DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: City and County Building 1437 Bannock Street Denver, CO 80202	DATE FILED: July 8, 2019 12:44 PM CASE NUMBER: 2019CV30343 ▲ COURT USE ONLY ▲
Plaintiffs: COLORADO AUTOMOBILE DEALERS ASSOCIATION v. Defendants: THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, THE COLORADO AIR QUALITY CONTROL COMMISSION, and THE COLORADO AIR POLLUTION CONTROL DIVISION	Case Number: **19CV30343** Courtroom: **424**

ORDER RE: DEFENDANT'S MOTION TO DISMISS

This is before the Court on the Defendants' Motion to Dismiss. Upon consideration of the motion, the Response and the Reply filed thereto, as well as the attachments appended to the pleadings, and having reviewed the applicable authorities and being sufficiently advised, the Court finds and orders as follows.

I. Background and Facts

The Plaintiff seeks judicial review the Colorado Air Quality Control Commission's ("the Commission) adoption of Regulation Number 20, the Colorado Low Emission Automobile Regulation ("CLEAR"), under the Air Pollution Prevention and Control Act (APPCA), the State Administrative Procedure Act, and Rules 57 and 106(a). [1] The challenged regulations require

[1] The Defendants assert that, to the extent the Plaintiff has standing to assert its claims, jurisdiction is appropriate only pursuant to C.R.S. § 24-4-106(4). Although the Complaint appears to seek judicial review pursuant to C.R.C.P. 57 and 106, as well as under the statute, the Plaintiff appears to concede that judicial pursuant to the Rules is not appropriate because there is an adequate remedy available under section 24-4-106(4). Complaint ¶ 17. The Court agrees that, to the extent that standing exists, judicial review is applicable only pursuant to the statute.

automobile manufactures build and certify light and medium-duty vehicles sold in Colorado that comply with the California vehicle emissions standards, beginning with 2022 model year vehicles. The regulations also require aftermarket catalytic converters sold or installed in Colorado be certified pursuant to the California standards for such devices.

The regulation of new vehicle emission standards is governed by the federal Clean Air Act. *See* 42 U.S.C. § 7543. The Act preempts the states from imposing such standards, with the exception of California, which is permitted to seek a waiver from the federal Environmental Protection Agency (EPA) to tailor and impose its own standards for new vehicles. However, once California obtains a waiver, other states may adopt the California standards so long as the standards are identical to the California standards for which a waiver has been granted and the standards are adopted at least two years in advance of the model year vehicles to which they apply.

As alleged in the Complaint, the federal and California standards currently are essentially the same for model year 2017 – 2025 vehicles. [Complaint ¶ 24 – 25.] However, in apparent response to a proposal by the EPA and the National Highway Traffic Safety Administration to decrease the stringency of applicable federal standards,[2] the Colorado Department of Public Health and Environment was directed to develop and propose regulations consistent with the California standards. Following a rulemaking process, the Commission adopted CLEAR, which took effect December 30, 2018.

The Plaintiff is a non-profit association that represents Colorado automobile dealers. Its Complaint asserts five claims for relief challenging the Commission's final agency action in its adoption of CLEAR, and seeks declaratory and injunctive relief finding that the regulations were adopted in violation of the APPCA and the APA. The Defendants' assert that the Complaint must be dismissed because the Plaintiff lacks standing to assert its claims.

II. Motion to Dismiss

In order for the Court to have jurisdiction over this dispute, the Plaintiff must have standing to bring its claims. To establish standing for judicial review

[2] The proposed decrease in the stringency of the federal standards remains pending with no final action having been taken.

of final agency action under the APA, the Plaintiff must establish that (1) it suffered an injury-in-fact; and (2) that injury must be to a legally protected interest. *Wimberly v. Ettenberg,* 570 P.2d 535 (Colo. 1977).

The Plaintiff asserts that, should the federal standards be revised to differ from the California standards as adopted by CLEAR, its members will suffer economic injury inasmuch as its members will be precluded from engaging in "cross border trading" because dealers will only be able to trade for California compliant inventory. As a result, the Plaintiff alleges that the transaction costs and overall costs of new vehicles in Colorado will increase [Complaint ¶ 151-152]; the enforcement of the new standards will increase manufacturer's costs and thereby increase the cost of new vehicles for Colorado dealers and consumers [Complaint ¶ 153]; and California certified vehicles will be more expensive than federally certified vehicles, thereby placing its members at a competitive disadvantage relative to out-of-state dealers and increase "cross-border sales." [Complaint ¶ 154.]

In evaluating substantially similar allegations, a federal district court considered the New York Automobile Dealers Association's challenge to the state's adoption of California's vehicle emission standards and concluded that the Association's allegations regarding the asserted economic impacts did not constitute injuries-in-fact sufficient to confer standing to challenge the regulations. *New York Auto. Dealers Ass'n v. New York State Dep't of Envtl. Conversation,* 827 F. Supp. 895, 898 - 900 (N.D.N.Y. 1993). More significantly for this Court's analysis, the federal district court also concluded that, even assuming that the state's adoption of the regulations caused harm to the plaintiff's members, they "do not have any right under the Constitution or any statute to be free from such harm;" i.e. the claimed harm was not to a legally protected interest. *Id.* at 901.

The court reasoned that, while the federal Clean Air Act was intended to protect interstate commerce from the burdens of different state standards, the amendment to the Act permitting different state standards recognized the comparable importance of protecting the environment. The amendment, while imposing somewhat of a burden on interstate commerce, balances "these two important interests." *Id.* The federal district court found no statutory or legislative history of "Congressional concern that granting states the authority to adopt California's new motor vehicle standards would impose a burden on automobile dealers." *Id.* at 902. The court reasoned:

> [n]ot only was Congress primarily concerned with motor vehicle manufacturers, but it implicitly accepted what plaintiffs now argue is a burden on interstate commerce. The harm for which plaintiffs seek redress is the inherent consequence of Congress' passage of § 177 . . . By permitting states like New York to adopt California's new vehicle emission standards, Congress implicitly accepted the consequences of that action which were that automobile dealers in such adopting states would be limited to selling California certified vehicles and consumers in such states would be limited to registering only those vehicles. Consequentially, even assuming that Congress sought to protect automobile dealers' interests in selling federally certified vehicles by enacting § 209, by enacting § 177 Congress effectively sacrificed that interest in favor of the legitimate police powers of states.

Id.

The Court finds the reasoning of the federal district court persuasive and dispositive of the issue in this case. Even if the claimed injuries asserted by the Plaintiff are sufficiently distinguishable from those asserted in the federal district case, and even if those allegations are sufficient to constitute cognizable injuries-in-fact, the Court is not persuaded that the asserted injury is to a legally protected interest.

"While the economic impact of lawful competition may, as a practical matter, inflict an injury, it cannot confer standing under *Wimberly* unless the economic interest harmed is protected by a statutory or constitutional provision - i.e., unless a legislative intent to protect economic interests from competitive harm is explicit or fairly inferable from the statutory provisions under which an agency acts or if the legislature expressly confers standing on competitors to seek review of agency action." *Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission,* 620 P.2d 1051, 1057 (Colo. 1980). Here, the Court discerns no principled distinction between the consequences resulting from the rules adopted in New York from those anticipated under Colorado's adoption of CLEAR. In both instances, Congress has "effectively sacrificed" the automobile dealer's interest in favor of the "legitimate police powers of the states." 827 F. Supp. At 902. Nor does the Court discern any principled distinction between

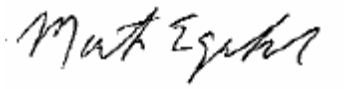
the analysis of the federal district court, which replied upon federal law, from the state principles requiring injury to a legally protected as a precondition for standing to assert a claim.

III. Conclusion

For the foregoing reasons, the Court concludes that the Plaintiff has failed to establish an injury-in-fact that to its legally protected interest. Accordingly, the Defendants' Motion to Dismiss is **granted.**

Dated this 8th day of July, 2019.

BY THE COURT:



Martin F. Egelhoff
District Court Judge

cc: all counsel via e-filing