

December 9, 2004

By e-Mail (thom.allen@ncmail.net)
and First Class Mail

Mr. Thomas C. Allen
Division of Air Quality
North Carolina Department of
Environment and Natural Resources
1641 Mail Service Center
Raleigh, North Carolina 27699-1641

**Re: Proposed Opt-In to California Standards For 2008
And Later Model Year Heavy-Duty Diesel Vehicles**

Dear Mr. Allen:

The Engine Manufacturers Association (“EMA”) hereby submits these comments in opposition to the proposal that the North Carolina Department of Environment and Natural Resources (“NCDENR”) has made to opt-in to California’s emission control standards for 2008 and later model year on-highway diesel-fueled motor vehicles. A public hearing on the NCDENR’s regulatory proposal has been scheduled for August 18, 2004.

The specific proposed regulatory language at issue would read, in relevant part, as follows:

No model year 2008 or subsequent model year heavy-duty or medium-duty diesel vehicle may be sold, leased, or registered within North Carolina unless the vehicle or its engine has been certified by the California Air Resources Board [“CARB”] as meeting the applicable model year requirements of Title 13 of the California Code of Regulations, Section 1956.8, California Exhaust Emission Standards and Test Procedures for 1985 and Subsequent Model Heavy-Duty Diesel Engines and Vehicles [the “California Heavy-Duty Diesel Standards”].

The background to this proposal relates to a comprehensive set of stringent, aftertreatment-forcing emission control standards that both U.S. EPA and CARB have adopted for heavy-duty diesel-fueled motor vehicles and engines, which standards will be phased-in during the 2007 through 2010 model years. More specifically, in 2001, U.S. EPA adopted a final rule to implement additional and dramatic reductions in the emission standards applicable to heavy-duty diesel engines and motor vehicles during the 2007-2010 time frame (the “2007-2010 Standards”). When fully phased-in, the 2007-2010 Standards will achieve a 90% reduction in PM emissions, a 72% reduction in NMHC emissions, and a greater than 90% reduction in NOx emissions. Subsequent to EPA’s adoption of the 2007-2010 Standards, CARB adopted

regulatory amendments that fully harmonize and align its emission standards for 2007 and subsequent model year heavy-duty diesel vehicles -- the California Heavy-Duty Diesel Standards -- with the 2007-2010 Standards.

Despite the existence of what now amounts to a uniform, nationwide program to obtain additional dramatic reductions in emissions from heavy-duty diesel vehicles commencing in 2007, the NCDENR is proposing, as a separate regulatory initiative, to opt-in to the California Heavy-Duty Diesel Standards, even though the identical 2007-2010 Standards -- which will apply in all 50 states except California -- already are slated to take effect in North Carolina starting in the 2007 model year. NCDENR is seeking to do so ostensibly "as a contingency in the event that EPA delays or weakens its 2007 model year standards." (See NCDENR Agenda 04-22.) The NCDENR proposal would apply to 2008 and later model year vehicles (as opposed to 2007 and later model year vehicles) because, according to the NCDENR, "in order to provide two-years' lead time as required by the [federal Clean Air] Act, emission standards for model year 2007 vehicles would have to have been effective before January 2, 2004," since the 2007 model year can start as early as January 2, 2006 under EPA's definition of "model year." (Id.)

EMA has a number of significant procedural and substantive concerns relating to the NCDENR's opt-in proposal. Addressing the procedural issues first, it is clear that the NCDENR cannot now opt-in to the California Heavy-Duty Diesel Standards. In that regard, the controlling statutes are Sections 209(b) and 177 of the federal Clean Air Act. 42 U.S.C. § 7543(b), 7507. Those statutes provide, in relevant part, as follows:

The Administrator shall, after notice and opportunity for public hearing, waive application [of preemption of state standards relating to the control of emissions from new motor vehicles and engines] for [California] if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such [preemption] waiver shall be granted if the Administrator finds that-

(A) the determination of the State is arbitrary and capricious;

(B) such State does not need such State standards to meet compelling and extraordinary conditions; or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) [Section 202(a)] of this title.

* * *

Notwithstanding [the preemption provisions of Section 209(a)], any State which has [state implementation] plans approved under this part may adopt and enforce for any model year standards relating to the control of emissions from new motor vehicles or new motor vehicle engines... if –

(1) such standards are identical to the California standards *for which a waiver has been granted* for such model year, and

(2) California and such State adopt such standards at least two years before commencements of such model year (as determined by regulations of the Administrator).

42 U.S.C §§ 7543(b), 7507. (Emphasis added).

The foregoing language highlights a critically important point relating to the NCDENR's proposal to opt-in to the California Heavy-Duty Diesel Standards. The proposal is premature. More specifically, EPA has not yet granted a preemption waiver for the California Heavy-Duty Diesel Standards. Indeed, to the best of EMA's knowledge, California has not even sought a preemption waiver from EPA for the California Heavy-Duty Diesel Standards. Thus, the initial precondition for opt-in -- valid California standards "for which a waiver has been granted [past tense]" -- does not exist in this instance. As a result, the Section 177 opt-in procedure is not yet available to the NCDENR with respect to the California Heavy-Duty Diesel Standards. Stated differently, what the NCDENR proposes to do cannot be done as a result of fundamental procedural constraints.

An additional procedural point also argues against the NCDENR's pending proposal. As noted above, the basic premise for the NCDENR's opt-in proposal is to adopt the California Heavy-Duty Diesel Standards as a "backstop" or "contingency" measure in the event that U.S. EPA determines to delay or amend the 2007-2010 Standards. While the NCDENR cites concerns about "various lobbying pressures" that could lead to such a delay or amendment, the only possible basis for such a delay or amendment would be a factual determination that the technology required to achieve compliance with the 2007/2010 Standards is not achievable or cost-effective.

In the event that such a determination were made, a necessary corollary result would be that the California Heavy-Duty Diesel Standards would no longer be qualified to receive a federal preemption waiver (and so could no longer be subject to a valid opt-in procedure). More specifically, a condition precedent to a preemption waiver for California standards is that those standards must be consistent with Section 202(a) of the federal Clean Air Act, 42 U.S.C. § 7543(a). That section requires, among other things, that mobile source emission standards be technologically achievable and cost-effective. See 42 U.S.C. § 7543(a)(3).

Given the foregoing, it is clear that if U.S. EPA were to determine that specific issues of technological infeasibility or lack of cost-effectiveness warranted some type of delay or modification to the 2010 standards,¹ then, as a direct result, the identical California Heavy-Duty Diesel Standards would no longer be consistent with Section 202(a)'s requirements for technological feasibility and cost-effectiveness. Such a result would render invalid any preemption waiver in favor of the California Heavy-Duty Diesel Standards, which, in turn, would invalidate any attempted opt-in procedure relating to those California Standards.

Turning to the substance of the NCDENR proposal, it is important to consider the threshold questions of whether the NCDENR is likely to achieve the intended benefits from the pending proposal. If not, then the proposal should not be pursued, especially given the procedural barriers that stand in the way of moving forward with the opt-in proposal in any event.

The sole stated purpose behind the NCDENR's pending opt-in initiative is to circumvent any potential (not anticipated) delay or relaxation of the 2007-2010 Standards that EPA might determine to be warranted in the future. The underlying assumption is that by opting-in to the California Heavy-Duty Diesel Standards as a "contingency," then even if the parallel EPA regulations were delayed, the anticipated emission benefits from the 2007-2010 Standards nonetheless would be realized in North Carolina because heavy-duty diesel engine and vehicle manufacturers would be required to make products available for sale in North Carolina that complied with the stringent requirements of the California Heavy-Duty Diesel Standards. While this rationale might seem reasonable in theory, it does not hold up when the relevant commercial realities are taken into account.

In the event that EPA were to delay or modify the 2007-2010 Standards, opting-in to the California Heavy-Duty Diesel Standards would not ensure the availability in North Carolina of heavy-duty vehicles that nonetheless comply with the 2007-2010 Standards. To the contrary, if EPA delays or modifies the 2007-2010 Standards, it will be because the technology required to meet these standards is not available or cost-effective. But the availability and cost of advanced emission-control technologies do not change simply because CARB, North Carolina, or any number of other states choose to adopt standards calling for that technology. Manufacturers will only be able to produce what is, in fact, technologically feasible and cost-effective. Under the scenario at issue, therefore, manufacturers would continue to produce current model engines that meet current model year emission standards (or that meet the modified standards that EPA determined to be necessary).

The net result from the NCDENR's proposed contingency plan, therefore, is that no new heavy-duty diesel vehicles would be available for sale in North Carolina. As noted above, manufacturers will not produce a separate California-complaint product line, but instead will

¹ Publicly available data suggest that no such factual determination could be made with respect to the 2007 standards.

produce new vehicles for sale in the other 49 (or, in this context, 48) states. Since those vehicles will not be authorized for sale in North Carolina if the proposed opt-in is approved, there will be no new heavy-duty vehicles available for sale in the State. The necessary results from that undesirable predicament would be that heavy-duty vehicle operators in North Carolina would retain their older vehicles longer, would rebuild their used vehicles in lieu of acquiring new vehicles, would delay the turnover of their vehicle fleets to newer and lower-emitting engines, or would buy out-of-state vehicles to use in North Carolina. All of this would have adverse impacts on air quality in North Carolina, and so would have the exact opposite result from what the opt-in proposal is meant to accomplish.

Other potential results from the proposed opt-in would be equally detrimental to the State. Faced with an inability to acquire new vehicles in North Carolina, operators of heavy-duty fleets would have a strong incentive to move their operations out-of-state. This in turn would result in a loss of jobs and revenue in the State. The loss of sales tax revenues and registration fees from the underlying inability to sell new heavy-duty vehicles in the State would only add to these materially adverse economic impacts. And, since North Carolina's trucking needs could be serviced by the displaced out-of-state trucking fleets, which would be operating EPA-certified engines, any hypothetical emission benefits from the opt-in proposal would be lost. Thus, it is clear that the opt-in proposal is fundamentally unsound from a substantive perspective, both as a matter of environmental and economic policy. The proposal, therefore, should not be approved.

The other alternative to consider in assessing the proposed opt-in leads to the same conclusion: the opt-in proposal is unsound and should not be approved. Specifically, it is far more likely than not (indeed, it is taken as a given at this time) that U.S. EPA will not delay or weaken the 2007-2010 Standards. Thus, it is far more likely than not that the proposed opt-in will accomplish nothing other than an increase in the cost of doing business in North Carolina. Once North Carolina opts-in to the California Heavy-Duty Diesel Standards, only those vehicles that are certified by CARB and labeled as such will be eligible for purchase in North Carolina (even though the vehicles certified for sale nationwide by U.S. EPA will be identical to CARB-certified vehicles). This inability to sell identical EPA-certified vehicles in North Carolina will require manufacturers, distributors and dealers to adopt and implement separate and distinct procedures to track, ship, label and account for those vehicles intended for sale into North Carolina, and will require North Carolina to adopt potentially expensive enforcement procedures to try to ensure that only vehicles with CARB-certified engines are registered in North Carolina. The net result from these distinct and otherwise unwarranted administrative costs is that vehicle purchasers in North Carolina again will end up paying more for the very same products than purchasers in the other 48 states. This will impose significant negative impacts on North Carolina businesses (akin to those noted above), while yielding no environmental benefits whatsoever. Thus, when the likely scenario of EPA maintaining the 2007-2010 Standards is considered, the opt-in proposal is again revealed to be an unsound regulatory initiative.

In light of the significant procedural and substantive concerns at issue, the NCDENR should not opt-in to the California Heavy-Duty Diesel Standards. The pending opt-in proposal is

Mr. Thomas C. Allen
December 9, 2004
Page 6

premature and will lead to potentially adverse environmental and economic impacts in the State. Thus, instead of pursuing an unwarranted adoption of California standards, the identical 2007-2010 federal Standards should remain applicable in North Carolina, just as they are throughout the rest of the nation.

EMA appreciates the opportunity to submit these comments relating to this very important issue. In the event that you have any questions regarding these comments, please do not hesitate to contact us.

Respectfully submitted,

ENGINE MANUFACTURERS ASSOCIATION

By:

Timothy A. French
Legal Counsel

cc: HDOH Committee
Jed R. Mandel

EMADOCS: 6255.1