

offset the much smaller increment of sulfur control from 500 ppm down to 15 ppm.

#### b. 2010

After June 1, 2010, the fuel standards situation is simplified considerably and the fuel program structure can therefore also be simplified. The need for the non-highway baseline percentage disappears, since all highway and nonroad diesel fuel must meet the same 15 ppm cap. Furthermore, the only high sulfur distillate remaining in the market should be heating oil, since we are proposing that high sulfur diesel fuel no longer be permitted to be used in any NRLM equipment. Heating oil would have to be kept segregated. Preventing its use in NRLM equipment could be enforced on the basis of sulfur level, avoiding the need for a unique marker to be added to heating oil.

After June 1, 2010, under this proposal locomotive and marine diesel fuel would be allowed to remain at the 500 ppm level. In addition, assuming we allowed the continued production and use of 500 ppm nonroad diesel fuel through the small refiner hardship provisions discussed in subsection C and fuel credit provisions, 500 ppm nonoad fuel would continue to exist in the distribution system as late as May 31, 2014. A refiner could produce 500 ppm diesel fuel without the use of credits for the intended use in locomotive and marine applications, but if this 500 ppm fuel later made its way into nonroad equipment, less 15 ppm nonroad fuel would be produced and the full benefits of the 15 ppm nonroad standard would not be achieved. If this happened to a large enough extent it could call into question the adequate supply of 15 ppm for nonroad purposes beginning in 2010. Thus, some method is needed to differentiate locomotive and marine 500 ppm diesel fuel from nonroad 500 ppm diesel fuel after June 1, 2010. EPA is proposing to use a marker for this purpose.

#### i. A Marker To Differentiate Locomotive and Marine Diesel From Nonroad Diesel

This proposal would allow the limited production of 500 ppm nonroad diesel fuel by small refiners and by other refiners through the use of credits between 2010 and 2014 (*see* section IV.B.3.b). This 500 ppm fuel could only be used in pre-2011 model year nonroad diesel engines, and would have to be segregated from 15 ppm nonroad diesel fuel and 500 ppm locomotive and marine diesel fuel. To ensure compliance with the proposed segregation requirements for such fuel, it would be necessary for parties in the

distribution system, and for EPA, to be able to distinguish such 500 ppm nonroad diesel fuel from 500 ppm locomotive and marine diesel fuel. Differentiating locomotive and marine diesel fuel from nonroad diesel fuel presents a very analogous situation, though perhaps on a smaller scale, to that described above for heating oil prior to June 1, 2010.<sup>246</sup> As a result, we propose to use a marker to segregate locomotive and marine diesel fuel from 500 ppm nonroad diesel fuel beginning June 1, 2010. Since both fuels need to be dyed red for tax purposes prior to sale, for the reasons discussed above with respect to heating oil, we propose that solvent yellow 124 be used as the marker for locomotive and marine diesel fuel beginning June 1, 2010. We propose that the marker would be required to be added at the refinery gate just as visible evidence of the red dye is required today, and fuel containing more than the trace concentration of 0.1 mg/l of the marker would be prohibited from use in any nonroad application.

Since marked locomotive and marine diesel fuel would be a relatively small volume product, we anticipate that in most parts of the distribution system it would not be carried as a separate product in the fungible distribution system. Therefore we anticipate that most shipments of marked locomotive and marine fuel would be from refinery racks or other segregated shipments directly into end-user tankage. Any diesel fuel supplied off the fungible supply system for locomotive and marine uses would therefore likely be spillover from 15 ppm nonroad or highway diesel supply.

Since we anticipate that 500 ppm locomotive and marine diesel fuel will be a small volume product, not carried in the fungible distribution system, and only available in limited locations, we also seek comment on whether the approach of using a marker for locomotive and marine diesel fuel could be replaced with an alternative approach. Specifically, we seek comment on whether to just limit supply of 500 ppm locomotive and marine diesel fuel to segregated shipments, with refineries being liable to ensure and keep records demonstrating that 500 ppm fuel produced for locomotive and marine purposes was distributed solely for these purposes.

<sup>246</sup> Without the proposed marker requirement for locomotive and marine diesel fuel discussed in this section, we expect that there would be no physical difference between 500 ppm nonroad diesel fuel and 500 ppm locomotive and marine diesel fuel.

#### ii. Diesel Sulfur Credit Banking and Trading Provisions for 2010

For the reasons described above for 2007, we are proposing a similar diesel sulfur credit banking and trading program for 2010. We propose that refiners and importers could generate early credit for production of 15 ppm nonroad diesel fuel prior to June 1, 2010. These credits could be used to delay compliance with the 15 ppm nonroad diesel standard in 2010. As in 2007, while it is possible that a refinery could entirely delay compliance with the 15 ppm standard in 2010 through the use of credits, the most advantageous use of these credit provisions is likely to be the continued sale by individual refineries of otherwise off-spec product during the startup of the 2010 program, when they are still adjusting their operations for consistent production to the 15 ppm sulfur standard.

#### Credit Generation

Under this proposal, highway and NRLM fuels of like sulfur level would be allowed to be distributed fungibly, and as such would be indistinguishable. For example, prior to June 1, 2010, undyed 15 ppm diesel fuel would be distributed together whether or not it was later dyed for nonroad purposes. Consequently, we are proposing that credits for production of early 15 ppm nonroad diesel fuel prior to June 1, 2010, be determined using the non-highway baseline. Any volume up to a refinery's total highway requirement (100 percent minus the non-highway baseline) would continue to be counted under the provisions of 2007 highway diesel fuel program.<sup>247</sup> Any production of 15 ppm fuel greater than this amount (100% minus the non-highway baseline) beginning June 1, 2009 could be used to generate early nonroad credits.

An example will help to explain the use of these credits. Assume the baseline non-highway percentage has been established at 40% and the refinery produces a total of 100,000,000 gallons of diesel fuel from June 1,

<sup>247</sup> Under the highway program four gallons of excess 15 ppm diesel fuel produced or imported would generate one 500 ppm diesel fuel credit. This credit grants the refiner or importer the right to produce one additional gallon of undyed 500 ppm diesel fuel between June 1, 2006 and May 31, 2010. These credits can be used (or traded within the PADD in which they were generated) to produce or import less than 80% of its highway volume as 15 ppm fuel. This would continue under this proposal for any production up to (100% minus the non-highway baseline). For any volume of 15 ppm fuel greater than 100% minus the non-highway baseline a refiner could either receive gallon-for-gallon nonroad credit under this proposal, or treat it as highway fuel and receive 1:4 credit under the provisions of the highway rule.