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MEMORANDUM

To: Rep. Timothy Briglin, Chair, House Committee on Energy and Technology

From: Robert F. McDougall, Chief, Environmental Protection Division,
Vermont Attorney General's Office

Laura B. Murphy, Assistant Attorney General,
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Cc: Charity Clark, Chief of Staff, Vermont Attorney General's Office

Re: Questions on H.688, "Global Warming Solutions Act"

Date: January 29, 2020

This memo provides responses to questions presented by the Committee following Attorney General Donovan's testimony on January 23, 2020. We encourage the Committee to consult with Legislative Council and the Agency of Natural Resources regarding these issues as well.

1) Whether the Agency of Natural Resources could promulgate rules that would result in a tax or fee under the Global Warming Solutions Act.

ANR could not impose a tax under the Global Warming Solutions Act (GWSA) without legislative approval. A "tax" is a "monetary charge imposed by the government on persons, entities, or property to yield public revenue." *Black's Law Dictionary* 1469 (7th ed. 1999). Only the legislature may authorize a tax. Vt. Const. ch. 1, art. 9 ("previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more

service to community than the money would be if not collected”); Vt. Const. ch. 2, § 6 (“all Revenue bills shall originate in the House of Representatives”); *accord* U.S. Const. art. I, § 8, cl. 1 (“The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . .”). Tax “imposition” statutes tend to be explicit. E.g., 32 V.S.A. § 9771 (“there is imposed a tax on retail sales in this State”); 32 V.S.A. § 5402 (“A statewide education tax is imposed . . .”); and 32 V.S.A. § 5822 (“A tax is imposed for each taxable year upon the taxable income earned or received in that year . . .”).

Fees paid to an agency generally need legislative approval. A “fee” would be “a monetary charge by an agency or the Judiciary for a service or product provided to, or the regulation of, specified classes of individuals or entities.” 32 V.S.A. § 602(2)(A). Under the legislative provisions for “Executive and Judicial Branch Fees,” an agency generally cannot adopt or adjust a fee without legislative action. 32 V.S.A. § 603(1)(2). There are some exceptions, e.g., for charges established by the Division of Liquor and Lottery, or sales of commercially available items, or agency fees for transcripts, trainings, or conferences. 32 V.S.A. §§ 602(2)(B), 603(3).

2) Whether the Agency of Natural Resources could ban internal combustion engines under the Global Warming Solutions Act.

The GWSA does not speak specifically to internal combustion engines. If ANR banned internal combustion engines by rule, the rule would need to adhere to proper rulemaking procedures and standards as well as constitutional standards. This response provides an overview of the main legal standards that a ban on internal combustion engines may be subject to if challenged in court: rulemaking and constitutional standards.

Rulemaking

There are procedural and substantive rulemaking standards.

- Procedurally, among other things, ANR’s rule would be subject to (i) proposed rule, final proposed rule, and adopted rule filings; (ii) specific requirements for the content of the proposed rule filing (e.g., environmental and economic impact analyses, detailed record of scientific, legal, and technical information); (iii) public notice and comment; (iv) public hearings across the State; (v) assistance and input from the Interagency Committee on Administrative Rules; and (v) objections by the Legislative Committee on Administrative Rules (LCAR). 3 V.S.A. §§ 820, 836, 837, 838, 840, 842; H.688 Section 4 {10 V.S.A. § 593(a)(2), (c)}.

Any rule banning internal combustion engines would be subject to these opportunities for public input and LCAR review. Some procedural defects prevent a rule from taking effect. 3 V.S.A. § 846(a).

- Substantively, there are basically three standards a rule needs to meet.
 - First and second (relatedly), a rule cannot “exceed [the agency’s] legislative grant of authority” or (ii) “compromise[] the intent of the authorizing statute.” *Lemieux v. Tri-State Lotto Comm’n*, 164 Vt. 110, 113 (1995); accord 3 V.S.A. § 842(b)(1), (2) (grounds for LCAR objections include where rule goes beyond authority of agency or is contrary to legislative intent).
 - Third, a rule may not be arbitrary. *In re Club 107*, 152 Vt. 320, 323 (1989); accord 3 V.S.A. § 842(b)(3) (grounds for LCAR objections include where rule is arbitrary). This means there must be a reasonable basis for the agency’s decision; e.g., where the agency’s findings are supported by the evidence and the agency has provided a rational explanation for its rule. *Beyers v. Water Res. Bd.*, 2006 VT 65, ¶ 19; *State Dep’t of Taxes v. Tri-State Indus. Laundries, Inc.*, 138 Vt. 292, 294 (1980).

If a rule banning internal combustion engines were challenged in court, it would need to satisfy these standards.

Constitutional

Constitutional issues might also be raised in a court challenge. For instance, whether a federal law such as the Clean Air Act preempts particular state regulation under the Supremacy Clause. U.S. Const. art. VI (“the laws of the United States . . . shall be the supreme law of the land”). Or, under the Dormant Commerce Clause, courts may look to whether a state rule treats in-state entities differently from out-of-state entities, regulates commerce that occurs wholly outside the state, or imposes burdens that are clearly excessive in relation to the rule’s benefits. *See generally Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 604 (D. Vt. 2015).

Sometimes, state bans are challenged under the Dormant Commerce Clause. For instance, in *Maine v. Taylor*, the United States Supreme Court upheld a Maine statute prohibiting the importation of live bait because the statute served a legitimate local purpose. 477 U.S. 131, 148-51 (1986). However, an Iowa law banning trucks more than 60 feet-long on interstate highways in the state was struck down as an unconstitutional burden on interstate commerce. *Kassel v. Consol. Freightways Corp. of De.*, 450 U.S. 662, 671 (1981).

3) The ability of a judge, when a plaintiff prevails in the second cause of action, to order a remedy beyond the scope of the Global Warming Solutions Act; and what language could be added to make it clear that a court may not do so?

Generally, the legislative branch has the authority to make policy – not the courts. *See, e.g.*, Vt. Const. ch. 2, § 2 (“The Supreme Legislative power shall be exercised by a Senate and a House of Representatives.”); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 193 (2015) (“Congress gets to make policy, not the courts.”). In a typical rulemaking challenge, the court’s role is limited to assessing whether the rule complies with the standards described above under Question 2, and rules are presumed valid. *Hatin v. Philbrook*, 134 Vt. 456, 458 (1976); *Jones v. Dep’t of Forests, Parks, & Recreation*, 2004 VT 49, ¶ 14 (“We have cautioned that courts are not ‘a higher environmental agency entrusted with the power to make environmental law and policy,’ but rather exercise a ‘narrow role in ensuring that the decisions of ANR are made in accordance with law.’”).

However, we believe the following edits to the current language of H.688 should address the concern that was raised in Committee:

“If the court finds that the rules adopted by the Secretary pursuant to section 593 of this chapter are a substantial cause of failure to achieve the greenhouse gas emissions reductions requirements pursuant to section 578 of this title, the court shall enter an order remanding the matter to~~directing~~ the Secretary to adopt or update rules that achieve the greenhouse gas emissions reductions requirements consistent with this Act [or insert code provisions].” (10 V.S.A. § 594(b)(3)).

4) Whether the Legislature is ceding too much policy-making authority to the executive branch in the rulemaking allowed under the bill.

We believe the bill as currently proposed is constitutional under the “nondelegation” doctrine. Under the nondelegation doctrine, a legislature may not delegate “legislative power” to the administrative branch. This is because the Constitution – both state and federal – gives legislative power to the legislative branch. U.S. Const. art. I, § 1 (“[a]ll legislative Powers herein granted shall be vested in a Congress of the United States”); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (“The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”); Vt. Const. ch. 2, § 5 (“The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.”); *Village of Waterbury v. Melendy*, 109 Vt. 441, 448 (1938) (“Functions of the legislature, which are purely and strictly legislative, cannot be delegated, but must be exercised by it alone.”).

However, as long as the delegation has some “intelligible principle” and is not “devoid of any conceivable standard to guide and constrain discretion,” a legislature may delegate the power to implement legislative policy through, for example, rulemaking. *See, e.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *re: MVP Health Ins. Co.*, 2016 VT 111, ¶ 12 (respectively). The basic inquiry is whether the legislature has provided standards or policy guidance to the agency. *See, e.g., Panama*, 293 U.S. at 415 (whether legislature has “declared a policy” on the subject); *Whitman v. Am. Trucking Assn’s, Inc.*, 531 U.S. 457, 473-74 (2001) (whether legislature has provided criteria for the setting of standards); *Melendy*, 109 Vt. at 453 (whether legislature has provided any “policy or plan” or “rule or standard”).

Though there are no guarantees, we believe this bill provides sufficient policy guidance to pass constitutional muster. For example:

- It provides multiple GHG-reduction standards that must be met through the rules (26% by 2025, 40% by 2030, 80% by 2050).
- It provides the process and timelines for developing the rules (utilizing Vermont Climate Action Plan; deadlines of 2022, 2026, 2040, and interim).
- It provides numerous criteria—policy guidance—for development of the rules. The Vermont Climate Action Plan, upon which the rules are based, must include programs to meet specific policy-based requirements and achieve specific policy-based goals. *See* H.688 Section 4 {10 V.S.A. § 592(b), (d)}. For example:
 - ✓ Reduce GHGs from specific sectors based on the relative contribution of the source (transportation, building, regulated utility, industrial, commercial, agricultural);
 - ✓ Achieve long-term sequestration on natural working lands;
 - ✓ Limit chemicals and products that contribute to climate change;
 - ✓ Prioritize most cost-effective, technologically feasible, equitable reductions;
 - ✓ Minimize impacts on rural, marginalized, and lower-income communities;
 - ✓ Support opportunities for businesses to benefit from GHG solutions; and
 - ✓ Maximize involvement in interstate and other partnerships.

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