UPPER MIDWEST LAW CENTER

February 22, 2021

Via E-filing

The Honorable Judge Jessica Palmer-Denig
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, MN 55164-0620

Re: In the Matter of Proposed Rules Adopting Vehicle Greenhouse Gas Emissions Standards-Clean Cars Minnesota, Minnesota Rules, chapter 7023; Revisor's ID Number 04626
OAH Docket No. 71-9003-36416

Dear Judge Palmer-Denig:

Center of the American Experiment (CAE) opposes the adoption of the proposed Clean Cars Minnesota rules because they are illegal and bad for Minnesotans. CAE, through its attorneys at the Upper Midwest Law Center, attaches here a letter brief which demonstrates that the rulemaking is illegal under Minnesota and federal law. Before the end of the initial comment period, CAE will provide additional comments from Mr. Isaac Orr of CAE, which will demonstrate the harm these proposed rules will cause Minnesotans. CAE urges the Administrative Law Judge to prohibit the adoption of the proposed rules.

Respectfully,

Douglas Seaton, Esq., President of UMLC
Attorney for Center of the American Experiment

Attachment

cc: James V.F. Dickey, Esq. (UMLC)
Isaac Orr (CAE)

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Dear Judge Palmer-Denig:

I represent, along with my colleague Attorney James Dickey, also of the Upper Midwest Law Center ("UMLC"), the Center of the American Experiment ("CAE"), which wishes to offer comments on the proposed Clean Cars Minnesota rules at issue in this proceeding.

CAE's additional comments on the economic impact and the environmental report, prepared by Isaac Orr of CAE, will be submitted under separate cover by UMLC, on CAE's behalf, at a later date. Mr. Orr's comments relate to the damage that the proposed rules will do to Minnesota and Minnesotans, and they also relate to the MPCA's failure to properly weigh the impact of the proposed Clean Cars Minnesota rules on the establishment, maintenance, operation and expansion of business, commerce, trade, industry, and other economic factors which affect the proposed rule's feasibility and practicability. *See* Minn. Stat. § 116.07, Subd. 6.

In addition, I offer as comment and testimony for your consideration in this proceeding the following analysis related to the legality of the proposed Clean Cars Minnesota rules. In short, and as detailed further below, the proposed rules are invalid under state and federal law, are thus both unreasonable and unlawful, and should not be approved. *See* Minn. Stat. §§ 14.05, Subd. 1; Minn. Stat. § 14.45; Minn. Stat. § 14.15, Subd. 4; Minn. Stat. § 14.50.

I. The Proposed Clean Car Rules Violate Federal Law.

The proposed Clean Cars Minnesota rules are preempted by federal law because they seek to "adopt or attempt to enforce" rules contrary to the federal Clean Air Act and Energy Policy and Conservation Act.

Shockingly, the MPCA recently admitted in a legal brief to the federal District of Minnesota that the federal Clean Air Act will not allow the enforcement of this proposed rule upon its adoption, even if it is adopted. Exhibit 1, p. 11. ("With full knowledge that while SAFE Part I persists, California does not have a waiver, the MPCA's proposed rule (which the ALJ is yet to consider and the agency is yet to adopt) provides that it will not be effective unless authority is restored."); *see also* Proposed Rule pp. 1:17-1:22, *available at* https://www.pca.state.mn.us/sites/default/files/aq-rule4-10n.pdf. MPCA thus admits that the rule is preempted under federal law.

At the same time, the text of the proposed rule and the SONAR contradict the MPCA's admission because it attempts to start offering "early action credits" as an "enforcement mechanism" that kick in within 5 days after the proposed rule's publication and which will pressure auto dealers to participate despite the illegality of the proposed rule. Proposed Rule, pp. 8:22-9:18; Statement of Need and Reasonableness ("SONAR"), Clean Cars Minnesota Rule, Dec. 14, 2020, p. 35 ("The proposed early action credit mechanism and one-time credit allotment are not emission standards, but rather enforcement mechanisms intended to ensure that the ZEV standard is effective in Minnesota."). When apparently realizing that creating "enforcement mechanisms" as part of a proposed rule undoubtedly triggers the EPA's preemption clause discussed below, the MPCA tried to misrepresent the early-action credit in federal court by stating, in direct contradiction of the SONAR, that "[the early action credit mechanism] is neither compulsory nor an enforcement mechanism." Ex. 1, p. 13. The MPCA's misrepresentation to the federal court notwithstanding, what MPCA said in the SONAR is true—the early action credit mechanism is an enforcement mechanism.

MPCA's admissions alone are reason enough to reject the proposed rules—they are a legal nullity at best and unavoidably preempted by federal law.

Under the Supremacy Clause, federal law is supreme where Congress has jurisdiction. U.S. Const. art. VI; *M'Culloch v. Maryland*, 17 U.S. 316 (1819). In a similar context, the Minnesota Supreme Court has recognized that rules passed pursuant to the authority allegedly derived from Minn. Stat. § 116.07 are subject to preemption where the MPCA has sought to regulate noise pollution. *State by Minnesota Pub. Lobby v. Metro. Airports Comm'n*, 520 N.W.2d 388, 390 (Minn. 1994). In *Metro Airports*, the Supreme Court noted that, related to air travel and noise, "[f]ederal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *Id.*

Likewise, the federal government's regulation of motor vehicle emissions and sales is "intensive and exclusive." The federal government heavily regulates what vehicles can emit and what cars may be sold in the United States. *See, e.g.,* 42 U.S.C. § 7543(a); 49 U.S.C. § 32919; 84 Fed. Reg. 51313.

Under the federal Clean Air Act, "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicles." 42 U.S.C. § 7543(a) (emphasis added). Under the federal Energy Policy and Conservation Act, "a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard." 49 U.S.C. § 32919 (emphasis added). Absent an exception, therefore, Minnesota cannot "adopt or attempt to enforce" any law or regulation contrary to the CAA or the EPCA.

The only exception to the CAA's preemption of state law in existence *was* the waiver that was granted to California under 42 U.S.C. § 7543(b)(1). *If* the California waiver is in place, then other states may adopt standards identical to California's, assuming they follow their own state law requirements, as discussed below. 42 U.S.C. § 7507. However, in 2019, the federal government revoked California's waiver. 84 Fed. Reg. 51310 (Sept. 27, 2019). Thus, the CAA preempts any state attempt to adopt ZEV or LEV mandates like those MPCA is attempting to adopt.

In addition, on the same day that the EPA revoked California's waiver under the CAA, the National Highway Traffic Safety Administration issued a rule stating that attempts to reduce carbon dioxide emissions are related to fuel economy. 84 Fed. Reg. 51310, 51313. The NHTSA stated:

> A State or local requirement limiting tailpipe carbon dioxide emissions from automobiles has the direct and substantial effect of regulating fuel consumption and, thus, is ''related to'' fuel economy standards. Likewise, since carbon dioxide emissions constitute the overwhelming majority of tailpipe carbon emissions, a State regulation of all tailpipe greenhouse gas emissions from automobiles or prohibiting all tailpipe emissions is also ''related to'' fuel economy standards and preempted by EPCA.

While the MPCA may consider air pollution a major problem that should be remedied, Your Honor should consider the restraint exercised by Justice Page in the *Metro Airports* case cited above:

> We do not doubt the aircraft noise generated by MSP is a serious and unpleasant problem which interferes with the enjoyment of life and property for people living in areas affected by that noise. The problem, though, cannot be remedied with means Congress preempted.

Metro Airports, 520 N.W.2d at 393.

Here, the MPCA is clearly "attempting to adopt" a rule within the purview of the CAA and EPCA. Even worse, the rule has "enforcement mechanisms" that "enforce" the rule. Under the CAA and EPCA, as a matter of law, the MPCA's rulemaking is federally preempted and therefore illegal. The ALJ should not allow the adoption of a regulation that violates federal law.

II. The Proposed Clean Car Rules Are Not Supported by a Sufficient Grant of State Statutory Authority.

"An agency has the power to issue binding administrative rules only if, and to the extent, the legislature has authorized it to do so." *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 485 (Minn. 1995); Minn. Stat. § 14.05.

The MPCA relies only on Minnesota Statutes § 116.07 for its authority to force auto dealers to sell certain vehicles and otherwise regulate what cars auto dealers may sell in Minnesota. SONAR, Clean Cars Minnesota Rule, Dec. 14, 2020, pp. 12 (LEV and ZEV standards require new cars to produce increasingly lower emissions, and a certain number of electric vehicles must be sold in Minnesota), 34-36 (discussing Minn. Stat. § 116.07). Minn. Stat. § 116.07 allows MPCA to "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." Minn. Stat. § 116.07, Subd. 4(a). More specifically, the statute allows MPCA to "adopt standards

of air quality, including maximum allowable standards of emission of air contaminants from motor vehicles." *Id.* Subd. 2(a).

Neither of these grants of authority allows, either expressly or by implication, the MPCA to regulate what new motor vehicles may be sold in Minnesota. The MPCA is engaging in full-scale bootstrapping—trying to manufacture specific legislative authority from a statute that does not grant it. Without an express grant of regulatory authority, the MPCA has no power to impose a rule or standard on car sales. *See State, By Spannaus v. Lloyd A. Fry Roofing Co.*, 246 N.W.2d 696, 699-700 (Minn. 1976). And, legislative authority is strictly limited to the subject matter delegated by the Legislature. *See Lee v. Delmont*, 36 N.W.2d 530, 539 (Minn. 1949).

Lloyd A. Fry is important here. In that case, the Minnesota Supreme Court held that even though Section 116 related to air pollution allowed certain regulatory actions, it did not specifically allow MPCA to issue "orders" or "a regulation authorizing an order" requiring private companies to conduct emissions tests. 246 N.W.2d at 700. Chapter 116 did not allow the issuance of orders because that power was not in the "explicit language" of Section 116. *Id.* at 699. Consequently, the MPCA's orders to the Lloyd A. Fry Roofing Co. were invalid.

This matter is similar to *Lloyd A. Fry* because here, the MPCA is not imposing "maximum allowable standards of emission of air contaminants from motor vehicles," but rather is requiring car dealers to sell certain types of vehicles and certain amounts of those vehicles consistent with California's now-federally-revoked standards. SONAR, Dec. 14, 2020, pp. 11-14. Regulating emissions and requiring the sale of certain vehicles are not the same thing, and "any implied discretion or power granted [a regulatory agency] is necessarily limited by the purpose and scope of the statute as a whole." Minn. Op. Att'y Gen. 1030-A (1978).

The MPCA's attempt to use vaguely related language from section 116.07 is starkly different from the specific grant of authority from Congress to the EPA. In 42 U.S.C. § 7521(a), Congress directed the EPA to "prescribe . . . in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines . . . ." Congress gave EPA a clear directive to regulate new motor vehicles, and the Minnesota Legislature did not give MPCA a similar grant of authority, nor could it have lawfully done so in defiance of the preemptive federal CAA and EPCA.

MPCA must be aware of the need for more specific legislative authority. The MPCA has, previously, regulated tailpipe emissions by requiring inspections from 1991-1999 to achieve proper ambient air quality consistent with EPA requirements, but only because of a much more detailed grant of statutory authority. Air Quality in Minnesota: Problems and Approaches, Appendix A Draft § 1.2, *available at* https://www.leg.mn.gov/docs/pre2003/mandated/010077.pdf. In 1988, the Legislature passed, and the Governor signed, Minn. Stat. § 116.62, which provided specific authority for an inspection program. Laws 1988, Chapter 661, S.F. No. 1783. Notably, the MPCA did not attempt to rely on Minn. Stat. § 116.07 in creating that program—it only mentioned section 116.07 as related to the general considerations the agency must weigh in determining a proposed rule's need and reasonableness. SONAR, In the matter of the Proposed Motor Vehicle Inspection/Maintenance Rules 7005.5010 to 7005.5105, Apr. 19, 1989, *available at* https://www.leg.mn.gov/archive/sonar/SONAR-01466.pdf. If Section 116.07 wasn't enough to create an actual testing program directly related to air emissions from motor vehicles, it is even less sufficient now to regulate the sale of cars in Minnesota.

"It is the nature of the power . . . which determines the validity of its delegation." *Lee*, 36 N.W.2d at 539. Here, the nature of the power the MPCA seeks to exercise is not contained in Minn. Stat. §116.07. Consequently, there is no legislative grant of authority that would allow the MPCA to issue its proposed rules related to the sale of vehicles in the state.

The UMLC and CAE thus respectfully request that the ALJ find that the proposed rules are invalid under state and federal law, are thus unreasonable and unlawful, and should not be approved. *See* Minn. Stat. §§ 14.05, Subd. 1; Minn. Stat. § 14.45; Minn. Stat. § 14.15, Subd. 4; Minn. Stat. § 14.50.

III. The ALJ Must Consider Both the Environmental and Economic Impact of the Proposed Rule in Rendering a Decision.

Finally, if the ALJ still believes that this Court has the legal authority to allow the adoption of MPCA's proposed rule, we respectfully submit that the ALJ should consider the forthcoming comments of CAE and Isaac Orr as part of its duty to "consider both the economic impact and the environmental impact in rendering decisions dealing with environmental matters." *Reserve Min. Co. v. Herbst*, 256 N.W.2d 808, 841 (Minn. 1977) (citing Minn. Stat. § 116.07). Upon consideration of these comments, we respectfully submit that the ALJ should reject the proposed rule as economically detrimental and without significant environmental benefit to Minnesota, even if not deemed unlawful.

* * * *

In addition to the foregoing analysis and the forthcoming comments of Mr. Orr, UMLC reserves the right, on CAE's behalf, to submit further comments and replies to the comments of other parties through the close of the hearing record and rebuttal period, and to proceed with any applicable appeals.

Respectfully,

Douglas Seaton, Esq., President of UMLC
Attorney for Center of the American Experiment

cc: James V.F. Dickey, Esq. (UMLC)
Isaac Orr (CAE)