**Gelnett, Wanda B.** #2523

**From:** Jewett, John H.
**Sent:** Friday, October 27, 2006 10:34 AM
**To:** Gelnett, Wanda B.
**Cc:** Stephens, Michael J.; Leslie A. Lewis Johnson; Wyatte, Mary S.
**Subject:** FW: Pennsylvania Clean Vehicles Program Regulation (EQB Reg. #7-398, IRRC #2523)


Ct's Opinion in support of dis...


McGinty's Mn to Dismiss 1st Am...


EPA letter 2-2-05.pdf (174 KB.

Wanda:

I apologize that I forgot to tell you about this email and its attachments when they arrived.

However, I think the email from DEP and its attachments should be filed under "agency" for #2523.

Thanks,

John

-----Original Message-----
From: Wyatte, Mary S.
Sent: Wednesday, October 11, 2006 10:03 AM
To: Wilmarth, Fiona E.; Kim Kaufman; Jewett, John H.; Leslie A. Lewis Johnson; Smith, James M.
Subject: FW: Pennsylvania Clean Vehicles Program Regulation (EQB Reg. #7-398, IRRC #2523)

-----Original Message-----
From: Campfield, Kristen [mailto:kcampfield@state.pa.us]
Sent: Tuesday, October 10, 2006 5:22 PM
To: Wyatte, Mary S.
Cc: Mather, Richard P
Subject: Pennsylvania Clean Vehicles Program Regulation (EQB Reg. #7-398, IRRC #2523)

Hi Mary:

I wanted to update you on the citizen suit that was filed in federal court earlier this year to enforce the Pennsylvania Clean Vehicles Program. I have attached a copy of the Eastern District's September 22, 2006 decision that dismissed the case. The court's opinion is consistent with the Department's motion to dismiss, which was premised upon the fact that CA LEV II is currently the operative program in Pennsylvania. The court's opinion is also consistent with the Department's argument that while this lawsuit did not stand against a state defendant, allegations of violations of this portion of the State Implementation Plan could stand against the auto industry. Our motion to dismiss is also attached.

Additionally, I have attached a December 2, 2005 letter from EPA Region 3 Administrator Donald Welsh to Representative Richard Geist, in which Administrator Welsh stated that it is EPA's opinion that the California program is currently the legally effective program in Pennsylvania. The letter is attached.

Please let me know if you have any questions.

Kristen.

Kristen M. Campfield
Assistant Counsel

Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
400 Market Street
Harrisburg PA 17101-2301
(ph) (717) 787-7060
(fax) (717) 783-7911

<<Ct's Opinion in support of dismissal.pdf>> <<McGinty's Mn to Dismiss 1st Amended Complaint.pdf>> <<EPA letter 12-2-05.pdf>>

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| CLEAN AIR COUNCIL, INC. and PENNENVIRONMENT, INC.,<br><br>Plaintiffs,<br><br>v.<br><br>KATHLEEN A. MCGINTY in her capacity as Secretary of the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,<br><br>Defendant,<br><br>and<br><br>ALLIANCE OF AUTOMOBILE MANUFACTURERS,<br><br>Defendant-Intervenor. | CIVIL ACTION<br>NO. 06–00741 |

**MEMORANDUM**

**ROBERT F. KELLY, Sr. J.** **SEPTEMBER 22, 2006**

The Clean Air Council, Inc. and PennEnvironment, Inc. (the "Plaintiffs") are bringing a citizen suit against Defendant Kathleen A. McGinty (the "Secretary"), in her official capacity as Secretary of the Pennsylvania Department of Environmental Protection ("PADEP"), for violations of the federal Clean Air Act ("CAA"). Presently before this Court is the Secretary's Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the Alliance of Automobile Manufacturers's (the "Alliance") Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). These Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) will be granted.

## I. STANDARD OF REVIEW

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a Motion to Dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989) (citations omitted). Exhibits which are attached to the complaint and upon which one or more claims are based can be considered in deciding a motion to dismiss pursuant to Rule 12(b)(6). See Rossman v. Fleet Bank (R.I.) Nat'l Assoc., 280 F.3d 384, 388 n.4 (3d Cir. 2002). However, a court need not credit either "bald assertions" or "legal conclusions" in a complaint when deciding a motion to dismiss. Evancho v. Fisher, 423 F.3d 347, 351 (3d Cir. 2005) (citations omitted).

## II. BACKGROUND

This is a citizen suit brought under the CAA for alleged violations of an "emission standard or limitation" committed by the Secretary. 42 U.S.C. § 7604(a)(1) (2000). Plaintiffs seek a declaration that the PADEP is in ongoing violation of its State Implementation Plan ("SIP") and an injunction ordering the Secretary to fully implement the Pennsylvania Clean Vehicles Program. (Amend. Compl. pg. 15). Plaintiffs request that this Court compel the Secretary to bar the sale or delivery of new automobiles in the Commonwealth that do not meet the California Low Emissions Vehicle standards ("CA LEV II"). 25 Pa. Code § 126.411 (2006).

Plaintiffs' allege that the Secretary has violated the CAA and Pennsylvania's federally approved SIP by failing to implement certain provisions of the Pa. Clean Vehicles Program. (Amend. Compl. ¶¶ 1, 7, 8, 40, 41 and Count 1).

The federal CAA was enacted to protect and enhance the quality of the Nation's air resources and promote the public health and welfare. Under the CAA, 42 U.S.C. §§ 7401-7642 (2000), the United States Environmental Protection Agency ("EPA") is given the authority to promulgate maximum levels for air-borne pollutants. The EPA accomplishes this by establishing National Ambient Air Quality Standards ("NAAQS") for certain air pollutants. 42 U.S.C. § 7409. These air quality standards are designed to protect the public from the known or anticipated adverse effects of air pollution, and are set based on strict criteria and adequate margins of safety. §7409(b).

Once the EPA establishes the NAAQS, the states are responsible for developing plans that provide for their implementation, maintenance, and enforcement. 42 U.S.C. § 7410. Each state adopts a SIP that details the particular measures the state will take to ensure that the air within its borders does not contain more than federally determined acceptable levels of various pollutants. See Am. Lung Ass'n of N.J. v. Kean, 871 F.2d 319, 322 (3d Cir. 1989) (describing scheme created by Clean Air Act). Pennsylvania enacted the Clean Vehicles Program as one step towards its compliance with the NAAQS, and the EPA approved and included this program in the Commonwealth's SIP in 1998. 28 Pa. Bull. 5873 (Dec. 5, 1998).

Under the CAA, a distinction is made between stationary and movable pollution sources. Stationary sources include factories and power plants, and states are rather free in choosing the methods to attaining compliance with the NAAQS from these sources. 42 U.S.C. §§ 7401-7515.

States are more constrained in what they can regulate in regards to movable sources, which includes motor vehicles. 42 U.S.C. §§ 7521-7590. Congress recognized the potentially chaotic consequences of allowing each state to promulgate regulations for auto emissions, and therefore expressly preempted the states from adopting or enforcing emissions related requirements for new motor vehicles. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, 501 (1967).

The CAA, as originally drafted, stated that no individual state could "adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines . . .." 42 U.S.C. § 7543(a). However, California is authorized to adopt new vehicle emissions control rules different from the national standards. This authorization comes from the EPA, which granted the state a preemption waiver from the national standards. 42 U.S.C. § 7543(b). California cannot enforce its standards if the EPA does not concur that the rules meet the criteria specified in the CAA. 42 U.S.C. § 7543(b).

Amendments to the CAA allowed other states to adopt California's standards. Section 177 of the CAA, adopted in 1977, gives other states the option of adopting California's emissions standards instead of the national standards. 42 U.S.C. § 7507. States must adopt standards identical to California though, and must give automobile manufacturers two years lead time before putting the standards into effect. Id. Many states in the 1990's began to borrow the California standards, especially the states in the Northeast. (Def. Inter. Br. 4).

Pennsylvania's Clean Vehicles Program was established under Section 177 of the CAA. This program is designed primarily to achieve emission reductions of the precursors of ozone and other pollutants from new motor vehicles. 25 Pa. Code § 126.401 (2006). The regulations incorporated by reference certain provisions of CA LEV II, thus the California standards became

part of the Commonwealth's regulations. 40 C.F.R. § 52.2020© (2006).

When the California regulations were adopted, the Commonwealth also adopted a temporary compliance alternative known as the National Low Emission Vehicle program ("NLEV"). 25 Pa. Code § 126.401(b) (2006) ("This subchapter allows motor vehicle manufacturers to comply with the voluntary NLEV program as a . . . compliance alternative to the Pennsylvania Clean Vehicles Program requirements . . ."). The temporary compliance alternative extended until model year 2006, after which time the CA LEV II standards became operative in Pennsylvania. 25 Pa. Code § 126.402. The Clean Vehicles Program is codified at 25 Pa. Code §§ 126.401–126.441.

The Pennsylvania Environmental Quality Board ("EQB") presented a proposed rulemaking that would amend the Clean Vehicles Program by postponing the compliance date until model year 2008 instead of model year 2006. 36 Pa. Bull. 715 (Feb. 11, 2006). The EQB has not proposed adoption of the CA LEV II standards, because the Secretary finds that the CA LEV II standards were automatically adopted as the current regulations upon expiration of the NLEV alternative compliance provision. See Proposed Rulemaking - Pa. Clean Vehicles Program Amend. available at http://www.dep.state.pa.us/dep/ subject/eqb/eqb2005.htm#101805.

A final rulemaking is scheduled to be presented to the EQB in September, 2006. (Def. Br. 6). The EQB has stated its intention to suspend enforcement of the Pennsylvania Clean Vehicles Program until the rulemaking process has commenced. 36 Pa. Bull. 715 (Feb. 11, 2006). Plaintiffs bring this action to stop the Secretary from suspending enforcement of the Pennsylvania Clean Vehicles program during this rulemaking process.

## III. DISCUSSION

The issue presented in Defendants' Motions to Dismiss is whether Plaintiffs have stated a claim upon which this Court may grant relief. Plaintiffs claim that the Secretary has violated an "emission standard or limitation," but they fail to state what standard she has violated. Plaintiffs do not state specific affirmative steps that the Secretary failed to implement, and for that reason the Motions to Dismiss must be granted. Furthermore, the case law in this Circuit and others does not support Plaintiff's assertion that the PADEP's decision to suspend prosecution of violators, during the rulemaking process, is a violation of an emission standard or limitation under the CAA.

Plaintiffs filed this suit under the citizen suit provision of the CAA asserting that this court has jurisdiction under 42 U.S.C. § 7604(a)(1). In the context of a citizen suit under the CAA, for violation of an "emission standard or limitation," the plaintiff must allege that the defendant has violated or is in violation of an "emission standard or limitation." 42 U.S.C. § 7604(a)(1). The definition of "emission standard or limitations" as found in section 7604(f) of the CAA reads as follows:

> (f) "Emission standard or limitation under this chapter" defined
>
> For purposes of this section, the term "emission standard or limitation under this chapter" means—
>
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,
>
> . . .
>
> (4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.

> which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

42 U.S.C. § 7604(f)(1) and (4) (2006).

Section 7604 has been interpreted to allow a district court to consider citizen suits seeking to police plan violations when specific measures requiring state action included in a SIP are not undertaken by the state. Del. Valley Citizen Council v. Davis, 932 F.2d 256 (3d Cir. 1991). The Second Circuit has succinctly stated what the plaintiff needs to allege in citizen suits under the CAA. "To state a claim under the citizen suit provision a plaintiff must allege a violation of 'a specific strategy or commitment in the SIP and describe, with some particularity, the respects in which compliance with the provision is deficient.'" Coal. against Columbus Ctr. v. City of N.Y., 967 F.2d 764, 769 (2d Cir. 1992) (citing Council of Commuter Org. v. Metro. Transp., 683 F.2d 663, 670 (2d Cir. 1982)).

Specific affirmative violations must be stated in the claim. Case law indicates that this complaint's lack of specific affirmative violations of the SIP constitutes a failure to state a claim under Fed. R. Civ. P. 12(b)(6). In Am. Lung Ass'n of N.J. v. Kean, 871 F.2d 319, 323 (3d Cir. 1989), the state of New Jersey had obligated itself under its SIP to install devices to limit ozone escape during automobile refueling and gasoline barge loading. Injunctive relief was granted in that citizen suit because the state had failed to install the specified devices in a timely manner. Concerned Citizens of Bridesburg v. EPA, 836 F.2d 777 (3d Cir. 1987), presents a factual scenario where the EPA rescinded fourteen state and local regulations contained in Pennsylvania's SIP. Id. at 779. The court held that the EPA had a statutory obligation under 42 U.S.C. § 7410 to propose its revisions to the Commonwealth for a hearing before deleting regulations. Id. at 780. By bypassing the Commonwealth, the EPA had violated the terms of the

statute. Relief was granted in these cases because the defendant EPA bypassed the specific requirements for amendment of the state's SIP and the citizen suit was proper.

Following these precedents, this District has required that plaintiffs allege violations of specific strategies or commitments in the applicable SIP. In Clean Air Council v. Mallory, 226 F.Supp.2d 705, 709 (E.D. Pa. 2002), the Commonwealth failed to implement SIP mandated emissions testing procedures. Id. The court held that SIP mandated emissions testing procedures were affirmative steps with which the Commonwealth must and had not complied. Id. at 720. Failure by this Commonwealth to use a specified emissions test was not a restatement that the states must attain the NAAQS, and therefore the citizen suit was allowed. Id. Therefore, plaintiffs cannot seek to compel a state or its agencies to comply with the general requirements of the NAAQS, but may seek to enforce specific requirements aimed at achieving the NAAQS. Id. This reasoning implies that any claim not stating specific affirmative steps would not "satisfy the threshold definition of an emission standard or limitation under § 7604(a)(1)(A)."[1] Id. at 720-21.

Assuming that all factual allegations in the Plaintiffs' Amended Complaint are true, this amended complaint has failed to state a claim for relief. Plaintiffs have not alleged any specific

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[1]The provision at issue in the [Mallory] case commits the Commonwealth to take specific steps in an effort to bring the Philadelphia nonattainment area into compliance with the Act. Specifically, the SIP requires that the Commonwealth utilize ASM emission tests for all 1981 and newer model year vehicles and all 1984 and newer model year light-duty trucks registered within the five-county Philadelphia area and that those ASM emission tests employ specific "final" pass/fail emission standards, or cutpoints, commencing December 1, 1998.

Because the SIP requirement in the instant case contains a list of affirmative steps that the Commonwealth must take to comply with its terms, it does not merely "restate[ ] the [Act's] requirement that the NAAQS ··· must be attained," id. at 770, but rather contains a "valid, identifiable strategy" for achieving its ends. Id. at 771. Consequently, the enhanced I/M program-the final cutpoints and the December 1, 1998 deadline for implementation of the final cutpoints-created under the approved SIP are not designed to lead to general compliance with the NAAQS itself, but with specific requirements established as a mechanism for achieving the NAAQS. These requirements of the SIP satisfy the threshold definition of an "emission standard or limitation" under § 7604(a)(1)(A).

affirmative steps that the Secretary has failed to comply with under the SIP. Rather, Plaintiffs allege that the Secretary has failed to comply with the CAA by suspending enforcement action against violators during the period when the PADEP is seeking to amend its regulations. The Amended Complaint states in paragraph 41 that the Secretary's actions will "increas[e] the likelihood that the Commonwealth will not achieve and maintain the health–based 8–hour NAAQS for ground level ozone." (Amend. Compl. ¶ 41). Since this claim seeks to enforce the general NAAQS, and not steps aimed at achieving the standards, it does not pass the threshold definition.

Paragraph 40 of the Amended Complaint attempts to allege specific affirmative steps that the Secretary has failed to take. (Amend. Compl. ¶¶ 40(A–K)). Plaintiffs aver that "[i]n particular, the Secretary has violated and continues to violate her obligation to implement the Pennsylvania Clean Vehicles Program by failing to take various actions." Id. This claim is a general assertion analogous to one that the Secretary has not complied with the NAAQS. Accompanying subparagraphs allege violations of each section of Clean Vehicles Program, but these sections apply to vehicle manufacturers, not the Secretary. See 25 Pa. Code §§ 126.401–126.441 (2006).

The SIP provisions that Plaintiffs allege the Secretary has violated either do not apply directly to the Secretary or are within her discretion to enforce. In Heckler v. Chaney, 470 U.S. 821, 831 (1985), the Supreme Court continued its recognition of the presumption that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." The Court added, "[t]his recognition of the existence of discretion is attributable in no small part to the general

unsuitability for judicial review of agency decisions to refuse enforcement." Id. An agency's refusal to institute proceedings shares to some extant the characteristics of the decision of a prosecutor in the Executive Branch not to indict. Id. at 833.

Plaintiffs allegations, instead of stating specific provisions of the approved SIP that have been violated, allege that the Secretary is in violation because she has not exercised her enforcement authority against automobile manufacturers who may be selling and delivering new cars and light trucks in the Commonwealth in violation of the federally approved SIP. While generally, "[o]nce the EPA approves regulations contained in a SIP, the state and federal governments have obligations to enforce them," the CAA does not take away the state agency's discretion over when and how to police violations. Concerned Citizens of Bridesburg v. U.S. E.P.A., 836 F.2d 777, 781 (3d Cir. 1987) (citing 42 U.S.C. § 7413 (2000)).

Plaintiffs' first allegation that the Secretary has not applied the provisions of the incorporated CA LEV II program fails to state a claim because the Secretary has discretion to choose when and how to enforce the regulations. (Amend. Compl. ¶ 40(A)). Section 126.411 of the Pa. Code states the general requirements of the Clean Vehicles Program. It says that the program applies to all new passenger vehicles sold, leased, etc. in the Commonwealth. 25 Pa. Code § 126.411(a). It also says that certain CA LEV II standards are incorporated by reference. Id. at (b). The Secretary is not required to do any specific action under this section.

Plaintiffs' second allegation that the Secretary failed to bar the sale, import, delivery or purchase of new light duty vehicles also fails to state a claim, because the Secretary is not required under the SIP to bar the sale, import, delivery or purchase of new automobiles in the Commonwealth. (Amend. Compl. ¶ 40(B)). The regulation states that "a person may not sell,

import, deliver, purchase . . . a light duty vehicle . . . subject to [the Program] . . . that has not received a CARB Executive Order[.]" 25 Pa. Code § 126.412(b). In policing the provision, the Secretary may be able to bar sales and imports, but for the purposes of this claim this provision does not state a specific act that the Secretary must undertake. The Secretary can only violate this provision by selling, importing, delivering, leasing, renting, acquiring, receiving or registering a new vehicle within the Commonwealth subject to the program that does not comply with the requirements of CA LEV II.

Plaintiffs' third allegation, stating that the Secretary has not found that manufacturers have complied with fleet wide averages, also fails to state a claim of a specific SIP violation. (Amend. Compl. ¶ 40©). This provision states that fleet average non-methane organic gas emissions from automobile sales by manufacturers shall not exceed specified percentages. 25 Pa. Code § 126.411(b). Manufacturers are subject to this provision, and a violation by the manufacturer could be actionable. The SIP contains no specific provision for the Secretary to undertake and consequently no violation has been alleged.

Plaintiffs' fourth allegation, which states that the Secretary failed to require a valid emissions control label be affixed to new motor vehicles, fails to cite a valid provision of the Clean Vehicles Act and thus fails to state a claim. (Amend. Compl. ¶ 40(D)).

Plaintiffs' fifth and sixth allegations, stating that the Secretary failed to require new motor vehicle certification for compliance with CA LEV II standards, fail to state claims because the specific required actions are imposed on the automobile manufacturers, not the Secretary. (Amend. Compl. ¶ 40(E) and (F)). These two provisions require that new vehicles subject to the Clean Vehicles Program receive certification and compliance testing to ensure that they are

within the standards of CA LEV II. 25 Pa. Code §§ 126.421(a); 126.422(a). Manufacturers are subject to these requirements and have attendant duties. The Secretary has within her authority the ability to police violations of these two provisions. Ultimately, no specific violation by the Secretary has been alleged under either provision.

Plaintiffs' seventh allegation is that the Secretary failed to bar the sale or lease of new automobiles that did not have assembly line inspection. (Amend. Compl. at 13, ¶ 40(G)). This claim fails because the provision does not require the Secretary to undertake any action. Section 423 of the Pa. Code states that each "manufacturer . . . shall conduct inspection testing . . ." in accord with the regulations. 25 Pa. Code § 126.423(a). The Secretary does not violate the manufacturer's duty to inspect by not barring the sale of vehicles that were not inspected on the assembly line. Plaintiffs have failed to show a specific violation committed by the Secretary.

Plaintiffs' eighth allegation, that the Secretary did not require new cars meet warranty requirements, fails to state a claim because the provision applies to automobile manufacturers. (Amend. Compl. ¶ 40(H)). The warranty provision states that "[a] manufacturer of new vehicles" shall warrant that the vehicle shall comply. 25 Pa. Code § 126.431(a). The Secretary was not required to warrant anything and as such this claim does not show a violation by the Secretary.

Plaintiffs' ninth, tenth, and eleventh allegations all fail to state claims for relief because the applicable provisions require that the automobile manufacturers submit certain reports and documentation to the Secretary. (Amend. Compl. ¶¶ 40(I–K)). 25 Pa. Code §§ 126.431, 126.432. The Secretary did not violate these SIP provisions because she was to receive the reports from the automobile manufacturers. No specific provision was violated by the Secretary.

All the claims presented by Plaintiffs fail to state any specific affirmative violations of SIP provisions by the Secretary. Rather, these claims allege that the Secretary has violated the CAA and the NAAQS by her decision to suspend enforcement of the Clean Vehicles Program while the agency conducts a rulemaking session on proposed amendments to the program's compliance date. Supreme Court precedent states that an agency's decision whether and when to prosecute is analogous to a prosecutors discretion and cannot be reviewed. Case law in this Circuit and others clearly indicates that Plaintiffs must allege violations of specific affirmative SIP requirements for this citizen suit to go forward. Since no specific violations have been alleged, the Secretary cannot be subject to this citizen suit.

## IV. CONCLUSION

For the reasons set forth above, Plaintiffs have failed to state claims for which this court can grant relief. Plaintiffs have not alleged any specific affirmative actions by the Secretary that are in violation of the Commonwealth's SIP. The actions that Plaintiffs allege constitute violations are prosecutorial enforcement actions which are solely within the discretion of the Secretary of the PADEP, and as such this court cannot review them.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| CLEAN AIR COUNCIL, INC. and PENNENVIRONMENT, INC., Plaintiffs, | : | |
| v. | : | CIVIL ACTION NO. 06–00741 |
| KATHLEEN A. MCGINTY in her capacity as Secretary of the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendant, | : | |
| and | : | |
| ALLIANCE OF AUTOMOBILE MANUFACTURERS, Defendant-Intervenor. | : | |

**ORDER**

**AND NOW,** this 22nd day of September, 2006, upon consideration of Defendant Kathleen A. McGinty's, in her capacity as Secretary of the Pennsylvania Department of Environmental Protection, Motion to Dismiss Plaintiff's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Doc. No. 32), and Defendant-Intervenor Alliance of Automobile Manufacturers Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Doc. No. 6) and the Responses and Replies thereto, it is it is hereby **ORDERED** that the Motions are **GRANTED** and all claims against Defendants are hereby **DISMISSED.**

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY, Sr. J.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **CLEAN AIR COUNCIL, INC. and PENNENVIRONMENT, INC.,** | : | |
| **Plaintiffs,** | : | |
| | : | **CIVIL ACTION NO. 2:06-cv-00741-RK** |
| **v.** | : | |
| **KATHLEEN A. McGINTY in her capacity as Secretary of the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,** | : | |
| **Defendant, and** | : | |
| **ALLIANCE OF AUTOMOBILE MANUFACTURERS** | : | |
| **Intervenor.** | : | |

**DEFENDANT McGINTY'S MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Defendant Kathleen A. McGinty respectfully submits this Motion to Dismiss First Amended Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The reasons for this Motion are set forth in the attached Memorandum of Law. Defendant McGinty respectfully requests that this motion be granted.

Dated: September 11, 2006

Respectfully submitted,

FOR DEFENDANT KATHLEEN A. McGINTY, in her capacity as Secretary of the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

s/ Kristen M. Campfield
Richard P. Mather, Sr. (No. 36922)
Kristen M. Campfield (No. 70237)
Commonwealth of Pennsylvania
Department of Environmental Protection
RCSOB, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464
717-787-7060

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **CLEAN AIR COUNCIL, INC. and PENNENVIRONMENT, INC.,** | : | |
| **Plaintiffs,** | : | **CIVIL ACTION NO. 2:06-cv-00741-RK** |
| **v.** | : | |
| **KATHLEEN A. McGINTY in her capacity as Secretary of the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,** | : | |
| **Defendant, and** | : | |
| **ALLIANCE OF AUTOMOBILE MANUFACTURERS** | : | |
| **Intervenor.** | : | |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT McGINTY'S MOTION TO DISMISS FIRST AMENDED COMPLAINT**

## STATEMENT OF FACTS

This lawsuit concerns the Pennsylvania Clean Vehicles Program, a regulatory program designed primarily to reduce ozone-forming emissions and other air pollutants from new cars and light-duty trucks. 25 Pa. Code § 126.401. The Pennsylvania Clean Vehicles Program is set forth in Pennsylvania's regulations at 25 Pa. Code §§ 126.411 – 126.441. These regulations incorporate by reference certain provisions of California's Low Emission Vehicle regulations[1] and are part of the Commonwealth's federally approved State Implementation Plan (SIP). 64 Fed. Reg. 72,564, 72,565 (Dec. 28, 1999) (EPA's direct-final notice of SIP approval, effective Feb. 28, 2000); 40 C.F.R. 52.2020(c); *see also,* First Amended Complaint ¶¶ 2, 37. Plaintiffs allege in their First Amended Complaint that the Pennsylvania Department of Environmental Protection Secretary, Kathleen A. McGinty, has violated the federal Clean Air Act (CAA) and the Commonwealth's SIP by failing to implement the Clean Vehicles Program. *See* Complaint, ¶¶ 1, 7, 8, 40, 41 and Count 1. Secretary McGinty asserts in this Motion to Dismiss First Amended Complaint that the alleged violations are not actionable because the First Amended Complaint does not state a claim upon which relief may be granted, this Court does not have jurisdiction and the Eleventh Amendment bars this action.

The Commonwealth adopted the Clean Vehicles Program in 1998, 28 *Pennsylvania Bulletin* 5873 (Dec. 5, 1998), under state law and Section 177 of the CAA. 42 U.S.C. § 7507. In the same rulemaking, the Commonwealth adopted a voluntary

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[1] Section 126.411 reads, in pertinent part:

(b) The provisions of the California Low Emission Vehicle Program, Title 13, CCR, Chapters 1 and 2, are adopted and incorporated herein by reference, and apply except for the following:

(1) The zero emissions vehicle sales mandate in Title 13 CCR Chapter 1, § 1960.1(g)(2) (footnote 9),

(2) The emissions control system warranty statement in Title 13 CCR, Chapter 2, § 2039.

25 Pa. Code § 126.411(b).

national program that had been negotiated with the automobile industry and the United States Environmental Protection Agency (EPA), known as the National Low Emission Vehicle (NLEV) program. Id. The NLEV program was adopted as a temporary compliance alternative to the Pennsylvania Clean Vehicles Program. 25 Pa. Code §126.401(b) ("This subchapter allows motor vehicle manufacturers to comply with the voluntary NLEV program ... as a compliance alternative to the Pennsylvania Clean Vehicles Program ...."); *see also* First Amended Complaint ¶¶ 3, 4. The regulations incorporated the California Low Emission Vehicle program to apply in the event a vehicle manufacturer decided not to follow the national NLEV program and also from model year (MY) 2006 onward. 28 *Pa. B.* at 5874 ("This program will only be implemented if an auto manufacturer opts out of the NLEV program or at the conclusion of the NLEV program"). The Pennsylvania regulations were approved by EPA as a revision to the Commonwealth's SIP. 64 Fed. Reg. 72,564, 72,565, *supra.*

Congress added Section 177 to the CAA in 1977 to allow states to adopt emission standards for motor vehicles. 42 U.S.C. § 7507; *see* Complaint ¶ 31. Section 177 authorizes states to adopt and enforce new motor vehicle emission standards for any model year if the standards are identical to the California standards and the state adopts the standards at least 2 years before the beginning of the model year. 42 U.S.C. § 7507. Section 177 provides that California's standards must also have been granted a waiver by EPA of the CAA's prohibition against state emission standards under Section 209(b) of the CAA, 42 U.S.C. § 7543(b), in order for a state to adopt them. 42 U.S.C. § 7507. The Second Circuit has ruled that states may adopt, but not enforce, California emissions standards before the EPA has acted on California's waiver request. Motor Vehicle

Manufacturers Association of the United States v. New York State Department of Environmental Conservation, 17 F.3d 521, 534 (2d Cir. 1994). If a state does not adopt California's standards, vehicle manufacturers and others are subject to the Federal emissions standards established by EPA. 36 Pa. B. at 716; *see* First Amended Complaint ¶ 31.

Under the Pennsylvania regulations approved by EPA in the SIP, the Commonwealth's participation in the NLEV program extended only until MY 2006, at which time vehicle manufacturers were no longer able to use NLEV as a compliance alternative to the incorporated provisions of the California program. Instead, the incorporated provisions of the California program would become effective. 25 Pa. Code § 126.402(b) and (d); *see* First Amended Complaint ¶ 36. For the duration of the Commonwealth's participation in the NLEV program, manufacturers could comply with NLEV or equally stringent federal standards (if promulgated), instead of the incorporated California standards. 25 Pa. Code § 126.402(c). Because EPA promulgated its "Tier II" emission regulations in that timeframe, Tier II replaced the NLEV program for MYs 2004 and 2005 and vehicle manufacturers operating under the NLEV program in Pennsylvania became subject to the Tier II requirements for those two model years. Id; see also 65 Fed. Reg. 6,698 (Feb. 10, 2000) (Tier II adoption). Beginning with MY 2006, however, the opportunity to follow the federal Tier II program ended and vehicle manufacturers became subject exclusively to the Pennsylvania Clean Vehicles Program, with its incorporated provisions of the California program, in accordance with 25 Pa. Code § 126.402(c).

The currently operative California program is known as the California Low Emission Vehicle II, or CA LEV II, program. *See* California Code of Regulations, Title 13, Division 3, Chapters 1 and 2; First Amended Complaint ¶ 39. California adopted this program in 1996 and obtained a waiver of federal preemption from EPA in 2003. 68 Fed. Reg. 19,811 (Apr. 22, 2003). The prior version of California's regulations, which had been in place in 1998, was known as CA LEV I. Pennsylvania's 1998 regulations did not limit the incorporation by reference of California's program to CA LEV I. To the contrary, by operation of law, the Pennsylvania regulations include the incorporated California regulations with all amendments and supplements thereto and any new regulations substituted for them as in force at the time of application of the regulations. *See,* 1 Pa. C.S.A. §1937(a)[2]. In other words, the Pennsylvania regulations currently include CA LEV II. No revision to the regulations or SIP is necessary, or contemplated, to have the CA LEV II program operative under Pennsylvania's Clean Vehicles Program.

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 Department's official rulemaking body, the Environmental Quality Board (EQB), stated an intention in the 1998 rulemaking to reassess the air quality needs and emission reduction potential of both

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[2] Section 1937(a) of the *Pennsylvania Statutory Construction Act,* entitled, "References to statutes and regulations," reads:

> 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.

programs in advance of the end of the Commonwealth's commitment to the NLEV program. Preamble to 1998 rulemaking, 28 Pa.B. 5873, 5875.

The assessment was performed. 36 Pa. B. at 716. It showed that the Commonwealth will experience more air pollution reduction benefits from retaining the California LEV II requirements than it would with the Federal Tier II requirements. Id. The Commonwealth will achieve additional volatile organic compound (VOC) and oxides of nitrogen (NOx) emission reductions compared to the federal Tier II program of about 2,850 to 6,170 tons per year of VOCs, and 3,540 tons per year of NOx and will achieve an additional 5% to 11% total reduction of six toxic air pollutants (including benzene) by 2025, when full vehicle fleet turnover is expected. 36 Pa. B. at 716.

VOC and NOx emissions contribute to the formation of ground-level ozone. First Amended Complaint ¶ 29. The EPA has concluded that there is an association between ambient ozone concentrations and increased hospital admissions for respiratory ailments, such as asthma. First Amended Complaint ¶ 23. Further, although children, the elderly and those with respiratory problems are most at risk, even healthy individuals may experience increased respiratory ailments and other symptoms when they are exposed to ambient ozone while engaged in activities that involve physical exertion. Id. Though the symptoms are often temporary, repeated exposure could result in permanent lung damage. Id. The implementation of measures to address ozone air quality nonattainment in this Commonwealth is necessary to protect the public health. Id. About one-third of this Commonwealth's ozone-forming pollution comes from motor vehicles. First Amended Complaint ¶ 30.

Earlier this year, the EQB, under the leadership of its current chairperson, Secretary McGinty, proposed a rulemaking to revise 25 Pa. Code Chapter 126, Subchapter D, which includes the Pennsylvania Clean Vehicles Program. 36 Pa. B. 715 (Feb. 11, 2006). The purposes of the proposed rulemaking, listed in the Preamble to the proposed rulemaking, are to postpone the compliance date of the Pennsylvania Clean Vehicles Program from MY 2006 to MY 2008, update definitions, clarify the program, and specify a transition mechanism for compliance with the program. Id. As stated in the rulemaking documents, the proposed rulemaking does not attempt to adopt CA LEV II since that program is already automatically incorporated by reference. *See, e.g.,* Executive Summary of proposed rulemaking on Department's website at http://www.dep.state.pa.us/dep/subject/eqb/eqb2005.htm#101805 ("The proposed rulemaking continues the existing adoption of the California program and is no more stringent than what is currently required in the existing Pennsylvania regulations ...."). The Department is scheduled to present the final rulemaking to the EQB on September 19 of this year, for final adoption and publication in late 2006; this statement appears on the Department's public participation web page, at http://www.depweb.state.pa.us/pubpartcenter/cwp/view.asp?a=3&q=504724.

Postponing the Pennsylvania Clean Vehicles Program compliance date to MY 2008 is consistent with the actions of various other states that have adopted the California program. For example, New Jersey's CA LEV II program will begin with MY 2009,[3] Connecticut[4] and Rhode Island's with MY 2008,[5] and Washington and Oregon's with

[3] NJ Admin. Code 7:27-26.1 *et seq.*

[4] Regs. Conn. State Agencies § 22a-174-36b.

MY 2009.[6] Other adopting states, namely New York, Maine, Massachusetts and Vermont, are already implementing CA LEV II.

The CA LEV II program also includes a greenhouse gas component, which will apply to automobile manufacturers beginning with MY 2009 if it survives its current court challenges filed in California[7] and if California obtains waiver coverage from EPA. The Alliance writes at length about the greenhouse gas provisions in its Motion to Dismiss, but the greenhouse gas provisions are not pertinent to the Alliance's legal argument nor to this Motion to Dismiss First Amended Complaint, so are not addressed in any further detail here.

Because of the two-year postponement of the Pennsylvania Clean Vehicles Program proposed in the 2006 EQB rulemaking, the EQB announced in the Preamble to the 2006 rulemaking that, "[t]he Commonwealth intends to suspend its enforcement of the Program during the rulemaking process." Preamble, 36 Pa. B. at 715. That exercise of enforcement discretion is not actionable under the citizen suit provisions of the CAA, for the reasons set forth below. This does not render the citizen suit provisions meaningless, though; the Pennsylvania Clean Vehicles Program remains part of the Commonwealth's approved SIP, and therefore failure to comply with it *is* actionable against violators, such as vehicle manufacturers.

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[5] R.I. Code R. 12-031-037.

[6] Wash. Rev. Code § 70.120A.010(1); and Or. Admin. R. 340-257-0010 *et seq.*

[7] California's Low Emission Vehicle greenhouse gas provisions have been challenged in *Central Valley Chrysler-Jeep, Inc. v. Witherspoon,* E.D. Cal., 1:04-cv-06663 and *Fresno Dodge, Inc. v. California Air Resources Board,* Cal. Superior Ct., 04 CE CG 03498.

## ARGUMENT

### I. PLAINTIFFS' FIRST AMENDED COMPLAINT AGAINST THE SECRETARY FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED BECAUSE THE FIRST AMENDED COMPLAINT IS NOT AUTHORIZED BY SECTION 304[8] OF THE CLEAN AIR ACT (CAA).

#### A. Standard of Review under Rule 12(b)(6)

Defendant Kathleen A. McGinty, in her capacity as Secretary of the Department of Environmental Protection, asserts in this Motion to Dismiss First Amended Complaint that this Court should dismiss this case under Federal Rules of Civil Procedure, Rule 12(b)(6), because Plaintiffs have failed to state a claim upon which relief may be granted. In the procedural context of a Motion to Dismiss, the Court must accept the factual allegations in the complaint as true and the Plaintiffs receive the benefit of all reasonable inferences to be drawn from it. City of Philadelphia v. Lead Industries Assoc., 994 F.2d 112 (3d Cir. 1993). Even assuming, for the purpose of this Motion, that the factual allegations of the First Amended Complaint are true, the First Amended Complaint must be dismissed.

#### B. Plaintiffs have failed to allege actionable SIP requirements applicable to the Secretary.

Plaintiffs' First Amended Complaint is directed at the Department's postponement of enforcement during an update to its regulations. Plaintiffs attempt to cast the postponement as a failure to implement the Pennsylvania Clean Vehicles Program in the SIP. But the allegations in the First Amended Complaint do not support a

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[8] Section 304 of CAA is codified at 42 U.S.C. § 7604.

claim of failure to implement or enforce the SIP, under the citizen suit provision of the CAA, 42 U.S.C.A. § 7604(a)(1).

Plaintiffs have filed their action under the citizen suit provision of Section 304 of the Clean Air Act, 42 U.S.C. § 7604, and have asserted that this Court has jurisdiction for the action under § 7604(a)(1). First Amended Complaint ¶ 7. Plaintiffs have further alleged that, "The Defendant's current and ongoing failure to implement the [Pennsylvania Clean Vehicles] Program has violated, and continues to violate, an 'emission standard or limitation' under the CAA. 42 U.S.C.§ 7604(a)(1) and (f)." First Amended Complaint ¶ 7. For the reasons set forth in greater detail below, Plaintiffs have failed to state a claim upon which relief may be granted under Section 7604(a)(1). Fed. R. Civ. P. 12(b)(6). Because the Plaintiffs have failed to allege in their First Amended Complaint any basis for the assertion that the Secretary has violated and continues to violate an emission standard or limitation, the First Amended Complaint should be dismissed.

Section 7604(a)(1) provides, in part:

> § 7604. Citizen suits.
>
> (a) Authority to bring civil action; jurisdiction
>
> Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf –
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, . . .

42 U.S.C. § 7604(a)(1) (emphasis added). Section 7604(f)(1) and (4)[9] define "emission standard or limitation under this chapter" as:

> (f) "Emission standard or limitation under this chapter" defined
>
> For purposes of this section [7604], the term "emission standard or limitation under this chapter [the Clean Air Act]" means –
>
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,
>
> . . .
>
> (4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.

42 U.S.C. § 7604(f)(1) and (4). To pursue a claim under Section 7604(a)(1), (f)(1) and (f)(4), then, a person must allege that the defendant has violated or is in violation of an emission limitation or standard that can include timetables of compliance or other standards, limitations or schedules established in a SIP. In this case, however, the Department's suspension of enforcement during its transition to update its regulations does not translate to a violation of an emission standard or limitation.

Defendant acknowledges that Section 7604 allows citizens to sue a state in its regulatory capacity to ensure that the state promulgates regulatory programs that it has committed in its SIP. *See, e.g.,* American Lung Ass'n of New Jersey v. Kean, 871 F.2d 319 (3d Cir. 1989). The emission standard at issue in American Lung Ass'n of New Jersey was an express requirement in New Jersey's SIP that New Jersey would propose, promulgate and implement regulations mandating Stage II vehicle refueling and barge loading controls in accordance with schedules set forth in the SIP. Similarly, in Delaware

[9] Section 7604(f)(2) and (3) list other types of "emission standards or limitations" that are not relevant to the discussion here. 42 U.S.C. § 7604(f)(2) and (3).

Valley Citizens Council v. Davis, 932 F.2d 256, 266 (3d Cir. 1991), the Third Circuit Court of Appeals held that the citizen suit provisions in Section 7604 provided jurisdiction to enforce a specific commitment applicable to the state and contained in the Pennsylvania SIP.[10] The specific SIP commitment was an alleged commitment "to adopt and implement sufficient additional emission reduction measures to achieve a 44% emission reduction by December 31, 1987." Delaware Valley Citizens Council, 932 F.2d at 268. These Third Circuit decisions support the Department's position that Plaintiffs must allege that the Secretary violated specific, affirmative SIP commitments applicable to the Department to be authorized to maintain their action under Section 7604.

Recent case law from this District Court follows the rule that a person who is pursuing a cause of action against a state defendant under Section 7604(a)(1) must identify affirmative steps the state defendant must take to comply with the SIP, that are set forth in the SIP. In Clean Air Council v. Mallory, 226 F. Supp. 2d 705 (E.D. Pa. 2002), plaintiff filed a citizen suit under Section 7604(a)(1) alleging, *inter alia,* that state defendants had violated certain SIP commitments concerning the Commonwealth of Pennsylvania's enhanced motor vehicle inspection and maintenance program ("enhanced I/M program") in the five Philadelphia-area counties located in the Philadelphia ozone nonattainment area. In the decision, the Court stated, "Specifically, plaintiff asserts that defendants have violated and continue to violate emission standards or limitations within the meaning of 42 U.S.C. § 7604(a)(1) and (f) by failing to meet the applicable December 1, 1998 deadline to fully implement the SIP's [second-phase] emission test pass/fail standards, or 'cutpoints,' for motor vehicles in the five-county Philadelphia ozone

[10] The Third Circuit Court of Appeals also decided that Section 7604 does not permit redress of a state's alleged violations of statutory requirements not contained in a SIP. *Delaware Valley Citizens Council*, 932 F.2d at 267. Section 7604 only allows citizen suits seeking to police specific SIP violations.

nonattainment area." 226 F. Supp. 2d at 718.[11] The Court evaluated whether these allegations were sufficient to satisfy the definition of an "emission standard or limitation" and concluded:

> The provision at issue in the instant case commits the Commonwealth to take specific steps in an effort to bring the Philadelphia nonattainment area into compliance with the Act. Specifically, the SIP requires that the Commonwealth utilize ASM emission tests for all 1981 and newer model year vehicles and all 1984 and newer model year light-duty trucks registered within the five-county Philadelphia area and that those ASM emission tests employ specific "final" pass/fail emission standards, or cutpoints, commencing December 1, 1998.
>
> Because the SIP requirement in the instant case contains a list of affirmative steps that the Commonwealth must take to comply with its terms, it does not merely "restate [ ]the [Act's] requirement that the NAAQS . . . must be attained," id. at 770, but rather contains a "valid, identifiable strategy" for achieving its ends. Id. at 771. Consequently, the enhanced I/M program – the final cutpoints and the December 1, 1998 deadline for implementation of the final cutpoints – created under the approved SIP are not designed to lead to general compliance with the NAAQS itself, but with specific requirements established as a mechanism for achieving the NAAQS. These requirements of the SIP satisfy the threshold definition of an "emission standard or limitation" under § 7604(a)(1)(A).

226 F.Supp. 2d at 720-21. The SIP, in that case, contained specific, affirmative steps that the state committed to undertake.[12] Thus, to state a claim under Section 7604(a)(1), Plaintiffs in this case must identify and allege that the Defendant has violated specific,

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[11] The December 1, 1998 deadline was contained in the I/M regulations, which state, *inter alia*: "*ASM vehicle engine displacement methodology.* Upon notice by the Department in the *Pennsylvania Bulletin,* the exhaust emission standards used for ASM tests performed shall be in accordance with the following tables:..." 67 *Pa. Code* § 177.691, App. A, § 1(a)(2)(ii). This regulation is part of the Commonwealth's approved SIP. 40 CFR 52.2020(139).

[12] Along with containing a December 1, 1998 deadline, the SIP contains additional obligations of the Departments. For example, Section 177.51 requires the Pennsylvania Department of Transportation to certify enhanced I/M testing facilities and to establish counties or regions within the Commonwealth which are subject to an emission inspection by certification of the Secretary of the need to comply with Federal law and publication of the certification in the *Pennsylvania Bulletin.* 67 *Pa. Code* § 177.51(a) and (f).

affirmative steps identified in the SIP that the Commonwealth committed to take to comply with the SIP. *See, also* Citizens for Pennsylvania Future v. Mallory, 2002 U.S. Dist. LEXIS 24406 (ED. Pa. Dec. 18, 2002) (SIP's November 15, 1999 scheduled deadline for enhanced I/M program to begin in sixteen counties "fits within the definition" of "emission standards or limitations.").[13]

The decisions from this District Court are consistent with decisions from other federal courts that have evaluated whether a state has violated or continues to be in violation of its SIP. For instance, in Natural Resources Defense Council, Inc. v. New York Dept. of Envir. Conser., 668 F. Supp. 848 (S.D. N.Y. 1987), New York's failure to develop and implement four articulated strategies for reducing volatile organic compounds (VOCs) emissions according to the timetables established in the New York SIP provided basis for citizen suit against state under Section 7604. The SIP in question contained specific and affirmative obligations imposed directly on the state to develop and implement particular VOC control strategies in accordance with detailed compliance schedules. Most of the strategies required the state to conduct studies and/or adopt regulations by a date certain. Because the state had violated the SIP commitments imposed directly on it to perform these specified acts in accordance with the detailed compliance schedule, the district court concluded that the state was subject to the citizen suit provisions in Section 7604. In Citizens for a Better Environment v. Deukmejian, 1990 U.S. Dist. LEXIS 7762 (N.D. Cal. 1990), the district court decided that a citizen suit under Section 7604 against a transportation commission could proceed to enforce specific commitments that the SIP imposed on the transportation commission. However, with respect to the state defendant, the district court decided that the citizen suit action was not

[13] See footnote 12, *supra.*

the proper vehicle to compel the timely preparation of a SIP. These decisions support the Department's position that, in an action against state defendants, Section 7604 only allows enforcement of specific SIP commitments imposed directly on the state defendants in the SIP.

Secretary McGinty made this argument in her Motion to Dismiss the original Complaint in this case, and Plaintiffs responded by citing several other cases for the broad proposition that a state defendant may be found to have violated a SIP. The SIP violation in each case, however, was a failure by a state defendant to perform an act expressly required of the state in the SIP. See, American Lung Ass'n of N.J. v. Kean, 670 F. Supp. 1285 (D.N.J. 1987) (court held state defendants subject to citizen suit for failing to propose, promulgate and implement regulations according to express commitments and schedules in SIP to propose, promulgate and implement regulations); Friends of the Earth v. Carey, 535 F.2d 165, 169 (2d Cir. 1976) (New York City agreed that it failed to meet deadlines applying to it in New York's SIP to adopt regulations and take other actions – the plan contained "32 mandatory 'strategies' or schedules of specific actions to be taken by certain dates to abate air pollution"); Citizens for a Better Environment v. Metropolitan Transportation Commission, 731 F. Supp. 1448 (N.D.Cal. 1990) (Air Quality Management District failed to adopt measures that it had expressly committed in the state's SIP to adopt and implement to reduce air emissions from stationary sources; District and Metropolitan Transportation Commission failed to adopt contingency measures that they had committed in the SIP to adopt); Coalition for Clean Air, Inc. v. South Coast Air Quality Management, 1999 U.S. Dist. LEXIS 16106 (C.D. Cal. Aug. 27, 1999) (defendant agency failed to adopt regulations despite having

committed to their adoption dates in the state's SIP); Sweat v. Hull, 200 F. Supp. 2d 1162 (D.Ariz. 2001) (state failed to meet its obligation in SIP to conduct random on-road testing of vehicle emissions with a remote sensing device to sense excess vehicle emissions, as part of the state's obligations under its SIP-approved vehicle inspection and maintenance program); Kentucky Resources Council, Inc. v. EPA, 304 F. Supp. 2d 920, 925, 934 (W.D. Ky. 2004) (Air Pollution Control District was responsible under SIP to operate or to contract with an operator to run I/M program abolished by state legislature); and, Atlantic Terminal Urban Renewal Area v. New York, 697 F. Supp. 157, 159 (S.D.N.Y. 1988) (New York City committed in the SIP to assure that mitigating measures would be implemented by a project sponsor or the City any time an environmental impact statement for a project proposal identified a violation or exacerbation of the carbon monoxide standard).

In other cases cited by Plaintiffs in their Response to McGinty's Motion to Dismiss the original Complaint, the facts were generally even more remote, giving the "boilerplate" language about SIP enforcement cited in those cases little relevance to the case at bar. See, Concerned Citizens of Bridesburg v. EPA, 836 F.2d 777 (3d Cir. 1987) (concerning whether EPA acted properly by removing odor regulations from Pennsylvania's SIP); Baughman v. Bradford Coal Co., Inc., 592 F.2d 215, 218 (3d Cir. 1979), quoted in Clean Air Council, *supra* (state regulatory agency's administrative enforcement action against coal processing plant for violating SIP did not preclude a later citizen suit action against company); Communities for a Better Environment v. Cenco Ref. Co., 180 F. Supp. 2d 1062 (C.D. Cal. 2001) (concerning the application of a SIP's permitting provisions in issuance of a permit); Sierra Club v. Tennessee Valley

Authority, 430 F.3d 1337 (11th Cir. 2005) (concerning enforcement against the Tennessee Valley Authority for emission opacity violations occurring at one of its electric generating facilities); and Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) (suit brought by industry against EPA challenging EPA regulations).

The case at bar is not a case about a state's failure to adopt regulations it had committed in a SIP to adopt. The EQB adopted the Clean Vehicles Program regulations before the Commonwealth submitted them to EPA for inclusion in the SIP. The First Amended Complaint alleges the Secretary is subject to a citizen suit for failing to implement the regulations. The Defendant's research has not identified any authority to allow a person to pursue a citizen suit against a state defendant under Section 7604(a)(1) based solely on an allegation that the state regulatory authority is not implementing or enforcing state regulations that are part of the state's SIP. A state's decision to exercise its enforcement discretion and temporarily not to pursue enforcement of state regulations that are part of the state's SIP is not actionable against the Secretary under Section 7604(a)(1).

**C. Plaintiffs' First Amended Complaint fails to identify or allege that the Department failed to take "specific", "affirmative" steps to comply with SIP commitments.**

Plaintiffs' First Amended Complaint is devoid of any mention of any specific or affirmative SIP commitments or SIP obligations that are imposed directly on the Department and any assertion that the Secretary has violated any of these SIP commitments or SIP obligations. In place of specific or affirmative allegations of SIP commitments or SIP obligations that the Secretary has violated, Plaintiffs make only the general and conclusory assertions that the Secretary's current and ongoing failure to

implement the Pennsylvania Clean Vehicle Program provides a basis under Section 7604(a)(1) for the suit against the Secretary. As a matter of law, these general and conclusory allegations about the lack of implementation are insufficient to state a claim under Section 7604(a)(1), because a person must identify specific, affirmative obligations that a SIP imposes on a state that the state has failed to meet.

The First Amended complaint does not allege that the SIP contains an affirmative obligation or schedule for the Department's implementation of the Pennsylvania Clean Vehicles Program. Even where the First Amended Complaint specifically lists actions the Secretary allegedly failed to take to implement the Pennsylvania Clean Vehicles Program, the First Amended Complaint does not allege that these actions are stated in the SIP. These allegations, therefore, are not actionable.

For example, Plaintiffs allege that the Secretary failed to "appl[y] the provisions of the incorporated CA LEV II program ... to all new passenger cars, ... ." First Amended Complaint, ¶ 40(A). Plaintiffs allege that the Secretary failed to "bar[] the sale, import, ... of new light-duty vehicles subject to the Pennsylvania Clean Vehicles Program which lack a CARB Executive Order ..." First Amended Complaint, ¶ 40(B). These allegations and the others in the same paragraph (an alleged failure to "find" that manufacturers have demonstrated compliance; alleged failures to "requir[e]" subject vehicles to possess a valid emissions control label, to be certified, to meet the California requirements, to meet the warranty requirement; alleged failures to bar sale or lease of new motor vehicles subject to the program unless assembly line and quality audit testing have been performed; and alleged failures to "obtain[] and review[]" reports) are just other ways of Plaintiffs saying that the Secretary has postponed enforcement of the

Pennsylvania Clean Vehicles Program. But they are not allegations of SIP violations, as there is no allegation in the First Amended Complaint that the SIP states that the Secretary will "apply," "bar," "find," "require," "obtain" or "review," any of these things.

These and the more general and conclusory allegations that the Secretary "is now required to implement the CA-LEV aspects of the Pennsylvania Clean Vehicle Program for all Model Year 2006 or later vehicles" (First Amended Complaint at ¶ 6), and that the "Defendant's current and ongoing failure to implement the [Pennsylvania Clean Vehicles] Program has violated, and continues to violate, an 'emission standard or limitation' under the CAA" (First Amended Complaint at ¶ 7),[14] are not adequate to support a claim that the Secretary "has violated and continues to violate" an "emission standard or limitation". In the absence of allegations that the Defendant has violated specific, affirmative steps to comply with SIP commitments, Plaintiffs have failed to state a claim against the Defendant under Section 7604(a)(1).

**D. Plaintiffs seek judicial review of the Department's exercise of enforcement discretion, which is not actionable under Section 7604(a)(1).**

By Plaintiffs' general and conclusory allegations in the First Amended Complaint that the Secretary is not implementing the Pennsylvania Clean Vehicles Program, Plaintiffs seek, in effect, to obtain judicial review, under Section 7604(a)(1), of the Department's exercise of its enforcement discretion. In addition to the reasons set forth above, Section 7604(a)(1) does not provide jurisdiction for such a claim because "an agency's decision not to prosecute or enforce, whether through civil or criminal process,

[14] Paragraphs 1 and 8 also contain similar general and conclusory assertions concerning the Defendant's failure to implement and enforce the Program. First Amended Complaint at ¶¶ 1 and 8.

is a decision generally committed to an agency's absolute discretion". Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

In Heckler, the Supreme Court evaluated whether the passage of the Administrative Procedures Act changed the tradition that an agency's decision not to pursue enforcement is immune from judicial review and concluded that, "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)". Heckler, 470 U.S. at 832. In the absence of some indication that Congress intended that there be judicial review of the exercise of enforcement discretion, there is a presumption against reviewability of an agency's decision not to enforce. An exercise of enforcement discretion does not amount to a violation of an "emission standard or limitation."

There is nothing in the Clean Air Act, 42 U.S.C. §§ 7401-7671q, to suggest that Congress intended to make a state's exercise of its enforcement discretion against third parties subject to judicial review under Section 7604. To the contrary, Congress only provided jurisdiction for citizen suits against the United States or other government agency "who is alleged to have violated or to be in violation of an emission standard or limitation . . . " 42 U.S.C. § 7604(a)(1)(A) (emphasis added). See also, Sierra Club v. Whitman, 268 F.3d 898, 903 (9th Cir. 2001) (EPA's decision not to enforce Clean Water Act (CWA) violations was discretionary and not subject to judicial review under CWA citizens suit provision at § 1365(a)(2)); and Amigos Bravos v. United States Environmental Protection Agency, 324 F.3d 1166, 1171 (10th Cir. 2003) (CWA does not require EPA to take enforcement action against all illegal discharges in light of Heckler); cf. Kentucky Resources Council, supra, (district court asserting without citing precedent

that a citizen's right to bring suit to enforce the CAA is independent of the government's exercise of its prosecutorial discretion – case involves state defendant as violator of SIP program it was required to operate or contract to operate directly, as opposed to allegations in the instant case). The Department's decision to exercise its enforcement discretion while it actively pursues amendments to its state regulations and federally approved SIP to provide a compliance extension, is not subject to judicial review under Section 7604(a)(1) because exercise of enforcement discretion does not constitute a violation of "an emission standard or limitation."

To avoid this clear prohibition against reviewing the Defendant's exercise of enforcement discretion, the Plaintiffs have attempted to characterize the Defendant's conduct as a violation of an emission standard or limitation. Plaintiffs fail on both counts.

## II. DISMISSING THIS LAWSUIT DOES NOT DEPRIVE PLAINTIFFS OF THEIR OPPORTUNITY TO SEEK ENFORCEMENT OF THE PENNSYLVANIA CLEAN VEHICLES PROGRAM.

The Secretary disagrees with the assertion the Alliance made in its Motion to Dismiss the original Complaint, that the Pennsylvania Clean Vehicles Program, which is part of the current federally enforceable SIP, is not an "emission standard or limitation" within the meaning of Section 7604. Alliance Memorandum of Law at 22-24. Contrary to this assertion, the Department and EPA recognize that the Pennsylvania Clean Vehicles Program is part of the currently approved and federally enforceable SIP for Pennsylvania.[15] As part of the SIP in Pennsylvania, the Pennsylvania Clean Vehicles Program contains emissions standards and limitations within the meaning of Section

[15] *See* letter, EPA Regional Administrator Donald S. Welsh to Rep. Richard A. Geist (December 2, 2005) that is described in Alliance Memorandum of Law at page 14.

7604(f) that are currently applicable to and regulate the conduct of automobile manufacturers and dealers who offer certain motor vehicles for sale in Pennsylvania. A person who is subject to regulation under the Pennsylvania Clean Vehicle Program and who is in violation of it is subject to the citizen suit provisions in Section 7604 of the Clean Air Act.

As part of an ongoing effort to extend the current compliance schedule for persons subject to the Pennsylvania Clean Vehicles Program, the Department, through the EQB, has published notice of proposed rulemaking to postpone the compliance date to Model Year 2008. 36 Pa. B. 715 (Feb. 11, 2006). After the rulemaking is final as a matter of state law, the revised regulations containing the new compliance date will be submitted to EPA for review and approval as a SIP revision. 36 Pa. B. at 717. The current SIP will remain in effect, as a matter of federal law, until EPA approves the SIP revision containing the extended compliance schedule. United States v. Wheeling Pittsburgh Steel Corp., 818 F.2d 1077, 1085-86 (3d Cir. 1987). While the Department has announced that it will exercise its enforcement discretion during the rulemaking process, the Department's exercise of its enforcement discretion does not bar others from seeking to enforce the current SIP requirements against those persons who are in violation of the existing SIP. *See* Concerned Citizens of Bridesburg v. Philadelphia Water Dept., 843 F.2d 679 (3d Cir. 1988) (alleged violations of state odor regulations that are part of Pennsylvania's SIP are recognizable federal claims under SIP).

## III. THE CITIZEN SUIT PROVISION OF THE CAA DEFINES THE LIMIT OF THIS COURT'S JURISDICTION AND THE LIMITS OF THE *EX PARTE YOUNG* EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY

This Court should dismiss this case under Federal Rules of Civil Procedure, Rule 12(b)(1), because this Court has no jurisdiction over the subject matter of the First Amended Complaint. When the subject matter jurisdiction of the Court is challenged, the party that invokes the Court's jurisdiction, i.e., the plaintiff, bears the burden of persuasion. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

Subject matter jurisdiction for bringing a citizen suit under Section 304 of the CAA is determined by Section 304, itself. 42 U.S.C. § 7604. While that section authorizes an action to enforce certain provisions of a federally-approved SIP, as explained in Points I and II, *supra,* it does not authorize a court to enforce alleged violations outside of the SIP. Delaware Valley Citizens Council, 932 F.2d 256, 267 (3d Cir. 1991). How and when the Department enforces the Pennsylvania Clean Vehicles Program is outside of the SIP. Consequently, Plaintiffs' failure to state a claim under Section 304 upon which relief may be granted also deprives this Court of jurisdiction under Rule 12(b)(1), and this case should be dismissed.

Similarly, Section 304 defines the limits of the Ex parte Young, 209 U.S. 123 (1908) exception to Eleventh Amendment immunity. In general, the Eleventh Amendment bars suits against states in federal court. But under the narrow exception created in Ex parte Young, suit may be brought against a state official to restrain a continuing violation of federal law. Id. The Supreme Court, in Seminole Tribe v. Florida, 517 U.S. 44 (1996), recognized that Congress can define the boundaries of the Ex parte Young exception, and cited the citizen suit provision of the Clean Water Act as

an example. 517 U.S. at 74, n. 17. As a result, the potential applicability of the Ex parte Young exception in the instant case is limited by the essentially similar citizen suit provision of the Clean Air Act. Just as Section 304 defines the limits of this Court's jurisdiction, it defines the limits of the Ex parte Young exception. Plaintiffs seek to review the manner in which the Pennsylvania Clean Vehicles Program is being enforced, but that is beyond the requirements of the SIP. Accordingly, Plaintiffs' action is beyond the limits of the citizen suit provision, beyond the jurisdiction of this Court, and barred by the Eleventh Amendment.

**Conclusion**

For the reasons set forth above, the Department requests that the Court grant its Motion to Dismiss First Amended Complaint and dismiss Plaintiffs' First Amended Complaint.

Dated: September 11, 2006

Respectfully submitted,

FOR DEFENDANT KATHLEEN A. McGINTY, in her capacity as Secretary of the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

s/ Kristen M. Campfield
Richard P. Mather, Sr. (No. 36922)
Kristen M. Campfield (No. 70237)
Commonwealth of Pennsylvania
Department of Environmental Protection
RCSOB, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105-8464
717-787-7060

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **CLEAN AIR COUNCIL, INC. and PENNENVIRONMENT, INC.,** | : | |
| **Plaintiffs,** | : | |
| | : | **CIVIL ACTION NO. 2:06-** |
| **v.** | : | **cv-00741-RK:** |
| **KATHLEEN A. McGINTY in her capacity as Secretary of the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,** | : | |
| **Defendant, and** | : | |
| **ALLIANCE OF AUTOMOBILE MANUFACTURERS** | : | |
| **Intervenor.** | : | |

**ORDER**

AND NOW, this _____ day of _____, 2006 upon consideration of Defendant McGinty's Motion to Dismiss First Amended Complaint and the responses thereto, if any, the Motion is GRANTED. It is further ORDERED that this action is dismissed.

BY THE COURT:

_____
KELLY, J.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **CLEAN AIR COUNCIL, INC. and PENNENVIRONMENT, INC.,** | : | |
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| **Defendant, and** | : | |
| **ALLIANCE OF AUTOMOBILE MANUFACTURERS** | : | |
| **Intervenor.** | : | |

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of September, 2006 a copy of the foregoing Defendant McGinty's Motion to Dismiss First Amended Complaint and Memorandum of Law in support thereof have been served by e-mail upon the following via the Court's Electronic Case Filing System and via e-mail from the undersigned:

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s/ Kristen M. Campfield
Kristen M. Campfield

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

DEC 12 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.

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

Donald S. Welsh
Regional Administrator