

temporary relief to small refiners, we are able to adopt a program that expeditiously reduces off-highway diesel sulfur levels in a feasible manner for the industry as a whole.

iii. Limited Impact of Small Refiner Options on Program Emissions Benefits

Small refiners that choose to make use of the delayed nonroad diesel sulfur requirements would also delay to some extent the emission reductions that would otherwise have been achieved. However, the overall impact of these postponed emission reductions would be small, for several reasons.

First, small refiners represent only a fraction of national non-highway diesel production. Today, refiners that we expect would qualify as small refiners represent only about 6 percent of all high-sulfur diesel production. Second, the proposed delayed compliance provisions described below would affect only engines without new emission controls. During the first step to 500 ppm NRLM fuel, small refiner nonroad fuel could be well above 500 ppm, but the new advanced engine controls would not yet be required. During the second step to 15 ppm nonroad diesel fuel, equipment with the new controls would be entering the market, but use of the 500 ppm small refiner fuel would be restricted to older engines without the new controls. There would be some loss of sulfate PM control in the older engines that operated on higher sulfur small refiner fuel, but no effect on the major emission reductions that the proposed new engine standards would achieve starting in 2011. Finally, because small diesel refiners are generally dispersed geographically across the country, the limited loss of sulfate PM control would also be dispersed.

One proposed small refiner option would allow a modest 20% relaxation in the gasoline sulfur interim standards for small refiners that produce all nonroad diesel fuel at 15 ppm by June 1, 2006. To the extent that small refiners elected this option, a small loss of emission control from Tier 2 gasoline vehicles that used the higher sulfur gasoline could occur. We believe that such a loss of control would be very small. A very few small refiners would be in a position to use this provision. Further, the relatively small production of gasoline with slightly higher sulfur levels should have no measurable impact on the emission of new Tier 2 vehicles, even if the likely "blending down" of sulfur levels did not occur as this fuel mixed with lower sulfur fuel during distribution. This provision would also maintain the maximum 450

ppm gasoline sulfur per-gallon cap standard in all cases, providing a reasonable sulfur ceiling for any small refiners making use of this provision.

b. How Do We Define Small Refiners for Purposes of the Hardship Provisions?

The definition of small refiner for the proposed nonroad diesel program is basically the same as our small refiner definitions in the Tier 2/Gasoline Sulfur and Highway Diesel rules. A small refiner must demonstrate that it meets both of the following criteria:

- No more than 1,500 employees corporate-wide, based on the average number of employees for all pay periods from January 1, 2002 to January 1, 2003.
- A corporate crude oil capacity less than or equal to 155,000 barrels per calendar day (bpcd) for 2002.

As with the earlier fuel sulfur programs, the dates for the employee count and for calculation of the crude capacity represent the latest complete years prior to the issuing of the proposed rule.

In determining the total number of employees and crude oil capacity, a refiner must include the number of employees and crude oil capacity of any subsidiary companies, any parent company and subsidiaries of the parent company, and any joint venture partners. We define a subsidiary of a company to mean any subsidiary in which the company has a 50 percent or greater ownership interest. However, we are proposing that a refiner be eligible for small refiner status if it is owned and controlled by an Alaska Regional or Village Corporation organized under the Alaska Native Claims Settlement Act (43 U.S.C. 1626), regardless of number of employees and crude oil capacity. Such an exclusion would be consistent with our desire to grant relief from the regulatory burden to that part of the industry that can least afford compliance. We believe that very few refiners, probably only one, would qualify under this provision. Similarly, we are proposing to incorporate this exclusion into the small refiner provisions of the highway diesel and gasoline sulfur rules, which did not address this issue.

As with the earlier fuel sulfur rules, we are proposing that a refiner that restarts a refinery in the future may be eligible for small refiner status. Thus, a refiner restarting a refinery that was shut down or non-operational between January 1, 2002, and January 1, 2003, could apply for small refiner status. In such cases, we would judge eligibility under the employment and crude oil capacity criteria based on the most recent 12 consecutive months unless we

conclude from data provided by the refiner that another period of time is more appropriate. Companies with refineries built after January 1, 2002, would not be eligible for the small refiner hardship provisions.

2. The Effect of Financial Transactions on Small Refiner Status and Small Refiner Relief Provisions

During the implementation of the gasoline sulfur and highway diesel sulfur programs, several refiners have raised concerns about how various kinds of financial transactions would affect implementation of the small refiner fuel sulfur provisions. The kind of transactions typically involve refiners with approved small refiner status that are involved in potential or actual sales of the small refiner's refinery, or involve the purchase by the small refiner of another refinery or other non-refining asset. We believe that these concerns are also relevant to the small refiner provisions proposed below for the nonroad diesel sulfur program.

a. Large Refiner Purchasing a Small Refiner's Refinery

One situation involves a "non-small" refiner that wishes to purchase a refinery owned by an approved small refiner. The small refiner may not have completed or even begun refinery upgrades to meet the long-term fuel sulfur standards, since it is making use of the special small refiner relief provisions. This situation is of most concern where the purchase is to take place near or after the beginning of the gasoline or highway diesel sulfur programs. Under the existing gasoline sulfur and highway diesel sulfur programs, once such a purchase is completed, the "non-small" purchaser would not have the benefit of the small refiner relief provisions that had applied to the previous owner.

The purchasing refiner would have to perform the necessary upgrades to meet the "non-small" sulfur standards. As the gasoline sulfur and highway diesel sulfur provisions exist today, such a refiner would be left with very little or (if the respective fuel sulfur control program has already begun) no lead time for compliance. The refiners that have raised this issue have claimed that refiners in this situation would not be able to comply with the "non-small refiner" standards upon acquisition of the new refinery. These refiners claim that this could prevent them from purchasing a refinery from a small refiner and, as a result, this would severely limit the ability of small refiners to sell such an asset. The refiners that have raised this issue have