

C. Hardship Provisions for Qualifying Refiners

1. Hardship Provisions for Qualifying Small Refiners

In developing our proposed off-highway diesel sulfur program, we evaluated the need and the ability of refiners to meet the 500 and 15 ppm standards as expeditiously as possible. We believe it is feasible and necessary for the vast majority of the program to be implemented in the proposed time frame to achieve the air quality benefits as soon as possible. Based on information available from small refiners and others, we believe that refineries owned by small businesses generally face unique hardship circumstances, compared to larger refiners. Thus, as discussed below, we are proposing several special provisions for refiners that qualify as "small refiners" to reduce the disproportionate burden that nonroad diesel sulfur requirements would have on these refiners.²⁴⁹

a. Qualifying Small Refiners

EPA is proposing several special provisions that would be available to companies approved as small refiners. The primary reason for these provisions is that small refiners generally lack the resources available to large companies that help large companies, including those large companies that own small-capacity refineries, to raise capital for investing in desulfurization equipment, such as shifting of internal funds, securing of financing, or selling of assets. Small refiners are also likely to have more difficulty in competing for engineering resources and completing construction of the needed desulfurization equipment in time to meet the standards proposed today.

Since small refiners are more likely to face hardship circumstances than larger refiners, we are proposing temporary provisions that would provide additional time to meet the sulfur standards for refineries owned by small businesses. This approach would allow the overall program to begin as early as possible, avoiding the need for delay in order to address the ability of small refiners to comply.

i. Regulatory Flexibility for Small Refiners

As explained in the discussion of our compliance with the Regulatory Flexibility Act in section X.C and in the Initial Regulatory Flexibility Analysis in

chapter 11 of the Draft RIA, we considered the impacts of the proposed regulations on small businesses. Most of our analysis of small business impacts was performed as a part of the work of the Small Business Advocacy Review (SBAR) Panel convened by EPA, pursuant to the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The final report of the Panel is available in the docket for this proposed rule.

For the SBREFA process, EPA conducted outreach, fact-finding, and analysis of the potential impacts of our regulations on small businesses. Based on these discussions and analyses by all panel members, the Panel concluded that small refiners in general would likely experience a significant and disproportionate financial hardship in reaching the objectives of the proposed nonroad diesel fuel sulfur program.

One indication of this disproportionate hardship for small refiners is the relatively high cost per gallon projected for producing nonroad diesel fuel under the proposed program. Refinery modeling of refineries owned by refiners likely to qualify as small refiners, and of non-small refineries, indicates significantly higher refining costs for small refiners. Specifically, we project that without special provisions, refining costs for small refiners on average would be about 5.5 cents per gallon compared to about 4.0 cents per gallon for non-small refiners.

The Panel also noted that the burden imposed on the small refiners by the proposed sulfur standards may vary from refiner to refiner. Thus, the Panel recommended more than one type of burden reduction measure so that most if not all small refiners could benefit. We have continued to consider the issues raised during the SBREFA process and have decided to propose each of the provisions recommended by the Panel.

ii. Rationale for Small Refiner Provisions

Generally, we structured these proposed provisions to reduce the burden on small refiners while expeditiously achieving air quality benefits and ensuring that the availability of 15 ppm nonroad diesel fuel would coincide with the introduction of 2011 model year nonroad diesel engines and equipment. We believe the proposed special provisions for small refiners are necessary and appropriate.

First, the proposed compliance schedule for the nonroad diesel program, combined with flexibility for

small refiners, would achieve the air quality benefits of the program as soon as possible, while helping to ensure that small refiners will have adequate time to raise capital for new or upgraded fuel desulfurization equipment. Most small refiners have limited additional sources of income beyond refinery earnings for financing and typically do not have the financial backing that larger and generally more integrated companies have. Therefore, they can benefit from additional time to accumulate capital internally or to secure capital financing from lenders.

Second, we recognize that while the sulfur levels in this proposed program can be achieved using conventional refining technologies, new technologies are also being developed that may reduce the capital and/or operational costs of sulfur removal. Thus, we believe that allowing small refiners some additional time for newer technologies to be proven out by other refiners would have the added benefit of reducing the risks faced by small refiners. The added time would likely allow for small refiners to benefit from the lower costs of these improvements in desulfurization technology (e.g., better catalyst technology or lower-pressure hydrotreater technology). This would help to offset the financial burden facing small refiners.

Third, providing small refiners more time to comply would increase the availability of engineering and construction resources. Most refiners would need to install additional processing equipment to meet the nonroad diesel sulfur requirements. We anticipate that there may be significant competition for technology services, engineering resources, and construction management and labor. In addition, vendors will be more likely to contract their services with the larger refiners first, as their projects will offer larger profits for the vendors. Temporarily delaying compliance for small refiners would spread out the demand for these resources and probably reduce any cost premiums caused by limited supply.

We discuss below the provisions we are proposing to minimize the degree of hardship for small refiners. With these provisions we are confident about going forward with the 500 ppm sulfur standard for NRLM diesel fuel in 2007 and the 15 ppm sulfur standard for nonroad diesel fuel in 2010 for the rest of the industry. Without small refiner flexibility, EPA would have to consider delaying the overall program until the burden of the program on many small refiners were diminished, which would delay the air quality benefits of the overall program. By providing

²⁴⁹ The proposed small refiner provisions would not apply to importers, as the burden from capital expenditures for physical refinery improvements are not imposed on importers.