

2009—December 31, 2009. Its applicable non-highway baseline would be 40,000,000 gallons. If it then produced and marked 10,000,000 gallons of 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 the remaining 60,000,000 gallons of diesel fuel would be considered highway diesel fuel and would have to meet the applicable 80/20 requirements (48,000,000 at 15 ppm and 12,000,000 at 500 ppm). If the refiner instead produced only 20,000,000 gallons of fuel to the 500 ppm NRLM standard and produced 70,000,000 gallons to the 15 ppm standard, then it would receive credit for the 10,000,000 gallons excess 15 ppm NRLM fuel that it produced. In this example the refiner could also earn 3,000,000 highway credits for the excess production of 15 ppm highway fuel (1:4 ratio).

In addition to this source of credits, we propose two other sources of credits to allow production of 500 ppm nonroad diesel fuel after June 1, 2010. First, as discussed in subsection B.3.a.iv above, high-sulfur NRLM credits generated prior to June 1, 2010, could be converted into 500 ppm nonroad credits and carried over for use beginning June 1, 2010. Second, under the small refiner hardship provisions described below in subsection C, small refiners could generate credits for any production of NRLM fuel to the 15 ppm standard from June 1, 2010, through May 31, 2012. These credits could be traded to any other refinery or importer nationwide.

We seek comment on whether credits should be permitted to be generated prior to June 1, 2009. Our proposal would restrict the early credit period to just one year for two main reasons. First, any 15 ppm fuel produced prior to June 1, 2009, can be treated as highway diesel fuel and any credits generated on the fuel under the highway program can be traded under the highway credit program. We do not want the early nonroad credit provisions to detract from the smooth functioning of the highway diesel credit program. Second, we do not want the early credit provisions to undermine the availability of 15 ppm diesel fuel for nonroad applications in 2010. Allowing more than a years worth of credits to be generated, plus up to a years worth of high sulfur credits to be generated and carried over for use in 2010 would raise concerns that insufficient 15 ppm nonroad diesel fuel might be produced in 2010 to ensure availability everywhere nationwide. Nevertheless, we seek comment on extending the

period for early credit generation and on this assessment.

Credit Use

We propose that 500 ppm nonroad credits could be used on a gallon for gallon basis during the period from June 1, 2010—May 31, 2012, allowing continued production of 500 ppm nonroad diesel fuel. Small refiners could continue to produce 500 ppm nonroad diesel until June 1, 2014, without credits. Any 500 ppm nonroad fuel produced would have to be dyed red at the refinery gate, kept segregated from other fuels in the distribution system, and tracked through the use of unique codes on product transfer documents all the way through to the end-user. Refiners wishing to produce 500 ppm fuel and sell it as nonroad would have to get EPA approval in advance demonstrating how they will ensure such segregation.

Given the cost and burden associated with segregating 500 ppm nonroad diesel fuel as a separate product in the distribution system, we anticipate that the most likely manner in which refiners will be able to use 500 ppm nonroad credits will be through sales made directly from their on-site fuel rack.

We request comment on all aspects of the proposed credit trading system.

c. 2014

Beginning June 1, 2014, after all small refiner and credit provisions have ended, both the 15 ppm nonroad diesel fuel standard and the 500 ppm locomotive and marine diesel fuel standard could be enforced based on sulfur level throughout the distribution system and at the end-user. There would no longer be a need for a baseline, a marker, or a dye. Consequently, we are proposing that after May 31, 2014, the different grades of diesel fuel, 15 ppm, 500 ppm, and high-sulfur would merely have to be kept segregated in the distribution system.

3. Other Options Considered

In developing the proposed program structure described above, we also evaluated a number of other possible approaches. Some of the alternatives discussed below would allow for even greater fuel fungibility, for example, extending to smaller volume products such as those produced through the use of credits. However, these alternative approaches would either place more restrictions on refinery operations, or raise significant enforcement and program integrity concerns. As a result, we are not proposing the following

alternatives but seek comment on them, including ways to minimize or alleviate the concerns associated with them.

a. Highway Baseline and a NRLM Baseline for 2007

The proposed program described above relies on a non-highway baseline percentage to distinguish highway fuel from NRLM fuel, and a marker to distinguish heating oil from NRLM fuel. In lieu of using a marker for heating oil, another approach would be to use a second baseline aimed at identifying the NRLM portion of non-highway diesel fuel. In this case a highway baseline would be established consistent with the non-highway baseline proposed above (100 percent minus the proposed non-highway baseline). The highway 80/20 standards would apply to this baseline. A second NRLM baseline would be established to which the 500 ppm NRLM standard would apply. The remaining diesel fuel percentage would be uncontrolled (*i.e.*, it could be high sulfur). This approach would allow for greater fungibility of fuels with the same sulfur level. Not only could 500 ppm highway and 500 ppm NRLM fuel be distributed together, but high sulfur NRLM fuel produced through the credit and hardship provisions could be fungibly distributed with heating oil. Heating oil would not need to contain a marker. As a result, this approach would allow for greater flexibility in using the fuel credit and hardship provisions. The disadvantage, however, is that refiners would face additional burden when shifting into the heating oil market. An explanation of this approach follows.

i. Highway Baseline

The highway baseline would be very analogous to the non-highway baseline proposed above. It would be calculated in the same way, except that it would be 100 percent minus the proposed non-highway baseline. The requirement that NRLM fuel be dyed at the refinery gate would become voluntary. From June 1, 2007, through May 31, 2010, any volume of 500 ppm fuel not dyed at the refinery gate would have to meet the 80/20 highway provisions up to the refinery specific highway baseline percentage. The highway baseline percentage would be determined for each refinery and importer in the same manner as described above for the non-highway baseline.

ii. Nonroad, Locomotive, and Marine Baseline

Under this approach, a refiner or importer would be assigned a NRLM baseline percentage. This baseline