

May 24, 2023

I am submitting these comments with respect to the Proposed Regulations, issued by DNRC for the “Delaware Low Emission Vehicle Program.” I write to express my opposition to the proposed regulations and urge that the Department not adopt these Regulations, as I believe they are unlawful and unenforceable for the reasons stated herein. While I write in my personal, and not representative capacity, I believe that my perspective and expertise may be particularly useful to the Department’s consideration. I am a Delaware lawyer who specializes in municipal, governmental and Constitutional law issues. I have more than 20 years of experience representing government entities, including previously as a Deputy Attorney General at the Delaware Department of Justice.

The comments clearly show there is widespread opposition to these regulations by the citizens of this State, as well as affected industry. While the record is replete with comments noting the practical problems, and frankly human and environmental detriments resulting from an EV mandate (e.g., pollution and other environmental harm from mining raw materials; human rights abuses in mining industry; waste and disposal of used EV batteries and vehicles themselves over time), there is not too much in the comments addressing the legality (or illegality) of the proposed regulations. The point of my comments is to focus the Department on these. In the interest of time and, given the volume of comments received, I will be brief. **A summary of some of the reasons why these Regulations are legally invalid, and certainly will be subject to legal challenge, is as follows:**

1. The Regulations – including that “no person shall . . . purchase . . . or register” a new 2014 or subsequent vehicle which does not comply with CARB (which through multiple, external legal references ultimately provides that only zero emissions (= EV) vehicles may be obtained or registered in Delaware after a certain date) --goes far beyond the scope of “rulemaking,” and well beyond the Department’s authority in that regard. What the Department is doing is legislating via rulemaking. This is impermissible because the existing “regulations” are not authorized by the Department’s statutory authority and legislation can only be enacted by the Legislative branch, not the Executive Branch, where DNREC resides. **Thus, if adopted, the Regulations would violate the Separation of Powers doctrine, Article II, Section 1 of the Delaware Constitution, and would constitute impermissible lawmaking by the Department, an Executive Agency.**
2. DNREC has no jurisdiction over individual’s rights to purchase or obtain otherwise legal goods and services, via “clean air” regulations. While the Department has said that consumers will “still be able” to “keep” gas cars and that the regs apply only to dealers and not to owners, this is misleading at best. The “or register” provision effectively means that a Delaware resident (“person”) could not obtain a used gas or hybrid powered car even out of state to use in Delaware, because the State would refuse to register it. **The Regulations are overbroad and likely violate the commerce clause of the U.S. Constitution.** Further the regulation would not even fill its stated purpose as it would not guarantee in any way “zero emissions” in Delaware. Delaware is in extremely close proximity to neighboring states without such draconian regulations, and older and out of state vehicles would

continue to traverse the highways of the State. Vehicle emissions and air pollution does not respect State lines.

3. The regulations will disproportionately impact low-income groups, low-income workforce, the elderly and communities of color, who have less resources to purchase and maintain very expensive EVs, and even the cost of older-model gas-powered vehicles, which will become a more sought-after and therefore expensive commodity, if these regulations go into effect. **Thus, the regulations could have a discriminatory impact.**
4. The wholesale “adoption by reference” of portions of the California Code is illegal, both as **unconstitutional legislation via regulation, and legislation via unelected (by Delaware) representatives.** The CCR is enacted by California elected representative; California regulations are set up by and within the California Executive branch. Obviously, the citizens of Delaware have no say in the actions of these out of state governmental entities, and those lawmakers and officials are not accountable to the citizens of Delaware in the same way that the representatives of the DE State Legislature and Executive Branch are. Thus, critical decisions affecting the day-to-day life of Delawareans are being made by government officials from another state who have no accountability to the State of Delaware. Nor does the Department (DNREC itself) have any say in the future standards that are set by CCR and CARB, as it has simply adopted those portions of California law wholesale, and these standards may well be amended in the future – changing Delaware law as well. The mere fact that the Department may have previously adopted some portions of California law regarding vehicle emissions and standards does not legitimize the practice or render it legal – it simply means that this issue has not yet been challenged.
5. **The public notice of the contents of these “Proposed Regulations” may well be legally inadequate,** as it is far from clear to interested citizens and parties exactly what regulations and standards the Department is proposing, which is caused in large part by the “adoption of California law” issue, discussed above. The “Brief Synopsis” in the Register refers to California “Advance Clean Car II” regulations as well as the “Clean Air Act” (misleadingly not identifying this here as a federal standard). Also, a quick search of this Act reveals no language “require[ing]” that Delaware’s standards “must be identical” to California’s, as DNREC states in its Register notice. In fact, such language would likely violate several federal Constitutional provisions. The DNREC Regulations contain 3 entire pages of complex “Definitions” which reveal that the operative standards referred to in these Regulations come from multiple other codifications of CA law, including the California Code of Regulations, which a reader would have to access, look up, item by item as applicable, and understand. “Table 1” lists, by title only, *seventy (70)* sections of the CCR which are “Provisions Incorporated by Reference.”

Frankly, if I were not a lawyer who deals with administrative law all day long, I would probably never be able to roughly figure out what is being proposed here, and I still have not had the time to plumb the depths of the California Code and regulations to parse out the details (*See e.g.*, §6.2, citing 25 (!) different CCR statutes). The average citizen might have to hire a California regulatory lawyer to even begin to understand what is being proposed here. Proposed Regulations should clearly put interested parties (here, all

Delaware motor vehicle owners, users, manufacturers and dealers) on notice of the precise details of what is being regulated, and, as published in this manner by DNREC, it is an understatement to say that these fall far short.

The confusing and misleading framework of the “Proposed Regulations” as discussed here just further amplifies the argument that this is legislation in disguise.

In the interests of time, I will end my comments here, but further review of these Proposed Regulations is certainly likely to reveal more legal problems, than less. As stated above, I am currently writing in my personal capacity but, if these Regulations are adopted, there will more than likely be a client in my office, and/or that of other lawyers, ready to challenge these Regulations administratively and judicially. I respectfully and strongly urge that the Department keep in mind the bounds of its legal authority, and *not adopt* these Proposed Regulations.

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