

THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION HAS BEEN PUBLISHED IN THE NOVEMBER 21, 2005 NEW JERSEY REGISTER AT 37 N.J.R. 4429 (a). SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

ENVIRONMENTAL PROTECTION

OFFICE OF AIR QUALITY MANAGEMENT

National Low Emission Vehicle (NLEV) and Heavy-Duty Diesel New Engine Standards Program

Adopted Amendments: N.J.A.C. 7:27-26.1 through 26.7

Adopted New Rules: N.J.A.C. 7:27-28.1, 28.2, 28.5, 28.6, 28.7, 28.9 and 28.10

Adopted Recodification: N.J.A.C. 7:27-26.11 and 26.16 as 26.8 and 26.10, respectively

Adopted Recodification with Amendments: N.J.A.C. 7:27-26.8, 26.9, 26.10 and 26.15 as 28.3, 28.4, 28.8 and 28.9, respectively

Proposed: December 20, 2004 as 36 NJR 5620(a).

Adopted: October 25, 2005 by Bradley M. Campbell, Commissioner, Department of Environmental Protection.

Filed: October 27, 2005, as R.2005 d.414, **with substantive and technical changes** not requiring additional public notice and comment (See N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 13:1B-3(e), 13:1D-9, 26:2C-8 et seq., specifically 26:2C-8, 8.1 through 8.5, 8.11, and 39:8-61.

DEP Docket Number: 29-04-11 /455.

Effective Date: November 21, 2005.

Operative Date: December 24, 2005.

Expiration Date: Exempt.

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The Department of Environmental Protection (Department) is adopting new rules, rule amendments, recodifications and repeals of rule provisions to clarify and supplement the existing requirements regarding the sale, for use or registration in New Jersey, of certain heavy-duty diesel vehicles (HDDVs) and heavy-duty diesel engines (HDDEs), model years (MY) 2007 and later (manufactured for use in HDDVs, only).

In December of 2001 the Department adopted rules (33 N.J.R. 4128(b)) that opted into California's standards for new HDDEs, beginning with model year 2005, by requiring that these engines be certified by the California Air Resources Board (CARB). For model years 2005 and 2006, CARB certification included the employment of test procedures commonly referred to as the "Not-To-Exceed (NTE) Requirements" to determine compliance with the applicable standards. For model years 2007 and later new HDDEs, which are also covered by the Department's 2001 rulemaking, CARB certification is based on standards CARB adopted in October 2001 that are the same as the standards promulgated by the United States Environmental Protection Agency (USEPA) in December 2000. (See CARB's website at <http://www.arb.ca.gov/regact/HDDE2007/hdde2007.htm> for the adopted CARB regulations and related materials submitted to the California Office of Administrative Law and 66 Fed. Reg. 5002, January 18, 2001 for the USEPA adoption.) The USEPA's rule (the Federal 2007 rule) and California's rule (the CARB 2007 rule) establish stringent emission standards for heavy-duty highway diesel engines, to take effect beginning with the 2007 model year.

This rulemaking does not impose new standards for MY 2007 and later HDDEs per se; rather, it serves to clarify the finer points of the application of CARB-certification requirements to MYs 2007 and beyond, since CARB's standards for those model years are significantly different from the NTE requirements and standards for MYs 2005 and 2006 and were not discussed in the Department's previous NTE rulemaking.

The Department has also added a prohibition of the practice known as "stockpiling" engines. Stockpiling, which is generally prohibited by the USEPA and CARB, is the practice of purchasing vehicles and/or engines earlier than necessary in order to avoid more stringent emission standards that will apply. In addition, the Department has added provisions that would,

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in the event that the provisions of the Federal 2007 rule are not in effect, require recordkeeping and reporting of the sale, for use in New Jersey, of MY 2007 and later HDDEs.

This action is consistent with the Memorandum of Understanding (MOU) into which New Jersey has entered with other members of the Ozone Transport Commission, committing to pursue such rulemaking. This rulemaking is also part of a national effort to support, and if necessary, continue in effect promulgated Federal standards for these HDDEs. This adoption also constitutes a revision to New Jersey's State Implementation Plan (SIP) for ozone and would be part of any future New Jersey SIP for particulate matter, as well. A copy of the adopted rules has been forwarded to the USEPA.

In addition, by this adoption the Department has separated the rules for New Jersey's participation in the National Low Emission Vehicle (NLEV) program from those for HDDEs by recodifying the provisions relating to the heavy-duty diesel new engine requirements at N.J.A.C. 7:27-28, and by retaining the NLEV program rules at N.J.A.C. 7:27-26. New Jersey's commitment to the NLEV program ended with the commencement of the 2006 model year (January 2, 2005). Accordingly, after it proposed this recodification, the Department proposed further amendments to N.J.A.C. 7:27-26 that would repeal the portions of subchapter 26 that pertain to the NLEV program. See 37 N.J.R. 2762(a), August 1, 2005.

Summary of Hearing Officer's Recommendations and Agency Responses:

Chris Salmi, Assistant Director of the Department's Division of Air Quality, served as the Hearing Officer at the January 21, 2005 public hearing held at the Department Headquarters Building, 401 E. State Street, Trenton, New Jersey. The Department held this public hearing to provide interested parties the opportunity to present comments on the Department's proposed rulemaking, as well as the proposed SIP revisions that this rulemaking represents. The comment period for the proposal and the proposed SIP revision closed on February 18, 2005. The Department has summarized and responded to the comments it received on the proposal and the proposed SIP revision below. No comments were presented at the public hearing. The Hearing Officer recommended that the Department adopt the amendments, new rules and recodification

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as proposed, with the changes described in the response to comments, below. The Department has accepted the Hearing Officer's recommendations. A record of the public hearing is available for inspection in accordance with applicable law by contacting:

Department of Environmental Protection
Office of Legal Affairs
ATTN: Docket No.29-04-11/455
401 East State Street
PO Box 402
Trenton, New Jersey 08625-0402

This adoption document can also be viewed or downloaded from the Department's website at www.nj.gov/dep/aqm, where the Department has posted Air Quality Management rules, proposals, adoptions and SIP revisions.

Summary of Public Comments and Agency Responses:

The following people submitted written comments on the proposal:

1. S. William Becker STAPPA/ALAPCO (State and Territorial Air Pollution Programs Administrators/Association of Local Air Pollution Control Officials)
2. Kathleen A. McGinty Pennsylvania Department of Environmental Protection
3. Christopher D. Kneisler NJSBA (New Jersey School Boards Association)
4. Michael L. Pisauro NJEL (New Jersey Environmental Lobby)
5. Lisa A. Stegink EMA (Engine Manufacturers Association)

The written comments and agency responses are summarized below. The number(s) in parentheses after each comment correspond to the number identifying the commenter(s) above.

1. COMMENT: The USEPA's new rules for model year 2007 and later heavy-duty diesel engines will dramatically reduce pollution from on-highway, heavy-duty trucks beginning in 2007 and represents a critical component in the effort to provide clean air for all Americans.

Like New Jersey, states and localities across the country avidly support the rigorous regulation of heavy-duty diesel truck emissions and are relying on the emission reductions that timely implementation of the Federal rules will entail. Concern lest there be efforts to delay or weaken this rule led to the participation of numerous states, in addition to California, in a cooperative multi-state effort to ensure timely implementation of the 2007 standards. To facilitate the efforts of these states, our associations recently published a model rule offering one approach to ensuring implementation of these important clean engine standards. Our associations fully support and urge final adoption of the Department's proposed amendments and applaud New Jersey's strong commitment to protecting the health and welfare of its citizens and leadership in environmental protection. (1)

2. COMMENT: Pennsylvania has adopted requirements for model year 2007 and later heavy-duty diesel engines similar to New Jersey's, and many other states are proceeding to do so. Multi-state adoption of California's requirements is important in encouraging the Federal government to stand fast on the national requirements and to ensure that if they do not, states will have heavy-duty engines that are as clean as possible. We urge New Jersey to join Pennsylvania in adopting these requirements. (2)

3. COMMENT: The rules are a means to reduce the estimated 15,000 premature deaths caused each year nationally by fine particulate matter from diesel exhaust and to reduce incidents of asthma and asthma attacks in New Jersey and the United States. (4)

RESPONSE TO COMMENTS 1 through 3: The Department acknowledges the commenters' support of the adopted rules.

4. COMMENT: While commendable, the proposed rules do not go far enough in improving New Jersey's air quality and public health. The rules should also address non-road farm equipment and urban buses. The Department should correct these flaws in either these or subsequent rules. The Department and the Legislature should work together to enact strong and

meaningful legislation to address not only new vehicles but also the retrofitting of existing vehicles. (4)

RESPONSE: The Department's rules opt in to California's 2007 HDDE standards. The California standards, however, do not include the 2007 and later MY urban bus standards, nor do they include standards for non-road farm equipment, and so these elements are not part of New Jersey's rules.

The Department does agree that the Federal 2007 standards for heavy-duty diesel engines alone are not sufficient to address New Jersey's health and clean air needs and that New Jersey should pursue additional measures to reduce emissions from the thousands of diesel vehicles on the road today. These additional reductions are necessary to improve New Jersey's air quality, help achieve attainment of Federal ambient air quality standards and protect the public health and environment from air pollution caused by diesel exhaust, the effects of which are often felt most strongly in urban areas. To this end, the State has already undertaken several initiatives to reduce emissions from diesel-powered vehicles.

Most recently, Governor Codey and the New Jersey Legislature developed legislation requiring the establishment of a diesel emission reduction program for transit buses, garbage trucks, school buses and publicly-owned vehicles and equipment. Governor Codey signed this legislation on Wednesday, Sept. 7, 2005 (P.L.2005, c.219). Targeting these vehicles will result in reduced emissions in high-traffic and urban areas and will reduce children's exposure to diesel exhaust. However, implementation of some components of this program depends on the passage of a constitutional amendment by New Jersey voters on November 8, 2005 that would allow a portion of revenue from the existing Corporate Business Tax Fund to be used to fund this important program.

Earlier initiatives include the State's launch, in April of 1998, of the Heavy-Duty Diesel Vehicle Inspection Program, which requires the annual inspection for smoke emissions of diesel-powered trucks and buses with a GVWR of 18,000 pounds or more. The program also subjects both in-State and out-of-State vehicles to random roadside inspections. Over 70,000 vehicles are

inspected each year. The Department considers the program highly successful, evidenced by the fact that excessively-smoking vehicles are now the exception, rather than the rule, on New Jersey's highways.

In the fall of 2004, the Department launched an aggressive anti-idling campaign to increase awareness of the three-minute idling restriction for all diesel vehicles. Mass mailings, press releases, and articles in trade journals targeting the regulated community were supplemented by the sale of "No Idling Zone" signs. This outreach was followed by a two-week Statewide enforcement sweep. During a second idling outreach effort, which was specifically tailored to school districts, the Department encouraged schools to sign a No Idling Pledge and implement best management practices for their buses. The Department is also working to develop an infrastructure to provide alternatives to idling, such as truck stop electrification and on-board auxiliary power units.

In addition, the Department is working to develop amendments to N.J.A.C. 7:27-14, Control and Prohibition of Air Pollution from Diesel-powered Motor Vehicles, that would bolster the effectiveness of the existing three-minute idling limit by removing some of the current exemptions. The Department expects to propose these amendments by the end of this year. The Department is also considering amending N.J.A.C. 7:27-14 to establish more stringent in-use standards for exhaust emissions for diesel trucks and diesel buses.

The State is also engaged in several activities designed to reduce emissions from urban buses. Most urban buses operating in this State are owned and operated by the New Jersey Transit Corporation (NJTransit). Since 2001, NJTransit has been fueling its diesel fleet exclusively with ultra-low sulfur diesel fuel. In addition, nearly 44 buses have been retrofitted with particulate emissions filtration systems. Funding is in place for another 300 buses that are scheduled to be completed through the next year. In addition, NJTransit has retrofitted or rebuilt 212 pre-MY 1994 buses to meet MY 1994 emissions standards. The NJTransit fleet also includes 258 diesel buses that meet an optional Federal low-NO_x emissions standard and 82 buses fueled by natural gas.

5. COMMENT: Reasonable voluntary programs and initiatives to accomplish the reduction of greenhouse gases are important, but the implementation of the Federal diesel standard would not be voluntary and would result in considerable expense for the State's 600 plus school districts. Would school districts receive grant monies to retrofit their school buses with the new equipment? There would be significant cost increases for districts to purchase the low sulfur diesel fuel. At a time when the State has capped school district's administrative costs, of which fuel is one, an unforeseen and unbudgeted increase will create great strain on budgets. Will the State subsidize the purchase of low sulfur fuel? Will it provide cap relief for its purchase? (3)

RESPONSE: While the Department is working on other initiatives to address greenhouse gases, the primary purpose of these rules is to achieve attainment of Federal ambient air quality standards for 8-hour ozone and fine particulates by reducing emissions of some of their precursors, namely emissions of diesel exhaust from heavy-duty vehicles. As stated in the rule proposal (36 N.J.R. 5620(a), emissions from heavy-duty vehicles, whether gasoline-fueled or diesel-powered, include or contribute to the formation of harmful pollutants such as ozone, particulate matter (PM), oxides of nitrogen (NO_x), sulfur dioxide (SO₂) and volatile organic compounds (VOCs). Both NO_x and VOCs contribute to the formation of ground level ozone, while PM, NO_x, SO₂ and VOCs contribute to PM levels. In particular, emissions from heavy-duty diesel engines account for substantial portions of the country's ambient PM and NO_x concentrations. Exposure to diesel exhaust PM is of special concern because the USEPA and many other organizations classify it as a likely carcinogen; it may worsen the symptoms of asthma and trigger an asthma attack; and it poses additional risks to children and the elderly, who are more susceptible to its harmful effects.

The Department's CARB-certification requirements do not go beyond Federal standards already promulgated and currently in effect (for MY 2007 and thereafter). Rather, they simply act as a "backstop" in the event that such Federal standards were to be repealed or otherwise weakened or eliminated. School districts, as well as all other heavy-duty diesel vehicle owners in the country, are already subject to the existing Federal regulations, which means that any new

buses they purchase in 2007 or later must be equipped with engines manufactured to meet the new, more stringent Federal standards. Accordingly, the school districts will not have to install aftermarket technology in order for the buses to meet the new standards. The Department does not have the authority to provide relief from those standards. The Department also does not have funds to provide grants to school districts to offset the potentially higher cost of the model year 2007 and newer buses.

In addition, it should be noted that the adopted rules do not impose any new requirements on school districts to purchase low sulfur diesel fuel. The USEPA's new requirements that all on-road diesel fuel meet low sulfur standards begin in the fall of 2006. While all diesel vehicles will be using this new diesel fuel, its use is particularly critical for the new, cleaner engines (that is, model years 2007 and later) to function properly and produce significantly reduced emissions. By itself, this fuel will reduce the risk to the health of the children riding the buses, as well as to the public in general. In addition, when used by vehicles equipped with engines meeting the 2007 standards, this fuel will greatly reduce emissions, thus benefiting both the environment and the health of New Jersey residents. Among those who stand to benefit is the highly vulnerable segment of the population whose health and welfare is of utmost concern to the NJSBA, the children riding diesel schoolbuses.

Since the commenter expresses support for voluntary measures to help reduce air pollution, the Department encourages the commenter's full cooperation in promoting and implementing the Department's anti-idling pledge program for school buses, being implemented as part of the Department's "Stop the Soot" campaign (see response to Comment 4, above, for more details).

6. COMMENT: The Department's proposal to opt-in to the California Heavy-Duty Diesel Standards is premature since the USEPA has not yet granted a preemption waiver for the California Heavy-Duty Diesel Standards as required by Sections 209(b) and 177 of the Federal Clean Air Act. (5)

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RESPONSE: On August 19, 2005, the USEPA issued a notice of its decision, pursuant to section 209(b) of the Clean Air Act (Act), 42 U.S.C. 7543(b), to grant California its request for a waiver of Federal preemption for its heavy-duty diesel regulations for 2007 and subsequent model year vehicles and engines (2007 California Heavy Duty Diesel Engine Standards). See 70 Fed Reg 50322, Friday, August 26, 2005.

7. COMMENT: Even if the USEPA had granted a waiver to California, the Department is proposing to opt in to the California Heavy-Duty Diesel Standards for model year 2007 long after the date required to do so by Section 177 of the Clean Air Act. The two years lead-time for states to opt-in to the California program requires New Jersey to have adopted the proposed regulation by January 2005. Consequently, the Department's proposal cannot legally apply to MY 2007 engines and vehicles as proposed. (5)

RESPONSE: The Department complied with the Section 177 lead-time requirement when it adopted its CARB certification requirements for these vehicles and engines in December of 2001.

8. COMMENT: The basic premise for the Department's opt-in proposal appears to be to adopt the California Heavy-Duty Diesel Standards as a backstop or contingency measure in the event that the USEPA determines to delay or amend the 2007-2010 Standards. If the USEPA were to base such a determination on technological infeasibility or lack of cost-effectiveness, then the identical California Heavy-Duty Diesel Standards would no longer be consistent with Section 202(a) of the CAA'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 State opt-in procedure relating to those California standards. (5)

RESPONSE: As mentioned in the Department's response to comment 6, the USEPA has granted a preemption waiver to CARB for the 2007 California Heavy Duty Diesel Engine Standards. While it is certainly still possible that the USEPA could decide to delay or modify the standards for MY 2007 and later heavy-duty diesel engines, one can only speculate as to what the basis for that decision would be and what effect this decision would have on the already-granted preemption waiver and CARB's standards. The Department's CARB-certification requirements would not be affected by any change to CARB's standards that might ensue from such action on the part of the USEPA. That is, the Department's rules do not require MY 2007 and later heavy-duty diesel engines to be certified to CARB's current standards for those model years; rather, they require only that they be certified by CARB as meeting the standards in effect at the time. Accordingly, if CARB is forced to delay or modify its standards, it would be the substituted standards that CARB would employ in certifying engines, and those would be the standards underlying the certification by CARB required by the Department's rules.

9. COMMENT: The Department assumes that by opting in to the California Heavy-Duty Diesel Standards as a contingency, the anticipated emission benefits from the 2007-2010 Standards would be realized in New Jersey even if the parallel USEPA regulations were delayed, because manufacturers would be required to make products available for sale in New Jersey that complied with the stringent CARB requirements.

If the USEPA were to delay or modify its standards, it would be because the technology required to meet those standards was not available or cost-effective, which would also be the case in California and New Jersey. Manufacturers would continue to produce engines that meet current model year emission standards (or that meet the modified standards that USEPA determined to be necessary) and there would be no new heavy-duty diesel vehicles available for sale in New Jersey. Manufacturers would not produce a separate California-compliant product line, but instead would produce new vehicles for sale in the other 49 (or, in this context, 48) states. Since those vehicles would not be authorized for sale in New Jersey, there would be no new heavy-duty vehicles available for sale in the State. Thus, heavy-duty vehicle operators in

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New Jersey 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, would buy out-of-State vehicles to use in New Jersey, or would have a strong incentive to move their operations out-of-State. All of this would have adverse impacts on air quality in New Jersey, and so would have the exact opposite result from that which the opt-in proposal is meant to accomplish. (5)

RESPONSE: In response to a comment by the EMA opposing a technology review by the USEPA for the 2007 standards, CARB stated:

Although the ARB has not committed to an official Technology Review, the ARB will examine any findings from the U.S. EPA's Technology Review. As a result, on a case-by-case basis, the ARB may propose changes to the adopted requirements. Regardless of any results from the Technology Review, engine manufacturers should expect and develop technologies necessary to comply with the adopted requirements. Therefore, no further changes to the adopted requirements are necessary.

(From CARB's "Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Responses" available on CARB's website at <http://www.arb.ca.gov/regact/hdde2007/hdde2007.htm>, more specifically, at www.arb.ca.gov/regact/hdde2007/fsor.doc (for the Microsoft Word version) and at www.arb.ca.gov/react/hdde2007/fsor.pdf (for the PDF version).

A more detailed description of CARB's HDDE standards can be found at CARB's website, generally, at <http://www.arb.ca.gov/homepage.htm>.

By letter dated July 16, 2004, CARB submitted a request that EPA grant a waiver of preemption under section 209(b) of the Clean Air Act (CAA), 42 U.S.C. 7543(b) for the California 2007 rule. In its waiver request, CARB reviewed and relied on the two technology reviews performed by the USEPA regarding the Federal 2007 rule requirements and standards. (See Highway Diesel Progress Review Report, U.S. EPA, EPA420-R-02-016, June, 2002, and

Highway Diesel Progress Review Report 2, U.S. EPA, EPA 420-R-04-004, March, 2004.) Both the reviews and CARB's assessments confirmed the USEPA's initial determination when it promulgated the Federal 2007 rule that the requirements should be technologically feasible by the time the requirements were in effect. (CARB has indicated that it has no plans to conduct a further technology review.). Because the USEPA and CARB have been consistent in their findings regarding technological feasibility, there should be no need for a separate California-compliant product line. If, however, the USEPA does modify its standards or requirement to differ from the California 2007 rule, resulting in a separate California-compliant engine, the level of demand in New Jersey and the other states that have opted in to CARB's standards could be such that engine manufacturers would be willing to produce a separate California-compliant product line.

10. COMMENT: It is far more likely than not that the USEPA will not delay or weaken the 2007-2010 standards and the proposed opt-in will accomplish nothing more than increase the cost of doing business in New Jersey. Once New Jersey 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 New Jersey (even though the vehicles certified for sale nationwide by USEPA will be identical to CARB-certified vehicles). This inability to sell identical USEPA-certified vehicles in New Jersey 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 New Jersey, and will require New Jersey to adopt potentially expensive enforcement procedures to try to ensure that only vehicles with CARB-certified engines are registered in New Jersey. The net result is that vehicle purchasers in New Jersey again will end up paying more for the very same products than purchasers in the other 48 states pay. (5)

RESPONSE: Automobile manufacturers have adopted a "50 State" label, indicating compliance with both USEPA and CARB standards. If the HDDEs certified for sale nationwide by USEPA are, in fact, identical to CARB-certified HDDEs, a similar labeling practice would satisfy the

New Jersey requirement and, as such, would not require manufacturers, distributors or dealers to adopt and implement separate and distinct procedures to track, ship, label and account for those vehicles intended for sale in New Jersey, nor would it require New Jersey to adopt potentially expensive enforcement procedures.

11. COMMENT: The requirement at N.J.A.C. 7:27-28.7 related to stockpiling is not part of Title 13, section 1956.8 of the California Code or Regulations. N.J.A.C. 7:27-28.7(a) provides a general provision aimed to prevent purchasers from purchasing HDDEs or HDDVs in excess of their business needs for the purpose of evading the requirements of the California emissions standards. Although this provision apparently is intended to parallel anti-stockpiling provisions found in Federal regulations it is an unnecessary requirement, since the significant capital and inventory costs required to purchase excess vehicles and engines serve as a highly effective economic deterrent to such practices. Today's competitive marketplace, coupled with demanding financial performance expectations, simply does not allow companies to stockpile surplus engines or vehicles. (5)

12. COMMENT: The Department should promulgate N.J.A.C. 7:27-28.7 without modification on adoption. The prohibition against stockpiling of pre-2007 vehicles is key to the implementation of these programs. In a similar situation, the United States Government Accounting Office (GAO) found that eight out of 10 trucking companies bought older vehicles in anticipation of the effect of a consent order requiring engine manufacturers to produce cleaner engines. There is no reason to believe that the trucking industry will act any differently in the future. The GAO further found that this industry practice negatively impacted the effectiveness of the consent order. Consequently, by prohibiting the practice of stockpiling of vehicles in order to avoid the purchase of modern equipment, N.J.A.C. 7:27-28.7 will help preserve the original intent and impact of the consent order - improving air quality. (4)

RESPONSE TO COMMENTS 11 and 12: If the prohibition against stockpiling engines turns out to be unnecessary because companies respond to economic factors and do not, in fact, purchase

HDDEs or HDDVs in excess of their normal business needs, the adopted anti-stockpiling provisions at N.J.A.C. 7:27-28.7(a) will have no effect. On the other hand, the anti-stockpiling provisions will protect the integrity of the rulemaking should stockpiling be an issue in the future.

13. COMMENT: N.J.A.C. 7:27-28.7(b), which prohibits the sale or lease of an HDDV manufactured after April 1, 2007 unless “it is equipped with an engine certified by CARB as meeting all of the requirements of Section 1956.8, Title 13, California Code of Regulations that apply to MY 2007 and later engines,” amounts to a preempted emission standard applicable to new motor vehicle engines and is unlawful. Heavy-duty engines are manufactured by entities that are separate and distinct from the manufacturers of heavy-duty vehicles. As a result, so long as a heavy-duty engine is duly certified to meet the applicable standards in the model year of its manufacture, it may be lawfully sold and installed in a heavy-duty vehicle, even if that vehicle ends up being manufactured and sold in a subsequent model year due to other vehicle manufacturing and installation considerations. Consequently, there are likely to be vehicles manufactured in calendar year 2007 that meet all Federal and California emissions standards, but do not have an MY 2007 engine. Accordingly, this requirement, which establishes an illegal ban on the sale or lease of vehicles and engines that otherwise comply and are certified to California and Federal emission standards must be removed from the proposed regulation. (5)

RESPONSE: The Department had intended to prohibit a secondary stockpiling situation whereby a manufacturer could equip a MY 2007 or later vehicle with an engine not certified by CARB as meeting the MY 2007 and later standards. Because of the model year production and implementation practices common in the industry, the Department, consistent with the model rule developed by STAPPA/ALAPCO for opting in to CARB’s MY 2007 standards, selected April 1, 2007 as the deadline date by which, in most cases, manufacturers would have fully integrated current model year engines into their product lines and would have exhausted their stock of any prior model year engines. The Department, however, has determined not to adopt

the provisions at N.J.A.C. 7:27-28.7(b) at this time, in order to consider further the best way to achieve these ends.

Federal Standards Analysis

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65), require State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. The adopted rules do not exceed Federal standards for HDDEs sold for use in New Jersey, as they are based on California's standards for these engines, which are identical to the existing Federal standards promulgated by the USEPA for these engines. (See 66 Fed. Reg. 5002, January 18, 2001.)

The recordkeeping and reporting requirements at N.J.A.C. 7:27-28.5 and 6 will not go into effect so long as the Federal 2007 rule is in effect. In the event that the Federal 2007 rule is not in effect, however, the recordkeeping and reporting requirements will affect engine and vehicle manufacturers and those who sell or lease a vehicle subject to these certification requirements. The recordkeeping and reporting requirements are different from those currently imposed on engine and vehicle manufacturers by the USEPA, inasmuch as there are no parallel Federal reporting requirements for those who manufacture and sell these new HDDEs and HDDVs. The recordkeeping and reporting requirements are necessary, though, because if the Federal 2007 rule is not in effect, then the USEPA will no longer audit or enforce compliance with the 2007 standards still in use by CARB. Accordingly, New Jersey would not be able to rely upon the USEPA for enforcement and any such enforcement would be the responsibility of the State.

The adopted New Jersey rules require certification by CARB that CARB's requirements have been met. The recordkeeping and reporting provisions of N.J.A.C. 7:27-28.5 and 28.6, which would be in effect only if the Federal 2007 rule is not in effect, require that the engine and vehicle manufacturers maintain and provide the Department with records demonstrating that they

are in compliance with CARB's standards. Although CARB's recordkeeping and reporting requirements may differ somewhat from the adopted requirements, there should be minimal, if any, additional expense in complying with the proposed recordkeeping and reporting requirements, since the manufacturers must now demonstrate to CARB that they are in compliance with CARB's requirements.

Compliance with the recordkeeping requirements for vehicle manufacturers may involve more effort than for engine manufacturers, insofar as they include keeping a record of the identity of the seller, first purchaser and the state in which the vehicle was first registered. The adopted requirements will not, however, require the hiring of experts or consultants in order to comply, but rather simple bookkeeping regarding sales. The Department does not anticipate vehicle or engine manufacturers to incur substantial costs to comply with the new recordkeeping and reporting requirements.

Similarly, those who sell or lease vehicles subject to the new subchapter will only be required to retain bookkeeping records, some of which they already keep. Any information that they do not currently keep should be readily available from the documents provided with the engines and the vehicles. They must also provide the purchaser with documentation indicating that the engine or vehicle is CARB certified. This information is readily available from the documentation that the manufacturer has provided to the seller or lessor.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 26. NATIONAL LOW EMISSION VEHICLE (NLEV) PROGRAM

7:27-26.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

...

"California Air Resources Board" or "CARB" means the agency or its successor agency established and empowered to regulate sources of air pollution in the State of California, including motor vehicles, pursuant to section 39003, California Health & Safety Code, 1999, as amended or supplemented.

...

7:27-26.2 Applicability

(a) This subchapter applies to all 1999 model year and subsequent model year passenger cars and light-duty trucks, motor vehicle engines in such motor vehicles, and air contaminant emission control systems for such motor vehicles and motor vehicle engines, otherwise referred to in this subchapter as "OTC-LEV program vehicles, engines and control systems."

(b) (No change.)

(c) Upon termination of the State's participation in the NLEV Program, the provisions of this subchapter shall apply to OTC-LEV program vehicles, engines, and control systems. In such event, the Department shall publish notice of such termination in the New Jersey Register.

(d) Notwithstanding (a) above, the provisions of this subchapter do not apply to OTC-LEV program vehicles, engines, and control systems unless the combined number of registrations of new motor vehicles in those states and the District of Columbia, excluding New Jersey, within the OTR that have enacted legislation or adopted rules and regulations establishing and implementing a low emission vehicle program for a motor vehicle model year not later than 1999, is equal to or greater than 40 percent of the total number of registrations of new motor vehicles in all of the states and the District of Columbia within the OTR.

7:27-26.3 Prohibitions

(a)–(e) (No change.)

7:27-26.4 Emission certification standards

(a)–(e) (No change.)

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7:27-26.5 Fleet average

(a)-(b) (No change.)

7:27-26.6 Reporting and new motor vehicle dealer requirements

(a)-(b) (No change.)

7:27-26.7 Additional requirements

(a) (No change.)

7:27- 26.8 Enforcement

(a) (No change.)

7:27-26.9 Incorporation by reference

(a)-(d) (No change.)

(e) The following documents and sources are incorporated by reference within this subchapter:

1. - 10. (No change.)

11. "Control of Air Pollution from New and In-Use Motor Vehicles and New and In-Use Motor Vehicle Engines: Certification and Test Procedures," 40 C.F.R. Part 86, Subparts A and B; and

12. 40 Code of Federal Regulations (CFR) Parts 51, 52 and 85.

(f) (No change.)

7:27-26.10 Severability

(No change.)

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SUBCHAPTER 28. HEAVY-DUTY DIESEL NEW ENGINE STANDARDS AND REQUIREMENTS PROGRAM

7:27-28.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Business" means an occupation, profession or trade; a person or partnership or corporation engaged in commerce, manufacturing, or a service; or a profit-seeking enterprise or concern.

"California Air Resources Board" or "CARB" means the agency or its successor agency established and empowered to regulate sources of air pollution in the State of California, including motor vehicles, pursuant to section 39003, California Health & Safety Code, 1999, as amended or supplemented.

"Certification" means a finding by CARB or the USEPA that a motor vehicle, motor vehicle engine, or air contaminant emission control system has satisfied the criteria for the control of specified air contaminants from motor vehicles, adopted by CARB or the USEPA, respectively, as set out in their respective regulations at Title 13, California Code of Regulations, as amended or supplemented, and 40 CFR Part 86, as amended or supplemented.

"Department" means the New Jersey Department of Environmental Protection.

"Diesel engine" means a compression ignition type of internal combustion engine, without regard to fuel type.

"Engine family" means the basic classification unit comprised of the engine and drive-train configuration selected by a manufacturer and used for the purpose of certification testing.

"Established place of business" means a place actually occupied either continuously or at regular periods for business use.

"Gross vehicle weight rating" or "GVWR" means the value specified by the manufacturer as the maximum design loaded weight of a single vehicle.

"Heavy-duty diesel engine" means a diesel engine that is used to propel a heavy-duty diesel vehicle.

"Heavy-duty diesel vehicle" means a motor vehicle with a GVWR greater than 14,000 pounds that is equipped with a heavy-duty diesel engine.

"Lease" means any commercial transaction recognized under the laws of this State as a means of creating a right to use a good and includes renting. It also includes offering to rent or lease.

"Model year" or "MY" means the manufacturer's annual production period, which includes January 1 of a calendar year or, if the manufacturer has no annual production period, the calendar year. In the case of any vehicle manufactured in two or more stages, the time of manufacture shall be the date of completion of the chassis.

"Motor vehicle" or "vehicle" means every device in, upon, or by which a person or property is or may be transported otherwise than by muscular power, excepting such devices that run only upon rails or tracks and motorized bicycles.

"Motor vehicle engine" means an engine that is used to propel a motor vehicle.

"New complete HDDV" means a newly manufactured, ready-to-operate HDDV, equipped with an HDDE, offered for sale or lease by a manufacturer or dealer, the equitable or legal title to which has never been transferred to the ultimate purchaser.

"Person" means an individual, public or private corporation, company, partnership, firm, association, society or joint stock company, municipality, state, interstate body, the United States, or any Board, commission, employee, agent, officer or political subdivision of a state, an interstate body or the United States.

"Recall" means the issuing of notices directly to consumers that vehicles in their possession or control should be corrected, and/or efforts to actively locate and correct vehicles in the possession or control of consumers.

"Sale" or "sell" means the transfer of equitable or legal title to a motor vehicle or motor vehicle engine to the ultimate or subsequent purchaser.

"State" means the State of New Jersey, unless otherwise specified.

"Ultimate purchaser" means, with respect to any new motor vehicle or new motor vehicle engine, the first person who in good faith purchases a new motor vehicle or new motor vehicle engine for purposes other than resale.

7:27-28.2 Applicability

(a) Except as specifically provided herein, this subchapter applies to:

1. All new complete HDDVs sold or leased for use in this State that are equipped with a MY 2005 or later HDDE; and
2. All MY 2005 and later HDDEs sold or leased for use in this State.

7:27-28.3 Requirements for engine and vehicle transactions

(a) No person who is a resident of this State, or who operates an established place of business within this State, shall sell, lease, rent, import, deliver, purchase, acquire, receive or otherwise transfer in this State, or offer for sale, lease, or rental in this State (or attempt or assist in any of these actions) either a MY 2005 or later HDDE or a new complete HDDV equipped with a MY 2005 or later HDDE that is intended primarily for use or for registration in this State, unless the California Air Resources Board has issued an Executive Order certifying the engine as meeting all requirements of Title 13, section 1956.8 of the California Code of Regulations, as amended or supplemented, and the test procedures incorporated by reference therein that apply to the model year of the engine in question.

(b) For the purposes of this subchapter, it is conclusively presumed that the equitable or legal title to any motor vehicle with an odometer reading of 7,500 miles or more has been transferred to an ultimate purchaser, and that the equitable or legal title to any motor vehicle with an odometer reading of less than 7,500 miles has not been transferred to an ultimate purchaser.

7:27-28.4 Exemptions and technology review

(a) Notwithstanding the provisions of N.J.A.C. 7:27-28.3, the requirements set forth at N.J.A.C. 7:27- 28.3, 28.5 and 28.6 do not apply to:

1. A model year 2005 or 2006 heavy-duty diesel engine that is exempt from CARB's certification requirements pursuant to Section 86.1370-2007B.4 of the California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Diesel-Engines and Vehicles as either an engine manufactured by an ultra-small volume manufacturer or an engine installed in an urban bus;
2. A model year 2007 or later heavy-duty diesel engine intended for use in an urban bus;
3. A heavy-duty diesel engine of a model year and engine family for which CARB has determined, based upon its technology review, that compliance with its heavy-duty diesel engine standards is not required;
4. A heavy-duty diesel vehicle that is owned and operated by a county, municipality, fire district, or duly incorporated non-profit organization for first aid, emergency, ambulance, rescue, or fire-fighting purposes; or
5. A heavy-duty diesel vehicle owned by the United States Department of Defense and/or the United States military services and used in combat, combat support, combat service support, tactical or relief operations, or training for such operations and any heavy-duty diesel engine used in such a vehicle, including:
 - i. any heavy-duty diesel engine or heavy-duty diesel vehicle that is excluded from regulation under 40 CFR Part 85, subpart R, section 85.1703, and exempted from regulations under the Federal national security exemption, 40 CFR, subpart R, sections 85.1702(a)(2), 85.1704(b), 85.1708, and 85.1710, and
 - ii. any commercially available vehicle, for which a Federal certificate of conformity has been issued under 40 CFR Part 86.

7:27-28.5 Recordkeeping

(a) In the event that the Federal certification requirements for MY 2007 and later HDDEs, promulgated by the USEPA on January 18, 2001 and codified at 40 CFR Part 86, are not in effect, the following shall apply:

1. Each manufacturer of any engine or vehicle subject to the requirements of this subchapter shall create and retain for a period of not less than five years from the date of manufacture records sufficient to determine whether the manufacturer is in compliance with each applicable requirement of this subchapter. For an engine, this includes, but is not limited to, the family designation, emission level to which each subject engine has been certified by engine identification number, the make and model year and horsepower rating. For a vehicle, this includes, but is not limited to, the make, model and model year and identification number of the vehicle in which the engine was installed by the manufacturer and, by vehicle identification number, the identity of the seller, the first purchaser and the State in which the vehicle was first registered;
2. Each person who sells or leases a vehicle subject to this subchapter shall provide a copy to the purchaser and retain for not less than three years from the date of sale or lease records sufficient to determine whether such seller or lessor is in compliance with the requirements of this subchapter. This includes, but is not limited to, the Certificate of Compliance for the engine installed in the vehicle, the Certificate of Origin of the vehicle and the vehicle registration for each applicable year.

(b) In the event that the USEPA subsequently promulgates Federal certification requirements for MY 2007 or any subsequent model year HDDEs at least as stringent as those the USEPA promulgated on January 18, 2001, the requirements for record keeping set forth in (a) above shall not be in effect for any such model year HDDE.

7:27-28.6 Annual Reporting

(a) In the event that the Federal certification requirements for MY 2007 and later HDDEs, promulgated by the USEPA on January 18, 2001 and codified at 40 CFR Part 86 are not in effect

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at the start of MY 2007 or any subsequent model year, each manufacturer of any engine subject to the requirements of this subchapter shall submit to the Department, on or before July 1 of the year following the model year, a report demonstrating that such manufacturer has complied with all applicable requirements of this subchapter, including CARB's emission phase-in, averaging, banking and trading and early introduction incentives for the 12-month period running from April 1 of the model year to the following March 31. This report shall include all sales, leasing, registration and emissions certification data needed to verify an assertion of compliance. If the manufacturer is not in compliance, the report shall so state and shall include all information relevant to the noncompliance.

(b) In the event that the USEPA subsequently promulgates Federal certification requirements for MY 2007 or any subsequent model year HDDEs at least as stringent as those the USEPA promulgated on January 18, 2001, the requirements for annual reporting set forth in (a) above shall not be in effect for any such model year HDDE.

7:27-28.7 Prohibition against stockpiling

(a) No person shall purchase any HDDEs or HDDVs in excess of normal business needs for the purpose of evading the requirements of this subchapter.

*[(b) No person shall sell or lease a new complete HDDV that is manufactured after April 1, 2007, for use in this State, unless:

1. It is equipped with an engine certified by CARB as meeting all requirements of section 1956.8, Title 13, California Code of Regulations that apply to MY 2007 and later engines, and
2. The sale, lease or registration of such vehicle will not result in a violation of the phase-in, averaging, banking or trading or early incentive provisions of CARB's HDDE certification requirements.]*

7:27-28.8 Manufacturer compliance with California orders and voluntary recalls

(a) Any order or enforcement action taken by the California Air Resources Board to correct noncompliance with any heavy-duty diesel engine requirements adopted by such Board applicable to MY 2005 and later HDDEs applies to all such engines and motor vehicles subject to this subchapter that are sold, leased, or rented, offered for sale, lease, or rental, or registered in New Jersey, except where the manufacturer demonstrates to the Department's satisfaction, within 21 days of issuance of such California Air Resources Board action, that this action is not applicable to such engines or vehicles in New Jersey.

(b) Any voluntary or influenced emission-related recall campaign initiated by any manufacturer pursuant to Title 13, sections 2113 through 2121 of the California Code of Regulations shall extend to all applicable engines and motor vehicles subject to this subchapter, sold, leased, or rented, offered for sale, lease, or rental, or registered in New Jersey, except where the manufacturer demonstrates to the Department's satisfaction, within 21 days of approval of the campaign by the California Air Resources Board, that this campaign is not applicable to such engines or vehicles in New Jersey.

7:27-28.9 Enforcement

(a) The Department and its representatives have the right to enter and inspect any site, building, equipment, or vehicle, or any portion thereof, at any time, in order to ascertain compliance or non-compliance with the Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., this subchapter, any exemption, or any order, consent order, agreement, or remedial action plan issued, approved or entered into pursuant thereto. Such right includes, but is not limited to the right to test or sample any materials, motor vehicles or motor vehicle engines or any emissions therefrom, at the facility, to sketch or photograph any portion of the site, building, vehicles or motor vehicle engines, to copy or photograph any document or records necessary to determine such compliance or non-compliance, and to interview any employees or representatives of the owner, operator or registrant. Such right is absolute and is not conditioned upon any action by the Department,

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except the presentation of appropriate credentials as requested and compliance with appropriate standard safety procedures.

(b) Any person who fails to comply with any of the obligations or requirements of this subchapter will be subject to an enforcement action pursuant to the provisions of N.J.S.A. 26:2C-19.

7:27-28.10 Severability

Each section of this subchapter is severable. In the event that any section, subsection or division is held invalid in a court of law, the remainder of this subchapter will continue in full force and effect