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Testimony in Opposition to LD 2261, *An Act Designating New Motor Vehicle Emissions Rules as Major Substantive Rules*

Senator Brenner, Representative Gramlich, and distinguished members of the Joint Standing Committee on Environmental and Natural Resources, my name is Aaron Frey, I live in Bangor, and I have the privilege to serve as Maine's Attorney General. I am here today to provide comments regarding LD 2261, "*An Act Designating New Motor Vehicle Emissions Rules as Major Substantive Rules.*"

This bill declares that rules adopted by the Department of Environmental Protection (the "Department") regarding new motor vehicle emission standards are major substantive rules. It also states that proposed rules pending before the Board of Environmental Protection (the "Board") on or after January 1, 2024 incorporating the requirements of California's Advanced Clean Cars II ("ACC II") regulation and California's Advanced Clean Trucks regulation are major substantive rules. These provisions would be retroactive to May 22, 2023.

Currently, all of these rules are routine technical. I am concerned that retroactively changing the designation could cause confusion and raise separation of power issues. This is especially so with respect to the pending ACC II rule (proposed as a new rule at 06-096 C.M.R. ch. 127-A) which, to my knowledge, is the only rule that would be affected by this bill. On May 23, 2023, the Department received a citizen petition to initiate ACC II rulemaking. On July 20, 2023, the Department presented the petition to the Board, and the Board held a public hearing on August 17, 2023. The Board is scheduled to consider whether to finally adopt the ACC II rule at its March 20, 2024 meeting.

If the Board were to adopt the rule at its upcoming meeting, and LD 2261 were subsequently enacted, there would be significant confusion regarding the status of the previously adopted rule. Presumably, the adopted rule would be effective at least until LD 2261 takes effect. Once LD 2261 takes effect, though, the continued validity of the rule is unclear. Further, LD 2261 could be subject to potential legal challenge under the Maine Constitution's heightened separation of powers principles. Arguably one branch of government – the Legislature – cannot retroactively interfere with the prior exercise of power by another branch – the Executive Branch. These concerns would not exist if LD 2261 were to apply only prospectively.

I also want to note that if the ACC II rule were to be made major substantive, the Legislature's review of a provisionally adopted rule would be constrained to only approving or rejecting the rule. This is because Section 177 of the federal Clean Air Act allows states to choose to adopt California's new motor vehicle emission standards instead of federal standards only if certain conditions are met.¹ One of these conditions is that the state's standards must be identical to those of California for a given model year. Because of the Clean Air Act's identity requirement, the Legislature could not suggest changes to Maine's ACC II rule, such as, for example, altering percentage figures for Zero Emission Vehicle sales.

I trust this information is helpful. If the Committee has questions, I would be happy to answer them now if I can or provide answers at the work session.

¹ The Department has previously adopted California motor vehicle emission standards. *See* 06-096 C.M.R. ch. 127.