

ppm fuel earlier so as not to lose market share. At least one small refiner has indicated that it might decide to desulfurize its NR pool at the same time as it desulfurized its highway diesel fuel, in June of 2006, due to limitations in its distribution system and to take advantage of economies of scale. Given these situations, we propose that small refiners be able to choose between two mutually exclusive options, as an incentive for early compliance.

The first proposed option would make the diesel sulfur credit banking and trading program discussed earlier in this section fully applicable to small refiners. A small refiner could generate diesel sulfur credits for production of 500 ppm NRLM diesel fuel prior to June 1, 2010, and for production of 15 ppm nonroad fuel from June 1, 2010, through May 31, 2012. The specifics of the credit program are described above in subsection B.2, including how they would be applicable to small refiners. Generating and selling credits could provide funds to defray the costs of early nonroad compliance.

The second proposed option would apply to a small refiner that produced all of its NRLM diesel production at 15 ppm by June 1, 2006, and elected not to use the provision described above to earn NRLM sulfur credits for this early compliance. (As for other refiners, locomotive and marine fuel sulfur would not be controlled in 2006 and could meet the 500 ppm standard beginning June 1, 2007.) Such a refiner would receive a modest revision in its interim small refiner gasoline sulfur standards, starting January 1, 2004. Specifically, the applicable small refiner annual average and per-gallon cap gasoline standards would be revised upward by 20 percent for the duration of the small refiner gasoline sulfur interim program (*i.e.*, through either 2007 or 2010, depending on whether the refiner had extended its participation in the gasoline sulfur interim program by complying with the highway diesel standard at the beginning of that program (June, 2006, as provided in 40 CFR 80.552(c))). However, in no case could the per-gallon cap exceed 450 ppm, the highest level allowed under the gasoline sulfur program.

We believe it is very important to link any such temporary relaxation of a small refiner gasoline sulfur interim sulfur standards with environmental benefit of early desulfurization of a significant volume of NRLM diesel fuel. Thus, we propose that a small refiner wishing to use this option must produce a minimum volume of NRLM diesel fuel at 15 ppm by June 1, 2006. Each participating small refiner would need

to produce a volume of 15 ppm fuel that was at least 85% of the volume represented by its non-highway distillate baseline percentage. If the refiner began to produce gasoline in 2004 at the higher interim standard of this provision but then either failed to meet the 15 ppm standard for its NRLM fuel by June 1, 2006, or failed to meet the 85% minimum volume requirement, the original small refiner interim gasoline sulfur standard applicable to that refiner would be reinstated. In addition, the refiner would need to compensate for the higher gasoline levels that it had enjoyed by purchasing gasoline sulfur credits or producing an equivalent volume of gasoline below the required sulfur levels.

Under this option, a small refiner could in effect shift some funds from its gasoline sulfur program to accelerate desulfurization of nonroad diesel fuel. Given the environmental benefit that would result from the production of 15 ppm diesel fuel earlier than necessary, and the small potential loss of emission reduction under the gasoline sulfur program from fuel produced by the very few small refiners that we believe would qualify under this second option, we believe the environmental impact of this option would be neutral or positive.

#### d. How Do Refiners Apply for Small Refiner Status?

A refiner applying for status as a small refiner would provide EPA with several types of information by December 31, 2004. The detailed application requirements are summarized in section VII.E.2 below. In general, a refiner would need to provide information about the following for the parent company and all subsidiaries at all locations: (1) The average number of employees for all pay periods from January 1, 2002, through January 1, 2003; (2) total corporate crude refining capacity; and (3) an indication of which small refiner option the refiner is likely to use (*see* subsection c. above). As with applications for relief under other rules, applications for small refiner status under this proposed diesel rule that were later found to contain false or inaccurate information would be void *ab initio*.

### 2. General Hardship Provisions

#### a. Temporary Waivers from Non-highway Diesel Sulfur Requirements in Extreme Unforeseen Circumstances

We are proposing a provision which, at our discretion, would permit any domestic or foreign refiner to seek a temporary waiver from the nonroad, locomotive, or marine diesel sulfur

standards under certain rare circumstances. This waiver provision is similar to provisions in the reformulated gasoline (RFG), low sulfur gasoline, and highway diesel sulfur regulations. It is intended to provide refiners short-term relief in unanticipated circumstances—such as a refinery fire or a natural disaster—that cannot be reasonably foreseen now or in the near future.

Under this provision, a refiner may seek permission to distribute nonroad, locomotive, or marine diesel fuel that does not meet the applicable 500 or 15 ppm sulfur standards for a brief time period. An approved waiver of this type could, for example, allow a refiner to produce and distribute diesel fuel with higher than allowed sulfur levels, so long as the other conditions described below were met. Such a request would be based on the refiner's inability to produce complying nonroad, locomotive or marine diesel fuel because of extreme and unusual circumstances outside the refiner's control that could not have been avoided through the exercise of due diligence. The request would also need to show that other avenues for mitigating the problem, such as purchase of credits toward compliance under the proposed credit provisions, had been pursued and yet were insufficient. As with other types of relief established in this rule, this type of temporary waiver would have to be designed to prevent fuel exceeding the 15 ppm standard from being used in 2011 and later model year nonroad engines.

The conditions for obtaining a nonroad diesel waiver are similar to those in the RFG, Tier 2 gasoline sulfur, and highway diesel regulations. These conditions are necessary and appropriate to ensure that any waivers that are granted are limited in scope, and that refiners do not gain economic benefits from a waiver. Therefore, refiners seeking a waiver would need to show that the waiver is in the public interest, that the refiner was not able to avoid the nonconformity, that it would make up the air quality detriment associated with the waiver, that it would make up any economic benefit from the waiver, and that it would meet the applicable diesel sulfur standards as expeditiously as possible.

#### b. Temporary Waivers Based on Extreme Hardship Circumstances

In addition to the provision for short-term relief in extreme unforeseen circumstances, we are proposing a provision for relief based on extreme hardship circumstances that is very similar to those established in the