over an extended period of time to significantly modify its baseline. The potential financial loss associated with this, particularly if other refineries or importers tried to do the same thing, would likely be prohibitive.

At the same time, we anticipate that a number of refiners may be changing their highway diesel production volumes as they comply with the highway diesel fuel standards in 2006. To the extent that a refiner planned to lower its highway production in 2006, a non-highway baseline set based on 2003–5 data would penalize them by forcing them to continue to meet the highway requirements for a greater volume, based on their pre-2006 production pattern. To avoid this situation, we propose that refiners would be allowed to set their non-highway baseline percentage using June 1, 2006, through May 31, 2007, as the baseline time period. By doing so the refinery's baseline would automatically take into account changes made for compliance with the 2006 highway standard. It would, however, preclude that refinery from participating in the early NRLM credit program prior to June 1, 2007, using the baseline approach, and would require them to continue dyeing their NRLM at the refinery gate

until June 1, 2007, since that is the period during which the baseline was being established. Since the purpose of this option is to provide an opportunity to account for the physical changes refineries make in complying with the highway rule, we propose that this option would only apply to refiners and not importers.

Each refinery and importer would have to submit its application for a non-highway baseline to EPA by February 28, 2006, along with the supporting information. If the refinery elected to use the optional baseline period, we propose that the refinery would have to submit its application for a non-highway baseline to EPA by August 1, 2007. EPA would then approve these baselines by June 1, 2006, and any optional baselines by December 1, 2007. We propose that any refinery or importer which was not in operation for the full period of January 1, 2003, through December 31, 2005, would establish their baseline using data from the period they were in operation, as long as that period was greater than or equal to 12 months. The 12 months need not be continuous. Any refinery or importer unable to establish a baseline during this period would have to comply using the dye alternative. In the case of a new or restarted refinery or new importer, we propose to assign a non-highway baseline percentage reflecting the projected average production of non-highway fuel in 2004 for their region of the country. We propose to use the credit trading areas (CTAs) as defined in the highway Based on data from the Department of Energy's Energy Information Agency (EIA) on the current production of low and high sulfur diesel fuel and heating oil, and EIA and EPA projections of future fuel use, these PADD average non-highway baseline would be as shown in Table IV–1.

TABLE IV–1—NON-HIGHWAY BASELINE FOR NEW REFINERIES

PADD 1	PADD 2	PADD 3	PADD 4	Oregon and Washington	Alaska	Hawaii	California ²⁴⁴
41%	20%	26%	13%	21%	68%	40%	0%

In discussions with various refiners, there was a strong interest in allowing refiners with multiple refineries and importers with multiple points of

import to aggregate the baselines across all of their facilities nationwide. However, since the baselines determine how much of a refineries production

must comply with the highway standards, allowing nationwide aggregation of the baselines would have the same impact as allowing nationwide

²⁴² Specialty fuels such as JP–5, JP–8 and F76 are in some instances also used in nonroad diesel equipment today. However, our expectation is that the majority of this fuel is today and will be in the future continue to be used in tactical military equipment that would be exempted from the

provisions of this proposal. Consequently, we propose that these fuels would not be counted in either setting the baseline or in determining compliance with the baseline.

²⁴³ The areas would be defined as the credit trading areas (CTAs) as defined in the highway rule.

²⁴⁴ A value of zero is proposed for California, since we anticipate that all non-highway diesel fuel in California will be covered by the same State standards applicable to highway diesel fuel during this time period.