

result from the adoption of the proposed rule parallels that under the highway program. We estimate that the use of lubricity additives would increase, and that the use of other additives would be unaffected.³²⁵ We request comment on this assessment.

Similar to the highway diesel rule, this proposed rule would allow the use of diesel fuel additives with a sulfur content greater than 15 ppm in nonroad diesel fuel. However, nonroad diesel fuel containing such additives would remain subject to the proposed 15 ppm sulfur cap. We believe that it is most appropriate for the market to determine how best to accommodate increases in the fuel sulfur content from the refinery gate to the end user, while maintaining the 15 ppm cap, and whether such increases result from contamination in the distribution system or diesel additive use. By providing this flexibility, we anticipate that market forces will encourage an optimal balance between the competing demands of manufacturing fuel lower than the 15 ppm sulfur cap, limiting contamination in the distribution system, and limiting the additive contribution to fuel sulfur content.

As in the highway diesel program, additive manufacturers that market additives with a sulfur content higher than 15 ppm and blenders that use them in nonroad diesel fuel subject to the proposed 15 ppm sulfur standard would have additional requirements to ensure that the 15 ppm sulfur cap is not exceeded. The 15 ppm sulfur cap on highway diesel fuel that becomes effective in 2006 may encourage the gradual retirement of additives that do not meet a 15 ppm sulfur cap. The proposed 15 ppm sulfur cap for nonroad diesel fuel in 2010 may further this trend. However, we do not anticipate that this will result in disruption to additive users and producers or a significant increase in cost. Additive manufacturers commonly reformulate their additives on a periodic basis as a result of competitive pressures. We anticipate that any reformulation that might need to occur to meet a 15 ppm sulfur cap will be accomplished prior to the implementation of the 15 ppm sulfur cap on highway diesel fuel in 2006.

Like the highway diesel fuel rule, this proposed rule would limit the continued use in nonroad diesel fuel that is subject to the proposed 15 ppm sulfur standard of additives that exceed 15 ppm sulfur. These additives would

be limited to use in concentrations of less than one volume percent. We believe that this limitation is appropriate and would not cause any undue burden because the diesel fuel additives for which this flexibility was included are always used today at concentrations well below one volume percent. Further, one volume percent is the threshold above which the blender of an additive becomes subject to all the requirements applicable to a refiner. See 40 CFR 79.2(d)(1).

The specific proposed requirements regarding the use of diesel fuel additives in nonroad diesel fuel subject to the proposed 15 ppm standard are as follows:

- Additives that have a sulfur content at or below 15 ppm must be accompanied by a PTD that states: "The sulfur content of this additive does not exceed 15 ppm."

- Additives that exceed 15 ppm sulfur could continue to be used in nonroad diesel fuel subject to the proposed 15 ppm sulfur standard provided that they are used at a concentration of less than one volume percent and their transfer is accompanied by a PTD that lists the following:

- (1) A warning that the additive's sulfur content may exceed 15 ppm,
- (2) The additive's maximum sulfur concentration,
- (3) The maximum recommended concentration for use of the additive in diesel fuel, and,
- (4) The contribution to the sulfur level of the fuel that would result if the additive is used at the maximum recommended concentration.

Blenders of additives that exceed 15 ppm in sulfur content would be liable if their actions caused the sulfur content of the finished nonroad diesel fuel to exceed 15 ppm. In some cases, blenders may not find it feasible to conduct testing, or otherwise obtain information on the sulfur content of the fuel either before or after additive blending, without incurring substantial cost. We anticipate that blenders would manage the risk associated with the use of additives above 15 ppm in sulfur content under such circumstances with actions such as the following:

- Selecting an additive with minimal sulfur content above 15 ppm that is used at a low concentration, and
- Working with their upstream suppliers to provide fuel of sufficiently low sulfur content to accommodate the small increase in sulfur content which results from the use of the additive.

This is similar to the way distributors would manage contamination from their distribution hardware, such as tank

trucks. Distributors would not necessarily test for fuel sulfur content after each opportunity for contamination, but rather will rely on mechanisms set up to minimize the contamination, and to obtain fuel sufficiently below the standard to accommodate the increase in sulfur content from the contamination.

The recordkeeping, reporting, and PTD provisions associated with these proposed requirements are discussed in Section VIII.E below. The liability provisions are discussed in Section VIII.F below.

The 1993 and 2007 highway diesel programs did not contain any requirements regarding the maximum sulfur content of additives used in highway diesel fuel subject to a 500 ppm sulfur cap.³²⁶ Our experience under the highway program indicates that application of the 500 ppm sulfur cap throughout the distribution system to the end-user has been sufficient to prevent the use of additives from jeopardizing compliance with the 500 ppm sulfur standard. The potential increase of several ppm in the sulfur content of diesel fuel which might result from the use of diesel additives raises substantial concerns regarding the impact on compliance with a 15 ppm sulfur cap. However, this is not the case with respect to the potential impact on compliance with a 500 ppm sulfur cap. The current average sulfur content of highway diesel fuel of 340 ppm provides ample margin for the minimal increase in the fuel sulfur content which might result from the use of additives. We expect that this would also be the case for NRLM fuel subject to the proposed 500 ppm sulfur standard. Therefore, we are not proposing any requirements regarding the sulfur content of additives used in NRLM fuel subject to the proposed 500 ppm sulfur standard. We believe that the proposed requirement that NRLM fuel comply with the 500 ppm sulfur cap throughout the distribution system to the end-user would be sufficient to ensure that entities who introduce additives into such fuel take into account the potential increase in fuel sulfur content.

6. End User Requirements

In light of the importance of ensuring that the proper fuel is used in nonroad, locomotive, and marine engines covered

³²⁵ See Section IV.G. of today's preamble for a discussion of the potential impact of the proposed sulfur standards on fuel lubricity.

³²⁶ The 500 ppm highway diesel final rule contains the requirement that highway diesel fuel not exceed 500 ppm in sulfur content at any point in the fuel distribution system including after the blending of additives. Fuel Quality Regulations for Highway Diesel Fuel Sold in 1993 and Later Calendar Years, Final Rule, 55 FR 34120, August 21, 1990.