

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
MINNESOTA POLLUTION CONTROL AGENCY

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In the Matter of the Proposed Rules  
Adopting Vehicle Criteria, Greenhouse Gas, and  
Zero Emissions Standards –  
Clean Cars Minnesota,  
Minnesota Rules Chapter 7023

OAH Docket No. 71-9003-36416

Revisor’s ID No. 04626

Administrative Law Judge  
Jessica A. Palmer-Denig

**ALLIANCE FOR AUTOMOTIVE  
INNOVATION’S  
REBUTTAL COMMENTS**

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## I. INTRODUCTION

The Alliance for Automotive Innovation (“Auto Innovators”) represents automakers that produce and sell about 99 percent of all the new light-duty cars and trucks sold in Minnesota.<sup>1</sup> To be clear: Auto Innovators shares and supports Minnesota’s goal of increased sales of electric vehicles (“EVs”).<sup>2</sup> Our members are investing and working hard to bring these vehicles to market: by 2023, the auto industry will have invested more than \$250 billion in vehicle electrification.<sup>3</sup> Today, automakers offer more than 50 high-quality ZEV models, and this number is expected to exceed 130 models within the next five years.<sup>4</sup> These vehicles are safe, dependable, affordable, and fun to drive. They come in every shape and size—small car to large car; SUV to mini-van; 2WD and AWD; economy to luxury; and everything in between, to ensure that there will be an EV that fits the needs of every customer. Soon, even electric pick-up trucks will be offered.<sup>5</sup> Our members hope to sell as many of these EVs as they can, and they are doing their part to market them to consumers.

These efforts by automakers are essential to growing the EV market, but they are not sufficient on their own. Rather, Minnesota, in concert with other stakeholders in the state, should

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<sup>1</sup> Auto Innovators is the authoritative and respected voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, Auto Innovators is directly involved in regulatory and policy matters impacting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, technology, mobility and other automotive-related companies and trade associations. For more information, visit our website <http://www.autosinnovate.org>.

<sup>2</sup> The term “electric vehicles” is used to mean plug-in hybrid, battery electric, and fuel cell electric vehicles, all of which qualify under California’s Zero Emission Vehicle program.

<sup>3</sup> AlixPartners. “A “Pile-Up of Epic Proportions” Awaits Auto Industry as Investments Necessary to an Electric and Autonomous Future Balloon Just as Market Slows, According to AlixPartners Study.” Press Release (Jun. 20, 2018). Found at: <https://www.alixpartners.com/media-center/press-releases/pile-up-awaits-auto-industry-investments-electric-autonomous-future-balloon/>.

<sup>4</sup> Brinley, Stephanie (May 28, 2019). *IHS Markit forecasts EV sales to reach US market share of 7.6% in 2026*. IHS Markit. Found at: <https://ihsmarkit.com/research-analysis/--ihs-markit-forecasts-ev-sales-us.html>.

<sup>5</sup> Car and Driver. “Every Electric Pickup Truck Currently on the Horizon: Tesla’s Cybertruck isn’t the only EV with a cargo bed that’s coming soon.” (Jan. 20, 2021). Found at: <https://www.caranddriver.com/news/a29890843/full-electric-pickup-trucks/>.

work to expand electric charging and hydrogen infrastructure and to reduce costs to “refuel;” to reduce vehicle costs through proven tools like purchase incentives; and to improve consumer knowledge and comfort with the technology.

## **II. POINTS RAISED RELATING TO ZEV CREDIT MECHANISMS**

Several commenters raised points related to the Minnesota Pollution Control Agency’s (“MPCA”) proposed credit mechanisms under the Zero Emission Vehicle (“ZEV”) rules. These commenters generally provided support for early action credits and opposed any allotment of credits in the credit bank. Many of these commenters provided an alternative proposal to strike the credit allotment entirely. On the other hand, Auto Innovators raised concerns about the insufficiency of the MPCA’s one-time allotment of ZEV credits (one year’s worth of credits), and instead we recommended that the MPCA follow the regulatory precedent set by nearly all ZEV states that have previously adopted the California ZEV mandate. Auto Innovators continues to believe that our recommended approach will meet Minnesota’s needs and, at the same time, manage the concerns raised by other commenters.

### ***A. POINTS RELATING TO CREDIT BANKS***

Commenters raised concerns that the credits could overwhelm the ZEV requirements and that allotted credits are “freebies.” Auto Innovators disagrees.

For instance, commenters asserted that:

In its own SONAR, MPCA estimates that by the beginning of MY 2025 the proportional credit balance would represent 5 years of MY2025 compliance. Adopting such a large credit balance would overwhelm the actual ZEV obligations and result in no additional ZEV requirement beyond business-as-usual in Minnesota. The outcome in terms of sales would thus be very different between California and Minnesota.<sup>6</sup>

This point, on overwhelming the ZEV obligations, is unfounded. Auto Innovators' recommended approach includes a cap on credit usage, and this approach was adopted in Colorado (and codified in Virginia legislation last month). This cap, as recommended, restricts the use of proportional credits in any single year, avoids the situation that appears to be concerning to the MPCA, and can be set at a level to ensure EV adoption will continue to increase in Minnesota.

However, *the MPCA never actually assessed the caps on proportional credits as we proposed*, even though we recommended this approach, provided it to the MPCA early in its regulatory development process, and discussed it in Auto Innovators' testimony provided on February 22<sup>nd</sup>.

In response to Auto Innovators' February 22<sup>nd</sup> testimony, the MPCA notes:

Regarding the comment about rejecting the concept of providing a proportional bank of ZEV credits with caps on the use of those credits, the MPCA analyzed a variety of credit bank scenarios, ranging from providing proportional credits to offering only an early-action credit mechanism, but decided to propose adoption of the early action-credit mechanism and one-time allotment instead. The MPCA developed this initial ZEV credit bank proposal as a compromise that balances the need for compliance flexibility in the early years of implementation along with the goal of increasing EV adoption in Minnesota beyond business-as-usual EV sales growth. Although the MPCA believes this approach to be reasonable on its own, the Agency also notes that we have received both comments that suggest our

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<sup>6</sup> Written comments by Fresh Energy, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, and Chuck Shulock, at 27. (Mar. 15, 2021).

proposal is too conservative and comments that suggest we are too liberal in our proposed approach.<sup>7</sup>

This was the MPCA’s roundabout way of saying that it evaluated several proposals, but apparently Auto Innovators’ recommended approach – capped usage of proportional credits – was not evaluated, notwithstanding the fact that this was the approach adopted by virtually every other state that has adopted the standards. Capped usage of proportional credits is a critical element of Auto Innovators’ recommended approach because it provides the MPCA, and other interested parties, with an assurance that the ZEV requirements will not be overwhelmed and that EV sales will increase, while providing appropriate flexibility for auto manufacturers.

Without purchase incentives or more significant investment in charging and hydrogen refueling stations,<sup>8</sup> there is a higher level of uncertainty about how Minnesota’s EV adoption rates will grow. The MPCA’s assertion that EV sales will grow purely because of its mandate completely ignores the realities of customer purchasing habits, affordability concerns at the point

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<sup>7</sup> MPCA, “Second Initial Response to Public Comments Submitted During the Pre-Hearing Public Comment Period, at the February 22 and 23, 2021 Public Hearings, and During the Post-Hearing Public Comment Period up to March 10, 2021,” (“MPCA Second Initial Response”) at 5 (Mar. 15, 2021).

<sup>8</sup> *See*, written comments submitted by Auto Innovators, at 33-41. (Mar. 15, 2021).

of purchase (and associated cost and convenience parity challenges), or that many customers do not view EVs as the right vehicle for their lifestyle.<sup>9,10,11,12</sup>

Many commenters raise concerns about the “freebie” or “free allocation” of one-time credits and/or proportional credit banks.<sup>13,14</sup> There is, however, little to nothing free about these credit allotments. The MPCA’s proposed approach equally grants ZEV credits across automakers, and, therefore, the MPCA’s proposed approach is perhaps less representative of *all* automakers’ efforts to date. Proportional credits, however, are directly linked to automakers’ efforts to expand EV sales above and beyond ZEV requirements as the market is maturing. These perceived “free” credits have been hard-earned in the race to EV commercialization. They represent tens of billions of dollars invested by automakers, to date, in research and development of batteries, fuel cells, and

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<sup>9</sup> Descant, S (2020, February 14). *EV Options Have Increased but Public Awareness Not So Much*. Government Technology. <https://www.govtech.com/fs/transportation/EV-Options-Have-Increased-but-Public-Awareness-Not-So-Much.html>.

<sup>10</sup> ICCT. “Update on electric vehicle costs in the United States through 2030.” *Working Paper* (Apr. 2, 2019). Found at: <https://theicct.org/publications/update-US-2030-electric-vehicle-cost> (last accessed March 18, 2021). (“This working paper assesses battery electric vehicle costs in the 2020–2030 time frame, using the best battery pack and electric vehicle component cost data available through 2018. The assessment analyzes the timing for price parity for representative electric cars, crossovers, and sport utility vehicles compared to their conventional gasoline counterparts in the U.S. light-duty vehicle market. The analysis leads to two high-level findings. ***Electric vehicle initial cost parity is coming within 5–10 years.*** As battery pack costs drop to approximately \$104/kWh in 2025 and \$72/kWh in 2030, electric vehicle cost parity with conventional vehicles is likely to occur between 2024–2025 for shorter-range and 2026–2028 for longer-range electric vehicles. This applies to typical electric cars, crossovers, and SUVs. If battery cost breakthroughs lead to a further reduction in battery costs, for example to \$89/kWh in 2025 and \$56/kWh in 2030, this will bring electric vehicle initial cost parity forward by approximately one year. ***Cost-competitiveness for consumers approaches even faster than initial cost parity based on fuel savings.*** Analysis of first-owner 5-year ownership costs indicates that an average new vehicle buyer will see an attractive proposition to choose electric vehicles in the 2022–2026 time frame. The consumer ownership parity point for each vehicle application is one to two years sooner than initial cost parity, due to the high fuel savings of electric vehicles. For example, the first owners of 200-mile electric vehicles realize fuel savings of \$3,500 for cars, \$3,900 for crossovers, and \$4,200 for SUVs, based on electricity costs typically being much lower than conventional vehicle gasoline expenses.”)

<sup>11</sup> Mitchell, R (2020, January 17). *Car buyers shun electric vehicles not named Tesla. Are carmakers driving off a cliff?* Los Angeles Times. <https://www.latimes.com/business/story/2020-01-17/ev-sales-fizzle>.

<sup>12</sup> Lane, Charles (2021, March 16). *Opinion: Electric vehicles won’t fix our carbon dilemma without some hard choices along the way.* The Washington Post. [https://www.washingtonpost.com/opinions/electric-vehicles-wont-fix-our-carbon-dilemma-without-some-hard-choices-along-the-way/2021/03/16/c8759c6a-8665-11eb-bfdf-4d36dab83a6d\\_story.html?outputType=amp](https://www.washingtonpost.com/opinions/electric-vehicles-wont-fix-our-carbon-dilemma-without-some-hard-choices-along-the-way/2021/03/16/c8759c6a-8665-11eb-bfdf-4d36dab83a6d_story.html?outputType=amp).

<sup>13</sup> Clean Cars Minnesota Public Testimony as presented by Anjali Bains, Fresh Energy, at 1 (Mar. 15, 2021).

<sup>14</sup> Written comments from Thad Kurowski, Tesla, at 7-8 (Mar. 15, 2021).

related components; consumer research, outreach, and support; marketing and advertising; dealer training; retooled or newly built manufacturing facilities; development of codes, standards, and testing requirements; design, testing and development of EV platforms; etc., and all while complementary market measures are being implemented to grow demand.<sup>15</sup> This same automaker investment has built a foundation for the expansion of EVs in the U.S. market. Without this groundwork, states like Minnesota, who are well behind the national average for EV sales,<sup>16</sup> would be less likely to achieve successful EV adoption through a ZEV mandate. One-time allocated credits do not adequately acknowledge the \$250 billion that the auto industry is investing in electrification through 2023,<sup>17</sup> or the extremely high cost of preparing for and complying with the ZEV mandate.

Additionally, commenters and the MPCA dismiss the significant challenges associated with increasing EV sales, prior to implementation of the mandate, as well as once implementation begins. For instance, MN350 states:

Because manufacturers are large, have several years to adapt to the changes, and can use credits to meet their market flexibly, granting manufacturers an additional year of credits is unnecessary and will push out the benefits to Minnesotans.<sup>18</sup>

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<sup>15</sup> For instance, in the state of California, the growth of EV sales from 0 to 8% over the past ten years has been accompanied by at least \$3.5 billion of public investment, in addition to utility proceedings, state agency resources and coordination, numerous businesses invested in charging and/or hydrogen refueling infrastructure, a consumer awareness program, and more.

<sup>16</sup> See, Auto Innovator's ZEV Dashboard, at <https://www.autosinnovate.org/resources/electric-vehicle-sales-dashboard>. The data on this website reports that Minnesota's EV sales rate was 1.3% in 2019 and 1.6% in 2020, while the national average was 2.0% in 2019 and 2.3% in 2020.

<sup>17</sup> AlixPartners. "A "Pile-Up of Epic Proportions" Awaits Auto Industry as Investments Necessary to an Electric and Autonomous Future Balloon Just as Market Slows, According to AlixPartners Study." Press Release (Jun. 20, 2018). Found at: <https://www.alixpartners.com/media-center/press-releases/pile-up-awaits-auto-industry-investments-electric-autonomous-future-balloon/>.

<sup>18</sup> Written comments by Madi Johnson, MN350, at 2. (Mar. 15, 2021).

Here, MN350 makes a broad generalization about the ability to expand EV sales and grow customer adoption, based on nothing more than its perceptions about companies' sizes.

One of the key defining factors of these auto manufacturers is that no single one is alike. Some are larger, some are smaller; some manufacture a full line of vehicles, while others have more focused product lines; some have manufactured EVs for many years, some are still at the early stages of launch; and many have faced EV-related challenges, ranging from manufacturing capacity to cost reduction to battery procurement (in a highly competitive, global, and constrained market).<sup>19,20</sup> In addition, the challenges of responding to the wants and needs of automakers' unique customer bases must also be addressed. What these automakers have in common is the goal of producing and selling cleaner cars and supporting the proliferation of EVs in Minnesota aligned with the appropriate level of state market support (i.e., incentives, infrastructure, other complementary measures, and an appropriately implemented ZEV mandate should the State move forward with it).

Additionally, the MPCA addresses Auto Innovators' February testimony, where we highlighted the significant 450% increase in EV sales that would be required in Minnesota, when one compares today's EV sales with what is estimated to be required by the ZEV mandate. The MPCA responds as follows:

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<sup>19</sup> Geman, Ben (2021, March 16). *I big thing: The mad scramble for electric vehicle batteries*. Axios. [https://www.axios.com/newsletters/axios-generate-ddf8d1f5-50d6-4076-8f66-6f76d8ae0b63.html?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=newsletter\\_axiosgenerate&stream=top](https://www.axios.com/newsletters/axios-generate-ddf8d1f5-50d6-4076-8f66-6f76d8ae0b63.html?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosgenerate&stream=top). (“Efforts to rapidly improve battery technology and make EVs more affordable could be hampered by a shortage of raw materials like lithium, cobalt and nickel. Many automakers are racing to lock up supply chains — and in some cases, to produce batteries themselves.”) (“Most automakers, even Tesla, the leading EV company, assemble battery packs from cells imported from Asia.”) (“The focus is turning to how quickly the world can scale the raw materials and chemicals that feed all those battery plants, according to Moores. • VW's six plants alone would consume more than 60% of the lithium produced globally in 2020, Benchmark estimates.”)

<sup>20</sup> BloombergNEF. “2020 Long-Term EV Outlook.” Found at: <https://about.bnef.com/electric-vehicle-outlook/>. This is a purchased report, and it assesses the outlook for global EV and battery production and market share, showing that China leads in lithium cell and cathode product today and expected in 2025 and that China and the EU are expected to have stronger EV sales rates than the US in the coming decade.

These comments misinterpret the purpose of this analysis, which is not to predict the future of EV sales, but, rather, to understand the potential impact that the proposed ZEV standard would have over and above a scenario without the policy, often called a reference or business-as-usual scenario. It is a standard goal of policy analysis to analyze the impact that a proposed policy would have compared with a business-as-usual case, and that is what the MPCA has done here.<sup>21</sup>

If the analysis does not look at what expected sales might be compared to what will be required, then the analysis is obviously missing a critical element of how massive of a challenge such a sales increase might be. ***This point cannot be emphasized enough.*** Auto Innovators simply seeks the necessary conditions for success to ensure that EV sales can and will grow above the reference case, without overburdening or stressing automakers' capacity to do so. Ideally, this increase will occur at a rate sufficient to meet or exceed the ZEV requirements, in which case any allotment of credits would not need to be used. The ability to predict such an increase, however, relies on many factors outside the control of the ZEV program.

Further, the MPCA's justification reasons that:

Based on the historical widespread compliance seen in other states, plus the proposed early action credit mechanism and one-time allotment of one year's worth of ZEV credits establishing an initial bank of ZEV credits for manufacturers, it is reasonable to assume that manufacturers would be able to comply with the regulatory requirements that are analyzed by the MPCA.<sup>22</sup>

This point of view, again, entirely misses the mark and inappropriately dismisses the challenges of increasing sales. The ZEV credit (not vehicle volume) requirements increase from 4.5% in model year ("MY") 2018 to 22.0% in MY 2025.<sup>23</sup> ***These requirements were designed to***

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<sup>21</sup> MPCA Second Initial Response at 3.

<sup>22</sup> MPCA Second Initial Response at 3.

<sup>23</sup> CARB, 13 CCR § 1962.2, "Zero-Emission Vehicle Standards for 2018 and Subsequent Model Year Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles." *See*, "(b) Percentage ZEV Requirements." Found at:

*gradually increase year over year; Minnesota will be joining the ZEV program at its most stringent point, without the six years of ramp up from MY 2018.*

The MPCA’s assessment also does not consider that large volume manufacturers had the ability to pool ZEV requirements through MY 2021. In exchange for this regulatory flexibility, these automakers had to meet requirements a few years in advance of MY 2018, but also received lower requirements in MYs 2018-2020 (i.e., 3.5% in MY 2018 instead of 4.5%).<sup>24</sup> This regulatory flexibility was provided to alleviate the significant burden, to provide additional time for EV sales to ramp up in the Section 177 states, and to facilitate compliance as a regional approach. This flexibility has since ended.

Thus, historical compliance in other ZEV mandate states relates to several important regulatory provisions and flexibilities to comply with the ZEV mandate in these “historical years.”

Additionally, a commenter conveyed:

Further, it can be intuited in reviewing the California Air Resource Board’s (CARB’s) most current statewide ZEV annual compliance report from 2019 (2020 is not yet available)...that all manufacturers subject to compliance under the ZEV standard have been able to meet compliance each year. Put another way, no manufacturers have fallen out of compliance nor has the industry as a whole.<sup>25</sup>

This point is true, at least in part, because ZEV credits can be transferred (i.e., bought and sold) to meet the ZEV requirements. CARB’s ZEV annual compliance reports shows credit transfers have occurred annually from 2010-2019.<sup>26</sup> While this information is not readily available or updated for all Section 177 states, for those available, use of credit transfers is also demonstrated. For

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[https://govt.westlaw.com/calregs/Document/I505CA51BB0AD454499B57FC8B03D7856?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/I505CA51BB0AD454499B57FC8B03D7856?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).

<sup>24</sup> California Air Resources Board, 13 CCR § 1962.2(d)(5)(E)2.c.

<sup>25</sup> Written comments from Thad Kurowski, Tesla, at 12 (Mar. 15, 2021).

<sup>26</sup> CARB, “Zero-Emission Vehicle Credit Balances.” *Website*. Found at: <https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/zev-program/zero-emission-vehicle-credit-balances> (last accessed Mar. 18, 2021).

example, Vermont’s credit bank reports show credit transfers in 2015-2019 (the only years posted to the website),<sup>27</sup> New York in 2014-2019 (the only years posted to the website),<sup>28</sup> and Oregon in 2017, but not in 2018.<sup>29</sup>

Auto Innovators is concerned that the MPCA’s credit bank approach – one year’s worth of banked credits – does not go far enough and does not represent a long-term view of the state’s commitment to electrification. Although described as a “compromise” approach,<sup>30</sup> the MPCA’s proposal does not consider the business risks automakers will be required to take by rapidly expanding sales of EVs in Minnesota for one year of a ZEV mandate. The MPCA’s one-time allotment will be helpful in managing concerns and uncertainty and ensure, at least in the near-term, feasibility of Minnesota’s ZEV program. In comparison, however, Auto Innovators’ recommended approach for credit banks – capped usage on proportional credit banks – presents significantly less risk. It represents the market-tested approach that has already been successfully implemented in other states (while other regulatory flexibilities were also present) and provides the MPCA with a method to ensure EV sales continue to increase year over year. Capped proportional credits also prevent the perceived concern of “[zeroing] out automakers’ compliance obligations the first year of the program.”<sup>31</sup> In addition, Auto Innovators’ approach provides

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<sup>27</sup> Vermont Department of Environmental Conservation, “ZEV Credits.” *Website*. Found at [https://dec.vermont.gov/air-quality/mobile-sources/zev/zev-credits#:~:text=Manufacturer%202019%20ZEV%20Credit%20Balances,credits%20based%20on%20vehicle%20type.&text=The%20credits%20are%20in%20units,NMOG\)%20converted%20to%20ZEV%20Credits](https://dec.vermont.gov/air-quality/mobile-sources/zev/zev-credits#:~:text=Manufacturer%202019%20ZEV%20Credit%20Balances,credits%20based%20on%20vehicle%20type.&text=The%20credits%20are%20in%20units,NMOG)%20converted%20to%20ZEV%20Credits) (last accessed Mar. 18, 2021).

<sup>28</sup> New York Department of Environmental Conservation, “Light-Duty Low and Zero Emission Vehicles.” *Website*. <https://www.dec.ny.gov/chemical/8575.html> (last accessed Mar. 18, 2021).

<sup>29</sup> Oregon Department of Environmental Quality (“OR DEQ”). “2018 Oregon ZEV Credit Balances.” Found at: <https://www.oregon.gov/deq/aq/Documents/ZEVcredit2018.pdf> (last accessed Mar. 18, 2021). And, OR DEQ. “2017 Oregon ZEV Credit Balances.” Found at: <https://www.oregon.gov/deq/FilterDocs/zevcredit2017.pdf> (last accessed Mar. 18, 2021).

<sup>30</sup> MPCA Second Initial Response, at 5 (Mar. 15, 2021).

<sup>31</sup> Written comments from Alyssa Tsuchiya, Union of Concerned Scientists, at 6 (Mar. 15, 2021).

automakers with additional certainty and thus ensure the long-term feasibility, and durability, of Minnesota's ZEV program.

Auto Innovators' automakers are looking to provide a pathway for success in Minnesota. Commenters from environmental organizations are clear in their goals – they want more EVs in Minnesota. These groups, however, do not have to comply with the requirements and do not fully comprehend the challenges involved.<sup>32</sup> Auto Innovators' automakers must comply with the ZEV requirements, and thus, we are proposing an approach that will meet the goal for more EVs, while also providing needed compliance flexibility.

***B. CONSIDERATION OF CALIFORNIA'S INTENDED FUTURE ZEV STANDARDS IS NECESSARY***

The uncertainty and challenges of complying with the ZEV mandate at implementation are significant and warrant an approach with early action credits and capped usage on proportional credit banks.<sup>33</sup> This uncertainty demonstrates a clear defect in the MPCA's proposed rules. Similarly, this same approach is appropriate when considering future ZEV standards. While the MPCA has clearly stated its rulemaking efforts cannot consider future, unknown standards, there is more than adequate information to guide decision-making now. As it stands, the MPCA is willing to move forward on regulations without verified knowledge that the California waiver for the ZEV mandate, and greenhouse gas ("GHG") standards, will be approved, but the MPCA and

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<sup>32</sup> Tesla and Rivian also oppose any allotment or proportional credit banks in any form. These automakers (one of which has not yet begun sales and distribution of their EV products) have drastically different ZEV compliance strategies since they solely manufacture and sell EVs. Every vehicle they sell produces ZEV credits and does not have to take a larger fleet of more diverse powertrains into account.

<sup>33</sup> Given that capped usage of proportional credits are a more robust version of a one-time allotment, better aligned to automakers' progress to date, and would provide additional regulatory assurances to the MPCA and to automakers (while reducing programmatic costs, as noted in Auto Innovators' written comments on Colorado's adoption of the approach, at 25), Auto Innovators believes capped usage of proportional credits could be easily incorporated into the MPCA's regulation under the current APA process. See, Minn. Stat. §§ 14.15 and 14.16; Minn. R. 1400.2100 and 1400.2240.

other commenters too easily dismiss any speculation that the federal GHG and fuel economy standards will be increased or that CARB will set a path to 100% EVs by 2035.

To quickly review these three expected, upcoming regulatory events:

- California currently does not have a waiver for its GHG or ZEV standards. The Biden Administration has announced its intent, via an Executive Order,<sup>34</sup> that the EPA and NHTSA will take action to reconsider the waiver and preemption, respectively, by April. Both agencies have yet to take action, and neither agency has announced intent about what it will do or exactly when in April that action will occur. Therefore, under the logic of MPCA's and other commenters' points that any future actions are speculative, any assertion that California's waiver will be reconsidered or approved is equally speculative. (note, just as Auto Innovators believes that action will be taken on the EPA on its GHG standards and by California on its future ZEV standards, we also believe there will be action to reconsider the waiver; the expectations regarding federal GHG standards and California ZEV standards are addressed in the following two bullets.)
- Under the same Executive Order, the Biden Administration has directed EPA and NHTSA to revise the SAFE Part 2 GHG and fuel economy standards and to act by July. Here, Auto Innovators has shared our point of view that the standards will be revised and increased. Yet, several commenters have rejected this point as speculative since it has not occurred. We see no reason this expectation, based on

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<sup>34</sup> Biden Administration. "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." (Jan. 21, 2021). Found at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>.

the publicly announced Executive Order, is any different than the assertion that California will have its waiver reconsidered and approved.

- California has publicly announced plans to conduct the Advanced Clean Cars 2 rulemaking, and for several years now, has released preliminary modeling and messaging that the ZEV standards will need to reach 100% to meet the state’s climate goals, and that existing ZEV credit banks will be addressed.<sup>35</sup> Further, the Governor has specifically directed CARB to set rules that achieve 100% EVs by 2035.<sup>36</sup> While these rules are not yet proposed or promulgated, the direction is clear. Auto Innovators only asks that the MPCA recognize that the ZEV rules will be changed and are expected to ramp up (significantly). Under this well-informed context, Auto Innovators’ recommended approach for capped usage of proportional credits ensures Minnesota is prepared to comply with the current standards, and to be no different than California when the rules are revised. Auto Innovators’ recommended approach prepares Minnesota for the long-term realities of the ZEV mandate.

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<sup>35</sup>CARB. “Advanced Clean Cars II Regulations, Informational Update.” *Presentation*, at 12. (May 28, 2020). Found at: <https://ww3.arb.ca.gov/board/books/2020/052820/20-5-3pres.pdf> (last accessed Mar. 18, 2021).

<sup>36</sup> Office of Governor Newsom. “Governor Newsom Announces California Will Phase Out Gasoline-Powered Cars & Drastically Reduce Demand for Fossil Fuel in California’s Fight Against Climate Change.” *Press Release*, 23-Sep 2020. Found at: <https://www.gov.ca.gov/2020/09/23/governor-newsom-announces-california-will-phase-out-gasoline-powered-cars-drastically-reduce-demand-for-fossil-fuel-in-californias-fight-against-climate-change/>.

### III. POINTS RAISED RELATING TO LEGAL AUTHORITY & REQUIREMENTS

Other commenters raised a handful of legal issues, including those related to the Clean Air Act’s “identity” requirement and the need for California to have a Clean Air Act waiver in order to promulgate ZEV standards. We respond to those points below.

#### ***A. THE CLEAN AIR ACT’S IDENTITY REQUIREMENT***

One commenter argues that “the [Clean Air Act’s] identity requirement pertains only to the adoption of California’s standards . . . the Alliance’s assertion seemingly conflates the differences between the identity of standards and provisions for enforcement.”<sup>37</sup> While we agree that initial credit banks are part of the enforcement element of the ZEV standards and thus are at the discretion of the states, consideration of the “standards” and development of crediting mechanisms must necessarily evaluate effective stringency to ensure that the Clean Air Act is not violated.

As a reminder, the Clean Air Act requires that a state adopting a California emissions program under Section 177 of the Clean Air Act adopt standards that “are identical to the California standards for which a waiver has been granted for that model year,” and that in doing so does not have the effect of creating a requirement to build a “third car” not otherwise sold in California or elsewhere in the country in order to meet the Section 177 state standards.<sup>38</sup>

The rationale behind these provisions is that an automaker’s compliance obligations in a Section 177 state should be consistent with its compliance obligations in California. ***Tesla’s myopic view of the identity provision would lead to an absurd result where an automaker’s ZEV compliance obligations in Minnesota are twice its obligations in California for a given***

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<sup>37</sup> Written comments from Thad Kurowski, Tesla, at 7-8 (Mar. 15, 2021).

<sup>38</sup> 42 U.S.C. § 7507.

*model year. That is because companies are starting off in Minnesota with significant compliance deficits relative to California. Because of these credit banks in California (and the absence of them in the MPCA's proposal), manufacturers have to sell vastly more EVs in Minnesota than they do in California in order to meet what should be "identical" standards.*

Failing to consider the effective stringency of the standards also risks violating the "third car" principle. The sales of any given vehicle are limited by supply and demand economics. Beyond a certain point, simply supplying more of the same vehicle to a given market such as Minnesota will not result in continued increases in sales regardless of advertising, pricing, or other manufacturer initiatives. (For example, regardless of the number of sedans supplied to Minnesota, only a certain percentage of Minnesotans will choose to buy sedans.) If, because of Minnesota's lack of action to create a sales requirement proportional to that of California's, a manufacturer is required to introduce an additional EV model(s) to meet the proportionally higher ZEV requirements in Minnesota, the effect is a requirement for the creation of a "third vehicle."

Additionally, the credit banks in California inform compliance planning: if Manufacturer A plans to end a specific EV model in one MY, but the replacement vehicle will not be available for two more years, in California (and other states) that manufacturer might have built up two years' worth of credits in its ZEV credit bank in order to 'weather' the years during which it won't have an EV model available. However, if a new state's ZEV mandate becomes effective during that time, and the new state does not grant proportional credits with respect to the amount of ZEV credits states have in California, Manufacturer A would not be able to comply with the ZEV mandate in that new state; rather, the manufacturer would have to develop a "third car." This is exactly the sort of problem that could arise when a state like Minnesota joins the California ZEV mandate mid-stream without recognizing the status of the program in California.

Clearly, the EPA understands that these sorts of outcomes were not intended. As cited in our main comments, the EPA has repeatedly noted that state adoption of California’s standards “*should not place an undue burden on the vehicle manufacturers.*”<sup>39</sup> It is the responsibility of Minnesota, in developing its ZEV program, to ensure that the program does not present an undue burden to manufacturers and that operation of its standards and program do not require greater sales of ZEVs than does California. As Auto Innovators previously suggested, its proposal for proportional credits would do this.

### ***B. THE CLEAN AIR ACT WAIVER***

Multiple parties have also argued that California need not have a waiver from EPA for Minnesota to adopt the ZEV mandate.

This position is *in direct contravention of the text of the Clean Air Act*. Section 209(a) clearly says: “No State or any political subdivision thereof shall ***adopt*** or attempt to enforce any standard relating to the control of emissions from new motor vehicles or motor vehicle engines subject to this part.”<sup>40</sup> Section 209(b) allowing California to promulgate its own standard functions as an *exception* to the prohibition, and Section 177 for other states thus also functions as an exception to the prohibition.<sup>41</sup> Thus, states are generally ***prohibited from adopting*** or enforcing standards outside of the federal standards, except for California under the waiver provisions of Section 209(b) of the Clean Air Act. By its very terms, Section 177 comes into play only where a state seeks to adopt and enforce emission “standards [that] are identical to the California standards for which a waiver has been granted for such model year.”<sup>42</sup> Presently, California does not

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<sup>39</sup> 78 Fed. Reg. 2112, 2143 (Jan. 9, 2013).

<sup>40</sup> 42 U.S.C. § 7543(a).

<sup>41</sup> 42 U.S.C. §§ 7507, 7543(a).

<sup>42</sup> *Id.*

currently have a waiver for its ZEV mandate. Since there is currently no waiver for the California ZEV regulations at issue here, Section 177 is inapplicable, and this rulemaking is therefore governed by the prohibition in Section 209(a) that Minnesota may not “adopt or attempt to enforce” the regulations. To be clear about what MPCA is proposing to do: ***Minnesota plans to adopt the ZEV standards now***, but MPCA’s proposed language attempting to address the above concern states that these adopted standards will only become *effective* once California receives its waiver. The delay of the effective date of the regulations certainly ensures that MPCA will not “enforce” the standards in the way that the Clean Air Act prohibits; however, the *adoption* of the standards still plainly violates the Clean Air Act.

Several parties have cited a non-precedential decision from more than 25 years ago<sup>43</sup> in support of MPCA’s action here.<sup>44</sup> The decision spent substantial time analyzing the language in Section 177, which does permit a qualifying state to “adopt and enforce” standards such as the ZEV standard; however, the court failed to analyze the central and plain prohibition on “adopt[ing] *or* enforc[ing]” in Section 209(a) to which Section 177 is an exception.<sup>45</sup>

Some commenters also raise the issue of the two-year lead time requirement. We agree that Section 177 of the Clean Air Act requires that a Section 177 state “adopt such standards at least two years before commencement of such model year.”<sup>46</sup> However, as explained above, the text of Section 209(a) makes clear that a Section 177 state cannot formally *adopt* the standards unless and until California has a waiver for those standards.<sup>47</sup>

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<sup>43</sup> *Motor Vehicle Mfrs. Ass’n v. New York State Dept. of Env. Cons.*, 17 F. 3d 521 (2d Cir. 1994).

<sup>44</sup> See Written comments from Fresh Energy, Minnesota Center for Environmental Advocacy, NRDC, and Sierra Club, at 7-10 (Mar. 15, 2021).

<sup>45</sup> See 17 F. 3d at 526-528, 533; see also 42 U.S.C. §§ 7507, 7543(a) (emphasis added).

<sup>46</sup> 42 U.S.C. § 7507.

<sup>47</sup> 42 U.S.C. § 7543(a).

### ***C. MPCA'S AUTHORITY UNDER STATE LAW***

Many commenters stated that the MPCA has “clear,” “unquestionable,” and unfettered authority to promulgate the Clean Car Rules. Perhaps the assumptions and arguments of these commenters would be marginally better supported if only Minnesota law was at issue. Of course, and as detailed above, Minnesota requires the underlying authority provided by the Clean Air Act, which the MPCA plainly lacks. This is a notable defect, and the MPCA’s proposed rulemaking should not be allowed to proceed.

Indeed, these statements from numerous commenters demonstrate a fundamental misunderstanding that an agency rulemaking is not authorized and may not proceed if the proposed rule *exceeds the agency’s authority as set forth in its enabling legislation or other applicable law*.<sup>48</sup> Here, the “other applicable law,” which controls this entire proceeding, is the Clean Air Act.

Without a valid waiver pursuant to the Clean Air Act, Minnesota’s Low Emission Vehicle (“LEV”) and ZEV standards plainly go beyond what is allowed by the MPCA’s existing authority given to it by the Minnesota Legislature under Minnesota Statutes Chapters 14 and 116, as well as the clear limitations placed on it under the federal Clean Air Act, as described above. Reviewing courts will declare a rule invalid if the rule “exceeds the statutory authority of the agency.”<sup>49</sup> Attempting to promulgate a rule without the underlying authority constitutes perhaps the purest example of an agency exceeding its authority. Indeed, it is the federal Clean Air Act – and that

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<sup>48</sup> Minn. R. 1400.2100.

<sup>49</sup> Minn. Stat. § 14.45; *see also*, See City of Morton v. Minn. Pollution Control Agency, 437 N.W.2d 741, 746 (Minn. Ct. App. 1989) (“An administrative agency exceeds its statutory authority when it promulgates a rule inconsistent with the agency’s enabling legislation.”); *see also* Stasny by Stasny v. Minnesota Dep’t of Commerce, 474 N.W.2d 195, 198 (Minn. Ct. App. 1991) (rule excluding an individual from the right to convert to an individual policy when an insurance provider terminates group health coverage ruled invalid because it was inconsistent with the express language of the enabling authority and because it conflicts with federal law prohibiting discrimination in the Medicare Social Security Act).

Act alone – that provides states like Minnesota and agencies like the MPCA with the authority to promulgate the Clean Car Rules. And, as described above, because MPCA does not have authority under federal law to adopt the ZEV mandate, MPCA therefore also does not have authority under Minnesota law.

***D. REASONABLENESS REQUIREMENT UNDER MINNESOTA STATE LAW***

Many commenters seem to have overlooked that the MPCA may only propose “reasonable rules,” and that the MPCA’s proposed rules do not comply with requirements under Minnesota law.<sup>50</sup> A rule is reasonable if it is rationally related to the end sought to be achieved by the underlying statute, which must be demonstrated in the record,<sup>51</sup> and unreasonable rules are invalid.<sup>52</sup> Minnesota case law has likened an unreasonable rule to one that is arbitrary and capricious.<sup>53</sup>

Not only must rules be reasonable to comply with Minnesota law, but in this matter, they must comply with Minnesota Statutes section 116.07, subdivision 2(f)(1)(i), which requires the MPCA to evaluate the consistency of the Clean Cars Rules in relation to federal standards, *i.e.*, those promulgated under the Clean Air Act.

The fundamental error in the MPCA’s justification for the reasonableness of this rulemaking is the notion that a Minnesota ZEV mandate will be successful by itself in spurring sales of these vehicles. This is factually incorrect and ignores the critical aspects of the feasibility and reasonableness of the standards.

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<sup>50</sup> Chapter 22.2.1, “Nature of the Factual Presentation in Support of Need and Reasonableness,” Minn. Admin. Proc. (George A Beck and Mehmet Konar-Steenberg, eds. 3d ed. 2014).

<sup>51</sup> *Mammenga v. Dep’t of Human Servs.*, 442 N.W.2d 786, 789-90 (Minn. 1989) (a rule is unreasonable and invalid where it fails to comport with substantive due process because it is not rationally related to the objective sought to be achieved); *see also* Minn. Stat. § 14.26.

<sup>52</sup> *Juster Bros. v. Christgau*, 7 N.W.2d 501, 507 (1943).

<sup>53</sup> *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 246 (Minn. 1984).

Pursuant to the proposed rules, sales of EVs must increase 450% from current levels (assuming the ZEV rule is implemented in MY 2025). In 2019, about 3,100 EVs were sold in Minnesota, and in 2020, about 3,200 EVs were sold.<sup>54</sup> This one-year increase of 4% does not come close to closing the gap with the 450% increase to about 17,000 EVs that will be required to be sold in MY 2025. Moreover, sales must increase 100% every year between now and MY 2025 in order to reach the levels of EVs required by the mandate. As demonstrated by the reference case and models detailed in Auto Innovators' initial comments and legal memorandum submitted on March 15, 2021, Minnesota's EV market will need to substantially outperform California's EV market in order to meet the standards set forth by the proposed rules. This outcome seems highly unlikely in light of the lack of supportive policies throughout the State and current adoption rate by Minnesota consumers.

Most importantly, a suite of complementary support measures for EVs must be developed to boost consumer demand prior to adoption of the ZEV mandate. At a minimum, this suite must include the development of purchase incentives, significant investment in electric charging and hydrogen fueling stations, education and awareness programs aimed at consumers, and collaboration with utilities and other stakeholders to make sure that customers can easily and cost-effectively "refuel" their EVs at home, work, and elsewhere.

Moreover, the additional assumptions made by the MPCA and many commenters relating to the impact, or perceived lack thereof, on the manufacturers is unreasonable. Efforts by the MPCA to directly regulate a large industry, such as the automobile industry, require more

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<sup>54</sup> IHS Markit, Vehicle Registration Data for calendar years 2019 and 2020. See also Alliance for Automotive Innovation's "Electric Vehicle Sales Dashboard" found at: <https://www.autosinnovate.org/resources/electric-vehicle-sales-dashboard>. Note, data for completed calendar year 2020 had not yet been updated on this website as of March 4, 2020 but should be available in the near future.

comprehensive, data-driven, and responsible due diligence of the impact of the Clean Car Rules. Instead, the MPCA’s SONAR concludes without support that there are “no costs associated with research and development of new vehicles,” there may only be “marginal costs in staff time,” it is “not anticipated” that more staff will be required, and advertising “may” need to be increased, but that any increases can assumed to be shifted from previous advertising expenditures.<sup>55</sup> The SONAR also opines that “[s]ince the proposed rule produces a net benefit and does not directly require Minnesotans to purchase an EV,<sup>56</sup> the ZEV standard is not overly costly or intrusive.”<sup>57</sup> The SONAR goes on to state that it is “assumed” that vehicle technology and compliance costs will be passed to the consumer.<sup>58</sup>

Respectfully, the opinions and conclusions of the MPCA in the SONAR are without support by objective data or evidence. Without this information, the Clean Car Rules are unreasonable because they fail to take into consideration the impact of the rules on the directly regulated industry, *i.e.*, auto manufacturers.

#### IV. CONCLUSION

Auto Innovators reiterates that the recommended approach we provided to the MPCA prior to the rules being issued, as well as in our comments, remains the best way to balance automakers’ compliance needs and the MPCA’s and Minnesota’s goals to expand electrification in the state. Minnesota’s EV market, at 1.3% of sales in 2019 and 1.6% in 2020, trails those of existing ZEV states and is also well behind the national average for EV market share. Therefore, the MPCA will

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<sup>55</sup> SONAR, p. 68.

<sup>56</sup> We note that if Minnesotans do not purchase EVs in the quantities required by the ZEV mandate, manufacturers will either be non-compliant or need to take additional action, e.g., selling EVs at a loss or buying credits.

<sup>57</sup> SONAR, p. 67.

<sup>58</sup> SONAR, p. 68.

require a greater EV sales rate increase in the preceding years to enter the ZEV program at the most stringent level of the requirements.

The issues raised by other commenters regarding the MPCA's one-time allotment of credits and/or regarding Auto Innovators' recommended approach do not take into account the challenges of increasing EVs in the Minnesota market leading up to implementation of the ZEV program, the strong regulatory precedent and proven successful implementation for such an approach, or the likelihood that upcoming changes to the ZEV program will significantly increase stringency. At the same time, there remains significant uncertainty regarding how customer adoption will grow and whether the State will commit the necessary public resources to support the increase in EV volumes that the ZEV mandate will require. Proportional credit banks, with a cap on usage, put one critical element of Minnesota's new ZEV program in the same place as California's long-standing ZEV program. The increase in sales and the commitment of state funding for incentives, infrastructure and supportive measures must still happen in parallel, and neither is guaranteed even with the ZEV mandate in place.

Finally, the legal issues must be fully considered. In ensuring that the Clean Air Act's "identity" requirement is met, the MPCA must take into account the functional stringency of the ZEV program. Additionally, genuine concerns exist about whether Minnesota has the authority under the Clean Air Act to adopt the Clean Cars Rules—in fact, we find that the statutory language makes it clear that Minnesota does not, because California currently does not have a waiver for those regulations. The MPCA's Clean Cars Rules must comply with all applicable state and federal laws.

It has always been, and remains, Auto Innovators' goal to work with the state to expand electrification. While we remain opposed to mandates, Auto Innovators works with states to

develop a market for EVs and make sure the appropriate regulatory elements are present, based on regulatory precedent and legal and statutory requirements, to lay the foundation for success.

With 130 EV models expected by 2025, Minnesota's concerns about production capacity and range of product offerings will no longer exist. Instead of being driven by requirements to sell EVs in any single location, regardless of customer demand, EVs should be able to be freely sold across the country, with states and markets that have committed to growing infrastructure and customer-focused efforts.

Respectfully submitted,

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