

January 12, 1999

Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, DC 20530

Re: United States v. Caterpillar, Inc., Civil Action No. 98-2544 (HHK), D.J. Ref. 90-5-2-1-2255
United States v. Cummins Engine Co., Civil Action No. 98-2546 (HHK), D.J. Ref. 90-5-2-1-2136A
United States v. Detroit Diesel Corporation, Civil Action No. 98-2548 (HHK), D.J. Ref. 90-5-2-1-2253
United States v. Mack Trucks, Inc., Civil Action No. 98-1495 (HHK), D.J. Ref. 90-5-2-1-2251 and United States v. Renault Vehicules Industriels, Civil Action No. 98-2543 (HHK), D.J. Ref. 90-5-2-1-2251/1
United States v. Navistar International Corp., Civil Action No. 98-2545 (HHK), D.J. Ref. 90-5-2-1-2252
United States v. Volvo Truck Corp., Civil Action No. 98-2547 (HHK), D.J. Ref. 90-5-2-1-2256

Dear Assistant Attorney General Schiffer:

The State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) – the two national associations representing the air pollution control agencies in the 55 states and territories and more than 165 major metropolitan areas across the country – are pleased to provide comments on the proposed Consent Decrees related to the above-referenced civil actions. These proposed Consent Decrees – announced in the *Federal Register* on November 3, 1998 (63 FR 59330-59334) – have been filed by the United States to settle civil complaints against seven manufacturers of motor vehicle diesel engines alleged to have sold, offered for sale or introduced or delivered into commerce, heavy-duty diesel engines equipped with "defeat devices" in the form of computer software that alters fuel injection timing when the engines are in use, thus adversely affecting the engines' emission control systems for oxides of nitrogen (NO_x); such defeat devices are prohibited by the Clean Air Act. The California Air Resources Board has also entered into settlement agreements with these same seven engine manufacturers.

General Comments

Emissions from heavy-duty diesel engines represent one of the most significant sources of mobile source NO_x emissions in the country; these engines also emit

substantial levels of fine particulate matter (PM2.5). Given the persistent air quality problems facing so many areas of the nation, STAPPA and ALAPCO have consistently supported efforts to control emissions from heavy-duty diesel engines. With respect to NOx, it is becoming increasingly apparent that for many areas of the country, lowering NOx emissions outside urban centers will result in reduced peak ozone levels in downwind areas; such reductions will likely be critical to the efforts of many areas to attain the health-based ozone standard. Further, NOx plays a role in the formation of PM2.5, as well as in visibility impairment, acid deposition and global warming. Therefore, states and localities across the nation necessarily continue to pursue NOx control measures as we strive to achieve and maintain clean, healthful air.

STAPPA and ALAPCO applaud the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ) for discovering and seeking remedy to the very substantial environmental violations of the seven named engine manufacturers. Detection of the defeat devices will prevent the continuation of an enormous quantity of excess pollution that poses a detriment to public health and, accordingly, we credit EPA for its persistent scrutiny of the affected vehicles. Further, we acknowledge and commend the tremendous effort put forth by DOJ and EPA in attempting to reach an effective agreement with the engine manufactures. However, notwithstanding that effort, we are extremely disappointed with the proposed result.

As we diligently persist in our efforts to reduce emissions that pose health risks to our citizens, we are dismayed that the settlement reflected in the proposed Consent Decrees takes such a lenient approach to penalizing engine manufacturers whose actions over more than a decade have resulted in the sale of 1.3 million heavy-duty diesel engines equipped with auxiliary emission control devices that, in 1998 alone, were responsible for more than 1.3 million tons of excess NOx emissions. As EPA has noted, this level of NOx emissions is equivalent to that from 65 million cars and represents 6 percent of all NOx emissions nationwide.

In light of the tremendous capital – financial and political – being expended at every level of government to identify and institute effective air pollution control strategies – particularly for NOx – as well as the costs of control being borne by virtually all contributing sectors of the economy and the public, we believe that a settlement that fails to ensure full recovery of every ton of excess NOx emissions that has occurred or will occur as a result of the use of the defeat devices is inappropriate and certainly not "fair, reasonable and in the public interest" as asserted by the proposed Consent Decrees.

When DOJ and EPA conclude that a party or parties has violated the Clean Air Act, they have a responsibility to ensure that any settlement, at a minimum, 1) requires future actions that will recover any excess emissions caused by the violation and 2) includes terms that are demanding enough to create an incentive for the parties and others involved not to engage in similar illegal actions in the

future. The proposed settlement reached by DOJ, EPA and the seven engine manufacturers fails to accomplish these objectives.

With respect to the first objective, the proposed settlement fails to recoup nearly 12 million tons of excess NOx emissions that have occurred or will occur as a result of the violation. Instead, it merely sets in place provisions to begin reducing future excess NOx emissions due to the continued use of the existing defeat devices. However, even these future excess emissions will not be completely eliminated until well after 2020. STAPPA and ALAPCO find it unacceptable that the parties directly responsible for 88 million excess tons of air pollution, including 12 million that are proposed to go unrecovered, are not held more accountable for correcting the damage caused by their actions.

If it has been concluded that the remaining excess NOx emissions can not be offset by remedial action, DOJ and EPA should pursue compensatory alternatives. First, because NOx emissions lead to the formation of nitrate emissions that contribute to the PM2.5 inventory, heavy-duty diesel engines could be required to implement strategies to reduce PM emissions by an amount consistent with the 12 million excess tons of NOx. PM control technology is currently being used on new and existing onroad and nonroad heavy-duty engines and could be applied to other heavy-duty engines to achieve PM reductions. Depending on the control strategies employed, an added benefit of requiring greater PM reductions could be additional reductions in toxic hydrocarbon emissions. Second, DOJ and EPA could levy greater financial penalties to be used to purchase additional NOx and PM reductions.

STAPPA and ALAPCO also believe that the proposed settlement falls far short of achieving the second objective – that the conditions of the settlement be onerous enough to deter the parties from doing the same thing again. While the proposed settlement has been characterized as costing the engine manufacturers more than \$850 million, not only will most of this money never leave their hands, but it will remain in their control and would eventually have been spent by the manufacturers anyway to meet tighter tailpipe standards. Further, although the \$83.4-million civil penalty may be the "largest civil penalty ever for an environmental violation," as described by DOJ, when we consider the magnitude of the violation – equipping 1.3 million heavy-duty engines with an illegal device that circumvents air pollution control requirements – the "penalty," which averages less than \$65 per engine, can hardly be considered of consequence.

Moreover, with respect to the \$109 million to be spent by the engine manufacturers to fund "special environmental projects" (SEPs), STAPPA and ALAPCO have serious concerns with the considerable control engine manufacturers have over how these funds – their fines – will be spent. We take serious issue with the fact that state and local air pollution control agencies, as well as others who will propose SEPs to be funded by the federal portion of the available funds, must apply to the engine manufacturers for funding and, further, that these manufacturers,

rather than environmental regulators, will be the ones to determine which environmental projects are most suitable to attempt to make up for their own wrongdoing. We find this approach to the disbursement of penalty monies levied for a serious violation to be incredible.

Finally, while we appreciate the opportunity to comment on this proposed settlement, we believe that public input on the provisions of this agreement should have been sought earlier. While requesting public comment after a proposed settlement is reached may be appropriate when a settlement serves only to set a monetary penalty and prescribe remedial action, in this instance, the proposed settlement goes beyond such measures to broader public policy issues that set the landscape for future regulatory action. Accordingly, public input on those aspects of the agreement should have been solicited before this time.

Specific Comments

Compliance Testing

STAPPA and ALAPCO are concerned that enforcement of the proposed settlement consists of a compliance program run solely by the engine manufacturers themselves. We believe the very circumstances that have led to the need for this settlement in the first place argue strongly in favor of a program that is not self-policing. Accordingly, we recommend that EPA assume responsibility for conducting an independent compliance program to ensure full adherence to the terms of the settlement.

Removal of Defeat Devices at Rebuild

STAPPA and ALAPCO have several concerns regarding the provisions of the proposed settlement calling for the engine manufacturers to correct emission violations at the time noncompliant heavy-duty engines are rebuilt.

First, we are concerned over whether the necessary repairs will be performed correctly and, if so, whether tampering will occur in the future. In that removal of the defeat device may have an adverse impact on fuel economy, there may be an incentive for heavy-duty vehicle owners or operators to seek rebuild alternatives to the low-NOx rebuild kits to be provided by the engine manufacturers to preserve fuel economy or to tamper with the vehicle after it is rebuilt to restore original fuel economy performance. We are aware that EPA currently devotes virtually no funding to anti-tampering enforcement and believe that it is imperative that the agency establish a comprehensive oversight program to ensure that all repairs are properly designed and performed and that subsequent tampering does not occur.

Second, we are concerned that a potential, unintended consequence of remedying the defeat device may be an increase in emissions of particulate matter (PM). Accordingly, we urge that the settlement include provisions to ensure that no such

increase occur and that, in the event a PM emission increase does result, the approved repair will include a requirement for PM exhaust controls.

Finally, the rebuild program applies only to affected engines manufactured after 1993 or 1994 (depending on the option selected by the engine manufacturer), not to those manufactured from 1988 through at least 1992, thereby excluding hundreds of thousands of engines equipped with defeat devices and, thus, allowing the excess NOx emissions from these engines to continue. STAPPA and ALAPCO believe that all engines that have been equipped with defeat devices must be subject to the remedial measures stipulated in the settlement.

Averaging, Banking and Trading NOx Credits

STAPPA and ALAPCO object to the provisions of several of the proposed Consent Decrees to allow some of the engine manufacturers to retain a portion of their averaging, banking and trading (ABT) NOx credits for use in 1998 and 1999. Under the proposed settlement, it is suggested that 12 million tons of NOx reductions be forfeited. We, therefore, believe that it is inappropriate to allow any manufacturer to retain any ABT credits and that all NOx credits generated by the manufacturers prior to 1999 should be forfeited. To the extent that ABT NOx credits are necessary for compliance in 1998 or 1999, manufacturers should be required to generate them anew, to be applied retroactively.

Conclusions

As the state and local officials responsible for developing and implementing strategies that will achieve and maintain clean and healthful air nationwide, STAPPA and ALAPCO strongly object to a proposed settlement that would allow such an egregious violation of laws to protect public health to be so inadequately penalized. The business of air pollution control is a zero-sum game. The actions of the seven engine manufacturers will result in 12 million tons of excess air pollution that, under this proposed settlement, will go unrecovered. Unless these same manufacturers are held more accountable for their actions in a timely manner, the burden of overcoming those excess emissions will unfairly fall to other businesses that have acted in good faith to contribute to our national clean air effort. We urge DOJ and EPA to pursue a more equitable solution that truly is "fair, reasonable and in the public interest."

Sincerely,

John Elston
STAPPA Chair
Mobile Sources and Fuels Committee

Richard H. Baldwin
ALAPCO Chair
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