



General Assembly of the Commonwealth of Pennsylvania
Joint State Government Commission
Room 108 Finance Building, 613 North Street
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May 10, 2019

Senate Transportation Committee
“EXEMPTING ELIGIBLE COUNTIES FROM VEHICLE EMISSIONS TESTING”

Comments submitted by:
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Joint State Government Commission

Senate Resolution 168 of 2017 was adopted October 24, 2017, directing the Joint State Government Commission appoint an advisory committee and 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, individually and collectively, from the [motor vehicle] emissions testing program;” and the impact on environmental credits and related financial aspects of the program. This report is due one year from the adoption of the resolution, or October 24, 2018.

The Commission appointed an advisory committee that included representatives of PennDOT and DEP, as well as representatives of consumers, environmental advocates, and inspection stations. From the first meeting, it became clear that the overwhelming consensus of the advisory committee was that it was not possible under the Clean Air Act to remove any counties from the emissions testing program because of Pennsylvania’s inclusion in the Ozone Transport Region, and even if it were possible, it was neither advisable nor desired. Efforts by Commission staff to include some “what if” scenarios in that report were rebuffed because of the Advisory Committee’s position that it was not legally possible, and thus including “what if” scenarios and potential financial impacts would be unnecessary and confusing. Because of this position, the directives of the resolution were only partially addressed in the advisory committee report of October 24, 2018.

After release of the report, our offices were contacted by the SR 168 prime sponsors, Senators Langerholc and Vogel, to request that the Commission further develop responses to those directives. As far as the Advisory Committee was concerned, its work was completed with the release of the October 2018 report. Consequently, in response to the Senators’ follow-up request, Commission staff revisited the issue and produced the Supplemental Memorandum of January 18, 2019. This was a very rare event in the life of the Commission; once projects are done, we are often called up to explain or justify the findings and recommendations included in a report, but not add to it. However, as the Senators pointed out, some of the directives of the resolution were not fully explored, and thus merited a revisit.

The gist of the debate over this issue is whether or not Pennsylvania can, through a State Implementation Plan (SIP) amendment, change the testing requirements of counties in the emissions testing program. It is the Commission’s position that the federal statutory provisions governing emissions testing can allow it. This is principally a debate over statutory construction. It is our position that the provisions of the Clean Air Act are meant to be read together, in a way that allows for the fullest implementation of all of the provisions, not prioritizing one over the other. The requirement for emissions testing was not meant to be carved in stone for all eternity; the statute contemplates changes in circumstances over time, and provides a method to do so in the form of an amendment to the SIP.

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As for the counties identified in the Supplemental Memorandum, Commission staff simply attempted to identify those counties whose circumstances had changed since 1995 to the point where removal from the emissions testing program was likely to have a minimal effect on the overall ability of the community to maintain emission standards.

Whether the SIP should be amended, and what counties are best positioned to be removed, is a policy decision ultimately to be negotiated between the General Assembly and the Governor. Our role here is as it has always has been, to present all the information on the matter in question available to the General Assembly in order for it to make reasoned, deliberative decisions about the welfare of the citizens of Pennsylvania.

Senate Transportation Committee

"Exempting Eligible Counties from Vehicle Emissions Testing"

Comments submitted by:
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Joint State Government Commission

SR168 of 2018 required the Joint State Government Commission to assemble an Advisory Committee, and, working with the Advisory Committee, 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, individually and collectively from the emissions testing program; and be it further ...

Resolved, that the final report include recommendations to make up for the loss of environmental credits associated with the approved SIP, the cost in actual dollars, historically and projected, to each of the respective departments, and any other potential financial aspect to the Commonwealth.

The Advisory Committee concluded that, because of the Commonwealth's inclusion in the Ozone Transport Region (OTR), the Commonwealth could not remove any counties from its Vehicle Inspection and Maintenance Program. The federal Clean Air Act mandates an "enhanced vehicle inspection and maintenance program" in certain areas of the OTR states, specifically any metropolitan statistical area or portion thereof with a 1990 population of 100,000 or more, regardless of the area's nonattainment classification under the National Ambient Air Quality Standards. An exception is made for rural areas.

Because the Advisory Committee determined that a state was effectively foreclosed from removing a county or area from the OTR's requirement that it have an enhanced vehicle inspection and maintenance program, the Joint State Government Commission did not address "the impact of removing each participating county of the third, fourth, and fifth class ... from the emission testing program." Nor did staff address the "cost...in dollars ... to each of the respective departments" that removing such counties would have.

Further, staff did not "include recommendations to make up for the loss of environmental credits," because it did not discuss removing such counties for the aforementioned reason, and because the OTR's mandate that members states participate in an enhanced vehicle inspection and maintenance program does not countenance any kind of environmental credit to the Commonwealth for participating.

Staff did, however, note that one federal statute governing interstate transport regions allows the Administrator of the EPA to remove states or portions of states from the OTR "whenever the Administrator has reason to believe that the control of emissions in that State or portion of the state ... will not significantly contribute to the attainment of the standard in any area

in the region.”¹ The Administrator may do this of his own accord, or may do so upon petition of the Governor of the state.

Staff detailed the state of Maine’s petition to remove most of that state from the OTR; efforts by current member states of the OTR to expand the OTR to include eight additional states; Pennsylvania’s existing Enhanced Vehicle I/M Program; federal and state regulations governing the conduct of emissions testing; data on the Commonwealth’s emissions testing stations for each of the four I/M Program regions, including average cost of each test performed; data on the number of vehicles subject to emissions testing in the Commonwealth; data on the statewide emission inspection failure rates, including an appendix showing such failure rate data for the 2014-2017 testing years in the Northern Region, by county and model year.

After the publication of the report, Senators Langerholm and Vogel wrote to the Joint State Government Commission and requested that it issue an addendum to the Report. The Senators stated “[t]he directives of SR 168 supersede the opinions of any advisory committee.” In response to this inquiry, we issued a Supplemental Memorandum, in which we identified a regulation which may be used to remove some counties from the Enhanced Vehicle I/M Program – 40 C.F.R. § 51.350(c), which provides

[a]ll 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 (emphasis added).²

The Supplemental Memorandum discusses the potential need to effect commensurate emissions reduction if the Commonwealth were to pursue this route to remove areas of the Commonwealth from the federally-mandated enhanced I/M program. The Supplemental Memorandum also further discusses the potential cost of removing counties from the enhanced I/M program, including PennDOT’s expenditures, the economic impact to consumers and service stations, and suggested specific counties to target for removal based on whether their removal would have minimal effects on their ability to maintain current emissions standards. Staff hypothesized that these counties’ removal would have a minimal impact on emissions standards based on their declining emissions, low vehicle emissions I/M testing failure rates, declining populations, and declining inventories of 1975 through 1995 model year vehicles.

DEP has indicated to JSGC that it disagrees with JSGC’s interpretation of the regulation at issue, 40 C.F.R. § 51.350(c). DEP’s position is that the content of this regulation is at odds with the EPA’s description of the regulation and the intent of Congress. It also seems to assert that this regulation is only applicable to I/M programs that are mandated in NAAQS nonattainment areas. However, the entirety of 40 C.F.R. Subpart S governs Inspection/Maintenance Program Requirements and it appears that the entire subpart was intended to apply to both I/M programs

¹ 42 U.S.C. § 7506a(a)(2).

² 40 C.F.R. § 50.350(c).

required for the areas in nonattainment for ozone under the NAAQS and the I/M programs required under the OTR. The specific subsection of the regulation at issue even begins “[a]ll I/M programs”.

Further, the statutory provision establishing the Northeast OTR, 42 U.S.C. § 7511c, makes reference to the “enhanced vehicle inspection maintenance program” under “Plan Submissions and Requirements” under “Additional Provisions for Ozone Nonattainment Areas.”³ This kind of “nesting-doll” construction gives the impression that Congress simply wanted to make OTR-designated I/M Programs comply with the same rules to which a nonattainment-based I/M Program in a “serious area” would adhere. In fact, the statute establishing the Northeast OTR specifically references the statute governing plan submissions and requirements for ozone nonattainment areas, stating,

“each State included within a transport region established for ozone shall submit a State Implementation Plan ... which requires ... that each areas in such State that is in an ozone transport region ... comply with the provisions of § 7511(c)(3)(A) (pertaining to enhanced vehicle inspection and maintenance programs).”⁴

The statute establishing the Northeast OTR instructs the Northeast OTR States that they must comply with the statute governing nonattainment-based I/M Programs (regardless of whether any state or portion thereof is in nonattainment under the ozone NAAQS).

The regulation in dispute requires that the Commonwealth, or any other state, submit a SIP revision. As noted above and in the report entitled “*Motor Vehicle Emission Testing: Pennsylvania’s Program*,” the provision of the Clean Air Act that allows this requires that the Governor petition the Administrator of the EPA for such a removal.⁵ Further, if DEP were to submit a proposed revision to the EPA, it is unclear whether the revision would “convincingly demonstrate[] that the area can maintain the relevant standard(s) without benefit of the emission reductions attributable to the I/M program.”⁶

If the General Assembly’s intent is to remove counties from the OTR’s enhanced vehicle inspection and maintenance program, removing those counties from the OTR entirely would perhaps be the most straightforward option from a legal standpoint. The Supplemental Report identifies a list of counties that the General Assembly may wish to discuss with the Governor. Discussions with DEP may lead to modeling a hypothetical removal of the counties to determine if the Commonwealth can maintain the relevant standards without the benefit of emissions reductions attributable to the I/M program.

³ 42 U.S.C. § 7511c.

⁴ 42 U.S.C. § 7511c(b)(1)(B).

⁵ 42 U.S.C. § 7506a(a)(2).

⁶ 40 C.F.R. § 51.350(c).