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INDEPENDENT REGULATORY
REVIEW COMMISSION

November 10, 2005

Donald Welsh
Regional Administrator
US Environmental Protection Agency, Region 3
1650 Arch St. (3PM52)
Philadelphia, PA 19103-2029

RE: Pennsylvania Vehicle Emission Standards

Dear Administrator Welsh,

The Pennsylvania House of Representatives is currently considering House Bill 2141 – a piece of legislation the Alliance of Automobile Manufacturers favors. The Alliance urgently requests a meeting with you to correct certain misstatements by representatives of the Governor's Administration, which disfavors HB 2141.

The Alliance's view is that HB 2141 would merely confirm what appears to have been true for several years -- that Pennsylvania will be a "Tier 2" State -- in other words a State where Tier 2 vehicles certified by EPA under the Clean Air Act ("CAA") have been and will be sold. At the end of 1998, the Pennsylvania Department of Environmental Protection ("PA DEP") did adopt the California Low Emission Vehicles Program ("Cal LEV I"), calling it the PA Clean Vehicles Program. But Pennsylvania did so merely as a backstop in the event automakers failed to implement to the voluntary National Low Emissions Vehicle Program ("NLEV").

In the closing years of NLEV and early years of Tier 2, PA DEP made several state implementation plan ("SIP") submittals to EPA. In those submissions, PA DEP frequently premised its modeling of future emissions on the applicability of the Tier 2 program to Pennsylvania. Most significantly, PA DEP also appears to have explicitly told EPA that it was adopting Tier 2 in its SIP. See Final Pittsburg-Beaver Valley Area Ozone Maintenance Plan and Request for Redesignation as Attainment for Ozone, Executive Summary, vii (May 15, 2001) ("The following are state and federal emission reduction strategies adopted since 1990 that are included in this plan: * * * * EPA's Tier 2/low sulfur gasoline program for light-duty vehicles.").

Recently, PA DEP Secretary McGinty proposed new regulations that would adopt the Cal LEV II program into Pennsylvania law. Her proposed regulations, like HB 2141, would remove Cal LEV I's adoption from Pennsylvania's regulatory books. Pending EPA approval of a SIP revision incorporating Cal LEV II, Secretary McGinty herself proposes to suspend enforcement of Cal LEV I. HB 2141 simply resolves the policy question for the Commonwealth differently than Secretary McGinty, by opting for Tier 2 federal automobiles to be sold in Pennsylvania, not

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Cal LEV II vehicles. This is the Legislature's prerogative, especially since Secretary McGinty acts only pursuant to delegated authority.

Also in recent weeks, Secretary McGinty and PA Transportation Secretary Biehler have been telling the PA House members that if HB 2141 passes, EPA will be putting at risk $1.6 billion in federal highway funds, and that Pennsylvania could face severe economic development constraints or a finding of having violated federal law. These assertions are not in accord with the law or the facts. It seems that just as Secretary McGinty can process the necessary approval paperwork with EPA concerning the repeal of LEV I and institution of LEV II, so the Pennsylvania General Assembly has the power to formally repeal LEV I and leave in place Tier 2, which has been applied (and continues to apply) in Pennsylvania ever since the inception of that program in model year 2004.]

The Clean Air Act, its regulations, and its system of cooperative federalism often present highly complex matters that call for EPA explanation and correction of the public record. Unless EPA corrects the misstatements being made by the Rendell Administration in the debate over HB 2141, and does so soon, many legislators could well conclude that the Administration's assertions are accurate. That would thwart a debate on fair terms about HB 2141.

The meeting would seek to confirm the following points, and thus confirmation in an EPA letter of these points would make a meeting unnecessary:

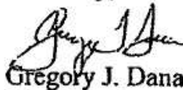
- Adopting HB 2141 would not cause PA to lose its federal highway funds or face other sanctions for non-compliance with the CAA, assuming PA DEP timely requests and obtains approval for the necessary revisions to its SIP deleting the PA Clean Vehicles Program from Pennsylvania law.

- Were HB 2141 adopted, PA DEP would not need to make any substantive demonstrations or identify any substitute emissions limitations from any source, including stationary sources, because PA has never claimed the benefits of adopting Cal LEV I in prior SIP submittals. Indeed, PA's recent SIP submittals already calculate emissions benefits based on the applicability of the federal Tier 2 program in Pennsylvania.

- Even if the relevant baseline for emissions purposes was to compare Tier 2 to Cal LEV II, instead of Cal LEV I, the emissions benefits of adopting Cal LEV II would be minimal or non-existent.

Please let us know at your earliest convenience about when you are available to meet with a small group of Alliance representatives concerning this important topic.

Sincerely,



Gregory J. Dana
Vice President, Environmental Affairs

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

DEC 2 2005

Honorable Richard A. Geist
Chairman, Transportation Committee
Pennsylvania House of Representatives
House PO Box 202020
Harrisburg, Pennsylvania 17120

Dear Representative Geist:

Thank you for your letter dated November 2, 2005 to the U.S. Environmental Protection Agency (EPA) regarding HB 2141, which is currently under consideration by the Pennsylvania House of Representatives.

Let me begin by stating that in the northeastern United States much already has been done in order to attain the standards for criteria air pollution. Adoption of the California Low Emission Vehicle Standards (or CA LEV), pursuant to Title I, Part D of the Federal Clean Air Act (Act), remains an option on a shrinking slate of options available for use by Pennsylvania in meeting its air quality planning goals, particularly with respect to upcoming demonstrations to attain the 8-hour ozone standard. However, adoption of CA LEV standards in Pennsylvania is a choice for Pennsylvania to make.

Having stated that, I will address your questions regarding the consequences of passage of HB 2141 and potential ramifications that revocation of the authorization to implement CA LEV standards could have. Pennsylvania adopted CA LEV (i.e., the Pa. Clean Vehicle Program), as codified at 25 Pa. Code Chapter 126, pursuant to Section 177 of the Act, which allows states to adopt CA LEV as an alternative to the Federal Motor Vehicle Control Program (i.e., Tier II) standards. However, as you know, Pennsylvania elected to participate in the National Low Emission Vehicle (NLEV) program as a compliance alternative to the Pa. Clean Vehicle Program.

As to whether CA LEV was adopted in Pennsylvania "solely as a backstop to the NLEV (and successively the Federal Tier II program)," EPA approved the Pa. Clean Vehicle Program as part of Pennsylvania's State Implementation Plan (SIP) as a "backstop" to NLEV in a December 28, 1999 rulemaking. However, because Pennsylvania's acceptance of NLEV continued only up to the 2006 model year, it is our opinion that the CA LEV program is no longer a "backstop," but is the legally effective program for Pennsylvania. It is also our opinion that the Pa. Clean Vehicle Program is a "federally enforceable part of the SIP," as was represented by Secretary Biehler in his correspondence with you.

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Regarding whether passage of HB 2141 would result in application of Federal sanctions against the Commonwealth, I believe it would not. Revocation of legal authority for an approved SIP element could lead EPA to make a finding that the Commonwealth failed to implement an approved SIP element. Such a finding by EPA is prerequisite to imposition of sanctions. Pennsylvania was not required to adopt and submit the CA LEV regulations as an element of its SIP. Mandatory sanctions under section 179 of the Act would not be triggered by failure to implement the CA LEV program unless Pennsylvania relied on emission 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. EPA could impose "discretionary" sanctions under section 110(m) of the Act, but it is unlikely that EPA would do so for failure to implement a non-mandatory SIP element upon which the State does not rely for emissions reductions.

Please note that adoption of HB 2141 (or similar legislation) would not remove the Pa Clean Vehicle program from the SIP – only the Governor or the Pennsylvania Department of Environmental Protection (PADEP) Secretary can submit a formal SIP revision requesting EPA to amend the SIP through rulemaking. If CA LEV remains an element of the approved SIP, but is not being enforced, Pennsylvania could be vulnerable to citizens' suit, 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.

You also inquired about "credit" currently being claimed by Pennsylvania for participation in the Tier II program. Pennsylvania relies upon emissions reductions for the Federal Tier II program in approved SIP plans submitted to address the 1-hour ozone standard (i.e., attainment demonstrations, redesignation, maintenance plans, etc.). PADEP has indicated that it intends to rely upon additional emission benefits from the Pa Clean Vehicle Program in SIP plans now being prepared to address the 8-hour ozone standard.

You inquired whether EPA has quantified the emission benefits from CA LEV II adoption by Pennsylvania. At present, EPA has not performed such an analysis, although PADEP has done so. Section 177 of the Act does not require a state to do such analysis prior to adoption of CA LEV standards. However, such benefits would need to be quantified in order to rely on the associated emission reductions in a SIP plan submitted for EPA approval. We would expect to see a detailed analysis of emissions benefits in any SIP plan submitted to EPA that relies on benefits from the Pa Clean Vehicle Program.

You further inquired about communication from EPA to the Northeast States for Coordinated Air Use Management (NESCAUM) cautioning states against claiming too much incremental benefit for CA LEV II beyond that available from the Federal Tier II standards. EPA commented in a March 26, 2004 letter to NESCAUM on a White Paper NESCAUM prepared on methods for quantifying differences between Federal Tier II and CA LEV II standards. EPA was concerned that states use the proper methods in modeling both programs to ensure that incremental benefit from LEV II is properly quantified, although EPA also provided a typical estimate for incremental emissions benefits to be expected between the two programs. Pennsylvania should follow EPA's guidelines when calculating incremental emission benefits available to Pennsylvania for CA LEV II versus Tier II.

Finally, you inquired about the potential impact on CA LEV II vehicles using Pennsylvania fuels, rather than California's fuels. Court precedent in related challenges has upheld states' authority to adopt CA LEV standards without California fuels. Modeling of the emissions benefits for Pennsylvania's situation should account for this factor.

I hope these answers assist you in making this important decision regarding the fate of the Pa. Clean Vehicle Program. If you have any questions, please do not hesitate to contact me or have your staff contact Ms. Stacie Driscoll, EPA's Pennsylvania Liaison, at 215-814-3368.

Sincerely,

Donald S. Welsh
Regional Administrator