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Senator Mary Jo White, Chairman
Environmental Resources & Energy
Room 169 Main Capitol Building
Senate Box 203021
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Senate of Pennsylvania

March 27, 2006

The Honorable John R. McGinley, Jr., Esq., Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Proposed Rulemaking #7-398
PA Clean Vehicles Program Amendments

Dear Chairman McGinley:

We are writing to share our comments with the Independent Regulatory Review Commission (IRRC) concerning the above-referenced proposed rulemaking. This rulemaking was approved for public comment by the Environmental Quality Board (EQB) at its October 18, 2005 meeting and published in the *Pennsylvania Bulletin* on February 11, 2006.

This letter is written in our respective capacities as chairs of the Senate Transportation Committee and Senate Environmental Resources and Energy Committee, former chair of the Senate Environmental Resources and Energy Committee, and current and former members of the Environmental Quality Board. To that end, we seek to balance and protect the environmental, health and consumer interests of our constituents and all Pennsylvanians.

As you may know, under the federal Clean Air Act, states must choose to utilize either the federal vehicle emission manufacturer's standard (currently known as "Tier II"), or the vehicle emission manufacturer's standard developed by the state of California (currently known as "Cal-LEV II"). In 1998, under former Governor Tom Ridge, the Department of Environmental Protection (DEP) adopted the Clean Vehicles Program. The program adopted a more stringent (compared to Tier I) federal option available at the time, called NLEV (National Low-Emission Vehicle Program). NLEV was the precursor to Tier II. However, since NLEV was a voluntary program, legal mechanics made it necessary for the Commonwealth to adopt the California vehicle emission standard (then known as Cal-LEV I) as a backstop, should the entities voluntarily participating in NLEV withdraw.

Official records maintained by DEP and the EQB from 1998 make it clear that reference to the California vehicle emission standard was nothing more than a legal backstop, and that DEP would look to adopt the federal Tier II standard once it was finalized. Tier II was finalized in 2000, effective for Model Year 2004. The following statements made by DEP in 1998 during the rulemaking process substantiate this:

- o "This regulation...is the final step PA needs to take to participate in NLEV."

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- Adopting the California standards *“is a contingency. This language is part of verbatim language that EPA is asking us to adopt.”*
- *“DEP agrees...that NLEV would have a greater air quality benefit (than Tier I) and be much more equitable for PA than a state-by-state”* approach.
- *“Without the state ‘backstop’ program, there could not be a compliance alternative. It is the state program that creates the legal mechanism for NLEV as a compliance alternative. The NLEV program is voluntary and may have limited duration.”*
- *“This is trying to make continuity about clean vehicles from the NLEV vehicle to what is called the Tier-two vehicle.”*

There is no doubt about the clear inference of the intent of the 1998 rulemaking. Unfortunately, the current DEP administration has reversed course from its 1998 statements and representations to the public and members of the General Assembly. Through a disjointed argument, DEP now claims that the California vehicle emission standard is in fact effective in Pennsylvania for Model Year 2006. However, with regulation #7-398, DEP has proposed to delay the implementation of the California standard for two years, until Model Year 2008. If DEP’s current interpretation is to be believed, then the department has offered no reason to substantiate why it is proposing to postpone implementing the California standard when, per its own argument, the automobile industry and consumers have had advance notice of its effective date for nearly eight years. We note that while most environmental and health organizations have refused to challenge DEP’s effort to “postpone” the effective date of the California vehicle emission standard, two groups (Clean Air Council, Inc. and PennEnvironment, Inc.) have filed suit in federal court seeking immediate implementation of the California vehicle emission standard. Ironically, both filed suit after praising DEP’s intention to promulgate regulation #7-398.

Our belief is that DEP has failed to revisit the current regulation in a timely fashion to incorporate the federal Tier II standards, and that proposed regulation #7-398 is actually a conscious decision to codify the California standard in Pennsylvania’s regulations. On December 13, 2005 we co-chaired a public hearing on this subject, and have introduced Senate Bill 1025 to prohibit the adoption of the California standard. Similar legislation (HB 2141) has been introduced in the House of Representatives. A transcript of this hearing is available upon request or online at www.senatormjwhite.com/environmental.html. As amended, the bill now sets up a stakeholder process to identify recommendations in non-attainment regions on how best to meet federal air quality standards, and requires DEP to report back to the General Assembly by June 30, 2010. Senate Bill 1025 passed the Senate and is currently before the House Transportation Committee.

While DEP is free to argue in support of adopting the California standards, we are extremely troubled by its repeated assertions that adoption of, with intent to implement, the California standard was in fact done through the 1998 rulemaking. We are also dismayed at the

manner in which DEP and PENNDOT have sought to counter both concerns over this policy shift, as well as consideration of HB 2141 and SB 1025 by the General Assembly. For example:

- A seemingly internal October 27, 2005 email exchange between DEP administrators was leaked by DEP to an activist organization. The email listed large energy generators and manufacturers that would face additional and costly emission restrictions if HB 2141 was enacted. Entities on the list were privately urged to oppose HB 2141 and SB 1025.
 - *The email was utilized to browbeat legislators into opposing HB 2141; was never formally or informally shared with legislators by DEP; and contained facilities located in politically targeted regions, not necessarily the largest emitters.*
- An October 28, 2005 letter from DEP to members of the House of Representatives states that passage of HB 2141 and repeal of the Clean Vehicles Program “puts us in violation of federal law”.
 - *Subsequently, DEP changed its argument, conceding that Pennsylvania can in fact maintain the federal Tier II standards, but in DEP’s view would need additional reductions from stationary sources to meet air quality standards.*
- A November 1, 2005 email from PENNDOT Secretary Allen Biehler to all members of the General Assembly insinuates that passage of HB 2141 would jeopardize \$1.6 billion in federal highway funding. The email failed to include a detailed discussion of the implications of HB 2141, the likelihood of whether the Commonwealth in fact would lose federal funding, or whether the Commonwealth actually relied upon the California vehicle emission standards as part of its State Implementation Plan (SIP) compliance strategy.
 - *A December 2, 2005 letter from EPA Regional Administrator Donald Welsh states the Clean Vehicles Program is part of the Commonwealth’s federally enforceable SIP. However, Administrator Welsh also writes “regarding whether passage of HB 2141 would result in application of Federal sanctions against the Commonwealth, I believe it would not...At present, the Commonwealth’s SIP does not rely upon such [California] emission reductions”.*
- DEP’s January 31, 2006 letter to the General Assembly asserts that DEP adopted and intended to implement the California vehicle emission standards in Pennsylvania.
 - *As previously discussed, DEP intentionally omits the context of the 1998 rulemaking, as well as its own stated intention to revise the regulation to incorporate Tier II when it was finalized.*

- DEP's January 31, 2006 letter dismisses as irrelevant arguments that EPA has stated there is only a 1%-2% emission reduction difference between federal vehicle emission standards and the California program. DEP writes "EPA was comparing CA LEV II to the NLEV program".
 - *Indisputably false. While absurd to claim that NLEV is more stringent than Tier 2, the March 26, 2004 EPA letter to the Northeast States for Coordinated Air Use Management (NESCAUM) actually states "we estimate that [CAL] LEV II will provide about 1% additional reduction in mobile source VOC, and about 2 % reduction in air toxics, over Tier 2 in 2020 with the program starting in the 2004 model year, and lower with a later program start date" (emphasis added).*
- DEP's preamble for proposed regulation #7-398 touts the California standard as a means of controlling carbon dioxide (greenhouse gas) emissions.
 - *DEP fails to acknowledge that reduction of carbon dioxide emissions is not a requirement of the SIP or the federal Clean Air Act; further, DEP ignores a September 2003 EPA General Counsel determination that EPA does not have authority under federal law to regulate motor vehicle emissions of carbon dioxide or other greenhouse gases*
- DEP routinely notes that 37 counties are classified as non-attainment for the 8-hour ozone standard; DEP further states that it has relied upon the additional benefits of adopting CAL-LEV II as a means of achieving attainment.
 - *DEP fails to acknowledge that 31 counties are expected to come into compliance with the 8-hour ozone standard by 2009, and that none of the remaining counties' attainment strategy calls for utilizing projected benefits from CAL-LEV II. No documents provided to the General Assembly or the public by DEP actually show where DEP calculates and anticipates such benefits. To the contrary, several documents, including DEP's August 2003 recommendations to EPA for 8-hour ozone attainment/nonattainment areas (which makes no mention of achieving future credit under CAL-LEV II) reflect DEP's confidence that, realizing the benefits of cleaner cars under Tier II, the Commonwealth can meet and maintain federal air quality standards.*

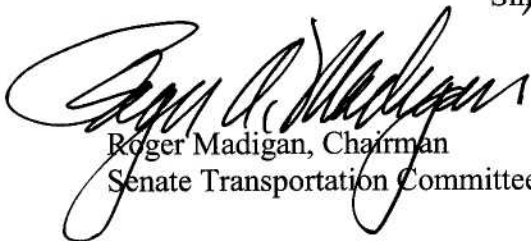
We believe that this issue is of sufficient importance to merit legislative guidance. We have little faith that DEP will revise the PA Clean Vehicles Program regulation to maintain continued use of the federal Tier II standard in Pennsylvania. Nonetheless, the manner in which DEP has attempted to revise the historical origin of the PA Clean Vehicles Program, misled members of the General Assembly and public, disregarded its own previous statements about the value of the federal Tier II standards and the Commonwealth's ozone attainment status, and

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other troublesome tactics should call into serious question the good-faith credibility traditionally extended to an agency when promulgating a regulation deemed to be in the public's best interest.

We therefore do not support promulgation of this regulation, and will continue to advocate for legislation which calls for a comprehensive strategy of assessing, improving and maintaining the Commonwealth's air quality in a manner compliant with the federal Clean Air Act. By copy of this letter, we are also submitting these comments to the EQB for inclusion in the public comment period.

Sincerely,


Roger Madigan, Chairman
Senate Transportation Committee


Mary Jo White, Chairman
Senate Environmental Resources
& Energy Committee

cc: Environmental Quality Board

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