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**ema** Engine  
Manufacturers  
Association®  
www.enginemanufacturers.org

Two North LaSalle Street  
Suite 2200  
Chicago, Illinois 60602  
Tel: 312.827.8700  
Fax: 312.827.8737

May 4, 2007



Mr. Glenn Shankle  
Executive Director  
Texas Commission on Environmental Quality  
P.O. Box 13087 – MC 109  
Austin, Texas 78711-3087

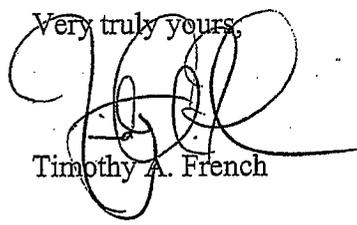
**Re: Petition for Adoption of Rules; 30 TAC §§ 114.700 – 114.709;  
Elimination of Requirement to Sell Only California-Certified  
Heavy-Duty Diesel Engines in Texas**

Dear Mr. Shankle:

The Engine Manufacturers Association (“EMA”) hereby submits the enclosed petition for adoption of rules seeking revisions to 30 Texas Administrative Code (“TAC”) Chapter 114 (Subchapter L, Division 1), *Control of Air Pollution from Motor Vehicles, On-Road Engines, Heavy-Duty Diesel Engines*.

Specifically, and for the reasons explained in EMA’s petition, EMA is seeking the repeal of 30 TAC §§ 114.700 – 114.709, inclusive, which regulations mandate the sale of only California-certified heavy-duty diesel engines (“HDDE”) in Texas. Alternatively, EMA is seeking an amendment to 30 TAC §§ 114.707 to add a new subparagraph (5) to allow for the sale or other use in Texas of “any 2008 or later model year HDDE certified by the United States Environmental Protection Agency (“EPA”) as compliant with all applicable EPA emission control regulations.”

Thank you for your careful consideration of EMA’s petition, and please do not hesitate to contact me if you have any questions relating to this matter.

Very truly yours,  
  
Timothy A. French

TAF:kj  
Encl.  
cc: John M. Minter, Staff Attorney

EMADOCS: 30147.1

EMA European Office, C.P. 65, CH-1231 Conches, Switzerland  
Telephone: +41 22 784 3357 Facsimile: +41 22 784 3349

EMA is a Non Governmental Organization in Special Consultative Status with the Economic and Social Council of the United Nations

## PETITION FOR ADOPTION OF RULES

The Engine Manufacturers Association (“EMA”) hereby petitions the Texas Commission on Environmental Quality (“TCEQ”) for adoption of rules to amend 30 Texas Administrative Code (“TAC”) Chapter 114 (Subchapter L, Division 1), *Control of Air Pollution from Motor Vehicles, On-Road Engines, Heavy-Duty Diesel Engines*. Specifically, and for the reasons set forth below, EMA is seeking the repeal of 30 TAC §§ 114.700 – 114.709, inclusive, which regulations mandate the sale of only California-certified heavy-duty diesel engines (“HDDE”) in Texas. Alternatively, EMA is seeking an amendment to 30 TAC §114.707 to add a new subparagraph (5) to allow for the sale or other use in Texas of “any 2008 or later model year HDDE certified by the United States Environmental Protection Agency (EPA) as compliant with all applicable EPA emission control regulations.”

### NAME AND ADDRESS OF PETITIONER

Engine Manufacturers Association  
c/o Timothy A. French  
Two N. LaSalle Street  
Suite 2200  
Chicago, Illinois 60602

### PURPOSE AND EXPLANATION OF THE PROPOSED RULE

EMA represents the interests of the world’s leading manufacturers of internal combustion engines, including HDDEs used in heavy-duty on-highway (“HDOH”) vehicles. As a result of recent rulemaking activity in California, TCEQ has a regulatory program in place -- a program that requires the sale of only California-certified HDDEs into Texas -- that creates very significant problems for HDDE and HDOH vehicle manufacturers, since Texas’ HDDE regulations are no longer consistent with California’s. Consequently, and as explained in further detail below, EMA is requesting an amendment to TCEQ’s current regulations to allow for the sale or other use in Texas of HDDEs that are certified by the U.S. Environmental Protection Agency (“EPA”), commencing with the 2008 model year.

#### a. Summary of the Pending Problem

By way of background, TCEQ adopted regulations, effective as of January 9, 2002, requiring that only HDDEs conforming with and certified under California’s emission control requirements (as enacted by the California Air Resources Board (“CARB”) as of July 25, 2001) can be sold into Texas. (See 30 TAC §§ 114.700 – 114.709.) More recently, effective as of November 15, 2006, CARB enacted a new additional emission control requirement for HDDEs-- specifically, an automatic engine idle shutdown requirement applicable to 2008 and later model year HDDEs (hereinafter, the “HDOH Engine-Shutdown Requirement”). TCEQ has taken no action to adopt and include the HDOH Engine-Shutdown Requirement as a component of Texas’

HDDE emission control regulations. As a result, TCEQ's HDDE program is no longer consistent with CARB's, and CARB-certified engines will include emission-control features -- i.e., automatic engine-shutdown features -- that are not required under TCEQ's regulations. This inconsistency threatens to cause very significant logistical problems for the manufacturers of HDDEs and HDOH vehicles.

As discussed more fully below, EMA believes that the best overall solution to the pending problem is for TCEQ to repeal 30 TAC §§ 114.700 – 114.709, inclusive, which will have the effect of allowing the sale of EPA-certified HDDEs into Texas. Alternatively, TCEQ can achieve the same net result by amending 30 TAC § 114.707 to include a new subparagraph (5) to allow for the sale or other use in Texas of “any 2008 or later model year HDDE certified by the United States Environmental Protection Agency (EPA) as compliant with all applicable EPA emission control regulations.” EMA believes that this is the optimal remedy for the current problem for the following reasons:

- The original justification for Texas to require CARB-certified HDDEs has disappeared, since EPA has adopted and implemented emission control standards, including “not-to-exceed” (“NTE”) standards, for 2007 and later model year HDDEs and HDOH vehicles that are identical to the numerical emission limits promulgated by CARB.
- The HDOH Engine-Shutdown Requirement that CARB recently adopted is likely to be unpopular with many HDOH vehicle owners and operators, and is therefore likely to cause delays in their purchases of new HDOH vehicles, thereby reducing the benefits from the new stringent emission standards applicable to 2007 and later model year HDDEs and HDOH vehicles.
- CARB-certified HDDEs will no longer be consistent with TCEQ's HDDE emission control regulations as of the 2008 model year, which constitutes a violation of the identity requirement in Section 177 of the Clean Air Act (“CAA”). *See* 42 U.S.C. § 7507.

Significantly, the rulemaking action requested by EMA will have no adverse impacts on Texas' air quality. On the contrary, it is likely to yield air quality benefits, since it will avoid the delays in the purchases of new ultra-clean HDOH vehicles and HDDEs that might otherwise be occasioned by the adverse reaction of owners and operators in Texas to the HDOH Engine Shutdown Requirement.

Similarly, the rulemaking changes that EMA is seeking will not have any negative impacts on Texas' State Implementation Plan (“SIP”). First, as already noted, the EPA numerical emission standards applicable to new HDDEs are identical to the current CARB emission standards. And second, TCEQ has not adopted the HDOH Engine-Shutdown Requirement as a Texas environmental quality regulation, so it is not a component of the Texas SIP in any event.

**b. Regulatory Background to the Pending Problem**

The pending problem stems from the flurry of significant and ground-breaking regulatory activity that occurred several years ago relating to the control of emissions from new HDDEs and HDOH vehicles. In particular, in 2001 and 2002, respectively, EPA and CARB adopted a new set of very stringent, aftertreatment-forcing emission control standards applicable to new HDDEs. Under those ground-breaking EPA and CARB HDDE emission limits, which are identical in all material respects, particulate matter (PM) emissions have been reduced by 90% or more (from 0.1 g/bhp-hr to 0.01 g/bhp-hr) as of the current model year (through the deployment of ultra-low sulfur diesel fuel and diesel particulate filters), and emissions of oxides of nitrogen (NOx) have been reduced by more than half, and will be reduced by more than 90% as of the 2010 model year (from 2.4 g/bhp-hr in 2002/2004 to 0.2 g/bhp-hr in 2010).

Despite the advent of these ground-breaking, aftertreatment-forcing HDDE emission regulations (which have been and are being fully implemented), there was lingering concern among certain parties during the 2003-2005 timeframe that EPA might relax the stringent HDDE emission standards prior to their implementation. In addition, CARB's HDDE regulations included certain NTE standards for 2005 and 2006 model year HDDEs, which under EPA's regulations became applicable to 2007 and later model year HDDEs. To guard against the prospect of any potential EPA "back-sliding" and in an attempt to pick up the NTE standards for 2005 and 2006 model year HDDEs, TCEQ (in a rulemaking that became effective on January 9, 2002) adopted new regulations (30 TAC §§ 114.700 – 114.709), which incorporated by reference the CARB HDDE regulations that had been codified as of July 25, 2001 (*see* Title 13 of the California Code of Regulations, section 1956.8 (hereinafter "Section 1956.8")).

The underlying premise for Texas' opt-in to the CARB HDDE emission standards is no longer valid. EPA has fully-implemented its own identical emission control standards (including NTE standards) for 2007 and later model year HDDEs and HDOH vehicles, and all of the environmental benefits resulting from those new aftertreatment-forcing standards are being realized across the nation, including in Texas. Thus, the rationale for the opt-in, as well as the rationale for maintaining the opt-in to the CARB HDDE emission control requirements as a TCEQ regulation, have been mooted, and Texas can now achieve the very same air quality benefits it originally sought by allowing the distribution and sale of new EPA-certified HDDEs.

**c. TCEQ's Requirement for CARB-Certified HDDEs Is No Longer Consistent With Texas' Underlying HDDE Emission Control Regulations**

EMA's principal concerns, however, do not stem from the fact that Texas' opt-in to the CARB HDDE emission standards is no longer warranted. Rather, EMA's concerns stem from the fact that due to a recent CARB rulemaking -- undertaken well after Texas' opt-in to the CARB HDDE emission control regulations -- TCEQ's HDDE regulations are no longer consistent with the requirements that must be fulfilled to obtain CARB certification for HDDEs.

The recent CARB regulatory amendment at issue relates to the idle operation of HDOH vehicles. On November 15, 2006, a new CARB regulation became effective as an amendment to

Section 1956.8, the same regulatory provision that Texas incorporated by reference several years ago. In particular, new Section 1956.8(a)(6) now requires, among other things, that,

[A]ll new 2008 and subsequent model year heavy-duty diesel engines shall be equipped with an engine shutdown system that automatically shuts down the engine after 300 seconds [5 minutes] of continuous idling operation once the vehicle is stopped, the transmission is set to "neutral" or "park," and the parking brake is engaged. If the parking brake is not engaged, then the engine shutdown system shall shut down the engine after 900 seconds [15 minutes] of continuous idling operation once the vehicle is stopped and the transmission is set to "neutral" or "park."

As noted earlier, TCEQ has engaged in no rulemaking activity to adopt or include the HDOH Engine-Shutdown Requirement as a component of Texas' HDDE emission standards. Thus, as of the 2008 model year, CARB-certified engines will no longer be consistent with TCEQ's underlying HDDE emission standards. To resolve this inconsistency, TCEQ's should take the rulemaking steps specified below to establish that, as of the 2008 model year, TCEQ will accept for sale and distribution in Texas the otherwise identical (from an ultra-low emissions perspective) EPA-certified HDDEs.

#### **TEXT OF THE PROPOSED RULE**

To accomplish the rulemaking changes at issue, TCEQ should either repeal 30 TAC §§ 114.700 – 114.709, inclusive, in their entirety, or adopt the following proposed revision to 30 TAC § 114.707:

#### **Rule §114.707 -- Exemptions and Technology Review**

The following engines are exempt from the requirements of §114.702 of this title (relating to Adoption and Incorporation by Reference of California Rules Regarding Exhaust Emission Standards):

- (1) any model year 2005 or 2006 heavy-duty diesel engine (HDDE) manufactured by an ultra-small volume manufacturer or intended for use in an urban bus;
- (2) any engine if, followed by a technology review, the California Air Resources Board determines that it is inappropriate to require compliance for HDDEs of that particular model year;
- (3) any vehicle acquired by a resident of this state for the purpose of replacing a vehicle registered to that resident which was damaged, became inoperative beyond repair, or which was stolen while out of this state; provided the replacement vehicle is acquired out of the state at the same time the previously-owned vehicle was either damaged, became inoperative, or was stolen;

(4) any vehicle transferred by inheritance, or by a decree of divorce, dissolution, or legal separation entered by a court of competent jurisdiction; and

(5) any 2008 or later model HDDE certified by the United States Environmental Protection Agency (EPA) as compliant with all applicable EPA emission control regulations.

### **STATUTORY AUTHORITY FOR PROMULGATION OF THE PROPOSED RULE**

Section 382.017 of the Texas Clean Air Act (TCAA) authorizes TCEQ to adopt rules consistent with the policies and purposes of the TCAA. That authority extends to the repeal and/or amendment of rules adopted by TCEQ.

### **INJURY OR INEQUITY THAT COULD RESULT FROM FAILURE TO IMPLEMENT THE PROPOSED RULE**

#### **a. TCEQ Has Never Considered the Adverse Impacts of the HDOH Engine Shutdown Requirement**

As noted above, TCEQ engaged in no rulemaking activities of its own to specifically consider or adopt the HDOH Engine-Shutdown Requirement. As a result Texas has never considered the cost, safety or environmental impact of the HDOH Engine-Shutdown Requirement. Similarly, Texas has never assessed what it will mean to trucking operations and activities in Texas if HDOH vehicles, including long-haul vehicles with sleeper berths, can no longer idle to run necessary in-cab systems, including systems designed for basic driver safety and comfort, as well as the maintenance of perishable loads. Nor has Texas afforded any impacted stakeholders (including the trucking industry, truck and engine manufacturers, owners, operators, cartage companies, HDOH vehicle dealers, truck stop operators, and numerous other interested parties) with any notice or opportunity to comment on the potentially severe impacts of implementing mandatory HDOH vehicle shutdown in Texas.

#### **b. No Preemption Waiver Has Been Sought or Issued for the HDOH Engine Shutdown Requirement**

In order for Texas to accomplish a lawful opt-in to a California emission control requirement under CAA Section 177, (see 42 U.S.C. § 7507) the California standard, among other things, must have received a formal preemption waiver from EPA, and must have been adopted by California and Texas at least two full model years before the standard would take effect. In this instance, neither of those requirements under CAA Section 177 has been met. No EPA preemption waiver has been granted for the HDOH Engine-Shutdown Requirement. Indeed, as of this writing, CARB has not even applied for an EPA preemption waiver for the HDOH Engine-Shutdown Requirement. It is also doubtful whether CARB could ever obtain such a preemption waiver for the Shutdown Requirement, since it does not comply with the four-year leadtime and three-year regulatory stability provisions mandated under CAA Section 202(a)(3)(C). (42 U.S.C. § 7521 (a)(3)(C)). Under those controlling provisions of federal law,

the earliest that an Engine-Shutdown Requirement could become effective is 2013, not 2008. Moreover, it is beyond dispute that since the HDOH Engine-Shutdown Requirement became effective in California as of November 15, 2006, the Requirement cannot lawfully apply to 2008 model year HDOH vehicles under the independent two-year leadtime provision of CAA Section 177. Thus, it is clear that, in all events, Texas is precluded from attempting to enforce the HDOH Engine-Shutdown Requirements under federal law.

**c. The Engine-Shutdown Requirement Poses Fundamental and Unacceptable Logistical Difficulties For Engine Manufacturers**

In addition to the foregoing, the HDOH Engine-Shutdown Requirement is problematic for very practical reasons as well. The HDDE and HDOH vehicle manufacturing business is a non-integrated business. Generally speaking, HDDE manufacturers are not also engaged in the business of manufacturing HDOH vehicles. Instead, engine manufacturers' products are centrally-manufactured at engine plants located in various places around the country, and are then sold to independent HDOH truck manufacturing companies that assemble and produce HDOH vehicles at other plants located in other areas of the country. One consequence of this non-integration is that engine manufacturers cannot know into what state(s) their HDDE engine products will be sold once they are integrated into HDOH vehicles. Even HDOH vehicle manufacturers can find it impractical to know where their completed products will end up, since they often sell to vehicle distributors and dealers that service multi-state regions, and the HDOH vehicles are themselves expressly designed to operate in interstate commerce.

Given the foregoing features of the non-integrated HDDE and HDOH vehicle market, it is vitally important that the emission control requirements applicable to new HDDEs and HDOH vehicles be as identical and uniform as possible throughout all 50 states to ensure an orderly and manageable process for introducing new HDOH vehicles into commerce. Indeed, multiple or differing HDDE emission control requirements among the several states would cause chaos in the sale and delivery of HDOH vehicles, since manufacturers lack the resources to design, build, market and sell separate HDDE and HDOH vehicle configurations to comply with separate state-specific emission-control requirements. That is the main reason why, over the years, the CARB and EPA emission requirements applicable to new HDDEs and HDOH vehicles have been, in all material respects, identical.

The HDOH Engine-Shutdown Requirement represents a significant and disruptive break from the past practice of aligning CARB and EPA emission standards. It will require that engine manufacturers produce unique products containing unique computerized engine-shutdown systems for the California market, and that manufacturers try to track where those unique products are shipped, assembled, delivered, and sold to ensure that they enter commerce in California as intended. While that will be extremely difficult, it is potentially manageable because of manufacturers' past experience in establishing procedures to accommodate CARB's independent (albeit heretofore aligned) emission control requirements (such as the need to obtain separate CARB certification and to ensure distinct CARB-approved labeling of new HDDEs sold into California). However, HDDE engine manufacturers have no such experience or systems in place to accommodate unique emission control requirements in states other than California, and disruptions in the manufacture and sale of new HDDEs would be an inevitable result to the

extent that such requirements proliferate among the states. Moreover, since vehicle owners and operators in all likelihood will object to the automatic engine-shutdown feature (for many reasons, not the least of which is operator safety), proliferation of the HDOH Engine-Shutdown Requirement is likely to deter the purchase of new ultra-clean HDOH vehicles, and otherwise drive cleaner trucking operations out of Texas, all to the detriment of the overall efforts to improve air quality in Texas. Thus, any potential proliferation of the HDOH Engine-Shutdown Requirement, be it unintentional or not, is unsound both as a legal matter and a very practical matter as well.

**CONCLUSION**

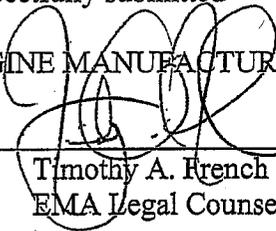
For all the foregoing reasons, therefore, EMA respectfully requests that TCEQ initiate rulemaking proceedings within the next 60 days consistent with the regulatory repeals (or amendments) that EMA is seeking pursuant to this petition.

Dated: May 4, 2007.

Respectfully submitted

ENGINE MANUFACTURERS ASSOCIATION

By: \_\_\_\_\_

  
Timothy A. French  
EMA Legal Counsel

EMADOCS: 30149.1