

for refiners and importers that are not addressed in Section IV. In addition, Sections VIII.D, E, and F below discuss several provisions that apply to all parties in the diesel fuel production and distribution system, including refiners and importers.

1. Transfer of Credits

This proposal includes provisions for diesel sulfur credit transfers that are essentially identical to other fuels rules that have credits provisions. As in other fuels rules, nonroad diesel sulfur credits could only be transferred between the refiner or importer generating the credits and the refiner or importer using the credits. If a credit purchaser could not use all the credits it purchased from the refiner who generated them, the credits could be transferred one additional time. We recognize that there is potential for credits to be generated by one party and subsequently purchased and used in good faith by another party, where the credits are later found to have been calculated or created improperly, or otherwise found to be invalid. As with the reformulated gasoline rule, the Tier 2/Gasoline Sulfur rule, and the highway diesel rule, invalid credits purchased in good faith would not be valid for use by the purchaser. To allow such use would not be consistent with the environmental goals of the regulation. In addition, both the seller and purchaser of invalid credits would have to adjust their credit calculations to reflect the proper credits and either party (or both) could be deemed in violation if the adjusted calculations demonstrated noncompliance. The parties to such a credit transaction can be expected to develop contractual provisions to address these circumstances.

Nevertheless, in a situation where invalid credits are transferred, our strong preference would be to hold the credit seller liable for the violation, rather than the credit purchaser. As a general matter we would expect to enforce a shortfall in credit compliance calculations against the credit seller, and we would expect to enforce a compliance shortfall (caused by the good faith purchase of invalid credits) against a good faith purchaser only in cases where we are unable to recover sufficient valid credits from the seller to cover the shortfall. Moreover, in settlement of such cases we would strongly encourage the seller to purchase credits to cover the good faith purchaser's credit shortfall. EPA would consider the covering of a credit deficit through the purchase of valid credits a very important factor in mitigation of any case against a good faith purchaser,

whether the purchase of valid credits is made by the seller or by the purchaser.

2. Additional Provisions for Importers and Foreign Refiners Subject to the Credit Provisions or Hardship Provisions

Since this proposed rule includes several compliance options that could be used by NRLM diesel fuel importers and foreign refiners, we are also proposing specific compliance and enforcement provisions to ensure compliance for imported NRLM diesel fuel. These additional foreign refiner provisions are similar to those under the conventional gasoline regulations, the gasoline sulfur regulations and the highway diesel fuel regulations (see 40 CFR 80.94, 80.410 and 80.620).

Under this proposal, standards for NRLM diesel fuel produced by refineries owned by foreign refiners must be met by the importer, unless the foreign refiner has been approved to produce NRLM diesel fuel under the credit provisions, small refiner provisions or hardship provisions of this proposal. If the foreign refiner is approved under any of these provisions, the volume requirements would be met by the foreign refiner's refinery(s) and the foreign refinery(s) would be the entity(s) generating, using, banking or trading credits for the NRLM diesel fuel produced for and imported into the U.S. We are proposing that importers themselves not be eligible for small refiner or hardship relief. Importers may participate in the proposed credit programs; however, an importer and a foreign refiner may not generate credits for the same fuel.

Any foreign refiner that applies for and obtains approval to produce NRLM diesel fuel subject to credit provisions, small refiner provisions or the hardship provisions would be subject to the same requirements as domestic refiners operating under the same provisions. Additionally, we are proposing provisions for foreign refiners similar to the provisions at 40 CFR 80.94, 80.410, and 80.620, which include:

- Segregation of NRLM diesel fuel produced at the foreign refinery until it reaches the U.S. and separate tracking of volumes imported into each PADD;
- Controls on product designation;
- Load port and port of entry testing; and
- Requirements regarding bonds and sovereign immunity.

These provisions would aid the Agency in tracking NRLM diesel fuel from the foreign refinery to its point of import into this country. We believe these provisions would be necessary and sufficient to ensure that foreign

refiners' compliance could be monitored and that the proposed diesel fuel requirements could be enforced against foreign refiners. For more discussion of the rationale for these enforcement provisions, see preamble to the final Anti-Dumping Foreign Refiners rule (see 62 FR 45533, Aug. 28, 1997) and the gasoline sulfur rule (see 65 FR 6698, February 10, 2000).

3. Proposed Provisions for Transmix Facilities

In the petroleum products distribution system, certain types of interface mixtures in product pipelines cannot be added in any significant quantity to either of the adjoining products that produced the interface. These mixtures are known as "transmix." The pipeline and terminal industry's practice is to transport transmix via truck, pipeline, or barge to a facility with an on-site fractionator that is designed to separate the products. The owner or operator of such a facility is called a "transmix processor." Such entities are generally considered to be a refiner under existing EPA fuel regulations.

Under the non-highway baseline percentage approach proposed in today's diesel rule, absent special treatment transmix processors that wished to commingle highway and NRLM fuel would need to comply with the baseline percentage requirements. Transmix processors, as with conventional refiners, are also currently subject to the "80 percent/20 percent" production requirements for 15 ppm and 500 ppm highway diesel fuel. In both of these cases, producing fuel in set percentages appears to be inconsistent with the inherent nature of the transmix processors' business. Unlike conventional refiners, transmix processors refine shipments of fuel that vary in volume and timing—largely unpredictably. Complying with set percentages of different highway and NRLM sulfur grades would be very difficult, probably resulting in either a need to purchase credits or to postpone processing of some shipments.

In light of this disproportionate burden on transmix processors, we propose that transmix processors could choose to not be covered by both the proposed non-highway baseline provision and the TCO provisions for highway diesel fuel. This would only be an option for diesel fuel produced according to typical operational practices involving separation of transmix and not, for example, diesel fuel produced due to the blending of blend stocks. If the processor chooses not to be covered by these provisions,