

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

Rulemaking Regarding
Title 6 of the Official Compilation of Codes, Rules and
Regulations of the State of New York (6 NYCRR) Part 248,
Use of Ultra Low Sulfur Diesel Fuel and Best Available Retrofit
Technology for Heavy Duty Vehicles
and
6 NYCRR Part 200, General Provisions

- by -

_____/s/_____
Susan J. DuBois
Administrative Law Judge

_____/s/_____
Richard Sherman
Administrative Law Judge

_____/s/_____
Kevin J. Casutto
Administrative Law Judge

December 30, 2008

PROCEEDINGS

The New York State Department of Environmental Conservation (the Department), Division of Air Resources (DAR) scheduled public comment hearings on the proposed Rulemaking regarding Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 248, Use of Ultra Low Sulfur Diesel Fuel and Best Available Retrofit Technology for Heavy Duty Vehicles, and 6 NYCRR Part 200, General Provisions. This rulemaking was initiated to require the use of ultra low sulfur diesel fuel and best available retrofit technology on heavy duty diesel vehicles owned by, operated by, on behalf of, or leased by state agencies and state and regional public authorities.

On October 8, 2008, notice of the public hearing appeared in the New York State Register and the Environmental Notice Bulletin. Notice was also provided in the form of legal notices published on October 8, 2008 in the following newspapers: *Albany Times Union, Buffalo News, Glens Falls Post Star, New York Post, Newsday, Rochester Democrat and Chronicle, and the Syracuse Post-Standard.*

DAR requested the services of Departmental Administrative Law Judges to preside at the public comment hearings held throughout the state. Hearings were held on the following dates at the indicated locations:

Monday, November 24, 2008 at 1:00 p.m., at the NYSDEC Region 2 Office Annex, Hearing Room 106, 11-15 47th Avenue, Long Island City, New York, 11101-13215.

Tuesday, November 25, 2008 at 1:00 p.m., at the NYSDEC Region 8 Office Conference Room, 6274 Avon-Lima Road, Avon, New York, 14414.

Wednesday, November 26, 2008 at 9:00 a.m., at the NYSDEC Central Office Public Assembly Room 129B, 625 Broadway, Albany, New York, 12233.

In addition to the three hearing sessions, the hearing record

was held open to receive additional written comments until 5:00 p.m., December 4, 2008, as described in the public hearing notice.

Prior to the hearings, the DAR Staff provided the ALJ with a complete copy of the Department's proposed rule making, a copy of *State Register* and *ENB* notices of proposed rulemaking published on October 8, 2008 and affidavits of publication for the October 8, 2008 legal advertising in the newspapers identified herein above. These documents were made available for public review during the four legislative hearing sessions and are deemed incorporated into the hearing record. Additionally, these documents could be obtained for review during the public comment period at the DEC Central Office and at any of the nine DEC Regional Offices.

During each hearing session, a DAR staff person described the rulemaking generally as follows: These regulations will require the use of ultra low sulfur diesel fuel and best available retrofit technology on heavy duty diesel vehicles owned by, operated by or on behalf of, or leased by state agencies and state and regional public authorities. The term "on behalf of" means to provide, by a contractor, labor, services, materials and/or equipment to a regulated entity which are integral to the performance of work by a regulated entity. The required use of ultra low sulfur diesel fuel in heavy duty diesel vehicles will reduce diesel particulate matter from those vehicles; however, the use of ultra low sulfur diesel combined with the use of best available retrofit technology on covered heavy duty diesel vehicles will also significantly reduce emissions of diesel particulate matter from those vehicles. Part 248 also requires that affected heavy duty diesel vehicles have their engine control modules software updated (reflashed) to further reduce excess oxides of nitrogen emissions during certain off-cycle operation.

ALJ Kevin J. Casutto conducted the hearing on November 24, 2008 at 1:00 p.m., at the Department's Region 2 Annex, 11-15 47th Avenue, Long Island City, New York. Speaking for DAR Staff at the hearing was Saji Samuel, an Environmental Engineer with the Department's DAR. Twelve people provided comments at this hearing session, the majority supporting the rulemaking. Representatives of organizations providing comments supporting the rulemaking included the American Lung Association, New York Public Interest Research Group, and the Local Development Corporation of the Southwest Bronx. Those who spoke in support of the rulemaking stated that this rulemaking would reduce pollutant emissions of diesel vehicles, including ozone, carbon monoxide, sulfur

dioxide, nitrogen oxide and particulate pollution, thereby resulting in improved air quality for the state's citizens, and especially for those who suffer from asthma. In turn, the improved air quality will result in fewer hospitalizations and medical treatment for those with asthma, resulting in economic benefits from reduced need for medical services. These speakers assert that the retrofit technologies are effective for older vehicles, when appropriately fitted to the particular vehicle.

Representative of organizations providing comments opposing the rulemaking included the General Contractors Association, New York State Motor Truck Association (Metro Region), and the Construction Industry Council of Westchester and Hudson Valley, Inc. Those who spoke in opposition to the rulemaking questioned the costs of retrofitting older vehicles and questioned the efficacy of the retrofit technology. These speakers stated that the proposed rule will have adverse economic results, including increased truck operation and maintenance costs for New York businesses at a time when the economy has created grave hardship for businesses; reduced truck availability for state agency projects and state funded projects; higher costs to renew and rebuild New York's infrastructure and facilities at a time of increased materials cost inflation; and loss of construction and building industry jobs. Some speakers argued that in view of the poor economic climate, implementation of the rule should be delayed for a period of three to five years; and that in view of the typical life of service of these vehicles, many could be replaced rather than retrofitted.

These speakers also challenged the efficacy of the retrofit technology, citing a New York State Department of Transportation report that only 3 of 80 retrofitted vehicles met the emission standard required by this rulemaking.

The legislative hearing session ended after 2:15 p.m.

Administrative Law Judge Richard Sherman conducted the hearing on November 25, 2008 at 1:00 p.m., at the NYSDEC Region 8 Office, Avon, New York. Thomas Marriott, Regional Air Pollution Control Engineer for DEC Region 8, provided a brief overview of the proposed regulations.

Approximately thirty-five persons attended this hearing session, eight offered comments on the proposed regulations. Seven commenters spoke in opposition to the proposed regulations, one spoke in favor of the regulations.

Those who spoke in opposition to the regulations were predominantly contractors, their employees and/or representatives of trade associations. The Highway Superintendent for the Town of Penfield also spoke. These speakers generally did not object to the use of ultra low sulfur diesel, but did object to the requirements concerning best available retrofit technology (BART). Speakers cited the high cost associated with implementing BART requirements and several noted the likelihood that contractors would be forced to layoff employees to offset implementation costs. Some speakers suggested delaying or phasing in the BART requirements to defer the costs and allow older vehicles to be retired from service without retrofitting. Another issue raised was the perception that inspection and enforcement would be difficult and non-compliant contractors, possibly including some from out of state, may under bid contractors that abide by the regulations and incur the associated costs.

One commenter, who spoke on behalf of the American Lung Association of New York, Inc., favored the adoption of the regulation, including the BART requirements. This speaker noted that, among other things, diesel exhaust pollutants are listed by the EPA as a human carcinogen, have been shown to trigger asthma attacks and are linked to premature deaths in seniors. This speaker also stated that the cost of implementing the regulations would be far outweighed by the health benefit to New Yorkers. He stated that the typical cost for a person covered by Medicaid to be hospitalized for an asthma attack is \$9500, and that this cost is greater than the cost of a diesel particulate filter.

The legislative hearing session ended at approximately 2:00 p.m.

Administrative Law Judge Susan J. DuBois conducted the hearing on November 26, 2008 at 9:00 a.m., at the NYSDEC Central Office Public Assembly Room 129B, 625 Broadway, Albany, New York, 12233. Joseph Iannotti, an Environmental Engineer, spoke on behalf of DEC Staff. Approximately thirty-two persons attended the hearing, twelve of whom presented comments. The hearing ended at approximately 10:30 a.m.

The comments at the Albany hearing focused on retrofitting engines, rather than on the use of low sulfur fuel. Supporters and critics of the proposed regulations cited substantially different dollar amounts as the estimated cost of retrofitting a diesel engine. Supporters and critics also differed about the effectiveness of retrofit equipment. The NYS Motor Truck

Association stated that data from the New York State Department of Transportation indicates that the devices do not work as intended on older engines that operate at lower temperatures. Corning (a manufacturer of emission control devices, among other products) stated the equipment has been tested in use and found to work, and that temperatures are high enough in most heavy duty diesel applications.

The Clean Air Task Force, the American Lung Association, Environmental Advocates, New York Public Research Interest Group and Corning spoke in favor of the proposed regulations. Several comments urged that the regulations be adopted as written and that the phase-in schedule not be extended. Environmental Advocates stated that the required technology already exists and is readily available, and urged that the final rule retain the draft's approach of making the requirement applicable to subcontractors. Several comments discussed the economic and social costs of diseases caused by air pollution. The American Lung Association and Corning Enterprises noted that emission control equipment is manufactured in New York State and that the demand for such equipment has economic benefits including high tech jobs.

The New York Public Transit Association, the New York State Motor Truck Association, the New York Construction Materials Association, Associated General Contractors of New York State, Vantage Equipment, and Peckham Industries opposed the retrofit requirement or asked that it be modified. Associated General Contractors stated that the implementation schedule is too fast and the Motor Truck Association recommended that the compliance date of the regulation be delayed by five years. The Public Transit Association proposed exempting buses that will not be in operation as of 2013, or extending the overall schedule. The Public Transit Association also stated that air quality will not improve unless more New York residents use public transit, and that the expense of complying with the proposed regulations during a financial crisis will negatively impact public transit. Vantage Equipment questioned how the retrofit would affect fuel efficiency of vehicles. Associated General Contractors stated the regulation should be more specific in identifying what information to submit in support of a waiver, and questioned how penalties would be calculated for violations by subcontractors.