

then the processor could produce highway or NRLM diesel fuel without these limits on production or percentages. For example, the processor could choose whether to produce 15 ppm highway, 500 ppm highway, 500 ppm NRLM, or 15 ppm NR in any proportions, during the time periods when the non-highway baseline volume percentage or the highway TCO are applicable. We are concerned that to discourage abuse, some reasonable limit on a transmix processor's production volume that could be exempted from the requirements may be necessary. Thus, we propose to limit it to 105% of its 2003–2005 average production but seek comment on whether additional flexibility is warranted.

The processor would still need to properly designate its fuel with the proper product transfer documents and, in the case of heating oil between 2007 and 2014 and locomotive and marine fuel between 2010 and 2014, to apply the specified marker and comply with other reporting and recordkeeping requirements applicable to refiners. A processor choosing this approach would not be eligible to generate or use NRLM or highway sulfur credits.

Because the volume of fuel involved would be small and the fuel processed would already have been “off-spec,” we believe that providing these options for transmix processors would have essentially no environmental impact and would not affect the efficient functioning of the proposed program or the existing highway diesel program. Rather, these options would allow fuel volume to remain in the highway and/or NRLM markets that might otherwise be forced into the heating oil market.

4. Highway or Nonroad Diesel Fuel Treated as Blendstock (DTAB)

Under the proposed program, a situation could arise for importers where that was expected to comply with the 15 ppm NR or highway standard is found to be slightly higher in sulfur than the standard. Rather than require that importer to account for, and report, that fuel as 500 ppm fuel, we propose to allow the importer to designate the non-complying fuel as blendstock—“diesel fuel treated as blendstock” or DTAB—rather than as either highway or nonroad diesel fuel. In its capacity as a refiner, the party could blend this DTAB fuel with lower sulfur diesel fuel to cause the sulfur level of the combined product to meet the 15 ppm nonroad or highway standard.

Where previously certified diesel fuel is used to reduce the sulfur level of the DTAB to 15 ppm or less, the party, in its refiner capacity, would report only

the volume of the imported DTAB as the amount of diesel fuel produced. This avoids the double counting that would result if the same diesel fuel is reported twice. If the product that is blended with the DTAB is not previously certified diesel fuel, but is also blendstock, the total combined volume of the DTAB and other blendstock would constitute the batch produced.

When an importer classifies diesel fuel as DTAB, that DTAB would not count toward the importer's calculations under the highway diesel rule's temporary compliance option, toward credit generation or use, or for compliance calculations under the non-highway baseline approach.³²⁰ The same party, however, would include the DTAB in such calculations in its capacity as refiner. We believe such an approach would increase the supply of 15 ppm fuel by reducing the volume of near-compliant fuel that is downgraded to higher sulfur designations. In essence, it allows importers the same flexibility that refiners have within their refinery gate.

C. Requirements for Parties Downstream of the Refinery or Import Facility

In order for the environmental benefits of the proposed program to be ensured, parties in the fuel distribution system downstream of the refinery (including pipelines, terminals, bulk plants, wholesale purchaser-consumers, and retailers) must in most cases keep the various grades of fuel in the system separate. Owners and operators of nonroad diesel equipment must also be required in certain circumstances to use fuels meeting specific sulfur content standards. The following paragraphs discuss several provisions that we propose to apply to these parties: segregation of various fuel sulfur grades; diesel fuel pump labeling; use of used motor oil in diesel fuel; use of kerosene in diesel fuel; use of additives in diesel fuel; requirements for end users; and provisions covering downgrading of undyed diesel fuel to different grades of fuel. These provisions are analogous to similar provisions that apply to highway diesel fuel under the highway program.

1. Product Segregation and Contamination

This subsection discusses the various grades and uses of NRLM fuel under the proposed program and when these fuel grades must be segregated from each other. In later subsections, we discuss

related requirements for product transfer documents to identify fuels throughout the distribution system and provisions relating to the liability all parties in the distribution face for preventing contamination of these different fuel sulfur grades.

a. The Period From June 1, 2007 through May 31, 2010

Starting June 1, 2007, NRLM fuel having a sulfur content exceeding 500 ppm that is produced or imported under the credit, small refiner, or hardship provisions would need to be segregated from other NRLM fuel subject to the 500 ppm standard, until the point where IRS dye is added. After that point the 500 ppm NRLM fuel could be mixed with NRLM small refiner, hardship or credit fuel, but could not be mixed with heating oil without changing the designation to heating oil. However, during this period there would also be nonroad equipment equipped with engines subject to emission standards, where some of this equipment is expected to be equipped with sulfur sensitive technology that needs to operate on 500 ppm or less sulfur fuel in order to meet the proposed emission standards in-use. Fuels sold for use in, or dispensed into, these engines would need to be identified as meeting the 15 ppm standard or the 500 ppm standard, as applicable, and if so identified it would need to meet such standard, and avoid being contaminated with higher sulfur fuels.

We are proposing an additional segregation requirement for heating oil. As provided in Section IV of the preamble, such fuel would be required to be identified by a marker and segregated throughout the distribution system to the end user. It could not be used as nonroad, locomotive or marine fuel but could only be used as heating oil. NRLM fuel could, however, be used as heating oil. To be able to effectively enforce the segregation of heating oil, we are proposing that heating oil be marked by the refiner or importer by the addition of 6 mg/L of solvent yellow 124.

b. The Period From June 1, 2010 through May 31, 2014

Because of the extreme sulfur sensitivity of the expected engine emission control systems beginning in model year 2011 for nonroad diesel engines, it would be imperative that the distribution system segregate nonroad diesel fuel subject to the 15 ppm sulfur standard from higher sulfur distillate products, such as 500 ppm diesel fuel produced by small refiners or through the use of credits, heating oil, and jet fuel.

³²⁰ Importer/refiners availing themselves of the DTAB provisions would still be subject to the non-highway distillate baseline provisions, downgrading provisions, and other provisions applicable to any importer or refiner.