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March 13, 2023

Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Re: EPA-HQ-OECA-2022-0981

Dear Colleagues:

The National Association of Clean Air Agencies (NACAA) appreciates this opportunity to comment on the U.S. Environmental Protection Agency's (EPA) *National Enforcement and Compliance Initiatives for Fiscal Years 2024-2027*, which was published in the *Federal Register* on January 12, 2023¹. Since this document will help guide EPA's compliance and enforcement activities for the next three years, it could profoundly impact our nation's efforts to protect public health and the environment. Therefore, we are eager to contribute our thoughts and recommendations as the agency develops the final document.

NACAA is the national, non-partisan, non-profit association of 157 state and local air pollution control agencies in 40 states, including 117 local air agencies, and the District of Columbia and four territories. The members of NACAA have primary responsibility under the Clean Air Act (CAA) for implementing our nation's clean air program. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the U.S. These comments are based upon that experience. The views expressed in these comments do not represent the positions of every state and local clean air agency in the country.

EPA's National Enforcement and Compliance Initiatives (NECIs) are a multi-year planning document that allows EPA's Office of Enforcement and Compliance Assurance to target its resources to the most serious environmental violations by identifying national enforcement and compliance program priorities. In selecting initiatives for the Fiscal Year (FY) 2024-2027 cycle, EPA proposes to use the following three criteria to evaluate the existing

¹ 88 Fed. Reg. 2093 (January 12, 2023)
<https://www.federalregister.gov/documents/2023/01/12/2023-00500/public-comment-on-epas-national-enforcement-and-compliance-initiatives-for-fiscal-years-2024-2027>

and proposed new initiatives: (1) the need to address serious and widespread environmental issues and significant violations impacting human health and the environment, particularly in overburdened and vulnerable communities; (2) areas where federal enforcement can help ensure national consistency, promote a level playing field, and achieve compliance; and (3) alignment with the Agency's 2022-2026 Strategic Plan². EPA says that it “aims to align all existing and proposed NECIs with two overarching Strategic Plan goals: Goal 1: Tackle the Climate Crisis and Goal 2: Take Decisive Action to Advance Environmental Justice.”

Although it is not listed in this guiding list of strategic goals, NACAA notes these NECIs must also be guided by EPA’s Strategic Plan Goal 3: “Enforce Environmental Laws and Ensure Compliance”. In NACAA’s January 15, 2021 Transition Letter to the Biden-Harris Administration³, we stated that “EPA should include among its national enforcement priorities areas in which its expertise, resources and focus are not substitutable by its state and local-agency partners’ expertise, as well as areas in which EPA can do work that its partners cannot.” EPA’s national enforcement and compliance priorities should focus on areas of the greatest impact where 1) environmental violations are widespread, flagrant, and have the greatest harmful impact; 2) areas where the damage to human health and the environment caused by a violation would be high and receive the most attention for prevention; and 3) areas where the agency has sole jurisdictional authority or where its expertise, resources, and focus are non-substitutable by its state, local, and other partners. NACAA recommends that EPA should not overlook these three enforcement- and compliance-focused impact criteria in selecting NECIs and should use enforcement- and compliance-focused impact criteria to inform their development of metrics and goals for evaluating and driving toward success. In addition, EPA should strive to ensure that the NECIs are implemented consistently and adequately across all regions and programs.

EPA plays an essential role in enforcement and compliance assurance for sources that are nationally significant – those that represent a substantial portion of the emissions inventory, are best regulated at the national level and offer the potential to reduce emissions of numerous pollutants and precursors that cause or contribute to public health and environmental problems. State and local agencies work in partnership with our federal colleagues, and have a great deal to offer EPA both in terms of on-the-ground perspectives of the issues, and in some cases, in terms of leadership shown by our agencies that has led to greater expertise and experience in the prevention and reduction of some pollutants.

For FY 2024-2027, EPA proposes to retain four initiatives as NECIs, return two to the core program, and engage two new NECIs. EPA is also taking comment on two additional areas that it does not currently propose to advance as NECIs. The initiatives EPA proposes to retain as NECIs include “Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants”; “Reducing Risks of Accidental Releases at Industrial and Chemical Facilities”; Reducing Significant Non-Compliance in the National Pollutant Discharge Elimination System (NPDES) Program”; and “Reducing

² <https://www.epa.gov/planandbudget/strategicplan>

³ Available online at <https://www.4cleanair.org/wp-content/uploads/Documents/NACAA2021PresidentialTransitionDocument-01152021.pdf>

Non-Compliance with Drinking Water Standards at Community Water Systems”. EPA is proposing to remove two initiatives from its national priority list: “Reducing Toxic Air Emissions from Hazardous Waste Facilities” and “Stopping Aftermarket Defeat Devices for Vehicles and Engines”. EPA is considering two additional NECIs, one mitigating climate change and one addressing Per- and Poly-fluoroalkyl substances (PFAS). The agency seeks comment on whether NECIs should be established to address coal combustion residuals and reduce lead exposures.

NACAA is not opposed to retaining the four core NECIs that EPA proposes to re-list. However, EPA should consistently explain why these priorities are best served by being listed as NECIs (such as how they meet the enforcement- and compliance-focused impact criteria suggested in this letter), what the goals of the NECI are, what metrics will be tracked and what success looks like in the future. Without explicit goals and metrics, it will be impossible to determine whether the NECIs are having their intended effect. NACAA recommends that EPA support the selection of these (or other) NECIs and that it should clearly articulate metrics and goals for evaluating success.

With regard to the proposed return of “Stopping Aftermarket Defeat Devices for Vehicles and Engines” to the core program, NACAA has significant questions about whether it should be removed from the NECI priority list. Emissions from mobile sources remain an important area of unfinished agency work, which has continued harmful impacts on the health of Americans, the economy, and the environment. As EPA acknowledges in its Strategic Plan, the agency “develops, implements, and ensures compliance with national emission standards to reduce mobile-source-related air pollution from light-duty cars and trucks, heavy-duty trucks, buses, nonroad engines and vehicles, and their fuels”. NACAA’s January 15, 2021 Transition Letter to the Biden-Harris Administration notes that “Mobile source emission and fuel standards are a prime example of an area in which enforcement by state and local agencies is generally precluded” and that “Known areas of noncompliance with the Clean Air Act that have seen little enforcement by EPA should be prioritized. For example, diesel pickup truck and passenger vehicle tampering must be taken seriously and enforcement should address not only marketers and resellers, but installers. EPA should support state and local inspection programs as well.” Deprioritizing enforcement that prevents illegal aftermarket tampering would be inconsistent with the recommendation of the state and local agencies who have on-the-ground perspective on the emissions resulting from aftermarket tampering, and the harms they cause.

EPA’s 2024-2027 NECI proposal asserts that the EPA has taken significant action to resolve illegal aftermarket tampering, but does not provide an analysis on which to form a conclusion that this problem has been significantly mitigated. EPA states that it has “made significant progress on this initiative, addressed serious violations through enforcement actions reducing pollution and improving air quality, and raised awareness of the concerns.” Details released by EPA do not clarify whether the 130 cases it has resolved is indicative of a significant number of the total estimated violations, or offer information about what trends indicate that progress has been made. On Jan. 25, 2023, the EPA’s Office of Inspector General (OIG) issued its own report titled “The EPA Is Not on Track

to Reach Its National 23-E-0006 Compliance Initiative Goals to Stop Aftermarket Defeat Devices and Tampered Vehicles.”⁴ In this report, OIG found that the EPA has not met the majority of the 40 measures and deliverables it included in its original compliance initiative. The OIG concluded, “Aftermarket defeat devices and tampered vehicles will continue to allow the release of excess emissions unless additional steps are taken to promote voluntary state efforts to complement the EPA’s [NECI] work.” OIG made a number of recommendations in its final report, including the development of “guidance for the regions that outlines how to interpret, track, and report metrics and that defines vague terms used in the EPA’s Stopping Aftermarket Defeat Devices for Vehicles and Engines National Compliance Initiative strategic plan” and ensuring “the strategic plan includes quantifiable deliverables that are linked to known compliance-rate baselines that promote the success of the initiative”. The OIG report also called for EPA to support complementary work by the states to stop aftermarket defeat devices and tampering. The OIG’s final report relates that none of its recommendations have been resolved.

A November 20, 2020 report from OECA to NACAA⁵ and others stated that “emissions controls have been removed from more than 550,000 diesel pickup trucks in the last decade. As a result of this tampering, more than 570,000 tons of excess oxides of nitrogen (NOx) and 5,000 tons of particulate matter (PM) will be emitted by these tampered trucks over the lifetime of the vehicles. These tampered trucks constitute approximately 15 percent of the national population of diesel trucks that were originally certified with emissions controls. But, due to their severe excess NOx emissions, these trucks have an air quality impact equivalent to adding more than 9 million additional (compliant, non-tampered) diesel pickup trucks to our roads.” NACAA has not received or seen any update to these figures.

Without up-to-date data clearly demonstrating that excess emissions resulting from illegal vehicle equipment tampering have successfully reduced, it is difficult to assess the rationale for removing this NECI. Moreover, removal of this NECI from the list of national priorities appears counter to one of EPA’s own NECI selection criteria, Strategic Goal 2: “Take Decisive Action to Advance Environmental Justice.” Because of the frequency with which at-risk populations are exposed to vehicle emissions, this NECI may be one of the most critical to support EPA efforts to advance environmental justice and retaining this NECI would demonstrate EPA’s continued commitment to Strategic Goal 2. Whether EPA chooses to retain or remove this initiative from the NECI list, it should continue to make strong and effective efforts to prevent this illegal activity. Diesel emissions are directly harmful to human health by exposing surrounding communities to cancer risks, and these emissions exacerbate ozone problems, especially in nonattainment areas where every feasible reduction is needed.

NACAA offers no recommendation to EPA’s proposed return of “Reducing Toxic Air Emissions from Hazardous Waste Facilities”, to the core program. Nor does NACAA

⁴ OIG Report #23-E-0006, January 25, 2023 <https://www.epa.gov/office-inspector-general/report-epa-not-track-reach-its-national-compliance-initiative-goals-stop>

⁵ This OECA letter is available online at <https://www.4cleanair.org/wp-content/uploads/truck-tampering.pdf>

have a specific recommendation about the potential addition of PFAS to its NECI priorities, or to its request for feedback about the areas of coal combustion residuals or lead exposure. However, whatever NECIs it adopts and implements, NACAA again recommends that EPA use impact criteria in selecting NECIs, and be clear in articulating metrics and goals for evaluating success: focusing its priorities where 1) environmental violations are widespread, flagrant, and have the greatest harmful impact; 2) areas where the damage to human health and the environment caused by a violation would be high and receive the most attention for prevention; and 3) areas where the agency has sole jurisdictional authority or where its expertise, resources, and focus are non-substitutable by its state, local, and other partners.

Enforcement- and compliance-focused impact criteria like these should also guide EPA as it explores whether or not it will advance the potential inclusion of “Mitigating Climate Change” as an NECI. The scale and urgency of the climate crisis suggests that placing a priority on preventing greenhouse gas (GHG) emissions bears its consideration as a national priority, even though state and local agencies have a well-developed lead in implementing these GHG reduction programs and assuring their effectiveness. There are some federal GHG regulations against which enforcement and compliance actions could be taken, particularly those highlighted with existing EPA authority to address hydrofluorocarbon (HFC), methane, and vehicle CO₂ emissions. EPA should consider that the expected publication of new power sector GHG rules under CAA Section 111(d) may create a plethora of new compliance and enforcement obligations, in which case this NECI will be important but may be premature. Nonetheless, if EPA proceeds, existing regulations regarding HFC, methane and mobile source CO₂ emissions already present opportunities for action. In our July 2, 2021 comment letter on implementation of the AIM Act⁶, NACAA noted that:

“Enforcement provisions within the proposal articulate non-compliance consequences, requirements for packaging, labeling tracking, recordkeeping, reporting, and auditing, and details for the transparent disclosure of program data. EPA should, as it finalizes its proposal, include provisions for compliance assurance strategies to augment the enforcement provisions. EPA should also work to assure strong compliance assistance and enforcement on programs to address end of life and leakage concerns. EPA programs should promote the recovery, reclamation and reuse of existing HFCs, reducing and preventing their eventual release. In particular, EPA should develop and promulgate guidance that assists potential reclaimers in making the transition to alternatives. EPA guidance should also support efforts on leak management issues concerning containment, handling, maintenance, as well as HFC reclamation and possibly HFC disposal and destruction. As it finalizes its proposal, EPA should also detail how it will coordinate with state and local recovery, reclamation and reuse programs. Another key enforcement and compliance assurance lesson learned from the European experience is the possibility of import fraud, smuggling, and leakage that undermine the effectiveness of the program. Given the jurisdictional limits of state and local agencies, the federal role in preventing these kinds of undermining actions will be extremely important. EPA should be particularly

⁶ Available online at https://www.4cleanair.org/wp-content/uploads/Final-NACAA_7_2_21_Comments_HFC_AIM_ACT-1.pdf

mindful and consider the potential for non-compliance leakage through the international land borders of the contiguous 48 states. Tracking international imports and cross-boundary movement is a clear federal role, although EPA may wish to make clear whether and how it will depend on other agencies (federal or otherwise) to support this function.”

As EPA determines whether or not it should commit to an NECI focused on climate change, with one area of its focus on HFCs, NACAA restates this call. Similarly, regarding the enforcement of methane regulations, our February 13, 2023 comments on the agency’s December 2022 Supplemental Methane Proposal for the Oil and Gas Sector⁷ called on EPA to support state and local efforts given a large potential increase in inspection, enforcement, and compliance assurance needs that would be created by the rule (if finalized), noting that “all agencies face inadequate resources to meet their existing and emerging Clean Air Act responsibilities. For agencies that have a daunting number of sources and already-stretched funding, human resources, and equipment, the rule will create implementation challenges if EPA does not deploy resources to match the regulatory responsibilities assigned to these agencies with the resources to carry them out.”

EPA seeks comment on other issues that may be of importance as potential future NECIs. Many such priorities are available and could be considered using consistent impact criteria. For example, in our January 15, 2021 Transition Letter, NACAA offered that a broader “mobile source NCI could focus on ... proactive investigation of all models of diesel engines to see if strategies to avoid pollution controls have been used, uncertified parts or engines or engines have been sold, or whether defeat devices have been installed, among other violations. As a compliance priority, EPA could go beyond on-road motor vehicles to ensure compliance by nonroad vehicles and engines, such as construction and farm equipment, and marine vessels, including enforcement of the Emissions Control Area around the United States Coast, which impact states as far away as the Midwest. Finally, a mobile source NCI could examine excessive rail idling, which not only wastes fuel and causes odors, it also causes emissions of diesel particulate and ozone precursors.” NACAA’s January 15, 2021 Transition Letter also raised lagging enforcement in other arenas, such as residential wood heaters, which contribute to some of the most severe nonattainment events in the country. “After decades of being severely shortchanged, EPA must take decisive action to ensure the emission reductions intended to accrue from this important program are actually achieved,” our letter states. On February 28, 2023, EPA’s OIG released a report on EPA’s residential wood heating program concluding that this ineffective program puts human health and the environment at risk for exposure to dangerous fine-particulate-matter pollution by allowing sales of wood heaters that may not meet emission standards⁸. Other longstanding areas of widespread and harmful noncompliance, such as asbestos exposure, could be valuable additions to the NECIs. If EPA is willing to broaden its issue areas for consideration, selection should be based on enforcement- and compliance-focused impact criteria, and the agency’s bases for evaluating success should be enumerated upon selection. Without success metrics, it will

⁷ Available online at <https://www.4cleanair.org/wp-content/uploads/NACAAOilandGasMethaneSupplementalComments-Ltrhd-02132023.pdf>

⁸ EPA OIG Report #23-E-0012, February 28, 2023, available online at <https://www.epa.gov/office-inspector-general/report-epas-residential-wood-heater-program-does-not-provide-reasonable>

be impossible to gauge empirically whether an NECI no longer needs the attention, resources, and priorities earned under NECI-designation and can be confidently returned to the core program.

A final theme missing throughout the document is the recognition of the essential part that both state *and local* agencies play in our nation's environmental programs and the importance of federal efforts to collaborate with these organizations. Local agencies are mentioned only in passing in the NECI proposal. Indeed, the Clean Air Act articulates the critical role of local air agencies, as well as state agencies, as follows:

*The Congress finds...(3) that air pollution prevention...and air pollution control at its source is the primary responsibility of States and local governments; and (4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.*⁹


Local air pollution control agencies, along with their state counterparts, have tremendous experience and knowledge to contribute to our nation's efforts to obtain and maintain healthful air quality. EPA should rely on the expertise of these air agencies in developing and implementing national compliance and enforcement programs, and they should be explicitly enumerated wherever state and local air pollution control agencies are mentioned.

On behalf of NACAA, we thank you for this opportunity to provide these comments. If you have any questions please feel free to contact us, or Miles Keogh, Executive Director of NACAA at 571-970-6795.

Sincerely,



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Co-Chair, NACAA Enforcement Committee



Richard A. Stedman
Monterey Bay Air Resources District
Co-Chair, NACAA Enforcement Committee

⁹ Clean Air Act Section 101(a)(3) and (4)