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National Highway Traffic Safety Administration
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Docket Management Facility, M–30
U.S. Department of Transportation
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Re: Supplemental Comments from the State of California on the Proposed Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, Docket ID Nos. NHTSA-2021-0053 & NHTSA-2021-0054

INTRODUCTION

As indicated in previously submitted comments (NHTSA-2021-0053-1499), California appreciates the opportunity to comment on the National Highway Traffic Safety Administration's (NHTSA's) Notice of Proposed Rulemaking (NPRM) to adopt more stringent federal fuel-economy standards and urges NHTSA to finalize stringent standards. California submits this supplemental comment in response to certain comments submitted by others.

Specifically, some commenters have argued that it is unlawful for NHTSA to include any battery-electric vehicles (BEVs) in the No Action baseline NHTSA uses when determining whether to adopt or revise federal fuel economy standards.[1] This is incorrect. Principles of reasoned decision-making do not permit NHTSA to ignore the real world, including that BEV sales are occurring and BEV market share is increasing in response to consumer demand, market conditions, and automaker legal obligations other than fuel economy standards. These principles apply with full force here, where Congress's express statutory commands indicate that NHTSA's analysis must be grounded in real world conditions. And, contrary to some commenters' contentions, the limitation prohibiting consideration of the fuel economy of BEVs in 49 U.S.C. § 32902(h)(1) does not require NHTSA to ignore the real world and use a counter-factual baseline without BEVs. Rather, all three of the limitations in Section 32902(h) apply to NHTSA's consideration of what is "technologically feasible," "economically practicable," and, ultimately, "maximum feasible" to require of automakers. That consideration is inherently iterative, requiring NHTSA to assess whether automakers can make *more* progress on fuel efficiency than they already have. Logically and textually, then, the limitations in Section 32902(h) apply to NHTSA's determination of how much improvement in average fuel economy, if any, it should

[1] *See, e.g.*, Alliance for Automotive Innovation, Comments to the National Highway Traffic Safety Administration Regarding Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, NHTSA-2021-0053-1492, at 39-47 (October 26, 2021). To our knowledge, no commenter asserted that NHTSA must exclude hybrid vehicles (including plug-in hybrid vehicles) or other vehicles from its regulatory baseline, so this supplemental comment focuses exclusively on electric vehicles.

demand from automakers *over and above what they have already achieved*; they do not apply to the No Action baseline—what automakers would do if NHTSA changed nothing.[2]

I. NHTSA CAN AND SHOULD INCLUDE BEVS IN ITS NO ACTION BASELINE, AND OMITTING THEM WOULD VIOLATE PRINCIPLES OF REASONED DECISIONMAKING

A. BEVs Are a Part of the Existing Nationwide Fleet, and Their Numbers are Projected to Continue to Grow in Response to Market Conditions and Regulatory Obligations

As of 2020, there were already over 1 million BEVs on the roads in the United States.[3] Those numbers have since grown and are projected to continue growing significantly. In fact, in 2021, BEV sales grew by 83 percent compared to 2020 sales, and the 434,879 BEVs sold in the United States in 2021 increased the number of BEVs on the road by approximately 50% in a single year.[4] Multiple forecasts project that BEVs will achieve a 10% share of the light-duty market in the United States by 2025 and a share greater than 25% by 2030.[5] And many major automakers have indicated they expect 50% or more of their new light-duty vehicle sales to be BEVs or other zero-emission-vehicles by 2030 or 2035.[6]

This growth in sales—both real and projected—undoubtedly reflects multiple factors, including automaker compliance with legal obligations, as well as existing and anticipated consumer preferences. As NHTSA acknowledged in its NPRM, automakers have long been subject to zero-emission-vehicle (ZEV) standards both in California and in States that have adopted California's ZEV standards, 86 Fed. Reg. 49,622, and will be subject to those standards in the event EPA restores the relevant part of the 2013 waiver it revoked in 2019, *id.* at 49,749.[7] In addition, since the public comment period closed on NHTSA's NPRM, EPA has finalized revised federal GHG standards for model years 2023-2026 that are more stringent than those it adopted in 2020. 86 Fed. Reg. 74,434 (Dec. 30, 2021). In its Regulatory Impact Analysis, EPA estimated that its revised GHG standards would lead to 7% BEV sales in model year 2023, with those sales growing to 17% in model years 2026.[8] Thus, legal obligations, *other than fuel*

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[2] The analysis herein pertains to the inclusion of BEVs in NHTSA's No Action baseline. We are aware that commenters also asserted that NHTSA's modeling of compliance with proposed changes to its standards (particularly the modeling of preparations to comply that occur before the new standards take effect) reflected increasing BEV sales. We note those comments raise distinct questions and express no views on those comments here.

[3] Stacy C. Davis and Robert G. Boundy, Oak Ridge National Laboratory, *Transportation Energy Data Book, Edition 39* (Feb. 2021) at 6-4 (Table 6.2), available at https://info.ornl.gov/sites/publications/Files/Pub147659.pdf.

[4] Reuters, *U.S. hybrid electric car sales hit record highs*, available at https://www.reuters.com/business/autos-transportation/us-hybrid-electric-car-sales-hit-record-highs-2022-01-06/.

[5] Report by Gary W. Rogers (then of Roush Engineering), submitted to EPA with comments from the California Air Resources Board, at 11 (EPA-HQ-OAR-2021-0208-0643).

[6] EPA, Regulatory Impact Analysis at 2-12 (summarizing announcements by General Motors, Ford, Volkswagen, Honda, Volvo, Fiat, and more).

[7] California has required automakers to sell an increasing percentage of ZEVs in the States since the 1998 model year. Cal. Code Regs. tit. 13, § 1960.1(g)(2) (1991); *see also* TSD at 104 (acknowledging that ZEV standards were first adopted in 1990). The State has extended the program multiple times, increasing the sales requirements for later model years, and has received multiple preemption waivers from EPA. *See* 58 Fed. Reg. 4166 (Jan. 13, 1993); 71 Fed. Reg. 78,190 (Dec. 28, 2006); 78 Fed. Reg. 2,112 (Jan. 9, 2013).

[8] EPA, Revised 2023 and Later Model Year Light Duty Vehicle GHG Emissions Standards: Regulatory Impact Analysis, at 4-29 (Table 4-31), available at https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1013ORN.pdf.

economy standards, to which automakers are subject to (or may be subject to) encourage or require them to sell BEVs. And sales of BEVs *will* increase, in part in response to such regulatory obligations, whether or not NHTSA makes any change to its fuel economy standards. Automaker announcements of dramatically expanded BEV offerings and anticipated significant growth in BEV sales confirm the point.

B. Principles of Reasoned Decisionmaking Forbid NHTSA from Ignoring the Real World Fleet

Consistent with long-standing principles of reasoned decisionmaking, NHTSA may not ignore the existence of BEVs in the Nation's light-duty fleet. *E.g.*, *NRDC v. Herrington*, 768 F.2d 1355, 1408 (D.C. Cir. 1985) (stating "it would be patently unreasonable" for agency to refuse to recognize "dramatic[]" changes in regulated industry). Indeed, the use of a national baseline fleet with no BEVs would require "a massively counterfactual assumption" of the kind courts find "[p]articularly troubling" as a basis for agency action. *Sokol v. Kennedy*, 210 F.3d 876, 881 n.11 (8th Cir. 2000); *see also Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017) ("Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking.") (cleaned up); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1053 (D.C. Cir. 2001) ("While courts routinely defer to agency modeling of complex phenomena, model assumptions must have a rational relationship to the real world.") (cleaned up); *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1365 (D.C. Cir. 1985) (upholding agency's rejection of "the most unlikely set of extreme assumptions" that were "virtually impossible" to occur "in the real world"). As the D.C. Circuit stated almost forty years ago, it would be "wholly futile for [courts] to require [an agency] to conform its decisionmaking procedures to the statute, but permit it to trudge through the correct procedure based on information that is now incontestably antique." *Herrington*, 768 F.2d at 1408.

Just as NHTSA cannot ignore the growing presence of BEVs in the real world, it also cannot assume that regulated parties—here, automakers—will fail to comply with their legal obligations. As noted in California's previous comment, courts routinely uphold agencies' inclusion of such compliance in their baselines for regulatory analyses. NHTSA-2021-0053-1499, Appendix A (detailed comments), at 36 n.158. Moreover, agencies, like courts, should honor the longstanding "presumption that parties act lawfully." *See Schwab v. Reilly*, 560 U.S. 770, 790 (2010) (citing *United States v. Budd*, 144 U.S. 154, 163 (1892)). Doing otherwise, particularly in the face of evidence indicating compliance is the norm, would be arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency may not "offer an explanation for its decision that runs counter to the evidence").

Given the facts on the ground and principles of reasoned decisionmaking, NHTSA should include BEVs in its No Action baseline both because BEVs exist in the real-world fleet today and because NHTSA can and should assume automakers will comply with their legal obligations regardless of any action NHTSA may take in its rulemaking.

Finally, the assumption that automakers will comply with their legal obligations need not turn on whether those obligations constitute "other motor vehicle standards of the Government" under Section 32902(f). As shown in an earlier comment, EPA's GHG standards and California's emission standards for which it has a waiver from EPA are "other motor vehicle standards of the Government." NHTSA-2021-0053-1499, Appendix A (detailed comments), at 36-39. NHTSA

must, therefore, "consider" those standards when determining the level of average fuel economy that is maximum feasible. 49 U.S.C. § 32902(f). But, as discussed above and in that earlier comment, principles of reasoned decisionmaking should lead NHTSA to assume compliance with those standards as part of its No Action baseline, even if the agency were not expressly required to consider them. NHTSA-2021-0053-1499, Appendix A (detailed comments), at 39-40. Put another way, NHTSA's correct conclusion that EPA's GHG standards and California's emission standards for which the State has a waiver are "other motor vehicle standards of the government" does not change the baseline (or NHTSA's standards) here; neither the baseline nor NHTSA's standards would look any different if the statute did not command NHTSA to consider those emission standards.

II. THE FUEL ECONOMY STATUTE DOES NOT AUTHORIZE, LET ALONE REQUIRE, THE OMISSION OF BEVS FROM THE NO ACTION BASELINE

Some commenters have argued that Section 32902(h)(1)—which prohibits NHTSA from "consider[ing] the fuel economy of dedicated automobiles," such as BEVs, when it determines maximum feasible fuel economy standards—requires the construction and use of a hypothetical, counter-factual baseline in which there are no BEVs. The fuel economy statute (hereafter EPCA) does not authorize, let alone require, such a baseline. For one thing, EPCA's text provides no basis to conclude that Congress intended to override the long-standing principles of reasoned decisionmaking under which counter-factual assumptions disconnected from reality are arbitrary and capricious. Quite the contrary, the statutory commands confirm that NHTSA's analysis must be grounded in real world conditions and considerations. Moreover, the text and structure of Section 32902(h), and other parts of the statute, indicate that the limitations in Section 32902(h)—including the one on which commenters rely—apply not to the No Action baseline but to NHTSA's determination of whether, and how much, *additional* improvement in average fuel economy is feasible.

A. The Statute Demands Consideration of the Real World, Not Counter-Factual Baselines

The text of EPCA provides no indication that Congress intended NHTSA to flout well-established principles of reasoned decisionmaking and use a counter-factual baseline for its analysis. Quite the contrary: EPCA's text confirms that NHTSA cannot ignore the real world, and, in fact, its statutory directives are incompatible with a counter-factual baseline, such as one with no BEVs. Congress requires NHTSA to establish "the maximum feasible average fuel economy levels" the agency "decides the manufacturers can achieve" in a given model year. 49 U.S.C. § 32902(a). And NHTSA must "consider technological feasibility [and] economic practicability," among other factors, "[w]hen deciding maximum feasible average fuel economy." 49 U.S.C. § 32902(f). These are clear instructions to determine, based on real world practicalities, what degree of fuel economy automakers can achieve in their real fleets. These instructions are incompatible with the construction of imaginary fleets for use as an analytical starting point. *See Herrington*, 768 F.2d at 1408 (utilizing unrealistic data "would make a mockery of the clear statutory emphasis on a realistically administered … program").

Indeed, it is not apparent—and the commenters do not explain—how NHTSA could carry out the express instruction to determine what "*maximum* feasible" levels "manufactures *can* achieve" under new fuel economy standards, if it must ignore what automakers will already achieve

without any action by NHTSA. *See* 49 U.S.C. § 32902(a) (emphasis added).[9] Likewise, it makes no sense to read the statute as requiring NHTSA to consider the "technological feasibility" and "economic practicability" of further improvements to average fuel economy, *id.* § 32902(f), *and* as requiring NHTSA to begin that analysis from a counter-factual starting point. To illustrate, assume the average, real-world fleet fuel economy in a given model year is 38 mpg, but would be 35 mpg if one shrank the fleet by omitting BEVs. NHTSA cannot begin its analysis of "the *maximum* feasible average fuel economy levels … manufacturers can achieve"—or assess what is *technologically feasible* or *economically practicable* to achieve—by pretending automakers would achieve only 35 mpg absent any change by NHTSA. The words Congress chose are entirely inconsistent with the notion that NHTSA must bury its head in the sand with respect to what the actual fleet would look like absent any change to NHTSA's standards.

B. By Congressional Design, NHTSA's Determination of "Maximum Feasible" Average Fuel Economy Levels Focuses on *Additional* Progress NHTSA Should Require Automakers to Make

EPCA's text focuses NHTSA on one primary question: how much, if any, *additional* progress can be made improving average fuel economy. Congress understood that multiple levels of average fuel economy would be feasible and directed NHTSA to identify the "*maximum* feasible" level, taking into account the factors specified in Section 32902(f). By definition, the level of fuel economy that has already been achieved in the Nation's fleet is "feasible" but may not be (and likely is not) "maximum feasible," meaning NHTSA must determine whether *additional* improvement is feasible while considering the factors in Section 32902(f).

Other parts of the statute confirm that NHTSA's job is an iterative one that focuses on whether, and how much, *additional* progress can be made in improving the average fuel efficiency of the Nation's vehicles. For one thing, Congress expressly limited NHTSA to promulgating no more than five model-years of standards at one time. 49 U.S.C. § 32902(b)(3)(B). By design then, NHTSA is obligated to frequently consider what is "maximum feasible." And NHTSA must do so based on a record regarding the facts on the ground at the time, including progress the industry has made to date. *See Herrington*, 768 F.2d at 1409 ("We believe Congress thought that 'technologically feasible' meant 'technologically feasible *based on information that is reasonably current at the time* the final rules are validly adopted.'") (emphasis added). By limiting the number of model years encompassed in any single rulemaking, Congress required NHTSA to engage in an iterative analysis that would consider real world developments since the prior rulemaking.

If there were any doubt, Section 32902(b)(2) confirms the iterative nature of the fuel economy standard-setting regime Congress designed. There, Congress mandated NHTSA establish standards for model year 2020 that would require fleetwide average fuel economy "of at least 35 miles per gallon." 49 U.S.C. § 32902(b)(2)(A). Congress then directed NHTSA to set standards *requiring incremental progress* toward that goal in each year beginning with 2011. *Id.* §

[9] Commenters seem to think NHTSA must calculate a No Action baseline average fuel economy that excludes BEVs, but they do not explain how NHTSA could or should do that. Should NHTSA use only the average fuel economy of the non-BEV portion of the fleet (in other words, counter-factually shrink the fleet), or should it treat BEVs as though they are some theoretically similar conventional vehicle (in other words, counter-factually change the composition, but not the size, of the fleet)? The absence of any indication in the statute as to *how* NHTSA should exclude BEVs underscores that this is not an instruction Congress gave the agency.

32902(b)(2)(C). On its own, that provision demonstrates that Congress designed a program of iterative standards intended to build on progress that has already occurred. This is particularly clear given that NHTSA could not set standards for this whole period (model years 2011 through 2020) in a single rulemaking, due to the five-model-year limitation described above. Congress, thus, anticipated NHTSA must consider the progress of the industry in iterative fashion, determining during each rulemaking how much *more* progress the agency could require. This is confirmed by the additional requirement that NHTSA set fuel economy standards for each model year in the decade *after the 2020 target would be met. Id.* § 32902(b)(2)(B) (requiring standards for every year from 2021 to 2030). There would be little point to Congress mandating those standards if it did not intend NHTSA to consider how much *more* progress the industry could make beyond the 35 mpg goal Congress set for 2020. And all of these iterative directions must be understood against the backdrop that Congress knew that industry's progress toward the 2020 target could include the production and sale of BEVs. Indeed, although BEVs have no "fuel economy" under the definitions in the statute, Congress permitted automakers to account for BEVs, using an equivalency factor determined by the Department of Energy, when calculating the average fuel economies of their fleets for compliance. *Id.* § 32904(a)(2)(B).

In sum, Congress designed a regulatory regime where each set of standards is intended to build upon past progress. Thus, Congress gave NHTSA clear directions that require the agency to determine whether, and how much, *more* progress can be made in improving average fuel economy. NHTSA cannot reasonably conduct that inquiry by starting with a counter-factual baseline.

C. Section 32902(h)'s Limitations Likewise Apply to the Amount of *Additional* Progress Automakers Can Be Required to Make, Not to the No Action Baseline

Section 32902(h) imposes three limitations on NHTSA's determination of "maximum feasible" fuel economy levels and its consideration of the four factors in Section 32902(f). Under Section 32902(h), NHTSA

> (1) may not consider the fuel economy of dedicated automobiles [including BEVs];
>
> (2) shall consider dual fueled automobiles to be operated only on gasoline or diesel fuel; and
>
> (3) may not consider, when prescribing a fuel economy standard, the trading, transferring, or availability of credits under section 32903.

Contrary to the arguments of some commenters, these limitations do not apply to NHTSA's No Action baseline—NHTSA's determination of what the Nation's fleet would look like absent further action by the agency. Rather, they apply to NHTSA's consideration of how much, if any, *additional* progress automakers can make beyond the progress reflected in that baseline.

First, Section 32902(h) expressly applies to NHTSA "carrying out" its analysis under subsections (c) and (f), which require NHTSA to determine "maximum feasible" fuel economy levels and to consider four factors—including "technological feasibility" and "economic

practicability"—when doing so. 49 U.S.C. § 32902(h), (c), (f).[10] As shown above, NHTSA's determinations under subsections (c) and (f) are iterative ones that look at what *additional* progress can be required of automakers. The limitations in Section 32902(h), therefore, expressly apply to that analysis of potential additional progress, not to the No Action baseline.

Second, all three of the limitations in Section 32902(h) are prohibitions against NHTSA *requiring* certain activities that Congress wished only to *encourage* or *allow* as compliance strategies. This is plainly true of the credits referred to in Section 32902(h)(3). Through the credit provisions, Congress encouraged over-compliance and allowed automakers to earn, trade, and use over-compliance credits to smooth out periods of over- and under-compliance over multiple years. 49 U.S.C. § 32903(a). But, in Section 32902(h)(3), Congress forbade NHTSA from *requiring* the use of over-compliance credits by prohibiting the agency from considering the "availability" of credits when determining what more to demand of automakers. Thus, automakers are allowed, and even encouraged, to use credit flexibilities in their compliance strategies, but NHTSA may not conclude that automakers can achieve greater fleet fuel economy simply because of the "availability" of those credits. Likewise, Congress allowed automakers to count BEVs toward compliance with the fuel economy standards, as one way of incentivizing their development and production, *id.* § 32904(a)(2),[11] but it prohibited NHTSA from *requiring* the production and sale of BEVs, *id.* § 32902(h)(1). Thus, NHTSA cannot decide that automakers can achieve *greater than baseline* fuel efficiency by selling BEVs or by using or trading credits. But Congress's prohibition against NHTSA requiring BEV sales or credit usage does not require omission of BEVs or the effects of credits from the No Action baseline. Indeed, by definition, the No Action baseline should reflect the world that would exist if NHTSA required nothing more.

Third, the text indicates that all three limitations listed in Section 32902(h) apply to the same activity: NHTSA's "carrying out subsections (c), (f), (g)"—in other words, its consideration of the factors in subsection (f) while determining "maximum feasible levels" of average fuel economy under (c) or (g). 49 U.S.C. § 32902(h). If commenters are correct that (h)(1)—the limitation on consideration of the fuel economy of BEVs—applies to the No Action baseline, then the other limitations—(h)(2) and (h)(3)—would also apply to that baseline. But commenters do not assert that (h)(3)'s prohibition against consideration of "the trading, transferring, or availability of credits" applies to the baseline.[12] Perhaps this is because commenters would prefer that NHTSA's counter-factual baseline fuel economy be artificially low (as it would be without BEVs), whereas eliminating the effects of credit banking and trading would likely have the opposite effect. Indeed, to eliminate the effects of credits from the baseline, NHTSA would presumably have to adjust every automaker's fleet so that it would meet existing fuel economy standards in each and every model year. In years when one or more automakers' fleets did not meet the standards, and the automaker used credits to achieve compliance, these adjustments would *increase* the average fuel economy of the fleet. Regulated

[10] Section 32902(h) also references subsection (g) which governs amendments to existing standards. Amended standards must "meet[] the requirements of subsection (a)," meaning amended standards must also reflect the "maximum feasible" level of average fuel economy. 49 U.S.C. § 32902(g)(1), (a). This confirms that the limitations in subsection (h) apply to changes in determinations of what is "maximum feasible," not to conditions comprising No Action baselines.

[11] *See also* H.R. Rep. No. 96-730, at 14 (1979).

[12] These commenters likewise do not appear to assert that NHTSA must treat "dual fueled" vehicles in the No Action baseline in accord with the limitation in Section 32902(h)(2).

parties cannot design their preferred baselines—picking and choosing among listed limitations because some might result in less demanding obligations.

Fourth, this reading of Section 32902(h) is also consistent with Congress's overall objectives for the fuel economy program because it focuses NHTSA on what more automakers can achieve with their *conventional* fleets, even if BEVs are produced as Congress hoped they would. Under commenters' reading of Section 32902(h)(1), however, if the market changed as Congress hoped, a gap between *actual* average fuel economy and *imaginary* (non-BEV) average fuel economy would materialize. And if that gap grew sizable, it would likely make it more and more difficult for NHTSA to set standards that demand the very improvements from conventional vehicles that Congress intended. Congress cannot reasonably be understood as having incentivized BEV sales while simultaneously designing a regulatory regime that would be undercut by those sales. Rather, Congress mandated "maximum feasible" standards intended to protect the Nation and its consumers from the hazards of dependency on oil and did not authorize NHTSA to demand less of conventional vehicles simply because BEVs materialized as Congress hoped they would. *See* H. Rep. 100-476 (Dec. 14, 1987) ("This incentive [to manufacture BEVs] is not intended to allow manufacturers to relax their efforts to achieve better mileage in the remainder of their fleets that are still fueled with gasoline.").

CONCLUSION

NHTSA should reject the view of Section 32902(h) advanced by some commenters and use a No Action baseline that reasonably reflects the world that would exist without further action by NHTSA. That world already includes BEVs, and NHTSA should assume automakers will comply with their existing legal obligations, including EPA's revised GHG standards and California's emission standards for which it has a waiver.

If we can provide additional information that would be helpful in considering these comments, or if you wish to discuss any issue raised above with us, please do not hesitate to contact the undersigned.

Sincerely,

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