



March 13, 2023

Michael S. Regan, Administrator  
U.S. Environmental Protection Agency  
EPA Docket Center, OECA  
Mail Code 28221T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Attention: Docket ID No. EPA–HQ–OECA–2022–0981

Re: *Public Comment on EPA’s National Enforcement and Compliance Initiatives for Fiscal Years 2024–2027, Notice of Public Comment Period*

Dear Administrator Regan:

The Northeast States for Coordinated Air Use Management (NESCAUM) and the Ozone Transport Commission (OTC) are pleased to submit the following comments on the U.S. Environmental Protection Agency’s (EPA’s) “Public Comment on EPA’s National Enforcement and Compliance Initiatives for Fiscal Years 2024–2027, Notice of Public Comment Period” [88 Fed. Reg. 2093-2097 (January 12, 2023)] (hereinafter the “NECI Proposal”). NESCAUM is the regional association of state air pollution control agencies representing Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. NESCAUM provides technical advice and policy guidance to its member states. The OTC members are Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia. In addressing their collective regional ozone problem, the OTC members are responsible for developing and implementing initiatives to reduce nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs), the emitted precursor air pollutants that contribute to the formation of ground-level ozone pollution.

These comments focus on EPA’s intention, as stated in the NECI Proposal, to return *Stopping Aftermarket Defeat Devices for Vehicles and Engines*, which has been a National Compliance Initiative (NCI) since FY 2020, to the standard “core” enforcement program. That initiative, hereinafter the “anti-tampering initiative,” is designed to curtail the manufacture, sale, and installation of hardware and software designed to defeat required emissions controls on on-road and non-road vehicles and engines [88 Fed. Reg. 2094].

The NECI Proposal identifies three criteria used to select the proposed 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 Strategic Plan.

The Strategic Plan goals identified are tackling the climate crisis and taking decisive action to advance environmental justice [88 Fed. Reg. 2094]. As discussed below, NESCAUM and OTC states believe that the anti-tampering program continues to meet all of those criteria. Therefore, it should remain an enforcement initiative within the NECI.

The NECI Proposal recognizes that "(i)llegally-modified vehicles and engines contribute substantial excess pollution that harms public health and impedes efforts to attain air quality standards," estimating that the removal of emissions controls from a diesel truck increases emission of oxides of nitrogen (NOx) by 310%, nonmethane hydrocarbons (NMHC) by 1,140%, carbon monoxide (CO) by 120%, and particulate matter (PM) by 40% [88 Fed. Reg. 2094]. In a 2020 study, EPA determined that emissions controls have been defeated in approximately 15 percent of Class 2B and 3 diesel pickup trucks in the last decade, resulting in excess emissions of more than 570,000 tons of NOx and 5,000 tons of PM over the lifetime of the vehicles, the equivalent of adding more than 9 million Class 2b and 3 diesel vehicles to the road.<sup>1</sup>

Excess emissions associated with emission control tampering increase already elevated pollutant levels in high-traffic areas, affecting the health of people living in those neighborhoods. According to EPA's Office of Transportation and Air Quality (OTAQ), "(p)eople who live, work, or attend school near major roads appear to have an increased incidence and severity of health problems that may be related to air pollution from roadway traffic. Health effects that have been associated with proximity to roads include asthma onset and aggravation, cardiovascular disease, reduced lung function, impaired lung development in children, pre-term and low-birthweight infants, childhood leukemia, and premature death."<sup>2</sup>

Environmental justice communities are disproportionately affected by traffic-related emissions. A 2013 study analyzing census and transportation data found that, "nationally, greater traffic volume and density are associated with larger shares of non-white residents and lower median household incomes."<sup>3</sup> In the NESCAUM/OTC region, an environmental justice analysis conducted as part of Rhode Island's 2040 Long Range Transportation Plan found that the percentages of minority and low-income individuals living within 250 feet of Interstate highways

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<sup>1</sup> US EPA (2020). Tampered Diesel Pickup Trucks: A Review of Aggregated Evidence from EPA Civil Enforcement Investigations, p. 13. <https://www.epa.gov/sites/default/files/2021-01/documents/epaedletterreportontampereddieselpickups.pdf>.

<sup>2</sup> US EPA OTAQ (2014). Near Roadway Air Pollution and Health: Frequently Asked Questions. <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100NFFD.PDF?Dockkey=P100NFFD.PDF>.

<sup>3</sup> Rowangould, G.M., "A census of the US near-roadway population: Public health and environmental justice considerations," *Transportation Research Part D: Transport and Environment*, 25:59-67 (2013), <https://doi.org/10.1016/j.trd.2013.08.003>.

were significantly elevated relative to the state as a whole.<sup>4</sup> More recent studies using satellite observations to assess pollution spatial patterns at neighborhood scales have further demonstrated the disparate impacts of mobile source pollution in low-income communities and communities of color.<sup>5,6</sup>

Increased pollution associated with emissions controls tampering also contribute to ozone formation and reduced visibility. Tampering reduces the effectiveness of EPA’s mobile source regulations and, in turn, interferes with states’ ability to attain the National Ambient Air Quality Standard (NAAQS) for ozone, particularly in areas that are substantially impacted by mobile source emissions. Robust enforcement is critical to upholding the integrity of EPA’s mobile source regulations and to deterring noncompliance with anti-tampering requirements. NESCAUM and OTC are concerned that relaxing or decentralizing the enforcement of such requirements could lead to an even greater prevalence of aftermarket defeat devices on the market and on the road.

While EPA has estimated the excess emissions associated with tampering of class 2b/3 pick-up trucks, little information is available on the prevalence of tampering in truck classes 4 to 8 where more than two-thirds of truck VMT occurs. Without an assessment of the incidence of tampering in these classes, the extent of tampering-related excess criteria emissions and ozone precursors is not fully known. This information void underscores the need for a sustained federal effort to quantify tampering activity in heavier vehicle classes to augment what we already know about tampering in class 2b/3.

In January 2023, EPA’s Office of Inspector General (OIG) issued an evaluation of EPA’s progress towards meeting the goals in the anti-tampering NCI strategic plan. That report clarifies the roles of OECA (EPA’s Office of Enforcement and Compliance Assurance), EPA regional offices, and states in implementing that initiative. The report states that, while “OECA is responsible for developing, maintaining, and overseeing the NCI,” the regional offices have primary responsibility “for conducting NCI inspections, issuing information requests, and pursuing enforcement cases within their jurisdictions.”<sup>7</sup> States cannot be delegated federal enforcement authorities under the anti-tampering provisions of the Clean Air Act, but some states voluntarily complement EPA enforcement activities using state authorities.

The report states that according to the NCI strategic plan, “state partnerships are essential to reduce customer demand by preventing the registration, use, or resale of tampered vehicles.”

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<sup>4</sup> Rhode Island Division of Statewide Planning (2020). Long Range Transportation Plan – 2040 Environmental Justice Analysis. <https://planning.ri.gov/sites/g/files/xkgbur826/files/documents/LRTP/LRTP-app/AppendixK.pdf>.

<sup>5</sup> Demetillo, M.A.G.; Harkins, C.; McDonald, B.C.; Chodrow, P.S.; Sun, K.; Pusede, S. E., “Space-Based Observational Constraints on NO<sub>2</sub> Air Pollution Inequality From Diesel Traffic in Major US Cities,” *Geophys. Res. Lett.*, 48:e2021GL094333 (2021), DOI: 10.1029/2021GL094333, <https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2021GL094333>.

<sup>6</sup> Hunter Kerr, G.; Goldberg, D.L.; Anenberg, S.C., “COVID-19 pandemic reveals persistent disparities in nitrogen dioxide pollution,” *PNAS* 118(30):e2022409118 (2021), DOI: 10.1073/pnas.2022409118, <https://www.pnas.org/doi/suppl/10.1073/pnas.2022409118>.

<sup>7</sup> US EPA OIG (2023). The EPA Is Not on Track to Reach Its National Compliance Initiative Goals to Stop Aftermarket Defeat Devices and Tampered Vehicles. Report No. 23-E-0006, pp. 6-7.

However, participation in anti-tampering activities is highly variable among states, largely due to whether the state has an inspection and maintenance program and the vehicle-testing requirements in those programs.<sup>8</sup> In addition, not all states have the regulatory or statutory authority to enforce against entities that sell tampered vehicles or the authority to enforce against entities that sell tampering products. States also cannot control the interstate movement of tampered vehicles and transport of pollution from tampered vehicles in upwind states. For these reasons, state efforts must be coupled with continued robust federal enforcement of vehicle tampering. While federal and state enforcement efforts have resulted in successful prosecution of offenders, tampering continues to be a widespread problem.

To justify the removal of the anti-tampering initiative, EPA asserts that “(t)he Agency 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” [88 Fed. Reg. 2096]. However, the OIG report states that “16 (64 percent) of the 25 (anti-tampering) NCI strategic plan metrics that we reviewed either were not met or were too vague to measure for progress. Specifically, the EPA did not meet ten (40 percent) of those 25 metrics, and we could not determine the status of six other metrics because OECA did not define key terms or establish concrete requirements, which made the metrics too vague.”<sup>9</sup>

NESCAUM and OTC acknowledge the importance of EPA actions on this initiative. However, in view of the OIG’s determination that many metrics have not been met coupled with the important role of the regions and the wide variability in state partnership in this program, EPA should retain this initiative to promote national consistency and maximize the impact of anti-tampering activities.

NESCAUM and OTC states have a long history of engagement on anti-tampering policies. We appreciate the opportunity to comment on this and look forward to working with the Agency on the implementation of this important policy.

Sincerely,



Paul E. Farrell, Chair  
OTC Mobile Sources Committee  
Acting Bureau Chief, CT DEEP



Coralie L. Cooper  
Deputy Director, NESCAUM

cc: OTC Directors  
NESCAUM Directors  
EPA Regions 1, 2, and 3

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<sup>8</sup> *Ibid.*, pp. 5-6.

<sup>9</sup> *Ibid.*, p. 9.