Office of Administrative Hearings

OAH Docket Number 71-9003-36416

Honorable Jessica A. Palmer-Denig

600 North Robert Street

Saint Paul, MN 55101

These comments are submitted by Senator Scott Newman et al. in opposition to the Pollution Control Agency's ("PCA") proposed adoption of the California emission standards. The proposed rules ("proposed rules" or "PCA rules" means the proposed revisions to Minnesota Rules, chapter 7023, Adopting Vehicle Greenhouse Gas Emissions Standards (Clean Cars Minnesota), Revisor ID No. 04626) are deficient in multiple respects. The PCA rules exceed the authority provided to the PCA in statute, and violate important Constitutional principles concerning due process and the delegation of legislative authority. Furthermore, the administrative record fails to properly demonstrate the need and reasonableness for the proposed rules.

A. The PCA's Adoption of the Proposed Rules Exceeds Its Grant of Rulemaking Authority

In proposing to adopt the California emission standards, the PCA relies on rulemaking authority granted in Minnesota Statutes, sections 116.07, subd. 4 and 116A.07, subd. 2.

116.07, subd. 4, provides, in relevant part, with emphasis added:

> Subd. 4. **Rules and standards**. (a) Pursuant and subject to the provisions of chapter 14, and the provisions hereof, **the Pollution Control Agency may adopt, amend and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1967, chapter 882, for the prevention, abatement, or control of air pollution.** Any such rule or standard may be of general application throughout the state, or may be limited as to times, places, circumstances, or conditions in order to make do allowance for variations therein. Without limitation, rules or standards may relate to sources or emissions of air contamination or air pollution, to the quality or composition of such emissions, or to the quality of or composition of the ambient air or outdoor atmosphere or to any other matter relevant to the prevention, abatement, or control of air pollution.

116.07, subd. 2, provides in relevant part, with emphasis added:

> (a) The Pollution Control Agency shall improve air quality by promoting, in the most practicable way possible, the use of energy sources and waste disposal methods which produce or emit the least air contaminants consistent with the agency's overall goal of reducing all forms of pollution. **The agency shall also adopt standards of air quality, including maximum allowable standards of emission of air**

> **contaminants from motor vehicles, recognizing that due to variable factors, no single standard of purity of air is applicable to all areas of the state.** In adopting standards the Pollution Control Agency shall give due recognition to the fact that the quantity or characteristics of air contaminants or the duration of their presence in the atmosphere, which may cause air pollution in one area of the state, may cause less or not cause any air pollution in another area of the state, and it shall take into consideration in this connection such factors, including others which it may deem proper, as existing physical conditions, zoning classifications, topography, prevailing wind directions and velocities, and the fact that a standard of air quality which may be proper as to an essentially residential area of the state, may not be proper as to a highly developed industrial area of the state. Such standards of air quality shall be premised upon scientific knowledge of causes as well as effects based on technically substantiated criteria and commonly accepted practices. No local government unit shall set standards of air quality which are more stringent than those set by the Pollution Control Agency.

These grants of rulemaking authority were enacted in 1967 (Laws 1967, chapter 882) in the enabling legislation for the creation of the pollution control agency. In pertinent part, these grants of the Pollution Control Agency's rulemaking authority are unchanged since enactment. Rulemaking authority granted to the MPCA in the 1967 statute was viewed vastly different than general rule making authority the 21st century. In 1967 general rule making authority granted by the legislature was intended to involve authority to perform administrative functions and had not yet evolved to the point of granting agencies the authority to adopt substantive public policy positions. To allow the PCA to use general rule making authority granted in the enabling legislation that created the PCA 54 years ago would be to ignore the 1967 legislatures intent of granting the PCA the authority to create administrative rules so the Agency could function. Applying general rule making authority standards in 2021 based on standards existing in 1967 greatly exceeds the legal authority granted to the PCA and robs the legislature of its rightful constitutional authority of enacting public policy legislation.

1. The PCA's Rulemaking Authority Requires that Its Rules Reflect Different Needs of Different Parts of the State

As highlighted above, the PCA's rulemaking authority requires that in adopting rules for vehicle emissions, the rule must reflect differing pollution conditions in differing areas of the state:

> The agency shall also adopt standards of air quality, including maximum allowable standards of emission of air contaminants from motor vehicles, recognizing that due to variable factors, no single standard of purity of air is applicable to all areas of the state.

Minn. Stat. section 116.07, subd. 2 (emphasis added).

However, the PCA's proposed rules are restraints that will apply equally statewide because the rules will apply to vehicles sold anywhere in the state. The rules establish a single standard of purity of air that is applicable to all areas of the state. This statewide mandate for vehicle

emissions is in direct opposition to the statutory rulemaking authority and therefore is not authorized by the statute.

The rulemaking authority granted in 116.07, subd. 4, provides for rules that apply generally to the state, but the rulemaking authority in subd. 2 is more specific and therefore to the extent these rulemaking authority grants are in conflict, the more specific prohibition on a single standard in subd. 2 must prevail. "General words are construed to be restricted in their meaning by preceding particular words." Minn. Stat. section 645.08.

2. The PCA's Incorporation of California Law by Reference Exceeds Its Authority

The PCA is proposing to incorporate California's emissions standard by reference to California's rules. The PCA describes and justifies this practice for its convenience for the PCA:

> Incorporating material by reference makes these publications or documents enforceable parts of Minnesota's rules while sparing the MPCA the time and expense of having to reproduce the text as part of the rule. The MPCA believes incorporation by reference is the most effective way to meet the identicality requirements of section 177 of the CAA by ensuring that minor changes California may make to its standards are incorporated into state rules.

Statement of Need and Reasonableness ("SONAR"), p. 40.

The PCA asserts that reliance on California law is permitted under Minn. Stat. section 14.07, subd. 4. This provision lists several permissible sources of material for incorporation by reference, but, notably, does not expressly list "laws of other states." The PCA summarily concludes that California's laws fall within the category of "publications and documents which are determined…to be conveniently available to the public." This interpretation of the meaning of "publications and documents" must be explained and supported. A better interpretation of "publications and documents" would be limited to those publications and documents that do not change, causing an automatic change to Minnesota Rule.

If "publications and documents" is more reasonably interpreted to exclude documents that are subject to change, and therefore would not include laws of other state, then the proposed rule cannot be adopted because its incorporation of documents by reference is invalid.

3. The PCA's Analysis of the Economic and Environmental Impact of the Proposed Rules is Flawed and Unreliable; Adoption of a Rule Based on an Erroneous Analysis of the Economic Impact is Unreasonable and Therefore Outside the Scope of the Agency's Authority to Adopt the Rule

The adoption of the California emissions standards exceeds the rulemaking authority granted because the likelihood of danger to the public from a less restrictive standard is remote and speculative, and therefore the economic impact of the proposed rule is important. Yet, the Agency's analysis of the economic impact of the rule is incomplete. It fails to take into account

a host of costs associated with the supply of lithium, a mineral used in the production of batteries for electric vehicles, including the extremely high volume of water used in mining lithium, other environmental impacts on wildlife and the ecosystem of mining activity, and the ultimate process of recycling these lithium-ion batteries. Because lithium-ion batteries are nearly impossible to fully recycle, the most common method of disposal is pyrometallurgy, a process in which the batteries are combusted in fossil fuel-generated smelting factories, leaving only a fraction of the lithium and aluminum to be recovered. The other method most frequently used is hydrometallurgy, an expensive and complex procedure in which the lithium-ion cells are soaked and dissolved in acid. Further, the potential environmental disasters that could be caused through improper handling of radioactive waste from the processing of technologically enhanced naturally occurring radioactive material is entirely ignored in the SONAR.[1]

Further, the SONAR fails to recognize the full costs to consumers of the shift to electric vehicles, such as the costs of installing charging capacity at people's homes where it is possible to do so, the cost of overnighting on a car trip to wait for an electric vehicle to charge during car trip that exceeds the life of the battery; and the cost of additional miles driven to get to charging stations. For consumers who require a vehicle powered by a combustion engine, a scarcity in available vehicles will result in increased vehicle prices.

The SONAR fails to recognize the impact of adoption will have on auto dealerships in Minnesota. Because the proposed rules prohibit the sale of nonconforming vehicles, if adopted MN will become an island, surrounded by states with less restrictive regulations on the sale of cars. Consumers will buy automobiles in North Dakota, South Dakota, Iowa and Wisconsin because the cost will be significantly less than a car offered for sale in MN by a dealer. Auto dealers are legitimately concerned the proposed rules will cause some to close their businesses, hundreds of taxpayers across the State will lose their jobs and unemployment claims will rise putting further strain on the unemployment system.

Finally, the SONAR does not consider or address the loss of revenue to the State of Minnesota. Our transportation system relies heavily on the "motor vehicle sales tax" amounting to almost a Billion dollars per biennium, all of which is deposited into the "Highway User Tax Distribution Fund" and public transit systems. MN will lose that revenue when vehicles are purchased in surrounding states. With the reduction or loss of auto dealerships, State and local governments will see a reduction in real estate tax revenue. State income and corporate tax revenue, the primary source of State General Funds and Local Government Aid to Cities and Counties will also be significantly reduced.

These failures are legally significant because "…where the likelihood of danger to the public is remote and speculative …economic impacts which are devastating and certain may be weighed in the balance to arrive at an environmentally sound decision." Reserve Min. Co. v. Herbst, 256 N.W.2d 808, 841 (Minn. 1977).

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[1] "How Green are Electric Vehicles?," Tabuchi, H. and Plumer B., New York Times, March 2, 2021.

B. The PCA's Proposed Rules Violate Constitutional Principles Regarding Procedural Due Process and Delegation of Authority

1. A Rule That Will Be Amended Automatically as a Result of Rule Change in Another State Will Deprive Minnesotans of Procedural Due Process

The rule proposed by the PCA incorporates by reference a rule adopted by an executive branch agency in California.

Under Minn. Stat. 645.31, "[w]hen an act adopts the provisions of another law by reference it also adopts by reference any subsequent amendments of such other law, except where there is clear legislative intention to the contrary." Consequently, the proposed rules will change automatically whenever the state of California modifies its rules. In effect, the proposed rules will change without notice to Minnesotans and without an opportunity for Minnesotans to be heard. Adoption or changing of rules without notice and an opportunity to be heard is an unconstitutional denial of procedural due process. Hough Transit, Ltd. v. Harig, 373 N.W.2d 327, 333 (Minn.App.1985).

An interpretation of "documents and publications" in Rule 14.07 should not include material that changes after the Minnesota rule is adopted. To the extent that Rule 14.07 permits the use of material that can mutate and thereby change Minnesota law without due process, Rule 14.07 is unconstitutional on its face. Alternatively, "documents and publications" in rule 14.07 should be interpreted not to permit incorporation by reference of material that can change.[2]

The Minnesota Supreme Court has upheld the validity of rules that incorporated material, other than a federal law, that was subject to change. The PCA rule differs from the rules that were the subject of these two cases, however. These two cases involved licensing of professionals. In re Hansen, 275 N.W.2d 790, 796-97 (Minn. 1978), regarding credentials for law schools, incorporating American Bar Association findings. Draganosky v. Minn. Bd. of Psychology, 367 N.W.2d 521, 525 (Minn. 1985) involved credentials for educational institutions, relying on accreditation by a regional accrediting association. The rules at issue in these cases permitted an applicant the opportunity to obtain a variance if their educational institutions were not approved by the entity relied upon in the rules. The variance provision afforded those applicants due process, assuming the process was not overly burdensome. In contrast, the PCA's proposed emissions rules offer no such variance from meeting the requirements of the standard set in the California rule incorporated by reference.

Other jurisdictions have found the adoption of a third-party's certification requirements, incorporated as part of a state's licensing requirements, to be impermissible. These cases are noted below in the discussion of an impermissible delegation of authority.

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[2] Note that other items specifically listed in 14.07 are federal laws. Of course, these too can change after a Minnesota rule is adopted incorporating them by reference. This may survive a constitutional challenge if state law is required to be consistent with federal law.

2. The PCA's subdelegation of its rulemaking authority to another state violates substantive due process under the U.S. and Minnesota constitutions

Statute places the responsibility to set emissions standards on the PCA. Minn. Stat. 116.07, subdivisions 2 and 4. The PCA is abdicating its responsibility to set emissions standards and has thereby violated the legal principles regarding delegation of legislative authority.

Other jurisdictions have considered and rejected as unconstitutional the practice of agencies subdelegating duties ascribed to them in statute. Garces v. Department of Registration & Education, 254 N.E.2d 622, 628-29 (Ill. App. Ct. 1969) (finding adoption of private organization's standards improper subdelegation of authority); Costanzo v. N.J. Racing Comm'n, 126 N.J. Super. 187, 192, 313 A.2d 618, 620 (1969) (concluding non-membership in the U.S. Trotting Association was not valid grounds for refusal to issue or revocation of horse owner's license).

The PCA may claim that Minnesota Statutes, section 14.07 gives the agency the authority to use incorporation by reference to accomplish its work. But to the extent that section 14.07 permits an agency to subdelegate rulemaking powers to other entities, it is unconstitutional.

3. The Legislature Cannot Delegate the Power to Adopt Unreasonable Rules

Though Minnesota is a state that generally permits a broad delegation of authority for rulemaking, that delegated grant has limits. "[W]henever a law confers upon a board or commission the power to make regulations or to conduct examinations it is to be construed as if it only conferred the power and the right to make Reasonable regulations and to conduct Reasonable examinations. Lee v. Delmont, 228 Minn. 101, 114, 36 N.W.2d 530, 539 (1949).

The PCA rules are unreasonable as discussed above.

Because the proposed rules are unreasonable, the PCA lacks authority to adopt them under the delegation of authority granted to the agency by statute and the rule must not be adopted.

4. The Legislature has exclusive Legislative Authority

Article III of the Minnesota Constitution clearly defines the "Distribution of the Powers of Government". The Legislature, duly elected by the citizenry, not appointed executive branch agency employees, has the sole authority to enact laws governing the people of Minnesota. The proposed rules, advanced by the Executive branch are in clear violation of the Minnesota Constitution.

C. The Record Does Not Demonstrate the Reasonableness of Adopting Standards Developed for a State Vastly Different from Minnesota.

Under Minnesota law, a proposed rule must be disapproved if the administrative law judge determines that the record "does not demonstrate the…reasonableness of the rule." (Minn. Rules, Part 1400.2100.)

The relevant differences between the state of California and the state of Minnesota are numerous and vast. The states differ greatly in their size, population, geographical distribution of population, history of air pollution, geography, the way that weather patterns affect air pollution, natural and manmade resources for addressing air pollution, and in many other important respects that have a direct impact on the reasonableness of adopting California vehicle emissions standards in Minnesota. The Pollution Control Agency acknowledges this in the statement of need and reasonableness when it admits that it "heard concerns that pointed out differences between Minnesota and California and reasons adopting standards developed by California might not be suitable for Minnesota." (SONAR p. 23.)

Instead of then engaging in a meaningful exploration of these major differences, however, the agency proceeds to ignore the question by spending a mere two paragraphs of its 99-page SONAR examining a few of the more superficial differences between the states. For example, the agency notes that some have argued that although the standards might work fine in California with its relatively warm weather, the extreme cold of Minnesota would negatively affect the batteries of the cars favored by the California standards. The agency swiftly dispatches this concern by noting that other states with cold weather haven't experienced any problems.

It is not possible to know whether adopting another state's emissions standards in this state is reasonable without carefully examining the significant differences between the two states. The PCA has failed to acknowledge, much less examine, those differences and accordingly the record does not demonstrate the reasonableness of the proposed rule.

D. <u>The Record Does Not Demonstrate the Need for Adopting Standards When There Are Already Standards in Place.</u>

For a proposed rule to be approved the record must also "demonstrate the need for … the rule." (Minn. Rules, Part 1400.2100)

One of the main reasons the proposed rule is needed, according to PCA, is the Trump administration's decision to reduce the environmental protection provided by national vehicle emissions standards:

> The federal government's action eliminates previously expected critical environmental protections. Immediate action is needed to reduce the emissions of harmful air pollution from light-duty and medium-duty vehicles, address the disproportionate exposures from harmful air pollution, and reduce Minnesota's GHG emissions to help address Minnesota's contribution to global climate change. The proposed rule is a necessary step toward achieving substantive emission reductions in Minnesota's transportation sector. (SONAR p. 20)

If the Trump administration had decided to completely eliminate national vehicle emissions standards then it could be argued that the adoption of standards was needed, but that is not the

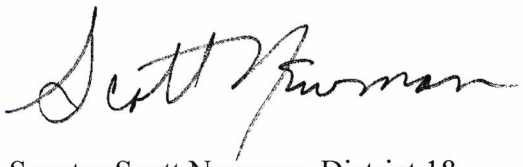
case in this instance. Regardless of whether Minnesota adopts the proposed rules, modern vehicle emissions standards will remain in place in the form of the federal standards. Put differently, vehicle emissions standards have changed over time, and if Minnesota declines to adopt California emissions standards all that will happen is that the applicable standards will change once more. Against a backdrop of relatively constant change, it is difficult to argue that there is suddenly a need to adopt California standards.

The Minnesota Supreme Court has held that "an agency decision is arbitrary or capricious where 'its determination represents its will and not its judgment.'" (1 Mammenga v. State Dept. of Human Services, 442 N.W.2d 786, 789 (Minn. 1989). The decision to proceed with adopting California vehicle emissions standards seems more a product of what the agency wills than of responding to an actual need.

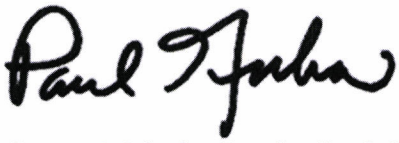
Conclusion

For all of the reasons stated in this document, the undersigned State Senators urge the Administrative Law Judge to find the proposed rules may not be legally adopted.

Respectfully Submitted:



Senator Scott Newman, District 18



Senate Majority Leader Paul Gazelka, District 9

Senator Bruce Anderson, District 29

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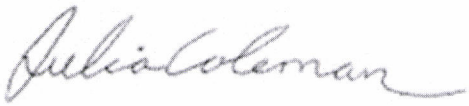
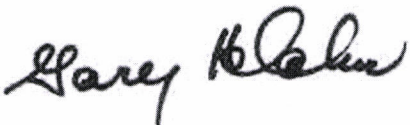


Senator Julia Coleman, District 47



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Senator Gene Dornink, District 27

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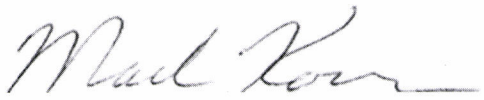
Senator Jeff Howe, District 13

Senator Bill Ingebrigtsen, District 8

Senator John Jasinski, District 24

Senator Mark Johnson, District 1



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Senator Mary Kiffmeyer, District 30

Senator Andrew Lang, District 17

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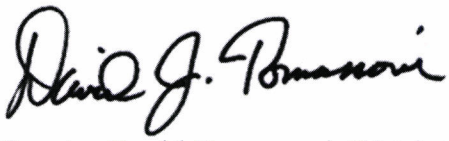
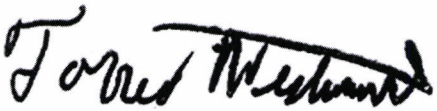
Senator Jason Rarick, District 11

Senator Carrie Ruud, District 6



Senator David Tomassoni, District 6

Senator Paul Utke, District 2



Senator Torrey Westrom, District 12