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January 12, 2006

Senator Gerald J. LaValle
Room 458
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Senate Box 203047
Harrisburg, PA 17120-3047

Re: Legal Issues Arising in Connection with the December 13, 2005 Joint Hearing Before the Pennsylvania Senate Committees on Transportation and Environmental Resources & Energy

Dear Senator LaValle:

This letter responds to the request you made to me when I was one of the Alliance of Automobile Manufacturers' witnesses testifying before a joint session of the Committees of Transportation and Environmental Resources & Energy. At that December 13, 2005 hearing, I focused on the legal issues presented. You asked for a written copy of my testimony. As you will remember, I indicated that I was not reading from written remarks. Therefore, in response to your request and on the Alliance's behalf, I summarize below the general points I made orally, amplifying where appropriate and providing supporting citations.

1. The Rendell Administration Significantly Shifted Its Position When It Appeared Before the Committees.

The Rendell Administration witnesses significantly shifted from their earlier position when they appeared at the hearing. In letters such as one sent on October 28, 2005, to members of the House of Representatives, the Administration claimed that "[r]epeal of the [Pennsylvania Clean Vehicles Program] puts us in violation of federal law. The consequences of this violation of federal law for the Commonwealth includes the loss of 1.6 billion in federal highway funds." That appears no longer to be the Administration's position.

In their testimony at the hearing, the Administration's witnesses were careful to say that Pennsylvania would be able to choose not to adopt the California vehicle program (as reflected in the so-called Pennsylvania Clean Vehicles Program). The Administration's witnesses noted that the Commonwealth would need comply with the procedural requirements under the federal Clean Air Act associated with properly obtaining approval for state implementation plan ("SIP")

amendments from EPA, a point that we addressed at the hearing and cover below in this letter, as requested.

The Administration's revised position should eliminate any doubt about the wisdom of the legislation now under consideration by the Committees. You will recall that in advance of the hearing, in a November 10, 2005 letter to EPA Regional Administrator Donald Welsh (a copy of which is attached), we asked EPA to confirm that Pennsylvania is free to choose whether it wants the California vehicle program or the federal Tier 2 vehicle program to apply in the Commonwealth. As the Committees are aware, the EPA has now done so. Were Pennsylvania to make clear its adoption of the federal Tier 2 program, it faces no consequent loss of federal highway funds as long as it complies with the procedures for obtaining a SIP amendment.

It also should be noted that the formality of a SIP revision will be necessary in any event, even in the absence of legislation. Pennsylvania regulators in 1998 supposed that, long before model year 2006 arrived, approval for such SIP amendments would be requested from EPA, assuming EPA put in place before that time a new generation of federal emissions standards commonly referred to as the Tier 2 standards. This understanding of the regulatory history in Pennsylvania surrounding the adoption in 1998 of the Pennsylvania Clean Vehicles Program was confirmed by several witnesses at your hearing, including the Executive Director of Pennsylvania's AAA Federation.

2. EPA Has Plainly Disclaimed Seeking Federal Highway Fund Sanctions Against the Commonwealth.

The letter that Regional Administrator Donald Welsh sent to Richard A. Geist, the Chairman of the House Transportation Committee on December 2, 2005, represents a very clear disclaimer, in the overall context of EPA pronouncements in the area of the Clean Air Act, that were Pennsylvania to adopt the Tier 2 program instead of the California program, it would not face any sanctions or other kinds of enforcement actions brought by the EPA. EPA's letter states clearly that "adoption of the CA LEV standards in Pennsylvania is a choice for Pennsylvania to make." Welsh Letter at 1. Regional Administrator Welsh, speaking for EPA, also stated that "[r]egarding whether passage of H.B. 2141 would result in application of Federal sanctions against the Commonwealth, I believe it would not."

One point that the Administration has more recently advanced may warrant further comment. One Administration official has indicated that she would not read EPA's letter as a strong disclaimer of any intent on EPA's part to enforce against Pennsylvania should the Commonwealth not adopt the California vehicles program because many of the pronouncements in that letter are in the form of the third person plural ("we" or "our"), whereas the statement Regional Administrator Welsh made about enforcement actions and sanctions was expressed only in the first person singular ("I believe"). "Mr. Welsh himself provides the appropriate

caution. Whereas on other key findings in the letter Mr. Welsh says that he is providing an agency view (' . . . it is our opinion . . .'), on this point he distinctively qualifies the statement as '. . . I believe . . .'." McGinty Testimony at 4. In point of fact it is unremarkable that EPA's letter switches back and forth from being written in the first person singular to the first person plural. This is common in many EPA pronouncements. It merely reflects that EPA Regional Administrator Welsh is speaking for the EPA as a whole, and thus sees no distinction between stating what he (singular) will or will not do and what the agency will or will not do. If he were purporting to speak only for himself, he would not have issued a letter in his official capacity at all and would have framed no portion of a letter in the first person plural ("we"). Finally, to the extent there is any doubt about this point, the Committees could easily request the views of EPA headquarters in Washington, D.C., to confirm that on this matter the Regional Administrator was responding on behalf of the Agency.

3. Any Citizen Suit Brought Against the Commonwealth in Connection with the Legislature Making a Choice to Adopt the Federal Tier 2 Standards Would Fail on Numerous Grounds.

EPA's letter correctly notes that "[i]f CA LEV remains an element of the approved SIP, but is not being enforced, Pennsylvania could be vulnerable to citizens' suits, pursuant to Section 304 of the Act, which allows lawsuits to be brought in Federal court for enforcement of the program, civil penalties, litigation costs and attorney's fees." EPA letter at 2. Of course, the Senate version of the legislation, S.B. 1025, provides in Section 6 that state regulators would be required to seek to remove California LEV I as an element from the approved SIP as expeditiously as possible after the passage of the bill. Citizen suits cannot succeed if the California LEV I program is removed from Commonwealth's SIP.

There are also other reasons why citizen suits would fail if the legislation is adopted. Pennsylvania would not be violating federal law by making clear that it was adopting the federal Tier 2 standards -- as EPA has confirmed, this is a viable choice for Pennsylvania to make. Moreover, it bears noting that as a sovereign State, the Commonwealth possesses Eleventh Amendment sovereign immunity. The most that environmental plaintiffs could obtain as a remedy in a citizen suit against state officials consistent with the Eleventh Amendment would be prospective injunctive relief -- in other words, an order to come into compliance with federal procedural law governing obtaining SIP amendments. Retrospective relief would not be

available -- in other words, third-party citizen plaintiffs could not obtain monetary penalties.[1] See Pennsylvania Fed'n of Sportmen's Clubs, Inc. v. Hess, 297 F.3d 310, 323 (3d Cir. 2002).[2]

Additionally, as the Rendell Administration has necessarily now conceded, if the Commonwealth complies with the formalities for obtaining a SIP amendment from EPA, there will be no violation of federal law. Section 10 of the Senate version of the bill (S.B. 1025), confirming that the Commonwealth wants to abrogate the Pennsylvania Clean Vehicles Program and make the federal Tier 2 standards applicable, clearly states that the bill would not become effective until after the necessary SIP amendment paperwork was processed and approved by EPA. Thus, a citizen suit would be pointless because, at most, it could only obtain relief that the State General Assembly had already pronounced itself in agreement with -- an order from a court that before Pennsylvania could change what is technically present in its SIP, it must first seek and then obtain EPA's approval.

Furthermore, even if the House version of the pending legislation were adopted, there is no reason to fear that a citizen suit could result in Pennsylvania losing any federal highway funding. The House Bill (H.B. 2141) does not state a legislative intent to change the SIP in defiance of federal procedural requirements for SIP amendment under the Clean Air Act. It is simply silent on the issue of SIP amendment procedures. Thus, there would be no reason for any state executive branch official tasked with implementing H.B. 2141 to interpret that bill to be at

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1 Additionally, it is clear from EPA's letter that Clean Air Act Section 179 sanctions such as highway-fund reductions are unavailable because the Commonwealth's SIP has never relied upon emissions reductions associated with the California vehicle program. See Welsh Letter at 2 (first paragraph) ("Mandatory sanctions under section 179 of the Act would not be triggered by failure to implement the CA LEV program unless Pennsylvania relied on emissions reductions attributable to the CA LEV program in certain SIP-approved elements (e.g., attainment demonstrations, reasonable further progress plans). At present, the Commonwealth's SIP does not rely upon such emission reductions."). Furthermore, Section 179 sanctions are sanctions that only the EPA can impose. They are not sanctions that may be obtained in Section 304 citizen suits. At most, Section 304 citizen suits against non-States can obtain the financial remedy of a "civil penalt[y]." A reduction in highway funds, tied to the exercise of Congress's Spending Clause powers, is not a "civil penalt[y]." And, most importantly, as noted above, the Eleventh Amendment blocks any ability to obtain civil penalties against States.

2 Further hurdles in Eleventh Amendment law would also face any citizen suit in this area. For instance, under Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74-75 (1995), the Supreme Court ruled that in situations where Congress has created a detailed remedial scheme of enforcement concerning States, even prospective injunctive relief is unavailable against a State. The Clean Air Act, especially in Section 179, but also in other provisions, appears to contain a highly detailed enforcement scheme directed at States specifically. Thus, if the Commonwealth presented such a defense vigorously, it would be possible obtain a federal court ruling that no viable form of relief, not even prospective injunctive relief, could be obtained in the type of citizen suit under consideration.

odds with federal law. Indeed, such an official's duty would be to the contrary -- to reconcile H.B. 2141 with the federal Clean Air Act. Thus, after H.B. 2141's passage, officials at the Pennsylvania Department of Environmental Protection would be duty-bound to process the necessary conforming SIP amendment paperwork with the EPA.

It is now also clear that EPA would have no basis to deny a request to amend the SIP in order to delete the California rule, assuming all other requirements of the Clean Air Act were met. See Welsh Letter at 1 ("adoption of the CA LEV standards in Pennsylvania is a choice for Pennsylvania to make"). Of course, the Rendell Administration would have to present a plan to EPA on Pennsylvania's behalf, supported by sufficient modeling demonstrations, to come into compliance with the national ambient air quality standard for ozone. But that obligation would exist regardless of whether H.B. 2141 or S.B. 1025 or similar legislation were or were not adopted. And since Pennsylvania has never relied on California vehicle program emissions reductions in its modeling demonstrations up to this point, the adoption of H.B. 2141, S.B. 1025, or any close variation thereof, would not negatively impact Pennsylvania's ability to make the necessary showings to EPA in any way.

4. The Version of California's Emission Standards Technically on Pennsylvania's Books Is Legally Obsolete -- Hence the Rendell Administration Proposal to Repeal That Program and Adopt in Its Place California LEV II Standards.

One of the issues that may not have received enough attention in the current debate is that the version of the California LEV program technically still on Pennsylvania's books -- LEV I -- is legally obsolete. Since Pennsylvania adopted California LEV I in its 1998 Clean Vehicle Program, California has adopted LEV II, leaving LEV I behind as a legal nullity. See Clean Air Act Section 177 (allowing States attempting to borrow California's emissions standards only if the receiving State's standards "are identical to the California standards" then in existence "for such model year") (emphasis added).

The newly proposed regulations of the Rendell Administration do not explicitly acknowledge this legal fact, but it is clear that the Administration does not contest it, because it attempted neither to claim it could lawfully apply LEV I standards to model year 2006 and later vehicles in Pennsylvania, nor did it claim that LEV II could become law without new regulatory action here in the Commonwealth. Hence, the Rendell Administration was faced with a choice to allow the federal Tier 2 standards to govern in Pennsylvania (as they do in most States as a matter of default federal law), or instead to take new steps to attempt to adopt the current California LEV II standards. As is now well known, the Administration opted for the latter choice. Seen in that way, however, there is nothing about the adoption of LEV I in 1998 that locks the Pennsylvania Legislature into the California program forever and no reason that the Legislature cannot choose to exercise its supremacy to make a different choice for the Commonwealth than the Rendell Administration would make.

The issue of LEV I vs. LEV II has in part been obscured by the way in which the Rendell Administration has chosen to deal with the legally defunct LEV I regulations technically present on the books. Instead of simply declaring the LEV I program in Pennsylvania legally inoperative by virtue of Clean Air Act Section 177, the Administration instead has purported to suspend enforcement of the existing Pennsylvania Clean Vehicles Program for model years 2006 and 2007, and make its new proposal to adopt the California LEV II program begin to operate only starting with model year 2008. See EQB Oct. 18, 2005 Preamble at 2 ("The Commonwealth intends to suspend its enforcement of the Pennsylvania Clean Vehicles Program during the pendency of the amendatory rulemaking process."). If the LEV I program were legally viable and remained part of Pennsylvania's law, it is far from clear how the Rendell Administration could claim the power to suspend LEV I's operation in the Commonwealth. Thus, there is some irony to be seen in comparing the earlier broad claims by the Administration that Pennsylvania is somehow locked into the California emissions program against the Administration's assertion in its newly proposed regulations that it possesses the power to suspend the enforcement of a regulatory program present in Pennsylvania's SIP.

The best way to deal with the LEV I vs. LEV II issue is simply to confront it head on by (1) declaring the LEV I program inoperative in the state; and (2) submitting amendment paperwork to EPA to conform the Pennsylvania SIP to that undeniable legal reality. Then the Commonwealth can make the straightforward choice about whether it wants the federal Tier 2 program or the California LEV II program to apply in Pennsylvania. Or alternatively, the Commonwealth could make the choice of vehicle programs and then submit SIP amendment paperwork to EPA. The one thing there is no need for the Commonwealth to do is to venture into the uncharted legal territory of establishing a dubious interim policy against enforcing what is technically part of Pennsylvania's SIP.

5. It Has Long Been Foreseeable That the California LEV I Standards Would Become the Formal Law Of Pennsylvania in Model Year 2006, If Steps Were Not Taken Before That Time to Confirm Pennsylvania's Adoption of Federal Tier 2.

As the preamble to the proposed EQB regulations itself concedes,[3] it has been clear since 1998 that if Pennsylvania did nothing before model year 2006, then the Pennsylvania Clean

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[3] "Since neither the federal Tier II nor California LEV II standards had been established when the Commonwealth adopted the Pennsylvania Clean Vehicles Program in 1998, it was uncertain which program would be more appropriate for this Commonwealth in the long run. Because of this, the Board stated an intention in the 1998 final rulemaking Order to reassess the air quality needs and emission reduction potential of both programs in advance of the end of the Commonwealth's commitment to the NLEV program. 28 Pa. B. 5873, 5875, Dec. 5, 1998." EQB Oct. 18, 2005 Preamble at 5. This passage clearly indicates the Rendell Administration's agreement that the regulators in 1998 intended that a new choice about the operative vehicle program for

(Continued...)

Vehicles Program (applying California LEV I standards) would kick in. The regulatory history is clear that in 1998 the regulators intended in the future for a new choice about applicable vehicle standards to be made sometime after 1998 and before the onset of model year 2006. Accordingly, suggestions by proponents of the California program that Pennsylvania was somehow locked into the California standards are inaccurate. To the extent that there is any foundation for an argument that Pennsylvania's failure to act before model year 2006 arrived means that the California vehicle standards irrevocably now apply in Pennsylvania (and putting aside that argument is wrong on its own terms, as EPA has confirmed in the Welsh letter), such an argument would falter because it would be unable to explain why the regulatory authorities in Pennsylvania did not earlier bring this issue forcefully to the Legislature's attention.

Given that Pennsylvania submitted modeling data to EPA for periods going out beyond model year 2006 based on the applicability of federal Tier 2 standards, there was a fundamental mismatch between the Pennsylvania Clean Vehicles Program remaining on the books and how Pennsylvania regulatory authorities were actually behaving in their dealings with EPA. If the Pennsylvania regulators wanted the federal Tier 2 program to apply, they were right to submit modeling demonstrations to EPA based on Tier 2. But they were wrong not to submit a SIP amendment to EPA to eliminate the vestiges of the Pennsylvania Clean Vehicles program's adoption in 1998 from both federal and state law. Indeed, once the LEV I program was replaced by the LEV II program in California, they were particularly remiss in not submitting the necessary paperwork to EPA because the alternative to formally repealing LEV I would be that come model year 2006, the operative vehicle program in Pennsylvania, LEV I, would be unlawful for the Commonwealth to attempt to apply under the Clean Air Act. Alternatively, if the regulators wanted the California LEV II program to apply after model year 2006 (as they have now made clear is their desire), they should have submitted modeling demonstrations based on that California program and not modeling demonstrations based on the federal Tier 2 program. Yet the Pennsylvania modeling demonstrations to EPA, including those submitted throughout the entire tenure of the Rendell Administration, have consistently relied on Tier 2, and not on the California program.

It is likely that if the regulators had tried to submit modeling demonstrations to EPA based on the California program governing Pennsylvania in advance of model year 2006 (i.e., sometime between 1998 and the third quarter of 2005), then the odd issue of the state of the law formally on Pennsylvania's books would have come to a head much earlier. As a result, the Legislature could have taken corrective action well in advance of model year 2006 to clarify that

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Pennsylvania needed to be made before the Commonwealth's commitment to the NLEV program was set to expire in model year 2006.

the federal Tier 2 program applied in Pennsylvania. It is only because the regulators submitted modeling demonstrations based on Tier 2, but took no steps to remove from its books the adoption of California LEV I standards that had occurred back in 1998, that the Commonwealth finds itself in its current, highly unusual position.

The point that should not be lost is that fixing the technical problem with the Pennsylvania SIP is a straightforward procedural issue that can and should be resolving by Pennsylvania's regulators filing the necessary paperwork with EPA. But that relatively minor issue should not be allowed to confuse the terms of the debate over which vehicle program -- federal or California -- Pennsylvania should adopt. The Legislature is indisputably free to make that choice, and is best positioned to do so.

Sincerely,

Jeffrey Bossert Clark

Jeffrey Bossert Clark

Attachment