Testimony of

Chris Trostle, Section Chief, Mobile Sources Section

Bureau of Air Quality

Pennsylvania Department of Environmental Protection

Senate Transportation Committee

Hearing on

Exempting Eligible Counties from Vehicle Emissions Testing

May 10, 2019

Good afternoon, Chairwoman Ward and Members of the committee. On behalf of DEP, I'd like to thank you for the opportunity to discuss the reasons why it is necessary and important for Pennsylvania to implement a Vehicle Inspection and Maintenance Program – also known as the "I/M" Program - in the counties where the program is currently implemented. While we recognize concerns that some Members of this committee may have regarding the I/M Program, the Commonwealth's actions are constrained by the federal Clean Air Act and U.S. Environmental Protection Agency regulations, under which none of the counties in Pennsylvania with an I/M program are eligible for removal.

The Pennsylvania counties that have an I/M Program are required by federal law to have an I/M Program regardless of whether these counties have attained federal air pollution standards or not, because Pennsylvania is a member of the Northeast Ozone Transport Region established in 1990 by Congress. Pennsylvania would need EPA's approval to remove a county from the I/M Program, but DEP expects that EPA would not be able to approve removal of any Pennsylvania I/M county. If Pennsylvania were to remove a county without EPA approval, Pennsylvania could face federal sanctions under the Clean Air Act.

Under the Clean Air Act, two categories of areas must implement an I/M Program:

- The first category in Section 182 consists of areas that are designated as "nonattainment areas" for the federal ozone standard.

- The second category in Section 184 consists of areas regardless of their attainment or nonattainment status. States within the Ozone Transport Region must implement an I/M program in any area of the state that is a metropolitan statistical area or portion of an MSA with a 1990 population of 100,000 or more, as defined by the Office of Management and Budget.

Pennsylvania is one of 12 states in the Northeast United States, along with the District of Columbia, that form the Northeast Ozone Transport Region. The Ozone Transport Region was created by Congress in the 1990 amendments to the Clean Air Act to aid all states within the region to attain the federal health-based standards for ground level ozone. The Clean Air Act establishes common, enhanced air pollution reducing requirements for states in the Ozone Transport Region to help ensure that downwind states, or downwind areas of states, meet federally mandated clean air goals. Pennsylvania is both a downwind recipient of air pollution and an upwind contributor of air pollution.

The current I/M Program for 16 of Pennsylvania's I/M counties is the result of two 2003 settlement agreements. In 2002 and 2003, two environmental groups sued the Secretaries of PennDOT and DEP to force implementation of the I/M Program in 16 southcentral and northern counties. The settlement agreements, consistent with each other, were developed through negotiations of all parties and EPA. The agreements established the elements of the I/M Programs for these counties and a timeline for implementation. To effectuate the settlement, PennDOT promulgated regulations in close coordination with DEP. DEP then submitted the regulations to EPA as a revision to the State Implementation Plan – or "SIP." EPA approved the SIP revision in 2005. The settlement agreements expired by their own terms on July 18, 2006, when all terms of the agreements had been met. Implementation of I/M Programs in the other nine I/M counties in Pennsylvania was already underway.

To meet Clean Air Act requirements, changes to an I/M Program must be submitted to EPA as a proposed State Implementation Plan revision. Upon EPA approval of the SIP revision, the new requirements become federally enforceable. In the absence of EPA approval, the state's prior requirements remain federally enforceable and consumers and the regulated community would find themselves subject to new and old requirements simultaneously.

DEP submits all SIP revisions for Pennsylvania. If EPA finds that the SIP revision falls short of federal law, EPA may propose disapproval of the SIP revision. Persons with standing may challenge final EPA action on a SIP revision in a federal Court of Appeals.

The Joint State Government Commission, or "Commission," as directed by Senate Resolution 168 of 2017, established an Advisory Committee consisting of representatives from PennDOT, DEP, and others who possess knowledge of the I/M program and the SIP to conduct a thorough and comprehensive analysis of issues relating to the potential impact of removing each participating county of the third, fourth, and fifth class from the I/M program. Following several productive consultations with the Advisory Committee, the Commission issued a Final Report on October 24, 2018. The Final Report expressed an "overwhelming consensus" that the Clean Air

Act does not authorize removing any of these counties from the I/M Program. DEP agrees with the conclusions in the Final Report.

The Joint State Government Commission issued a Supplemental Memorandum three months after issuance of the Final Report, with the title, "Supplemental Information to SR168 (2017) Auto Emissions Report." As far as DEP is aware, the Commission did not engage any Advisory Committee member in developing the Supplemental Memorandum. The Supplemental Memorandum asserts legal conclusions that DEP believes to be incorrect. Specifically, in the Supplemental Memorandum, the Commission asserts that a provision in the federal I/M regulations supports removing counties from the I/M Program. This is a conclusion in direct conflict with the Final Report. In the Supplemental Memorandum, the Commission identifies seven counties that it believes have the greatest combination of favorable factors to indicate that their removal could be accomplished with minimal need for compensation with other emission controls. DEP does not believe that counties can be lawfully removed from the I/M Program or that other measures can replace an I/M program.

On April 22, 2019, DEP Secretary McDonnell sent a letter responding to the Joint State Government's Commission's January Supplemental Memorandum. The letter explains in detail why the Commission's Supplemental Memorandum conflicts with the Clean Air Act.

Additionally, DEP believes that the Joint State Government Commission mistakenly asserted in its January Supplemental Memorandum that the emissions reductions that would be lost by removing a county from the I/M Program could be replaced by emission reduction credits. In the Ozone Transport Region, emission reduction credits may only be used in only limited circumstances, which would not include removing a county.

Pennsylvania could face sanctions under the Clean Air Act for not implementing enhanced I/M program requirements if the General Assembly were to enact legislation directing PennDOT or DEP to remove areas from the I/M Program and submit a SIP revision to EPA for approval. DEP believes that:

- The General Assembly would be ordering the agencies to perform an unlawful act under federal law.
- EPA would very likely disapprove the SIP revision seeking to remove the counties.
- Pennsylvania could be sanctioned for failing to implement its approved SIP. At the end of the day, if our rules don't meet federal standards, Pennsylvania would be subject to sanctions that would affect a portion of our federal highway funding – which in Pennsylvania would amount to approximately $420 million per year.
- Another sanction that could be imposed would affect new major stationary sources. These sources would need to purchase twice the emission reduction credits needed today to obtain a permit. This would be a job killing-business unfriendly sanction.
- Along with enduring sanctions, Pennsylvania would need to comply with the federal I/M laws, anyway.

In addition to being federally mandated, the I/M Program is an effective and key mobile source emission control program. The Joint State Government Commission's Final Report and

Supplemental Memorandum mention the rate of vehicles that fail when they go through I/M testing – this is called the "failure rate." Some may mistakenly believe that a seemingly low failure rate – such as the failure rate of around 3 percent cited by the Commission - is evidence that the I/M Program is no longer needed. It would be a mistake to evaluate the effectiveness of the I/M Program by examining this factor alone.

I/M Programs keep emissions and deterioration of emission control systems in check in several ways that are not reflected in the I/M failure rate statistic.

- First, a vehicle with a malfunctioning emission control component can emit many times more pollution than a properly functioning vehicle. We all saw in the Volkswagen cheating scandal that when a vehicle's emission controls are not operating as intended that emissions can be many times higher than what emissions should be, up to 40 times higher – or more - in the Volkswagen case. The potential exists for three percent of vehicles failing an I/M test to emit as much pollution as the other 98 percent of non-failing vehicles.
- Second, the number of failures does not count the repairs carried out by motor vehicle owners *to avoid* failing the I/M inspection and therefore driving with an expired sticker. Many motorists repair their vehicles prior to the I/M test. It has been recognized in a study by the Lawrence Berkeley National Laboratory that pre-inspection and repair is a large contributor to emission reductions achieved by California's I/M Program. If motorists follow a similar pattern of practicing pre-inspection and repair in Pennsylvania, which they likely do, the number of vehicles having a problem and being repaired in Pennsylvania would be higher than the I/M failure rates indicate.
- Finally, we have seen in states that have recently expanded their I/M programs to include diesel vehicles, that emission controls on many diesel vehicles have been electronically altered or physically removed. DEP believes that just having an I/M Program acts as a significant deterrence against tampering with vehicle emission control systems.

DEP would like to have been consulted by the Joint State Government Commission when the Commission was developing its draft Supplemental Memorandum. DEP would have been available and willing to discuss with the Commission the points I have presented here today and perhaps the Commission would have reached different conclusions.

DEP consulted with the EPA Region 3 Air Quality Program. The EPA region has expressed its concurrence with DEP's interpretation of Clean Air Act requirements pertaining to Pennsylvania's I/M program. In fact, in the past EPA has asserted several deficiencies with Pennsylvania's current I/M program. Any revision to the I/M program could lead to an even more stringent Program. As I stated previously, DEP does not expect that EPA would approve a state implementation plan revision that removes a county from the Pennsylvania I/M Program. Even if EPA were to approve such a revision, the approval would likely be challenged in court by public interest groups.

Thank you again for inviting DEP to testify before the Transportation Committee on this important topic. I would like to submit my testimony and a copy of DEP Secretary McDonnell's April 22, 2019 letter responding to the Joint State Government's Commission's January Supplemental Memorandum for the record. I am available to respond to any questions you may have.

April 22, 2019

Glenn Pasewicz, Executive Director
Joint State Government Commission
General Assembly of the Commonwealth of Pennsylvania
108 Finance Building
Harrisburg, PA 17120-0018

RE: Vehicle and Inspection and Maintenance (I/M) Program; Memorandum from Joint State Government Commission of January 18, 2019 (January Memorandum)

Dear Mr. Glenn Pasewicz:

We provide this letter in response to the January 18, 2019 memorandum (January Memorandum) of the Joint State Government Commission (JSGC) to Senator Wayne Langerholc, Jr. and Senator Elder Vogel, Jr. The topic of the January Memorandum was "Supplemental Information to SR168 (2017) Auto Emissions Report."

S.R. 168 of 2017
Pennsylvania S.R. 168 directed the JSGC to analyze the impact of potentially removing third, fourth and fifth class counties from Pennsylvania's I/M program. State Resolution 168 directed the JSGC to establish an advisory committee, consisting of representatives of the Department of Transportation (PennDOT) and the Department of Environmental Protection (DEP) and others who possess knowledge of the I/M program and the State Implementation Plan, to facilitate the work of the JSGC. Further, S.R. 168 directed the JSGC, "working with the advisory committee," to conduct a thorough and comprehensive analysis of issues relating to the potential impact to the Commonwealth of removing each participating county of the third, fourth and fifth class from the I/M program. The resolution directed the JSGC to report findings and recommendations to the Senate by October 24, 2018.

Advisory Committee
As directed, the JSGC appointed an Advisory Committee to facilitate its work. Members of the Advisory Committee included DEP Deputy Secretary George Hartenstein, who engaged key I/M staff and counsel in the discussions. The Advisory Committee also included representatives of PennDOT, the Pennsylvania Petroleum Association, automotive interests and citizen/environmental groups. The JSGC engaged the Advisory Committee in developing the October 2018 Report.

Final Report
The JSGC met several times with the Advisory Committee members before publishing its 83-page report on October 24, 2018, entitled "Motor Vehicle Emissions Testing: Pennsylvania's Program," available at http://jsg.legis.state.pa.us (2018 Report). The 2018 Report expresses the Advisory Committee's "overwhelming consensus" that the federal Clean Air Act (CAA) does

not authorize removing counties under consideration by the JSGC from the I/M program, mainly due to the Commonwealth's inclusion in the Ozone Transport Region (OTR). *See* 2018 Report, page 1.

January Memorandum

As far as DEP is aware, the JSGC did not engage the Advisory Committee in developing the January 18, 2019 Supplemental Report, which asserts legal conclusions that are incorrect. In the 21-page January Memorandum, the JSGC asserted that a provision in the federal I/M regulations, specifically 40 C.F.R. § 51.350(c) (relating to applicability), supports removing counties from the I/M program; a conclusion in direct conflict with the Advisory Committee's October 2018 Final Report. The JSGC identifies seven of the counties that it believes have the greatest combination of favorable factors to indicate that their removal could be accomplished with minimal need for compensation with other emission controls: Blair, Cambria, Lackawanna, Luzerne, Lycoming, Mercer, and Westmoreland. *See* January Memorandum, p. 19. DEP disagrees that counties can be lawfully removed from Pennsylvania's I/M program.

The following describes where the seven counties selected by the JSGC fit into the I/M program.

Pennsylvania includes 25 counties in its EPA-approved I/M SIP. All 25 counties are in the I/M program because of the CAA OTR requirements. The 20 counties that are the subject of the January Memorandum are listed here:

Third class:	Berks, Chester, Cumberland, Dauphin, Erie, Lackawanna, Lancaster, Lehigh, Luzerne, Northampton, Westmoreland, York
Fourth class:	Beaver, Cambria, Centre, Washington
Fifth class:	Blair, Lebanon, Lycoming, Mercer

The 25 I/M counties in Pennsylvania's program are divided into I/M regions. The seven counties the JSGC identifies in its January Memorandum are underlined:

Philadelphia:	Bucks, Chester, Delaware, Montgomery and Philadelphia
Pittsburgh:	Allegheny, Beaver, Washington and <u>Westmoreland</u>
South Central:	Berks, Cumberland, Dauphin, Lancaster, Lebanon, Lehigh, Northampton and York
Northern:	<u>Blair</u>, <u>Cambria</u>, Centre, Erie, <u>Lackawanna</u>, <u>Luzerne</u>, <u>Lycoming</u> and <u>Mercer</u>

Legal Structure

Statutory Requirements. The CAA requires that Pennsylvania implement an I/M program for two distinct categories of areas.

The first category consists of areas subject to I/M requirements based on nonattainment of the ozone NAAQS (nonattainment-based I/M areas). These areas are governed by CAA Section 182 (relating to plan submissions and requirements), which was added in the 1990 CAA amendments relating to ozone nonattainment. Section 182 sets forth increasingly stringent control measures

and other SIP requirements for areas in marginal, moderate, serious, severe and extreme ozone nonattainment areas.[1] Marginal and moderate areas must meet a basic I/M performance standard under CAA Section 182(a)(2)(B) and (b)(4), respectively[2]; serious, severe and extreme ozone nonattainment areas must meet an "enhanced" I/M performance standard under CAA Section 182(c)(3).[3] EPA explained in the preamble to its 1992 I/M regulations that a performance standard is the minimum amount of emission reductions, based on a model or benchmark program design, that a program must achieve. A performance standard provides a state with flexibility to vary any of the design elements (except those required by the CAA) of the model program provided the overall effectiveness is at least as great as the effectiveness of the performance standard.[4]

The second category of mandated I/M areas consists of areas subject to enhanced I/M programs based on being located in an OTR state (OTR-based I/M areas). These areas are governed by CAA Section 184(b)(1)(A) (relating to control of interstate ozone air pollution),[5] also added in the 1990 CAA amendments. Section 184 established the Northeast OTR to address the interstate transport of air pollutants from one or more northeastern states that contributes significantly to a violation of a NAAQS in one or more other states.[6] Hence, the regional (namely, multistate) impacts of emissions throughout the OTR, not the status of attainment or nonattainment of any particular area in the OTR, matter for inclusion in this category of I/M area.

Section 184(b)(1)(A) requires states in the OTR to implement I/M in any area of the state that is a metropolitan statistical area (MSA) or part of an MSA with a population of 100,000 or more. This subparagraph subjects these OTR-based I/M areas to the enhanced I/M program requirements to which CAA Section 182(c)(3)(A)[7] subjects serious and worse nonattainment areas. The OTR I/M provision, CAA Section 184(b)(1)(A), requires an OTR state to submit a SIP that requires:

> (A) that each area in such State that is in an ozone transport region, and that is a metropolitan statistical area or part thereof with a population of 100,000 or more comply with the provisions of section 7511a(c)(3)(A)[8] of this title (pertaining to enhanced vehicle inspection and maintenance programs); …

EPA Regulations and Congressional Intent. EPA adopted I/M regulations in 1992 for enhanced I/M programs designed to implement the 1990 CAA amendments, in 40 C.F.R. part

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[1] 42 U.S.C. § 7511a

[2] 42 U.S.C. § 7511a(a)(2)(B) and (b)(4)

[3] 42 U.S.C. § 7511a(c)(3). See also introductory language in 42 U.S.C. § 7511a(d) and (e), applying the I/M requirements for serious ozone nonattainment areas specified in 42 U.S.C. § 7511a(c)(3) to severe and extreme ozone nonattainment areas.

[4] Inspection/Maintenance Program Requirements, 57 Fed. Reg. 52,950, 52,953 (Nov. 5, 1992)

[5] 42 U.S.C. § 7511c(b)(1)(A)

[6] Congress created the Northeast OTR in CAA Section 184 consistent with the guidelines Congress established for transport regions in CAA § 176a. 42 U.S.C. § 7506a(a)

[7] 42 U.S.C. § 7511b(c)(3)(A). A scrivener's error resulted in CAA Section 184(b)(1)(A) mistakenly cross-referenced CAA Section 182(c)(2)(A), 42 U.S.C. § 7511b(c)(2)(A), rather than the intended reference of CAA Section 182(c)(3)(A), 42 U.S.C. § 7511(c)(3)(A). We cite the intended cross-reference above.

[8] Please see footnote 11 for explanation of the scrivener's error. The intended cross-reference is used above.

51, subpart S (relating to inspection/maintenance program requirements).[9] The regulation singled out by the JSGC in the January Memorandum, 40 C.F.R. § 51.350(c), was part of the 1992 rulemaking but is at odds with EPA's description in that very rulemaking of the CAA and Congressional intent.

In EPA's preamble to the 1992 regulations, EPA emphasized the two statutory categories of I/M areas, writing, "… enhanced I/M is required by the [Clean Air] Act in areas with the worst air quality problems *and* in the Northeast Ozone Transport Region."[10] (emphasis added). EPA also explained in the preamble that Congress, in its legislative history of the 1990 CAA amendments, established that inclusion of OTR-based I/M areas was to be required *regardless of the areas' attainment classifications*. EPA wrote:

> The legislative history uses slightly different wording [than CAA Section 184(b)(1)(A)] in saying enhanced I/M is required "in metropolitan statistical areas" [] and goes on to say "whether or not the areas are in nonattainment." *In establishing the ozone transport region provisions, it seems that Congress intended to address emissions that could contribute to a violation of the standard anywhere in a region. Thus, it included attainment MSAs* as well as nonattainment areas. Broad, sparsely settled rural areas with no MSAs or only MSAs under 100,000 population were not included, however, indicating an intent to balance the small emission reductions possible from these areas and the greater difficulty of implementing I/M programs in such areas.[11]

(emphasis added.)

The I/M applicability requirements in 40 C.F.R. § 51.350 address both categories of I/M areas. There is conflict between provisions within Section 51.350, and conflict between Section 51.350 and its enabling statute (the CAA). It is a basic understanding that in interpreting federal law that courts and federal agencies must give effect to the unambiguously expressed intent of Congress (*see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)) and that a statute that is clear on its face will prevail to the extent that a regulation detracts from the clear import of the statute (*see Com. of Pa., Dept. of Public Welfare v. U.S. Dept. of Health and Human Services*, 80 F.3d 796, 809 (3d Cir. 1996)). Given this, the CAA and Congress' intent behind it prevail over the regulation that conflicts internally and with the CAA and Congressional intent.

While the introductory language of Section 51.350 could, by itself, appear to limit the applicability of I/M programs to nonattainment areas, the first numbered paragraph of the Section specifies just the opposite, namely that some areas are subject to an I/M program *based solely on the OTR-based criteria.* The regulation even states that this even include an *attainment* area. This embodies the legislative intent. Section 51.350(a)(1) reads:

> **(a) Nonattainment area classification and population criteria.**

[9] 57 Fed. Reg. 52,950

[10] 57 Fed. Reg. at 52,952

[11] 57 Fed. Reg. at 52,966

> **(1)** States or areas within an ozone transport region shall implement enhanced I/M programs in any metropolitan statistical area (MSA), or portion of an MSA, within the 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*. In the case of a multi-state MSA, enhanced I/M shall be implemented in all ozone transport region portions if the sum of these portions has a population of 100,000 or more, irrespective of the population of the portion in the individual ozone transport region State or area.

(emphasis added.) EPA incorporated legislative intent into Section 51.350(b)(1) and (2) in another way, too, by excluding broad, sparsely settled rural areas from OTR-based I/M programs and from nonattainment-based programs. **Under these regulatory paragraphs, 10 counties in Pennsylvania that would otherwise be subject to the I/M regulations are already exempted.**[12] The remaining counties are required to be in the program under the authorities cited above, with all 20 of the participating third, fourth and fifth class counties being subject to the program by virtue of being in OTR-based I/M areas.

Oddly, EPA overlooked the distinction between nonattainment-based I/M areas and OTR-based I/M areas in 40 C.F.R. § 51.350(c). Taken out of context, this provision could allow a state to remove an OTR-based I/M area if the state could demonstrate to EPA that the area could maintain the NAAQS without the I/M program. This is counterintuitive, though. And, as discussed above, OTR-based I/M areas are required to have I/M programs due to the multistate *regional* impacts of the pollutants. Subsection (c) reads:

> **(c) Requirements after attainment**. All I/M programs shall provide that the program will remain effective, even if the area is redesignated to attainment status or the standard is otherwise rendered no longer applicable, until the State submits and EPA approves a SIP revision which convincingly demonstrates that the area can maintain the relevant standard(s) without benefit of the emission reductions attributable to the I/M program. The State shall commit to fully implement and enforce the program until such a demonstration can be made and approved by EPA. At a minimum, for the purposes of SIP approval, legislation authorizing the program shall not sunset prior to the attainment deadline for the applicable National Ambient Air Quality Standards (NAAQS).

Section 51.350(c) conflicts with CAA and Congressional Intent. Congress did not provide the "off-ramp" from the I/M requirements for OTR-based I/M areas as suggested in 40 C.F.R. § 51.350(c), upon which the JSGC based its January Memorandum. If Congress had wanted to force OTR areas that meet or exceed the 100,000-person population threshold into the I/M program only if their air quality did not meet a NAAQS, Congress would have written that into the CAA. Yet the JSGC based its January Memorandum on the assertion that Subsection (c)

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[12] 40 C.F.R. § 51.350(b)(1). The exempted counties are Carbon, Perry, Somerset, Pike, Butler, Fayette, Columbia, Monroe, Wyoming and Adams Counties.

provides a basis for removing counties in OTR-based I/M areas from the I/M program based on the areas' attainment status. *See* January Memorandum, p. 3.

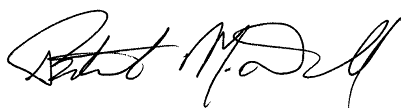
Suggested SIP Revision. DEP does not expect that EPA could approve a Pennsylvania SIP revision seeking removal of an OTR-based I/M area from the I/M program. Even if EPA were to approve such a SIP revision, the approval would likely be challenged in court by public interest groups, and that could lead to an even more stringent I/M program, not a less inclusive I/M program.

DEP believes that the JSGC misinterpreted 40 C.F.R. § 51.350(c) as a basis for removing OTR-based I/M areas based on the areas' attainment status. Reading Subsection (c) in isolation, as the JSGC apparently did, would create an untenable construct under which CAA Section 184 would require a state to impose I/M programs on OTR areas attaining the NAAQS and EPA's regulations would allow the state to seek immediate EPA approval to remove the areas from the program.

DEP, as the delegated agency under the Clean Air Act, does not agree with the JSGC's January Memorandum, that counties of the third, fourth or fifth class could possibly be removed from the Commonwealth's vehicle emissions inspection and maintenance (I/M) program.

It is unfortunate that the JSGC did not consult with DEP, a key member of its Advisory Committee, in developing the contrary January Memorandum. DEP would have been able to explore the issue with the JSGC to avoid the public confusion that may now result from the January Memorandum. If you have any questions, please do not hesitate to contact Gregory Kauffman, Acting Director of Legislative Affairs, by telephone at 717.783.8303 or by e-mail at grekauffma@pa.gov.

Respectfully,



Patrick McDonnell
Secretary

cc: Senator Wayne Langerholc, Jr.
Senator Elder Vogel, Jr.