

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

<p>Minnesota Automobile Dealers Association,</p> <p style="text-align:center">Petitioner,</p> <p>vs.</p> <p>Minnesota Pollution Control Agency,</p> <p style="text-align:center">Respondent.</p>	<p><b>PETITION FOR DECLARATORY JUDGMENT</b></p> <p>APPELLATE COURT CASE NUMBER:</p> <p>AGENCY OR BODY NUMBER: OAH 71-9003-36416</p>
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TO: The Court of Appeals of the State of Minnesota:

The above-named petitioner hereby petitions the Court of Appeals pursuant to Minn. Stat. § 14.44 for a declaratory judgment determining the validity of Minn. R. 7023.0150, .0200, .0250, and .0300, adopted by Respondent Minnesota Pollution Control Agency on July 26, 2021 (46 S.R. 66), upon the grounds that the rule exceeds the statutory authority of the agency under Minn. Stat. § 116.07, is not authorized under the federal Clean Air Act, and additionally based on the following allegations:

**The Parties**

1. Petitioner Minnesota Automobile Dealers Association (“MADA”) is a non-profit trade association representing 348 franchised new car and truck dealers located across Minnesota (98% of the market). Its members support taking action to keep Minnesota’s air clean and help mitigate the impacts of climate change. However, MADA

and its members opposed the adoption of the Rules, which are California’s regulations for LEV and ZEV.

2. Respondent Minnesota Pollution Control Agency (“MPCA”) is a statutory agency created via Minn. Stat. § 116.02 and is responsible for the adoption of the Rules at issue.

### **Adoption of the Rules**

3. On December 21, 2020, the MPCA published in the State Register notice of its intent to adopt rules related to “vehicle greenhouse gas emissions standards” (the “Rules”) which follow California’s standards adopted based on its waiver from the federal Clean Air Act’s uniformity requirement for vehicle tailpipe emissions. 45 S.R. 663-670.

4. After notice, comments, a hearing, and a report of the Administrative Law Judge, the Rules were approved and adopted by publication in the State Register on July 26, 2021. 46 S.R. 66.

### **Requirements of the Rules**

5. These Rules incorporate by reference “California Code of Regulations, title 13, sections 1900, 1956.8(h) (medium-duty vehicle greenhouse gas emission standards only), 1961.2, 1961.3, 1962.2, 1962.3, 1965, 1968.2, 1976, 1978, 2035, 2037 to 2041, 2046, 2062, 2109, 2111 to 2121, 2122 to 2135, 2139, and 2141 to 2149, as amended.” Minn. R. 7023.0150, Subp. 2. The California standards referenced include standards for Low Emission Vehicles (LEV) and Zero Emission Vehicles (ZEV).

6. Minn. R. 7023.0250, Subp. 1 expressly requires all new motor vehicles “produced by a motor vehicle manufacturer and delivered for sale or lease in the state” to

be certified to the California standards incorporated in Minn. R. 7023.0150, Subp. 2. This includes all “passenger cars, light-duty trucks, medium-duty passenger vehicles, and medium-duty vehicles; new light- or medium-duty motor vehicle engines; and motor vehicles with a new motor vehicle engine.” Minn. R. 7023.0250, Subp. 1.

7. Passenger cars are vehicles designed mostly to transport 12 people or fewer. Light-duty trucks are vehicles with a gross vehicle weight of under 8,500 pounds. Medium-duty vehicles are vehicles with a gross vehicle weight of between 8,501 and 14,000 pounds. Medium-duty passenger vehicles are medium-duty vehicles with a gross vehicle weight of less than 10,000 pounds and designed mostly to transport people.

8. Minn. R. 7023.0250, Subp. 3 expressly forbids a manufacturer from delivering for sale or lease to Minnesota dealers a fleet of vehicles with average nonmethane organic gas plus oxides of nitrogen emission values or greenhouse gas exhaust emission values exceeding the limitations of California Code of Regulations, title 13, sections 1961.2 (nonmethane organic gas) and 1961.3 and 1956.8(h)(6) (greenhouse gases), respectively.

9. Minn. R. 7023.0300, Subp. 1 expressly requires a manufacturer to sell a certain percentage of ZEV to Minnesota dealers as part of its fleet for that model year, following California Code of Regulations, title 13, section 1962.2.

10. Beginning with Model Year 2022 and ending with Model Year 2025, the Rules create an early-action credit system which allows manufacturers to deliver more ZEV to Minnesota immediately to earn credits against future fleet averages. Minn. R.

7023.0300, Subp. 4; MPCA, Statement of Need and Reasonableness, p. 13, available at <https://www.pca.state.mn.us/sites/default/files/aq-rule4-10m.pdf>.

11. According to the MPCA’s SONAR, the rules are designed to mirror and follow the rules promulgated—and amended—by the State of California’s Air Resources Board (“CARB”). The SONAR specifically states:

- a. The proposed rule requires automobile manufacturers deliver for sale in Minnesota only passenger cars, light-duty trucks, medium-duty vehicles, and medium-duty passenger vehicles that are certified by California as meeting the LEV standard. SONAR p. 12.
- b. Manufacturers also need to meet average emission requirements for the entire fleet of vehicles they deliver for sale in Minnesota. There are separate fleetwide emission standards for passenger cars, light-duty trucks, medium-duty vehicles, and medium-duty passenger vehicles. SONAR p. 12.
- c. The MPCA is proposing to adopt the LEV and ZEV standards “as amended.” Incorporation “as amended” means that any future amendments to the incorporated California regulations automatically become part of Minnesota rules. Using “as amended” improves administrative efficiency by reducing the need for rulemakings to maintain consistency with the California rules. Historically, California has made minor housekeeping updates to its rules every few years. However, when California has conducted a major update to the rules, such as making them more stringent for future model years, California has done so in new rule parts. Because California uses new rule parts, these major updates would not be adopted automatically into Minnesota’s rules. SONAR p. 41.

12. The adopted Rules do not state that “major updates” to the California standards will not be immediately adopted when effective. Minn. R. 7023.0150, Subp. 2.

13. In testimony before the Minnesota Senate State Government Finance and Policy and Elections Committee on March 1, 2022, MPCA Commissioner Katrina Kessler,

Assistant Commissioner for Climate and Air Policy Craig McDonnell, and Climate Director Frank Kohlasch testified related to the meaning and effect of the Rules.<sup>1</sup>

14. Senator Mary Kiffmeyer asked the MPCA how a newly proposed California rule would affect the implementation of the Rule at issue here. Testimony at 19:20. Those proposed rules include proposed changes to California’s LEV and ZEV rules, which the Rules claim to adopt “as amended.”<sup>2</sup>

15. Commissioner Kessler initially testified that the MPCA is aware of the new California proposal, and that these new California emission standards would not automatically impact Minnesota, and that any changes in Minnesota would have to undergo a “new rulemaking and new process.” Testimony at 20:20.

16. Senator Jeff Howe then asked when the MPCA would simply adopt “minor” changes to the California rules “as amended,” versus going through a rulemaking process for “major” changes or new California rules. Testimony at 26:35. Commissioner Kessler then stated that “adoption of new standards” would require “new rulemaking” and that these would not be “minor changes.” *Id.* Senator Howe followed up, asking who determines what is major and what is minor. *Id.* Climate Director Kohlasch responded that new rules require new rulemaking, but “minor changes to definitions” in the California rules would automatically be incorporated into the Rules. *Id.*

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<sup>1</sup> Committee testimony (“Testimony”) available at <https://www.youtube.com/watch?v=EBR4kQhDmdA>.

<sup>2</sup> See <https://ww2.arb.ca.gov/events/public-workshop-advanced-clean-cars-ii-1> for background on these newly proposed California LEV and ZEV rules.

17. Senator Howe followed up again to ask whether a “definition change” which banned gas-powered lawn equipment would be automatically incorporated into the Rules. Testimony at 29:00. Climate Director Kohlasch did not answer the question, stating that California “has never done that.” *Id.* He then testified that the *MPCA* would “have to look to see” whether that change would be incorporated by reference. *Id.* Commissioner Kessler confirmed that the *MPCA* would have the authority to make the decision whether to adopt the California “minor” change. Testimony at 32:00.

18. Commissioner Kessler also testified that if California changed its rules and Minnesota failed to either adopt the changes “as amended” or go through new rulemaking, Minnesota would “default” to federal rules for LEV. Testimony at 32:35. Senator Kiffmeyer noted that the federal government does not even have a ZEV standard. *Id.* Assistant Commissioner McDonnell then affirmed that in the event Minnesota does not adopt any new ZEV standards adopted by California, it will “lose the ZEV standard that we currently enjoy.” *Id.* at 34:00.

19. The *MPCA* also testified as to its claim of authority under Minn. Stat. § 116.07 related to heavy-duty trucks (Testimony at 37:00) and gas-powered lawn equipment (Testimony at 38:00). When asked, Commissioner Kessler testified that the *MPCA* has the authority to ban gas-powered heavy-duty trucks and gas-powered law equipment because of its claimed authority to “regulate air pollution,” without subject-matter restriction. *Id.*; Testimony at 1:10:00.

## Effects of the Rules

20. Under the Rules, beginning in January 2024, with Model Year 2025, no dealer in Minnesota may purchase a new vehicle from a manufacturer unless it is certified according to the standards set by California, which may change whenever California makes a rule change.

21. In addition, dealers may only purchase vehicles based on the fleets which manufacturers are allowed to offer, which will contain far more ZEV and LEV than customers in Minnesota demand.

22. Because of the early-action credit mechanism and its coercive effect, dealers are immediately faced with vehicle fleet and engine options limited based on the requirements of the Rules.

23. MADA, and its members through it, are specifically harmed by the adoption of the Rules in a manner distinct from that of the general public, including as follows:

- a. The MPCA admits in its SONAR that “[a]utomobile dealers may have some costs associated with this proposed rule....Dealers are not directly regulated by this proposed rule, but they are the interface between the manufacturers and consumers and therefore may experience costs and changes to business. They may experience changes in requirements from manufacturers to ensure only LEV-certified vehicles are offered for sale to Minnesotans. They may also experience limitations on trading vehicles with dealers in other states if those dealers do not carry LEV-certified vehicles. In addition, they may need to invest in infrastructure, tools, and training to support increased EV sale.” SONAR p. 63.
- b. The MPCA admits that the Rules will make the price of all new vehicles sold in Minnesota more expensive by \$900 to 1,200 for ZEV and \$1,139 per LEV. SONAR pp. 63, 71. This amount is enough to deter a customer from the purchase of a new vehicle in a hyper-competitive market where consumers will drive hundreds of miles to get the best deal.

- c. Dealership members of MADA which border Wisconsin, North Dakota, South Dakota, and Iowa obtain customers from surrounding states. The increase in price of new cars imposed by the adopted Rules will cause those dealerships to lose customers.<sup>3</sup> According to MADA member dealers in Fergus Falls, customers from North and South Dakota comprise approximately 40% of their sales, the loss of which would be enough to put those dealer-members out of business.
- d. Dealers purchase their vehicles from manufacturers; they are not bought on consignment. The ZEV Rule requires MADA dealer-members to purchase electric vehicles for which there is no current demand. Dealers purchase their inventory from manufacturers when they deliver those vehicles for sale, and there are significant interest costs when doing so—tens of thousands of dollars per month for a midsize dealer.<sup>4</sup> When that inventory is not sold due to lack of demand, the dealer’s carrying costs mount and limit the number of other new vehicles they can take in, hurting their marketability to consumers.
- e. After six months of holding vehicles which customers do not want, dealers could face “curtailment” and be subject to paying significant interest and principal costs that could force them out of business.<sup>5</sup> A recent survey of some Minnesota Chevrolet dealers found EV inventory that had been sitting on their lots in excess of 275 days. With so much credit tied up in EVs, it will be harder for MADA dealer-members to stock vehicles that are in higher demand. This will make the dealerships less profitable and add to the weight these rules are bearing down on them.
- f. For some MADA members, as much as one-third of their new car sales are dependent on out-of-state dealer trades to obtain vehicles for sale which meet customers’ custom requests, which vary substantially. Trading with other LEV and ZEV states alone is practically impossible because of the

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<sup>3</sup> *E.g.*, MPCA, “Notice Comments 2,” pp. 66-68 (Affidavit of Douglas Erickson, Jan. 6, 2021, ¶¶ 25-40), 75-77 (Affidavit of Timothy Ciccarelli, Jan. 5, 2021, ¶¶ 21-31), 83-84 (Affidavit of Steve Whitaker, Jan. 8, 2021, ¶¶ 17-36), 89-91 (Affidavit of Chester Lockwood, Jan. 5, 2021, ¶¶ 16-34), 95-96 (Affidavit of Gregory House, Jan. 8, 2021, ¶¶ 13-22), *available at* <https://www.pca.state.mn.us/sites/default/files/aq-rule4-10z2.pdf>.

<sup>4</sup> *E.g.*, *id.*, p. 63 (Erickson Aff. ¶ 24).

<sup>5</sup> *E.g.*, *id.*, pp. 74-75 (Ciccarelli Aff. ¶¶ 17-20); p. 82 (Whitaker Aff. ¶¶ 12-16); pp. 88-89 (Lockwood Aff. ¶¶ 13-15).

transportation costs associated with moving those vehicles. The nearest California-compliant state is Colorado.<sup>6</sup>

### **The Rules Have Been Promulgated and Are Effective**

24. The Rules state that they become effective “on the date given in a commissioner’s notice published in the State Register after the standards incorporated by reference in subpart 2 are granted a waiver by the U.S. Environmental Protection Agency under United States Code, title 42, section 7543.” Minn. R. 7023.0150, Subp. 4.

25. On December 21, 2021, the United States Department of Transportation’s National Highway Traffic Safety Administration finalized a rule repealing the Trump Administration’s SAFE I rule, which had revoked California’s waiver from the Clean Air Act’s tailpipe emission regulations uniformity requirement. NHTSA, Corporate Average Fuel Economy (CAFE) Preemption, Final Rule, at p. 40, available at <https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-12/CAFE-Preemption-Final-Rule-Web-Version-tag.pdf>.

26. Thereafter, the MPCA Commissioner published notice in the State Register required by Minn. R. 7023.0150, Subp. 4 and the Note to the rule. 46 S.R. 755 (Dec. 27, 2021). While the notice states that “MPCA will not enforce any part of the Standards unless and until EPA grants a waiver,” the notice identifies the “effective date for the Standards is December 31, 2021.” 46 S.R. 755.

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<sup>6</sup> *E.g., id.*, pp. 67-68 (Erickson Aff. ¶¶ 31-40), pp. 76-77 (Ciccarelli Aff. ¶¶ 25-31), pp. 83-84 (Whitaker Aff. ¶¶ 24-36), pp. 90-91 (Lockwood Aff. ¶¶ 25-34), pp. 95-96 (House Aff. ¶¶ 13-21).

27. Thereafter, on March 14, 2022, the USEPA rescinded 2019’s SAFE I rule as well, and fully restored “California’s authority under the Clean Air Act (CAA) to implement its own greenhouse gas emission (GHG) emission standards and zero emission vehicle (ZEV) sales mandate.” USEPA, California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Programl Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14332 (Mar. 14, 2022), *available at* <https://www.govinfo.gov/content/pkg/FR-2022-03-14/pdf/2022-05227.pdf>.

**Delegating Rulemaking Authority to Another State Violates  
Minnesota’s Sovereignty, and Federal Law Does Not Authorize  
Minnesota to Adopt California’s Standards**

*The Rules Cannot Be Adopted “As Amended”*

28. By incorporating the California standards “as amended,” the Rules impermissibly delegate the MPCA’s authority to a California agency, the CARB. Minn. R. 1400.2100(F); Minn. Const. Art. I sec. 1.

29. The Minnesota Constitution, Article I, section 1, identifies the object of Minnesota’s government as “instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.”

30. Rule 1400.2100 prohibits approval of a rule where power is delegated to another body. It states, “[a] rule must be disapproved by the judge or chief judge if the rule:.... is unconstitutional or illegal; [or] ... improperly delegates the agency's powers to another agency, person, or group.”

31. Further, Minnesota Supreme Court precedent holds that the state may not delegate authority to make future changes to its laws to the Federal government because the people of Minnesota retain that power. *Wallace v. Comm'r of Tax'n*, 184 N.W.2d 588, 591-92 (Minn. 1971). This premise is even stronger when the delegation is to another state. At least with delegations to the Federal government, Minnesota laws are inherently subordinate to federal laws passed within the scope of federal jurisdiction.

32. Here, the MPCA admits that the “as amended” language requires immediate incorporation of the CARB’s rule changes when they are made. SONAR p. 41. This is a clear delegation of rulemaking authority and violates the legal principles just described. It is also a real problem; California has just announced its intent to change California’s LEV and ZEV standards incorporated by the Rules by creating new sections 1961.4 and 1962.4 related to LEV and ZEV, based on Governor Newsom’s Executive Order N-79-20, which “established a goal that 100 percent of California sales of new passenger car and trucks be zero-emission by 2035, and directed CARB to develop and propose regulations toward this goal.” Public Workshop on Advanced Clean Cars II, *available at* <https://ww2.arb.ca.gov/events/public-workshop-advanced-clean-cars-ii-1>.

33. Despite the MPCA’s testimony that it would go through rulemaking if changes to its Rules were “major,” as opposed to “minor,” the Rules do not say that, and the agency’s testimony as to its own arbitrary distinctions between major and minor do not clarify where the line between adoption of California rules and “default” to federal regulations might actually occur. The Rules provide MPCA unbridled discretion, which violates Minnesota law, as described below.

34. Given that the Rules expressly rely on the current definitions and regulations provided by the California standards, the “as amended” language in the Rules is not severable. “[A] statute cannot be severed if we determine that the valid provisions ‘are so essentially and inseparably connected with, and so dependent upon, the void provisions’ that the Legislature would not have enacted the valid provisions without the voided language.” *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014).

35. Even if the “as amended” language is severable, it must be struck. If California seeks to amend its standards, Minnesota must consider whether to adopt California’s amendments via new rulemaking.

*The MPCA Did Not Have the Authority to Make Future Rules  
Via an “As Amended” Provision*

36. And even if the “as amended” language of the Rules is permissible under non-delegation principles, it rests unbridled discretion in the MPCA and is vague as to whether future California rule changes will actually be adopted. More specifically, while the MPCA’s SONAR claims that “as amended” “means that any future amendments to the incorporated California regulations automatically become part of Minnesota rules,” the SONAR also claims that “major” Rules changes will not be automatically incorporated. SONAR p. 41. Yet the Rules say that they will. Minn. R. 7023.0150, Subp. 2.

37. Granting unbridled discretion to agency officials to adopt or reject new rules without following rulemaking procedures violates the Administrative Procedure Act and Article III, section 1 of the Minnesota Constitution. Minn. Stat. § 14.05, subd. 1 (“Each agency shall adopt, amend, suspend, or repeal its rules in accordance with the procedures

specified in sections 14.001 to 14.69.”); Minn. Stat. § 14.03 (nowhere is an “as amended” adoption excepted from the rulemaking process); Minn. Const. Art. III, sec. 1 (legislative power exclusive to Legislature, not executive agencies). Future amendments based on CARB amendments must go through the rulemaking procedure, but the MPCA claims that it will selectively decide which amendments to submit to the rulemaking process. SONAR pp. 40-41. In this way, the MPCA is trying to act exactly like the Legislature. This kind of unbridled discretion is impermissible.

*Minnesota Does Not Qualify for Use of  
California’s Waiver Under the Clean Air Act*

38. Finally, Minnesota does not meet the Clean Air Act’s predicate requirement for adopting California’s air quality rules. In order to adopt California’s rules under a CAA waiver, the adopting state must have “nonattainment” plan provisions approved by the EPA. 42 U.S.C. § 7507. This is common sense: if a state is meeting all air quality standards, there is no need to adopt stricter rules to clean up the air. The MPCA argued to the Administrative Law Judge that Minnesota had these plans approved by the EPA, so it was able to adopt California’s rules related to motor vehicle emissions. SONAR p. 35. This is deceptive—Minnesota has one “nonattainment” plan which was approved for the City of Eagan alone related to 2008 Lead levels, but Eagan reached “attainment” status in 2015. 80 Fed. Reg. 51127. There are no areas in Minnesota which are not at “attainment” levels for all National Ambient Air Quality Standards (NAAQS). Current Nonattainment Counties for All Criteria Pollutants (December 31, 2021), available at <https://www3.epa.gov/airquality/greenbook/ancl.html>; Status of Minnesota Designated

Areas, available at [https://www3.epa.gov/airquality/urbanair/sipstatus/reports/mn\\_areaby\\_poll.html](https://www3.epa.gov/airquality/urbanair/sipstatus/reports/mn_areaby_poll.html). Because there are no active nonattainment plans approved for Minnesota, and certainly none related to greenhouse gas emissions, Minnesota does not have the authority to adopt California's rules under 42 U.S.C. § 7507.

### **Prayer for Relief**

Based on the foregoing allegations, the administrative record, and the forthcoming briefs and arguments of counsel, Petitioner respectfully requests that the Court declare and adjudge the Rules to be invalid.

Respectfully submitted,

DATED: June 8, 2022

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