

Breton, Mary B

From: William Clardy <william@clardy.org>
Sent: Monday, August 28, 2023 4:57 PM
To: DEP Rule Comments
Subject: Comment on Chapter 127-A: Advanced Clean Cars II Program

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To all concerned,

This email is a written follow-up to my oral testimony at the public hearings for the proposed Chapters 127.A and 128 to be added to the Department of Environmental Protection's rules.

I will limit my comments to two (2) areas of concern: 1) a lack of statutory authority to implement the rules as proposed, and 2) An apparent dearth of analysis regarding the potential impact on fire departments and the general public when a significant percentage of vehicles involved in motor-vehicle accidents contain large lithium-ion batteries.

Lack of Statutory Authority

All Maine regulatory agencies, including the Department of Environmental Protection ("the Department"), derive their rulemaking authority from Subchapter 2 of the [Maine Administrative Procedures Act](#), specifically [§8052, Rulemaking](#), and [§8056, Filing and publication](#). The only statutory provision for defining a rule using incorporation by reference is in sub-paragraph 1.B.(1) of §8056:

(1) Through rulemaking, an agency may incorporate by reference all or any part of a code, standard, rule or regulation that has been adopted by an agency of the United States or of this State or by a nationally recognized organization or association.

The latter portion of this sentence clearly establishes the limits of the Department's authority to incorporate rules by reference. The incorporated rule must have been adopted by "an agency of the United States or of this State or by a nationally recognized organization or association." The Legislature explicitly omitted authorizing the Department a power to incorporate by reference regulations adopted by any state other than Maine.

Both draft rules unambiguously state in Section 3, "This chapter incorporates by reference certain sections of Title 13, California Code of Regulations." (Chap. 127.A) and "This Chapter incorporates by reference certain sections of Title 13 and Title 17 of the CCR." (Chap. 128) "CCR" is undefined within the draft for Chapter 128, but the Summary makes clear that it refers to the California Code of Regulations by the also-unambiguous declaration that the "Chapter establishes a program ... by incorporating the requirements of the California Advanced Clean Truck regulation".

Regardless of any good intentions by the Board, the Department, or the petitioners, these proposed regulations unambiguously declare themselves to be beyond the Department's rulemaking authority as defined by statute, presenting a *prima facie* argument for summary judgement in any court challenge. Unless the Attorney General can identify any applicable language from Maine's statutes which would explicitly override the limitation spelled out in §8056, the Board has no power to make either rule as submitted by petitioners without violating §8052's explicit prohibition in Para. 5(B) against adopting a rule which is not "consistent with the terms of the proposed rule".

This will have the advantage of allowing the Board to take the information it has gathered and apply it to crafting regulations *de novo* which do address the needs of Maine -- and which do not tie the Department to enforcing regulations which by their very definition (in the Appendices of the proposed rules) omit any knowledge, insight or even basic corrections from the last two years. Equally importantly, the Department can benefit from the public input provided by industry representatives to write regulations which can invalidate themselves more gracefully than California's regulations should market and technical realities prove the ideal standards to be unreachably optimistic.

Motor-Vehicle Accident Impact

Given the lack of apparent involvement of any Maine fire department, the Maine Fire Marshall's office, it appears that the Board has no actual knowledge of the impact that incorporating large lithium-ion batteries in a significant portion of the vehicles operating on Maine roads would have on the needs of Maine's professional and volunteer firefighters, or even on the Department's own HazMat response needs. While I lack the technical expertise to address those needs in detail, suffice to say that the propensity of lithium-ion batteries to reignite will require a much more sustained response to any vehicle accident where the battery casing is ruptured, leading to a runaway "thermal event." In hearing references to the "drown it in 30,000 gallons" technique, I would point out that most rural volunteer fire departments do not have access to hydrants and would have to ferry water to the scene in tankers which carry only one or two thousand gallons apiece (and few departments have more than one or two tankers).

In addition, the smoke from lithium-ion battery fires is known to be laced with high concentrations of carcinogens, some of which can be absorbed through the skin. This would mean that every accident involving an EV catching fire would become a haz-mat incident requiring an emergency response by the Department.

Sincerely,
William Clardy
13 Maple Street,
Augusta, ME
(207)242-7248