

by the proposed program, we propose to prohibit any person from fueling such an engine with fuel not meeting the applicable sulfur standard.

We propose that (1) no person may introduce, or permit the introduction of, fuel that exceeds 15 ppm sulfur content into nonroad equipment with a model year 2011 or later engine; (2) beginning December 1, 2010, no person may introduce, or permit the introduction of locomotive or marine fuel into any nonroad diesel engine; (3) beginning December 1, 2010, no person may introduce, or permit the introduction of any fuel exceeding 15 ppm sulfur content into any nonroad diesel engine regardless of year of manufacture, except that segregated 500 ppm nonroad diesel fuel produced by qualified small refiners, hardship refiners, or refiners using credits may be introduced into pre-2011 model year nonroad diesel engines; (4) beginning December 1, 2010, no person may introduce, or permit the introduction of fuel exceeding 500 ppm sulfur content into any locomotive or marine diesel engine; and (5) beginning December 1, 2014, no person may introduce, or permit the introduction of, fuel exceeding 15 ppm sulfur content into any nonroad diesel engine.

7. Anti-Downgrading Provisions

The highway diesel rule restricts downgrading of 15 ppm highway diesel fuel to 500 ppm highway diesel fuel, from June 1, 2006–May 31, 2010 by preventing downstream entities from intentionally downgrading 15 ppm highway fuel. This is to protect the nationwide availability of 15 ppm highway fuel. The concern was that since both 15 ppm highway fuel and 500 ppm highway fuel were expected to be comparably priced, entities downstream of the refinery could simply take delivery of whichever fuel was cheapest and commingle the two fuel grades into a single pool of 500 ppm highway fuel. We chose not to restrict downgrading to non-highway fuel grades, however, for three reasons. First, in order to avoid reprocessing costs, an outlet was needed for legitimately downgraded fuel produced through contamination in the distribution system. Second, the price differential between 15 ppm fuel and high sulfur non-highway fuel was expected to be sufficient to deter any intentional downgrading. Third, many of the entities such as retailers and fleets that might have an incentive to

downgrade 15 ppm highway fuel do not market non-highway fuel, and therefore would have no opportunity to do so.

With this proposal, however, all NRLM diesel fuel would also be required to meet the 500 ppm sulfur standard beginning June 1, 2007 and it could be mixed fungibly with 500 ppm sulfur highway fuel up to the point where dye was added for IRS excise tax purposes. As a result, application of the current anti-downgrading provision in the highway diesel rule is ambiguous with respect to what would and would not be allowed under this proposal. Furthermore, the assumption in the highway rule that the price differential between 15 ppm highway and non-highway fuel would be sufficient to deter intentional downgrading would not necessarily be valid any longer, given the application of the 500 ppm sulfur standard to NRLM diesel fuel. For these reasons, we propose that the anti-downgrading provisions contained in 40 CFR 80.527 be modified to restrict downgrading of undyed 15 ppm diesel fuel to any 500 ppm diesel fuel, whether the 500 ppm sulfur fuel is intended for highway purposes or NRLM purposes. We would continue to allow unrestricted downgrading of undyed 15 ppm diesel fuel to fuel which is marked as heating oil.

We further propose that the downgrading restriction apply to any undyed 15 ppm diesel fuel produced. Since the two fuels would be distributed together, this modification to the downgrading limitations would be needed to enable enforcement of the highway diesel fuel downgrading limitations. We are not proposing any extension of that the anti-downgrading provisions beyond their current set date of June 1, 2010. The purpose of the anti-downgrading provisions is to ensure availability of 15 ppm highway fuel nationwide, and we do not anticipate this as a concern after June 1, 2010. This proposal allows early credit for 15 ppm NRLM diesel fuel produced beginning June 1, 2009. Although availability is not an issue for this fuel, it will be fungible with highway fuel subject to the 15 ppm sulfur standard. Consequently, we seek comment on whether the anti-downgrading provision could expire then as well without negatively impacting the availability of 15 ppm diesel fuel for highway vehicles. We request comment on these proposed revisions of the anti-downgrading provisions.³²⁷

While these proposed downgrading provisions apply primarily to parties in the distribution system downstream of the refiners and importers, these requirements would also apply to refiners and importers.

D. Diesel Fuel Sulfur Sampling and Testing Requirements

1. Testing Requirements

As part of today's action, we are proposing a new approach for fuel sulfur measurement. The details of this approach are described below, followed by a description of who would be required to conduct fuel sulfur testing as well as what fuel they would be required to test.

a. Test Method Approval, Recordkeeping, and Quality Control Requirements

Most current and past EPA fuel programs designated specific analytical methods which refiners, importers, and downstream parties use to analyze fuel samples at all points in the fuel distribution system for regulatory compliance purposes. Some of these programs have also allowed certain specific alternative methods which may be used as long as the test results are correlated to the designated test method. The highway diesel rule (66 FR 5002, January 18, 2001), for example, specifies one designated test method and three alternative methods for measuring the sulfur content of highway diesel fuel subject to the 15 ppm sulfur standard. The rule also specifies one designated method and three alternative methods for measuring the sulfur content of highway diesel fuel subject to the 500 ppm sulfur standard.

The highway diesel fuel sulfur rule also announced the Agency's intention to adopt a performance-based test method approach in the future, as well as our intention to continue working with the industry to develop and improve sulfur test methods. Under today's action, we are proposing to adopt a performance-based test method approach for diesel fuel subject to the 15 ppm sulfur standard. We are also proposing to adopt such an approach as an option for diesel fuel subject to the 500 ppm sulfur standard. The current approach for measuring the sulfur content of diesel fuel subject to the 500 ppm sulfur standard, *i.e.*, using the designated sulfur test method or one of the alternative test methods with correlation could continue to be used.

³²⁷ Since the time of the highway diesel final rule, we have become aware of the need for several other

clarifications of the anti-downgrading provisions.

We intend to address these general issues through a future amendment to the highway diesel rule.