

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

272 MD 2023

PETERS BROTHERS, INC.;
H.R. EWELL, INC.;
MOTOR TRUCK EQUIPMENT COMPANY d/b/a
KENSWORTH OF PENNSYLVANIA; TRANSTEK, INC.; and
PENNSYLVANIA MOTOR TRUCK ASSOCIATION, Petitioners

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION OF
THE COMMONWEALTH OF PENNSYLVANIA;
PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD OF THE
COMMONWEALTH OF PENNSYLVANIA; and
RICHARD NEGRIN, in his official capacity as Secretary of the Department of
Environmental Protection, Respondents

**BRIEF IN SUPPORT OF THE RESPONDENT COMMONWEALTH
AGENCIES' PRELIMINARY OBJECTIONS TO PETITIONERS'
PETITION FOR REVIEW SEEKING DECLARATORY AND
INJUNCTIVE RELIEF**

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STATEMENT OF JURISDICTION

Petitioners Peters Brothers, Inc., H.R. Ewell, Inc., Motor Truck Equipment Company d/b/a Kenworth of Pennsylvania, Transteck, Inc. and the Pennsylvania Motor Truck Association (collectively, “Truckers”) filed a Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief (“Petition”) (Appendix A) pursuant to the Pennsylvania Constitution and 42 Pa. C.S. §§ 761 and 7532 under this Court’s original jurisdiction. Respondents Commonwealth of Pennsylvania, Department of Environmental Protection, (“DEP”) Environmental Quality Board (“EQB”) and Richard Negrin, acting in his official capacity as Secretary of DEP, (collectively “Agencies”) assert that this Court lacks jurisdiction for the reasons set forth in the Preliminary Objections (Appendix B) and this brief.

SCOPE AND STANDARD OF REVIEW

A party may raise preliminary objections to an initial pleading based on the grounds set forth at Rule 1028 of the Pennsylvania Rules of Civil Procedure. Pa.R.C.P. 1028; *see also* Pa.R.A.P. 1516(b). Those grounds include, in relevant part, lack of subject matter jurisdiction over a claim, Pa.R.C.P. 1028(a)(1); legal insufficiency of a pleading (demurrer), Pa.R.C.P. 1028(a)(4); lack of capacity to sue, Pa.R.C.P. 1028(a)(5); and failure to exhaust an available administrative remedy under Pa.R.C.P. 1028(a)(7).

In reviewing preliminary objections, the Court may examine the entire record consisting of the complaint, the preliminary objections to the complaint, and the response thereto, if any. Pa.R.A.P. 1516(b); *see Brimmeier v. Pa. Turnpike Comm'n*, 147 A.3d 954, 959 (Pa. Cmwlth. 2016) (the scope of a court's review of preliminary objections is limited to the pleadings). In reviewing preliminary objections, the Court may consider not only the facts in the initial pleading but also any documents or exhibits attached to it. *Diess v. Pa. Dept. of Transp.*, 935 A.2d 895, 903 (Pa. Cmwlth. 2007). Courts are prohibited under Pennsylvania rules from considering factual material outside the four corners of the petition for review. *See Seitel Data, Ltd. v. Ctr. Twp.*, 92 A.3d 851, 862 (Pa. Cmwlth. 2014), *appeal dismissed*, 111 A.3d 170 (Pa. 2015).

When considering preliminary objections, a court must accept as true all well-pled allegations of material fact and all inferences reasonably deducible from those allegations. *Smolsky v. Pa. General Assembly*, 34 A.3d 316, 319 (Pa. Cmwlth. 2011) (citing *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994)). However, the Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinions encompassed in the petition for review. *Armstrong Cty. Memorial Hospital v. Dept. of Public Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013). The Court should sustain preliminary objections when it appears with certainty that the law will not permit recovery. *League of Women Voters of Pa. v. Commonwealth*, 692 A.3d 263, 267 (Pa. Cmwlth. 1997).

QUESTIONS PRESENTED

1. Should the Petition be dismissed because the Truckers lack the capacity to sue?

Suggested Answer: Yes

2. Should the Petition be dismissed because this Court lacks subject matter jurisdiction to entertain the Truckers' Petition?

Suggested Answer: Yes

3. Should the Petition be dismissed because the Truckers fails to state a claim upon which relief can be granted?

Suggested Answer: Yes

4. Should the Petition be dismissed because the Truckers failed to exhaust all available administrative remedies?

Suggested Answer: Yes

STATEMENT OF THE CASE

The Agencies have incorporated by reference the California Heavy-Duty Diesel Engine Emissions Regulation (“California HDD Regulation”), 13 CCR Division 3, Chapter 1, Article 2, into Pennsylvania’s Heavy-Duty Diesel Emissions Regulation (“Final Pennsylvania HDD Regulation”), 25 Pa. Code §§ 126.501-126.531 to protect people and the environment from the harms these engines and vehicles cause. But because the Truckers had little time to comply with the newly promulgated Warranty Requirement¹ and Emissions Amendment,² under the California HDD Regulation, which were promulgated in 2018 and 2021 respectively, DEP is not enforcing these provisions that were incorporated by reference into the Final Pennsylvania HDD Regulation. As a result, this case should be dismissed in its entirety.

Substantive Background

Air Pollution from Heavy-Duty Diesel Engines and Vehicles

Air pollution from heavy-duty diesel (“HDD”) engines and vehicles greatly contribute to serious health and welfare problems, including premature mortality, aggravation of respiratory and cardiovascular disease, decreased lung function and increased respiratory disease symptoms, changes to lung tissues and structures,

¹ *Infra* n. 8.

² *Infra* n. 9.

altered respiratory defense mechanisms, and chronic bronchitis. *See* Proposed Pennsylvania HDD Regulation, 31 Pa. Bull. 4958, 4959 (Sept. 1, 2001) (Appendix C) and Final Pennsylvania HDD Regulation, 32 Pa. Bull. 2327 (May 11, 2002) (Appendix D). Furthermore, the United States Environmental Protection Agency (“EPA”) has concluded that diesel exhaust is likely to be carcinogenic to humans. *Id.*

Although vehicles powered by HDD engines account for about only 1 percent of all motor vehicles and equipment, they are responsible for nearly 25 percent of nitrogen oxide (“NO_x”) pollution from vehicles, which is the primary precursor pollutant for ground-level ozone pollution. *Id.* A substantial portion of ambient particulate matter (“PM”) in Pennsylvania is attributable to emissions from HDD engines and vehicles. PM and ozone cause and contribute to cardiovascular and respiratory damage. *Id.*; *see also* 77 Fed. Reg. 38890, 38906-38916 (June 29, 2012) and 80 Fed. Reg. 65292, 65302-65317 (Oct. 26, 2015). Urban areas, which include many poorer neighborhoods, can be disproportionately impacted by HDD vehicle emissions because of heavy truck traffic in these areas. Final Pennsylvania HDD Regulation, 32 Pa. Bull. at 2327.

Pennsylvania’s CAA Obligations and Authority

Under section 109 of the federal Clean Air Act (“CAA”), 42 U.S.C. § 7409, EPA is required to establish the National Ambient Air Quality Standards

(“NAAQS”) throughout the nation to protect public health and the environment.³ EPA’s designation of an area as nonattainment with primary health-based NAAQS under CAA section 107, 42 U.S.C. § 7407, means that a state is tasked with developing and implementing pollution control measures to attain and maintain the NAAQS under CAA Title I, Part D, 42 U.S.C. §§ 7501-7515.⁴

States have the primary responsibility for attaining and maintaining the NAAQS within their borders. *See* 42 U.S.C. § 7410. When doing so “states have broad authority to determine the methods and particular control strategies they will use to achieve the [CAA] statutory requirements.” *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003). Under section 110 of the CAA, each state develops a State Implementation Plan (“SIP”), which includes measures, including promulgating regulations, to control air pollution from stationary and mobile sources. 42 U.S.C. § 7410. When EPA approves a SIP, state air pollution control measures in the SIP become federally enforceable. *See generally* 42 U.S.C. § 7410(k)(3).

³ EPA has established NAAQS for six criteria pollutants (ozone, particulate matter, carbon monoxide, sulfur dioxide, nitrogen dioxide and lead) under sections 108 and 109 of the CAA, 42 U.S.C. §§ 7408 and 7409.

⁴ These areas are referred to as “nonattainment areas” under section 182 of the CAA, 42 U.S.C. § 7511a.

In its years carrying out the CAA, EPA has designated multiple areas of Pennsylvania as nonattainment with the primary health-based ozone NAAQS.⁵ *See, e.g.*, 56 Fed. Reg. 56694 (Nov. 6, 1991); 69 Fed. Reg. 23858, 23931 (Apr. 30, 2004); 77 Fed. Reg. 30088, 30142-30143 (May 21, 2012); 83 Fed. Reg. 25776, 25828 (June 4, 2018) and 87 Fed. Reg. 60897, 60917 (Oct. 7, 2022).

Moreover, all of Pennsylvania is designated as moderate nonattainment with the ozone NAAQS by operation of law because Pennsylvania is included in the Ozone Transport Region established by Congress under section 184 of the CAA, 42 U.S.C. § 7511c. So, all of Pennsylvania is subject to the specific requirements for a moderate nonattainment area in CAA Subchapter I, Part D, 42 U.S.C. §§ 7501-7515, and must develop and implement pollution control measures to attain and maintain the ozone NAAQS.

In addition, EPA has designated areas of the state as nonattainment for the 1997, 2006 and 2012 fine particulate matter (“PM2.5”) NAAQS. *See* 70 Fed. Reg. 944, 999-1000 (Jan. 5, 2005); 74 Fed. Reg. 58688 (Nov. 13, 2009); and 80 Fed. Reg. 2206, 2264-2265 (Jan. 15, 2015).⁶ Like PM, PM2.5 is an air pollutant inimical to

⁵ EPA designated the following nonattainment areas in Pennsylvania: 37 counties for the 1997 ozone standard, 17 counties for the 2008 8-hour ozone NAAQS and the five-county Philadelphia area for the 2015 ozone standard. These areas still are nonattainment or maintenance areas for the 2008 and 2015 ozone standards.

⁶ For example, EPA designated the following as PM2.5 nonattainment areas in Pennsylvania: 23 counties for the 2006 standard and seven counties for the 2012 standard.

public health and the environment. *See e.g.*, 80 Fed. Reg. at 2207. These designations also subjected Pennsylvania to the CAA Title I, Part D requirements, 42 U.S.C. §§ 7501-7515, for affected nonattainment areas.

CAA Authority to Regulate Engine and Vehicle Emissions

Under section 202 of the CAA, 42 U.S.C. § 7521, EPA can establish emission standards and enforcement procedures for new motor engines or new motor vehicles made, sold, and used in the country, which cause or contribute to air pollution. As a general rule, EPA’s authority under section 202 of the CAA to regulate motor vehicles and engines is exclusive. 42 U.S.C. § 7521. States may not adopt or enforce any standard relating to the control of emissions from new motor engines or new motor vehicles. *Id.* EPA has promulgated a Federal HDD Regulation which sets forth emission standards and enforcement procedures for new HDD engines and vehicles. *See generally* 40 CFR Part 1036 (Control of Emissions from New and In-Use Heavy-Duty Highway Engines).

The sole exception to EPA’s exclusive authority is under section 209(b) of the CAA, which allows California—and only California—to obtain a waiver of federal preemption from EPA to promulgate and enforce the state’s own emission standards for new motor vehicles or new motor vehicle engines. 42 U.S.C. § 7543(b) (“CAA Waiver”). A CAA waiver may be granted if, among other things, EPA finds that the California standards and accompanying enforcements procedures (for example,

testing and warranty) are not inconsistent with section 202(a) of the CAA. 42 U.S.C. § 7543(b)(1)(C). EPA has previously granted CAA waivers for the emission standards and accompanying enforcement procedures in the California HDD Regulation. *See generally* 13 CCR Division 3, Chapter 1, Article 2; *see also* 53 Fed. Reg. 7021 (Mar. 4, 1998), 70 Fed. Reg. 50322 (Aug. 26, 2005) and 88 Fed. Reg. 20688 (Apr. 6, 2023).

Because many states, like Pennsylvania, were unable to attain and maintain the applicable NAAQS, Congress amended section 177 of the CAA, 42 U.S.C. § 7507. The amendment allows those states with SIPs approved by EPA to further reduce emissions by adopting emission standards for motor engines and vehicles that are *identical* to California's standards and enforcement procedures for which EPA has granted a CAA waiver.⁷ However, section 177 of the CAA, 42 U.S.C. § 7507, prohibits states from taking any action which would create, or have the effect of creating, a set of vehicle emission standards that differs from EPA's standards or California's approved standards. Final Pennsylvania HDD Regulation, 32 Pa. Bull. 2327, 2329.

⁷ Courts have determined that the section 177 identity requirement includes not only the emission standards but the accompanying enforcement procedures as well. *See Motor and Equipment Mfrs. Ass'n, Inc. v. U.S. EPA*, 627 F.2d 1095, 1107 (D.C. Cir., 1979).

Agencies Authority Under Pennsylvania Law

The General Assembly has granted both Agencies express authority under the APCA to regulate emissions of HDD engines and vehicles.

The first duty and responsibility of DEP identified in section 4 of the APCA is to “[i]mplement the provisions of the [CAA] in the Commonwealth.” 35 P.S. § 4004(1). Section 4 further grants DEP the duty and responsibility to “[e]valuate motor vehicle emission control programs, including vehicle emission standards... with respect to their effect upon air pollution and determine the need for modifications of such programs.” 35 P.S. § 4004(16).

The first duty and responsibility of the EQB under section 5 of the APCA is to “[a]dopt rules and regulations, for the prevention, control, reduction and abatement of air pollution, applicable throughout the Commonwealth.” 35 P.S. § 4005(a)(1). Section 5 of the APCA further authorizes the EQB to “adopt rules and regulations designed to reduce emissions from motor vehicles ... in consultation with the Department of Transportation.” 35 P.S. § 4005(a)(7). Finally, section 5 of the APCA empowers the EQB to “adopt rules and regulations to implement the provisions of the [CAA]” and requires that “rules and regulations adopted to implement the provisions of the [CAA] shall be consistent with the requirements of the [CAA] and the regulations adopted thereunder.” 35 P.S. § 4005(a)(8).

Importantly, section 5(a)(7)—the only express provision under the APCA related to California law—prohibits the EQB from “mandating the sale or use of any set of specifications for motor fuel prescribed by the State of California under 42 U.S.C. § 7545(c)(4)(B) unless the set of specifications is required under the [CAA] or the regulations promulgated thereunder.” 35 P.S. § 4005(a)(7). The APCA has no such prohibition relating to the California HDD Regulation or other California laws regulating engine or vehicle emission standards.

Moreover, in implementing the NAAQS, section 4.2(a) of the APCA empowers the EQB to “adopt, by regulation, only those control measures or other requirements which are reasonably required, in accordance with the [CAA] deadlines, to *achieve and maintain the ambient air quality standards* or to satisfy related [CAA] requirements, unless otherwise specifically *authorized or required by this act* or specifically required by the [CAA].” 35 P.S. § 4004.2(a) (emphasis added). The promulgation of the Final Pennsylvania HDD Regulation is authorized by this section because the EQB found that this regulation was necessary to achieve and maintain the applicable NAAQS. 32 Pa. Bull. at 2327, 2328 and 2332.

Section 4.2(b) of the APCA authorizes the EQB to adopt requirements more stringent than the CAA if the EQB is “authorized or required” by the APCA or required by the CAA to do so. 35 P.S. § 4004.2(b). Furthermore, under Section 4.2(b) measures that are more stringent than the CAA may be required “if the [EQB]

determines that it is reasonably necessary for a control measure or other requirement to exceed minimum [CAA] requirements in order for the Commonwealth ... to (1) *achieve and maintain ambient air quality standards....*” 35 P.S. § 4004.2(b) (emphasis added). Thus, the EQB may adopt control measures or other requirements more stringent than the federal CAA. The promulgation of the Final Pennsylvania HDD Regulation is authorized by these APCA provisions as well. Though the regulation is more stringent than any federal HDD regulation, it is necessary to achieve and maintain the applicable NAAQS. Final Pennsylvania HDD Regulation, 32 Pa. Bull. at 2327, 2328 and 2332.

The Pennsylvania HDD Regulation

The EQB, acting in 2002 pursuant to its statutory authority under section 5(a)(1) and (7) of the APCA, 35 P.S. § 4005(a)(1) and (7), promulgated the Final Pennsylvania HDD Regulation, which adopted by reference the requirements of the California HDD Regulation, as authorized under section 177 of the CAA, 42 U.S.C. § 7507. 32 Pa. Bull. 2327; *see also* 25 Pa. Code § 126.501. The EQB relied on 1 Pa.C.S. § 1937(a) of the Rules of Statutory Construction, which allows for the incorporation by reference to a public body regulation to be effective as currently written and includes any subsequent amendments or supplements. The EQB also found that the California HDD Regulation, which reduces air pollution from HDD

engines and vehicles, was an important air quality strategy for Pennsylvania to reduce air pollution from HDD engines and vehicles too.

The Final Pennsylvania HDD Regulation carries out the Agencies' duties and responsibilities under the APCA because that regulation implements the CAA. During the rulemaking process, DEP thoroughly assessed the need for this regulation, *see* Final Pennsylvania HDD Regulation 32 Pa. Bull. at 2327-2329, and the EQB consulted with the Department of Transportation ("PennDOT") during the development of that regulation as required under section 5(a)(7) of the APCA, 35 P.S. § 4005(a)(7). *See* Proposed Pennsylvania HDD Regulation 31 Pa. Bull. at 4960 and Final Pennsylvania HDD Regulation 32 Pa. Bull. at 2329; *see also* 35 P.S. § 4005(a)(7). Furthermore, the promulgation of the Final Pennsylvania HDD Regulation carries out the EQB's duties and responsibilities under the APCA because it reduces air pollution from HDD engines and vehicles and is consistent with the provisions of the CAA. *See* 32 Pa. Bull. at 2327-2329.

Indeed, the Final Pennsylvania HDD Regulation was adopted, in part, because it would assist Pennsylvania's attainment and maintenance of the NAAQS for ozone by reducing emissions from new HDD engines and vehicles. 32 Pa. Bull. at 2333. HDD engines and vehicles subject to the Final Pennsylvania HDD Regulation would emit less pollution than those subject to the federal standards and test procedures in effect at that time. *See* 32 Pa. Bull. at 2327, 2328 and 2332. The preambles of the

Proposed and Final Pennsylvania HDD Regulation explain that “[m]odeling data from the Philadelphia area indicated that daily emissions of NO_x would be reduced by 2 tons per average summer day and 12.5 tons per average summer day Statewide from [HDD] trucks manufactured in 2005 and 2006 subject to the requirements of the Pennsylvania HDD Regulation.” 31 Pa. Bull. at 4962 and 32 Pa. Bull. at 2332.

The Agencies identified the following compelling public needs for the regulation:

HDD engines and vehicles contribute greatly to a number of serious health and welfare problems;

Emissions from HDD engines and vehicles account for a substantial portion of ambient PM and ground-level ozone levels;

Pennsylvania is a conduit for a large amount of truck traffic, which would create additional NO_x emissions if this rulemaking is not adopted; and

The emission reductions from the regulations are necessary to contribute to the attainment and maintenance of the ozone health-based standard in the Commonwealth.

See Proposed Pennsylvania HDD Regulation, 31 Pa. Bull. at 4959, 4962 and Final Pennsylvania HDD Regulation, 32 Pa. Bull. at 2327, 2332.

In addition to these public health reasons, the Agencies also adopted the Final Pennsylvania HDD Regulation to prevent the “backsliding” of air quality improvements within the state. Seven of the largest HDD engine and vehicle manufacturers (representing approximately 60 percent of HDD engine sales)

violated federal and California engine certification regulations by “defeating” or turning off diesel emission control devices during in-use highway driving. Final Pennsylvania HDD Regulation, 32 Pa. Bull. at 2328. The federal government and these manufacturers resolved the cases through settlement agreements, which required, among other things, the production of HDD engines and vehicles that complied with prescribed emission standards that are lower than those required in current California and federal regulations. Final Pennsylvania HDD Regulation, 32 Pa. Bull. at 2328. The federal government issued a regulation to make these agreed upon emission standards in the settlement agreements applicable to 2004 and subsequent model year (“MY”) HDD engine and vehicles. *Id.* However, due to timing constraints that the CAA imposes on the EPA under section 202 of the CAA, 42 U.S.C. § 7521, manufacturers were not required to comply with the new federal standards until the 2007 MY. *Id.* As a result, for two entire MYs there was the potential for increased diesel exhaust emissions to adversely impact air quality. *Id.* For this reason, California decided to fill that two-year MY gap during the 2005 and 2006 MYs by promulgating the California HDD Regulation.

Pennsylvania was not alone in adopting the California HDD Regulation to reduce emissions and prevent backsliding. When the Final Pennsylvania HDD Regulation was adopted, Delaware, North Carolina, Maryland, Georgia, Massachusetts, Texas, New Jersey, New York, Maine, Rhode Island, and the District

of Columbia also adopted the California HDD Regulation under section 177 of the CAA, 42 U.S.C. § 7507. 32 Pa. Bull. at 2328. Truck sales in these states account for 37 percent of national truck sales. *Id.*

California’s HDD Regulation Amendments

In 2018, California adopted a rulemaking amending the California HDD Regulation to establish warranty requirements for 2022 and subsequent MYs of HDD engines and vehicles. (“Warranty Requirement”).⁸ By imposing a more robust warranty on HDD engines and vehicles to keep those engine and vehicles in proper operating condition, the amended regulations sought to reduce HDD emissions of NO_x, PM, and other pollutants. *See* HD Warranty, 2018 Public Notice and Related Material, Hearing Date: June 28, 2018; available at <https://ww2.arb.ca.gov/rulemaking/2018/hd-warranty-2018> (last visited Oct. 13, 2023). In 2018, the Warranty Requirement, part of the California HDD Regulation, was automatically incorporated by operation of law into the Pennsylvania HDD Regulation. However, DEP could not enforce these new provisions until EPA granted California’s waiver request, which happened in 2023. 88 Fed. Reg. 20688 (Apr. 6, 2023).

⁸ The 2018 California HDD Warranty Amendments are comprised of amendments to title 13, California Code of Regulations, sections 1956.8, 2035, 2036, and 2040.

Separately, in 2021, California adopted a rulemaking entitled “Heavy-Duty Engine and Vehicle Omnibus Regulation and Associated Amendments” (“Emissions Amendment”), which amended the California HDD Regulation.⁹ The Emissions Amendment established emission standards for 2024 and subsequent MY HDD engines and vehicles and became effective in California on December 21, 2021. *See* Omnibus Regulation, Cal. Air. Res. Bd., available at <https://ww2.arb.ca.gov/our-work/programs/innovative-clean-transit/omnibus-regulation> (last visited on Oct. 13, 2023). By imposing stricter emission standards, California sought to reduce NO_x, PM, and other emissions from new HDD engines and vehicles to foster NAAQS attainment.¹⁰ *See* Heavy-Duty Omnibus Regulation Public Notice and Related Material, Hearing Date August 27, 2020, available at <https://ww2.arb.ca.gov/rulemaking/2020/hdomnibuslownox> (last visited on Oct. 13, 2023). The Emissions Amendment, part of the California HDD Regulation, was automatically incorporated into the Pennsylvania HDD Regulation. California has

⁹ The 2021 California HDD Emissions Amendment is comprised of new title 13, California Code of Regulations (Cal. Code Regs.) sections 2139.5, and 2169.1 through 2169.8; amendments to title 13, Cal. Code Regs., sections 1900, 1956.8, 1961.2, 1965, 1968.2, 1971.1, 1971.5, 2035, 2036, 2111- 2119, 2121, 2123, 2125 - 2131, 2133, 2137, 2139, 2140 - 2149, 2166, 2166.1, 2167 - 2170, 2423, and 2485; and amendments to title 17 Cal. Code Regs. sections 95662 and 95663.

¹⁰ California’s proposed Warranty Requirement and Emissions Amendment were subject to public participation. Thus, the Truckers were able to comment on the proposed amendments during the California’s administrative rulemaking public participation period.

applied to EPA for a CAA waiver for the Emissions Amendment. 87 Fed. Reg. 35765 (June 13, 2022). EPA, however, has taken no action on California’s waiver request. Therefore, DEP is unable to enforce these new provisions at this time.

Pennsylvania HDD Regulation Suspension Notices

In 2021, DEP published a public notice announcing that it was suspending enforcement of the Final Pennsylvania HDD Regulation, explaining that DEP would take no enforcement action against manufacturers and dealers of new HDD engines and vehicles sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired, or received in Pennsylvania that did not meet the California HDD Regulation. 51 Pa. Bull. 7000 (Nov. 6, 2021) (“2021 Suspension”) (Appendix E). The suspension allowed new HDD engines and vehicles subject to the regulation that did not comply with the California HDD Regulation (including the Warranty Requirement and the Emissions Amendment) to be sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired, or received in Pennsylvania beginning with MY 2022 and ending with MY 2026.

In 2023, DEP published another public notice which extended suspension of enforcement of the Final Pennsylvania HDD Regulation. 53 Pa. Bull. 3166 (June 10, 2023) (“2023 Suspension”) (Appendix F). The 2023 Suspension allows new HDD engines and vehicles subject to the Final Pennsylvania HDD Regulation, but which did not comply with the California HDD Regulation, to be sold, leased,

offered for sale or lease, imported, delivered, purchased, rented, acquired or received in Pennsylvania during the suspension period beginning with MY 2022 and ending with MY 2026.

When issuing the suspensions, DEP determined that the Truckers, and others in the trucking industry, had a relatively short time to comply with the Warranty Amendment incorporated into the Final Pennsylvania HDD Regulation and that new HDD engines and vehicles that satisfied both the Warranty Amendment and Emissions Amendment were costly and there was limited availability of those California compliant engine and vehicles in Pennsylvania.¹¹ However, any new HDD engines and vehicles sold in Pennsylvania are still required to meet the currently effective Federal HDD Regulation at 40 CFR Part 1036, which would still result in air quality improvements throughout the state.¹²

SUMMARY OF ARGUMENT

This Court should sustain the Respondent Agencies Preliminary Objections and dismiss the Truckers' Petition for multiple reasons.

¹¹ The exercise of enforcement discretion by DEP based on cost and product availability is not uncommon in Pennsylvania. *See e.g.*, Suspension of Enforcement of the Summertime Gasoline Volatility Requirements for the Pittsburgh-Beaver Valley Area. 48 Pa. Bull. 2347 (Apr. 21, 2018).

¹² EPA promulgated a rulemaking to make the Federal HDD Regulation, 40 CFR Part 1036, more stringent beginning with MY 2027. *See* "Control of Air Pollution From New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards," 88 Fed. Reg. 4296 (Jan. 24, 2023).

First, the Truckers lack standing, and their claims are not ripe for review. The Truckers are not aggrieved because DEP suspended enforcement of the Final Pennsylvania HDD Regulation for MY 2022 through MY 2026. The Truckers are not subject to any enforcement action, and complaints about future enforcement actions and harm are speculative. As such, the Truckers lack the capacity to sue.

Second, this Court lacks subject matter jurisdiction over the Truckers' claims because their Petition is a pre-enforcement challenge to the Final Pennsylvania HDD Regulation promulgated by the EQB to attain and maintain the ozone NAAQS, which is expressly prohibited under section 4.2(e) of the APCA, 35 P.S. § 4004.2(e).

Third, the Truckers' Petition fails to state any claim upon which relief can be granted. Their claims that the Pennsylvania HDD Regulation is *ultra vires* are without merit because the Truckers misrepresent the Agencies' authority under the APCA to regulate emissions from motor vehicles.

Fourth, the Truckers' claim that the APCA violates the nondelegation doctrine of the Pennsylvania Constitution also lacks merit. The General Assembly made a basic policy choice in the APCA to authorize the Agencies to regulate air pollution from motor vehicles, and the Agencies followed the boundaries established by the General Assembly when doing so.

Fifth, the Truckers have failed to state a claim upon which relief can be granted because the Agencies reasonably used incorporation by reference in the

Final Pennsylvania HDD Regulation to assure consistency, and therefore compliance, with Pennsylvania and federal law. The Petition cites no legal authority under Pennsylvania law that requires duly promulgated regulations that comply with state and federal law to undergo a separate rulemaking procedure each time a generally incorporated public agency law is amended.

Sixth, no relief can be granted to the Truckers under the Regulatory Review Act because there is no cause of action available under that act as a matter of law.

Seventh, the Truckers had adequate administrative remedies available which they chose not to exhaust. As a result, this Court lacks jurisdiction over the Truckers' claims.

ARGUMENT

I. PRELIMINARY OBJECTION NO. 1: The Truckers Lack Standing and the Issues They Raise Are Not Ripe Because the Provisions Challenged Are Suspended (Capacity to Sue, Claims I-VII)

The Truckers lack standing to raise the claims in their Petition, and those claims are not ripe. The provisions under the Final Pennsylvania HDD Regulation that the Truckers challenge are suspended and not being enforced in Pennsylvania. Accordingly, the Agencies preliminarily object to the Truckers' Petition pursuant to Pa.R.C.P. 1028(a)(4) for legal insufficiency in the nature of a demurrer because Claims I-VII fail to state a claim upon which relief can be granted, and the Truckers lack the capacity to sue.

It is well established that a party must be aggrieved to have standing to challenge a final agency action. *South Whitehall Twp. Police Service v. South Whitehall Twp.*, 555 A.2d 793, 795 (Pa. 1989) (quoting *Franklin Twp. v. Dept. of Env't'l Res.*, 452 A.2d 718, 719 (Pa. 1982)). ("*South Whitehall Twp.*"). The Pennsylvania Supreme Court has recognized the close connection between standing and ripeness, and has explained:

“[T]here is considerable overlap between the two doctrines, especially where the objecting party's claim that the matter is not justiciable is focused on arguments that the interest asserted by the petitioner is speculative, not concrete, or would require the court to offer an advisory opinion.”

Yocum v. Pa. Gaming Control Bd., 161 A.3d 228, 234 (Pa. 2017). (“*Yocum*”). Moreover, “[a] declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.” *Brouillette v. Wolf*, 213 A.3d 341, 357-358 (Pa. Cmwlth. 2019).

The Truckers lack standing to request declaratory relief regarding Pennsylvania’s Final HDD Regulation because it is not being enforced against them. Where the governmental act that would affect the petitioner has not occurred and it is uncertain whether it will occur, the requirement of an actual controversy is not satisfied, and the claim is not ripe for judicial determination. *Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441, 473-474 (Pa. 2015) (“*UPMC*”) (a “potential” enforcement action of the Commonwealth where no enforcement action has occurred is not ripe for review and would result in an advisory opinion); *see DeNaples v. Pa. Gaming Control Bd.*, 150 A.3d 1034, 1040 (Pa. Cmwlth. 2016) (“*DeNaples*”) (an issue that “may” arise in the future “is not considered ‘ripe’ for judicial interpretation”); *Am. Council of Life Ins. v. Foster*, 580 A.2d 448, 451 (Pa. Cmwlth. 1990) (a claim based on speculative, anticipated events is not justiciable).

A. The Warranty Requirement Is Suspended in Pennsylvania and Is Not Being Enforced

The 2021 and 2023 Suspensions of the Final Pennsylvania HDD Regulation apply to Warranty Requirement that was incorporated by reference in 2018.

Preliminary Objections, ¶¶ 37, 41-42. The Warranty Requirement has never been enforced against the Truckers, and they do not allege any Pennsylvania enforcement has occurred. Thus, the Truckers are not aggrieved. *South Whitehall Twp.*, 555 A.2d at 795; *see UPMC*, 129 A.3d at 473-474.¹³

The Truckers admit that they are not subject to enforcement of the Warranty Requirement by DEP because of the 2021 and 2023 Suspensions. Petition, ¶ 51 and Answer, ¶¶ 35, 37, 48, 49, 54 and 65 (Appendix G). Instead, the Truckers speculate that “DEP might change its policy of nonenforcement” and harbor an unsubstantiated belief that DEP intends to enforce this requirement in the future. Petition, ¶¶ 52, 53; Answer, ¶ 52. Speculation that injury could occur in the future does not establish ripeness or a justiciable controversy. *See UPMC*, 129 A.3d at 473-474; *DeNaples*, 150 A.3d at 1040.

Because no enforcement action by DEP of the Warranty Requirement has occurred or would occur against the Truckers, they lack standing and their claims are not ripe for review. *South Whitehall Twp.*, 555 A.2d at 795; *UPMC*, 129 A.3d at 473-474.

¹³ Before April 2023, Pennsylvania was not legally allowed to enforce the Warranty Amendment because the EPA had not yet granted a waiver to California. *See MVMA v. NYSDEC*, 17 F. 3d 521, 534 (2d Cir. 1994) (“*MVMA*”) (though a state may adopt a California vehicle emission standard regulation, the regulation cannot be enforced unless and until EPA grants a waiver).

B. EPA Has Not Granted A Waiver For The California Emissions Amendment, Which Is Suspended in Pennsylvania and Not Being Enforced

Similarly, the 2021 and 2023 Suspensions of the Final Pennsylvania HDD Regulation apply to Emission Amendment that was incorporated by reference in 2021. Preliminary Objections, ¶¶ 35 and 36. Pennsylvania cannot legally enforce this amendment because EPA has not granted a CAA waiver to California. Because the Emissions Amendment has not been, and cannot be, enforced against the Truckers, the Truckers are not aggrieved. *South Whitehall Twp.*, 555 A.2d at 795; *UPMC*, 129 A.3d at 473-474.

The Truckers incorrectly allege they are suffering a “here-and-now injury” as a result of the Emissions Amendment, because the Final Pennsylvania HDD Regulation incorporates this emissions amendment “without caveat.” Answer, ¶¶ 55 and 56. The Truckers fail to plead any facts supporting their conclusory allegation. And in fact, the Truckers have not been affected by the Emissions Amendment to date.

In 2021 and 2023, DEP suspended enforcement of the Final Pennsylvania HDD Regulation, which included the 2021 incorporation of the Emissions Amendment. However, even if DEP had not announced the suspensions, it would still be unable to enforce the Emissions Amendment because to date EPA has not acted on California’s CAA waiver request for the Emissions Amendment. *MVMA*,

17 F. 3d 534. The Truckers acknowledge that EPA has taken no final action on California's CAA waiver request for the Emissions Amendment. Answer, ¶ 53. They further acknowledge that, without a CAA waiver, the Emissions Amendment cannot be lawfully enforced in Pennsylvania. Answer, ¶ 54.

Nevertheless, the Truckers speculate that "DEP might change its policy of nonenforcement" and that DEP intends to enforce the new standard in the future. Petition, ¶¶ 52, 53; Answer, ¶ 52. Speculation that injury may occur in the future does not establish ripeness and is not justiciable. *See UPMC*, 129 A.3d at 473-474; *DeNaples*, 150 A.3d at 1040. The Truckers therefore have not suffered "here-and-now injury" and are not aggrieved. So, the Truckers lack standing, and their claims are not ripe for review.

C. The Truckers' Third-Party Enforcement Allegations Are Speculative And Not Justiciable

Finally, the Truckers' speculation of future enforcement by an unknown third party does not confer standing. *Yocum*, 161 A.3d at 234; *DeNaples*, 150 A.3d at 1040. The Truckers have not alleged any facts even suggesting that a third-party action to enforce either the Warranty Requirement or Emissions Amendment against

them is forthcoming.¹⁴ Thus, the Truckers have failed to show that they are aggrieved.

The Truckers speculate that “private litigants *may* still seek to enforce the Final Pennsylvania HDD Regulation and pursue civil penalties for alleged violations, the Truckers also face legal consequences for noncompliance despite the policy of nonenforcement by DEP.” Answer, ¶ 49. The Truckers then undermine their third-party enforcement allegation by admitting that third-party enforcement is speculative, and that they cannot know whether or when they may face such a lawsuit under the Final Pennsylvania HDD Regulation. Answer, ¶ 51. Furthermore, a third-party could not seek to enforce the Emissions Amendment because EPA has not issued a CAA waiver to California, and, until then, DEP is precluded from enforcement. *See MVMA*, 17 F. 3d 534.

Speculation about future third-party enforcement does not establish ripeness or a justiciable controversy. *Yocum*, 161 A.3d at 234; *DeNaples*, 150 A.3d at 1040.

For all the foregoing reasons, the Truckers have not demonstrated a clear right to declaratory and injunctive relief and have not demonstrated that they have

¹⁴ In their Answer, ¶ 51, the Truckers perplexingly contend that they lack knowledge to either deny or admit the assertion that no third party has taken any action to enforce the Warranty Requirement incorporated in the Pennsylvania HDD Regulation.

standing or that their claims are ripe for review. Therefore, Claims I-VII should be dismissed for failure to present a justiciable claim and lack of capacity to sue.

II. PRELIMINARY OBJECTION NO. 2: The Truckers' Pre-enforcement Challenge is Barred under the APCA (Ripeness—Claims I-VII)

The Truckers' pre-enforcement challenge is barred by the APCA, and their claims are not ripe for this Court's review.

A pre-enforcement review challenging the validity of regulations in Commonwealth Court generally may be brought when the challenged regulations have a “direct and immediate” effect on the industry. *PPL Generation, LLC v. Dept. of Env't'l Prot.*, 604, A.2d 48, 60-61 (Pa. 2009) (citing *Arsenal Coal Co. v. Dept. of Env't'l Res.*, 477 A.2d 1333, 1338-1339 (1984)). This Court, however, lacks original jurisdiction over the Truckers' Petition because it is a pre-enforcement challenge to the Final Pennsylvania HDD Regulation. Indeed, the APCA expressly prohibits pre-enforcement review challenges to the EQB's adoption of regulations that achieve and maintain the NAAQS requirements established under CAA section 109, 42 U.S.C. § 7409.

Accordingly, the Agencies preliminarily object to the Truckers' Claims I-VII pursuant to Pa. R.C.P. 1028(a)(1) because this Court lacks subject matter jurisdiction over those claims.

The APCA expressly prohibits pre-enforcement challenges related to the EQB’s adoption of regulations that achieve and maintain the NAAQS requirements established under CAA section 109, 42 U.S.C. § 7409. Specifically, section 4.2(e) of the APCA provides, “No person may file a preenforcement review challenge under this section based *in any manner upon the standards set forth in subsection (b)* of this section.” 35 P.S. § 4004.2(e) (emphasis added).

Section 4.2(b) of the APCA provides that control measures or other requirements adopted by regulation under subsection (a) shall be no more stringent than those required by the CAA “unless authorized... by this act,” and that the CAA stringency requirement “shall not apply if the [EQB] determines that it is reasonably necessary for a control measure or other requirement to exceed the minimum [CAA] requirements in order for the Commonwealth ... *to achieve and maintain ambient air quality standards.*” 35 P.S. § 4004.2(b) (emphasis added).

Section 4.2 of the APCA, 35 P.S. § 4004.2, directly applies to the promulgation of the Final Pennsylvania HDD Regulation. That is, while the regulation is more stringent than any federal HDD requirement at the time, the EQB nevertheless found that the Final Pennsylvania HDD Regulation was “reasonably necessary to achieve and maintain the National ambient air quality standards for ozone.” 32 Pa. Bull. 2327, 2333. Under section 4.2(e) of the APCA, 35 P.S. §

4004.2(e), regulations needed to achieve or maintain the NAAQS are exempt from pre-enforcement review.

The Truckers admit that section 4.2(e) of the APCA, 35 P.S. § 4004.2(e), precludes pre-enforcement challenges for a regulation promulgated under section 4.2(a) 35 P.S. § 4004.2(a). Answer ¶ 69. This admission alone undermines the Truckers' challenge. Furthermore, the rulemaking record for the Final Pennsylvania HDD Regulation shows that it was promulgated as a permissible action under sections 4.2(a) and (b) of the APCA. 32 Pa. Bull. 2327, 2333. That is, while the regulation was more stringent than any federal requirement at the time, the Final Pennsylvania HDD Regulation was necessary to achieve and maintain the applicable NAAQS. *See* 35 P.S. §§ 4004.2(a) and (b).

The Truckers, however, erroneously claim that the EQB promulgated the Final Pennsylvania HDD Regulation under sections 5(a)(1) and (7) of the APCA, 35 P.S. § 4005(a)(1) and (7), and section 4.2(e) of the APCA, 35 P.S. § 4004.2(e) is not implicated. Answer ¶ 69. But sections 5(a)(1) and (7), 35 P.S. § 4005(a)(1) and (7), provide broad rulemaking authority for the EQB, while section 4.2, 35 P.S. § 4004.2, contains the limitations on that rulemaking authority. In this matter, any rulemaking under section 5(a) of the APCA, 35 P.S. § 4005(a), necessarily implicates the limitations in section 4.2(a) of the APCA, 35 P.S. § 4004.2(a).

In the rulemaking record for the Final Pennsylvania HDD Regulation, the EQB found that it had the statutory authority to promulgate the regulation under sections 5(a)(1) and (7) of the APCA, 35 P.S. §§ 4004.5(a)(1) and (7); that the rulemaking was consistent with the engine and vehicle requirements of section 177 of the CAA, 42 U.S.C. § 7507; and that, to the extent the regulation was more stringent than any federal requirements, it was necessary to achieve and maintain the NAAQS. 32 Pa. Bull. 2327, 2329.

This last regulatory finding directly implicates section 4.2 of the APCA, 35 P.S. § 4004.2(a). Without that finding, the EQB would be precluded from adopting the Final Pennsylvania HDD Regulation because it was more stringent than anything required under federal law at the time. So, the Truckers' claim that their Petition challenging the Pennsylvania HDD Regulation does not invoke or rely on the standards set forth in sections 4.2(a) and (b), 35 P.S. §§ 4004.2(a) and (b), Answer ¶ 69, is incorrect.

For the foregoing reasons, the Truckers' Claims I-VII are not ripe for review and this Court lacks subject matter jurisdiction because section 4.2(e) of the APCA, 35 P.S. § 4004.2(e), precludes pre-enforcement review of the Pennsylvania HDD Regulation.

III. PRELIMINARY OBJECTION NO. 3: The Truckers Do Not Show That the Agencies Acted Inconsistently with the Law (Failure to State a Claim Upon Which Relief Can Be Granted—Claim I)

The Truckers have not demonstrated that the Agencies either exceeded their APCA authority or acted inconsistently with such authority in promulgating and implementing the Final Pennsylvania HDD Regulation. As a result, the Truckers’ *ultra vires* challenge to the Final Pennsylvania’s HDD Regulation is without merit.

In Pennsylvania, a regulation is valid if it is: (a) adopted within the agency’s granted power; (b) issued pursuant to proper procedure; and (c) reasonable. *Tire Jockey Serv., Inc. v. Dept. of Env’t’l Prot.*, 915 A.2d 1165 (Pa. 2007); *see also Marcellus Shale Coalition v. Dept. of Env’t’l Prot.*, 292 A.3d 921, 927 (Pa. 2023). (“*MSC III*”). That standard is met here.

A. The Final Pennsylvania HDD Regulation Was Promulgated Within the Grant of Authority Given to the EQB

To determine whether a regulation is within an agency’s granted power, courts look to the statutory language to see if the regulation falls within the statute’s grant of authority. *Bucks Cty., Inc. v. Philadelphia Parking Auth.*, 195 A.3d 218, 237 (Pa. 2018); *see Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 983 A.2d 1231, 1239-1241 (Pa. 2009). (“*Slippery Rock*”). While the Truckers claim that the APCA delegates only limited authority to establish emission control standards under APCA section 5(a)(1), 35 P.S. § 4005(a)(1), and that the General

Assembly delegated no authority to impose emission system warranty requirements, Petition, at ¶¶ 73-74, those assertions are wrong.

1. The Pennsylvania HDD Regulation is Permissible Under the APCA

Section 5(a)(1) of the APCA grants the EQB the authority to “[a]dopt rules and regulations, for the prevention, control, reduction, and abatement of air pollution....” 35 P.S. § 4005(a)(1). The Final Pennsylvania HDD Regulation was specifically promulgated to reduce air pollution from HDD engines and vehicles. The rulemaking record shows that implementing the rulemaking would result in, statewide, 12.5 tons less of NO_x being emitted on an average summer day. *See* 32 Pa. Bull. at 2329.

Section 5(a)(7) of the APCA grants the EQB regulatory authority to “adopt rules and regulations designed to reduce emissions from motor vehicles ... in consultation with the [PennDOT].” 35 P.S. § 4005(a)(7). The Final Pennsylvania HDD Regulation complied with this provision because the rulemaking was designed to reduce air pollution from HDD engines and vehicles and PennDOT was consulted in the process. *See* 32 Pa. Bull. at 2329.

Significantly, section 5(a)(7) of the APCA is the only express provision under the APCA that addresses California law, and it prohibits the EQB only from “mandating the sale or use of any set of specifications for motor fuel prescribed by the State of California under 42 U.S.C. § 7545(c)(4)(B) unless the set of

specifications is required under the [CAA] or the regulations promulgated thereunder.” 35 P.S. § 4005(a)(7). There is no similar prohibition related to engines or vehicles. Section 5(a)(7) demonstrates that if the General Assembly wanted to prohibit the EQB from promulgating regulations that made reference to California’s engine or vehicle emission standards regulations, the General Assembly would have expressly done so. The fact that the General Assembly did not do so indicates a different legislative intent – the General Assembly did not want to limit the EQB’s authority to adopt regulations like the California HDD Regulation. *See e.g., Commonwealth v. Bigelow* 399 A.2d 392, 395 (1979) (section of statute contains given provision, omission of such provision from similar section is significant to show different intent).

Moreover, Section 5(a)(8) of the APCA grants the EQB regulatory authority to “adopt rules and regulations to implement the provisions of the [CAA]” and “[t]he rules and regulations adopted to implement the provisions of the [CAA] shall be consistent with the requirements of the [CAA] and the regulations adopted thereunder.” 35 P.S. § 4005(a)(8). The Final Pennsylvania HDD Regulation complied with this APCA section too. Because of Pennsylvania’s inability to attain and maintain the applicable NAAQS, it utilized section 177 of the CAA, 42 U.S.C. § 7507, which allows states to adopt emission standards and enforcement procedures for motor vehicles that are identical to California standards for which EPA has

granted a waiver. Consistent with the provisions of the APCA and CAA, the Final Pennsylvania HDD Regulation adopted the California HDD Regulation through incorporation by reference, which includes the Warranty Requirement and Emissions Amendment.

The Truckers do not dispute the EQB's authority under the APCA in this regard. Answer, ¶¶ 13-17. So, it is difficult for them to assert that the EQB lacks the authority under the APCA to adopt the California HDD Regulation and the subsequent amendments to it.

The General Assembly specifically required vehicle emission standard regulations promulgated by the EQB to be consistent with the federal CAA. 35 P.S. § 4005(a)(8). The Final Pennsylvania HDD Regulation explains that "Congress amended section 177 of the CAA in 1990 to prohibit States from taking any action that would have the effect of creating a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards or otherwise create a "third vehicle"". 32 Pa. Bull. 2329; *see* Preliminary Objections, ¶¶ 27, 28, 77 and 78. So, the Pennsylvania Final HDD Regulation must be identical to the California HDD Regulation and any subsequent amendments for which EPA has granted California a CAA waiver. The Truckers concede this point by admitting that, under the CAA, Pennsylvania could only adopt regulations identical to those of California. Answer, at ¶¶ 27, 28, 77 and 78.

The EQB's incorporation by reference of the Warranty Requirement and Emissions Amendment in the Final Pennsylvania HDD Regulation assures continued compliance with the APCA's mandate of consistency with the CAA, 35 P.S. § 4005(a)(8), and CAA section 177's mandate of "identity" with the California HDD Regulation, 42 U.S.C. § 7507. *See Slippery Rock*, 983 A.2d at 1244-1245 (holding that a legislative rulemaking that conforms with federal law to meet its statutory mandate is reasonable). Federal courts that have considered this issue have found that the section 177 identity requirement includes not only the emission standards but the accompanying enforcement (testing and warranty) procedures too. *See Motor and Equipment Mfrs. Ass'n, Inc.*, 627 F.2d at 1095. Failure to adopt those testing and warranty provisions would be contrary to the CAA and APCA.

2. The Pennsylvania HDD Regulation is Permissible Under the Statutory Construction Act

Furthermore, section 1937(a) of the Pennsylvania Statutory Construction Act supports the Pennsylvania's incorporation by reference of the California HDD Regulation and any subsequent amendments, like the Warranty Requirement and Emissions Amendment. *See* 1 Pa. C.S. § 1937(a), *see also Highway New, Inc. v. Dept. of Transp.*, 789 A.2d 802, 808 (Pa. Cmwlth. 2002) (the Pennsylvania Statutory Construction Act also applies to regulations) and 1 Pa. Code § 1.7 (Statutory Construction Act of 1972 applicable).

Section 1937(a) provides that,

A reference in a statute to a statute or to a regulation issued by a public body or public officer includes the statute or regulation *with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation, as in force at the time of application of the provision of the statute in which such reference is made*, unless the specific language or the context of the reference in the provision clearly includes only the statute or regulation as in force on the effective date of the statute in which such reference is made.

1 Pa. C.S. § 1937(a) (emphasis added).

Under section 1937(a), the incorporation by reference to a public body regulation enables the law to be effective as currently written and includes any subsequent amendments or supplements. It is only where a public body regulation is incorporated with specific limitations placed on it (for example, as promulgated on a certain date) that such a law could not be interpreted to include amendments or supplements thereto. Use of the latter approach would necessitate that the Agencies undertake a rulemaking each and every time that there is a change to the California HDD Regulation.

The Agencies have commonly used incorporation by reference without specific limitations in rulemakings promulgated under the APCA so public body regulations incorporated by reference can be interpreted as currently written, including amendments and supplements. *See, e.g.*, 25 Pa. Code § 122.3 (adoption and incorporation of [EPA's new source performance] standards) 25 Pa. Code § 129.97(e) (adoption and incorporation of presumptive RACT for municipal solid

waste landfills) and 25 Pa. Code §§ 126.401 and 126.411 (adoption and incorporation of California’s low emission vehicle emission standards for light-duty vehicles and trucks). To do otherwise would be infeasible in most circumstances. Furthermore, requiring a new rulemaking each time an incorporated regulation is revised would be extremely burdensome and would lead to uncertainty for the regulated community and the public about the applicable requirements. Automatic incorporation, on the other hand, limits that burden and fosters certainty.

The automatic incorporation of the California HDD Regulation into the Pennsylvania HDD Regulation without any specific limitations is lawful under the APCA because it ensures continued compliance with CAA section 177, as required by APCA section 5(a)(8), 35 P.S. § 4005(a)(8), and is also supported by the automatic incorporation provision under 1 Pa. C.S. § 1937(a). *Slippery Rock*, 983 A.2d at 1244-1245. Because the Agencies acted within their rulemaking authority under the APCA and as permitted under the Pennsylvania Statutory Construction Act, the first prong of *Tire Jockey* is satisfied.

B. Pennsylvania’s HDD Regulation Was Issued Under the Proper Legal Procedures

Under the second *Tire Jockey* prong, related to following the proper procedures, legislative rulemakings must proceed through the rulemaking process consistent with the requirements of the enabling statute, which, in this matter is the APCA, and the statutes that govern the regulatory process—the Regulatory Review

Act, 71 P.S. §§ 745.1-745.15; the Commonwealth Attorney's Act, 71 P.S. §§ 732-101-732-506; the Commonwealth Documents Law, 45 P.S. §§ 1102-1611 and 45 Pa. C.S. §§ 501-907; and the Administrative Code of 1929, 71 P.S. § 232. *See Tire Jockey*, 915 A.2d at 1186; *see also MSC III*, 292 A.3d at 927. The Proposed and Final Pennsylvania HDD Regulations adopted through notice and comment rulemaking complied with these procedural requirements. *See* 31 Pa. Bull. 4958, 4960 and 4962, and 32 Pa. Bull. 2327, 2329 and 2333. The Truckers do not dispute this. Answer, ¶ 102. Therefore, the Pennsylvania HDD Regulation was issued pursuant to proper procedure.

C. The Pennsylvania HDD Regulation Was Reasonable

The third prong of the *Tire Jockey* test is that the regulation must be reasonable. *Tire Jockey*, 915 A.2d at 1186. When making this determination, “appellate courts accord deference to agencies and reverse agency determinations only if they were made in bad faith or if they constituted a manifest or flagrant abuse of discretion or a purely arbitrary execution of the agency’s duties or functions.” *Tire Jockey*, 915 A.2d at 1186; *see also State College Manor, Ltd. v. Dept. of Public Welfare*, 498 A.2d 996, 998 (Pa. Cmwlth. 1985) (the establishment of regulations involves agency discretion, a court will not disturb administrative discretion in the absence of fraud, bad faith or abuse of power).

In this matter, the Truckers have not alleged bad faith, abuse of discretion, or arbitrariness related to the Final Pennsylvania HDD Regulation. The Proposed and Final Pennsylvania HDD Regulations “establish[ed] a HDD program consistent with the requirements of section 177 of the CAA (42 U.S.C.A. § 7507) [which] will serve as the framework for the Commonwealth’s program to control emissions from new HDD engines and vehicles.” 31 Pa. Bull. at 4960 and 32 Pa. Bull. at 2329. The Final Pennsylvania HDD Regulation was intended “to reduce the emissions of NO_x, [sulfur oxides], PM and air toxics from HDD engines and vehicles under section 177 of the CAA.” 32 Pa. Bull. at 2331.

The EQB found that the Final Pennsylvania HDD Regulation is “necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble and is reasonably necessary to achieve and maintain the [NAAQS] for ozone.” 32 Pa. Bull. at 2333. The Pennsylvania Supreme Court has held that regulations implementing the APCA promulgated pursuant to a grant of legislative power enjoy a presumption of reasonableness. *Dept. of Env’tl Res. v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1210 (Pa. 1979).

Furthermore, the Final Pennsylvania HDD Regulation is presumed valid because it is a duly promulgated regulation that was issued pursuant to proper procedure, published in the *Pennsylvania Bulletin* and added to the *Pennsylvania*

Code. 32 Pa. Bull. 2327. *See Slippery Rock*, 983 A.2d at 1236, 1239. It therefore enjoys a presumption of reasonableness.

The foregoing shows that the Final Pennsylvania HDD Regulation meets the reasonableness prong.

For the above reasons, the Truckers have failed to state a claim upon which relief can be granted. Claim I should be dismissed, and the Agencies' Preliminary Objection should be sustained.

IV. PRELIMINARY OBJECTION NO. 4: The Truckers Have Failed to Show the Agencies Acted *Ultra Vires* in Promulgating and Implementing the Pennsylvania HDD Regulation (Failure to State a Claim Upon Which Relief Can Be Granted—Claim II)

Next, Truckers' Claim II should be dismissed because their assertion that only PennDOT may regulate for emissions control systems is without merit. The Truckers misrepresent the authority of EQB and PennDOT under the APCA, Petition, ¶¶ at 78, 79, and as a result the Truckers' claim that the EQB exceeded its authority to promulgate the Final Pennsylvania HDD Regulation is without merit. So, the Agencies preliminarily object to Claim II of the Truckers' Petition pursuant to Pa. R.C.P. 1028(a)(4) for legal insufficiency.

Through the APCA, the General Assembly delegated the Agencies with the authority to regulate pollution from motor vehicles and to implement the provisions of the federal CAA in Pennsylvania. 35 P.S. § 4004(16) and § 4005(a)(7). *Mercury*

Trucking, 55 A.3d 1056, 1067-1068 (Pa. 2012) (The plain language of a statute is, as a general rule, the best indicator of legislative intent). The Truckers admit the EQB's authority in this regard. Answer, ¶¶ 13-17 and 85. The Truckers further admit, Answer at ¶ 87, that both the Proposed and Final Pennsylvania HDD Regulations were developed in consultation with PennDOT, as required under 35 P.S. § 4005(a)(7). *See* 31 Pa. Bull. at 4960 and 32 Pa. Bull. at 2329. Both the Proposed and Final Pennsylvania HDD Regulations incorporated California's HDD Regulation by reference without the inclusion of any specific limitation on incorporation, which assured compliance with the CAA consistency requirement under section 5(a)(8) of the APCA, 35 P.S. § 4005(a)(8). 31 Pa. Bull. at 4960 and 32 Pa. Bull. at 2329. Therefore, because the Agencies consulted with PennDOT as required by APCA section 5(a)(7), 35 P.S. § 4005(a)(7), and the EQB otherwise promulgated a lawful Final Pennsylvania HDD Regulation under *Tire Jockey*, it follows that the Truckers' claim that the EQB exceeded its statutory authority is meritless.

Nevertheless, the Truckers incorrectly assert, Petition at ¶ 88, that the EQB is limited under 35 P.S. § 4005(a)(4) to making recommendations to PennDOT regarding performance or specification standards for emission control systems and devices on motor vehicles. Section 5(a)(4) of the APCA, 35 P.S. § 4005(a)(4), is not applicable to, and has no effect on, the EQB's authority to adopt the California HDD

Regulation, including the Warranty Requirement and Emissions Amendment, under section 5(a)(7) of the APCA, 35 P.S. § 4005(a)(7).

In reality, PennDOT has no authority to establish new vehicle emission standards and accompanying enforcement procedures under the APCA or any other Pennsylvania statute. The Truckers acknowledge as much because, despite their claims, Petition at ¶¶ 78-82, they confess that they know of no such authority delegated by the General Assembly to PennDOT. Answer, ¶ 88.

PennDOT's authority under other Pennsylvania laws, does not extend to the Final Pennsylvania HDD Regulation. PennDOT administers anti-tampering statutes related to vehicle air pollution control devices at 75 Pa. C.S. §§ 7531 and 7532, and the 67 Pa. Code Chapter 175, Subch. F regulations pertaining to vehicle equipment and inspection that apply to HDD engines and vehicles.¹⁵ None of these laws or regulations provides PennDOT with the authority to issue the California HDD Regulation as the Truckers suggest, Petition at ¶ 81, nor do those laws or regulations prohibit the EQB from adopting the California HDD Regulation under its APCA authority.¹⁶ Therefore, because PennDOT lacks authority to adopt the California

¹⁵ The EQB is limited under section 5(a)(4) of the APCA, 35 P.S. § 4005(a)(4), to making recommendations regarding the programs that PennDOT administers.

¹⁶ Under the CAA, PennDOT has no authority to issue HDD engine and emission standards. That authority resides exclusively with EPA under CAA section 202 and California under CAA section 209(b), 42 U.S.C. § 7543.

HDD Regulation, and was consulted during the Proposed and Final Pennsylvania HDD Regulation, EQB's exercise of authority in promulgating the regulation was lawful.

For the above reasons, the Truckers have failed to state a claim upon which relief can be granted, Claim II should be dismissed and the Agencies' Preliminary Objection should be sustained.

V. PRELIMINARY OBJECTION NO. 5: The Truckers Ignore the Basic Policy Choices Made by the General Assembly Under the APCA (Failure to State a Claim Upon Which Relief Can Be Granted—Claims III & IV)

The Truckers' claim that the APCA violates the nondelegation doctrine, and that the EQB disregarded the policy choices made by the General Assembly in the APCA and the standards established for the EQB when exercising its rulemaking authority lacks merit. The APCA does not violate the nondelegation doctrine, and the EQB followed the basic choice made by the General Assembly, acting well within the standards set by the General Assembly in the APCA. So, the Agencies preliminarily object to Claims III and IV of the Truckers' Petition pursuant to Pa. R.C.P. 1028(a)(4) for legal insufficiency.

A. The Rulemaking Authority Delegated to the EQB Does Not Violate the Non-Delegation Doctrine

The grant of authority under the APCA for the EQB to promulgate the Final Pennsylvania HDD Regulation does not violate the nondelegation doctrine. Under

the APCA, the General Assembly made a basic policy choice to delegate rulemaking authority to the EQB to implement the federal CAA and reduce emissions from motor vehicles, including HDD engines and vehicles, and to attain and maintain the ozone NAAQS. 35 P.S. § 4005(a)(1), (7) and (8). That policy choice was sufficiently confined through the standards established under the APCA. The Agencies promulgated the Proposed and Final Pennsylvania HDD Regulations consistent with the standards that the General Assembly provided in the APCA for implementation of the federal CAA and the regulation of motor vehicles to reduce emissions. So, the promulgation of the proposed and final regulations do not violate the non-delegation doctrine.

Pennsylvania Constitution Article 1, § 2, provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” The Pennsylvania Supreme Court has stated:

It is axiomatic that the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority. *It may, however, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act.* The principal limitations on this power are twofold: (1) the basic policy choices must be made by the Legislature; and (2) the legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions. This does not mean, however, that all details of administration must be precisely or separately enumerated in the statute.

Eagle Environmental II, L.P. v. Dept. of Env't'l Prot., 884 A.2d 867, 880 (Pa. 2005) (“*Eagle Env't'l*”) (emphasis added) (citing *Gilligan v. Pa. Horse Racing Comm'n.*, 422 A.2d 489 (Pa. 1980); see also, *Germantown Cab Co. v. Philadelphia Parking Auth.*, 206 A.3d 1030, 1047 (Pa. 2022) (“*Germantown Cab*”) (the General Assembly does not delegate legislative powers by delegating mere details of administration).

The Pennsylvania Supreme Court has recently recognized that the General Assembly has made policy choices taking into consideration the subject matter expertise of the Agencies. Specifically, the Court stated,

The General Assembly chose to bestow regulatory authority upon the Agencies in the first place, and Agencies are given that authority precisely because some issues are so highly complex and technical that the legislative branch approves of the agency with expertise addressing the complexities.

MSC III, 292 A.3d at 949-950.

The General Assembly, under section 5(a)(1) of the APCA, made the basic policy choice that there must be rules in place for the “prevention, control, reduction, and abatement of air pollution...,” 35 P.S. § 4005(a)(1). Under section 5(a)(7) of the APCA, the General Assembly further made the basic policy choice to require rules “to reduce motor vehicle emissions.” 35 P.S. § 4005(a)(7). Through these provisions, the General Assembly determined that EQB, the entity with subject-matter expertise, should adopt rules and regulations that will effectuate the General Assembly’s decisions to regulate air pollution and “to reduce emissions from motor

vehicles.” 35 P.S. § 4005(a)(7); *see Eagle Envt’l.*, 884 A.2d at 880; *see also MSC III*, 292 A.3d at 949-950.

The General Assembly also made the policy choice under section 5(a)(7) of the APCA to limit the EQB’s rulemaking so that it could not incorporate any California fuel standard, but made the choice not to impose a similar limit for California emission standards or any other California engine or vehicle requirements. Under section 5(a)(8) the APCA, 35 P.S. § 4005(a)(8), the General Assembly made an additional policy choice that the EQB should adopt regulations that “implement the provisions of the [CAA],” and ensure that those regulations are “consistent with the requirements of the [CAA]”

It is within these policy choices made by the General Assembly under the APCA that the EQB—the agency with subject matter expertise—exercised its discretion to promulgate the Final Pennsylvania HDD Regulation. *Id.* Therefore, the EQB’s APCA authority to promulgate the Final Pennsylvania HDD Regulation based on policy choices by the General Assembly is lawful and not an unconstitutional delegation of authority.

B. The EQB Exercised its Rulemaking Discretion within the Boundaries Established by the APCA

Under the APCA, the General Assembly established standards to guide and restrain the EQB’s exercise of its rulemaking discretion. *Eagle Envt’l.*, 884 A.2d at 880. Under section 4.2 of the APCA, the General Assembly limited the EQB’s

authority when promulgating rules to meet the Commonwealth’s CAA obligations under section 109 of the CAA, 42 U.S.C. § 7409, “*to achieve and maintain the ambient air quality standards or to satisfy related [CAA] requirements*, unless otherwise specifically authorized or required by this act or specifically required by the [CAA].” 35 P.S. § 4004.2(a) (emphasis added).

Section 4.2(b) of the APCA further limits the EQB’s authority with respect to the stringency of EQB rulemakings where “control measures or other requirements adopted under subsection (a) of this section [4004.2] *shall be no more stringent* than those required by the [CAA] unless authorized or required by this act or specifically required by the [CAA].” 35 P.S. § 4004.2(b). However, “this requirement shall not apply *if the [EQB] determines* that it is reasonably necessary for a control measure or other requirement to exceed minimum [CAA] requirements in order for the Commonwealth, among other things, to ... achieve and maintain ambient air quality standards....” 35 P.S. § 4004.2(b) (emphasis added).

In this matter, the EQB’s promulgation of the Final Pennsylvania HDD Regulation was consistent with the permissible actions established for the EQB by the General Assembly under section 4.2(a) and (b) of the APCA, 35 P.S. § 4004.2(a) and (b). *See* 32 Pa. Bull. at 2333 (“[t]his final form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C. of the Preamble (referencing APCA sections 5(a)(1) and (a)(7)) and is

reasonably necessary to achieve and maintain the National ambient air quality standards for ozone”).

The APCA also contains boundaries regarding the EQB’s discretion when promulgating rules and regulations that reduce emissions from motor vehicles and implement the CAA. For example, in making the policy choice to authorize the EQB to reduce emissions from motor vehicles in section 5(a)(7) of the APCA, 35 P.S. § 4005(a)(7), the General Assembly only prohibited the EQB from adopting regulations mandating the sale or use of any set of specifications for motor fuel prescribed by the State of California under 42 U.S.C. § 7545(c)(4), unless required by the CAA. Under section 5(a)(8) of the APCA, 35 P.S. § 4005(a)(8), the General Assembly also prohibited the EQB from promulgating regulations that are not consistent with the federal CAA.

In this matter, the EQB exercised its discretion within the boundaries of section 5(a)(8) of the APCA, 35 P.S. § 4005(a)(8), when it promulgated the Final Pennsylvania HDD Regulation consistent with CAA section 177, 42 U.S.C. § 7507, to reduce emissions from HDD engines and vehicles in Pennsylvania. *See Eagle Env’tl.*, 884 A.2d at 880; *see also Germantown Cab*, 206 A.3d at 1047. The EQB’s incorporation by reference of the California HDD Regulation into the Final Pennsylvania HDD Regulation, without specific limitations, as provided for under 1 Pa. C.S. § 1937(a), assures that the regulation will continue to comply with the

“identity” requirement in section 177 of the CAA, 42 U.S.C. § 7507; and comport with the CAA “consistency” requirement in section 5(a)(8) of the APCA, 35 P.S. § 4005(a)(8).

Thus, the Truckers’ contention, Answer at ¶ 96, that the APCA provides no standards for guiding or restraining the EQB’s exercise of discretion is baseless. Because the EQB exercised its subject matter expertise discretion within the basic policy choices made by the General Assembly and did so within the standards and boundaries established by the General Assembly, the EQB’s promulgation of the Final Pennsylvania HDD Regulation is lawful.

For the above reasons, the Truckers have failed to state a claim upon which relief can be granted, Claims III and IV should be dismissed and the Agencies’ Preliminary Objection should be sustained.

VI. PRELIMINARY OBJECTION NO. 6: The Truckers Misapply the Rulemaking Procedures Related to the Pennsylvania HDD Regulation (Failure to State a Claim Upon Which Relief Can Be Granted—Claims V-VII)

The rulemaking procedures the Truckers claim the Agencies violated were not required by law for incorporation of the Warranty Requirement and Emissions Amendment into the Final Pennsylvania HDD Regulation. The Agencies followed all applicable requirements in promulgating and implementing the Final Pennsylvania HDD Regulation. Accordingly, the Agencies preliminarily object to

Claims V-VII of the Trucker's Petition pursuant to Pa. R.C.P. 1028(a)(4) for legal insufficiency.

The Truckers assert that the Agencies violated the Commonwealth Documents Law ("CDL"), 45 P.S. §§ 1201-1208, by failing to solicit public comment on the Warranty Requirement and Emissions Amendment; violated the Regulatory Review Act ("RRA"), 71 P.S. § 745.5, by failing to submit an analysis to the Independent Regulatory Review Commission ("IRRC") considering the impacts of the Warranty Requirement and Emissions Amendment; and violated 4 Pa. Code § 1.374 ("Pennsylvania Code") by failing to submit a document to the Governor's office asserting that the Warranty Requirement and Emissions Amendment are needed to address a compelling need. Petition, ¶¶ 92-105.

Both the Proposed and Final Pennsylvania HDD Regulations, which allowed incorporation of amendments to California's HDD Regulations, were promulgated in accordance with all applicable Pennsylvania statutes and regulations, including the CDL. *See* 31 Pa. Bull. at 4960 and 4962, and 32 Pa. Bull. at 2329 and 2333 (May 11, 2002). The Truckers do not dispute this. Answer, ¶ 102. Nor do the Truckers assert that the Final Pennsylvania HDD Regulation violates the CDL, RRA or the Pennsylvania Code. *Id.* Both the Proposed and Final Pennsylvania HDD Regulations adopted and incorporated by reference the California HDD Regulation, as authorized under 1 Pa. C.S. § 1937(a), to meet the CAA consistency requirements

under the section 5 (a)(8) APCA, 35 P.S. § 4005(a)(8) and vehicle identity requirements under section 177 of the CAA 42 U.S.C. § 7507. *See* 31 Pa. Bull. at 4958 and 32 Pa. Bull. at 2327.

The Pennsylvania Statutory Construction Act, at 1 Pa. C.S. § 1937(a), provides that regulations that incorporate regulations from another jurisdiction without specific language limitations need not undertake a separate rulemaking every time the external regulations are subsequently revised. So, the amendments to the Final Pennsylvania HDD Regulation are adopted by operation of law. Thus, no separate notice or rulemaking is needed.

In this matter, it was unnecessary and would have been inappropriate for the Agencies to take the steps identified in Claims V-VII of the Truckers' Petition. The Warranty Requirement and Emissions Amendment were incorporated into the Pennsylvania HDD Regulation by operation of law.¹⁷ *See* 31 Pa. Bull. at 4958 and 32 Pa. Bull. at 2327. Incorporation by operation of law consistent with 1 Pa. C.S. § 1937(a), without the use of any specific limitations, assured continued compliance with the General Assembly's requirement, under the APCA, *see* 35 P.S. § 4005(8),

¹⁷ *See Estate of Chennisi*, 272 A.3d 67, 74, 77 (Pa. Super. 2022) (Agreeing with *Charter Hospital of Bucks Cty., Pa., Inc. v. Dept. of Health*, 534 A.2d 1125 (Pa. Cmwlth. 1987) in stating “it is clear that the legislature, in instructing that a reference to a law within an act of the General Assembly includes subsequent amendments, supplements, and replacements, contemplated not only its own enactments, but also the laws of “any public body or officer.””).

that rules and regulations promulgated by the EQB to implement the provisions of the CAA must be consistent with the requirements of the federal CAA, including the identity mandate in CAA section 177. *See Slippery Rock*, 983 A.2d at 1244-1245. Moreover, knowing that the proposed Warranty Requirement and Emissions Amendment would, if finalized, be incorporated by reference into the Pennsylvania HDD Regulation, the Truckers could have commented on those proposals when they were initially published.

In their pleadings, the Truckers admit the “identity” requirement under the section 177 of federal CAA, 42 U.S.C. § 7507. Answer, ¶¶ 27 and 28. The Truckers’ pleadings cite no legal authority that would require the Agencies to undertake a separate rulemaking for this incorporation by reference to be effective. As the foregoing shows, automatic incorporation by reference of Warranty Requirement and Emissions Amendment of the California HDD Regulation is necessary to meet the CAA “consistency” requirement under the APCA and “identity” requirement under the CAA. As a result, Claims V - VII are without merit.

For the above reasons, the Truckers have failed to state a claim upon which relief can be granted, Claims V-VII should be dismissed, and the Agencies’ Preliminary Objection should be sustained.

VII. PRELIMINARY OBJECTION NO. 7: By Its Terms, There is No Cause of Action Available under the RRA. (Failure to State a Claim Upon Which Relief Can Be Granted—Claim VI)

The Truckers are entitled to no relief for Claim VI because there is no cause of action under the RRA. In their Petition, the Truckers allege that the Agencies failed to comply with the RRA, 71 P.S. § 745.5, by submitting an analysis considering the impacts of the Warranty Requirement and Emissions Amendment. Petition, ¶¶ 98 and 99. The plain language of the RRA clearly states that there is no cause of action available under that act. Accordingly, the Agencies preliminarily objects to the Truckers' Petition pursuant to Pa. R.C.P. 1028(a)(4) for legal insufficiency in the nature of a demurrer because Claim VI fails to state a claim upon which relief can be granted.

Section 2(d) of the RRA provides that “this act is not intended to create a right or benefit, substantive or procedural, enforceable at law by a person against another person or against the Commonwealth, its agencies or its officers.” 71 P.S. § 745.2(d); *see also Mercury Trucking*, 55 A.3d at 1067-1068. This Court, relying on the limitation in section 2(d) of the RRA, has found that a party may not challenge the validity of a regulation based on the sufficiency of the information submitted to IRRC. *Marcellus Shale Coalition v. Dept. of Env't'l Prot.*, 193 A.3d 447, 468 (Pa. Cmwlth. 2018). Likewise, this Court has determined that a disagreement with the information in an agency's Regulatory Analysis Form is not, alone, a valid basis to

set aside a regulation. *Marcellus Shale Coalition v. Dept. of Env't'l Prot.*, 216 A.3d 448, 493 (Pa. Cmwlth. 2019). It is IRRC's role to weigh the contents of a Regulatory Analysis Form and settle any disagreements related to the analysis. *Id.*

The entire RRA applies to all of the Agencies regulations, including the limitation on legal challenges under section 2(d) of the RRA. While the Truckers claim that Pennsylvania courts have found regulations to be invalid for failure to comply with the RRA's required procedures, Answer at ¶ 112, they identify no legal authority to support that contention. Moreover, the Truckers cite no legal authority under the RRA or elsewhere to support their proposition that the Agencies are required to submit a Regulatory Analysis Form each time that a public body statute or regulation, which has been incorporated by reference into a previously promulgated regulation without any specific language limitations, is amended or supplemented. *See* 1 Pa. C.S. § 1937(a). If this procedure were to be employed as the Truckers suggest, it would be infeasible for administrative agencies to administer their statutory and regulatory programs in an effective and efficient manner and would create uncertainty and confusion for the public and regulated community.

For example, using the Truckers' approach (which would not allow for automatic incorporation by reference) any time that the California HDD Regulation was amended, the Pennsylvania HDD Regulation would violate section 5(a)(8) of the APCA, 35 P.S. § 4005(a)(8) (consistency requirement with the CAA), and

section 177 of the CAA, 42 U.S.C. § 7507 (identity requirement with California standards), for a period of 18-24 months before the Agencies could promulgate a final amendment to the Pennsylvania HDD Regulation to incorporate any California amendment. This patchwork approach would frustrate DEP's ability to implement and enforce the Final Pennsylvania HDD Regulation because it would not be identical with the California HDD Regulation as required under section 177 of the CAA, 42 U.S.C. § 7507, and result in additional staffing resource burdens for the Agencies. Furthermore, this delay would and would create uncertainty and confusion for the public and regulated community.

For the above reasons, the Truckers have failed to state a claim upon which relief can be granted and Claim VII should be dismissed and the Agencies' Preliminary Objection should be sustained.

VIII. PRELIMINARY OBJECTION NO. 8: The Truckers Failed to Use All Available Administrative Processes to Challenge the Pennsylvania HDD Regulation (Failure to Exhaust Administrative Remedies—Claims I-VII)

The Truckers chose not to pursue other administrative processes available under Pennsylvania law before filing the Petition. Accordingly, the Agencies preliminarily object to Claims I-VII of the Truckers Petition pursuant to Pa. R.C.P. 1028(a)(7) because they have failed to exhaust all available administrative remedies.

Under the doctrine of exhaustion of administrative remedies, a party must exhaust all available administrative remedies before the right of judicial review

arises. *See The Marstellar Community Water Auth. v. Dept. of Env't'l Res.*, 519 A.2d. 1112 (Pa. Cmwlth. 1987) (it is well settled that a party is precluded from seeking judicial review of an administrative decision without first exhausting available administrative remedies.)

The Truckers had an administrative remedy available other than challenging the Final Pennsylvania HDD Regulation in this Court. The Truckers could have filed a petition with the EQB pursuant to section 35.18 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.18, as an available administrative remedy. Section 35.18 provides that,

a petition to an agency for the issuance, *amendment, waiver or repeal of a regulation* shall set forth clearly and concisely the interest of the Petitioner in the subject matter, the specific regulation, amendment, waiver or repeal requested, and shall cite by appropriate reference the statutory provision or other authority therefor.

1 Pa. Code § 35.18 (emphasis added). If successful, an action brought by the Truckers in accordance with 1 Pa. Code § 35.18 could have resulted in an amendment or repeal of the challenged Final Pennsylvania HDD Regulation, the same result that the Truckers now seek through the Petition.

If the Truckers chose not to seek redress before the EQB directly, they had an alternative remedy under the RRA, 71 P.S. §§ 745.1-745.15. Section 8.1 of the RRA, provides that,

[IRRC], either on its own motion or on the request of any individual ... affected by a regulation, may also review any existing regulation or

administrative procedure [and] the commission may submit recommendations to any agency recommending any changes in existing regulations where it finds the existing regulations or administrative procedure to be contrary to the public interest under the criteria established in this section.”

71 P.S. § 745.8a. If the IRRC had made such a recommendation to the Agencies, DEP would have reviewed the recommendations and determined whether to amend or repeal the Final Pennsylvania HDD Regulation, the relief Truckers now seek from this Court. However, the Truckers chose not to pursue this course of action.

This Court has held that “[a] party challenging administrative decision-making that has not exhausted its administrative remedies is precluded from obtaining judicial review by mandamus or otherwise.” *Petsinger v. Dept. of Labor & Industry*, 988 A.2d 748, 754 (Pa. Cmwlth. 2010) (citing *Matesic v. Maleski*, 624 A.2d 776 (Pa. Cmwlth. 1993) and *Mueller v. Pa. State Police Headquarters*, 532 A.2d 900 (Pa. Cmwlth. 1987)). Truckers failed to exhaust available administrative remedies. So, they cannot obtain judicial review of their Petition.

For the above reasons, the Truckers have failed to exhaust all of its available administrative remedies, Claim I-VII should be dismissed, and the Agencies’ Preliminary Objection should be sustained.

CONCLUSION

For the reasons stated above, the Agencies respectfully request that this Court sustain their Preliminary Objections and dismiss the Truckers' Petition for Review in its entirety, with prejudice.

Respectfully submitted,

**FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
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DATE: October 13, 2023

CERTIFICATION OF WORD COUNT

I certify as required by Pa.R.A.P. 2135(a) that the forgoing brief contains
13,057 words in compliance with the length of brief requirement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of October 2023, I served a true and correct copy of DEP's foregoing brief on the following parties via the appellate court electronic filing system, which satisfies the requirements of Pa.R.A.P. 121 and 125:

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APPENDIX A

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JUN 15 2023

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PETERS BROTHERS, INC.;
H.R. EWELL, INC.; MOTOR TRUCK
EQUIPMENT COMPANY d/b/a
KENWORTH OF PENNSYLVANIA;
TRANSTEK, INC.; and
PENNSYLVANIA MOTOR TRUCK
ASSOCIATION,

Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION OF
THE COMMONWEALTH OF
PENNSYLVANIA; PENNSYLVANIA
ENVIRONMENTAL QUALITY BOARD
OF THE COMMONWEALTH OF
PENNSYLVANIA; and RICHARD
NEGRIN, in his official capacity as Acting
Secretary of the Department of
Environmental Protection,

Respondents.

No. _____

NOTICE

You have been sued. If you do not file a written response to the enclosed Petition for Review within thirty days of service, a judgment may be entered against you without further notice. You may lose important rights.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PETERS BROTHERS, INC.;
H.R. EWELL, INC.; MOTOR TRUCK
EQUIPMENT COMPANY d/b/a
KENWORTH OF PENNSYLVANIA;
TRANSTEK, INC; and PENNSYLVANIA
MOTOR TRUCK ASSOCIATION,

Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION OF
THE COMMONWEALTH OF
PENNSYLVANIA; PENNSYLVANIA
ENVIRONMENTAL QUALITY BOARD
OF THE COMMONWEALTH OF
PENNSYLVANIA; and RICHARD
NEGRIN, in his official capacity as Acting
Secretary of the Department of
Environmental Protection,

Respondents.

No. _____

**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This is an action to protect the rights of Pennsylvania businesses to lawfully sell, operate, and upgrade their fleets of commercial trucks—which provide critical services that the People of the Commonwealth depend upon for a continual supply of food, commodities, and consumer products.

2. The Petitioners challenge Pennsylvania regulations, 25 Pa. Code § 126.501, *et. seq*, which unlawfully incorporate standards adopted by bureaucrats in *California*. The statutory scheme thus delegates critical policy decisions concerning diesel engine emission and warranty standards to California officials who have no accountability to the People of Pennsylvania.

3. Pennsylvania's rolling incorporation regulations were promulgated without statutory authority—and, therefore, in violation of separation of powers.

4. But if the General Assembly truly delegated such open-ended regulatory powers as to allow a state agency to adopt a rolling incorporation of California law, then the Pennsylvania Air Pollution Control Act violates the nondelegation doctrine, which prohibits the Assembly from giving away its lawmaking powers.

5. Further, it is unlawful to enforce California's heavy diesel regulatory standards because they were not developed in accordance with Pennsylvania procedural rules—which demand, among other requirements, publication in the Pennsylvania Bulletin and opportunity for Pennsylvanians to provide comment.

6. The Petitioners seek relief because they should be at liberty to operate and grow their businesses free from imposition of California standards.

7. Only the General Assembly can bind Pennsylvania to such momentous policy decisions because the People have entrusted the Assembly (not any state agency—and much less the State of California) to represent their collective interests.

JURISDICTION

8. Petitioners are suing under the Pennsylvania Constitution and the Declaratory Judgments Act, 42 Pa. C.S. § 7532.

9. This Court has original jurisdiction under 42 Pa. C.S. § 761(a) because Petitioners are suing Commonwealth agencies and an officer of a state agency in his official capacity.

PARTIES

10. Plaintiff and Petitioner Peters Brothers, Inc. (“Peters Brothers”), is a trucking company that specializes in transporting refrigerated products and commodities across the country. Peters Brothers is incorporated in Pennsylvania as a C-Corp.

11. Plaintiff and Petitioner H.R. Ewell, Inc. (“H.R. Ewell”), is a trucking company that provides transportation services across the Eastern United States. H.R. Ewell, Inc., is incorporated in Pennsylvania as an S-Corp.

12. Plaintiff and Petitioner the Motor Truck Equipment Company d/b/a Kenworth of Pennsylvania, Inc. (“MTE”), is a dealership that sells heavy diesel trucks, and which is incorporated in Pennsylvania as an S-Corp.

13. Plaintiff and Petitioner Transteck, Inc. (“Transteck”), is a dealership that sells heavy diesel trucks in Pennsylvania. Transteck is incorporated as a Delaware

S-Corp; it is headquartered in Harrisburg, Pennsylvania, and has various locations across Pennsylvania.

14. Plaintiff and Petitioner the Pennsylvania Motor Truck Association (“PMTA”) is a trade association representing approximately 1,200 Pennsylvania trucking companies, dealerships, and other businesses servicing the trucking industry.

15. Defendant and Respondent the Pennsylvania Department of Environmental Protection of the Commonwealth of Pennsylvania (“Department” or “DEP”) is the state agency charged with enforcing regulation promulgated by the Pennsylvania Environmental Quality Board.

16. Defendant and Respondent the Pennsylvania Environmental Quality Board of the Commonwealth of Pennsylvania (“Pennsylvania Board”) is a state agency with delegated rulemaking authority under the Pennsylvania Air Pollution Control Act, 35 Pa. Stat. § 4002, *et. seq.*

17. Defendant and Respondent the Acting Secretary, Richard Negrin, is the officer with authority over the Department. He is sued in his official capacity because this lawsuit seeks declaratory and injunctive relief against the Office of the Secretary.

STATEMENT OF MATERIAL FACTS GENERAL ALEGATIONS

18. The Pennsylvania Board promulgated 25 Pa. Code § 126.501, *et. seq.*

19. These regulations, 25 Pa. Code §§ 126.502–03, 126.511–14, 126.531 (“Rolling Diesel Regulations”), require that all heavy diesel engines sold or acquired in Pennsylvania must comply with air emission standards set forth in the California Code of Regulations (“California Code”).

20. Additionally, 25 Pa. Code § 126.521 requires that any heavy diesel engine sold in Pennsylvania must comply with California’s vehicle emission warranty requirements (“Rolling Warranty Regulation”).

21. The Pennsylvania Board claimed that it was acting under delegated rulemaking authority from the Pennsylvania Air Pollution Control Act, 35 Pa. Stat. § 4002, *et. seq.*, when adopting this rolling incorporation of California law.

22. But the General Assembly made no policy choice to follow California emission or warranty standards.

23. The Act empowers the Department to take actions “necessary or proper for the effective enforcement” of the Act. *See* 35 Pa. Stat. § 4004(27).

24. In turn, the Assembly delegated authority to the Pennsylvania Board to adopt regulations “for the prevention, control, reduction and abatement of air pollution” consistent with the Commonwealth Documents Law—which requires adherence to specified procedures to ensure transparency and a measure of accountability to Pennsylvanians in the rulemaking process. *See* 35 Pa. Stat. § 4005(a)(1).

25. The Assembly delegated only limited rulemaking authority for the Pennsylvania Board to promulgate vehicle emission standards.

26. For example, the Pennsylvania Board only has authority to “[r]ecommend to the [Pennsylvania] Secretary of Transportation ... [vehicle] emission control[s]” 35 Pa. Stat. § 4005(a)(4).

27. And the Board has delegated authority to impose rules “designed to reduce emissions from motor vehicles,” such as mandating “centrally clean-fueled fleets [or] clean alternative fuels” only if working in consultation with the Pennsylvania Secretary of Transportation. *See id.* § 4005(a)(7).

28. The Assembly did not delegate the power to regulate Pennsylvania emissions to the *State of California*.

29. Yet Pennsylvania’s Rolling Diesel Regulations do not adopt any specific emission standard; instead, they incorporate “all applicable requirements” of Title 13 of the California Code—which the California Air Resources Board (“California Board”) revises periodically pursuant to California law.

30. As such, vehicles sold or acquired in Pennsylvania must satisfy California’s engine certification and compliance requirements and must “possess a valid emissions control label that meets” California Board requirements. 25 Pa. Code §§ 126.503(d), 126.531.

31. Likewise, Pennsylvania’s Rolling Warranty Regulation incorporates “the requirements of Title 13” of the California Code—which is periodically updated by the California Board pursuant to California law.

32. In late 2021, the California Board promulgated an omnibus regulation that now imposes more aggressive emission system standards, and that now requires extended warranty coverage—i.e., beyond what was previously required. *See* Exhibit A, Final Regulation Order, Amendments to Title 13, California Code of Regulations.

33. As might be expected, the California Board followed California procedures when revising California’s heavy diesel emission and warranty standards. Consequently, the California Board did not comply with any Pennsylvania-specific procedural requirements.

34. Nor did the California Board consult with or seek approval from the Pennsylvania Secretary of Transportation.

35. And neither the Pennsylvania Board nor the Pennsylvania DEP sought approval from, or worked in consultation with, the Secretary of Transportation to promulgate new vehicle emission standards for the Commonwealth.

36. Neither the Pennsylvania Board nor the Pennsylvania DEP published anything proposing these new standards or offering opportunity for public comment.

37. Therefore, Pennsylvanians were denied the opportunity to raise objections.

38. Nor did the Pennsylvania Board or the Pennsylvania DEP provide regulatory analysis as to the impacts of enforcing California's new standards.

39. For example, they failed to: (a) explain why there was a compelling public need for new standards in Pennsylvania; (b) provide a cost-benefit analysis; (c) consider whether new regulation would put Pennsylvania businesses at a competitive disadvantage, or; (d) consider less burdensome regulatory alternatives.

40. The Respondents contend that California standards govern automatically in the Commonwealth without need to comply with Pennsylvania procedures.

41. For example, the Pennsylvania DEP has confirmed that the Commonwealth's "rulemaking updates when [the California Board's] rulemaking updates[,] and that "DEP does not need to develop a rulemaking for regulations incorporated by reference." Exhibit B, Email Correspondence from Chris Trostle, Mobile Sources Section Chief, PA DEP, to Rebecca Oyler (June 21, 2021).

42. And former DEP Secretary Patrick McDonnell stated: "The Department interprets the Pennsylvania regulation adopting sections of California's regulation to be a continuing adoption including any changes which California may make to its regulation." Exhibit C, Letter to Hon. Daryl D. Metclafe, Chairman of Env'tl. Res. & Energy Committee (Nov. 3, 2021).

43. Pennsylvania's Rolling Diesel Regulations automatically incorporated changes to the California Code, which now imposes a schedule of progressively more stringent emission standards for Model Year 2024–2031 vehicles.

44. Pennsylvania's Rolling Warranty Regulation automatically incorporated changes to the California Code, which now requires extended warranty coverage that varies depending on the gross vehicle weight rating of the truck in question.

45. Whereas the California Code only previously required warranty coverage for the first 100,000 miles, California's new standards require warranty coverage for up to 110,000, 150,000, or 350,000 miles—depending on the weight class of the vehicle—for 2022–2026 model year engines.

46. For model years 2027–2031 engines, California's new standards will require warranty coverage for up to 150,000, 220,000, or 450,000 miles.

47. For model year 2031 and beyond, California's new standards will require coverage for up to 210,000, 280,000, or 600,000 miles.

48. Whereas the California Code only previously required warranty coverage for the first five years, California's new standards will require coverage for up to seven years beginning with model year 2027 engines and will require coverage for up to ten years beginning with model year 2031 engines.

49. Further, whereas the California Code only previously required warranty coverage for the first 3,000 operating hours, California's new standards will require

warranty coverage for up to 30,000 hours for some heavy diesel engines when model year 2031 vehicles come to market.

50. These new standards are now enforceable against anyone buying or selling heavy diesel trucks in Pennsylvania.

51. Pennsylvania DEP has temporarily suspended enforcement of California's new standards. *See* Exhibit D, Suspension of the Pennsylvania Heavy-Duty Diesel Emissions Control Program, 51 Pa.B 7000 (Nov. 6, 2021). *See also* Exhibit J, Suspension of the Pennsylvania Heavy-Duty Diesel Emissions Control Program, 53 Pa.B. 3166 (June 10, 2023).

52. DEP intends to begin enforcing California's new standards beginning with Model Year 2027 vehicles and engines.

53. But insofar as DEP maintains enforcement discretion, DEP might just as well elect to begin enforcing California's new heavy diesel emission and warranty standards applicable to Model Year 2024–2026 vehicles at any time.

54. In any event, DEP has warned that its “exercise of enforcement discretion does not protect” the Petitioners “from the possibility of legal challenge by third persons under 25 Pa. Code Chapter 126, Subchapter E.” Exhibit J.

55. Notwithstanding DEP's temporary policy of nonenforcement, “any person” may initiate suit “to compel compliance” with incorporated California Code standards under Pennsylvania's Rolling Diesel Regulations and Rolling Warranty

Regulation. 35 Pa. Stat. Ann. § 4013.6(c). And in such a case, the plaintiff may seek civil penalties against dealerships or trucking companies. *Id.*

56. Further, it is, putatively, a summary offense or a misdemeanor to violate incorporated California Code standards under Pennsylvania's Rolling Diesel Regulations and Rolling Warranty Regulation. *See* 35 Pa. Stat. Ann. § 4009.

INJURY TO PETITIONERS AND DECLARATORY RELIEF ALLEGATIONS

57. There is controversy between the parties as to whether Pennsylvania's rolling incorporation of California's new heavy diesel emission and extended warranty standards is lawful.

58. The Petitioners are injured by Pennsylvania's rolling incorporation of California's new heavy diesel emission and extended warranty standards because they are placed at a competitive disadvantage with competitors in other states who do not have to contend with California's unwieldy regulatory standards. *See* Exhibit E, Declaration of Rebecca Oyler ¶ 14 ("Oyler Decl."); Exhibit F, Declaration of Brian Wanner ¶ 12 ("Wanner Decl."); Exhibit G, Declaration of Kenton Good ¶¶ 6–7 ("Good Decl."); Exhibit H, Declaration of Calvin Ewell ¶ 18 ("Ewell Decl."); Exhibit I, Declaration of Shawn Brown ¶¶ 6–7 ("Brown Decl.").

59. PMTA members are injured because it will cost more for them to buy California-compliant trucks with extended warranties. *See* Exhibit E, Oyler Decl. ¶¶ 15–17; Exhibit G, Good Decl. ¶ 22; Exhibit I, Brown Decl. ¶¶ 8–9.

60. For example, Peters Brothers does not want to purchase extended California warranties for its new trucks. Exhibit F, Wanner Decl. ¶¶ 13–17. The company would rather decline extended coverage because it has in-house technicians who can handle issues that may arise. *Id.* ¶14.

61. Pennsylvania truck dealers like Transteck and MTE will lose existing customers and sales opportunities if Pennsylvania trucking companies begin buying heavy diesel trucks in other states to avoid unnecessary extended warranty requirements. *See* Exhibit G, Good Decl. ¶¶ 22–23; Exhibit I, Brown ¶¶ 8–10.

62. Likewise, Pennsylvania heavy diesel truck dealers like Transteck and MTE are injured by Pennsylvania’s rolling incorporation of new and increasingly more stringent heavy diesel engine emission standards. *See* Exhibit E, Oyler Decl. ¶¶ 15–16; Exhibit G, Good Decl. ¶¶ 13–21; Exhibit I, Brown ¶¶ 17–18.

63. For example, Transteck is limited to selling California-compliant engines in Pennsylvania. *See* Exhibit G, Good Decl. ¶ 10.

64. Dealers can sell a broader array of engines in other states. *Id.* ¶ 11. As such, Transteck stands to lose sales from customers who would prefer to purchase more reasonably priced engines elsewhere. *Id.* ¶ 18.

65. Conversely, PMTA members have fewer options when seeking to replace vehicles in their fleets because they are confined to purchasing California-compliant heavy diesel engines. *Id.* ¶¶ 10–11.

66. The Petitioners reasonably anticipate that the cost of California compliant heavy diesel engines will rise in response to California's increasingly more stringent emission standards. *See* Wanner Decl. ¶ 18; Exhibit G, Good Decl. ¶ 13; Exhibit I, Brown Decl. ¶ 17.

67. Transteck and MTE reasonably anticipate that they will see a reduction in sales because of increased costs for California-compliant vehicles going forward. *See* Decl. Exhibit G, Good Decl. ¶ 15; Exhibit I, Brown Decl. ¶ 18.

68. PMTA members reasonably anticipate that the State of California will make further regulatory changes to the California Code that will be incorporated into Pennsylvania regulation and that such changes will impose new challenges. *See* Exhibit E, Oyler Decl. ¶ 10; Exhibit H, Ewell Decl. ¶ 16.

69. A decision declaring Pennsylvania's Rolling Diesel Regulations and Rolling Warranty Regulation unlawful would provide relief to Petitioners.

70. Petitioners have no plain, speedy, and adequate remedy at law for their injuries. Money damages are not available. And therefore, they need declaratory and injunctive relief.

LEGAL CLAIMS

First Claim for Relief: Violation of 35 Pa. Stat. § 4005 (Ultra Vires Regulation)

71. The preceding paragraphs are incorporated herein by reference.

72. The Pennsylvania Air Pollution Control Act delegates only limited authority for the Pennsylvania Board to promulgate regulation.

73. The Act delegates limited authority to establish emission control standards. 35 Pa. Stat. § 4005(a)(1). This entails enumerated authority for regulation “for the prevention, control, reduction and abatement of air pollution.” *Id.*

74. But the Legislature did not delegate any authority to promulgate regulation imposing emission system warranty requirements.

75. Therefore, the Pennsylvania Board’s Rolling Warranty Regulation violates the Pennsylvania Air Pollution Control Act.

**Second Claim for Relief:
Violation of 35 Pa. Stat. § 4005 (Ultra Vires Regulation)**

76. The preceding paragraphs are incorporated herein by reference.

77. The General Assembly did not adopt California’s heavy diesel emission standards when it enacted the Pennsylvania Air Pollution Control Act.

78. Nor did the General Assembly delegate rulemaking authority for the Pennsylvania Board to adopt California’s heavy diesel engine emission standards.

79. The Act authorizes the Pennsylvania Board only to “recommend” performance or specification standards for emission control systems and devices on motor vehicles. 35 Pa. Stat. § 4005(a)(4). The Pennsylvania Board has no authority to adopt such standards on its own accord without approval from the Pennsylvania Secretary of Transportation.

80. The Act authorizes the Pennsylvania Board only to work in consultation with the Pennsylvania Secretary of Transportation in promulgating rules designed to reduce emissions from motor vehicles. *Id.* § 4005(a)(7).

81. The Pennsylvania Secretary of Transportation did not issue the heavy diesel emission and warranty standards set forth in Title 13 of the California Code.

82. The standards set forth in Title 13 of the California Code were not developed in consultation with the Pennsylvania Secretary of Transportation.

83. Therefore, the Pennsylvania Board's Rolling Diesel Regulations violate the Pennsylvania Air Pollution Control Act.

**Third Claim for Relief:
Violation of Pa. Const. art. II, § 1 (Nondelegation Doctrine Violation)**

84. The preceding paragraphs are incorporated herein by reference.

85. The General Assembly made no basic policy decision as to how to control emissions from heavy diesel trucks with enactment of the Pennsylvania Air Pollution Control Act.

86. The General Assembly provided no standard guiding or restraining the Pennsylvania Board's exercise of rulemaking discretion in deciding what conduct should be subject to regulation.

87. To the extent that the Air Pollution Control Act allowed the Pennsylvania Board to regulate conduct that only tangentially or indirectly affects air emissions

(i.e., regulation of emission system warranties), it violates Article II, Section 1 of the Pennsylvania Constitution.

Fourth Claim for Relief:

Violation of Pa. Const. art. II, § 1 (Nondelegation Doctrine Violation)

88. The preceding paragraphs are incorporated herein by reference.

89. The General Assembly made no basic policy decision to follow California's emission and warranty standards for heavy diesel trucks.

90. To the extent that the General Assembly delegated unfettered rulemaking authority to the Pennsylvania Board to adopt any emission and warranty standards that the Board might deem fit, it provided no standard guiding or restraining the Board's exercise of discretion.

91. This delegation violates Article II, Section 1 of the Pennsylvania Constitution.

Fifth Claim for Relief:

Violation of 45 Pa. Stat. § 1201

(Commonwealth Documents Law Violations)

92. The preceding paragraphs are incorporated herein by reference.

93. The heavy diesel emission and warranty standards set forth in Title 13 of the California Code were not published as a proposed rule in the Pennsylvania Bulletin.

94. The Respondents have failed to publish anything soliciting public comment on California's new heavy diesel emission and warranty standards set forth in Title 13 of the California Code.

95. Respondents failed to comply with the procedural and substantive requirements of the Commonwealth Documents Law, and thus the incorporation of California's standards was invalid.

Sixth Claim for Relief:
71 Pa. Stat. § 745.5 (Regulatory Review Act)

96. The preceding paragraphs are incorporated herein by reference.

97. The Respondents have failed to submit California's new heavy diesel emission and warranty standards or any associated regulatory analysis for review to the Pennsylvania Independent Regulatory Review Commission.

98. The Respondents have failed to submit analysis considering the impact of California's new heavy diesel emission and warranty standards on Pennsylvania small businesses; they have likewise failed to consider alternatives for minimizing the impact on small businesses.

99. The Respondents have failed to submit analysis considering the direct and indirect costs to the Commonwealth of enforcing California's new standards.

100. Respondents' putative adoption of California's standards therefore violates the Regulatory Review Act.

Seventh Claim for Relief:
Violation of 4 Pa. Code § 1.374 (Pennsylvania Administrative Code)

101. The preceding paragraphs are incorporated herein by reference.

102. The Respondents have failed to submit, to the Governor's Office, a written attestation that California's new heavy diesel emission and warranty standards are needed to address a compelling public need in Pennsylvania.

103. The Respondents have failed to provide a required cost/benefit analysis of California's new heavy diesel emission and warranty standards.

104. The Respondents have failed to provide analysis as to whether California's new heavy diesel emission and warranty standards places the Commonwealth at a competitive disadvantage compared to other states.

105. Respondents' putative adoption of California's standards therefore violates the requirements set out in the Pennsylvania Administrative Code.

REQUEST FOR RELIEF

WHEREFORE, Petitioners respectfully request relief as follows:

1. A judgment declaring that the Air Pollution Control Act does not authorize a rolling incorporation of any California law or standard, including California's heavy diesel emission and warranty standards, or that the Act violates the nondelegation doctrine if construed as authorizing a rolling incorporation.

2. A judgment declaring that California's new heavy diesel emission and warranty requirements have no effect in Pennsylvania for lack of statutory authority

or because imposition of new California standards violates separation of powers, as well as the Commonwealth Documents Law, the Regulatory Review Act, and the Pennsylvania Administrative Code.

3. An order permanently enjoining Respondents, and any private litigant, from enforcing Pennsylvania's Rolling Diesel Regulations and Rolling Emission Regulation (25 Pa. Code §§ 126.502–03, 126.511–14, 126.521, 126.531).

4. An award of costs and expenses.

5. Any further legal and equitable relief the Court deems just and proper.

DATED: June 13, 2023

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by first class, certified mail addressed as follows:

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Richard Negrin, Acting Secretary of the Pennsylvania Department of Environmental Protection of the Commonwealth of Pennsylvania

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DATED: June 13, 2023

/s/ Caleb J. Kruckenberg
Caleb J. Kruckenberg
Pacific Legal Foundation
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

DATED: June 13, 2023

/s/ Caleb J. Kruckenberg

Caleb J. Kruckenberg
Pacific Legal Foundation

Counsel for Petitioners

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

272 M.D. 2023

PETERS BROTHERS, INC.;
H.R. EWELL, INC.;
MOTOR TRUCK EQUIPMENT COMPANY d/b/a
KENWORTH OF PENNSYLVANIA; TRANSTECK, INC.; and
PENNSYLVANIA MOTOR TRUCK ASSOCIATION, Petitioners

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION OF
THE COMMONWEALTH OF PENNSYLVANIA;
PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD OF THE
COMMONWEALTH OF PENNSYLVANIA; and
RICHARD NEGRIN, in his official capacity as Secretary of the Department of
Environmental Protection, Respondents

**PRELIMINARY OBJECTIONS OF RESPONDENTS,
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND
ENVIRONMENTAL QUALITY BOARD**

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DATE: July 17, 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PETERS BROTHERS, INC.;	:	
H.R. EWELL, INC.; MOTOR TRUCK	:	
EQUIPMENT COMPANY D/B/A	:	
KENWORTH OF PENNSYLVANIA;	:	
TRANSTECK, INC.; AND	:	
PENNSYLVANIA MOTOR TRUCK	:	
ASSOCIATION,	:	
Petitioners,	:	
v.	:	No. 272 M.D. 2023
	:	
PENNSYLVANIA DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION OF	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA; PENNSYLVANIA	:	
ENVIRONMENTAL QUALITY BOARD	:	
OF THE COMMONWEALTH OF	:	
PENNSYLVANIA; and	:	
RICHARD NEGRIN, in his official	:	
capacity as Secretary of the Department	:	
of Environmental Protection,	:	
	:	
Respondents.	:	

NOTICE TO PLEAD

TO: Peters Brothers, Inc., H.R. Ewell, Inc., Motor Truck Equipment Company d/b/a Kenworth of Pennsylvania, Inc., Transteck, Inc., Pennsylvania Motor Truck Association and Pacific Legal Foundation their attorneys:

Pursuant to Pa. R.A.P. 1516(b), Petitioners are hereby notified to file a written response to the Preliminary Objections of Respondents, Commonwealth of Pennsylvania, Department of Environmental Protection and the Environmental Quality Board, to the Petition for Review in the Nature of a Complaint for

Declaratory Relief and Injunctive Relief within thirty (30) days from service hereof
or a judgment may be entered against you.

/s/ Jesse C. Walker
Jesse C. Walker
Assistant Counsel
Attorney ID No. 317750
Department of Environmental Protection

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PETERS BROTHERS, INC.;	:	
H.R. EWELL, INC.; MOTOR TRUCK	:	
EQUIPMENT COMPANY D/B/A	:	
KENWORTH OF PENNSYLVANIA;	:	
TRANSTECK, INC.; AND	:	
PENNSYLVANIA MOTOR TRUCK	:	
ASSOCIATION,	:	
Petitioners,	:	
v.	:	No. 272 M.D. 2023
	:	
PENNSYLVANIA DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION OF	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA; PENNSYLVANIA	:	
ENVIRONMENTAL QUALITY BOARD	:	
OF THE COMMONWEALTH OF	:	
PENNSYLVANIA; and	:	
RICHARD NEGRIN, in his official	:	
capacity as Secretary of the Department	:	
of Environmental Protection,	:	
	:	
Respondents.	:	

**PRELIMINARY OBJECTIONS OF RESPONDENTS,
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND
ENVIRONMENTAL QUALITY BOARD**

Pursuant to Pa. R.A.P. 1516(b) and Pa. R.C.P. 1028, Respondents, the Commonwealth of Pennsylvania, Department of Environmental Protection (“DEP”) and the Environmental Quality Board (“EQB”), (collectively “Agencies”) by and through their undersigned counsel, hereby submit the following Preliminary Objections to the Petition for Review in the Nature of a Complaint for Declaratory

Relief and Injunctive Relief (“Petition”) filed by the Peters Brothers Inc., H.R. Ewell, Inc., Motor Truck Equipment Company, d/b/a Kenworth of Pennsylvania, Transteck, Inc., and Pennsylvania Motor Truck Association (collectively “Truck Association”). A brief in support will be filed upon receipt of a briefing schedule from the Court.

I. PARTIES

1. Petitioner, Peters Brothers, Inc. is a trucking company that specializes in transporting refrigerated products and commodities across the country. Peters Brothers is incorporated in Pennsylvania as a C-Corp.

2. Petitioner, H.R. Ewell, Inc. is a trucking company that provides transportation services across the Eastern United States. H.R. Ewell, Inc., is incorporated in Pennsylvania as an S-Corp.

3. Petitioner, Motor Truck Equipment Company d/b/a Kenworth of Pennsylvania, Inc. is a dealership that sells heavy diesel trucks, and which is incorporated in Pennsylvania as an S-Corp.

4. Petitioner, Transteck, Inc. is a dealership that sells heavy diesel trucks in Pennsylvania. Transteck is incorporated as a Delaware S-Corp; it is headquartered in Harrisburg, Pennsylvania, and has various locations across Pennsylvania.

5. Petitioner, Pennsylvania Motor Truck Association is a trade association representing approximately 1,200 Pennsylvania trucking companies, dealerships, and other businesses servicing the trucking industry.

6. Respondent DEP is the Commonwealth agency with the duty and authority to administer and enforce the Air Pollution Control Act (“APCA”), Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. §§ 4001-4015, as well as provisions of the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q, in Pennsylvania.

7. Respondent EQB is an independent Commonwealth board with the power and duty under the APCA to, among other things, [a]dopt rules and regulations, for the prevention, control, reduction and abatement of air pollution, applicable throughout the Commonwealth, and promulgate regulations to carry out the Air Pollution Control Act and Clean Air Act in Pennsylvania, including regulations pertaining to motor vehicles. 35 P.S. §§ 4004.2, 4005(a)(1), (7) and (8).

II. BACKGROUND

Pollution from Heavy-Duty Diesel Engines

8. Pollution from heavy-duty diesel (“HDD”) engines and vehicles greatly contributes to a number of serious health and welfare problems, including premature mortality, aggravation of respiratory and cardiovascular disease, changes in lung function and increased respiratory disease symptoms, changes to lung tissues and structures, altered respiratory defense mechanisms, and chronic bronchitis. *See*

Proposed Pennsylvania HDD Regulation at 31 Pa. Bull. 4958, 4959 (September 1, 2001) and Final Pennsylvania HDD Regulation at 32 Pa. Bull. 2327 (May 11, 2002).

9. Further, the United States Environmental Protection Agency (“EPA”) has concluded that diesel exhaust is likely to be carcinogenic to humans. *Id.*

10. Although vehicles powered by HDD engines account for about only 1% of all motor vehicles and equipment, they are responsible for nearly 25% of nitrogen oxide (“NO_x”) pollution, which is the primary precursor pollutant for ground-level ozone pollution. *Id.*

11. Emissions from HDD engines and vehicles account for a substantial portion of ambient particulate matter (“PM”) and ground-level ozone levels. Urban areas, which include many poorer neighborhoods, can be disproportionately impacted by HDD vehicle emissions because of heavy traffic in densely populated urban areas. *Id.*

The Air Pollution Control Act

12. In its Declaration of Policy for the APCA, the General Assembly declared, among other things, that the policy of the Commonwealth of Pennsylvania is to protect the air resources of the Commonwealth to the degree necessary for the protection of public health, safety and well-being of its citizens; to develop, attract, and expand industry; and to implement the provisions of the federal Clean Air Act, (“CAA”) 42 U.S.C. §§ 7401-7671q, in Pennsylvania. 35 P.S. § 4002.

13. The first duty and responsibility of DEP identified in the APCA is to “[i]mplement the provisions of the [CAA] in the Commonwealth.” 35 P.S. § 4004(1).

14. The first duty and responsibility of the EQB set forth in the ACPA is to “[a]dopt rules and regulations, for the prevention, control, reduction and abatement of air pollution, applicable throughout the Commonwealth.” 35 P.S. § 4005(1).

15. The EQB also has the authority to “adopt rules and regulations designed to reduce emissions from motor vehicles ... in consultation with the Department of Transportation.” 35 P.S. § 4005(7).

16. The EQB may also “adopt rules and regulations to implement the provisions of the [CAA]” and those “rules and regulations adopted to implement the provisions of the [CAA] shall be consistent with the requirements of the [CAA] and the regulations adopted thereunder.” 35 P.S. § 4005(a)(8).

17. Moreover, section 4.2 of the APCA, 35 P.S. § 4004.2, recognizes that, in implementing the NAAQS (section 109 of the CAA), EQB may by regulation to impose requirements to achieve and maintain NAAQS using measures authorized or required by the APCA or CAA.

The Clean Air Act

18. Under section 109 of the CAA, EPA is required to establish National Ambient Air Quality Standards (“NAAQS”) throughout the nation to protect public health and the environment. 42 U.S.C. § 7409.

19. In carrying out these responsibilities, EPA has, throughout the years, designated multiple areas of Pennsylvania as nonattainment with the primary health-based ozone NAAQS. *See e.g.* 56 Fed. Reg. 56694 (Nov. 6, 1991); 69 Fed. Reg. 23858, 23931 (Apr. 30, 2004); 77 Fed. Reg. 30088, 30142 (May 21, 2012); 83 Fed. Reg. 25776, 25828 (Jun. 4, 2018) and 87 Fed. Reg. 60897, 60917 (Oct. 7, 2022). Designating an area as nonattainment with primary health-based ozone NAAQS under CAA section 107 (42 U.S.C. § 7407) means that a state becomes subject to the CAA Title I, Part D requirements and is tasked with developing and implementing pollution control measures to attain the NAAQS.

20. Moreover, all of Pennsylvania is designated as moderate nonattainment with the ozone NAAQS as a matter of law because Pennsylvania is included in the Ozone Transport Region established by Congress under section 184 of the CAA. 42 U.S.C. § 7511c. This means that irrespective of EPA’s CAA section 107 designation for ozone, Pennsylvania is automatically subject to the specific requirements in CAA Title I, Part D for a moderate nonattainment area and must develop and implement pollution control measures to attain the ozone NAAQS.

21. Under section 110 of the CAA, 42 U.S.C. § 7410, states have the primary responsibility for attaining and maintaining NAAQS within their borders. They do so by developing a State Implementation Plan (“SIP”). A SIP is a series of measures, including promulgating regulations, means to control air pollution from both stationary and mobile sources.

22. Under section 202 of the CAA, 42 U.S.C. § 7521, EPA can establish emission standards and enforcement procedures for new motor vehicles or new motor vehicle engines made, sold and used in the country which cause or contribute to air pollution. With one exception, EPA’s authority in this regard is exclusive as CAA section 209(a), 42 U.S.C. § 7543(a), prohibits states from adopting or enforcing any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.

23. EPA has promulgated a federal HDD regulation pursuant to the CAA, which sets forth emission standards and enforcement procedures for new HDD engines and vehicles. *See generally* 40 CFR Part 1036 (Control of Emissions from New and In-Use Heavy-Duty Highway Engines).

24. However, section 209(b) of the CAA, 42 U.S.C. § 7543(b), allows California – and only California – to obtain a waiver of Federal preemption from EPA to promulgate and enforce its own emission standards for new motor vehicles or new motor vehicle engines.

25. A waiver would be granted if, among other things, EPA finds that the California standards and accompanying enforcements procedures (i.e., testing and warranty) are not inconsistent with section 202(a) of the CAA. 42 U.S.C. § 7543(b)(1)(C).

26. California has established its own HDD regulation (“California HDD Regulation”) which sets forth emission standards and accompanying enforcement procedures for which EPA has granted previous waivers. *See generally* 13 CCR Division 3, Chapter 1, Article 2; *see also* 53 Fed. Reg. 7021 (Mar. 4, 1998), 70 Fed. Reg. 50322 (Aug. 26, 2005) and 88 Fed. Reg. 20688 (Apr. 6, 2023).

27. Because of the inability of many states to attain and maintain the applicable NAAQS, Congress amended the CAA to allow those states with nonattainment plan provisions approved by EPA under Title I, Part D of the CAA to adopt emission standards for motor vehicles that are identical to the California standards and enforcement procedures for which a CAA section 209(b) waiver has been granted for such model year. Section 177 of the CAA, 42 U.S.C. § 7507.

28. States are prohibited under CAA section 177, 42 U.S.C. § 7507, from taking any type of action which would create or have the effect of creating a “third vehicle” which is different from a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards.

The Pennsylvania Heavy-Duty Diesel Regulation

29. In 2002, the EQB used its statutory authority under section 5(a)(1) and (7) of the APCA, 35 P.S. § 4005(a)(1) and (7), to adopt 25 Pa. Code Chapter 126, Subchapter E, the Pennsylvania HDD Regulation. Through the Pennsylvania HDD Regulation, Pennsylvania expressly adopted and incorporated by reference certain requirements of the California HDD Regulation, as Pennsylvania was authorized to do under section 177 of the Clean Air Act, 42 U.S.C. § 7507. *See* 32 Pa. Bull. 2327.

30. The Final Pennsylvania HDD Regulation was adopted, in part, because it would contribute to Pennsylvania's attainment and maintenance of the health-based standard NAAQS standard for ozone in Pennsylvania by reducing emissions from new HDD vehicles and engines. Under the Final Pennsylvania HDD Regulation, newer HDD engines and vehicles would emit less pollution than those subject to the federal standards and test procedures in effect at that time. 31 Pa. Bull. at 4958-4960 and 4962, and 32 Pa. Bull. at 2327, 2328 and 2332.

31. The preambles of the Proposed and Final Pennsylvania HDD Regulation explain that "[m]odeling data from the Philadelphia area indicated that daily emissions of NO_x would be reduced by 2 tons per average summer day and 12.5 tons per average summer day Statewide from [HDD] trucks manufactured in 2005 and 2006 subject to the requirements of the Pennsylvania HDD Regulation." 31 Pa. Bull. at 4962 and 32 Pa. Bull. at 2332.

32. DEP consulted with the Department of Transportation during the development of the Proposed and Final Pennsylvania HDD Regulation. 31 Pa. Bull. at 4960 and 32 Pa. Bull. at 2329.

33. In both the Proposed and Final Pennsylvania HDD Regulations, the Agencies identified the following compelling public needs for the regulation – HDD engines and vehicles contribute greatly to a number of serious health and welfare problems; emissions from HDD engines and vehicles account for a substantial portion of ambient particulate matter (“PM”) and ground-level ozone levels; Pennsylvania is a conduit for a large amount of truck traffic and, if this rulemaking is not adopted, Pennsylvania can expect additional NO_x emissions; and the emission reductions from the regulations are necessary to contribute to the attainment and maintenance of the ozone health-based standard in the Commonwealth. *See* 31 Pa. Bull. at 4959, 4962 and 32 Pa. Bull. at 2327, 2332.

34. In 2018, California adopted a rulemaking amending the California HDD Regulation to establish warranty requirements for 2022 and subsequent model years (“MY”) of new HDD vehicles and engines. (“Warranty Regulation”). *See* 13 CCR § 2036(c)(4)(B)-(D). Through these amendments, which were subject to public participation, California sought to reduce HDD vehicle and engine emissions of NO_x, particulate matter and other pollutants. *See* State of California Air

Resources Board, Initial Statement of Reason, May 18, 2018, pp. I-4 and II-1 to II-11 available at: [ISOR HD Warranty \(ca.gov\)](https://www.ca.gov/ISOR/HD-Warranty).

35. EPA issued a CAA section 209(b) waiver for California's Warranty Regulation on April 6, 2023 (88 Fed. Reg. 20688).

36. The Warranty Regulation was incorporated by reference by operation of law into the Pennsylvania HDD Regulation at 25 Pa. Code § 126.521.

37. In 2021, DEP issued a public notice announcing that it was suspending enforcement of the Pennsylvania HDD Regulation, explaining that DEP would not take enforcement action against the manufacturers and dealers of new HDD vehicles and engines sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in the Commonwealth that did not meet the California HDD Regulation requirements. The suspension allowed new HDD vehicles and engines subject to that regulation that did not meet the requirements of the California HDD Regulation to be sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in Pennsylvania beginning with MY 2022. 51 Pa. Bull. 7000 (November 6, 2021).

38. In December 2021 California adopted a rulemaking entitled "Heavy-Duty Engine and Vehicle Omnibus Regulation and Associated Amendments." ("Emissions Regulation") The Emissions Regulation established emission standards for 2024 and subsequent MY HDD engines and vehicles and became effective in

California. *See* Heavy-Duty Omnibus Regulation at: [Heavy-Duty Omnibus Regulation | California Air Resources Board](#)

39. Through these California HDD Regulation amendments, California sought to reduce NO_x, PM and other emissions from new HDD engines and vehicles to attain the NAAQS. *See* State of California Air Resources Board, Initial Statement of Reason, May 18, 2018, pp. II-1 to II-3 available at: [HD Omnibus ISOR: Revised on 7-9-2020 for Errata \(ca.gov\)](#) The Emissions Regulation was incorporated by reference into various applicable sections of the Pennsylvania HDD Regulation.

40. California has applied to EPA for a CAA section 209(b) waiver for the Emissions Regulation. EPA has taken no action on California's waiver request at the time of the filing of the Truck Association's Petition.

41. In 2023, DEP issued another public notice announcing suspension of enforcement of the Pennsylvania HDD Regulation. 53 Pa. Bull. 3166 (June 10, 2023) ("current suspension"). The current suspension of enforcement superseded the previous November 6, 2021 suspension notice.

42. Like the previous suspension, the current suspension means that DEP will not take enforcement action against manufacturers and dealers of new HDD vehicles and engines sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in the Commonwealth that do not meet the California HDD Regulation requirements. The current suspension allows new HDD

vehicles and engines subject to the Pennsylvania HDD Regulation that have not met the requirements of the California HDD to be sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in this Commonwealth during the suspension period beginning with MY 2022 and ending with MY 2026.

III. PRELIMINARY OBJECTIONS

FIRST PRELIMINARY OBJECTION - TRUCK ASSOCIATION LACKS THE CAPACITY TO SUE (STANDING AND RIPENESS - CLAIMS I-VII)

43. The Agencies hereby incorporate by reference the preceding paragraphs, as if more fully set forth herein.

44. Preliminary objections challenging the sufficiency of a pleading are available under Pa. R.C.P. 1028(a)(4). In addition, preliminary objections raising a lack of capacity to sue are available under Pa. R.C.P. 1028(a)(5).

45. It is well established that for a party to have standing to challenge a final agency action, the party must be aggrieved. *South Whitehall Twp. Police Service v. South Whitehall Twp.*, 555 A.2d 793, 795 (Pa. 1989) (quoting *Franklin Twp. v. Dept. of Env'tl Res.*, 452 A.2d 718, 719 (Pa. 1982)).

46. "The core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution to his challenge." *Penn Parking Garage Inc., v. City of Pittsburgh*, 346 A.2d 269, 280-281 (Pa. 1975).

47. The Pennsylvania Supreme Court has stated the following regarding standing and ripeness: “[T]here is considerable overlap between the two doctrines, especially where the objecting party's claim that the matter is not justiciable is focused on arguments that the interest asserted by the petitioner is speculative, not concrete, or would require the court to offer an advisory opinion.” *Yocum v. Pa. Gaming Control Bd.*, 161 A.3d 228, 234 (Pa. 2017).

48. DEP announced that, beginning November 8, 2021, prior to EPA’s grant of a CAA section 209(b) waiver to California for the Warranty Regulation, the Department would suspend enforcement of 25 Pa. Code Chapter 126, Subchapter E (relating to Pennsylvania Heavy-Duty Diesel Emissions Control Program) commencing with MY 2022. 51 Pa. Bull. 7000 (November 6, 2021).

49. Subsequently, DEP announced a superseding suspension of enforcement of the Pennsylvania HDD Regulation, 25 Pa. Code Chapter 126, Subchapter E (relating to Pennsylvania Heavy-Duty Diesel Emissions Control Program) until January 2, 2026. 53 Pa. Bull. 3166 (June 10, 2023). This notice suspended the Department’s enforcement of the Pennsylvania HDD Regulation for MY 2022 through MY 2026.

Warranty Regulation Not Effective

50. Because of the suspension of enforcement of the Pennsylvania HDD Regulation for MY 2022 through MY 2026 the California Warranty Regulation that

the Truck Association objects to in the Petition is not effective in Pennsylvania. Accordingly, the Truck Association is not aggrieved and has no standing to challenge the Pennsylvania HDD Regulation.

51. To the extent that the Truck Association asserts that this suspension of enforcement does not protect it from any third-party action, this assertion is speculative. No third party has taken any action to enforce the Warranty Regulation in Pennsylvania. The Truck Association cannot claim standing on speculation.

52. The Truck Association's Petition is not ripe for review because the Department has suspended enforcement of the Pennsylvania HDD Regulation for MY 2022 through MY 2026, and any opinion offered by this Court regarding the Warranty Regulation would be advisory.

Emissions Regulation Not Effective

53. Furthermore, as of the date of Truck Association's filing of the Petition, California has not been granted a waiver by EPA under section 209(b) of the CAA, 42 U.S.C. § 7543(b), to implement and enforce the Emissions Regulation.

54. Neither California nor any other state can enforce the Emissions Regulation unless and until EPA grants a waiver for the Emissions Regulation. *See MVMA v. NYSDEC*, 17 F. 3d 521, 534 (2d Cir 1994) (though a state may adopt a California vehicle emission standard regulation, the regulation cannot be enforced unless and until EPA grants a waiver).

55. Because EPA has not granted a waiver to California for the Emissions Regulation that the Truck Association objects to in the Petition, the Truck Association is not aggrieved and lacks standing to challenge the Pennsylvania HDD Regulation.

56. The Truck Association's Petition is not ripe for review because EPA has not granted a waiver to California for the Emissions Regulation that the Truck Association objects to in the Petition, and any opinion offered by this Court regarding the Emissions Regulation would be advisory.

57. Even assuming *arguendo*, that EPA issued a waiver for the Emissions Regulation, the Truck Association would still lack standing, and its challenge to the Emissions Regulation would not be ripe, because Pennsylvania has suspended enforcement of the Pennsylvania HDD Regulation for MY 2022 through MY 2026.

58. No enforcement of either the California Warranty Regulation or Emissions Regulation by DEP has occurred or can occur because of the suspension of Pennsylvania HDD Regulation enforcement and EPA's inaction on California's CAA section 209(b) waiver request for the Emissions Regulation. So, the Truck Association lacks standing and its Petition is not ripe for review.

59. WHEREFORE, the Truck Association lacks the capacity to sue, Claims I-VII should be dismissed, and the Agencies' Preliminary Objections should be sustained.

**SECOND PRELIMINARY OBJECTION -
LACK OF SUBJECT MATTER JURISDICTION OVER
TRUCK ASSOCIATION CLAIMS
(RIPENESS – CLAIMS I-VII)**

60. The Agencies hereby incorporate by reference the preceding paragraphs, as if more fully set forth herein.

61. Preliminary objections challenging the lack of subject matter jurisdiction over a claim are available under Pa. R.C.P. 1028(a)(1).

62. EQB acted pursuant to its authority under sections 5(a)(1) and (7) of the APCA to promulgate the Final Pennsylvania HDD Regulation to contribute to attainment and maintenance of the ozone NAAQS. 32 Pa. Bull. 2327, 2329 and 2333.

63. Section 4.2 of the APCA, 35 P.S. § 4004.2, applies to EQB actions to implement the NAAQS (Section 109 of the CAA) to impose requirements to achieve and maintain NAAQS using measures authorized or required by the APCA or CAA.

64. Section 4.2(e) of the APCA provides, “No person may file a pre-enforcement challenge under this section based in any manner upon the standards set forth in subsection (b) of this section [35 P.S. § 4004.2].” 35 P.S. § 4004.2(e).

65. DEP has not enforced the California Warranty Regulation or Emissions Regulation under the Pennsylvania HDD Regulation because the Commonwealth has suspended enforcement of the Pennsylvania HDD Regulation (25 Pa. Code Chapter 126, Subchapter E) for MY 2022 through MY 2026.

66. Further, DEP could not enforce the Emissions Regulation in Pennsylvania under the Pennsylvania HDD Regulation because EPA has not granted a waiver for the California Emissions Regulation.

67. The Truck Association acknowledges DEP's suspensions of enforcement of the Pennsylvania HDD Regulation. Petition ¶ 51. The Truck Association does not assert that DEP has enforced the Pennsylvania HDD Regulations against it or anyone else.

68. Accordingly, the Petition is a pre-enforcement challenge to the adoption of the California Warranty Regulation and Emissions Regulation in Pennsylvania under the Pennsylvania HDD Regulation.

69. Pursuant to section 4.2(e) of the APCA, 35 P.S. § 4004.2(e), this Court lacks subject matter jurisdiction to entertain a pre-enforcement challenge to the adoption of the California Warranty Regulation or Emissions Regulation under the Pennsylvania HDD Regulation (25 Pa. Code Chapter 126, Subchapter E).

70. WHEREFORE, this Court lacks subject matter jurisdiction over the Truck Association's Petition, Claims I-VII should be dismissed, and the Agencies' Preliminary Objections should be sustained.

**THIRD PRELIMINARY OBJECTION -
TRUCK ASSOCIATION HAS FAILED TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED
(CLAIM I)**

71. The Agencies hereby incorporate by reference the preceding paragraphs, as if more fully set forth herein.

72. In Claim I, the Truck Association claims that the Pennsylvania HDD Regulation is *ultra vires* because Pennsylvania lacked the authority to adopt the Pennsylvania HDD Regulation, 25 Pa. Code Chapter 126, Subchapter E.

73. Preliminary objections challenging the sufficiency of a pleading are available under Pa. R.C.P. 1028(a)(4).

74. Section 5(a)(1) of the APCA grants the EQB broad regulatory authority “for the prevention, control, reduction, and abatement of air pollution.” 35 P.S. § 4005(a)(1).

75. Section 5(a)(7) of the APCA also grants the EQB regulatory authority to “adopt rules and regulations designed to reduce emissions from motor vehicles.” 35 P.S. § 4005(a)(7).

76. Moreover, Section 5(a)(8) of the APCA grants the EQB regulatory authority to “adopt rules and regulations to implement the provisions of the [CAA]. The rules and regulations adopted to implement the provisions of the [CAA] shall be consistent with the requirements of the [CAA] and the regulations adopted thereunder.” 35 P.S. § 4005(a)(8).

77. Section 209(b) of the CAA grants the State of California the authority to establish its own emission standards for new motor vehicles or new motor vehicle engines and accompanying enforcement procedures, if EPA grants a waiver for those emission standards and accompanying enforcement procedures after determining that those California standards and procedures are not inconsistent with the standards established under section 202(a). 42 U.S.C. § 7543(b).

78. Section 177 of the CAA allows other States with nonattainment plan provisions under CAA Title I, Part D, approved by EPA, to adopt “such standards [if they] are identical to the California standards for which a waiver has been granted” 42 U.S.C. § 7507(1). *See Motor and Equipment Mfrs. Ass'n, Inc. v. U.S. EPA*, 627 F.2d 1095, 1107 (D.C. Cir., 1979).

79. In accordance with the provisions of the APCA and CAA identified above, the EQB adopted the Pennsylvania HDD Regulation, 25 Pa. Code Chapter 126, Subchapter E, to incorporate the California HDD Regulation by reference. *See* 32 Pa. Bull. 2327 (May 11, 2002); *see also* 1 Pa. C.S.A. § 1937(a).

80. Because the EQB’s actions were authorized by both state and federal law, the Truck Association’s claim that the Pennsylvania HDD Regulation is *ultra vires* is without merit.

81. WHEREFORE, the Truck Association has failed to state a claim upon which relief can be granted, Claim I should be dismissed, and the Agencies' Preliminary Objections should be sustained.

**FOURTH PRELIMINARY OBJECTION -
TRUCK ASSOCIATION HAS FAILED TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED
(CLAIM II)**

82. The Agencies hereby incorporate by reference the preceding paragraphs, as if more fully set forth herein.

83. In Claim II, the Truck Association claims that the Pennsylvania HDD Regulation is *ultra vires* because the Agencies failed to consult with the Department of Transportation when developing the Pennsylvania HDD Regulation, 25 Pa. Code Chapter 126, Subchapter E.

84. Preliminary objections challenging the sufficiency of a pleading are available under Pa. R.C.P. 1028(a)(4).

85. Section 5(a)(7) of the APCA grants the EQB regulatory authority to “adopt rules and regulations designed to reduce emissions from motor vehicles.” 35 P.S. § 4005(a)(7).

86. Section 5(a)(7) further provides that “such rules and regulations shall be developed in consultation with the Department of Transportation.” *Id.*

87. Both the Proposed and Final Pennsylvania HDD Regulation were developed in consultation with the Department of Transportation. *See* 31 Pa. Bull. 4958, 4960 (September 1, 2001) and 32 Pa. Bull. 2327, 2329 (May 11, 2002).

88. The APCA does not grant the Department of Transportation any rulemaking authority and the Truck Association has not identified any such rulemaking authority for that department related to the establishment of new vehicle emission standards under the APCA or any other Pennsylvania statute.

89. WHEREFORE, the Truck Association has failed to state a claim upon which relief can be granted, Claim II should be dismissed, and the Agencies' Preliminary Objections should be sustained.

**FIFTH PRELIMINARY OBJECTION -
TRUCK ASSOCIATION HAS FAILED TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED
(CLAIMS III AND IV)**

90. The Agencies hereby incorporate by reference the preceding paragraphs, as if more fully set forth herein.

91. In Claims III and IV, the Truck Association claims that the Pennsylvania HDD Regulation, 25 Pa. Code Chapter 126, Subchapter E, violates the “nondelegation doctrine.”

92. Preliminary objections challenging the sufficiency of a pleading are available under Pa. R.C.P. 1028(a)(4).

93. Under section 5(a)(7) of the APCA, the General Assembly made the basic policy choice that there must be rules in place to reduce motor vehicle emissions and that EQB, the entity with subject-matter expertise, should adopt rules and regulations that realize the General Assembly’s decision “to reduce emissions from motor vehicles.” 35 P.S. § 4005(a)(7).

94. Under section 5(a)(8) the APCA, the General Assembly made an additional policy choice that Pennsylvania should “implement the provisions of the [CAA],” and charged the EQB with the task of adopting rules and regulations that do so. 35 P.S. § 4005(a)(8).

95. Additionally, under the CAA, Congress explicitly authorized States other than California with nonattainment plan provisions under CAA Title I, Part D approved by EPA to adopt “such standards [if they] are identical to the California standards for which a waiver has been granted” 42 U.S.C. § 7507(1).

96. Consistent with those basic policy choices, and within the statutory boundaries established under the APCA and the CAA, the EQB adopted the Pennsylvania HDD Regulation in 2002, incorporating the California HDD Regulation by reference. *See* 32 Pa. Bull. 2327 (May 11, 2002); *see also* 1 Pa. C.S. § 1937(a).

97. Because the EQB’s actions realized the policy choices made by the Pennsylvania General Assembly and Congress in the APCA and CAA, respectively,

the Truck Association's claims that the Pennsylvania HDD Regulation violates the "nondelegation doctrine" are without merit.

98. WHEREFORE, the Truck Association has failed to state a claim upon which relief can be granted, Claims III and IV should be dismissed, and the Agencies' Preliminary Objections should be sustained.

**SIXTH PRELIMINARY OBJECTION -
TRUCK ASSOCIATION HAS FAILED TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED
(CLAIMS V-VII)**

99. The Agencies hereby incorporate by reference the preceding paragraphs, as if more fully set forth herein.

100. In Claims V – VII the Truck Association asserts that the Agencies failed to comply with the Commonwealth Documents Law, 45 P.S. §§ 1201-1208, by failing to solicit public comment on the California Warranty Regulation and Emissions Regulation; violated the Regulatory Review Act, 71 P.S. § 745.5, by failing to submit an analysis to the Independent Regulatory Review Commission considering the impacts of California Warranty Regulation and Emissions Regulation; and failed to comply with 4 Pa. Code § 1.374 by failing to submit a document to the Governor's office asserting that the California Warranty Regulation and Emissions Regulation are needed to address a compelling need.

101. Preliminary objections challenging the sufficiency of a pleading are available under Pa. R.C.P. 1028(a)(4).

102. Both the Proposed and Final Pennsylvania HDD Regulations were promulgated consistent with all applicable Pennsylvania statutes and regulations, including the Commonwealth Documents Law, 45 P.S. §§ 1201-1208. *See* 31 Pa. Bull. 4958, 4960 and 4962 (September 1, 2001), and 32 Pa. Bull. 2327, 2329 and 2333 (May 11, 2002). The Truck Association does not dispute this in its Petition.

103. While both the Proposed and Final Pennsylvania HDD Regulations adopted, and incorporated by reference, certain requirements of the California Exhaust Emission Standards and Test Procedures for 1985 and Subsequent Model Year Heavy-Duty Engines and Vehicles as authorized under section 177 of the CAA, *see e.g., id.*, at 31 Pa. Bull. at 4958 and 32 Pa. Bull. at 2327, Pennsylvania regulations that incorporate external regulations need not undergo a new period of public comment every time the external regulations are revised.

104. Section 1937(a) of the Pennsylvania Statutory Construction Act states,

A reference in a statute to a statute or to a regulation issued by a public body or public officer includes the statute or regulation *with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation*, as in force at the time of application of the provision of the statute in which such reference is made, unless the specific language or the context of the reference in the provision clearly includes only the statute or regulation as in force on the effective date of the statute in which such reference is made.

1 Pa.C.S. § 1937(a) (emphasis added).

105. The Pennsylvania Statutory Construction Act also applies to the construction of regulations. 1 Pa. Code § 1.7; *Highway New, Inc. v. Dept. of Transp.*, 789 A.2d 802, 808 (Pa. Cmwlth. 2002).

106. Accordingly, the Agencies had no obligation to take the steps identified in Claims V-VII of the Truck Association's Petition because amendments to the California HDD Regulations were automatically incorporated into the Pennsylvania HDD Regulation, 25 Pa. Code Chapter 126, Subchapter E, by operation of law.

107. Because the Truck Association does not assert that the promulgation of the Pennsylvania HDD Regulation in 2002 failed to comply with the Commonwealth Documents Law, the Regulatory Review Act and 4 Pa. Code § 1.374 Claims V - VII are without merit.

108. WHEREFORE, the Truck Association has failed to state a claim upon which relief can be granted, Claims V-VII should be dismissed, and the Agencies' Preliminary Objections should be sustained.

**SEVENTH PRELIMINARY OBJECTION -
TRUCK ASSOCIATION HAS FAILED TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED
(CLAIM VI)**

109. Agencies hereby incorporate by reference the preceding paragraphs, as if more fully set forth herein.

110. In Claim VI, the Truck Association asserts that the Agencies failed to comply with the Regulatory Review Act, 71 P.S. § 745.5, by submitting an analysis

considering the impacts of California Warranty Regulation and Emissions Regulation.

111. Preliminary objections challenging the sufficiency of a pleading are available under Pa. R.C.P. 1028(a)(4).

112. As a matter of law, there is no cause of action under the Regulatory Review Act. Section 2(d) of the Regulatory Review Act states that “this act is not intended to create a right or benefit, substantive or procedural, enforceable at law by a person against another person or against the Commonwealth, its agencies or its officers.” 71 P.S. § 745.2(d).

113. This Court, relying on the limitation in section 2(d) of the Regulatory Review Act, has found that a party may not challenge the validity of a regulation based on the sufficiency of the information submitted to the Independent Regulatory Review Commission. *Marcellus Shale Coalition v. Dep’t of Env’t Prot.*, 193 A.3d 447, 468 (Pa. Cmwlth. 2018).

114. Likewise, this Court has determined that a disagreement with the information in an agency’s Regulatory Analysis Form is not, alone, a valid basis to set aside a regulation. *Marcellus Shale Coalition v. Dept. of Env’tl. Prot.*, 216 A.3d 448, 493 (Pa. Cmwlth. 2019). It is IRRC’s role to weigh the contents of a Regulatory Analysis Form and settle any disagreements related to the analysis. *Id.*

115. WHEREFORE, the Truck Association has failed to state a claim upon which relief can be granted, Claim VI should be dismissed, and the Agencies' Preliminary Objections should be sustained.

**EIGHTH PRELIMINARY OBJECTION -
TRUCK ASSOCIATION HAS FAILED TO EXHAUST ALL
AVAILABLE ADMINISTRATIVE REMEDIES
(CLAIMS I-VII)**

116. The Agencies hereby incorporate by reference the preceding paragraphs, as if more fully set forth herein.

117. Preliminary objections asserting failure to exhaust an administrative remedy are available under Pa. R.C.P. 1028(a)(7).

118. "It is well settled that this court must refrain from exercising its original equitable jurisdiction to review an allegedly invalid regulation when there exists an adequate statutory remedy and review process." *Duquesne Light Co., Inc. v. Dept. of Env'tl. Prot.*, 724 A.2d 413, 420 (Pa. Cmwlth. 1999) (citing *Concerned Citizens of Chestnuthill Twp. v. Dept. of Env'tl. Res.*, 632 A.2d 1, 2-3 (Pa. Cmwlth. 1993), appeal denied, 642 A.2d 488 (1994)).

119. Under the doctrine of exhaustion of administrative remedies, a party must exhaust all available administrative remedies before the right of judicial review arises. *See The Marsteller Community Water Auth. v. Dept. of Env'tl. Res.*, 519 A.2d 1112 (Pa. Cmwlth. 1987) (where it is well settled that a party is precluded from

seeking judicial review of an administrative decision without first exhausting available administrative remedies.)

120. The Truck Association had an administrative remedy available other than challenging the Pennsylvania HDD Regulation, 25 Pa. Code Chapter 126, Subchapter E.

121. The Truck Association should have filed a petition with the EQB pursuant to section 35.18 of the General Rules of Administrative Practice and Procedure, which provides:

A petition to an agency for the issuance, amendment, waiver or repeal of a regulation shall set forth clearly and concisely the interest of the Petitioner in the subject matter, the specific regulation, amendment, waiver or repeal requested, and shall cite by appropriate reference the statutory provision or other authority therefor. The petition shall set forth the purpose of, and the facts claimed to constitute the grounds requiring, the regulation, amendment, waiver or repeal. Petitions for the issuance or amendment of a regulation shall incorporate the proposed regulation or amendment.

1 Pa. Code § 35.18

122. If successful, an action brought by the Truck Association in accordance with the above cited section would result in the amendment or repeal of the challenged Pennsylvania HDD Regulation, the same result that the Truck Association now seeks through its Petition.

123. If the Truck Association chose not to seek redress before the EQB directly, it has an alternative remedy under the Regulatory Review Act. Section 8.1 of the Regulatory Review Act provides:

The [Independent Regulatory Review Commission], either on its own motion or on the request of any individual, agency, corporation, member of the general assembly or any other entity which may be affected by a regulation, may also review any existing regulation or administrative procedure.... The commission may submit recommendations to any agency recommending any changes in existing regulations where it finds the existing regulations or administrative procedure to be contrary to the public interest under the criteria established in this section.

71 P.S. § 745.8a.

124. A party challenging administrative decision-making that has not exhausted its administrative remedies is precluded from obtaining judicial review by mandamus or otherwise. *Petsinger v. Dept of Labor & Industry*, 988 A.2d 748, 754 (Pa. Cmwlth. 2010) (citing *Matesic v. Maleski*, 624 A.2d 776 (Pa. Cmwlth. 1993) and *Mueller v. Pa. State Police Headquarters*, 532 A.2d 900 (Pa. Cmwlth. 1987)).

125. WHEREFORE, because the Truck Association has failed to exhaust all available administrative remedies, Claims I-VII should be dismissed, and the Agencies' Preliminary Objections should be sustained.

V. CONCLUSION

For the reasons stated above, the Agencies respectfully requests that this Court sustain the Agencies' Preliminary Objections and dismiss the Truck Association's Petition for Review in its entirety, with prejudice.

Respectfully Submitted,

**FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION:**

/s/ Jesse C. Walker

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717-787-7060

Date: July 17, 2023

CONFIDENTIAL AND PRIVILEGED – DRAFT – 7/13/23

VERIFICATION

I, Chris Trostle, Chief of the Mobile Sources Section, Bureau of Air Quality, Department of Environmental Protection, hereby state that I am authorized to execute this Verification on its behalf, and that the averments of fact contained in the foregoing Preliminary Objections as those facts have been made known to me, are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).


Chris Trostle

July 14, 2023

CERTIFICATE OF SERVICE

I, Jesse C. Walker, hereby certify that on July 17, 2023, I caused to be served a true and correct copy of the foregoing Respondents' Preliminary Objections to the following persons via the Court's electronic filing system:

Respectfully Submitted,

**FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION:**

/s/ Jesse C. Walker

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Harrisburg, PA 17105-8464
717-787-7060

Date: July 17, 2023

CERTIFICATE OF CONFIDENTIALITY COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully Submitted,

**FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION:**

/s/ Jesse C. Walker

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Department of Environmental Protection
P.O. Box 8464
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717-787-7060

Date: July 17, 2023

APPENDIX C

identification number will be assigned a temporary Pennsylvania number until the Federal employer identification number is obtained, at which time the Department shall be notified. If an employer has multiple divisions using the same Pennsylvania employer identification number but remitting and reconciling withholding tax separately, the employer shall request a separate Pennsylvania number for each division.

§ 113.3b. Registration.

Every employer having an office or transacting business within this Commonwealth and making payment of wages for the first time to one or more nonresident individuals performing services on behalf of the employer within this Commonwealth or to one or more resident individuals shall, within 10 business days of the payment, register with the Department by completing and filing the form prescribed by instructions of the Department.

§ 113.4. Time and place for filing reconciliation and withholding statements.

(a) An employer shall submit a wage and tax withholding statement to each of his [employees] employees on or before January 31 following the year of payment of compensation, or within 30 days from the date of the last payment of compensation if employment or the business is terminated.

(1) An employer shall use the combined Federal-State Wage and Tax Withholding Statement (Form W-2) issued by the Internal Revenue Service or one that conforms thereto with the [name] word "Commonwealth" printed, stamped[,] or typed thereon.

[(i)] The statement shall show the name of employer, address and identification number of the employer; the name, address and Social Security number of [employee] the employee; the total compensation paid during the taxable year; and the total amount of Pennsylvania tax withheld during the taxable year.

[(ii)] For the year 1971, the employer shall also show on Form W-2 the actual compensation paid, for example, on and after June 1, 1971, through December 31, 1971, or, in the alternative, actual compensation paid for the period July 1, 1971, through December 31, 1971, plus, 1/3 of the calendar quarter July 1, 1971, to September 30, 1971.]

* * * * *

[(3)] With prior approval of the director of the Commonwealth Personal Income Tax Bureau, an employer or his agent may be permitted to submit a magnetic tape or computer printed listing in lieu of copies of Form W-2.]

(b) A completed Reconciliation Statement (Return Form [RIT-W-3] PA-W3), reconciling Personal Income Tax withheld with related quarterly withholding returns and deposit and [employee] employee withholding statements shall be submitted by the following:

* * * * *

(c) Reconciliation Statements (Form [RIT-W-3] PA-W3), with accompanying withholding statements (Form W-2) for each [employee] employee shall be forwarded via first class mail with sufficient postage [to Department of Revenue, Personal Income Tax Bureau,

Harrisburg, Pennsylvania 17129] or electronic or magnetic media as specified in instructions of the Department to the Department. [If an employer has a large number of Form W-2's to be forwarded, he may use as many packages as are conveniently necessary which shall be numbered consecutively and contain the name of the employer and identification number thereon. If more than one package is forwarded, Form RIT-W-3 shall be placed in the package numbered one.] If an employer is required to file 250 or more withholding statements, the reconciliation statement, with accompanying withholding statements shall be forwarded by means of electronic or magnetic media as specified in the instructions of the Department.

CHAPTER 121. FINAL RETURNS

§ 121.16. [Form W-2] (Reserved).

[This form is a receipt for the taxes withheld from the salary of an employee. It shall accompany his return Form PA-40 as evidence of taxes withheld. If an employee works for more than one employer during the year, he shall usually have more than one Form W-2. A copy of each Form W-2 shall accompany his return. If a person is unable to furnish his Form W-2, a statement shall be attached to the return explaining the reason.]

[Pa.B. Doc. No. 01-1599. Filed for public inspection August 31, 2001, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 121 AND 126]

Heavy-Duty Diesel Emissions Control Program

The Environmental Quality Board (Board) proposes to amend Chapters 121 and 126 (relating to general provisions; and standards for motor fuels) to read as set forth in Annex A.

The proposed rulemaking establishes a new heavy-duty diesel emissions control program designed to primarily reduce emissions of carbon monoxide (CO), oxides of nitrogen (NOx), volatile organic compounds (VOCs), particulate matter (PM) and air toxics from new heavy-duty diesel engines and trucks. The proposed amendments adopt and incorporate by reference certain requirements of the California Exhaust Emission Standards and Test Procedures for 1985 and Subsequent Model Year Heavy-Duty Engines and Vehicles as authorized under section 177 of the Clean Air Act (42 U.S.C.A. § 7507) (CAA).

This proposal was adopted by the Board at its meeting of July 17, 2001.

A. Effective Date

These proposed amendments will be effective immediately upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information, contact Arleen Shulman, Chief, Mobile Sources Section, Division of Air Resource Management, Bureau of Air Quality, Rachel Carson State Office

Building, 12th Floor, P.O. Box 8468, Harrisburg, PA 17105-8468, (717) 787-9495, or Robert A. Reiley, Assistant Counsel, Bureau of Regulatory Counsel, Office of Chief Counsel, Rachel Carson State Office Building, 9th Floor, P.O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060.

C. Statutory Authority

The proposed rulemaking is being made under the authority of section 5(a)(1) of the Air Pollution Control Act (act) (35 P.S. § 4005(a)(1)), which grants the Board the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth. The Board is also expressly authorized by section 5(a)(7) of the act to adopt regulations designed to reduce emissions from motor vehicles.

D. Background and Purpose.

Heavy-duty diesel (HDD) engines and vehicles contribute greatly to a number of serious health and welfare problems. First, they emit pollutants like PM, sulfur oxides (SOx), toxic compounds, such as formaldehyde, and ozone precursors, such as NOx and VOCs, whose documented adverse health effects include premature mortality, aggravation of respiratory and cardiovascular disease, changes in lung function and increased respiratory symptoms, changes to lung tissues and structures, altered respiratory defense mechanisms, chronic bronchitis and decreased lung function. Second, ozone pollution causes crop and forestry losses, and PM causes damage to materials and soiling of commonly used building materials and culturally important items such as statues and works of art. Third, NOx, SOx and PM contribute to visibility impairment. Fourth, NOx emissions from HDD vehicles contribute to the acidification, nitrification and eutrophication of water bodies. Fifth, the United States Environmental Protection Agency (EPA) has concluded that diesel exhaust is likely to be carcinogenic to humans. Finally, while vehicles powered by HDD engines account for about only 1% of all motor vehicles and equipment, they are responsible for nearly a quarter of NOx emissions.

Emissions from HDD engines and vehicles account for a substantial portion of ambient PM and ground-level ozone levels. These proportions are higher in some urban areas. Urban areas, which include many poorer neighborhoods, can be disproportionately impacted by HDD vehicle emissions because of heavy traffic in densely populated urban areas.

In addition, due to its location in the Northeast, this Commonwealth is a conduit for a large amount of truck traffic. If this rulemaking is not adopted, this Commonwealth can expect an additional 12.5 tons of NOx emissions per average summer day in 2006 Statewide from the trucks manufactured in 2005 and 2006. In the five-county Philadelphia area alone, model year 2005 and 2006 trucks are expected to emit an additional 2 tons of NOx per average summer day in 2006 without these additional controls.

HDD engines and vehicles have not been subject to many environmental regulations since passage of the Clean Air Act in 1970. The EPA's regulation of HDD engines and vehicles did not begin until 1984, when the agency adopted a 10.7 grams/brake horsepower-hour (g/bhp-hr) NOx standard. The EPA's NOx emissions standards for 1998 to 2003 model year HDD engines are 4 g/bhp-hr. The EPA currently requires testing of the engine (with emission control systems in place) rather than the entire vehicle. Thus the standards are expressed in units

of g/bhp-hr (that is, grams of emission per unit of work the engine performs over a period of time), rather than the grams per mile unit used for testing passenger cars and light-duty trucks.

Before being offered for sale, new engines must be certified to compliance with Federal emissions standards. Engines are tested for certification using an engine dynamometer. The performance test cycle or cycles for determining compliance with numerical standards plays an important part in determining the stringency of the existing standards. It is the performance test that serves as the basis for determining this compliance.

Currently, the EPA only tests engines with the Federal test procedure (FTP) to determine compliance with the HDD engine standards. The FTP, however, only represents a small portion of "real world" driving conditions. For example, the FTP does not include elevated high temperatures and highway cruise patterns. It is therefore inadequate in testing emissions under these conditions.

Several years ago, the United States Department of Justice, the EPA and the California Air Resources Board (CARB) brought major enforcement actions alleging that seven of the largest HDD engine and vehicle manufacturers (representing approximately 60% of HDD engine sales) violated Federal and California engine certification regulations by "defeating" or turning off diesel emission control devices during in-use highway driving. The manufacturers employed "defeat devices" in the HDD engines for model years 1988 through 1998. With these defeat devices, emission controls typically were turned off during cruising conditions to save fuel. This allowed NOx emissions as high as three times the emission standard. It is estimated that in 1998 alone, the "defeat devices" caused approximately 1.3 million tons of excess NOx emissions Nationally.

The Federal government and the seven HDD engine and vehicle manufacturers resolved the cases through settlement agreements. In 1998, they entered into judicial consent decrees (binding settlement orders) that imposed substantial penalties upon the seven manufacturers and required them to achieve additional emission reductions.

In the consent decrees, the settling manufacturers are required, among other things, to produce HDD engines and vehicles that comply with prescribed emission standards that are lower than those required in current California and Federal regulations, as measured by the FTP. Specifically, these engines must meet a 2.5 g/bhp-hr standard for nonmethane hydrocarbons (NMHC) plus NOx emissions no later than October 1, 2002. This will require production of new engines that are approximately 50% cleaner than current engines.

The majority of these settling engine manufacturers (Caterpillar, Cummins, Detroit Diesel, Mack Trucks, Renault (RVI) and Volvo Trucks) have also agreed to produce HDD engines by October 1, 2002, that meet supplemental certification test procedures. Together with the FTP test, the supplemental test procedures will require control of emissions during the majority of real world operating conditions, insuring that in the future "defeat devices" will no longer be employed. This will result in significant additional emission reductions of NOx and other pollutants during "real world" conditions. These supplemental test procedures are designed to make up for the deficiencies of the FTP.

The California rules require manufacturers to perform supplemental test procedures, in addition to the existing FTP. The two components of the supplemental test are

known as the Not To Exceed (NTE) test and the EURO III European Stationary Cycle (ESC) test. The ESC test also has associate requirements known as maximum achievable emission limits (MAEL).

The NTE test procedure can be run in a vehicle on the road or in an emissions testing laboratory using an appropriate dynamometer. The vehicle or engine is operated under conditions that may reasonably be expected in normal vehicle operation and use, including operation under steady-state or transient conditions and under varying ambient conditions. Emissions are averaged over a minimum time of 30 seconds and then compared to the applicable emission limits.

The ESC test simulates cruising conditions better than either the FTP or the NTE procedures. This can help prevent excess emissions increasing during highway driving. This test consists of 13 modes of speed and power, primarily covering the typical highway cruise operating range of HDD engines. During each mode of operation, the concentration of the gaseous pollutant is measured and weighted. The weighted average emissions for each pollutant, as calculated by this test, must not be greater than the applicable FTP emission standard.

The MAEL requirements can be considered an adjunct to the ESC test because they are utilized during the 12 nonidle test modes of that test. The MAEL specifications prevent manufacturers from complying with the ESC using computer programs that recognize when the engine is being tested at specific test points, and then recalibrating for better fuel economy (which results in higher emissions) between test points. The MAEL requirements ensure that emissions do not exceed a cap when operating within the nonidle ESC test modes.

Since certifying HDD engines using the NTE and ESC tests produces much higher reductions than the reductions achieved when only the FTP is used, the EPA issued a final rule to adopt these supplemental test procedures for 2004 and subsequent model year HDD engines and vehicles. See, 65 FR 59895 (October 6, 2000). However, due to timing constraints that the Clean Air Act imposes on the EPA under section 202 of the CAA (42 U.S.C.A. § 7521), manufacturers will not be required to comply with the NTE and ESC test procedures until 2007 model year. Therefore, there will be a 2-year gap between the expiration of these test procedures for the settling manufacturers following the 2004 model year and the commencement of the test procedures for model year 2007 under EPA's final rule.

As a result, for two entire model years there may be serious backsliding, that is, diesel exhaust emissions could increase significantly above the previous levels mandated by the consent decrees. For this reason, California decided to fill the gap by requiring compliance with the NTE and ESC test procedures in addition to the FTP test procedure during the 2005 and 2006 model years. Moreover, this regulation will apply to all manufacturers, not just those affected by the consent decrees, who may want to enter the United States HDD engine market to gain an unfair competitive advantage.

A number of states have recognized the benefits of adopting these test procedures to prevent any backsliding attempts by HDD engine and vehicle manufacturers and to maintain improved air quality. These states are anticipated to develop rules similar to those proposed in this Commonwealth. If enough states adopt these test procedures, it could result in a de facto National standard, removing any differences in engines and engine costs among states.

The Commonwealth also recognizes the benefits of adopting these test procedures. It is estimated that an additional 12.5 tons of NOx emissions per average summer day Statewide from trucks manufactured in 2005 and 2006 will be reduced through the adoption of this rule.

The proposed rulemaking establishes a HDD program consistent with the requirements of section 177 of the CAA (42 U.S.C.A. § 7507) and will serve as the framework for the Commonwealth's program to control emissions from new HDD engines and vehicles.

The CAA allows California (and only California) to obtain a waiver of Federal preemption to continue to set its own motor vehicle standards. The CAA was amended in 1977 to allow states to adopt emission standards for motor vehicles if the standards are identical to the California standards and a state adopts the standard at least 2 years before commencement of the model year.

Congress amended section 177 of the CAA in 1990 to prohibit states from taking any action that would have the effect of creating a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards or otherwise create a "third vehicle."

The Commonwealth's proposed HDD emissions control program does not mandate the sale or the use of any special diesel fuel which complies with the specifications adopted by the state of California. The courts have held that a state's failure to adopt California fuel requirements does not violate the section 177 of the CAA requirement that state emission standards be "identical to the California standards for which a waiver has been granted." *Motor Vehicle Manufacturers Association of the United States v. New York State Department of Environmental Conservation*, 177 F. 3d 521 (2d Cir. 1994).

Since HDD engines are engine certified, currently there is no mechanism in California to ensure that either a replacement engine or rebuild complies with requirements at least as stringent as the original engine. However, nonregulatory common practice dictates that when an engine is replaced, it is typically replaced with a newer, lower-emitting engine due to hardware and electronics compatibility concerns. Additionally, modern electronically controlled engines typically operate for more than 500,000 miles (and in many cases more than 1 million miles) before requiring replacements/rebuilds. By the time a typical replacement/rebuild occurs, engines older than the original engines are generally too old to be used or are not available.

Following promulgation of the proposed new HDD emissions control program regulations, amendments to Chapters 121 and 126 will be submitted to the EPA as a revision to the State Implementation Plan (SIP).

Under section 5(a)(7) of the act, the Department consulted with the Department of Transportation during the development of the proposed amendments. The Department also consulted with the Air Quality Technical Advisory Committee (AQTAC) on the proposed rulemaking. On April 27, 2001, the AQTAC recommended that the proposed rulemaking be submitted to the Board for consideration. AQTAC also suggested that the Department continue its aggressive efforts with other states to support uniform Federal standards for HDD vehicles to ensure progress in significantly reducing truck emissions during this decade.

This proposed rulemaking is consistent with the mandate under Executive Order 1996-1. The proposed rulemaking is necessary to achieve and maintain the ambient

air quality standard for ozone and as such is justified as a compelling and articulable State interest as required under the Executive Order.

E. Summary of Regulatory Requirements

This proposal establishes the requirements for the implementation of a new HDD emissions control program. A summary of the proposed rulemaking follows:

Chapter 121. General Provisions

The proposed amendment to § 121.1 (relating to definitions) includes terms and phrases applicable to the New HDD Emissions Control Program. The proposed definitions include the following terms: "heavy-duty diesel engine" and "heavy-duty diesel vehicle."

The proposed rulemaking also amends the definition of "new motor vehicle" or "new light-duty vehicle" to include vehicles subject to the requirements of the HDD Emissions Control Program.

Chapter 126. Motor Vehicle and Fuels Programs

Subchapter E. Pennsylvania Heavy-Duty Diesel Emissions Control Program

The title of Chapter 126 is proposed to be changed from "Standards for Motor Fuels" to "Motor Vehicle and Fuels Programs." Subchapter E contains provisions that establish a new HDD emissions control program in this Commonwealth to reduce the emissions of NO_x, SO_x, PM and air toxics from HDD engines and vehicles under section 177 of the CAA.

Proposed § 126.501 (relating to purpose) establishes a HDD emissions control program consistent with the requirements of section 177 of the CAA. It adopts and incorporates by reference certain provisions of the California exhaust emissions standards and test procedures for 1985 and subsequent model year HDD engines and vehicles. It also provides for certain exemptions from the program.

Proposed § 126.502(a) (relating to general requirements) provides that the Commonwealth's HDD Emission Control Program applies to new model year 2005 and subsequent model year HDD engines and vehicles with a gross vehicle weight rating (GVWR) greater than 14,000 pounds that are sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in this Commonwealth.

As proposed § 126.502(b) adopts and incorporates by reference the California Exhaust Emissions Standards and Test Procedures for 1985 and Subsequent Heavy-Duty Engines and Vehicles to the extent that they pertain to model year 2005 and subsequent model year HDD engines and vehicles with a GVWR of greater than 14,000 pounds.

As proposed, § 126.502(c) adopts and incorporates by reference the California Enforcement of Vehicle Emission Standards and Surveillance Testing under Title 13 *California Code of Regulations* (CCR), Division 3, Chapter 2, Article 1.5, § 2065.

Proposed § 126.503 (relating to emission requirements) provides that a person may not sell, import, deliver, purchase, lease, rent, acquire or receive a model year 2005 and subsequent model year HDD engine or vehicle that is subject to the requirements of this program that has not received a CARB Executive Order for all applicable requirements of Title 13 CCR.

As proposed, § 126.503(b) allows manufacturers the option to include any of the HDD engines or vehicles it

sells in this Commonwealth to participate in the averaging, banking and trading programs as provided under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8.

As proposed, § 126.503(c) allows manufacturers the option to certify any of its HDD engines and vehicles delivered for sale in this Commonwealth to the optional emission standards as provided under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8.

As proposed, § 126.503(d) requires that all new heavy-duty engines and vehicles subject to the requirements of this subject chapter shall possess a valid emissions control label which meets the requirements of Title 13, CCR, Division 3, Chapter 1, § 1965.

Proposed § 126.504 (relating to exemptions) provides that the following are exempt from the HDD Emissions Control Program in this Commonwealth: emergency vehicles; an HDD engine or vehicle transferred by a dealer to another dealer; an HDD vehicle transferred for use exclusively off highway; an HDD vehicle granted a National security or testing exemption under section 203(b)(1) of the CAA (42 U.S.C.A. § 7522(b)); an HDD vehicle defined as a military tactical vehicle or engine under Title 13, CCR, Division 3, Chapter 1, Article 1, § 1905; a HDD vehicle sold after the effective date of the final rule if it was registered in this Commonwealth before the effective date of the final-form rulemaking; an HDD engine or vehicle for the model years 2005 and 2006 manufactured by an ultra-small volume manufacturer as defined under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1976(f)(2); an urban bus as defined under Title 13, CCR, Division 3, Chapter 1, Article 2, § 1956.2(b)(4) for model years 2005 and 2006; and an HDD engine that following a technology review, CARB determines it to be inappropriate to require compliance with the emissions standards under § 1956.8 for that particular model year.

Proposed § 126.511 (relating to new engine and vehicle certification testing) requires that prior to being offered for sale or lease in this Commonwealth, new HDD engines and vehicles shall be certified as meeting the motor vehicle requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8.

Proposed § 126.512 (relating to new engine and vehicle compliance testing) requires that prior to being offered for sale or lease in this Commonwealth, new HDD engines and vehicles shall be certified as meeting the HDD engine and vehicle requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8 as determined by Title 13 CCR, Chapter 2, Article 2, §§ 2101—2110.

Proposed § 126.513 (relating to assembly line testing) provides that each manufacturer of new HDD engines and vehicles subject to the Commonwealth's HDD Emission Control Program shall conduct assembly line testing in accordance with Title 13 CCR, Chapter 2, Article 1.

Proposed § 126.514 (relating to in-use engine and vehicle enforcement testing) provides that for the purposes of detection and repair of engines and vehicles that fail to meet the emission requirements of the program, the Department may, after consultation with CARB, conduct in-use vehicle enforcement testing in accordance with the protocol and testing procedures under Title 13 CCR, Division 3, Chapter 2, Article 2.3, §§ 2136—2140.

Proposed § 126.515 (relating to in-use surveillance testing) provides that the Department may conduct in-use surveillance testing after consultation with CARB.

Proposed § 126.521 (relating to warranty and recall) provides that manufacturers of new HDD engines and

vehicles shall warrant to the owner that each engine or vehicle complies over its period of warranty coverage with the requirements of Title 13 CCR, Division 3, Chapter 1, Article 6, §§ 2036 and 2039—2041.

As proposed under § 126.521(b), each manufacturer shall submit to the Department failure of emission-related component reports for engines and vehicles subject to the program.

As proposed under § 126.521(c), any voluntary or influenced-related recall programs initiated by an HDD engine or vehicle manufacturer shall extend to all new HDD engines or vehicles in this Commonwealth.

As proposed under § 126.521(d), any in-use vehicle ordered recalls under Title 13 CCR, Division 3, Chapter 2, Article 2.2, §§ 2122—2135 shall extend to all new HDD engines and vehicles sold, leased or offered for sale or lease in this Commonwealth.

Proposed § 126.522 (relating to reporting requirements) provides that each manufacturer shall submit annually to the Department a report documenting the total deliveries for sale of HDD engines and vehicles for each engine family of that model year in this Commonwealth.

As proposed under § 126.522(b), each HDD engine and vehicle manufacturer shall submit annually to the Department a report of all of its HDD engines or vehicles delivered for sale that were included in any of the emissions averaging, banking and trading programs for heavy-duty diesel vehicles within the requirements of Title 13 CCR, Division 3, Chapter 1, § 1965.

Proposed § 126.531 (relating to responsibilities of heavy-duty diesel highway vehicle dealers) provides that a dealer must convey to the owner of a new HDD engine or vehicle subject to the requirements of this subchapter a valid emission control label which meets the requirements of Title 13 CCR, Division 3, Chapter 1, § 1965.

As proposed, § 126.531(b) a dealer may not sell, offer for sale or lease, or deliver a new HDD engine or vehicle subject of this subchapter unless the engine or vehicle conforms to the standards and requirements under Title 13 CCR, Division 3, Chapter 2, Article 3, § 2151.

As proposed under § 126.531(c) a dealer who imports, sells, delivers, leases or rents any HDD engines or vehicles subject to this subchapter shall retain records concerning the transaction for at least 3 years following the transaction.

F. Benefits and Costs

Executive Order 1996-1 requires a cost/benefit analysis of the proposed amendments.

Benefits. The new HDD engine and vehicle emissions control program will contribute to the attainment and maintenance of the ozone health-based standard in this Commonwealth due to emission reductions from the operation of lower-emitting HDD vehicles. Modeling data from the Philadelphia area indicates that daily emissions of NO_x will be reduced by 2 tons per average summer day and 12.5 tons per average summer day Statewide from trucks manufactured in 2005 and 2006 that are subject to the requirements of this program. In addition, it is anticipated that the health of the citizens of this Commonwealth will benefit from these reductions as well as through reduced exposure of air toxics, NO_x and other air pollutants, which place people's health at risk.

Compliance Costs. The primary cost to the trucking industry will be incurred when purchasing a new truck or engine. In 2005, this regulation could increase the aver-

age cost of an engine, which has a useful life of 15 to 20 years, by as much as \$800 and increase operating costs by up to \$9 per year. Because it is difficult to separate the incremental cost of the supplemental tests from other aspects of complying with Federal and California standards, the actual cost is anticipated to be much lower.

Compliance Assistance Plan. Compliance assistance will be provided to affected parties, primarily automobile dealers, by distributing pamphlets and conducting public meetings and workshops to explain the proposed regulatory requirements. The Department will involve appropriate State trade organizations in the distribution of information to their membership. Information concerning the program will also be provided to affected consumers.

Paperwork Requirements. HDD engine and vehicle manufacturers will be required to submit paperwork demonstrating compliance with the emissions standards and other requirements of the Commonwealth's HDD emissions control program. HDD engine and vehicle dealers, leasing and rental agencies, and purchasers of HDD engines and vehicles must demonstrate to the Department that new vehicles subject to the proposed amendments meet the emissions standards.

G. Sunset Review

The proposed amendments will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the amendments effectively fulfill the goals for which they were intended.

H. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of the proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Department. A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed amendments, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for the Department, the Governor and the General Assembly to review these objections before final publication of the regulations.

I. Public Comments.

Written Comments. Interested persons are invited to submit comments, suggestions or objections regarding the proposed amendments to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 15th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by November 9, 2001. Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by November 9, 2001. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

Electronic Comments. Comments may be submitted electronically to the Board at RegComments@state.pa.us.

A subject heading of the proposal and return name and address must be included in each transmission. Comments submitted electronically must also be received by the Board by November 9, 2001.

I. Public Hearings.

The Board will hold three public hearings for the purpose of accepting comments on this proposal. The hearings will be held at 1 p.m. on the following dates and at the following locations:

- | | |
|------------------|---|
| October 1, 2001 | Department of Environmental Protection
Southcentral Regional Office
909 Elmerton Avenue
Harrisburg, PA |
| October 4, 2001 | Department of Environmental Protection
Southeast Regional Office
Suite 6010, Lee Park, 555 North Lane
Conshohocken, PA |
| October 10, 2001 | Department of Environmental Protection
Southwest Regional Office
500 Waterfront Drive
Pittsburgh, PA |

Persons wishing to present testimony at a hearing are requested to contact Debra Sailor at the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477, (717) 787-4526, at least 1 week in advance of the hearing to reserve a time to present testimony. Oral testimony is limited to 10 minutes for each witness. Witnesses are requested to submit three written copies of their oral testimony to the hearing chairperson at the hearing. Organizations are limited to designating one witness to present testimony on their behalf at each hearing.

Persons with a disability who wish to attend the hearing and require an auxiliary aide, service or other accommodation to participate should contact Debra Sailor at (717) 787-4526, or through the Pennsylvania AT&T Relay Service at (800) 654-5984 (TDD) to discuss how the Department may accommodate their needs.

DAVID E. HESS,
Chairperson

Fiscal Note: 7-365. No fiscal impact; (8) recommends adoption.

There will be some costs to departments to comply with this regulation. Total estimated cost to comply with the regulation for 2003-04 is \$92,531, for 2004-05 is \$191,124 and for 2005-06 is \$100,417. These costs will be shared by the Department of Transportation, Turnpike Commission, Fish and Boat Commission and Game Commission.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE III. AIR RESOURCES

CHAPTER 121. GENERAL PROVISIONS

§ 121.1. Definitions.

The definitions in section 3 of the act (35 P. S. § 4003) apply to this article. In addition, the following words and

terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Heavy-duty diesel engine—A diesel engine that is used to propel a motor vehicle with a GVWR of greater than 14,000 pounds.

Heavy-duty diesel vehicle—A diesel-powered motor vehicle with a GVWR of greater than 14,000 pounds.

* * * * *

New motor vehicle or new light-duty vehicle—A motor vehicle for which the equitable or legal title has never been transferred to the ultimate purchaser. For purposes of the Pennsylvania Clean Vehicles Program and the Pennsylvania Heavy-Duty Diesel Emissions Control Program, the equitable or legal title to a motor vehicle with an odometer reading of 7,500 miles or more shall be considered to be transferred to the ultimate purchaser. If the equitable or legal title to a motor vehicle with an odometer reading is less than 7,500 miles, the vehicle will not be considered to be transferred to the ultimate purchaser.

* * * * *

CHAPTER 126. [STANDARDS FOR MOTOR FUELS] MOTOR VEHICLE AND FUELS PROGRAMS

(Editor's Note: This subchapter is new and is printed in regular type to enhance readability.)

Subchapter E. PENNSYLVANIA HEAVY-DUTY DIESEL EMISSIONS CONTROL PROGRAM

GENERAL PROVISIONS

- Sec.
126.501. Purpose.
126.502. General requirements.
126.503. Emission requirements.
126.504. Exemptions.

APPLICABLE HEAVY-DUTY ENGINE AND VEHICLE TESTING

- 126.511. New engine and vehicle certification testing.
126.512. New engine and vehicle compliance testing.
126.513. Assembly line testing.
126.514. In-use engine and vehicle enforcement testing.
126.515. In-use surveillance testing.

ENGINE AND VEHICLE MANUFACTURERS' OBLIGATIONS

- 126.521. Warranty and recall.
126.522. Reporting requirements.

MOTOR VEHICLE DEALER RESPONSIBILITIES

- 126.531. Responsibilities of heavy-duty diesel highway vehicle dealers

GENERAL PROVISIONS

§ 126.501. Purpose.

(a) This subchapter establishes a heavy-duty diesel emissions control program under section 177 of the Clean Air Act (42 U.S.C.A. § 7507) designed primarily to achieve emission reductions of the precursors of ozone, particulate matter, air toxics and other air pollutants from new heavy-duty diesel engines and vehicles.

(b) This subchapter adopts and incorporates by reference certain provisions of the California Exhaust Emission Standards and Test Procedures for Heavy-Duty Diesel Engines and Vehicles.

(c) This subchapter also exempts certain new heavy-duty diesel engines and vehicles from this new emissions control program.

§ 126.502. General requirements.

(a) The Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements apply to new heavy-duty diesel engines and vehicles with a GVWR of greater than 14,000 pounds that are sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received, in this Commonwealth starting with the model year 2005, and each model year thereafter.

(b) The California Exhaust Emission Standards and Test Procedures for 1985 and Subsequent Heavy-Duty Engines and Vehicles, Title 13, CCR, Division 3, Chapter 1, Article 2, § 1956.8 is adopted and incorporated by reference to the extent that it pertains to the requirements for heavy-duty diesel engines and vehicles with a GVWR of greater than 14,000 pounds.

(c) The California Enforcement of Vehicle Emission Standards and Surveillance Testing, Title 13 CCR, Division 3, Chapter 2, Article 1.5, § 2065, are adopted and incorporated by reference.

§ 126.503. Emission requirements.

(a) Starting with model year 2005, a person may not sell, import, deliver, purchase, lease, rent, acquire or receive a new heavy-duty diesel engine or vehicle, subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements, in this Commonwealth that has not received a CARB Executive Order for all applicable requirements of Title 13 CCR, incorporated herein by reference.

(b) Starting with the model year 2005, a manufacturer may elect to include its heavy-duty diesel engines or vehicles delivered for sale in this Commonwealth in the emissions averaging, banking and trading programs for heavy-duty diesel engines or vehicles as provided under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8.

(c) Starting with model year 2005, a manufacturer may elect to certify any of its heavy-duty diesel engines or vehicles delivered for sale in this Commonwealth to the optional emission standards as provided under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8.

(d) New heavy-duty diesel engines and vehicles subject to the requirements of this subchapter shall possess a valid emissions control label that meets the requirements of Title 13 CCR, Division 3, Chapter 1, § 1965, incorporated herein by reference.

§ 126.504. Exemptions.

The following new heavy duty diesel engines and vehicles are exempt from the Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements of this subchapter:

- (1) Emergency vehicles.
- (2) A heavy-duty diesel vehicle transferred by a dealer to another dealer.
- (3) A heavy-duty diesel vehicle transferred for use exclusively off-highway.
- (4) A heavy-duty diesel vehicle granted a National security or testing exemption under section 203(b)(1) of the Clean Air Act (42 U.S.C.A. § 7522(b)(1)).
- (5) A heavy-duty diesel vehicle defined as a military tactical vehicle or engine under Title 13, CCR, Division 3, Chapter 1, Article 1, § 1905, incorporated herein by reference.
- (6) A heavy-duty diesel vehicle sold after _____ (*Editor's Note: The blank refers to the*

effective date of adoption of this proposal.), if the vehicle was registered in this Commonwealth before _____ (*Editor's Note: The blank refers to the effective date of adoption of this proposal.*).

(7) A heavy-duty diesel engine or vehicle for the model years 2005 and 2006 manufactured by an ultra-small volume manufacturer as defined under Title 13, Division 3, Chapter 1, Article 2, § 1976(f)(2), incorporated herein by reference.

(8) For model years 2005 and 2006, an urban bus as defined under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.2(b)(4), incorporated herein by reference.

(9) A heavy-duty diesel engine or vehicle that, following a technology review, CARB determines is inappropriate to require compliance with the emission standards under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8 for a particular model year.

APPLICABLE HEAVY-DUTY ENGINE AND VEHICLE TESTING**§ 126.511. New engine and vehicle certification testing.**

(a) Prior to being offered for sale or lease in this Commonwealth, new heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements of this subchapter shall be certified as meeting the heavy-duty diesel engine and vehicle requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, Section 1956.8 as determined by Title 13 CCR, Chapter 2, Article 2, §§ 2101—2110.

(b) For purposes of complying with subsection (a), new vehicle certification testing determinations and findings made by CARB apply.

§ 126.512. New engine and vehicle compliance testing.

Prior to being offered for sale or lease in this Commonwealth, new heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emission Control Program requirements of this subchapter shall be certified as meeting the heavy-duty diesel engine and vehicle requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8 as determined by Title 13 CCR, Chapter 2, Article 2, §§ 2101—2110.

§ 126.513. Assembly line testing.

Each manufacturer of new heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emission Control Program requirements of this subchapter, certified by CARB and sold or leased in this Commonwealth, shall conduct assembly line testing in accordance with Title 13 CCR, Chapter 2, Article 1.

§ 126.514. In-use engine and vehicle enforcement testing.

(a) For the purposes of detection and repair of engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements which fail to meet the emission requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8, the Department may, after consultation with CARB, conduct in-use vehicle enforcement testing in accordance with the protocol and testing procedures in Title 13 CCR, Division 3, Chapter 2, Article 2.3, §§ 2136—2140, incorporated herein by reference.

(b) For purposes of compliance with subsection (a), in-use engine and vehicle enforcement testing determinations and findings made by CARB apply.

§ 126.515. In-use surveillance testing.

(a) For the purposes of testing and monitoring, the overall effectiveness of the Pennsylvania Heavy-Duty Diesel Emissions Control Program in controlling emissions, the Department may conduct in-use surveillance testing after consultation with CARB, in accordance with Title 13 CCR, Division 3, Chapter 2, Article 3, §§ 2150—2153.

(b) For purposes of program planning, in-use surveillance testing determinations and findings made by CARB apply.

ENGINE AND VEHICLE MANUFACTURERS' OBLIGATIONS**§ 126.521. Warranty and recall.**

(a) A manufacturer of new heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements of this subchapter which are sold, leased, offered for sale or lease in this Commonwealth, shall warrant to the owner that each engine or vehicle shall comply over its period of warranty coverage with the requirements of Title 13 CCR, Division 3, Chapter 1, Article 6, §§ 2036, 2039—2041 and 2046 incorporated herein by reference.

(b) Each manufacturer of new heavy-duty diesel engines and vehicles shall submit to the Department failure of emission-related components reports, as defined in Title 13 CCR, Division 3, Chapter 2, Article 2.4, § 2144, incorporated herein by reference, for engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program in compliance with the procedures in Title 13 CCR, Division 3, Chapter 2, Article 2.4, §§ 2141—2149, incorporated herein by reference.

(c) For heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program, a voluntary or influenced emission-related recall campaign initiated by any heavy-duty diesel engine or vehicle manufacturer under Title 13 CCR, Division 3, Chapter 2, Article 2.1, §§ 2111—2121, shall extend to all new heavy-duty diesel engines or vehicles sold, leased or offered for sale or lease in this Commonwealth.

(d) For heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emission Control Program, an in-use vehicle ordered recall under Title 13 CCR, Division 3, Chapter 2, Article 2.2, §§ 2122—2135,

shall extend to all new heavy-duty diesel engines or vehicles sold, leased or offered for sale or lease in this Commonwealth.

§ 126.522. Reporting requirements.

(a) For the purposes of determining compliance with the Pennsylvania Heavy-Duty Diesel Emissions Control Program, commencing with the model year 2005, each manufacturer shall submit annually to the Department, within 60 days of the end of each model year, a report documenting the total deliveries for sale of engines and vehicles for each engine family over that model year in this Commonwealth.

(b) For the purposes of determining compliance with the Pennsylvania Heavy-Duty Diesel Emissions Control Program, each heavy-duty diesel engine and vehicle manufacturer shall submit annually to the Department, by March 1 of the calendar year following the close of the completed calendar year, a report of its heavy-duty diesel engines and vehicles delivered for sale in this Commonwealth that were included in the emissions averaging, banking and trading programs for heavy-duty diesel engines and vehicles within the provisions of Title 13, CCR, Division 3, Chapter 1, Article 2, § 1956.8.

MOTOR VEHICLE DEALER RESPONSIBILITIES**§ 126.531. Responsibilities of heavy-duty diesel highway vehicle dealers.**

(a) A dealer may not sell, offer for sale or lease, or deliver a new heavy-duty diesel engine or vehicle subject to the requirements of this subchapter without a valid emissions control label which meets the requirements of Title 13 CCR, Division 3, Chapter 1, § 1965.

(b) A dealer may not sell, offer for sale or lease, or deliver a new heavy-duty diesel engine or vehicle subject to the requirements of this subchapter unless the engine or vehicle conforms to the standards and requirements under Title 13 CCR, Division 3, Chapter 2, Article 3, § 2151.

(c) A dealer who imports, sells, delivers, leases or rents an engine or vehicle subject to the requirements of this subchapter shall retain records concerning the transaction for at least 3 years following the transaction.

[Pa.B. Doc. No. 01-1600. Filed for public inspection August 31, 2001, 9:00 a.m.]

APPENDIX D

(2) The final-form amendments are necessary and appropriate for the administration of the code.

J. Order

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Board, 22 Pa. Code Chapter 213, are amended by amending §§ 213.2 and 213.23—213.25 to read as set forth at 31 Pa.B. 5711.

(b) This order and 31 Pa.B. 5711 shall be submitted to the Office of Attorney General for approval as to legality as required by law.

(c) The Secretary of the Board shall certify this order and 31 Pa.B. 5711 and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

DALE H. EVERHART,
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 2041 (April 20, 2002).)

Fiscal Note: Fiscal Note 43-8 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 02-843. Filed for public inspection May 10, 2002, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 121 AND 126]

Heavy-Duty Diesel Emissions Control Program

The Environmental Quality Board (Board) amends Chapters 121 and 126 (relating to general provisions; and motor vehicle and fuels programs) to read as set forth in Annex A.

The final-form rulemaking establishes a new Heavy-Duty Diesel (HDD) Emissions Control Program (HDD Program) designed to primarily reduce emissions of carbon monoxide, oxides of nitrogen (NOx), volatile organic compounds (VOCs), particulate matter (PM) and air toxics from new HDD engines and vehicles. The final-form amendments adopt and incorporate by reference certain requirements of the California Exhaust Emission Standards and Test Procedures for 1985 and Subsequent Model Year Heavy-Duty Engines and Vehicles as authorized under section 177 of the Clean Air Act (42 U.S.C.A. § 7507) (CAA).

This order was adopted by the Board at its meeting of March 19, 2002.

A. Effective Date

These amendments will be effective immediately upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

B. Contact Persons

For further information, contact Arleen Shulman, Chief, Mobile Sources Section, Division of Air Resource Management, Bureau of Air Quality, Rachel Carson State Office

Building, 12th Floor, P.O. Box 8468, Harrisburg, PA 17105-8468, (717) 787-9495; or Bo Reiley, Assistant Counsel, Bureau of Regulatory Counsel, Office of Chief Counsel, Rachel Carson State Office Building, 9th Floor, P.O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060.

C. Statutory Authority

This action is being made under the authority of section 5(a)(1) of the Air Pollution Control Act (act) (35 P.S. § 4005(a)(1)), which grants the Board the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth. The Board is also expressly authorized by section 5(a)(7) of the act to adopt regulations designed to reduce emissions from motor vehicles.

D. Background and Purpose

HDD engines and vehicles contribute greatly to a number of serious health and welfare problems. First, they emit pollutants like PM, sulfur oxides (SOx), toxic compounds, such as formaldehyde, and ozone precursors, such as NOx and VOCs, whose documented adverse health effects include premature mortality, aggravation of respiratory and cardiovascular disease, changes in lung function and increased respiratory symptoms, changes to lung tissues and structures, altered respiratory defense mechanisms, chronic bronchitis and decreased lung function. Second, ozone pollution causes crop and forestry losses, and PM causes damage to materials and soiling of commonly used building materials and culturally important items such as statues and works of art. Third, NOx, SOx and PM contribute to visibility impairment. Fourth, NOx emissions from HDD vehicles contribute to the acidification, nitrification and eutrophication of water bodies. Fifth, the United States Environmental Protection Agency (EPA) has concluded that diesel exhaust is likely to be carcinogenic to humans. Finally, while vehicles powered by HDD engines account for about only 1% of all motor vehicles and equipment, they are responsible for nearly 1/4 of NOx emissions.

Emissions from HDD engines and vehicles account for a substantial portion of ambient PM and ground-level ozone levels. These proportions are higher in some urban areas. Urban areas, which include many poorer neighborhoods, can be disproportionately impacted by HDD vehicle emissions because of heavy traffic in densely populated urban areas.

In addition, due to its location in the northeast, this Commonwealth is a conduit for a large amount of truck traffic. Without the benefits of this final-form rulemaking, this Commonwealth can expect an additional 12.5 tons of NOx emissions per average summer day in 2006 State-wide from the trucks manufactured in 2005 and 2006. In the five-county Philadelphia area alone, model year 2005 and 2006 trucks are expected to emit an additional 2 tons of NOx per average summer day in 2006 without these additional controls.

HDD engines and vehicles have not been subject to many environmental regulations since passage of the CAA in 1970. The EPA's regulation of HDD engines and vehicles did not begin until 1984, when the EPA adopted a 10.7 grams/brake horsepower-hour (g/bhp-hr) NOx standard. The EPA's NOx emissions standards for 1998 to 2003 model year HDD engines are 4 g/bhp-hr. The EPA currently requires testing of the engine (with emission control systems in place) rather than the entire vehicle. Thus the standards are expressed in units of g/bhp-hr (that is, grams of emission per unit of work the engine

performs over a period of time), rather than the grams per mile unit used for testing passenger cars and light-duty trucks.

Before being offered for sale, new engines must be certified to compliance with Federal emissions standards. Engines are tested for certification using an engine dynamometer. The performance test cycle or cycles for determining compliance with numerical standards plays an important part in determining the stringency of the existing standards. It is the performance test that serves as the basis for determining this compliance.

Currently, the EPA only tests engines with the Federal test procedure (FTP) to determine compliance with the HDD engine standards. The FTP, however, only represents a small portion of "real world" driving conditions. For example, the FTP does not include elevated high temperatures and highway cruise patterns. Therefore, it is inadequate in testing emissions under these conditions.

Several years ago, the United States Department of Justice, the EPA and the California Air Resources Board (CARB) brought major enforcement actions alleging that seven of the largest HDD engine and vehicle manufacturers (representing approximately 60% of HDD engine sales) violated Federal and California engine certification regulations by "defeating" or turning off diesel emission control devices during in-use highway driving. The manufacturers employed "defeat devices" in the HDD engines for model years 1988–1998. With these defeat devices, emission controls typically were turned off during cruising conditions to save fuel. This allowed NO_x emissions as high as three times the emission standard. It is estimated that in 1998 alone, the "defeat devices" caused approximately 1.3 million tons of excess NO_x emissions Nationally.

The Federal government and the seven HDD engine and vehicle manufacturers resolved the cases through settlement agreements. In 1998, they entered into judicial consent decrees (binding settlement orders) that imposed substantial penalties upon the seven manufacturers and required them to achieve additional emission reductions.

In the consent decrees, the settling manufacturers are required, among other things, to produce HDD engines and vehicles that comply with prescribed emission standards that are lower than those required in current California and Federal regulations, as measured by the FTP. Specifically, these engines must meet a 2.5 g/bhp-hr standard for nonmethane hydrocarbons plus NO_x emissions by October 1, 2002. This will require production of new engines that are approximately 50% cleaner than current engines.

The majority of these settling engine manufacturers (Caterpillar, Cummins, Detroit Diesel, Mack Trucks, Renault (RVI) and Volvo Trucks) have also agreed to produce HDD engines by October 1, 2002, that meet supplemental certification test procedures. Together with the FTP test, the supplemental test procedures will require control of emissions during the majority of real world operating conditions, insuring that in the future "defeat devices" will no longer be employed. This will result in significant additional emission reductions of NO_x and other pollutants during "real world" conditions. These supplemental test procedures are designed to make up for the deficiencies of the FTP.

The California rules require manufacturers to perform supplemental test procedures, in addition to the existing FTP. The two components of the supplemental test are known as the Not to Exceed (NTE) test and the EURO III

European Stationary Cycle (ESC) test. The ESC test also has associate requirements known as maximum achievable emission limits (MAEL).

The NTE test procedure can be run in a vehicle on the road or in an emissions testing laboratory using an appropriate dynamometer. The vehicle or engine is operated under conditions that may reasonably be expected in normal vehicle operation and use, including operation under steady-state or transient conditions and under varying ambient conditions. Emissions are averaged over a minimum time of 30 seconds and then compared to the applicable emission limits.

The ESC test simulates cruising conditions better than either the FTP or the NTE procedures. This can help prevent excess emissions increasing during highway driving. This test consists of 13 modes of speed and power, primarily covering the typical highway cruise operating range of HDD engines. During each mode of operation, the concentration of the gaseous pollutant is measured and weighted. The weighted average emissions for each pollutant, as calculated by this test, may not be greater than the applicable FTP emission standard.

The MAEL requirements can be considered an adjunct to the ESC test because they are utilized during the 12 nonidle test modes of that test. The MAEL specifications prevent manufacturers from complying with the ESC using computer programs that recognize when the engine is being tested at specific test points, and then recalibrating for better fuel economy (which results in higher emissions) between test points. The MAEL requirements ensure that emissions do not exceed a cap when operating within the nonidle ESC test modes.

Since certifying HDD engines using the NTE and ESC tests produces much higher reductions than the reductions achieved when only the FTP is used, the EPA issued a final rule to adopt these supplemental test procedures for 2004 and subsequent model year HDD engines and vehicles. See 65 FR 59895 (October 6, 2000). However, due to timing constraints that the CAA imposes on the EPA under section 202 of the CAA (42 U.S.C.A. § 7521), manufacturers will not be required to comply with the NTE and ESC test procedures until the 2007 model year. Therefore, there will be a 2-year gap between the expiration of these test procedures for the settling manufacturers following the 2004 model year and the commencement of the test procedures for model year 2007 under the EPA's final rule.

As a result, for 2 entire model years there may be serious backsliding, that is, diesel exhaust emissions could increase significantly above the previous levels mandated by the consent decrees. For this reason, California decided to fill the gap by requiring compliance with the NTE and ESC test procedures in addition to the FTP test procedure during the 2005 and 2006 model years. Moreover, this final-form rulemaking will apply to all manufacturers, not just those affected by the consent decrees, who may want to enter the United States HDD engine market to gain an unfair competitive advantage.

A number of other states have also recognized the benefits of adopting these test procedures to prevent any backsliding attempts by HDD engine and vehicle manufacturers and to maintain improved air quality. To date, Delaware, North Carolina, Maryland, Georgia, Massachusetts, Texas, New Jersey, New York, Maine, Rhode Island and the District of Columbia have adopted the California rules under section 177 of the CAA. Truck sales in these states account for 37% of National truck sales.

The Commonwealth also recognizes the benefits of adopting these test procedures. It is estimated that an additional 12.5 tons of NOx emissions per average summer day Statewide from trucks manufactured in 2005 and 2006 will be reduced through the adoption of this final-form rulemaking.

Section 209 of the CAA (42 U.S.C.A. § 7543) allows only California to obtain a waiver of Federal preemption to continue to set its own motor vehicle standards. The CAA was amended in 1977 under section 177 of the CAA to allow states to adopt emission standards for motor vehicles if the standards are identical to the California standards and a state adopts the standard at least 2 years before commencement of the model year.

Congress amended section 177 of the CAA in 1990 to prohibit states from taking any action that would have the effect of creating a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards or otherwise create a "third vehicle."

The final-form rulemaking establishes an HDD Program consistent with the requirements of section 177 of the CAA and will serve as the framework for the Commonwealth's program to control emissions from new HDD engines and vehicles.

The Commonwealth's proposed HDD Program does not mandate the sale or the use of special diesel fuel which complies with the specifications adopted by California. The courts have held that a state's failure to adopt California fuel requirements does not violate section 177 of the CAA requirement that state emission standards be "identical to the California standards for which a waiver has been granted." *Motor Vehicle Manufacturers Association of the United States (MVMA) v. New York State Department of Environmental Conservation (NYSDEC)*, 17 F. 3d 521 (2d Cir. 1994).

Since HDD engines are engine certified, currently there is no mechanism in California to ensure that either a replacement engine or rebuild complies with requirements at least as stringent as the original engine. However, nonregulatory common practice dictates that when an engine is replaced, it is typically replaced with a newer, lower-emitting engine due to hardware and electronics compatibility concerns. Additionally, modern electronically controlled engines typically operate for more than 500,000 miles (and in many cases more than 1 million miles) before requiring replacements/rebuilds. By the time a typical replacement/rebuild occurs, engines older than the original engines are generally too old to be used or are not available.

Following promulgation of the proposed new HDD Program regulations, amendments to Chapters 121 and 126 will be submitted to the EPA as a revision to the State Implementation Plan.

Under section 5(a)(7) of the act, the Department of Environmental Protection (Department) consulted with the Department of Transportation during the development of the proposed amendments. The Department also consulted with the Air Quality Technical Advisory Committee (AQTAC) on the final-form rulemaking. On January 17, 2002, the AQTAC recommended that the final-form rulemaking be submitted to the Board for consideration. AQTAC also suggested that the Department continue its aggressive efforts with other states to support uniform Federal standards for HDD vehicles to ensure progress in significantly reducing truck emissions during this decade.

This final-form rulemaking is consistent with the mandate under Executive Order 1996-1, "Regulatory Review and Procedure." The final-form rulemaking is necessary to achieve and maintain the ambient air quality standard for ozone and is justified as a compelling and articulable State interest as required under Executive Order 1996-1.

E. Summary of Comments and Responses on the Proposed Rulemaking

The Board received 198 sets of comments on the regulatory proposal. The following discussion summarizes the major issues and the Board's response.

Of the 198 commentators, 193 expressed general support for the rulemaking. Of the 193 commentators, 177 sent a form letter, which expressed general support for the rulemaking.

Two commentators expressed the view that adopting California's emission standards for HDD engines would provide states an opportunity to obtain substantial and cost effective emission reductions. The Board agrees. The cost for a ton of reductions is approximately \$400, which compares favorably with emission controls placed on industrial sources of several thousand dollars per ton.

A substantial number of commentators thought that a great opportunity exists for engine manufacturers to "backslide" to previous less stringent emission limits for model years 2005 and 2006. The Board agrees and believes that this is one of the main reasons why many states have decided to adopt the NTE standards. The economic and competitive incentives for engine manufacturers who sign the consent decrees could be too great not to backslide into the emissions standards developed prior to the signing of the consent decrees. The Board also believes that manufacturers would offer for sale engines that pollute excessively during the steady state portion of the engines' operations unless the NTE requirements are enforced in this Commonwealth.

One commentator believed that the NTE program is nothing more than a patchwork state-by-state program. The commentator further believed that the Commonwealth can expect significant negative economic impacts if these regulations are adopted because truck purchasers will take their business to other states. The Board does not agree with this comment for several reasons. First, there are a number of states that have already adopted this rulemaking including California, Delaware, North Carolina, Maryland, Georgia, Massachusetts, Texas, New Jersey, New York, Maine, Rhode Island and the District of Columbia. There are also a number of states that are working to adopt these regulations. Those states include the Commonwealth, Arizona and Minnesota. The Board believes that once these and other states adopt the requirements that nearly 50% of all new trucks will be required to comply with the supplemental test procedures. Moreover, the Board does not believe there will be a significant economic impact for several reasons. As previously stated, the NTE standards are becoming a de facto National program. The extra cost per truck required to comply with this rulemaking will be less than several hundred dollars. In addition, this rulemaking is only intended to cover a 2-year interim window between when the test procedures in the consent decrees expire and the new Federal regulations take place.

One commentator is concerned that the Commonwealth will not realize the expected emission reduction gains and that engines from outside the State will dominate the population of engines inside the State. As the Board has previously noted, this program is fast becoming a de facto

National program with over 37% of the National sales being covered by this rulemaking by the end of 2001. In addition, the Board believes that the Commonwealth will receive emission reduction benefits which will help the Commonwealth improve its air quality. Specifically, it is estimated that an additional 12.5 tons of NOx per average summer day will be reduced with the adoption of this rulemaking.

A number of commentators believed that if enough states adopt the NTE supplemental testing requirements that a level regulatory playing field will be created for all engine manufacturers and states. The Board agrees. Nonconsent decree and consent decree manufacturers will be required to follow the same regulations, and all states will have the same low-emitting vehicles available for sale.

One commentator was concerned that the cost for the Commonwealth to adopt, implement and enforce the California requirements far outweigh the potential air quality benefits from their adoption. The Board disagrees. First, the cost to adopt, implement and enforce this rulemaking will be low for the Commonwealth since enforcement will be handled by a small number of inspectors. Second, initial reductions that will be achieved as a result of this rulemaking will cost \$400 per ton, which compares favorably to stationary source reductions that usually cost \$1,000 or more per ton. Third, NOx emission reductions in this Commonwealth will approach 12 tons per day in 2006, which makes the adoption of the rulemaking worthwhile.

The CARB regulation has been challenged in the case *International Truck and Engine Corp v. California Air Resources Board et al.* (Case No. SIVS-01-1245GED GGH U.S. District Court, Eastern District of California). The commentator believed that the challenge will be successful and that the Board should not adopt the rulemaking. The Board notes that on October 24, 2001, the Court issued an order in the previously referenced case denying the Plaintiff's motion for summary judgment and granting the Defendant's motion to dismiss the case based on the grounds that the lawsuit is not "ripe" for adjudication.

Several commentators contended that California's adoption of the NTE standards are in violation of the statutory lead-time and stability requirements under section 202 of the CAA. Since there are no proposed changes to the emission standards that CARB adopted in 1999, the CAA requirements under section 202 of the CAA did not apply to that rulemaking. Moreover, since section 202(a)(3)(C) of the CAA is only applicable to standards promulgated under section 202(a) of the CAA and California promulgates its standards under section 209(b) of the CAA, the provision does not apply to California. However, as a practical matter, since the NTE standards were adopted in 2000 and do not apply until 2005, manufacturers have the 4-year lead-time they requested of California. As to stability, while the requirements of California certification testing changed between 2004 and 2005, the underlying standards are the 2004 standards as set forth in Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8(a). These standards are unchanged by the adoption of the supplemental test procedures as incorporated by reference in Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8(a). Furthermore, California has the authority to adopt a separate state program, including a certification program, for new motor vehicles and new motor vehicle engines under section 209(b) of the CAA. California has the authority to adopt test procedures that ensure that new motor vehicles and new motor vehicle engines meet California's state emission controls.

One commentator believed that the Commonwealth will need to ensure that the appropriate diesel fuel is available in this Commonwealth for HDD vehicles subject to the supplemental test procedures. The commentator went on to say that the California test fuel used to certify the engines must be the predominate fuel that in-use vehicles employ. The Board believes that these concerns are not valid. The provisions about certification of test fuel have been adopted to ensure that the fuel used during the certification is "not cleaner" than the fuel which is available in the California market, not this Commonwealth market. During certification, if a very clean fuel is used to meet the emission standards, the standards may not be met in reality because that particular clean fuel may not be available on the market. If the Commonwealth performs any type of compliance testing, the Department will obtain California fuel used in the certification process.

This commentator further stated that failure to adopt California fuels appears to be in violation of the identical requirement under section 177 of the CAA. The Board disagrees. The courts have held that a state's failure to adopt California fuel requirements does not violate section 177 of the CAA requirements that state emission standards be identical to the California standards. *MVMA v. NYSDEC*, 17 F. 3d 521, 523 (2d Cir 1994).

Several commentators believe that this Commonwealth is constrained by section 177 of the CAA from adopting the California regulations before California has obtained a Federal waiver of exemption. The Board disagrees. CARB already has an existing EPA waiver for HDD engines and vehicles, 53 FR 7021 (March 4, 1998). On December 26, 2001, CARB submitted to the EPA a "scope of the waiver request" to confirm that the NTE tests are within the scope of the previously granted waiver of Federal preemption under section 209(b) of the CAA. Moreover, a Federal court has ruled that states may adopt, but not enforce, CARB regulations before the EPA has acted on the waiver request. *MVMA v. NYSDEC*, 17 F. 3d 521, 534 (2d Cir 1994). As a result, the Commonwealth believes that adopting the CARB standards at this time is not precluded under the CAA.

One commentator believed that the proposed rulemaking constitutes new emission standards and not test procedures. The Board disagrees. The supplemental test procedures constitute additional test procedures to the FTPs since the requirement only provides extended methods for testing HDD engines and vehicles. Emission results from the tests are compared to the existing emission standard rather than a new emission standard. The underlying standards are the 2004 standards as set forth in Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8(a). These standards are unchanged by the adoption of the supplemental test procedures as incorporated by reference in Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8(a).

One commentator was concerned that the CARB regulation goes well beyond the supplemental test procedure requirements contained in the CARB settlement agreement and was rushed to completion without adequate technical input and discussion with stakeholders. Under section 177 of the CAA, the Commonwealth can only adopt those standards that have been adopted by California. The Board believes that California's regulation, which incorporates the Federal standards with supplemental test procedures, represents the best way to reduce emissions from new on-highway HDD engines at this time.

Several commentators believed that California has not found that the supplemental test procedures are technologically feasible as required under the CAA. The Board disagrees. Six of the seven settling manufacturers will comply with the NTE test procedures beginning in 2002. From February to June of 2000 CARB participated in a series of meetings with engine manufacturers and with the EPA regarding the supplemental tests. The major concerns raised by the engine manufacturers were extreme operating conditions. If there are feasibility concerns, the deficiency provisions under the California rule may be used for additional lead-time for compliance. Moreover, the Board notes that CARB received over 80 public comments on their supplement test procedure rules. Most comments originated from engine manufacturers or the manufacturers' representatives. Out of that public comment process, manufacturers were granted additional flexibilities by CARB for meeting some of the technical challenges.

One commentator believed that the Board should cooperate with California to adopt standards to include stricter enforcement of standards for urban buses and emergency vehicles, which are exempt under this final-form rulemaking. The Board recognized that urban buses and emergency vehicles are a significant source of diesel exhaust in heavily populated areas, and the Board will work diligently to reduce their emissions. Nevertheless, the Board believes that emission reductions would be insignificant as a result of incorporating urban buses and emergency vehicles into this final-form rulemaking.

A number of commentators believed that effectively limiting excess emissions from HDD vehicles and engines needed to be addressed from a regional or National level. The Board agrees. States, particularly those in the northeast, share a heavy volume of diesel traffic along with persistent elevated summertime ozone levels. Consequently this is one of the main reasons why the Board and other states have promulgated this final-form rulemaking.

A number of commentators believed that diesel exhaust is a large contributor to adverse health effects among members of the population. The Board agrees. Diesel engines produce large amounts of NOx, which is a precursor for the formation of ozone. Children, the elderly and individuals with preexisting respiratory problem are most at risk. This final-form regulation will greatly limit NOx production from diesel engines.

A number of the commentators share the Commonwealth's concern about persistent air pollution problems like ground level ozone, fine PM, regional haze and acid deposition. The Board agrees. All of the pollutants previously listed contribute to adverse health effects or interfere with the quality of life in some of the most populated areas of this Commonwealth and neighboring states.

F. Summary of Regulatory Requirements

This final-form rulemaking establishes the requirements for the implementation of a new HDD Program. A summary of the final-form rulemaking follows.

Chapter 121

The final-form amendment to § 121.1 (relating to definitions) includes terms and phrases applicable to the HDD Program. The definitions include "heavy-duty diesel engine" and "heavy-duty diesel vehicle."

The final-form rulemaking also amends the definition of "new motor vehicle or new light-duty vehicle" to include vehicles subject to the requirements of the HDD Program.

Chapter 126

The title of Chapter 126 is changed from "standards for motor fuels" to "motor vehicle and fuels programs."

Subchapter E. Pennsylvania Heavy-Duty Diesel Emissions Control Program

Subchapter E contains provisions that establish a new HDD Program in this Commonwealth to reduce the emissions of NOx, SOx, PM and air toxics from HDD engines and vehicles under section 177 of the CAA.

Section 126.501 (relating to purpose) establishes an HDD Program consistent with section 177 of the CAA. It adopts and incorporates by reference certain provisions of the California exhaust emissions standards and test procedures for 1985 and subsequent model year HDD engines and vehicles. It also provides for certain exemptions from the HDD Program.

Section 126.502(a) (relating to general requirements) provides that the Commonwealth's HDD Emission Control Program applies to engines and vehicles with the model year beginning May 11, 2004, with a gross vehicle weight rating (GVWR) greater than 14,000 pounds that are sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in this Commonwealth.

Section 126.502(b) adopts and incorporates by reference the California Exhaust Emissions Standards and Test Procedures for 1985 and Subsequent Heavy-Duty Engines and Vehicles to the extent that they pertain to the applicable model years for HDD engines and vehicles with a GVWR of greater than 14,000 pounds.

Section 126.502(c) adopts and incorporates by reference the California Enforcement of Vehicle Emission Standards and Surveillance Testing under Title 13 CCR, Division 3, Chapter 2, Article 1.5, § 2065.

Section 126.503 (relating to emission requirements) provides that a person may not sell, import, deliver, purchase, lease, rent, acquire or receive an HDD engine or vehicle starting with the applicable model year that is subject to the HDD Program that has not received a CARB Executive Order for all applicable requirements of Title 13 CCR.

Section 126.503(b) allows manufacturers the option to include any of the HDD engines or vehicles it sells in this Commonwealth to participate in the averaging, banking and trading programs as provided under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8.

Section 126.503(c) allows manufacturers the option to certify any of its HDD engines and vehicles delivered for sale in this Commonwealth to the optional emission standards as provided under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8.

Section 126.503(d) requires that all new heavy-duty engines and vehicles subject to the requirements of this subject chapter shall possess a valid emissions control label which meets the requirements of Title 13 CCR, Division 3, Chapter 1, § 1965.

Section 126.504 (relating to exemptions) provides that the following are exempt from the HDD Program in this Commonwealth: emergency vehicles; an HDD engine or vehicle transferred by a dealer to another dealer; an HDD vehicle transferred for use exclusively off highway; an HDD vehicle granted a National security or testing exemption under section 203(b)(1) of the CAA (42 U.S.C.A. § 7522(b)); an HDD vehicle defined as a military tactical vehicle or engine under Title 13 CCR, Division 3,

Chapter 1, Article 1, § 1905; an HDD vehicle sold after May 11, 2004, if it was registered in this Commonwealth before May 11, 2004; an HDD engine or vehicle for the model years 2005 and 2006 manufactured by an ultra-small volume manufacturer as defined under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1976(f)(2); an urban bus as defined under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.2(b)(4) for model years 2005 and 2006; and an HDD engine that following a technology review, CARB determines it to be inappropriate to require compliance with the emissions standards under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8 for that particular model year.

Section 126.511 (relating to new engine and vehicle certification testing) requires that prior to being offered for sale or lease in this Commonwealth, new HDD engines and vehicles shall be certified as meeting the motor vehicle requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8.

Section 126.512 (relating to new engine and vehicle compliance testing) requires that prior to being offered for sale or lease in this Commonwealth, new HDD engines and vehicles shall be certified as meeting the HDD engine and vehicle requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8 as determined by Title 13 CCR, Division 3, Chapter 2, Article 2, §§ 2101—2110. An additional subsection was added to clarify that all CARB testing determinations apply for compliance testing with subsection (a).

Section 126.513 (relating to assembly line testing) provides that each manufacturer of new HDD engines and vehicles subject to the Commonwealth's HDD Emission Control Program shall conduct assembly line testing in accordance with Title 13 CCR, Division 3, Chapter 2, Article 1. An additional subsection was added to clarify that all CARB testing determinations apply for compliance testing with subsection (a).

Section 126.514 (relating to in-use engine and vehicle enforcement testing) provides that for the purposes of detection and repair of engines and vehicles that fail to meet the emission requirements of the HDD Program, the Department may, after consultation with CARB, conduct in-use vehicle enforcement testing in accordance with the protocol and testing procedures under Title 13 CCR, Division 3, Chapter 2, Article 2.3, §§ 2136—2140.

Section 126.515 (relating to in-use surveillance testing) provides that the Department may conduct in-use surveillance testing after consultation with CARB.

Section 126.521 (relating to warranty and recall) provides that manufacturers of new HDD engines and vehicles shall warrant to the owner that each engine or vehicle complies over its period of warranty coverage with the requirements of Title 13 CCR, Division 3, Chapter 1, Article 6, §§ 2036 and 2039—2041.

Under § 126.521(b), each manufacturer shall submit to the Department failure of emission-related component reports for engines or vehicles subject to the HDD Program.

Under § 126.521(c), any voluntary or influenced emission related recall programs initiated by an HDD engine or vehicle manufacturer shall extend to all new HDD engines or vehicles in this Commonwealth.

Under § 126.521(d), any in-use vehicle ordered recalls under Title 13 CCR, Division 3, Chapter 2, Article 2.2, §§ 2122—2135 shall extend to all new HDD engines and vehicles sold, leased or offered for sale or lease in this Commonwealth.

Section 126.522 (relating to reporting requirements) provides that each manufacturer shall submit annually to the Department a report documenting the total deliveries for sale of HDD engines and vehicles for each engine family of that model year in this Commonwealth.

Under § 126.522(b), each HDD engine and vehicle manufacturer shall submit annually to the Department a report of all of its HDD engines or vehicles delivered for sale that were included in any of the emissions averaging, banking and trading programs for HDD vehicles within the requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1965.

Section 126.531 (relating to responsibilities of heavy-duty diesel highway vehicle dealers) provides that a dealer must convey to the owner of a new HDD engine or vehicle subject to the requirements of this subchapter a valid emission control label which meets the requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1965.

Under § 126.531(b), a dealer may not sell, offer for sale or lease or deliver a new HDD engine or vehicle subject of this subchapter unless the engine or vehicle conforms to the standards and requirements under Title 13 CCR, Division 3, Chapter 2, Article 3, § 2151.

Under § 126.531(c), a dealer who imports, sells, delivers, leases or rents any HDD engines or vehicles subject to this subchapter shall retain records concerning the transaction for at least 3 years following the transaction.

G. Benefits and Costs

Executive Order 1996-1 requires a cost benefit analysis of the final-form rulemaking.

Benefits. The new HDD Program will contribute to the attainment and maintenance of the ozone health-based standard in this Commonwealth due to emission reductions from the operation of lower-emitting HDD vehicles. Modeling data from the Philadelphia area indicates that daily emissions of NO_x will be reduced by 2 tons per average summer day and 12.5 tons per average summer day Statewide from trucks that are subject to the HDD Program. In addition, it is anticipated that the health of the citizens of this Commonwealth will benefit from these reductions as well as through reduced exposure of air toxics, NO_x and other air pollutants, which place people's health at risk.

Compliance Costs. The primary cost to the trucking industry will be incurred when purchasing a new truck or engine. For those model years affected in 2005, this final-form rulemaking could increase the average cost of an engine, which has a useful life of 15 to 20 years, by as much as \$800 and increase operating costs by up to \$9 per year. Because it is difficult to separate the incremental cost of the supplemental tests from other aspects of complying with Federal and California standards, the actual cost is anticipated to be much lower.

Compliance Assistance Plan. Compliance assistance will be provided to affected parties, primarily automobile dealers, by distributing pamphlets and conducting public meetings and workshops to explain the regulatory requirements. The Department will involve appropriate State trade organizations in the distribution of information to their membership. Information concerning the HDD Program will also be provided to affected consumers.

Paperwork Requirements. HDD engine and vehicle manufacturers will be required to submit paperwork demonstrating compliance with the emissions standards

and other requirements of the Commonwealth's HDD Program. HDD engine and vehicle dealers, leasing and rental agencies and purchasers of HDD engines and vehicles must demonstrate to the Department that new vehicles subject to the rulemaking meet the emissions standards.

H. Sunset Review

This final-form rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on March 26, 2002, the Department submitted a copy of the notice of proposed rulemaking published at 31 Pa.B. 4958 (September 1, 2001), to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing this final-form rulemaking, the Department has considered the comments received from IRRC, the Committees and the public. These comments are addressed in the comment and response document and Section E of this Preamble.

Under section 5.1(d) of the Regulatory Review Act (71 P.S. § 745.5a(d)), on April 15, 2002, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on April 19, 2002, and approved the final-form rulemaking.

J. Finding

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder in 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) This final-form rulemaking does not enlarge the purpose of the proposal published at 31 Pa.B. 4958.

(4) This final-form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble and is reasonably necessary to achieve and maintain the National ambient air quality standards for ozone.

K. Order

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapters 121 and 126, are amended by amending §§ 121.1 and by adding §§ 126.501—126.504, 126.511—126.515, 126.521, 126.522 and 126.531 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and

the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson shall submit this order and Annex A to IRRC and the Senate and House Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

DAVID E. HESS,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 2285 (May 4, 2002).)

Fiscal Note: 7-365. No fiscal impact; (8) recommends adoption. There will be some costs to departments to comply with this regulation. Total estimated cost to comply with the regulation for 2003-04 is \$90,431, for 2004-05 is \$185,941 and for 2005-06 is \$95,554. These costs will be shared by the Department of General Services, Department of Transportation, Turnpike Commission, Fish and Boat Commission and Game Commission.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE III. AIR RESOURCES

CHAPTER 121. GENERAL PROVISIONS

§ 121.1. Definitions.

The definitions in section 3 of the act (35 P.S. § 4003) apply to this article. In addition, the following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Heavy-duty diesel engine—A diesel engine that is used to propel a motor vehicle with a GVWR of greater than 14,000 pounds.

Heavy-duty diesel vehicle—A diesel-powered motor vehicle with a GVWR of greater than 14,000 pounds.

* * * * *

New motor vehicle or new light-duty vehicle—A motor vehicle for which the equitable or legal title has never been transferred to the ultimate purchaser. For purposes of the Pennsylvania Clean Vehicles Program and the Pennsylvania Heavy-Duty Diesel Emissions Control Program, the equitable or legal title to a motor vehicle with an odometer reading of 7,500 miles or more shall be considered to be transferred to the ultimate purchaser. If the equitable or legal title to a motor vehicle with an odometer reading is less than 7,500 miles, the vehicle will not be considered to be transferred to the ultimate purchaser.

* * * * *

CHAPTER 126. MOTOR VEHICLE AND FUELS PROGRAMS

Subchapter E. PENNSYLVANIA HEAVY-DUTY DIESEL EMISSIONS CONTROL PROGRAM GENERAL PROVISIONS

- Sec.
126.501. Purpose.
126.502. General requirements.
126.503. Emission requirements.
126.504. Exemptions.

APPLICABLE HEAVY-DUTY ENGINE AND VEHICLE TESTING

- 126.511. New engine and vehicle certification testing.
126.512. New engine and vehicle compliance testing.
126.513. Assembly line testing.
126.514. In-use engine and vehicle enforcement testing.
126.515. In-use surveillance testing.

ENGINE AND VEHICLE MANUFACTURERS' OBLIGATIONS

- 126.521. Warranty and recall.
126.522. Reporting requirements.

MOTOR VEHICLE DEALER RESPONSIBILITIES

- 126.531. Responsibilities of heavy-duty diesel highway vehicle dealers.

GENERAL PROVISIONS

§ 126.501. Purpose.

(a) This subchapter establishes a heavy-duty diesel emissions control program under section 177 of the Clean Air Act (42 U.S.C.A. § 7507) designed primarily to achieve emission reductions of the precursors of ozone, particulate matter, air toxics and other air pollutants from new heavy-duty diesel engines and vehicles.

(b) This subchapter adopts and incorporates by reference certain provisions of the California Exhaust Emission Standards and Test Procedures for Heavy-Duty Diesel Engines and Vehicles.

(c) This subchapter also exempts certain new heavy-duty diesel engines and vehicles from this new emissions control program.

§ 126.502. General requirements.

(a) The Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements apply to new heavy-duty diesel engines and vehicles with a GVWR of greater than 14,000 pounds that are sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in this Commonwealth starting with the model year beginning after May 11, 2004, and each model year thereafter.

(b) The California Exhaust Emission Standards and Test Procedures for 1985 and Subsequent Heavy-Duty Engines and Vehicles, Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8 are adopted and incorporated by reference to the extent that they pertain to the requirements for heavy-duty diesel engines and vehicles with a GVWR of greater than 14,000 pounds.

(c) The California Enforcement of Vehicle Emission Standards and Surveillance Testing, Title 13 CCR, Division 3, Chapter 2, Article 1.5, § 2065, are adopted and incorporated by reference.

§ 126.503. Emission requirements.

(a) Starting with the model year beginning after May 11, 2004, a person may not sell, import, deliver, purchase, lease, rent, acquire or receive a new heavy-duty diesel engine or vehicle, subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements, in

this Commonwealth that has not received a CARB Executive Order for all applicable requirements of Title 13 CCR, adopted and incorporated by reference.

(b) Starting with the model year beginning after May 11, 2004, a manufacturer may elect to include its heavy-duty diesel engines or vehicles delivered for sale in this Commonwealth in the emissions averaging, banking and trading programs for heavy-duty diesel engines or vehicles as provided under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8, adopted and incorporated by reference.

(c) Starting with the model year beginning after May 11, 2004, a manufacturer may elect to certify any of its heavy-duty diesel engines or vehicles delivered for sale in this Commonwealth to the optional emission standards as provided under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8, adopted and incorporated by reference.

(d) New heavy-duty diesel engines and vehicles subject to this subchapter shall possess a valid emissions control label that meets the requirements of Title 13 CCR, Division 3, Chapter 1, § 1965, adopted and incorporated by reference.

§ 126.504. Exemptions.

The following new heavy duty diesel engines and vehicles are exempt from the Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements of this subchapter:

- (1) Emergency vehicles.
- (2) A heavy-duty diesel vehicle transferred by a dealer to another dealer.
- (3) A heavy-duty diesel vehicle transferred for use exclusively off-highway.
- (4) A heavy-duty diesel vehicle granted a National security or testing exemption under section 203(b)(1) of the Clean Air Act (42 U.S.C.A. § 7522(b)(1)).
- (5) A heavy-duty diesel vehicle defined as a military tactical vehicle or engine under Title 13 CCR, Division 3, Chapter 1, Article 1, § 1905, adopted and incorporated by reference.
- (6) A heavy-duty diesel vehicle sold after May 11, 2004, if the vehicle was registered in this Commonwealth before May 11, 2004.
- (7) A heavy-duty diesel engine or vehicle for the model years 2005 and 2006 manufactured by an ultra-small volume manufacturer as defined under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1976(f)(2), adopted and incorporated by reference.
- (8) For model years 2005 and 2006, an urban bus as defined under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.2(b)(4), adopted and incorporated by reference.
- (9) A heavy-duty diesel engine or vehicle that, following a technology review, CARB determines is inappropriate to require compliance with the emission standards and other requirements under Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8 for a particular model year.

APPLICABLE HEAVY-DUTY ENGINE AND VEHICLE TESTING

§ 126.511. New engine and vehicle certification testing.

(a) Prior to being offered for sale or lease in this Commonwealth, new heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel

Emissions Control Program requirements of this subchapter shall be certified as meeting the heavy-duty diesel engine and vehicle requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8 as determined by Title 13 CCR, Division 3, Chapter 2, Article 2, §§ 2101—2110, adopted and incorporated by reference.

(b) For purposes of complying with subsection (a), new vehicle certification testing determinations and findings made by CARB apply.

§ 126.512. New engine and vehicle compliance testing.

(a) Prior to being offered for sale or lease in this Commonwealth, new heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements of this subchapter shall be certified as meeting the heavy-duty diesel engine and vehicle requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8 as determined by Title 13 CCR, Division 3, Chapter 2, Article 2, §§ 2101—2110, adopted and incorporated by reference.

(b) For purposes of compliance with subsection (a), new engine and vehicle compliance testing determinations and findings made by CARB apply.

§ 126.513. Assembly line testing.

(a) Each manufacturer of new heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emission Control Program requirements of this subchapter, certified by CARB and sold or leased in this Commonwealth, shall conduct assembly line testing in accordance with Title 13 CCR, Division 3, Chapter 2, Article 1, adopted and incorporated by reference.

(b) For purposes of compliance with subsection (a), assembly line testing determinations and findings made by CARB apply.

§ 126.514. In-use engine and vehicle enforcement testing.

(a) For the purposes of detection and repair of engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program requirements which fail to meet the emission requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8, the Department may, after consultation with CARB, conduct in-use vehicle enforcement testing in accordance with the protocol and testing procedures in Title 13 CCR, Division 3, Chapter 2, Article 2.3, §§ 2136—2140, adopted and incorporated by reference.

(b) For purposes of compliance with subsection (a), in-use engine and vehicle enforcement testing determinations and findings made by CARB apply.

§ 126.515. In-use surveillance testing.

(a) For the purposes of testing and monitoring, the overall effectiveness of the Pennsylvania Heavy-Duty Diesel Emissions Control Program in controlling emissions, the Department may conduct in-use surveillance testing after consultation with CARB, in accordance with Title 13 CCR, Division 3, Chapter 2, Article 3, §§ 2150—2153, adopted and incorporated by reference.

(b) For purposes of program planning, in-use surveillance testing determinations and findings made by CARB apply.

ENGINE AND VEHICLE MANUFACTURERS' OBLIGATIONS

§ 126.521. Warranty and recall.

(a) A manufacturer of new heavy-duty diesel engines or vehicles subject to the Pennsylvania Heavy-Duty Diesel

Emissions Control Program requirements of this subchapter which are sold, leased, or offered for sale or lease in this Commonwealth shall warrant to the owner that each engine or vehicle shall comply over its period of warranty coverage with the requirements of Title 13 CCR, Division 3, Chapter 1, Article 6, §§ 2036, 2039—2041 and 2046, adopted and incorporated by reference.

(b) Each manufacturer of new heavy-duty diesel engines or vehicles shall submit to the Department failure of emission-related components reports, as defined in Title 13 CCR, Division 3, Chapter 2, Article 2.4, § 2144, adopted and incorporated by reference, for engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program in compliance with the procedures in Title 13 CCR, Division 3, Chapter 2, Article 2.4, §§ 2141—2149, adopted and incorporated by reference.

(c) For heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emissions Control Program, a voluntary or influenced emission-related recall campaign initiated by any heavy-duty diesel engine or vehicle manufacturer under Title 13 CCR, Division 3, Chapter 2, Article 2.1, §§ 2111—2121, adopted and incorporated by reference, shall extend to all new heavy-duty diesel engines or vehicles sold, leased or offered for sale or lease in this Commonwealth.

(d) For heavy-duty diesel engines and vehicles subject to the Pennsylvania Heavy-Duty Diesel Emission Control Program, an in-use vehicle ordered recall under Title 13 CCR, Division 3, Chapter 2, Article 2.2, §§ 2122—2135, adopted and incorporated by reference, shall extend to all new heavy-duty diesel engines or vehicles sold, leased or offered for sale or lease in this Commonwealth.

§ 126.522. Reporting requirements.

(a) For the purposes of determining compliance with the Pennsylvania Heavy-Duty Diesel Emissions Control Program, commencing with the model year beginning after May 11, 2004, each manufacturer shall submit annually to the Department, within 60 days of the end of each model year, a report documenting the total deliveries for sale of engines and vehicles for each engine family over that model year in this Commonwealth.

(b) For the purposes of determining compliance with the Pennsylvania Heavy-Duty Diesel Emissions Control Program, each heavy-duty diesel engine and vehicle manufacturer shall submit annually to the Department, by March 1 of the calendar year following the close of the completed calendar year, a report of its heavy-duty diesel engines and vehicles delivered for sale in this Commonwealth that were included in the emissions averaging, banking and trading programs for heavy-duty diesel engines and vehicles within the provisions of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1956.8.

MOTOR VEHICLE DEALER RESPONSIBILITIES

§ 126.531. Responsibilities of heavy-duty diesel highway vehicle dealers.

(a) A dealer may not sell, offer for sale or lease, or deliver a new heavy-duty diesel engine or vehicle subject to this subchapter without a valid emissions control label which meets the requirements of Title 13 CCR, Division 3, Chapter 1, Article 2, § 1965, adopted and incorporated by reference.

(b) A dealer may not sell, offer for sale or lease, or deliver a new heavy-duty diesel engine or vehicle subject to this subchapter unless the engine or vehicle conforms to the standards and requirements under Title 13 CCR, Division 3, Chapter 2, Article 3, § 2151, adopted and incorporated by reference.

(c) A dealer who imports, sells, delivers, leases or rents an engine or vehicle subject to this subchapter shall retain records concerning the transaction for at least 3 years following the transaction.

[Pa.B. Doc. No. 02-844. Filed for public inspection May 10, 2002, 9:00 a.m.]

APPENDIX E

for a combined meeting in Room 105, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA. Individuals may attend the meetings in person or remotely. Individuals interested in providing public comments during the meeting are encouraged sign up in advance of the meeting by contacting Allison Acevedo at alacevedo@pa.gov or (484) 250-5818.

Information on how to join the meeting, as well as agenda and meeting materials, will be available on the Board's webpage, found through the Public Participation tab on the Department of Environmental Protection's (Department) web site at www.dep.pa.gov (select "Public Participation," then "Advisory Committees," then "Environmental Justice," then "Environmental Justice Advisory Board").

Individuals are encouraged to visit the Board's webpage to confirm meeting date, time and location prior to each meeting. Questions concerning the November 16, 2021, meeting can be directed to Allison Acevedo at alacevedo@pa.gov or (484) 250-5818.

Persons in need of accommodations as provided for in the Americans with Disabilities Act of 1990 should contact Allison Acevedo at (484) 250-5818 or through the Pennsylvania Hamilton Relay Service at (800) 654-5984 (TDD users) or (800) 654-5988 (voice users) to discuss how the Department may accommodate their needs.

PATRICK McDONNELL,
Secretary

[Pa.B. Doc. No. 21-1846. Filed for public inspection November 5, 2021, 9:00 a.m.]

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Suspension of Enforcement of the Pennsylvania Heavy-Duty Diesel Emissions Control Program

The Department of Environmental Protection (Department) announces that beginning November 8, 2021, the Department will suspend enforcement of 25 Pa. Code Chapter 126, Subchapter E (relating to Pennsylvania heavy-duty diesel emissions control program). The Pennsylvania Heavy-Duty Diesel Emissions Control Program (Program) applies to the manufacturers of new diesel-powered vehicles with a gross vehicle weight rating (GVWR) of greater than 14,000 pounds or new heavy-duty diesel (HDD) engines that are used in vehicles with a GVWR of greater than 14,000 pounds that are sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in this Commonwealth. The Program requires that subject vehicles and engines be issued a California Air Resources Board (CARB) Executive Order certifying compliance with CARB emission standards. This suspension of enforcement will allow vehicles and engines subject to the Program that have not been issued a CARB Executive Order and which meet the Federal HDD emission standards to be sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in this Commonwealth beginning with model year (MY) 2022. With this suspension notice, the Federal standards for heavy-duty diesel vehicles and engines will apply in this Commonwealth.

In 2002, the Department's Program implemented the then current CARB emission standards for all HDD

engines and vehicles that have a gross vehicle weight rating of 14,000 pounds in response to an emissions cheating scandal in the late 1990s, when engine manufacturers installed emission control system defeat devices. See 32 Pa.B. 2327 (May 11, 2002). The Program became effective May 11, 2002, and provided the necessary 2 year lead time to manufacturers as required under section 177(2) of the Clean Air Act (42 U.S.C.A. § 7507(2)). The Program's emission standards first applied to MY 2005 HDD vehicles and engines.

The Department will re-evaluate this suspension of enforcement no later than July 31, 2023, to determine if the Program is needed to assist the Commonwealth in attainment and maintenance of the National Ambient Air Quality Standards in areas of this Commonwealth and the Ozone Transport Region. This suspension of enforcement does not create a need for the Department to extend to manufacturers 2 years of lead time to meet the CARB emission standards implemented by the Program if this suspension of enforcement is revoked by the Department. If the Department revokes this suspension of enforcement for the Program on or before July 31, 2023, manufacturers will be required to meet the Program's requirements beginning with MY 2025 vehicles and engines.

The Department's exercise of enforcement discretion does not protect a manufacturer, distributor, seller, renter, importer, leaser or owner of a retail outlet from the possibility of legal challenge by third persons under 25 Pa. Code Chapter 126, Subchapter E.

For more information or questions concerning the requirements of the Program, contact Mark Hammond, Director for the Bureau of Air Quality, at mahammond@pa.gov or (717) 787-9702.

PATRICK McDONNELL,
Secretary

[Pa.B. Doc. No. 21-1847. Filed for public inspection November 5, 2021, 9:00 a.m.]

DEPARTMENT OF HEALTH

Long-Term Care Nursing Facilities; Requests for Exception

The following long-term care nursing facility is seeking an exception to 28 Pa. Code § 201.22(j) (relating to prevention, control and surveillance of tuberculosis (TB)):

Laurelwood Care Center
100 Woodmont Road
Johnstown, PA 15905
FAC ID # 380502

The following long-term care nursing facility is seeking an exception to 28 Pa. Code § 211.9(g) (relating to pharmacy services):

Haida Healthcare and Rehabilitation Center
397 Third Avenue Extension
Hastings, PA 16646
FAC ID # 340102

These requests are on file with the Department of Health (Department). Persons may receive a copy of a request for exception by requesting a copy from the Department of Health, Division of Nursing Care Facilities, Room 526, Health and Welfare Building, Harrisburg, PA 17120, (717) 787-1816, fax (717) 772-2163, ra-paexcept@pa.gov.

APPENDIX F

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Suspension of Enforcement of the Pennsylvania Heavy-Duty Diesel Emissions Control Program

The Department of Environmental Protection (Department) announces that the Department will suspend enforcement of 25 Pa. Code Chapter 126, Subchapter E (relating to Pennsylvania Heavy-Duty Diesel Emissions Control Program) until January 2, 2026. The Pennsylvania Heavy-Duty Diesel Emissions Control Program (Program) applies to the manufacturers of new diesel-powered vehicles with a gross vehicle weight rating (GVWR) of greater than 14,000 pounds or new heavy-duty diesel (HDD) engines that are used in vehicles with a GVWR of greater than 14,000 pounds that are sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in this Commonwealth. The Program requires that subject vehicles and engines be issued a California Air Resources Board (CARB) Executive Order certifying compliance with CARB emission standards. This suspension of enforcement will allow vehicles and engines subject to the Program that have not been issued a CARB Executive Order and which meet the Federal HDD emission standards to be sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired or received in this Commonwealth during the suspension beginning with model year (MY) 2022 and ending with MY 2026. This suspension of enforcement supersedes the suspension notice published at 51 Pa.B. 7000 (November 6, 2021).

In 2002, the Department's Program implemented the then current CARB emission standards for all HDD engines and vehicles that have a GVWR of 14,000 pounds in response to an emissions cheating scandal in the late 1990s, when engine manufacturers installed emission control system defeat devices. See 32 Pa.B. 2327 (May 11, 2002). The Program became effective May 11, 2002, and provided the necessary 2-year lead time to manufacturers as required under section 177(2) of the Clean Air Act (42 U.S.C.A. § 7507(2)). The Program's emission standards first applied to MY 2005 HDD vehicles and engines.

Manufacturers will be required to meet the Program's requirements beginning with MY 2027 HDD vehicles and engines.

The Department's exercise of enforcement discretion does not protect a manufacturer, distributor, seller, renter, importer, leaser or owner of a retail outlet from the possibility of legal challenge by third persons under 25 Pa. Code Chapter 126, Subchapter E.

For more information or questions concerning the requirements of the Program, contact Mark Hammond, Director for the Bureau of Air Quality, at mahammond@pa.gov or (717) 787-9702.

RICHARD NEGRIN,
Acting Secretary

[Pa.B. Doc. No. 23-767. Filed for public inspection June 9, 2023, 9:00 a.m.]

DEPARTMENT OF HEALTH

Medical Marijuana Advisory Board Meeting

The Medical Marijuana Advisory Board (Board), established under section 1201 of the Medical Marijuana Act (35 P.S. § 10231.1201), hereby gives notice that Board meetings will be held from 10:30 a.m. to 12:30 p.m. on each day listed as follows in the Keystone Building, Hearing Room 1, 400 North Street, Harrisburg, PA 17120, with an option for Board members to participate virtually.

- Wednesday, June 28, 2023
- Wednesday, September 6, 2023
- Wednesday, November 15, 2023

At these meetings, the Board will discuss Medical Marijuana Program updates.

These meetings will be broadcasted live for the public through Commonwealth Media Services. Check www.medicalmarijuana.pa.gov and click on the "Medical Marijuana Advisory Board" under "Information for:" for live streaming information the day of the meeting.

For additional information, including an alternative format of this notice (for example, large print, audiotope, Braille) or for persons with a disability who wish to attend the meetings who require an auxiliary aid, service or other accommodation to do so, contact Sirisha Reddy, Special Assistant, Office of the Secretary, Department of Health, 625 Forster Street, 8th Floor, Health and Welfare Building, Harrisburg, PA 17120, (717) 787-9857, or for speech and/or hearing-impaired persons, call the Pennsylvania Hamilton Relay Service at (800) 654-5984 (TDD users) or (800) 654-5988 (voice users).

This meeting is subject to cancellation without notice.

DR. DEBRA L. BOGEN,
Acting Secretary

[Pa.B. Doc. No. 23-768. Filed for public inspection June 9, 2023, 9:00 a.m.]

DEPARTMENT OF HUMAN SERVICES

Availability of the Low-Income Home Energy Assistance Program; Proposed State Plan and Public Hearing Schedule

The Department of Human Services (Department) is making available for public review and comment the Fiscal Year (FY) 2023-2024 Low-Income Home Energy Assistance Program (LIHEAP) proposed State Plan. Comments on this notice and testimony received at public hearings will be used to formulate the final State Plan for using Federal funds for FY 2023-2024 LIHEAP.

The Department has made the proposed State Plan available to the public at <https://www.dhs.pa.gov/Services/Assistance/Pages/LIHEAP.aspx>. In addition, copies of the proposed State Plan are available upon written request to the Division of Federal Programs and Program Management, Department of Human Services, CoPA HUB, Suite 240/250, P.O. Box 2675, Harrisburg, PA 17105-2675.

APPENDIX G

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PETERS BROTHERS TRUCKING, INC.;
H.R. EWELL, INC.; MOTOR TRUCK
EQUIPMENT COMPANY d/b/a
KENWORTH OF PENNSYLVANIA;
TRANSTEK, INC.; and
PENNSYLVANIA MOTOR TRUCK
ASSOCIATION,

Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION OF
THE COMMONWEALTH OF
PENNSYLVANIA; PENNSYLVANIA
ENVIRONMENTAL QUALITY BOARD
OF THE COMMONWEALTH OF
PENNSYLVANIA; and RICHARD
NEGRIN, in his official capacity as Acting
Secretary of the Department of
Environmental Protection,

Respondents.

No. 272 M.D. 2023

ANSWER TO RESPONDENTS' PRELIMINARY OBJECTIONS

Petitioners, through their counsel and pursuant to Rules 1516(b) and 1517 of the Pennsylvania Rules of Appellate Procedure and Rules 1028 and 1029 of the Pennsylvania Rules of Civil Procedure, hereby submit the following responses to the averments in the Respondents' Preliminary Objections.

I. PARTIES

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted, except that the Petitioners, Peters Brothers Trucking, Inc., H.R. Ewell, Inc., Motor Truck Equipment Company d/b/a Kenworth of Pennsylvania, Transteck, Inc., and the Pennsylvania Motor Truck Association (collectively "Truckers"), deny that the Environmental Quality Board ("EQB") has authority to regulate warranty requirements for heavy-duty diesel ("HDD") engines and vehicles or to adopt HDD regulation incorporating California regulatory standards on a rolling basis.

II. BACKGROUND

Emissions from Heavy-Duty Diesel Engines

8. Admitted in part and denied in part. The Truckers admit that, as background in support of its 2002 rulemaking, the EQB said: "HDD engines and vehicles contribute greatly to a number of serious health and welfare problems." 32 Pa. Bull. 2327 (May 11, 2002). The Truckers admit further that the EQB stated that

air pollution contributes to “premature mortality, aggravation of respiratory symptoms and cardiovascular disease, changes to lung tissues and structures, altered respiratory defense mechanisms, [and] chronic bronchitis.” *Id.* The Truckers otherwise deny this averment because they do not possess requisite scientific knowledge to speak to environmental and public health concerns and because the averment is irrelevant to the legal issues at hand.

9. Admitted in part and denied in part. The Truckers admit that, as background in support of its 2002 rulemaking, the EQB said: “[T]he United States Environmental Protection Agency (EPA) has concluded that diesel exhaust is likely to be carcinogenic to humans.” *Id.* The Truckers otherwise deny this averment because they do not possess requisite scientific knowledge to speak to environmental and public health concerns and because the averment is irrelevant to the legal issues at hand.

10. Admitted in part and denied in part. The Truckers admit that, as background in support of its 2002 rulemaking, the EQB said: “[W]hile vehicles powered by HDD engines account for about only 1% of all motor vehicles and equipment, they are responsible for nearly 1/4 of NOx emissions.” *Id.* The Truckers otherwise deny this averment because they do not possess requisite scientific knowledge to speak to environmental and public health concerns and because the averment is irrelevant to the legal issues at hand.

11. Admitted in part and denied in part. The Truckers admit that, as background in support of its 2002 rulemaking, the EQB said: “Emissions from HDD engines and vehicles account for a substantial portion of ambient PM and ground-level ozone levels. These proportions are higher in some urban areas. Urban areas, which include many poorer neighborhoods, can be disproportionately impacted by HDD vehicle emissions because of heavy traffic in densely populated urban areas.” *Id.* The Truckers otherwise deny this averment because they do not possess requisite scientific knowledge to speak to environmental and public health concerns and because the averment is irrelevant to the legal issues at hand.

The Air Pollution Control Act

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted in part and denied in part. The Truckers admit that 35 P.S. § 4004.2 provides that, in implementing section 109 of the Clean Air Act, the EQB may adopt, by regulation, requirements to achieve and maintain ambient air quality standards. The Truckers deny that the delegated rulemaking authority set forth in 35 P.S. § 4004.2 should be construed as anything but a single and independent

delegation of authority. Accordingly, the Truckers deny any implication that an exercise of authority under 35 P.S. § 4004.2 entails or requires the exercise of authority delegated elsewhere within the Air Pollution Control Act (“APCA”) or the Clean Air Act.

The Clean Air Act

18. Admitted.

19. Admitted.

20. Admitted that the U.S. Environmental Protection Agency has, at times, concluded that portions of Pennsylvania are not meeting national ambient air quality standards (“NAAQS”). *See* 87 Fed. Reg. 60897, 60917 (Oct. 7, 2022) (finding that the “Pennsylvania-New Jersey-Maryland-Delaware” area had “failed to obtain the 2015 ozone NAAQS”). Petitioners further admit that failure to meet NAAQS standards triggers CAA Title I, Part D requirements for nonattainment areas.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted.

26. Admitted.

27. Admitted.

28. Admitted.

The Pennsylvania Heavy-Duty Diesel Regulation

29. Admitted in part and denied in part. The Truckers admit that, in 2002, the EQB adopted 25 Pa. Code Chapter 126, Subchapter E (“Pennsylvania HDD Regulation”). The Truckers admit that the Pennsylvania HDD Regulation expressly adopted and incorporated by reference requirements from California’s HDD Regulation—which are set forth in Title 13 of the California Code of Regulations. The Truckers further admit that the Clean Air Act permits the Commonwealth of Pennsylvania to choose to adopt California standards as an alternative to baseline federal standards established by the U.S. Environmental Protection Agency. But the Truckers deny that the EQB had statutory authority to adopt a rolling incorporation of California emission standards, or to adopt any emission warranty regulation. And the Truckers deny any implication that the Clean Air Act, in any way, compels Pennsylvania to conform to California standards.

30. Admitted in part and denied in part. The Truckers admit that the EQB adopted the Pennsylvania HDD Regulation with the goal of reducing emissions and that the Board contemplated that anticipated reductions would potentially help Pennsylvania attain and maintain NAAQS. The Truckers further admit that, under the Pennsylvania HDD Regulation, newer HDD engines and vehicles would emit less than those subject to federal standards in effect in 2002. And the Truckers admit

that the EQB stated that this rulemaking was “necessary to achieve and maintain the ambient air quality standard for ozone.” 32 Pa. Bull. 2327, 2329. But the Truckers deny any implication that the EQB was relying on its authority under section 4005(a)(8) to “adopt rules and regulations to implement the provisions of the Clean Air Act.”

31. Admitted.

32. Admitted.

33. Admitted.

34. Admitted in part and denied in part. The Truckers admit that, in 2018, California amended Title 13 of the California Code of Regulations to establish warranty requirements for 2022 and subsequent model years of new HDD vehicles and engines, and that these amendments to the California Code of Regulations were subject to public comment in California. *See* 13 CCR § 2036(c)(4)(B)–(D). The Truckers admit further that California’s extended warranty requirements were intended to prompt reductions in HDD vehicle and engine emissions of NO_x, particulate matter, and other pollutants. But Petitioners deny any implication that extended warranty requirements directly regulate vehicle emissions.

35. Admitted.

36. Admitted in part and denied in part. Petitioners admit that the Pennsylvania HDD Regulation automatically incorporated changes in the California

Code of Regulations governing HDD warranty requirements “by operation of law.”

But Petitioners deny any implication that this rolling incorporation was lawful.

37. Admitted in part and denied in part. The Truckers admit that, in 2021, the Department of Environmental Protection (“DEP”) issued a public notice announcing that it was (temporarily) suspending enforcement of the Pennsylvania HDD Regulation. The Truckers further admit that, in this notice, DEP said that it would not take enforcement action against the manufacturers and dealers of new HDD vehicles and engines sold, leased, offered for sale or lease, imported, delivered, purchased, rented, acquired, or received in the Commonwealth that did not meet California’s HDD regulatory standards. But the Truckers deny that the suspension “allows” new HDD vehicles and engines to be sold, leased, offered for sale or lease, imported, delivered, purchased rented, acquired, or received in Pennsylvania if they do not meet California standards. Petitioners deny any implication that DEP’s policy of nonenforcement nullifies the legal responsibility to comply with Pennsylvania’s HDD Regulation and its incorporation of California standards.

38. Admitted.

39. Admitted.

40. Admitted.

41. Admitted in part and denied in part. The Truckers admit that, on June 10, 2023, DEP issued public notice that the agency has (temporarily) suspended

enforcement of the Pennsylvania HDD Regulation and incorporated California standards. But the Truckers deny that DEP has suspended or nullified these regulations. And Petitioners deny any implication that DEP's policy of nonenforcement relieves Petitioners from the legal obligation to comply with Pennsylvania's HDD Regulation and incorporated California standards.

42. Admitted in part and denied in part. The Truckers admit the existence of and content of the June 10, 2023, notice of enforcement policy. The Truckers deny that the suspension allows new HDD vehicles and engines subject to that regulation, that do not meet the requirements of the California HDD Regulation, to be sold, leased, offered for sale or lease, imported, delivered, purchased rented, acquired, or received in Pennsylvania at this time, or that DEP has suspended or nullified these regulations. Further, the Truckers deny any implication that DEP's policy of nonenforcement relieves them from the legal obligation to comply with Pennsylvania's HDD Regulation and incorporated California standards. Additionally, the Truckers deny any implication that DEP is bound to continue its policy of nonenforcement even through January 2, 2026, because DEP might change its policy of nonenforcement at any point.

III. PRELIMINARY OBJECTIONS

RESPONDENTS' FIRST PRELIMINARY OBJECTION (STANDING AND RIPENESS – RE: PETITIONERS' CLAIMS I–VII)

43. Admitted in part and denied in part. Petitioners admit those allegations set forth in paragraphs 1–42 of the Respondents' Preliminary Objections, except for those portions denied.

44. Admitted.

45. Admitted.

46. Admitted that a party must be injured or aggrieved in some manner to have standing.

47. Admitted.

48. Admitted that on November 8, 2021, DEP announced a temporary policy of nonenforcement of 25 Pa. Code Chapter 126, Subchapter E.

49. Admitted in part and denied in part. The Truckers admit that, on June 10, 2023, DEP announced a temporary extension of its policy of nonenforcement of 25 Pa. Code Chapter 126, Subchapter E. But the Truckers deny that DEP has categorically suspended enforcement of the Pennsylvania HDD Regulation for MY 2022 through MY 2026 because the notice merely provides that DEP is suspending enforcement through January 2, 2026. Additionally, the Truckers deny any implication that DEP's policy of nonenforcement will continue even through this period because DEP retains discretion to change its nonenforcement policy at any

point. Further, because private litigants may still seek to enforce the Pennsylvania HDD Regulation and pursue civil penalties for alleged violations, the Truckers also face legal consequences for noncompliance despite the policy of nonenforcement by DEP. Additionally, the Truckers face potential for misdemeanor charges if they should fail to comply with the Pennsylvania HDD Regulation.

*The Agencies' Assert That Warranty Regulation Is Not Effective*¹

50. Denied. There is a controversy between the parties as to the legal effect of DEP's temporary policy of nonenforcement. The Truckers contend that the Pennsylvania HDD Regulation remains in effect, notwithstanding the Department's temporary policy of nonenforcement. The Truckers contend that the Department's policy of nonenforcement does not, in any way, suspend or nullify the Pennsylvania HDD Regulation. Further, the Truckers contend that that DEP's policy of nonenforcement does nothing to relieve them of the legal obligation to comply with the Pennsylvania HDD Regulation, which automatically incorporated standards from California. The Truckers face legal consequences for any noncompliance, despite the Department's policy of nonenforcement.

51. Admitted in part and denied in part. The Truckers admit that they cannot know whether or when they will face a lawsuit from a third party if they should

¹ There is a controversy between the parties as to whether—as a matter of law—the contested warranty regulation is currently effective. Accordingly, the Truckers deny the assertion that the “Warranty Regulation [is] Not Effective.”

violate the Pennsylvania HDD Regulation. The Truckers lack knowledge to either deny or admit the assertion that no third party has taken any action to enforce the warranty requirements incorporated from California in the Pennsylvania HDD regulation. And, in any event, the Truckers deny the assertion that they lack standing; the threat of civil or criminal liability for alleged violations imposes a here-and-now injury for the Truckers who are forced to choose between complying with unlawful regulation or assuming substantial liabilities should they ignore requirements (unlawfully) incorporated from California in the Pennsylvania HDD regulation.

52. Denied. There is a ripe judiciable controversy between the parties.

*The Agencies' Assert That Emissions Regulation Is Not Effective*²

53. Admitted.

54. Admitted that no state may lawfully enforce California's emission regulations unless the EPA has first granted a waiver from the Clean Air Act's general preemption of state emission standards.

55. Denied. The Petitioners are suffering a here-and-now injury because the Pennsylvania HDD Regulation incorporates emission standards set forth in Title 13 of the California Code of Regulations without caveat. As a matter of law, Pennsylvania's HDD Regulation incorporates California standards automatically

² There is a controversy between the parties as to whether—as a matter of law—the contested emissions regulation is currently effective. Accordingly, the Truckers deny the assertion that the “Emissions Regulation [is] Not Effective.”

whenever California amends its regulations—regardless of whether EPA has granted a waiver to California.

56. Denied. The Petitioners are suffering a here-and-now injury because the Pennsylvania HDD Regulation incorporates the emission standards set forth in Title 13 of the California Code of Regulations without caveat. Pennsylvania's HDD Regulation incorporates California standards automatically whenever California amends its regulations—regardless of whether EPA has granted a waiver to California.

57. Denied. There is a controversy between the parties as to the legal effect of DEP's temporary policy of nonenforcement. The Truckers contend that the Pennsylvania HDD Regulations remain in effect, notwithstanding the Department's temporary policy of nonenforcement. Further, the Truckers contend that the Department's temporary policy of nonenforcement does not, in any way, suspend or nullify California standards incorporated by reference in the Pennsylvania HDD Regulations. And further, the Truckers maintain that the Department's policy of nonenforcement does not relieve them from the obligation to comply with California standards incorporated by reference in the Pennsylvania HDD Regulations.

58. Admitted in part and denied in part. The Truckers admit that DEP has adopted a temporary policy of nonenforcement as to newly incorporated California emission standards. But the Truckers deny the assertion that "no enforcement" can

occur at this time, as well as the implication that the Truckers are not currently subject to California HDD standards. Further, the Truckers deny that they lack standing and that their claims are unripe because the APCA authorizes third parties to bring suit to enforce California standards incorporated by reference in the Pennsylvania HDD Regulation and provides that anyone who violates the EQB's regulation commits a misdemeanor.

59. Denied.

**RESPONDENTS' SECOND PRELIMINARY OBJECTION
(RIPENESS – RE: PETITIONERS' CLAIMS I–VII)**

60. Admitted in part and denied in part. Petitioners admit those allegations set forth in paragraphs 1–59 of the Respondents' Preliminary Objections, except for those portions denied.

61. Admitted.

62. Admitted in part and denied in part. The Truckers admit that the EQB invoked sections 5(a)(1) and (7) of the APCA when promulgating Pennsylvania's HDD Regulation, and that the EQB asserted that a benefit of the regulation would be "attainment and maintenance of the ozone health-based standard." 32 Pa. Bull 2327, 2332. But the Truckers deny that the APCA authorized this regulation.

63. Admitted in part and denied in part. The Truckers admit that section 4.2 of the APCA, 35 P.S. § 4004.2, governs the EQB in adopting regulation to achieve and maintain NAAQS as needed to satisfy the Clean Air Act. But Petitioners deny

any implication that section 4.2 governs regulation authorized in other sections of the APCA.

64. Admitted.

65. Admitted that DEP has not yet enforced new California warranty or emission standards because DEP has (temporarily) suspended its enforcement of the Pennsylvania HDD Regulation until January 2, 2026.

66. Admitted that DEP cannot lawfully enforce California's new emission standards through incorporation under the Pennsylvania HDD Regulation until EPA grants a waiver to California.

67. Admitted.

68. Admitted.

69. Denied. Section 4.2(e) of the APCA, 35 P.S. § 4004.2(e), only precludes pre-enforcement challenges for regulation promulgated under section 4.2(a), 35 P.S. § 4004.2(a). But the EQB promulgated the Pennsylvania HDD Regulation under sections 5(a)(1) and (7), 35 P.S. § 4005(a)(1) and (7). Further, section 4.2(e), 35 P.S. § 4004.2(e), only precludes pre-enforcement actions alleging violations of the standards set forth in section 4.2(b), 35 P.S. § 4004.2(b). Here the Petitioners advance procedural, ultra vires, and constitutional claims; they do not invoke or rely on the standards set forth in section 4.2(b), 35 P.S. § 4004.2(b).

70. Denied.

**RESPONDENTS' THIRD PRELIMINARY OBJECTION
(SUFFICIENCY OF PLEADING - RE: PETITIONERS' CLAIM I)**

71. Admitted in part and denied in part. Petitioners admit those allegations set forth in paragraphs 1–70 of the Respondents' Preliminary Objections, except for those portions denied.

72. Admitted.

73. Admitted.

74. Admitted in part and denied in part. The Truckers admit that Section 5(a)(1) of the APCA grants the EQB broad authority to promulgate regulation “for the prevention, control, reduction, and abatement of air pollution.” 35 P.S. § 4005(a)(1). But the Truckers deny any implication that the EQB’s delegated rulemaking authority is so broad as to authorize any conceivable regulatory measure designed to indirectly reduce emissions of air pollution.

75. Admitted that section 5(a)(7) of the APCA grants the EQB regulatory authority to “adopt rules and regulations designed to reduce emissions from motor vehicles[,]” subject to the requirement that such rules and regulations must “be developed in consultation with the Department of Transportation.”

76. Admitted.

77. Admitted.

78. Admitted.

79. Admitted in part and denied in part. The Truckers admit that the Clean Air Act permits the Commonwealth of Pennsylvania to adopt California's regulatory standards if California has obtained a waiver from EPA. But Petitioners deny any implication that federal law compels Pennsylvania to adopt California standards, or to incorporate California standards on a rolling basis. Further, the Truckers deny the implication that the EQB relied on section 5(a)(8) of the APCA, 35 P.S. § 4005(a)(8), when promulgating the Pennsylvania HDD Regulation to establish a rolling incorporation of California emission and warranty standards in the Commonwealth.

80. Denied. EQB had no authority under state law to promulgate the Pennsylvania HDD Regulation.

81. Denied.

**RESPONDENTS' FOURTH PRELIMINARY OBJECTION
(SUFFICIENCY OF PLEADING - RE: PETITIONERS' CLAIM II)**

82. Admitted in part and denied in part. The Truckers admit those allegations set forth in paragraphs 1-81 of the Respondents' Preliminary Objections, except for those portions denied.

83. Admitted in part and denied in part. The Truckers admit that they are alleging that the California standards incorporated into the Pennsylvania HDD Regulation are ultra vires. But the Truckers deny that they are alleging that the EQB failed to consult with the Pennsylvania Department of Transportation (PA-DOT) when promulgating the Pennsylvania HDD Regulation in 2002, regarding the

incorporation of California standards as they existed then. Rather, the Truckers claim that the incorporated California standards were unlawfully developed by California authorities in subsequent years (as the Agencies admit) without consulting the PA-DOT, as is required for the adoption of “rules and regulations designed to reduce emissions from motor vehicles” in Pennsylvania. 25 P.S. § 4005(7). The Truckers claim that the EQB could not have possibly consulted with PA-DOT in 2002 about standards developed in 2018, 2021, or any future rulemaking.

84. Admitted.

85. Admitted.

86. Admitted.

87. Admitted in part and denied in part. The Truckers admit that the EQB consulted with the PA-DOT when promulgating the Pennsylvania HDD Regulation in 2001 and 2002. But the Truckers deny any implication that the EQB consulted with PA-DOT as to the adoption of the California emission standards now in effect for heavy diesel vehicles in Pennsylvania, which were developed much later by authorities in California.

88. Admitted that the Truckers are unaware of any delegated authority for the Department of Transportation to promulgate regulations imposing HDD emission standards.

89. Denied.

**RESPONDENTS' FIFTH PRELIMINARY OBJECTION
(SUFFICIENCY OF PLEADING -
RE: PETITIONERS' CLAIMS III AND IV)**

90. Admitted in part and denied in part. Petitioners admit those allegations set forth in paragraphs 1–89 of the Respondents' Preliminary Objections, except for those portions denied.

91. Admitted in part and denied in part. The Truckers admit that they claim the EQB Board unlawfully exercised legislative power with adoption of the Pennsylvania HDD Regulation. But the Truckers deny the Agencies' restatement of Claims III and IV. Properly construed, Claims III and IV allege that section 5 of the APCA, 35 P.S. § 4005, violates the nondelegation doctrine if construed as authorizing the rolling incorporation of regulatory standards developed by authorities in California, and if the EQB's delegated authority is construed so broadly as to authorize imposition of warranty requirements for heavy diesel engines.

92. Admitted.

93. Admitted in part and denied in part. The Truckers admit that, in section 5(a)(7) of the APCA, 35 P.S. § 4005(a)(7), the General Assembly decided that the EQB should be enabled to adopt rules and regulations designed to reduce emissions from motor vehicles. But the Truckers deny that the General Assembly made any policy choice speaking to whether the EQB should adopt California emission

standards or align Pennsylvania with EPA standards. The Truckers further deny any implication that the General Assembly decided basic policy to cabin or otherwise guide the EQB in exercising its discretionary rulemaking powers.

94. Admitted.

95. Admitted.

96. Admitted in part and denied in part. The Truckers admit that the Clean Air Act permits the Commonwealth of Pennsylvania to incorporate California standards by reference. But the Truckers deny that the EQB acted consistent with the General Assembly's basic policy choices, as set forth in the APCA. The Truckers further deny that the APCA provides any boundaries or standards guiding or controlling the EQB's exercise of discretion in developing vehicle emission control standards or otherwise limiting EQB's authority to impose any regulation it deems fit for the purpose of reducing air pollution.

97. Denied.

98. Denied.

**RESPONDENTS' SIXTH PRELIMINARY OBJECTION
(SUFFICIENCY OF PLEADING -
RE: PETITIONERS' CLAIMS V AND VII)**

99. Admitted in part and denied in part. Petitioners admit those allegations set forth in paragraphs 1-98 of the Respondents' Preliminary Objections, except for those portions denied.

100. Admitted that, in Claim V, the Truckers assert that the Respondents failed to comply with the Commonwealth Documents Law, 45 P.S. §§ 1201–1208, by failing to solicit public comment on California’s new emissions and extended warranty standards before making those rules effective in Pennsylvania. Admitted that, in Claim VI, the Truckers assert that the Respondents failed to comply with the Regulatory Review Act, 71 P.S. § 745.5, by failing to submit required analysis to the Independent Regulatory Review Commission evaluating the impacts of California’s new emissions and extended warranty standards before making those rules effective in Pennsylvania. Admitted that, in Claim VII, the Truckers assert that the Agencies failed to comply with the Pennsylvania Administrative Code, 4 Pa. Code § 1.374, by failing to submit required analysis to the Governor’s office considering the costs and benefits and explaining the need for adopting California’s new emissions and extended warranty standards before making those rules effective in Pennsylvania.

101. Admitted.

102. Admitted in part and denied in part. The Truckers admit that the EQB allowed for public comment when promulgating the Pennsylvania HDD Regulation in 2001 and 2002. But the Truckers deny any implication that the Respondents allowed for public comment as to the new HDD emission and extended warranty rules now in effect in Pennsylvania.

103. Denied that Pennsylvania regulations that incorporate external regulations need not undergo a new period of public comment when those external regulations are revised to impose new substantive rules in Pennsylvania.

104. Admitted.

105. Admitted.

106. Admitted in part and denied in part. The Truckers admit that the Pennsylvania Statutory Construction Act construes a reference to a foreign statute or regulation as incorporating the then-existing language and any subsequent amendments and supplements on a rolling basis. But the Truckers deny that this interpretive rule for statutory construction obviates the need for complying with statutorily required procedures governing the adoption of new rules where a rolling incorporation works a substantive change in regulation affecting the rights or legal relations of private parties.

107. Denied.

108. Denied.

**RESPONDENTS' SEVENTH PRELIMINARY OBJECTION
(SUFFICIENCY OF PLEADING - RE: PETITIONERS' CLAIM VI)**

109. Admitted in part and denied in part. The Truckers admit those allegations set forth in paragraphs 1-108 of the Respondents' Preliminary Objections, except for those portions denied.

110. Admitted.

111. Admitted.

112. Admitted in part and denied in part. The Truckers admit that section 2(d) of the Regulatory Review Act states that “this act is not intended to create a right or benefit, substantive or procedural, enforceable at law by a person against another person or against the Commonwealth, its agencies or its officers.” 71 P.S. § 745.2(d). But the Truckers deny that there is no cause of action because Pennsylvania courts have found regulations invalid for failure to comply with the Regulatory Review Act’s required procedures.

113. Admitted in part and denied in part. The Truckers admit that this Court found that a party may not challenge the validity of a regulation based on the sufficiency of the information submitted to the Independent Regulatory Review Commission in *Marcellus Shale Coalition v. Dep’t of Env’t Prot.*, 193 A.3d 447, 468 (Pa. Commw. Ct. 2018). But the Truckers deny that this opinion has bearing in this case where the Respondents have failed to submit anything to the Regulatory Review Commission on newly effective HDD emission and extended warranty rules.

114. Admitted in part and denied in part. The Truckers admit that a disagreement with the information in an agency’s Regulatory Analysis Form may not, alone, be a valid basis to set aside regulation. The Truckers further admit that it is the Independent Regulatory Review Commissions’ role to weigh the contents of

a Regulatory Analysis Form and settle any disagreements related to the weight of the evidence or persuasiveness of its analysis. But the Truckers deny that there is any defense to the Agencies' failure to submit anything to the Review Commission on newly effective HDD emission and extended warranty rules.

115. Denied.

**RESPONDENTS' EIGHTH PRELIMINARY OBJECTION
(EXHAUSTION OF REMEDIES - RE: PETITIONERS' CLAIMS I-VII)**

116. Admitted in part and denied in part. Petitioners admit those allegations set forth in paragraphs 1-115 of the Respondents' Preliminary Objections, except for those portions denied.

117. Admitted.

118. Admitted that in *Duquesne Light Co. v. Dep't of Env't Prot.*, this Court said it will "refrain from exercising its original equitable jurisdiction to review an allegedly invalid regulation when there exists an adequate statutory remedy and review process" in cases concerning permitting or licensing regimes—as opposed to cases where "the regulation itself causes actual, present harm." 724 A.2d 413, 416-17 (Pa. Commw. Ct. 1999).

119. Admitted that, in *Marstellar Community Water Auth. v. Dep't of Env't Res.*, 519 A.2d 1112 (Pa. Commw. Ct. 1987), this Court held that judicial review was precluded for a municipal authority that had failed to appeal issuance of drilling permits to DEP's Environmental Hearing Board.

120. Denied.

121. Denied. The Truckers deny that they should have filed a petition with the EQB for a new rulemaking under section 35.18 of the General Rules of Administrative Practice or Procedure, 1 Pa. Code § 35.18. A petition for new rulemaking is not an administrative remedy subject to the exhaustion of remedies requirement. And even if this was an available administrative remedy, it would have been a futile exercise.

122. Admitted in part and denied in part. The Truckers admit that EQB could revise its regulations to address their concerns. But the Truckers deny any implication that a petition for new rulemaking would have been anything but a futile exercise. And further, the Truckers deny any implication that they should have been expected to expend time and resources on a petition for new rulemaking as a precondition for asserting their right to be free from unlawful regulation.

123. Admitted that a party may ask the Regulatory Review Commission to recommend changes to existing regulations. But the Truckers deny any implication that this would have been anything but a futile exercise. And further, the Truckers deny any implication that they should have been expected to expend time and resources asking the Commission to nudge the EQB as a precondition for asserting their right to be free from unlawful regulation.

124. Admitted in part and denied in part. Petitioners admit that a party challenging administrative decision-making that has not exhausted its available administrative remedies or demonstrated futility or other grounds for relief from exhaustion is precluded from obtaining judicial relief. But Petitioners deny any implication that there were available administrative remedies here.

125. Denied.

WHEREFORE, the Petitioners ask this Court to overrule the Respondents' Preliminary Objections.

DATED: August 16, 2023.

Respectfully submitted,

/s/ Caleb J. Kruckenberg

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**Pro Hac Vice*

CERTIFICATE OF SERVICE

This is to certify that on this 16th day of August, 2023, I electronically filed the foregoing document with the Clerk of the Court via the CM/ECF system, which will cause a copy to be served upon counsel of record.

DATED: August 16, 2023.

Respectfully submitted,

/s/ Caleb J. Kruckenberg

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**Pro Hac Vice*

CERTIFICATE OF CONFIDENTIALITY COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than nonconfidential information and documents.

DATED: August 16, 2023.

Respectfully submitted,

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Peters Brothers, Inc.; H.R. Ewell, Inc.; : 272 MD 2023
Motor Truck Equipment Company d/b/a :
Kenworth of Pennsylvania; Transteck, Inc.; :
and Pennsylvania Motor Truck Association, :
Petitioners

v.

Pennsylvania Department of Environmental
Protection of the Commonwealth of
Pennsylvania; Pennsylvania Environmental
Quality Board of the Commonwealth of
Pennsylvania; and Richard Negrin, in his
official capacity as Acting Secretary of the
Department of Environmental Protection,
Respondents

PROOF OF SERVICE

I hereby certify that this 13th day of October, 2023, I have served the attached document(s) to the persons on the date(s)
and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Service

Served: Caleb Joseph Kruckenberg
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Petitioner Motor Truck Equipment Company
Petitioner Pennsylvania Motor Truck Association
Petitioner Peters Brothers, Inc.
Petitioner Transteck, Inc.

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Petitioner Motor Truck Equipment Company
Petitioner Pennsylvania Motor Truck Association
Petitioner Peters Brothers, Inc.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Jesse Collin Walker

(Signature of Person Serving)

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