



## **GROUP AGAINST SMOG & POLLUTION**

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April 20, 2020

**VIA EMAIL: [ecomment@pa.gov](mailto:ecomment@pa.gov)**

Policy Office  
Pennsylvania Department of Environmental Protection  
P.O. Box 2063  
Harrisburg, PA 17105-2063

**Re: Infrastructure SIP Revisions for the 2015 8-Hour Ozone Standard**

Dear Sir or Madam:

Please accept these comments regarding the proposed revisions to Pennsylvania's Infrastructure State Implementation Plan for the 2015 8-Hour Ozone National Ambient Air Quality Standard, which I am submitting on behalf of the Group Against Smog and Pollution ("GASP"). According to the Notice published in the March 14, 2020 Pennsylvania Bulletin, the Pennsylvania Department of Environmental Protection is accepting comments submitted on or before April 20, 2020.

Thank you for your attention to these comments.

Very truly yours,

/s

John K. Baillie  
Senior Attorney

**COMMENTS OF THE GROUP AGAINST SMOG AND POLLUTION  
REGARDING PENNSYLVANIA’S PROPOSED REVISIONS TO ITS  
INFRASTRUCTURE STATE IMPLEMENTATION PLAN FOR THE  
8-HOUR NATIONAL AMBIENT AIR QUALITY STANDARD FOR OZONE**

Section 110 of the Clean Air Act requires the states to revise their State Implementation Plans (“SIPs”) to meet each National Ambient Air Quality Standard (“NAAQS”) established by the United States Environmental Protection Agency (“EPA”).<sup>1</sup> Such SIPs are referred to as “Infrastructure SIPs,” and they generally describe how the states will implement, maintain, and enforce each NAAQS. Thus, an Infrastructure SIP must include such “enforceable emission limitations and other control measures, means, or techniques ... as may be necessary ... to meet the applicable requirements” of the Clean Air Act.<sup>2</sup> Section 110 also requires (among other things) that Infrastructure SIPs: provide for the operation of an ambient air quality monitoring system within each state;<sup>3</sup> provide that each state will have “adequate personnel, funding, and authority under state ... law to carry out” its SIP;<sup>4</sup> and require that the operators of “major stationary sources” within each state pay “a fee sufficient to cover” the state’s cost to administer its Title V Operating Permit Program.<sup>5</sup>

EPA revised the 8-hour NAAQS for ozone on October 1, 2015.<sup>6</sup> On March 14, 2020,<sup>7</sup> the Pennsylvania Department of Environmental Protection (“DEP”) published notice of proposed

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<sup>1</sup> 42 U.S.C. § 7410(a)(1).

<sup>2</sup> 42 U.S.C. § 7410(a)(2)(A).

<sup>3</sup> 42 U.S.C. § 7410(a)(2)(B).

<sup>4</sup> 42 U.S.C. § 7410(a)(2)(E)(i).

<sup>5</sup> 42 U.S.C. § 7410(a)(2)(L).

<sup>6</sup> *See National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65291 (Oct. 26, 2015).

<sup>7</sup> *See* 50 Pa. B. 1623 (Mar. 14, 2020).

revisions to Pennsylvania’s infrastructure SIP that are intended to meet the requirements of Clean Air Act section 110 in Pennsylvania as they relate to the 2015 NAAQS for ozone.

**I. PENNSYLVANIA’S INFRASTRUCTURE SIP DOES NOT MEET THE VEHICLE INSPECTION REQUIREMENTS IMPOSED PURSUANT TO SECTION 184 OF THE CLEAN AIR ACT**

The Clean Air Act Amendments of 1990 required EPA to promulgate a performance standard for vehicle inspections and maintenance (the “I/M Performance Standard”).<sup>8</sup> The federal standard is codified at 40 C.F.R. §§ 51.350 – 51.373; Pennsylvania’s enhanced vehicle inspection and maintenance (“I/M”) program is codified at 67 Pa. Code Chapter 177.

Pennsylvania’s I/M program fails to meet the I/M Performance Standard in two respects. **First**, Pennsylvania’s program fails to meet the I/M Performance Standard because it does not require emission testing of model year 1997 and newer diesel-powered light-duty vehicles (“LDVs”) and diesel-powered light-duty trucks (“LDTs”) up to 8,500 pounds gross vehicle weight rating (“GVWR”) that are registered in Pennsylvania counties that are subject to Pennsylvania’s enhanced vehicle I/M program.<sup>9</sup> **Second**, Pennsylvania’s I/M program fails to meet the I/M Performance Standard because it does not require that vehicles registered in Blair, Cambria, Centre, Erie, Lackawanna, Luzerne, Lycoming, and Mercer Counties (collectively, the “Northern Region”) that are equipped with on-board diagnostic (“OBD”) systems to undergo OBD checks.<sup>10</sup> All model year 1996 and newer gasoline-powered LDVs and LDTs and all

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<sup>8</sup> Specifically, 42 U.S.C. § 7511a(c)(3), 42 U.S.C. § 7511c, and 42 U.S.C. § 7521(m)(3).

<sup>9</sup> See 67 Pa. Code § 177.51(e) (making certain “gasoline-powered motor vehicles” subject to the emission testing requirement).

<sup>10</sup> See 67 Pa. Code § 177.51(f)(6) (subjecting vehicles in the “Northern Region” to a gas cap test requirement and visual inspection requirement, but not an OBD check).

model year 1997 and newer diesel-powered LDVs and LDTs sold in the United States must be equipped with standardized OBD systems.<sup>11</sup>

**A. The Clean Air Act Requires Pennsylvania to Implement an Enhanced Vehicle I/M Program that Complies With the I/M Performance Standard**

**1. Enhanced Vehicle I/M Programs Must Require Inspection and Testing of All LDVs and LDTs Subject to Standards Under 42 U.S.C. § 7521 and OBD Checks of All Vehicles Equipped with OBDs**

Pennsylvania is included in the Northeast Ozone Transport Region that was created by a provision in the Clean Air Act Amendments of 1990.<sup>12</sup> Another provision in those amendments, 42 U.S.C. § 7511c(b), requires each state in an ozone transport region to implement an “enhanced vehicle inspection and maintenance program” in each metropolitan statistical area (“MSA”) having a population of at least 100,000, and specifies that such I/M programs comply with the Clean Air Act’s provisions “pertaining to enhanced vehicle [I/M] programs,” which are set forth principally in 42 U.S.C. § 7511a(c)(3).<sup>13</sup>

42 U.S.C. § 7511a(c)(3) generally requires enhanced vehicle I/M programs to “reduce emissions of hydrocarbons and oxides of nitrogen [(“NOx”)] from in-use motor vehicles registered in each urbanized area.”<sup>14</sup> Section 7511a(c)(3) also requires EPA to publish guidance for such programs, and specifies that the programs must comply “in all respects” with EPA’s

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<sup>11</sup> See California Air Resources Board, On-Board Diagnostic II (OBD II) Systems – Fact Sheet/FAQs (Oct. 28, 2015), at <http://www.arb.ca.gov/msprog/obdprog/obdfaq.htm>.

<sup>12</sup> See 42 U.S.C. § 7511c(a).

<sup>13</sup> See 42 U.S.C. § 7511c(b)(1)(A). Section 7511c(b)(1)(A) refers to section 7511a(c)(2)(A), which does not pertain to enhanced vehicle I/M programs, rather than section 7511a(c)(3), which does. This reference is erroneous. See *Natural Def. Res. Council v. Environmental Prot. Agency*, 23 F.3d 1125, 1140 n.19 (recognizing that § 7511c(b)(1)(A) “erroneously” refers to 42 U.S.C. § 7511a(c)(2)(A), and should instead refer to 42 U.S.C. § 7511a(c)(3)).

<sup>14</sup> 42 U.S.C. § 7511a(c)(3)(A).

guidance. The statute further requires that EPA’s guidance: “shall include ... a performance standard achievable by a program combining emission testing, including on-road emission testing, with inspection to detect tampering with emission control devices and misfueling for all light-duty vehicles and all light-duty trucks subject to standards under [42 U.S.C. § 7521],”<sup>15</sup> and that enhanced vehicle I/M programs “shall include, at a minimum ... [i]nspection of emission control diagnostic systems and the maintenance or repair of malfunctions or deteriorations identified by or affecting such systems.” The provision requiring the inspection of emission control diagnostic systems is reinforced by 42 U.S.C. § 7521(m)(3), which mandates that EPA’s regulations pertaining to state “motor vehicle inspection and maintenance programs ... provide for inspection of on-board diagnostic systems ... and for the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostic systems.”<sup>16</sup>

Thus, the Clean Air Act requires that Pennsylvania implement an enhanced vehicle I/M program in all urbanized MSAs with populations of at least 100,000. Further, Pennsylvania’s program must comply with EPA’s Performance Standard. EPA’s Performance Standard, in turn, must require that enhanced vehicle I/M Programs include all LDVs and LDTs that are subject to standards under 42 U.S.C. § 7521 and require OBD checks of LDVs and LDTs equipped with OBDs.

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<sup>15</sup> 42 U.S.C. § 7511a(c)(3)(B)(i) (emphasis added).

<sup>16</sup> 42 U.S.C. § 7521(m)(3).

## 2. Model Year 1997 and Newer Diesel-Powered LDVs and LDTs are Subject to Standards Under 42 U.S.C. § 7521

Beginning with model year 1994, diesel-Powered LDVs and LDTs are subject to the “Tier 1” standards set forth in 42 U.S.C. § 7521(g). In fact, section 7521(g) creates an emission standard specifically for diesel-powered LDVs and LDTs:

[i]n the case of diesel-fueled [light-duty trucks] and light-duty vehicles, before the model year 2004 . . . the applicable standards for NO<sub>x</sub> shall be 1.0 gpm for a useful life of 5 years or 50,000 miles (or the equivalent), whichever first occurs, and 1.25 gpm for a useful life of 10 years or 100,000 miles (or the equivalent) whichever first occurs.<sup>17</sup>

Beginning with model year 2001, diesel-powered LDVs and LDTs are subject to the “Tier 2” standards<sup>18</sup> that EPA promulgated pursuant to 42 U.S.C. § 7521(i).<sup>19</sup> “[T]he Tier 2 standards are intended to be ‘fuel neutral’ . . . [u]nder the principle of fuel neutrality, all cars and light trucks, including those using diesel engines, will be required to meet the Tier 2 standards.”<sup>20</sup>

EPA’s Tier 3 standards, which were promulgated under the authority of 42 U.S.C. § 7521(a),<sup>21</sup> take effect beginning with model year 2017 vehicles, and apply to vehicles with GVWRs less than 14,000 pounds.<sup>22</sup> The Tier 3 standards continue the principle of “fuel neutrality.” Thus, “the same Tier 3 standards apply to all LDVs, LDTs, or [medium-duty passenger vehicles], regardless of the fuel they use . . . vehicles certified to operate on any fuel

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<sup>17</sup> 42 U.S.C. § 7521(g)(1).

<sup>18</sup> See 40 C.F.R. §86.1801-01(a).

<sup>19</sup> Control of Air Pollution from New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements, Final Rule, 65 Fed. Reg. 6698, 6702-3 (Feb. 10, 2000) (the “Tier 2 Final Rule”).

<sup>20</sup> Tier 2 Final Rule, at 6728 (emphasis added).

<sup>21</sup> Control of Air Pollution From Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards; Final Rule, 79 Fed. Reg. 23414, 23427 (Apr. 28, 2014) (the “Tier 3 Final Rule”).

<sup>22</sup> See Tier 3 Final Rule, at 23418.

(e.g., gasoline, diesel fuel, E85, CNG, LNG, hydrogen, and methanol) are all subject to the same standards.”<sup>23</sup>

Accordingly, model year 1997 and newer diesel-powered LDVs and LDTs are subject to standards under 42 U.S.C. § 7521 and are therefore also subject to the enhanced vehicle I/M program requirement in areas where that requirement applies.

### **3. The I/M Performance Standard Requires That All Vehicles Subject to an Enhanced Vehicle I/M Program Requirement and Equipped with OBDs to Undergo OBD Checks**

42 U.S.C. § 7521(m)(1) required EPA to promulgate regulations mandating vehicle manufacturers to equip all new LDVs and LDTs with OBDs. EPA promulgated those regulations in 1993.<sup>24</sup> As a result of EPA’s regulations and requirements imposed on vehicle manufacturers by the California Air Resources Board, OBDs have been installed in all new gasoline-powered LDVs and LDTs since model year 1996, and all new diesel-powered LDVs and LDTs since model year 1997.<sup>25</sup>

As already noted, the Clean Air Act also provides that the I/M Performance Standard must require OBD checks and the repair of any malfunctions or system deterioration such checks

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<sup>23</sup> Tier 3 Final Rule, at 23454 (emphasis added).

<sup>24</sup> See Control of Air Pollution from New Motor Vehicle Engines; Regulations Requiring On-Board Diagnostic Systems on 1994 and Later Model Year Light-Duty Vehicles and Light-Duty Trucks; Final Rule, 58 Fed. Reg. 9468 (Feb. 19, 1993). The original regulation requiring OBDs in new LDVs and LDTs was codified at 40 C.F.R. §86.094-17; the regulation was substantially amended in 2000 and is now codified (as further amended) at 40 C.F.R. § 86.1806-05. Beginning with model year 2017, OBDs will be required to meet the requirements set forth in 40 C.F.R. § 86.1806-17. See 40 C.F.R. § 86.1806-17(a).

<sup>25</sup> See California Air Resources Board, On-Board Diagnostic II (OBD II) Systems – Fact Sheet/FAQs (Oct. 28, 2015), at <http://www.arb.ca.gov/msprog/obdprog/obdfaq.htm>. The California Air Resources Board imposed the OBD requirement by its Mail-Out # 95-03, which EPA accepted in 1996. See Control of Air Pollution from New Motor Vehicles and New Motor Vehicle Engines: Regulations Requiring On-Board Diagnostic (OBD) Systems – Acceptance of Revised California OBD II Requirements; Final Rule, 61 Fed. Reg. 45898, 45900 (August 30, 1996). EPA’s acceptance of California’s OBD requirement is codified at 40 C.F.R. § 86.094-17(j).

might discover.<sup>26</sup> Accordingly, in 1996, EPA revised the I/M Performance Standard to require “OBD testing of all 1996 and newer model year vehicles ... in all I/M programs (basic and enhanced) beginning January 1, 1998,” except in certain areas of the Northeast Ozone Transport Region, where OBD checks were required to begin by January 1, 1999.<sup>27</sup> Further, the I/M Performance Standard requires enhanced vehicle I/M programs to “include inspection of all model year 1996 and later light-duty vehicles and light-duty trucks equipped with certified [OBD] systems, and repair of malfunctions or system deterioration identified by or affecting OBD systems as specified in [40 C.F.R.] § 51.357 ... and assuming a start date of 2002 for such testing.”<sup>28</sup>

Accordingly, model year 1996 and newer gasoline-powered LDVs and LDTs and model year 1997 and newer diesel-powered LDVs and LDTs are equipped with OBDS, and are required to undergo OBD checks in areas that are subject to the enhanced vehicle I/M requirement.

**B. Pennsylvania’s Enhanced Vehicle I/M Program Does Not Meet the Requirements of Clean Air Act Section 184 Because it Does Not Subject Diesel-Powered LDVs and LDTs to Emission Testing**

EPA published the I/M Performance Standard in the Federal Register on November 5, 1992. The I/M Performance Standard “assumes coverage of all 1968 and later model year light

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<sup>26</sup> See 42 U.S.C. § 7511a(c)(3)(C)(vii) (requiring enhanced vehicle I/M programs include “[i]nspection of emission control diagnostic systems and the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostic systems”); accord 42 U.S.C. § 7521(m)(3).

<sup>27</sup> I/M Program Requirement – On-Board Diagnostic Checks; Final Rule, 61 Fed. Reg. 40940 (Aug. 6, 1996) (emphasis added).

<sup>28</sup> 40 C.F.R. § 51.351(c) (emphasis added). 40 C.F.R. § 51.357 specifies that “[v]ehicles shall fail the [OBD] test if they fail to meet the requirements of 40 C.F.R. § 85.2207, at a minimum,” and 40 C.F.R. § 85.2207 requires that a model year 1996 or later vehicle fails an OBD check: if its OBD connector “is missing, has been tampered with, or is otherwise inoperable,” 40 C.F.R. § 85.2207(b); if its malfunction indicator light does not light when commanded, 40 C.F.R. § 85.2207(c); or if its malfunction indicator light is commanded to be lit and certain OBD codes are present, 40 C.F.R. § 85.2207(d).

duty vehicles and light duty trucks up to 8,500 pounds [gross vehicle weight rating], and includes vehicles operating on all fuel types.”<sup>29</sup> Although the I/M Performance Standard purports to allow “special exemptions” from an enhanced vehicle I/M program if certain conditions are met,<sup>30</sup> Pennsylvania did not claim a special exemption for diesel-powered LDVs and LDTs.<sup>31</sup>

Pennsylvania first submitted a proposal to implement an enhanced vehicle I/M program to EPA on November 5, 1993.<sup>32</sup> EPA recognized that Pennsylvania’s submission did not “include vehicles operating on all fuel types” in 1994<sup>33</sup> and again in 1996<sup>34</sup> but nevertheless proposed to approve the submission, on the following bases:

- Pennsylvania had committed “to adding the required testing [of vehicles operating on all fuel types] once EPA promulgates regulations on alternative fueled vehicle [inspection and maintenance] testing;”
- Pennsylvania had existing legal authority to add such testing; and
- the program’s “level of coverage ... provides the necessary emissions reductions to meet the I/M Performance Standard.”<sup>35</sup>

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<sup>29</sup> 40 C.F.R. § 51.356.

<sup>30</sup> 40 C.F.R. § 51.356(b)(2). To be granted an exemption, the I/M Performance Standard requires that the state describe exempted vehicles, estimate their number and the percentage of the vehicle fleet they make up, and account for the exemption in an emission reduction analysis. *Id.* However, it is worth noting that section 7511a(c)(3) does not authorize EPA to promulgate a performance standard that exempts classes of vehicles from the I/M requirement. In *Natural Resources Defense Council v. Environmental Protection Agency*, the D.C. Circuit determined that EPA was without discretion to exempt older cars from the visual inspection requirement imposed by section 7511a(c)(3), because the statute “clearly instructed” that I/M programs must require “visual inspection to detect tampering for all vehicles.” 22 F.3d 1125, 1144 (D.C. Cir. 1994)(emphasis added).

<sup>31</sup> *See* Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Enhanced Motor Vehicle Inspection and Maintenance Program; Proposed Conditional Approval, 59 Fed. Reg. 33709, 33713 (June 30, 1994) (stating that Pennsylvania’s “regulation provides for no special exemptions”).

<sup>32</sup> *Id.*, at 33710.

<sup>33</sup> *Id.* at 33713.

<sup>34</sup> Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Enhanced Motor Vehicle Inspection and Maintenance Program; Proposed Interim Rule, 61 Fed. Reg. 51638, 51644 (Oct. 3, 1996) (proposed approval of program as revised to permit decentralized emission testing of gasoline-powered vehicles only following Section 348 of the National Highway System Designation Act of 1995)..

<sup>35</sup> *Id.*; accord 59 Fed. Reg. at 33713.

The “performance standard” that EPA referred to “is expressed as emission levels in area-wide average grams per mile (gpm) for certain pollutants.” *See* 59 Fed. Reg. at 33712.

Pennsylvania's enhanced vehicle I/M program received EPA's final approval on or about June 17, 1999.<sup>36</sup>

Despite EPA's approval of Pennsylvania's enhanced I/M program, the program does not meet the I/M Performance Standard. An unambiguous regulation must be applied as it is written.<sup>37</sup> The I/M Performance Standard unambiguously provides that enhanced vehicle I/M programs "include[] vehicles operating on all fuel types;"<sup>38</sup> Pennsylvania's program does not include vehicles operating on fuel other than gasoline. The I/M Performance Standard does not authorize exemptions for classes of vehicles based on EPA's failure to promulgate an inspection protocol for such vehicles. Even if the I/M Performance Standard permitted such an exemption, the factual basis that was claimed for it when EPA approved Pennsylvania's program no longer exists – EPA has since promulgated an emissions inspection protocol that applies to model year 1997 and newer diesel-powered LDVs and LDTs: the OBD check.<sup>39</sup> Indeed, other states, including Delaware,<sup>40</sup> New Jersey,<sup>41</sup> New York,<sup>42</sup> and Ohio,<sup>43</sup> have federally-approved I/M programs that require model year 1997 and newer diesel-powered LDTs and LDVs be subjected

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<sup>36</sup> See Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Enhanced Motor Vehicle Inspection and Maintenance Program; Direct Final Rule, 64 Fed. Reg. 32411 (June 17, 1999).

<sup>37</sup> See, e.g., *Summit Petroleum Corp. v. United States Env'tl. Prot. Agency*, 690 F.3d 733, 744 (6th Cir. 2012).

<sup>38</sup> 40 C.F.R. § 51.356 (emphasis added).

<sup>39</sup> See 40 C.F.R. § 51.351(c).

<sup>40</sup> Delaware Div. of Motor Vehicles, *Exhaust Emission Inspection* (March 18, 2016), at [http://www.dmv.de.gov/services/vehicle\\_services/reg/ve\\_reg\\_emissions.shtml](http://www.dmv.de.gov/services/vehicle_services/reg/ve_reg_emissions.shtml).

<sup>41</sup> See New Jersey Motor Vehicle Comm'n, *Understanding Inspections and the Emissions Test* (March 18, 2016), at <http://www.state.nj.us/mvc/Inspections/VehiclesExempt.htm> (stating that model year 1996 and older diesel-powered vehicles and diesel-powered vehicles with GVWRs over 8,500 pounds are exempt from emission testing requirements).

<sup>42</sup> New York Dept. of Motor Vehicles, *About Diesel Emissions Inspections* (March 18, 2016), at <https://dmv.ny.gov/inspection/diesel-emissions-inspections>.

<sup>43</sup> Ohio Env'tl. Prot. Agency, *Which Vehicles Must be Tested?* (March 18, 2016), at [http://www.epa.ohio.gov/dapc/echeck/testing\\_info/need\\_a\\_test.aspx](http://www.epa.ohio.gov/dapc/echeck/testing_info/need_a_test.aspx).

to OBD checks. These other states' programs demonstrate that such testing is both practicable and consistent with the I/M Performance Standard.

Nor does the I/M Performance Standard permit diesel-powered LDVs and LDTs to be exempted from an enhanced vehicle I/M program based on a state's ability to meet certain emissions reductions targets by other means. Rather, the I/M Performance Standard unambiguously provides that "all" vehicles subject to standards under 42 U.S.C. § 7521 are also subject to enhanced vehicle I/M programs where such programs are required.<sup>44</sup> Model year 1997 and newer diesel-powered LDVs and LDTs are subject to standards under 42 U.S.C. § 7521. Thus, in areas subject to Pennsylvania's I/M program requirement, such vehicles must be included in Pennsylvania's I/M program.

Finally, the fact that Pennsylvania has the legal authority to include diesel-powered LDVs and LDTs in its enhanced vehicle I/M program does not excuse it from its duty to exercise such authority to comply with the I/M Performance Standard, which requires that such vehicles be included in the program..

Because Pennsylvania does not include diesel-powered LDVs and LDTs in its enhanced vehicle I/M program, the program violates EPA's I/M Performance Standard and provisions of the Clean Air Act. Pennsylvania's program must be revised to include diesel-powered LDVs and LDTs, so that it complies with the I/M Performance Standard.

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<sup>44</sup> See 40 C.F.R. § 51.356.

**C. Pennsylvania’s Enhanced Vehicle I/M Program Does Not Meet the Requirements of Clean Air Act Section 184 Because Pennsylvania’s Program Does Not Require OBD Checks of Model Year 1996 and Later Gasoline-Powered LDVs and LDTs and Model Year 1997 and Later Diesel-Powered LDVs and LDTs in All Areas Subject to the Program**

The I/M Performance Standard provides that “[s]tates or areas within an ozone transport region shall implement enhanced I/M programs in any [MSA], or portion of an MSA, within a state or area with a 1990 population of 100,000 or more as defined by the Office of Management and Budget (OMB) regardless of the area’s attainment classification.”<sup>45</sup> However, “largely rural counties having a population density of less than 200 persons per square mile based on the 1990 Census and counties with less than 1% of the population in the MSA may be excluded provided that at least 50% of the MSA population is included in the program.”<sup>46</sup> Blair, Cambria, Centre, Erie, Lackawanna, Luzerne, Lycoming, and Mercer Counties met these criteria based on data from the 1990 Census and are thus subject to the I/M Program Requirement.<sup>47</sup>

As discussed above, the I/M Performance Standard also requires that an enhanced vehicle I/M program include OBD checks of “all” model year 1996 LDTs and LDVs that are equipped with OBDs (and the repair of any malfunctions or system deterioration indicated by such checks).<sup>48</sup> Despite that requirement, Pennsylvania’s program does not require OBD checks on LDVs and LDTs registered in the eight-county “Northern Region.” In the Northern Region, an

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<sup>45</sup> 40 C.F.R. § 51.350(a).

<sup>46</sup> 40 C.F.R. §51.350(b)(1).

<sup>47</sup> See Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Enhanced Motor Vehicle Inspection and Maintenance Program; Proposed Conditional Approval, 59 Fed. Reg. 33709, 33711 (June 30, 1994). Blair, Cambria, Centre, Erie, Lackawanna, Luzerne, Lycoming, and Mercer Counties are called the “Northern Region” in materials related to Pennsylvania’s enhanced vehicle I/M Program. See, e.g., 67 Pa. Code § 177.3 (defining “I/M Region”).

<sup>48</sup> See 40 C.F.R. § 51.356(c).

emission inspection includes a gas cap check, but not an OBD check.<sup>49</sup> EPA acknowledged this omission when it proposed to approve Pennsylvania’s regulatory filings to require OBD checks in the other seventeen counties that are subject to Pennsylvania’s enhanced vehicle I/M program, but did not explain it.<sup>50</sup>

The I/M Performance Standard requires that enhanced vehicle I/M programs include OBD checks of “all” LDVs and LDTs that are equipped with OBDs in areas that are subject to the I/M program requirement.<sup>51</sup> Pennsylvania’s enhanced vehicle I/M program does not require OBD checks in the Northern Region. There is no basis for this exemption. Accordingly, Pennsylvania’s program must be revised to require OBD checks of all model year 1996 and newer gasoline-powered LDVs and LDTs and all model year 1997 and newer diesel-powered LDVs and LDTs that are registered in the eight-county Northern Region.

## **II. PENNSYLVANIA’S INFRASTRUCTURE SIP DOES NOT MEET THE REQUIREMENTS OF THE CLEAN AIR ACT BECAUSE IT DOES NOT PROVIDE DEP’S AIR QUALITY PROGRAM WITH FUNDING ADEQUATE TO CARRY OUT THE SIP**

Pennsylvania’s Air Pollution Control Act (the “APCA”) establishes a “Clean Air Fund,” which must be used to fund Pennsylvania’s compliance with the requirements that the Clean Air

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<sup>49</sup> See 67 Pa. Code § 177.51(f)(6) (requiring gas cap tests and visual inspections, but not OBD checks, in the Northern Region).

<sup>50</sup> See Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Revision to the Vehicle Inspection and Maintenance Program for the South Central and Northern Regions and New Safety Inspection Program Enhancements for Non-I/M Regions; Proposed Rule, 70 Fed. Reg. 21384, 21385-86 (Apr. 26, 2005) (acknowledging that Pennsylvania “does not require OBD I/M checks as part of the Northern Region”); see also Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Revision to the Motor Vehicle Enhanced I/M Program – Philadelphia, Pittsburgh, South Central, and Northern Regions and Safety Inspection Program for Non-I/M Regions, 70 Fed. Reg. 58313 (Oct. 6, 2005) (discussing the gas cap inspection requirement in the Northern Region but not the exemption for that region from the OBD check requirement in the federal I/M Performance Standard).

<sup>51</sup> See 40 C.F.R. §51.351(c).

Act imposes on the Commonwealth.<sup>52</sup> The Clean Air Fund consists of a “Title V Account” and a “Non-Title V Account.”<sup>53</sup> The Title V Account is funded by air quality permitting and emission fees paid pursuant to Pennsylvania’s Title V Operating Permit program. Those fees are used exclusively to fund the operations of the Title V program, which is administered by DEP.<sup>54</sup> The Non-Title V Account is funded by air quality permitting fees paid by facilities that are not subject to Title V of the Clean Air Act, as well as by fines and penalties paid pursuant to the APCA by Title V or non-Title V facilities. The Non-Title V Account funds the operations of DEP’s Air Quality Program that relate to facilities that are not subject to Title V.<sup>55</sup>

The current fee schedule for the Clean Air Fund was established in 1994.<sup>56</sup> As established the fee schedule provided for staged increases to fee amounts through 2005. The fees imposed by the fee schedule have not increased since 2005.<sup>57</sup> The emission fees imposed by Pennsylvania’s Title V Operating Permit program were last increased in 2013, with the increase being effective beginning with fees due on or after September 1, 2014.<sup>58</sup>

In April 2019, Pennsylvania’s Environmental Quality Board (the “EQB”) published proposed amendments to the fee schedule for DEP’s Air Quality Program.<sup>59</sup> The amendments

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<sup>52</sup> 35 P.S. § 4009.2(a).

<sup>53</sup> See Environmental Quality Board, *Air Quality Fee Schedule Amendments*, 49 Pa. B. 1777, 1778 (April 13, 2019).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See 24 Pa. B. 5899 (Nov. 26, 1994).

<sup>57</sup> EQB, *supra* note XX, at 1778.

<sup>58</sup> 25 Pa. Code § 127.705(a).

<sup>59</sup> EQB, *supra* note XX, at 1777. The APCA authorizes the EQB to adopt rules and regulations to control air pollution in Pennsylvania and to implement the requirements of the Clean Air Act in Pennsylvania. See 35 P.S. § 4005(a)(1) and (8).

generally proposed to increase the Air Quality Program’s existing fees and impose new fees for certain actions and determinations made by the program pursuant to the APCA.

The EQB claimed that the amended fees were required to keep the Air Quality Program solvent. When it proposed the amendments, the EQB stated that DEP had projected that disbursements from the Clean Air Fund would exceed the Fund’s revenues beginning in fiscal year 2021-22.<sup>60</sup> The EQB acknowledged that disbursements from the Clean Air Fund’s Non-Title V account began exceeding that account’s revenues in fiscal year 2015-16, and also noted that DEP had predicted that disbursements from the Fund’s Title V account would exceed that account’s revenues beginning in the then-current fiscal year of 2018-19.<sup>61</sup>

The EQB also claimed that unless the proposed amendments to the Air Quality Program’s fee schedule were adopted, DEP would be forced to reduce the program’s staff, and that such a staff reduction would in turn result in delayed decisions on permit applications, unspecified negative impacts to the operations of Pennsylvania’s ambient air quality monitoring network, and – most critically – less oversight by DEP of regulated facilities and thus “reduced protection of the environment and public health.”<sup>62</sup>

In July 2019, Pennsylvania’s Independent Regulatory Review Commission (the “IRRC”) withheld approval of EQB’s proposed amendments to the Air Quality Program’s fee schedule.<sup>63</sup> The IRRC asserted that it was unclear that the EQB had the authority under the APCA to revise the Air Quality’s Program’s fee schedule as proposed and that it was unclear whether the

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<sup>60</sup> EQB, *supra* note XX, at 1778.

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*, at 1779.

<sup>63</sup> Independent Regulatory Rev. Comm’n, *Comments Regarding Environmental Quality Bd. Reg. #7-536 (Air Quality Fee Schedule Amendments) (IRRC #3231)* (July 17, 2019), available at <http://www.irrc.state.pa.us/regulations/RegSrchrslts.cfm?ID=3241>.

proposed revisions were in the public interest.<sup>64</sup> Consequently, the Air Quality Program's operations continue to be funded using a fee schedule that was, as recently as last year, projected to require staffing cuts that would negatively impact the program's ability to fulfill the requirements imposed by the Clean Air Act. Because the fee schedule that funds DEP's Air Quality Program are not sufficient to fund the program's operations on a going forward basis, Pennsylvania's Infrastructure SIP fails to meet the requirements of section 110 of the Clean Air Act. DEP must explain how the fee schedule for the Air Quality Program will be amended so that the revenue that it generates is sufficient to fund the Air Quality Program's operations, or explain how that program's operations will avoid being curtailed or eliminated due to insufficient revenue.

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<sup>64</sup> *See id.*, at 2-4.