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BEFORE THE AIR RESOURCES BOARD

**COMMENTS OF
THE ALLIANCE OF AUTOMOBILE MANUFACTURERS (THE ALLIANCE)
(LEGAL APPENDIX)**

**NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO CALIFORNIA'S
EMISSION WARRANTY INFORMATION REPORTING AND RECALL
REGULATIONS AND EMISSION TEST PROCEDURES (RELEASED OCTOBER 10,
2006)**

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Before The Air Resources Board

Legal Appendix for Comments Of The Alliance Of Automobile Manufacturers (Alliance) on

NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO CALIFORNIA'S EMISSION WARRANTY INFORMATION REPORTING AND RECALL REGULATIONS AND EMISSION TEST PROCEDURES RELEASED OCTOBER 10, 2006)

I. INTRODUCTION

The Alliance of Automobile Manufacturers ("Alliance") respectfully submits these legal comments to explain why the draft emission warranty information reporting and recall regulations and emission test procedures ("Proposed Rule") released by Air Resources Board ("ARB") staff on October 10, 2006 (*see* <<<http://www.arb.ca.gov/regact/recall06/rnotice.pdf>>>) are unlawful as a matter both of limitations on ARB's substantive authority, and of various procedural defects in the Proposed Rule itself, including in its accompanying Initial Statement of Reasons ("ISOR").

On September 22, 2006, the Alliance sent a letter to staff explaining why the original proposal of the staff in April 2006 was unlawful. Many of the reasons provided there remain relevant to why the current and formal October 2006 proposal issued is also unlawful. And for that reason, the Alliance designates that letter as Attachment A to this Legal Appendix, incorporating it by reference. *See* Letter of Steven P. Douglas, Alliance, to Kirk Oliver, ARB Staff, Re Possible Amendments to the Procedures for Reporting Failures of Emission-Related Components (Sept. 22, 2006).

Additionally, the Alliance sent letters to the Executive Officer on October 30, 2006 and November 28, 2006 explaining various procedural and other flaws in the October 2006 Proposed Rule. The Alliance received no response to those letters, and while we have already electronically placed them into the docket for the Proposed Rule, we incorporate them by reference here as Attachments B and C, respectively. *See* Letters of Julie C. Becker, Alliance, to Catherine Witherspoon, ARB Executive Officer (Oct. 30, 2006) & (Nov. 28, 2006). To avoid redundancy, we do not restate arguments in this Legal Appendix made in Attachments A-C when they remain relevant to the flaws in the Proposed Rule, but simply cross-reference the appropriate place in those Attachments where the relevant arguments were explained in greater detail.

Therefore, in accordance with California administrative law, there can be no dispute now that all attachments to this Legal Appendix are part of the administrative record, and must be considered by the Board along with this Legal Appendix. As an initial matter, we note that Attachment A, which we incorporate by reference, describes how the status quo regulatory

system for defect and warranty reporting operates. See Attachment A (Legal Memorandum) at 1-4. The legal analysis below often makes comparisons to that existing regulatory baseline.

II. EXECUTIVE SUMMARY

The numerous errors of law made in the hastily prepared Proposed Rule are too numerous to summarize in their entirety in a few paragraphs, so it is possible to briefly describe only the highlights without simply setting forth a "laundry list."

First, the central provision cited to provide authority for the Proposed Rule -- the Board's ability to set "test procedures" -- does nothing of the kind. As staff, Board members, and industry are well aware, "test procedures" are *methods* for determining whether emissions standards have been complied with. They provide objective, repeatable, *scientific* means for coming to uncontested conclusions about the level of real-world emissions from particular vehicles that aim to be as reliable as any human-designed test can be. By contrast, ARB's substantive authority is to set emissions standards. Here, staff proposes to call for an extraordinarily high level of product reliability -- not 96% or greater for an entire emissions system, but 96% or greater for *every individual emissions-related component*, from the most significant down to the most trivial. That creates a level of *system* reliability orders of a magnitude beyond 96%. The difficulty of what is being demanded, if nothing else, marks the Proposed Rule's reliability standard as substantive, and thus as neither a "test" nor a "procedure." Staff should not be attempting to cloak a radical new way of regulating to achieve emissions reductions in the clothing of "test procedures."

Second, staff proposes to abandon the core approach to emissions control -- setting emissions standards -- by venturing into uncharted territory of instead erecting a draconian reliability standard for every emissions-related part. This ignores decades of advances in economic and policy analysis in this area establishing that the costs and benefits of environmental regulation are maximized if emissions controls are adopted in the form of emissions standards (a type of "performance standard"), and not in a command-and-control form (also known in California law as "prescriptive standards"). Not only has staff failed to assess whether it could accomplish the same goals by means of a performance standard, but staff has failed to apprehend that the Board lacks any authority to establish defect and warranty reporting regulations that ignore emissions standards. Under the governing law, it is simply insufficient for staff to claim that it may create any defect and warranty system of regulation it desires as long as there "could be" an effect on emissions from any defect proposed to be regulated, without attempting to ascertain what that effect might be and whether it would constitute a violation of emissions standards. Moreover, contrary to its past statements, the staff now proposes to seize control of the "emissions headroom" manufacturers build into their vehicles -- the margin between vehicles as certified and the applicable emissions standard. That approach threatens far more than the viability of this single Proposed Rule, since it would undermine the technological feasibility findings of numerous past rulemakings premised precisely on allowing for adequate "headroom."

Third, contrary to the Health & Safety Code, staff proposes here to grant itself the power to order extended warranties, even though it directly concedes it lacks that authority under the specific warranty statutes, because those statutes fix warranty periods the Board is not at liberty

to alter. Instead, ARB claims authority to issue such warranties as other "corrective action" pursuant to Health & Safety Code § 43105. But Section 43105 merely indicates that manufacturers can avert recalls by engaging in other forms of corrective action. Thus, Section 43105 confers no remedial authority on ARB to set extended warranties, and the claim to the contrary is untenable. Moreover, staff not only claims the power to order extended warranties, but to order extended warranties for periods *beyond useful life*. That approach independently violates numerous other provisions of the Health & Safety Code. Finally, after ignoring the plain text of Section 43105, which does not confer the claimed remedial authority on ARB, staff compounds its error by returning to textualism and only then applying the statute's terms to preclude granting a hearing to manufacturers in connection with extended-warranty orders, because Section 43105 requires hearings only for recall orders. That is a bizarre way to interpret the statute, where the much more natural (and indeed only possible) conclusion is that no hearing right was granted to challenge the remedy at issue because no power to order that remedy was granted in the first place. Hence, it was unnecessary in Section 43105 for the Legislature to specify that hearings were required for extended-warranty orders.

Fourth, staff proposes to tie the defect and warranty reporting system to initial vehicle certification by requiring manufacturers to make a statement that vehicles in use will never exceed a 4% "true" defect level. ARB has no power to require such an illogical statement that requires manufacturers to predict the future perfectly, and in fact is just a disguised attempt to make manufacturers insurers for any defect that arises anywhere in connection with the emissions system, no matter how unforeseeable the defect.

Fifth, the Proposed Rule is already procedurally defective because staff has failed to analyze (1) a proposed alternative to this Rule submitted by the Alliance during the workshop process, (2) a performance standard alternative, or (3) the April 2006 proposed alternative staff itself originally released in a manufacturer mailout. The Alliance brought this to ARB's attention more than one month ago, asking for a response to the point that such an ostrich-like approach to relevant alternatives clearly violates the California Administrative Procedure Act. Yet staff has nowhere responded, despite repeated requests. Apparently, staff intends to argue that its obligation to consider alternatives comes into effect only at the final-rule stage and not at the proposed rule (or ISOR) stage. That is plainly contrary to the text of the Administrative Procedure Act, and rightly so because it "sandbags" regulated parties (and other members of the public), by depriving them of the ability to comment on how staff has handled its analysis of potential alternatives.

Sixth, the Proposed Rule on its face violates the careful and numerous requirements in the Administrative Procedure Act (and elsewhere in administrative law) for ARB to assess the costs and emissions benefits of its actions. Regarding costs, staff simply argues that the Proposed Rule will be costless and/or save manufacturers money on net. Such a claim is facially inaccurate. The extreme product reliability standards and Spartan enforcement provisions here would clearly cost manufacturers extensive sums. It is indisputable that manufacturers have spent multiple millions of dollars in complying with the current defect and warranty reporting system, especially because the defects in question are typically unforeseeable. This Proposed Rule is thus at serious risk of being returned by the Office of Administrative Law on the simplest of grounds -- no realistic or good-faith attempt to assess cost was even tried here. And regarding

emissions benefits -- the principal benefit that this Proposed Rule claims to achieve -- staff attempts no quantification of such benefits at all, arguing that any attempt to do so would be "speculative." Having never attempted to design a model that could predict such emissions benefits, however (or costs for that matter), staff is in no position to argue that attempting to do so is infeasible. In short, staff's approach to quantifying emissions reductions has been a complete abdication of its duty to assess emissions impacts under its organic statutes and under the Administrative Procedure Act. The way the regulatory system is supposed to work is that staff is supposed to analyze the issues of cost and emissions benefit first and then the regulated community is supposed to review what staff has done and comment accordingly. Here, the first step was not attempted, thus making the second step impossible. Nor could the second step have been independently performed by industry here in the unreasonably short comment period available, especially where the direction of this Proposed Rule could not have been predicted from the less ambitious proposal in the April 2006 Mailout.

Seventh, staff here is actually proposing to amend *all* in-use regulatory programs, without even attempting an explanation for why this is necessary. The April 2006 Mailout only provided notice of changes to the Article 2.4 defect and warranty reporting system. The Proposed Rule goes much farther than that, and hence is arbitrary and capricious.

Eighth, contrary to its own evidence that it has achieved numerous recalls and voluntary extended warranties from manufacturers using the *status quo* defect and warranty reporting system, staff argues that the present system is "broken" on the basis of a mere two isolated examples. Even if such examples were apposite, one of which is plainly not (and the other of which is being addressed in separate manufacturer comments), such situations would be the very exceptions which prove the rule that the current system is *not* in need of radical regulatory overhaul.

Ninth, the Proposed Rule is completely at odds with due process. It would eliminate a fair system in which manufacturers can introduce any relevant evidence in their defense -- especially evidence that emissions standards have not been violated and evidence that proposed remedies would represent unwarranted burdens. It makes warranty reports about the number of defects claims filed and/or verified the sole criteria, other than an extensively broadened sphere of Executive Officer discretion, for issuing highly costly remedies. Manufacturers are not even given a process to contest abuses of the drastically expanded enforcement discretion of the Executive Officer. No such approach comports with federal or California due process.

Overall, the Proposed Rule has all of the hallmarks of an initiative that has not been sufficiently analyzed, sufficiently vetted, or considered calmly. The 1988 rulemaking record in this area, by contrast, shows the Board's patient approach and its willingness to listen to manufacturers' policy and legal objections, and to work out a resolution acceptable to all sides that let that rulemaking go into effect without legal challenge. There are simply too many legal errors in the Proposed Rule for the Board to approve its adoption. Instead, staff should be instructed to return to working with industry, and this Proposed Rule should be withdrawn, just as occurred the last time staff attempted to precipitously amend the regulations in the area.

III. LEGAL DEFECTS IN MAKING THE 4% "TRUE" DEFECT LEVEL AN IRREBUTABLE PRODUCT RELIABILITY STANDARD

A. ARB LACKS AUTHORITY TO ADOPT THE 4% STANDARD UNDER ITS POWER TO DEFINE "TEST PROCEDURES."

1. Staff's Proposed Approach to Adopt Substantive Product Reliability Standards as "Test Procedures"

The ISOR states that the Proposed Rule would mean that "once a group of vehicles exceeds a valid warranty claim rate threshold of four percent or 50 claims (an unscreened ten percent warranty rate or 100 claims), whichever is greater, it would be considered to be a systemic defect and a violation of *test procedures* and *possibly* emission standards. The manufacturer would be required to implement a recall and/or other corrective action, as specified." ISOR at iii (emphasis added). Thus, the Proposed Rule creates a system of automatic enforcement that makes the level of warranty claims the *only determinant* of whether corrective action will be undertaken in the discretion of the Executive Officer. "The staff proposes to . . . establish[] that when defects reported in the warranty process reach a level of four percent or 50 (whichever is greater) in any engine family or test group, the Executive Officer may order that the affected vehicle population be recalled or subjected to corrective action." *Id.* at 18-19. Hence, the Proposed Rule disclaims any need on ARB's behalf, before corrective action may be ordered, to prove a violation of emissions standards, conceding that exceedances of those standards are only "possible" outcomes when the 4% threshold is crossed.

Most importantly, the Proposed Rule rests on staff's claim that the new system for corrective action concerning defects falls under ARB's authority to define "test procedures." *See also id.* at 19 ("The proposed amendments would establish that excess warranty claims rates are violations of the durability requirements of ARB's test procedures."). This assertion of authority is neither lawful nor prudent.

Staff's view of ARB's "test procedures" authority is exceedingly broad: "Staff considers 'test procedures' to include all certification requirements [e.g., on-board diagnostic (OBD) system approval, actual exhaust and evaporative emissions testing to show compliance, durability demonstration of the emission control systems for the certified useful-life period, warranty and warranty reporting requirements, etc.]." ISOR at 1-2. Staff also illustrates its reading of ARB "test procedures" authority when it states that "an increase in emissions [could be] considered to be a violation of test procedures." *Id.* at 3. Even more directly, staff states that "[w]arranty reporting thresholds are linked to vehicle durability and can also be considered test procedures, the violation of which entitle ARB to order recall or other corrective action The staff proposes to make the warranty reporting thresholds part of existing test procedures, providing solid grounds for the ARB to order recall or other corrective action when a warranty reporting threshold is violated." *Id.* at 11.

In an attempt to explain why "test procedures" would embrace violating warranty reporting thresholds, staff argues:

The Health and Safety Code contains no definition of the term “test procedures” comparable to the definition it provides for “emission standards,” but the language of sections 43104 and 43105 suggests that “test procedures” means the test procedures that manufacturers must conduct to obtain ARB’s certification to sell their products in California. Health and Safety Code section 43104 provides, in pertinent part:

For the certification of new motor vehicles or new motor vehicle engines, the state board shall adopt, by regulation, test procedures and any other procedures necessary to determine whether the vehicles or engines are in compliance with the emissions standards established pursuant to Section 43101.

Id. In other words, the staff’s interpretation of “test procedures” equates to all requirements that must be met by manufacturers in order to obtain certification. Indeed, as noted above, on the very first page of the body of the ISOR, staff makes this point clear: “Staff considers ‘test procedures’ to include *all* certification requirements.” *Id.* at 1 (emphasis added).

Note the obvious point that a demonstration that vehicles meet emissions standards is the primary requirement that must be met at the time of certification. Hence, the Proposed Rule would obliterate the distinction between “emissions standards” and “test procedures.” Indeed, relying on its view of the onboard diagnostic system (“OBD”) regulations, staff argues that the OBD system, which by its very name indicates that it is designed to diagnose failures to meet emissions standards, constitutes an “emissions standard.” *See id.* at 12 & n.2 (“OBD systems . . . are themselves numerical, quantifiable emission standard[s].”). If substantive standards of product reliability may be fixed under the guise of setting “test procedures” (as staff would do in this Proposed Rule) and onboard *diagnostic* requirements can be established on the basis of a power to set “emissions standards,” then both of the terms “emissions standards” and “test procedures” are emptied of virtually all content. “Up” may be classified as “down,” “black” as “white,” and “substance” as “procedure,” and *vice versa*.

Thus, by staff’s view, ARB was not empowered to enact and enforce “emissions standards” and “test procedures” merely, but rather any policies that they desire that have a mere nexus to emissions. Indeed, even more than claiming that remarkable “mere-nexus” power, as staff makes clear by proposing to decouple the defect and warranty-reporting regulations from emissions standards, staff claims the power to regulate *even apart from demonstrating any effect on emissions*. *See id.* at 15 (“the failure of an emission-related part should be grounds for a recall, irrespective of whether the failure causes a quantifiable increase in tailpipe or evaporative emissions of the entire group of affected vehicles.”). The Legislature did not write the Health & Safety Code to grant ARB such broad and unconstrained power.

Another reason staff gives for effectively abolishing the distinction between emissions standards and test procedures for purposes of the defect and warranty reporting regulations is that it would be best to tie the defect and warranty reporting program to the durability portions of ARB’s general test procedures. “Since the thrust of the warranty reporting threshold is the durability of vehicles’ emission control systems, the durability portion of the test procedures is an entirely appropriate place to forge a link between the proposed warranty reporting and recall

amendments and the test procedures. Durability provisions exist in ARB's test procedures." *Id.* at 19; *see also id.* n.3.

But the durability provisions in ARB's test procedures are in fact true test procedures, not substantive emissions standards that are merely being labeled as test procedures for the purpose of improperly expanding ARB's authority to create substantive product reliability standards. *See* California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles (issued Aug. 4, 2005), *available at* <<http://www.arb.ca.gov/msprog/levprog/cleandoc/cleanLDTPs_GHG%209-233FINAL.pdf>>.

Essentially, these provisions of federal law ARB applies largely to incorporate what are plainly only test procedures and not substantive standards. *See id.* at F-1, G-1, *citing, e.g.*, 40 C.F.R. § 86.1820-01 ("Durability group determination"). Additionally, the linkage of ARB test procedures to federal test procedures makes limitations on federal authority regarding the dichotomy between emissions standards and test procedures particularly relevant. Provisions such as Section 86.1820-01 provide only a *method* by which durability will be tested, for instance specifying deterioration factors, methods for selecting vehicles, the type of evidence that will be required to demonstrate durability, and the like. The durability procedures to which staff proposes to "forge a link" are not substantive reliability standards. This makes it particularly inappropriate (and ironic) for staff to maintain that ARB possesses authority to adopt the Proposed Rule based on "the intent of the emission certification test procedures." ISOR, at 20; *see also id.* at 31 (referring to "the intentions . . . of the certification test procedures"). The intent of the emission certification test procedures is merely to provide a regularized, repeatable, and formalized set of steps and practices to measure whether emissions standards have been met, not to grant ARB unfettered authority to regulate in a substantive fashion by creating new regulatory requirements without regard to emissions impacts.

2. Explanation of Why Use of "Test Procedure" Authority Here Is Unlawful

a. Inconsistency with ARB's Own Past Interpretations

Staff fails to acknowledge that its new attempt to claim the authority to set a substantive product reliability standard is inconsistent with ARB's own past interpretations of its authority. The 1982 rulemaking record indicates that at that time the Board referred questions of legality for an advisory hearing by Deputy Executive Officer Gary Rubenstein. Mr. Rubenstein conducted such a hearing on behalf of the Executive Officer, and produced a hearing officer's report. In that report, later adopted by the Board as part of the 1982 version of the regulations at issue here, Mr. Rubenstein stated: "Staff feels that compliance with reporting requirements, as well as *actual test procedures*, is necessary to enable ARB to enforce California's standards." Executive Officer Hearing to Consider Proposed Changes to New Vehicle Compliance Regulations (Title 13) Regarding Enforcement Action, Violations and Penalties, at 4 (July 4, 1981) (emphasis added) [hereafter "1982 Hearing Officer Report"].

The Executive Officer and the Board therefore distinguished "actual test procedures" even from mere reporting obligations (which are clearly not substantive in nature). The full

context of the document is consistent with the Alliance's view that "test procedures" refers to methods to test compliance with "emissions standards," and not any other type of regulatory requirement. Additionally, the 1982 Hearing Officer Report makes clear in the statement quoted above that the purpose of "test procedures" is to enforce "emissions standards." Hence, staff's current interpretation of the term "emissions standards" is flawed, as is the attempt to decouple warranty reporting obligations and the violation thereof from the substantive emissions standards.

b. Contrary to the Legislature's Definition of "Test Procedures"

Staff asserts that the Health & Safety Code is silent on the meaning of the term "test procedures." Staff is wrong for the reasons we explain below. The Legislature did define "test procedures." Even were staff correct that no definition had been provided, however, that would not be a reason to conclude that staff could give whatever meaning it desired to the term. Words have meaning, and staff made no attempt to consider how the same term is used in the federal Clean Air Act and federal EPA implementing regulations from which it is plainly drawn, or even to consult dictionary definitions of the term "test procedures," or of the terms "test" or "procedure" in isolation. Had it done so, staff would have found that "procedure" is not substance.¹ However one approaches the issue (even from a non-technical perspective), ARB establishing a substantive product reliability target (the 4% defect rate or below) is not a "procedure."²

Moreover, silence by the Legislature does not equate to the conclusion that the Health & Safety Code is ambiguous and that ARB can interpret such language however it desires. See, e.g., *New Jersey v. New York*, 523 U.S. 767, 783 (1998); see also *id.* (Breyer, J., concurring) ("Justice SOUTER points out, ante, [page 783], n.6, silence is not ambiguity; silence means that ordinary background law applies . . ."); *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) ("This silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations.").

But quite apart from consulting background principles of law or dictionaries that might help to illuminate the term "test procedures," the California Legislature *actually* defined the term "test procedures" precisely and by way of statutory context. In Health & Safety Code § 43104, this definition is plain:

¹ See Black's Law Dictionary, at 1203-04 (6th ed. 1990) (defining "Procedure" as "[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product.").

² Any general dictionary can be consulted to see this point. The *Webster's II New College Dictionary*, for example, defines "procedure" to mean "[a] way of performing or effecting something." 881 (1999) (emphasis added). Establishing a reliability standard for emissions-related components on automobiles is not a "way" of performing the relevant thing -- attaining emissions standards; it is an independent end in itself. By contrast, "test procedures" properly interpreted are indeed a "way" of measuring compliance with a substantive emissions standard. There is no escaping that in the statutes the term "test procedures" is paired with the term "emissions standards" (or the like) and that it is a procedure designed as a way to attain that end alone.

For the certification of new motor vehicles or new motor vehicle engines, the state board shall adopt, by regulation, test procedures and any other procedures necessary to determine whether the vehicles or engines are in compliance with the emissions standards established pursuant to Section 43101. The state board shall base its test procedures on federal test procedures or on driving patterns typical in the urban areas of California.

It could not be clearer from Health & Safety Code § 43104 that the Legislature therein expressed its view of the meaning of the term "test procedures." Staff's view to the contrary, *see* ISOR at 11 ("The Health and Safety Code contains no definition of the term 'test procedures' comparable to the definition it provides for 'emission standards'"), appears to be rooted in the notion that if a definition fails to use the word "define" or "definition," then it is not a "comparable" definition. That kind of simplistic formalism makes no sense. Section 43104's meaning is clear. A test procedure is a procedure for performing a test. And the test in question is that "necessary to determine whether the vehicles or engines are in compliance with emissions standards established pursuant to Section 43101." In other words, "test procedures" are ancillary to substantive "emissions standards."³ Indeed, this obvious meaning of "test procedures" has been clear to federal and state regulators for years -- they are methods for measuring emissions, typically in a laboratory setting, such as, for example, requirements to use dynamometers, to use indolene fuel, and how to procure test vehicles. *See, e.g.,* Health & Safety Code § 43833(b) (referring to the Board's power to "engage independent laboratories to conduct such tests under test procedures specified by the state board.").

Test procedures are not, as staff maintains, any regulatory requirement that happens to have a nexus to certification, or any form of "test" that ARB might presently or in future require vehicles to meet. The ARB staff misconstrues the 1988 rulemaking history and argue that "an increase in emissions [could be and in 1988 was] considered to be a violation of test procedures," ISOR at 3, making the emissions increases relevant to emissions standards the mechanism for ensuring that test procedures are met. This stands the statutory scheme on its head. The statute authorizes the issuance of test procedures to measure whether emissions standards are met, and thus the purpose of test procedures is to ensure that emissions standards are met, not the reverse.

Furthermore, the tie to federal test procedures is clear and built right into the definition. Under the Clean Air Act, it is clear that a "test procedure" is for purposes of "determining whether motor vehicles under production actually conform to the standards pursuant to which the certificate of conformity was issued." *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1102 n.8 (D.C. Cir. 1979) (addressing EPA's powers and resolving a dispute over EPA's grant of a preemption waiver to the ARB).

³ This is why it is common to refer in the emissions area to the "associated test procedures." *See, e.g.,* 40 C.F.R. § 86.096-8, § 86.096-9; 13 C.C.R. § 1978.

"Test procedures" were established at the federal level to *constrain* agency authority in the emissions area, not to expand it. The evolution of the concept of "test procedures" makes this clear -- manufacturers held to a numeric emissions standards need clear, repeatable, and scientifically accurate methods by which they can measure their emissions. In short, valid measurement is the central reason why "test procedures" exist. See, e.g., *National Petrochem. Refiners Ass'n v. EPA*, 287 F.3d 1130, 1134 (D.C. Cir. 2002) (per curiam); *NRDC v. EPA*, 655 F.2d 318, 344 (D.C. Cir. 1981); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 623 (D.C. Cir. 1973); cf. *Public Citizen v. Steed*, 733 F.2d 93, 103 (D.C. Cir. 1984) (addressing "test procedures" in the auto safety area); *Chrysler Corp. v. Department of Transp.*, 472 F.2d 659, 675 (6th Cir. 1972) ("In the absence of objectively defined performance requirements and test procedures, a manufacturer has no assurance that his own test results will be duplicated in tests conducted by the Agency. Accordingly, such objective criteria are absolutely necessary so that the question of whether there is compliance with the standard can be answered by objective measurement and without recourse to any subjective determination.") (internal quotation marks omitted).

The California Legislature also used the term "test procedures" in numerous places other than Health & Safety Code § 43104, in ways that are fully consistent with the long-established and until-now undisputed meaning of the term.⁴ Section 43210 makes clear that "test procedures" are constrained to be repeatable. "If a motor vehicle does not meet the prescribed assembly line standards, the motor vehicle may be retested according to the official test procedures upon which original certification for that make and model vehicle was based." Of course, it would be nonsensical to talk about "retesting" on the basis of a requirement to ensure that future screened warranty claims do not exceed a 4% level. Such a 4% threshold is plainly a substantive reliability standard, and not a procedure for measuring compliance with a substantive standard that can be repeated to generate statistical results generating additional confidence.

Numerous other absurdities in the Legislature's contextual use of the term "testing procedure" would emerge if staff's proposed interpretation were correct. See, e.g., Health & Safety Code § 44012(h) ("The test procedures may authorize smog check stations to refuse the testing of a vehicle that would be unsafe to test, or that cannot physically be inspected, as specified by the department by regulation."). Obviously, it makes sense to allow laboratories to refuse to test dangerous vehicles or vehicles incapable of physical inspection. But it could never be unsafe to ARB agents to apply the substantive 4% defect threshold to vehicles, or impossible to do so on account of an inability to do a physical inspection.⁵ This is further evidence of the substantive nature of the 4% standard.

⁴ See, e.g., Health & Safety Code § 43105.5(a) (referring to "certifi[cation] in accordance with the test procedures adopted pursuant to Section 43104"), § 43208 (referring to "applicable certifying test procedure"), § 44096 (referring to "Test Procedures for Accrediting Emission Control Devices").

⁵ See also Health & Safety Code § 44013(b) (referring to "equipment" to be used in applying "test procedures"), § 43014(c) (same), § 43045.5(a)(3)(A) (same), § 44081(b)(3) (referring to "[p]rocedures for the testing of vehicles" occurring at facilities or stations), § 44104.5(b)(2) (referring to "measured emissions" determined by applying "test procedures").

Finally, as a matter of the background law that every court recognizes should be consulted to resolve disputes over definitions, all lawyers are familiar with the distinction between substance and procedure. An evidentiary statute is procedural, but a statute prescribing prohibited acts is substantive. A requirement that a pesticide not be adulterated is substantive, but a technique for determining whether the pesticide has been adulterated is procedural. And so on. See, e.g., *Application of Gault*, 387 U.S. 1, 71 (1967) ("The substantive-procedural dichotomy is, nonetheless, an indispensable tool of analysis . . ."). It is true that sometimes the line between substance and procedure can be difficult to discern. See, e.g., *Hambrech & Quist Venture Partners v. American Med. International, Inc.*, 38 Cal. App. 4th 1532, 1542 n.7 (2d Dist. 1995) ("Except at the extremes, the terms 'substance' and 'procedure' precisely define very little except a dichotomy . . ."). But the Proposed Rule poses an easy and "extreme" case, since the 4% threshold is entirely substantive and not in the least procedural. It is not a method for determining whether emissions standards have been met. Rather, the Proposed Rule sets a substantive 4% product reliability standard itself. "The meaning of 'substance' and 'procedure' in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Jinks v. Richland County, S.C.*, 538 U.S. 456, 465 (2003). Here, as we have established, the purpose of the dichotomy between substantive emissions standard and test procedures was for the latter to prescribe a method for measuring the former. With that purpose in mind, it is undeniable that the 4% threshold is a substantive standard.

B. ARB LACKS THE AUTHORITY TO ORDER ANY FORM OF REMEDY AS TO AN ENTIRE CLASS OF VEHICLES, UNLESS THERE IS EVIDENCE OF A CLASSWIDE DEFECT AFFECTING A SUBSTANTIAL NUMBER OF VEHICLES.

The Alliance hereby incorporates by reference its analysis and conclusion in its September 2006 letter and accompanying legal memorandum that ARB lacks authority to order any form of remedy as to an entire class of vehicles, unless there is evidence of a classwide defect affecting a substantial number of vehicles. See Attachment A (Legal Memorandum), at 13-16. The analysis there revealed the key points that:

- all relevant sources of authority for ARB in the Health and Safety Code are class-based;
- EPA's analogous authority under the Clean Air Act is class-based and restricted to defects affecting a substantial number of vehiclees;
- background principles of law, such as the law of torts in the product-liability area constrain ARB's remedial authority to go beyond remedies for truly classwide defects;
- the status quo regulatory system does not establish that a 4% "true" defect level represents an irrebuttable conclusion that such a defect is "systemic" -- to the contrary, under the status quo regulatory system, the 4% "true" defect system is nothing more than an early warning system to ARB to investigate whether to take enforcement action;
- the rulemaking history of the 1981 and 1988-89 iterations of the warranty and defect-reporting rules shows that ARB's recall authority was intended to be constrained to remedies only against classwide defects -- defects at a level far greater than a mere 4%.

In short, every indication from the California statutes, from prior regulatory practice, and logic, is that the California Legislature intended ARB to operate a system of regulating emissions-related defects identical to the federal system, which has certain key features. The D.C. Circuit held long ago that Section 207 of the Clean Air Act was intended to provide "classwide remedies of classwide defects." *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1568 (D.C. Cir. 1983), *cert. denied*, 105 S. Ct. 2153 (1985). The textual limitations on the government's recall power in Clean Air Act Section 207 (which restrict ordered recalls to situations in which a "substantial number" of "properly maintained" vehicles are violating a regulation "in actual use") thus represent Congress' effort to strike a balance "among competing goals of consumer convenience, improved air quality, and technical accuracy," in order to "ensure that manufacturers are not forced to 'repair' significant numbers of properly functioning vehicles." *MVMA v. Ruckelshaus*, 719 F.2d 1159, 1168 (D.C. Cir. 1983). The Court of Appeals has explained that Congress limited mandatory recall to "class-wide" problems because a manufacturer "incurs heavy costs – both financial and goodwill – simply by issuing [a recall] notice to owners." *General Motors v. Ruckelshaus*, *supra*, 742 F.2d at 1566 n.7.

IV. ARB LACKS THE AUTHORITY TO ORDER RECALLS IN SITUATIONS WHERE THE ENGINE FAMILY HAS NOT BEEN SHOWN TO FAIL APPLICABLE EMISSIONS STANDARDS.

A. IMPORTANCE OF EMISSIONS STANDARDS

The Alliance hereby incorporates by reference its analysis and conclusion in its September 2006 letter and accompanying legal memorandum that ARB lacks authority to order recalls in situations where the engine family has not been shown to fail applicable emissions standards. See Attachment A (Legal Memorandum), at 8-13.

B. THE TECHNOLOGICAL VIABILITY OF ARB'S PRIOR EMISSIONS STANDARDS DEPEND ON NOT INVADING MANUFACTURER "HEADROOM."

In addition, the Alliance also contests the notion that the "headroom" below emissions standards for vehicles as they are certified in practice is something that ARB can invade and thereby ignore in enforcement actions. In addition to giving themselves in-use compliance flexibility, manufacturers provide a voluntary benefit to the environment by certifying vehicles below the applicable standard. Hence, it is unlawful and unfair for ARB to attempt to seize that "headroom" by claiming that what is relevant for regulatory purposes is the level to which vehicles happen to be certified, as opposed to what level of emissions come from vehicles in use, as tested for compliance against the controlling emissions standards.

If ARB had been intended to have the authority to invade "headroom," the Legislature would have conferred it explicitly. Instead, it was denied such authority implicitly by directing ARB to set "emissions standards." Staff is proceeding here as if the Health & Safety Code talked in terms of violating certification levels (a concept that makes no sense), as opposed to violating emissions standards. Contrast Health & Safety Code § 43105 (discussing whether "manufacturer has violated emission standards"). Section 43106 does not contradict that conclusion. It merely requires vehicles in the field to be substantially the same as those certified; it does not confer a power on ARB to make certification levels an effective emissions standard.

Furthermore, emissions standard "headroom" is a concept that ARB and staff have recognized the validity of and on which the technological feasibility of various Board determinations about past emissions standards critically depends. *See, e.g.,* Staff Report: Initial Statement of Reasons in Support of Proposed Amendments to California Exhaust and Evaporative Emission Standards and Test Procedures for Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles "LEV II," at II-51 (purpose of setting emissions standards to include "headroom" is to guarantee that "adequate headroom [will exist] to ensure vehicles on average will pass emission requirements in-use."); Transcript of Public Hearing to Consider the "LEV II" and "CAP 2000" Amendments to The California Exhaust and Evaporative Emission Standards and Test Procedures for Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles, and to the Evaporative Emission Requirements for Heavy-Duty Vehicles, No. 98-12-1 (staff member stating that "In that study, staff used production improvements to reduce the evaporative emissions, and the vehicle evaporative emissions were reduced sufficiently to comply with the proposed standard with headroom.") (Nov. 5, 1998). The technological feasibility of all relevant emissions standards would have to be revisited if the "headroom" concept is disturbed by this new rulemaking. Moreover, such a change in agency course in disregarding "headroom" and its purposes is completely unexplained.

Additionally, the Alliance incorporates by reference its discussion of the "headroom" issue in its October 2006 letter. *See* Attachment B at 7-9 (incorporated into this section by reference).

V. ARB LACKS THE AUTHORITY TO ORDER RECALLS (OR EXTENDED WARRANTIES) FOR VEHICLES THAT ARE NOT NEW.

ARB's exclusive power to recall vehicles is given in Health & Safety Code § 43105 (emphasis added):

No *new* motor vehicle, *new* motor vehicle engine, or motor vehicle with a *new* motor vehicle engine required pursuant to this part to meet the emission standards established pursuant to Section 43101 shall be sold to the ultimate purchaser, offered or delivered for sale to the ultimate purchaser, or registered in this state if the manufacturer has violated emission standards or test procedures and has failed to take corrective action, which may include recall of vehicles or engines, specified by the state board in accordance with regulations of the state board

Moreover, the definition of "new motor vehicle" is given in Health & Safety Code § 39042: "New motor vehicle" means a motor vehicle, the equitable or legal title to which has never been transferred to an ultimate purchaser."

Section 43105 could not be clearer in textually granting only the power to order recalls as to new vehicles, which have never been sold. Since Section 43105 is the only basis for the types of remedial authority ARB is claiming here, and because it is highly specific, it precludes ARB from establishing regulations that order recalls of vehicles that are no longer new -- which have already been sold. By the same token, it precludes any attempt by ARB to order extended

warranties, a remedy not expressly delegated to ARB by the Legislature in Section 43105 at all, as to vehicles new or old.

This result is commanded not only by the text of Section 43105, see *Microsoft Corp. v. Franchise Tax Bd.*, 39 Cal. 4th 750, 758 (2006) (“As with any issue of statutory interpretation, we begin with the text of the relevant provisions. If the text is unambiguous and provides a clear answer, we need go no further.”) (citation omitted), but also by two canons of statutory interpretation known as (1) the specific controls the general and (2) *expressio unius*. See *Fuentes v. Workers’ Comp. Appeals Bd.*, 16 Cal. 3d 1, 8 (1976) (specific controls over the general in statutory interpretation); *Bonner v. County of San Diego*, 139 Cal. App. 4th 1336, 1347 (4th Dist. 2006) (“The statutory construction doctrine of *expressio unius est exclusio alterius* means the expression of certain things in a statute necessarily involves exclusion of other things not expressed.”) (internal quotation marks omitted). In other words, staff cannot defend against the obvious interpretation of the bounds of their remedial authority as ending when vehicles are no longer new by claiming that it is necessary and proper that they have additional authority to regulate non-new vehicles.⁶

Instead, the natural conclusion inevitably flows that if the triple repetition of the word “new” is to have any meaning in Section 43105, it means that the Legislature intended not to delegate to ARB a similar authority as to vehicles that were not new. Otherwise, the words “new” in the statute would be rendered complete surplusage. See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 50 Cal. Rptr. 585, 594 (2006) (“As is well settled, we will avoid constructions such as this that render statutory language surplusage.”); *Weber v. County of Santa Barbara*, 15 Cal. 2d 82, 86 (1940) (“cardinal rule of statutory construction that in attempting to ascertain the legislative intention effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part or provision useless or deprived of meaning.”) (emphasis added); see also *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003); *Bailey v. United States*, 516 U.S. 137, 146 (1995). Assuming the Legislature intended such a result cannot be justified, and particularly strains credulity where the limitation to “new” vehicles was repeated thrice.

Performing structural analysis by considering other parts of the Health & Safety Code does not alter the conclusion that Section 43105 recall authority (and clearly any attempt to tease additional remedial powers out of Section 43105) is limited exclusively to new motor vehicles and engines. For instance, examine Health & Safety Code § 44203, concerning vehicle imports. Subsection (d) of Section 44203 provides that the Board may determine “[a]ny other requirements . . . appropriate to assure the used direct import vehicle will continue to comply with emission standards in use, except that no requirement may be established to warrant the

⁶ We also specifically incorporate by reference here the argument in Attachment A (Legal Memorandum), at 9, which sets forth the Alliance’s construction of ARB’s powers under the gap-filling provisions of Health & Safety Code §§ 39600 and 39601. In short, those provisions cannot be read to expand ARB’s remedial powers in this area beyond “new” motor vehicles.

emissions control system or to recall vehicles which exhibit a defective emission control system subsequent to receiving a valid certificate of conformance." Unless Section 44203(d) were motivated by a kind of reverse protectionism (i.e., a desire to favor importers of used vehicles), there is no explanation for this provision except that it parallels the system applicable under Section 43105's plain text limiting recall authority (and not granting extended warranty authority, *see* Section VI.A. below) to new motor vehicles and engines.

See also Attachment A (Legal Memorandum), at 10 (discussing Section 43105's restriction to new motor vehicles and explaining that "ARB [is] at least two places removed from a clear statutory authorization to use recalls as a remedy for Article 2.4 enforcement.").

VI. LEGAL DEFECTS IN THE PROPOSED RULE'S HANDLING OF EXTENDED WARRANTY REMEDIES

A. ARB LACKS THE AUTHORITY TO ORDER EXTENDED WARRANTIES.

Staff and the Alliance are in agreement that under the status quo system, ARB may not order manufacturers found in violation of the defect and warranty reporting regulations to issue extended warranties. *See* ISOR at 6 ("The current regulations authorized recalls as the sole means for addressing failures of emissions components Manufacturers have voluntarily agreed to extend warranties in many cases . . . however ARB can not order a manufacturer to extend a warranty."). Staff never asks itself the question of why prior Boards never granted themselves such authority. The answer is obvious -- because the relevant statute does not confer such power on the Board. But the failure to even pose and then attempt to answer the question is an independent violation of an agency's heightened duty to explain changes in course. *See, e.g., Motor Vehicle Mfrs. Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.") (emphasis added). *See also* Section IX.B. below (applying the *State Farm* standard in greater detail).

This failure of explanation concerning the radical change in course is particularly inexcusable given that staff fully anticipated the relevant objection: "Extended warranties are also an expected area of controversy." ISOR at 27. Indeed, the staff continued, making important concessions that the warranty-specific provisions do not confer authority on ARB to order extended warranties:

Health and Safety Code sections 43204-43205.5 basically provide that manufacturers must warrant that the vehicles they manufacture are "designed, built and equipped so as to conform, at the time of sale, with the applicable emission standards" and "free from defects in materials and workmanship" which cause them to "fail to conform with applicable emission standards" for their useful lives. *Clearly, if it were basing its proposal solely on these provisions, ARB would not have authority to require that manufacturers extend warranties on failing emissions related parts beyond the useful lives of the vehicles they are found in. The reason is simple — because these provisions do not authorize warranty coverage beyond the periods prescribed in the statutes.*

Id. (emphasis added). Both the specific controls over the general and the *expressio unius* canons would demand the same result.

The importance of this concession cannot be understated. Staff has accepted the Alliance's argument that the warranty-specific statutes do not confer authority to order extended warranties. We also incorporate by reference the Alliance argument contained in the September 2006 letter and accompanying legal memorandum. See Attachment A (Legal Memorandum), at 17 (pointing out that the legislative history of the relevant provisions in the so-called I/M bill clearly established that the Legislature fixed extended warranty periods and assigned to ARB only limited authority to keep the repair deductible for consumers updated for inflation under Health & Safety Code § 43205(b)).

In staff's view, however, Section 43105 once again gives them authority denied under the *expressio unius* canon (and other indications of legislative intent):

The inquiry does not end there, however. Health and Safety Code section 43105 prohibits manufacturers from selling vehicles in California "if the manufacturer has violated emission standards or test procedures *and has failed to take corrective action, which may include recall of vehicles or engines, specified by the state board in accordance with regulations of the state board.*" Emphasis supplied. This means that in the case of violations of the test procedures or emission standards the ARB may require by regulation other kinds of relief in the form of corrective action, not just recall. Furthermore, the Health and Safety Code does not define or limit the term "corrective action". This, coupled with the fact that Health and Safety Code section 43105 provides that in the case of violations of the test procedures or the emission standards the ARB has wide discretion ("The procedures for determining, and the facts constituting, compliance or failure of compliance shall be established by the state board.") indicate that ARB does have the authority to require that warranties on failing emissions related part must be extended beyond the useful lives of the vehicles they are installed in. Extended warranties for failing emission control components is simply one type of corrective action, one made particularly effective because of the ability of OBD systems to detect malfunctions and warn owners to seek repairs. Again, the authority for doing this is not located in Health and Safety Code sections 43204-43205.5 which provide the authority for requiring the basic emissions warranty, but in Health and Safety Code section 43105 that provides the ARB with wide discretion to require recalls or other corrective action in the event of violations of emission standards or test procedures.

ISOR at 27-28.

That lengthy defense requires a point-by-point rebuttal (except for the last sentence beginning "Again" because it is redundant). First, staff misreads Section 43105 by ignoring the noun and verb associated with its focus on the broader terms "corrective action," as opposed to the term "recall." The verbal formulation used in connection with "corrective action" is "failed to take." Who failed to take? The manufacturer failed to take. See Health & Safety Code

§ 43105 ("the manufacturer . . . has failed to take corrective action"). By no stretch does this text confer authority on ARB or its Executive Officer to order corrective action.

What the provision does by its plain text is give manufacturers an option to take corrective action that would avert a recall. It has been asserted in meetings between staff and representatives of the Alliance that the Alliance would win a pyrrhic victory if it established that Section 43105 were limited to recalls only because then staff would simply induce the Board to authorize recall remedies in situations where the lesser remedy of an extended warranty would otherwise be preferred by staff. The problem with that argument is that it fails to acknowledge that the Legislature specifically gave manufacturers threatened with recalls something to bargain with -- something to offer the regulatory staff at ARB: *voluntary* extended warranties or other "corrective action" that would make a recall unnecessary. The staff proposal strips manufacturers of the ability to offer the regulators anything to prevent a recall. It eliminates anything that manufacturers might use to negotiate and to try to keep the regulators within reasonable bounds. Under the status quo, staff is free to offer a settlement on the basis of an extended warranty that they sketch. If manufacturers disagree, ARB must negotiate to a lesser extended warranty, or alternatively be put to its proof that a violation worthy of more rigorous remedial action exists in a potential contested recall action. If staff could order a recall whenever negotiations over a proper remedy reach an impasse, then they would be in a position to dictate the terms of whatever extended warranty they desire.

Second, staff once again seeks refuge in the fact that the term "corrective action" is not defined. The Alliance agrees that the term is undefined, that "[e]xtended warranties for failing emission control components [are] simply one type of corrective action," ISOR at 28, and that it is a broader term that must encompass remedies that are different than recalls. What the Alliance fails to see is why it matters here that the term is undefined. The point remains that the statute does not say: "The state Board may order recalls and/or extended warranties at its option." The statute says that "if" the manufacturer does not take corrective action, then a recall may occur. "If a manufacturer contests the necessity for, or the scope of, a recall of vehicles or engines ordered pursuant to this section and so advises the state board, the state board shall not require such recall *unless* it first affords the manufacturer the opportunity, at a public hearing, to present evidence in support of the manufacturer's objections." Health & Safety Code § 43105. The "unless" clause makes it clear that the state board can "order[]" a recall. Nowhere in Section 43105 does the Legislature indicate that the Board may "order" extended warranties.

Third, in a great irony, given staff's assertion that it need not provide hearings to manufacturers in connection with any future remedial orders for extended warranties, staff asserts that in connection with Section 43105's silence on the meaning of the term "corrective action," it is somehow significant that the Board can fix the "procedures for determining, and the facts constituting, compliance or failure of compliance." Health & Safety Code § 43105. But, of course, Section 43015 talks about hearings where such procedures would be applied and facts found only in connection with recalls, and says nothing about corrective action. We discuss in further detail below in Section VI.C. why staff is wrong to infer from this that the Board need not provide hearings at all for contested extended warranty situations. But the important point is that staff infers an inside-out point from a clear statute. The reason why Section 43105 gives a hearing right only as to a contested recall is that the best and obvious reading of 43105 is that it

does not confer the power on the Board to order extended warranties. (Even worse, to infer the opposite as the staff proposes to do would suggest that the Legislature intended to provide due process to manufacturers only some of the time.) There is obviously no need for the Board to grant a procedural right as to contesting the need for a remedy that the Board cannot unilaterally order.

ARB also continued in the ISOR to provide what in its view were still more reasons it must be deemed to have the authority to order extended warranties:

It is also notable that Health and Safety Code sections 43204-43205.5 do not place any limitations, explicit or otherwise, on ARB's authority to order corrective action under Health and Safety Code section 43105. Similarly, given ARB's wide discretion in this area, there is no legal impediment to requiring manufacturers to recall the affected vehicles or provide extended warranties for them. One factual rationale for doing this is similar to the one advanced in the OBD recall rulemaking — that projecting failure rates and future emission of failing components is highly speculative, but it is certain that emissions components fail more frequently as they age. When OBD systems detect these future failures of components that have systemically failed during the vehicles' useful lives, they should be remedied, either by recall or other corrective action such as extended warranty.

ISOR at 28.

Again, this reasoning is flawed. *First*, it is unremarkable that Health & Safety Code Sections 43204 through 43205.5 “do not place any limitations . . . on ARB’s authority to order corrective action under” Section 43105. This displays an astonishing ignorance of the method that courts use to interpret statutes. Reading statutes structurally to make inferences about silence is one of the major approaches to statutory construction and is commonplace. See *Gunther v. Lin*, 144 Cal. App. 4th 223, 243 (4th Dist. 2006) (“legislative history can be a factor to be weighed along with language *and structure* of a statute, and will often (as is logical) support the conclusion to be drawn from the bare language of a statute *and its surrounding statutory structure*.”) (emphasis added); *Donner Management v. Schaffer*, 142 Cal. App. 4th 1296, 1307 (4th Dist. 2006) (“Our conclusion, derived from the plain language and substantive structure of the statute . . . “); see also *Gallegos v. Principi*, 283 F.3d 1309, 1316-17 (Fed. Cir. 2002) (“The Court of Appeals for Veterans Claims recognized this and applied structural statutory interpretation to reach the correct result -- that the [Veterans Administration] cannot add an additional procedural requirement . . .”). Statutes have to be read as unified wholes and not as isolated provisions. See *Goold v. Superior Ct.*, --- Cal. Rptr. 3d ---, 2006 WL 3354009 (4th Dist. 2006) (“However, the language of section 1218 must be read as a whole and each of its provisions must be construed in the context of its other provisions.”). The fact that there is no explicit limitation in Section 43204 through 43205.5 (the specific warranty statutes) on Section 43105 does not mean that a structural comparison of the specific warranty statutes with Section 43105 tells the lawyer nothing. To the contrary, especially in conjunction with the legislative history cited in the Alliance’s September 2006 letter and accompanying legal memorandum, staff provides no reason why the Legislature would want to disallow ARB from extending warranties under warranty-specific statutes, giving ARB only a limited role in keeping a deductible in step

with inflation, and yet confer an authority to order extended warranties of any length in Section 43105. Such a conclusion would be poor and erroneous structural analysis.

Second, the fact that it is difficult to predict the failure rates of components and the emissions impacts thereof is no reason to infer that ARB must have extended warranty authority. This is a *non sequitur*. If anything, staff's concession that it is difficult to predict component failure rates is tantamount to accepting the Alliance's position that, for the most part, defects that appear in emissions-related components are unforeseeable. And such a recognition counsels in favor of a more, rather than less, lenient regulatory regime. In other words, where emissions-related components fail for unforeseeable reasons, staff should not be attempting, as they are in the extraordinary certification statement they propose to require, that manufacturers break out their crystal balls to pledge at the time of certification that defects will never emerge at a 4% screened rate or higher. Nor should they be attempting to acquire new remedial powers when there is no evidence that existing remedies and negotiated settlements for voluntary extended warranties are flawed remedies.

Finally, while there are only hints of this rationale in the ISOR, Alliance representatives were told in one meeting with staff that the Board possesses the authority to order extended warranties because manufacturers have voluntarily agreed to such remedies in the past. This is self-evidently a flawed point. Just because manufacturers (or any target of government enforcement or any party to actual or potential litigation for that matter) agrees to do something voluntarily does not mean that the other party or the government possesses the power to unilaterally order the same result. Compare ISOR at 6 ("Manufacturers have voluntarily agreed to extend warranties in many cases, as shown in Figure 1, however ARB can not order a manufacturer to extend a warranty.") (merely noting that this is a limitation in the status quo, but nevertheless suggesting that a remedy voluntarily agreed to in the past is one that may be ordered by the Board).

B. ARB LACKS THE AUTHORITY TO REQUIRE EXTENDED WARRANTIES BEYOND USEFUL LIFE TO REMEDY EMISSIONS-RELATED DEFECTS.

In the extensive passages defending the notion that ARB can order any form of extended warranty in this context, staff slips in the notion several times that they may order warranties extended for periods "*beyond*" the useful life. See, e.g., ISOR at 27 ("Clearly, if it were basing its proposal solely on these provisions, ARB would not have authority to require that manufacturers extend warranties on failing emissions related parts *beyond the useful lives* of the vehicles they are found in.") (emphasis added); see also *id.* at 27-28 ("ARB does have the authority to require that warranties on failing emissions related part must be extended beyond the useful lives of the vehicles they are installed in."). Of course, the two questions are separate, and ARB must separately demonstrate that it has the authority to order any extended warranties, but that it has the authority to order extended warranties, remarkably, for periods longer than the useful life of a vehicle. The arguments staff presents at pages 27 through 28 of the ISOR have nothing to do with the power to order extended warranty for periods in excess of the applicable vehicles' useful lives.

Staff separately attempts to justify extended warranties beyond useful life on page 21 of the ISOR:

While the staff believes that any extension to the emission warranty period to adequately address a systemic defect emission-control component should be equivalent to the entire on-road life of all affected vehicles, it is necessary and reasonable to limit the manufacturers' responsibility. Therefore, staff is proposing that the extension to the emission warranty period for passenger cars, light- and medium-duty vehicles will be limited to 15 years or 150,000 miles, whichever first occurs. This is equivalent to the emissions warranty period that manufacturers currently utilize for partial zero-emission vehicles (PZEV) and staff believes that manufacturers already design emission-control components to operate effectively for that period of time and mileage. Heavy-duty vehicles and engines used in such vehicles that are determined to contain systemic defects will be required to extend the warranty to 10 years, 200,000 miles, or 6,000 hours, whichever first occurs.

ISOR at 21.

Respectfully, this is an approach without any foundation in the Health & Safety Code (nor any attempt by staff to ground the proposal there). It is naked policymaking without any specific or even rough form of statutory authorization. Moreover, staff gives no reason for selecting the PZEV emissions warranty period and applying it to any defect situation. And it denies manufacturers the benefits and entitlement to rely on existing useful life periods as fixed for other types of vehicles.

But the more important reason why this attempt to create an agency precedent that aims a dagger at the heart of useful life periods fixed by the Legislature is that it is contrary to the statutory regime created by the California Legislature. The Health & Safety Code redounds with references to the concept of a vehicle's useful life, which in accord with the Alliance's technical comments discussing "the bathtub curve," is a recognition of the fact that products cannot be designed in the physical world to last infinitely, and that designing products to last for very long periods of time is a very costly endeavor. See, e.g., Health & Safety Code § 43018 (d)(1) ("Workshops on the adoption of vehicular fuel specifications . . . and revisions to the standards for new vehicle certification and durability to reflect current driving conditions and *useful vehicle life* shall be held not later than March 31, 1989.").

But it is Sections 43204 through 43205.5 of the Health & Safety Code that shed the most light on the careful guidance the Legislature provided for the meaning of the term "useful life" and the constraint on agency discretion that such a concept represents:

- (a) The manufacturer of each motor vehicle or motor vehicle engine manufactured prior to the 1990 model-year shall warrant to the ultimate purchaser and each subsequent purchaser that the motor vehicle or motor vehicle engine is:

* * *

(2) Free from defects in materials and workmanship which cause such motor vehicle or motor vehicle engine to fail to conform with applicable regulations for its useful life, determined pursuant to subdivision (b).

(b) As used in subdivision (a), "useful life" of a motor vehicle or motor vehicle engine means:

(1) In the case of light-duty motor vehicles, and motor vehicle engines used in such motor vehicles, a period of use of five years or 50,000 miles, whichever first occurs, except that, in the case of fuel metering and ignition systems and their component parts which are contained in the state board's "Emissions Warranty Parts List" dated December 14, 1978 (items I(A), I(C), III(A), III(C), III(E), IX(A), and IX(B)), and which are contained in vehicles or vehicle engines certified to the optional standards pursuant to Section 43101.5 and subject to subdivision (a) of Section 43009.5, "useful life" means a period of use of two years or 24,000 miles, whichever occurs first.

(2) In the case of any other motor vehicle or motor vehicle engine, a period of use of five years or 50,000 miles, whichever first occurs, unless the state board determines that a period of use of greater duration or mileage is appropriate.

Section 43204 shows the Legislature fixing a period of useful life and delegating to the Board the power to find that additional durations or mileage amounts are appropriate. What Section 43204 does not do, however, is delegate to the Board the authority to ignore its regulations on useful life once they are set. It is axiomatic that agencies must obey their own regulations because they bind not only regulated parties, but agencies themselves. See *Talmo v. Civil Serv. Comm'n*, 231 Cal. App. 3d 210, 218 (2d Dist. 1991) ("It is well settled an administrative agency is bound by its own rules and regulations."); see also *United States v. Nixon*, 418 U.S. 683, 696 (1974); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954).

Furthermore, there is no basis for concluding that in the extended warranty situation the Board is free to ignore useful-life periods and set extended warranties for whatever period is deemed expedient. Indeed, the structural contrast between Section 43204 and Sections 43205 and 43205.5 actually shows the contrary. Section 43204 (applicable to model years before 1990) provides for warranties specifically tied to useful-life periods, whereas Section 43205 (which applies to light medium duty vehicles after model year 1990) dispenses with tying useful life periods to warranties, but not for the purpose of giving the ARB more power, but rather less power. Compare Health & Safety Code Section 43205 (requiring manufacturers to warrant only that the relevant post-MY 1990 vehicles "[w]ill, for a period of three years or 50,000 miles, whichever first occurs, pass a test established under Section 44012, but that the warranty shall not apply if the manufacturer demonstrates that the failure of the motor vehicle or motor vehicle engine to pass the test was directly caused by the abuse, neglect, or improper maintenance or repair of the vehicle or engine." Moreover, Section 43205 contains no delegation of authority to

the Board parallel to the delegation of authority in Section 43204 to revise "useful life" periods. Instead, Section 43205's only delegated authority to the Board is again the very modest power to revise the deductible for inflation. See Section 43205(b).⁷ Hence, the 3 year/50,000 mile warranty is all that may be required by the Board. Finally, by way of structural contrast, the Legislature set out its intention as to vehicles other than light and medium duty vehicles in Section 43205.5. In that provision, ARB is explicitly empowered to set "a period of use determined by the board." Section 43205.5(a). And Section 43205.5(b) includes the curious explicit grant of power to the Board, for the purpose of "defects in materials and workmanship which cause the motor vehicle or motor vehicle engine to fail to conform with applicable requirements specified in this part," to fix periods of time that are less than or equal to use periods concerning the emissions warranty.

In short, all of the possible comparisons and contrasts between Sections 43204, on the one hand, and 43205 and 43205.5 on the other, suggest that the Legislature knows how to convey quite subtly different forms of authority to the Board in connection with emissions-related warranties. This is overwhelming evidence of an intent not to allow the Board to ignore the useful life periods set by regulation elsewhere simply because it is operating in the emissions warranty context. Indeed, pursuant to Section 43205(a)(3), ARB lacks the authority to require emissions warranties to extend past three years or 50,000 miles for post-MY 1990 light and medium duty vehicles.

C. IF ARB POSSESSES THE POWER TO UNILATERALLY ORDER EXTENDED WARRANTIES, ARB CANNOT DENY MANUFACTURERS A HEARING RIGHT TO CONTEST AN EXTENDED WARRANTY THAT THE EXECUTIVE OFFICER HAS ORDERED.

As we pointed out above, the reason for Section 43105's silence on the question of providing hearings to manufacturers as to extended warranties that might be ordered by the Board is that the Board lacks such a unilateral authority in the first place to order extended warranties, and may only order recalls. Even putting aside that obvious point about the text of Section 43105, and even if the Board had the claimed substantive remedial authority, ARB could not exercise that authority without providing a right of hearing parallel to that afforded in contested recall situations. The reason is the Due Process Clauses of the United States and California Constitutions and the precedent interpreting those guarantees in the federal and state courts. See ISOR at 26 (flowchart) ("Ma[n]ufacturers may request a public hearing to contest a finding for recall only.").

Statutes must be construed to avoid serious constitutional difficulties. See *Le Francois v. Goel*, 35 Cal. 4th 1094, 1105 (2005) (court commonly construes statutes, when reasonable, "to

⁷ Moreover, the legislative history of Section 43204 demonstrates that the warranty was originally 5 years/50,000 miles for all components, but that was reduced in part and enlarged in part to create the high-price/low-price distinction that is now well-known. This purposeful change to the mandatory warranty specified makes clear that the warranty period is fixed, and not upwardly adjustable by ARB. Otherwise, the change in legislative course would be rendered inexplicable.

avoid difficult constitutional questions.”). And it is clear that a statute or regulation that tolerated orders to manufacturers to undertake expensive extended warranty campaigns to be conducted and fulfilled over a period of many years would violate due process. This would clearly violate the core textual guarantee of the Due Process Clauses -- denying manufacturers property without any process whatsoever.

Moreover, there is an ambiguity in what staff is proposing here. At one point, staff states: “Based on its experience administering the emissions warranty reporting and recall programs, the staff proposes to amend the emissions warranty and recall regulations to improve their enforceability, streamline the warranty reporting regulations, simplify the grounds for recall, provide for other corrective action (including extended warranties) and clarify that hearings are available only when the EO orders a recall.” ISOR at 17. At another point, however, staff states: “Consistent with statute, under the staff’s proposal hearings would not be available when other types of corrective action besides recall are ordered, but parties would retain all rights to challenge such orders in court.” ISOR at 22.

One possibility -- the more extreme -- is that staff is recommending that the Board adopt a process by which manufacturers will never receive a hearing of any kind, in court or before the Board. (By that token the rights manufacturers would retain to challenge extended warranty orders in court would be the empty set.) The other possibility -- the less extreme -- is that staff is recommending that the Board adopt a process that merely denies manufacturers an administrative hearing, but allows them to contest in court ARB’s extended warranty orders. We note that as a constitutional and legal matter ambiguity here would be construed to leave manufacturer with a judicial remedy to contest extended warranty orders. Agencies possess no authority to construe the sources of law by which courts exercise judicial review of agencies. See, e.g., *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1038-39 (D.C. Cir. 2002) (“Nor is an agency’s interpretation of a statutory provision defining the jurisdiction of the court entitled to our deference under *Chevron*.”). See also *Southern Calif. Jockey Club v. California Horse Racing Bd.*, 36 Cal. 2d 167 (1950) (Mosk, J.) (“Accordingly, the findings of fact of an administrative agency must be reviewed by a court that must exercise its independent judgment on the facts, *Drummey v. State Board of Funeral Directors*, *supra*, and determine therefrom whether those findings are supported by the weight of the evidence, *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 801, 136 P.2d 304; *Moran v. Board of Medical Examiners*, 32 Cal.2d 301, 308, 196 P.2d 20, and not merely by substantial evidence. Presumably a more limited review would confer judicial functions upon the administrative agency in violation of the constitutional prohibition thereof.”). Agency action is presumed reviewable. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

The Alliance does not know which possibility staff intended. If staff intends to assert a power to strip manufacturers of all ability to contest an extended warranty order, then reviewing courts would hold such a regulation to be beyond ARB’s powers. And even if staff intends to assert the less-extreme position that manufacturers will simply be afforded no opportunity for a hearing on extended warranty orders *at the Board level*, staff’s position is puzzling. Because in accord with the presumption of reviewability (which pierces staff’s argument that the silence of Section 43105 in specifically requiring hearings for ordered extended warranties -- legislative silence is not sufficient to overcome the presumption) and in accord with cases like *Jockey Club*,

courts would simply provide a hearing process on any extended warranties ordered that ARB does not. But such a hearing process would obviously not be deferential to ARB because there would be nothing to defer to -- nothing for the deferential "substantial evidence" standard of review to act upon because no facts will have been found administratively. In that case, then staff will have accomplished nothing by purporting to deny manufacturers hearing rights to contest extended warranty orders.

Moreover, staff's explanation for why as a policy matter hearings should not be available for extended warranty situations is faulty: "Based on this experience, the staff believes that the improvements it is proposing and other proposed improvements such as clarifying when hearings are available consistent with Health and Safety Code section 43105 would increase the likelihood that failing emissions components will be corrected and excess emissions attributable to them will be avoided." ISOR at 18. It is tough to argue with this logic, though it is a type of rationale that is plainly unlawful. Of course, if manufacturers do not have a hearing right in connection with extended warranty orders, more failing emissions components will be corrected and any excess emissions associated with such failures will be avoided. But this is like saying that dispensing with trials and simply punishing the accused forthwith will reduce violations of law. That may be true, but such an approach is unlawful, and condemns the innocent along with the guilty. Here, by analogy, it is an approach that would lead to remedies when no remedies were warranted -- i.e., when manufacturers had not violated statute-based emissions standards. Particularly, in the agency context, ARB should look for a clear statement from the Legislature before inferring that it has the power to make any substantive standard it sets subject to a strict-liability remedial system.

For purposes of the discussion in this Section VI.C., we also incorporate by reference the due process case law and analysis set forth in the Alliance's September 2006 letter and accompanying legal memorandum. *See* Attachment A (Legal Memorandum), at 18-21.

VII. THE ADMINISTRATIVE HEARING DEFINED BY ARB TO CONTEST RECALLS IS AN EMPTY SHELL THAT DOES NOT COMPORT WITH DUE PROCESS.

We fully incorporate by reference, once again, the Alliance's September 2006 letter and accompanying legal memorandum. *See* Attachment A (Legal Memorandum), at 18-21. We anticipate that staff will argue that it has eliminated the problem in the April 2006 Mailout by eliminating a proposal to allow staff members to introduce any new evidence at recall hearings that they might gather at any time, while restricting evidence manufacturers could use in defense to information generated at the warranty reporting stage. While the analysis in the September 2006 Alliance letter and accompanying legal memorandum was directed in part at a lack of parity in the evidentiary powers of ARB as compared to manufacturers, even if the lack-of-parity argument were unavailable, many other arguments in the September 2006 letter remain fully applicable to the Proposed Rule.

Moreover, staff's proposal to create an uneven playing field tilted against manufacturers actually remains substantially unaltered, even though it is less overt than it was in the April 2006 Mailout. *See* ISOR at 22 ("The proposed amendments would make it clear that manufacturers may request hearings when recalls are ordered, and that the record would be limited to the

information generated in the emissions warranty reports *and any other information required by the Executive Officer up to the date of the recall order.*") (emphasis added). In other words, rather than granting itself the power of introducing evidence that the staff itself generated while severely limiting the evidence that manufacturers could present in defense, staff now proposes that it can admit any evidence that it directs manufacturers to obtain at any time. Indeed, while the current proposal is more subtle, it is even more violative of manufacturers' due process rights because in the present Proposed Rule staff would not be troubling itself to collect additional information that it could use against manufacturers hobbled in their own defense, but simply shifting that burden to manufacturers of collecting evidence against themselves.

It is also true that ARB has now proposed regulations that reduce the need for very much evidence by either side. "The proposed amendments would make it clear that manufacturers may request hearings when recalls are ordered, and that the record would be limited to the information generated in the emissions warranty reports and any other information required by the Executive Officer up to the date of the recall order." ISOR at 22. *See also* Proposed Section 2174(a). Essentially, the only issue in the contested recall hearings as staff proposes to structure them would be the level of "true" defects reported. If that level exceeded the 4% threshold, then manufacturers would be subject to recalls or extended warranties or both -- all at the Executive Officer's sole discretion. *See* Proposed Regulations Section 2169(b), 2170(b), 2172(b). Staff clearly intends that there would be no other defenses, apparently, and there would be no other evidence than evidence bearing on the number of screened warranty claims for a particular engine family. As such, the hearing "right" supposedly guaranteed by ARB is an empty shell that does not remotely comport with the opportunity that manufacturers must be given under Health & Safety Code Section 43105 to present their "objections." ARB's power "to determine facts constituting compliance with these emissions standards and test procedures . . . and to adopt these procedures" under Section 43105 is "wide," but it is not unlimited. ISOR at ii.

In most situations, agency decisions must be subject to review for abuse of discretion or due process is violated. This is why abuse-of-discretion review is a commonplace even where the judiciary is deferential to agencies, and it is why a clear statement from a legislature is required to demonstrate that a decision has been committed to agency discretion by law. Abuse of discretion is arbitrary decision making and arbitrary deprivations of property deny due process of law. The "touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). *See also Fuentes v. Shevin*, 407 U.S. 67 (1972) ("no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred"). The Court explains the principles well in a quip from *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994): "There is, however, a vast difference between arbitrary grants of freedom and arbitrary deprivations of liberty or property. The Due Process Clause has nothing to say about the former, but its whole purpose is to prevent the latter."

As the Court explained in *Honda Motor*, traditional procedures provide a touchstone by which arbitrariness in deprivations can be measured:

Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate

the Due Process Clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Winship*, 397 U.S. 358, 361 (1970); *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604 (1990); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). [paragraph break inserted]

Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution. *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604 (1990); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Honda Motor, 512 U.S. at 430.

Here, the traditional procedures for violations in emissions-related contexts are to be able to present evidence that the emissions standard has not been violated. Similarly, from a common-law perspective, administrative law requires that abuse-of-discretion review be available here. Staff proposes to make the entire determination of what remedies to choose and whether to invoke them in the hands of the Executive Officer. See Proposed Rule Sections 2169-2171. See also *id.* Section 2166(d) ("The Executive Officer may waive any or all of the requirements of this Article if he or she determines that the requirement constitutes an unwarranted burden on the manufacturer."). This is enormous power ARB should hesitate before delegating, but even if it could delegate this power, it cannot under the Constitution. Abuse-of-discretion review must be available, at the very least, given the enormity of the power staff proposes that the Board should delegate to staff. Since judicial review is sometimes held to be limited to the administrative record, the Board cannot abuse its power to define what evidence can properly be submitted by manufacturers. Indeed, by limiting the evidence as staff proposes to limit it here in Section 2174(a) (i.e., to evidence concerning screened warranty claims), and admitting no category of evidence that would allow manufacturers to demonstrate that they face an unwarranted burden either because a proposed remedy is too harsh or a proposed remedy would achieve no emissions benefits, manufacturers limited to the administrative record would never be able to test whether the Executive Officer's discretion in the enforcement area was being abused. That kind of process is simply constitutionally impermissible.

VIII. THE PROPOSED RULE SUFFERS FROM OTHER SUBSTANTIVE DEFECTS.

A. THE PROPOSED RULE IS INVALID UNDER THE CLEAN AIR ACT BECAUSE IT IS INCONSISTENT WITH EPA'S AUTHORITY UNDER CLEAN AIR ACT SECTION 202(A).

Clean Air Act Section 209(a), 42 U.S.C. § 7543(a) preempts all state standards relating to the control of emissions for new motor vehicles or new motor vehicle engines. California is eligible to apply for a waiver of this type of preemption from EPA. The Alliance does not

believe that EPA can meet the requirement to demonstrate that the in-use recall provisions it is creating are consistent with EPA's authority to set standards under Section 202(a), 42 U.S.C. § 7521(a). See Section 209(b)(1) ("No such waiver shall be granted if the Administrator finds that . . . (C) such State standards *and accompanying enforcement procedures* are not consistent with section 7521(a) of this title.") (emphasis added).

The federal statutory dichotomy between substantive "standards" vs. "enforcement procedures" clearly means that the proposed recall procedures at issue here to enforce all in-use programs must be classed as "enforcement procedures." Such enforcement procedures are not consistent with EPA's authority under Section 207 of the Clean Air Act, 42 U.S.C. § 7541, to regulate warranty and defect reporting issues connected to the substantive standards set in Section 202(a). In particular, ARB would not be able to demonstrate to EPA that its defect reporting system is consistent with, for example (but not limited to), the "substantial number" requirement of Clean Air Act Section 207(c)(1). Section 207(c)(1) is obviously the most relevant "enforcement procedure" at the federal level by which the consistency requirement under Section 209(b)(1)(C) must be measured here, since that is the program analogous to the main one that staff indicates they seek to have the Board to amend.

Finally, we note that as a factual matter, staff conceded to several representatives of one of the Alliance member companies that the federal EPA would lack the authority to adopt something like the current Proposed Rule. Apparently anticipating that the Proposed Rule faces a significant preemption obstacle in the form of the Section 209(b) consistency requirement with federal enforcement procedures, ARB stated the following in the Notice of Public Hearing document:

Federal law has a different, potentially less stringent standard for ordering vehicle recalls than California does. Federal law allows a recall when a substantial number of vehicles do not conform to emission standards (42 U.S.C. section 7541(c)), while California regulations require a demonstration that a class or category of vehicles contains a defect that will cause the vehicles on average to exceed emission standards over their useful lives. In 1990, U.S. Environmental Protection Agency formally found that ARB's emissions warranty reporting and recall regulations were within the scope of previous waivers of federal preemption. (55 Fed. Reg. 28823 (July 13, 1990).)

Notice of Public Hearing at 5.

The subtle argument here advanced by staff is wrong in numerous respects. *First*, it is important to note the concession that federal law creates a different standard. In and of itself, this leads to the conclusion that the Clean Air Act Section 209(b) consistency requirement cannot be met. *Second*, staff is wrong to deny that the "substantial number" test is not currently part of California's law, despite the fact that in numerous other places in the rulemaking documents ARB concedes that the status quo system includes the "substantial number" requirement. See, e.g., ISOR at 2 (describing the status-quo system and stating: "Once noncompliance was identified in a substantial number of vehicles or engines, a manufacturer may perform a voluntary recall. If a manufacturer is unwilling to implement a voluntary recall, the ARB can order the manufacturer to recall the noncompliant vehicles."). In any event, the current

regulations clearly embody the "substantial number" criterion. See 13 C.C.R. §§ 2112(h)(1), 2123(a), 2148(b)(1). There is a reason for this -- in order to meet the requirements for a preemption waiver, ARB's defect and warranty reporting system must stay in rough parallel with the system constraining EPA under the Clean Air Act.

Finally, staff is wrong that because the present ARB system contains fleet-averaging provision it is a more stringent system than the federal system. First of all, even if it were more restrictive of recall orders than the federal system, that is irrelevant to whether ARB's attempt in the Proposed Rule to make recall orders far less restrictive than the federal system is or is not preempted. More importantly, the fleet-averaging concept (showing the average vehicle is in or out of compliance with emissions standards) is simply a way of expounding on what it means to have a defect in a substantial number of vehicles. Seen that way, it is not that the present California standard is more restrictive of recalls than the federal system, but rather that California's present system is simply more detailed and thus dispels the ambiguity of how to interpret the "substantial number" criterion.

B. ARB CANNOT REQUIRE A STATEMENT AT THE TIME OF CERTIFICATION THAT CALLS FOR MANUFACTURERS TO PREDICT THAT UNFORSEEABLE DEFECTS WILL NOT OCCUR.

Staff proposes to require manufacturers to demonstrate the following at the time of certification:

§86.1823-01 October 6, 2000. Amend as follows: Add the following sentence to the first paragraph: Beginning with 2010 model-year vehicles or engines, at the time of certification manufacturers shall demonstrate that the emission control devices on their vehicles or engines will not exceed a valid failure rate of four percent or 50 claims, whichever is greater, in an engine family, test group or subgroup over the useful life of the vehicles or engines they are installed in. If any emission control device fails at this rate, that constitutes a violation of these test procedures and it entitles the Executive Officer of the Air Resources Board to require that the vehicles or engines they are installed in be recalled or subjected to corrective action as set forth in title 13 CCR, Division 3, Chapter 2, Article 5, sections 2166 through 2174,

Appendix B to Proposed Rule (Emission Test Procedure Changes), at 3.

This calls for the impossible. Manufacturers currently design all of the parts of their vehicles to fail at rates well below 4%. Ensuring that no emissions-related parts will fail in practice at greater than a 4% rate, however, is quite another matter. Oftentimes, vehicles will encounter unforeseen driving patterns, face driver abuse, or encounter completely unforeseeable circumstances. For instance, one manufacturer reports to us that one of their expensive corrective action campaigns resulted entirely from high warranty claims rates caused by a unique type of fuel used in California that the manufacturer could not have predicted would be used. No manufacturer can predict every circumstance that a vehicle will encounter with complete accuracy. Hence, this certification demonstration proposed by staff is misguided.

The proposed change here to the certification test procedures is once again (see Section III, above) not a test procedure at all. Instead, (contrary to the background law of products liability) it requires manufacturers to become insurers for any defects that might emerge in their vehicle over the substantive 4% threshold, including unforeseeable defects. It is simply not possible for manufacturers to make a certification that their vehicles will never develop defects based on the on-road and off-road conditions the vehicles will encounter. And any requirement to this sort of effect is not a "test procedure" but merely the automatic-enforcement aspect of a strict liability standard establishing that any defect that crosses the 4% threshold will violate California law. By placing such a requirement in the certification procedures (and not elsewhere, in *post hoc* checks on compliance with in-use requirements), the logic of staff's proposal would seem to indicate that if a defect later emerges, then the underlying certification is invalid. This kind of theory of voiding *ab initio* vehicle certifications threatens to introduce chaos into the established system of emissions regulation by depriving manufacturers of the certainty that they can rely on certificates of conformity issued by the Executive Officer. We see no basis for a claim of authority to void certificates, once granted, *ab initio* and challenge the Board and staff to explain the basis for such an incredible claim of authority.

In meetings between staff and representatives of the Alliance, it has been stated that the only purpose of the certification demonstration is to forge a link between certification of durability and defect and warranty reporting, but not otherwise to alter how manufacturers proceed to meet the test procedures associated with certification. Putting aside whether forging such a link is necessary or appropriate, it is clear that the text of the proposed change to the test procedures does much more than forge an abstract link of the sort asserted by staff members in meetings with the Alliance. It requires manufacturers to certify that something will never happen in the future, where in many cases the relevant events are beyond their control.

The ISOR expands on this certification requirement even further, and does not merely forge an abstract link, but calls for "data" to be presented demonstrating this crystal-ball prediction at the time of certification:

It is here where the proposed regulations would establish a link between the test procedures and the proposed warranty reporting thresholds by amending these sections to include a provision that incorporates the warranty reporting threshold, requiring that at certification, *manufacturers must present data proving that its emission related components will not fail in use at rates higher than the warranty reporting threshold* and providing that exceeding the warranty thresholds would entitle the ARB to order recall or other corrective action on the grounds that the exceedance is a violation of the test procedures. This would make it clear that since violating the warranty reporting threshold would constitute a violation of the test procedures it would be grounds for ordering a recall or other corrective action.

ISOR at 19 (emphasis added). The Alliance is at a loss to understand what sort of "data" an automaker could possibly present to not only vaguely support this kind of demonstration, but to "prove" it. See *International Harvester v. Ruckelshaus*, 478 F.2d 615, 639 (1973) (holding that agency had not engaged in a forbidden crystal-ball inquiry given constraints on its powers). See also *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391 (1973) ("Administrator may

make a projection based on existing technology, though that projection is subject to the restraints of reasonableness and cannot be based on 'crystal ball' inquiry."), *cert. denied*, 417 U.S. 921 (1978).

Indeed, staff actually quotes an existing requirement that mirrors federal law. Contrasting the proposed certification demonstration with existing law demonstrates the excesses of the proposal:

Below is an excerpt from the California Passenger cars, Light-Duty Trucks, and Medium-Duty Vehicles test procedures which incorporates by references Title 40, Code of Federal Regulations (CFR), §86.1823-01(e). This section lays out requirements for the vehicle's, and in this section particularly the emission component's durability requirements. §86.1823-01 (e) Emission component durability. The manufacturer shall use good engineering judgment to determine that all emission-related components are designed to operate properly for the full useful life of the vehicles in actual use.

ISOR at 20. Manufacturers can feasibly make a showing that they used good engineering judgment not to design emissions-related components to fail before the useful life of a vehicle in actual use had ended. What manufacturers cannot do is present "data" to "prove" that their vehicles in the future will never exceed a 4% defect threshold. That is an impossible prognostication. There are too many variables to attempt to control, numerous variables that cannot be controlled, and many unforeseeable circumstances. In short, staff arbitrarily calls in proposing its new certification demonstration for the unrealistic and the infeasible.

Staff states several times that "[w]hen a significant number of emission-related components fail in customer service, this is evidence that production vehicles do not satisfy this requirement [that manufacturers used good engineering judgment in designing components not to fail] since a component, which did not fail during certification testing, is now failing at an unacceptable rate within the vehicle's useful life. The ARB believes that the failure of emission-related components is a unique situation and cannot be held to a typical in-use noncompliance decision by simply averaging emission exceedances over the useful life." ISOR at 20. *See also* ISOR at 12 ("At the time of certification, manufacturers test prototype vehicles to demonstrate that their emissions control components will be durable and last for the useful life of the vehicle. When emissions components then fail at the rate of four percent or 50 in use, the staff believes that this is strong evidence that the production vehicles are not, in all material respects, substantially the same in construction as the test vehicles, and are in violation of Health and Safety Code section 43106 and test procedures.").

Staff is wrong that exceeding the 4% defect rate is evidence that vehicles are not substantially the same in construction as test vehicles. That is simply an unsubstantiated inference on ARB's part. Instead, when vehicles fail at such a rate, what is indicated in most situations is that the vehicles have encountered an unforeseen and/or unforeseeable situation, or that the test procedures applied to the prototype vehicles were incapable of uncovering a potential, but unknown risk of failure. In some cases, no doubt, defect rates reach the greater-than-4% level because of human error in the manufacturing process (what products-liability law calls "manufacturing defects"). But ARB has no basis for inferring that every time some

vehicles within a class of vehicles exceed the 4% threshold, a manufacturing defect has occurred (or manufacturers have deliberately built vehicles that are materially different than the prototype vehicles that were certified).

C. ARB CANNOT REQUIRE MANUFACTURERS TO TAKE CORRECTIVE ACTION AS TO VEHICLES THAT WERE NOT PROPERLY MAINTAINED AND USED, IF IT HAS BASED AN ENFORCEMENT ACTION ON IGNORING SUCH CONSIDERATIONS..

The Proposed Rule would prohibit manufacturers found liable for violating the new regulations from "condition[ing] eligibility for repair on the proper maintenance or use of the vehicle except for strong or compelling reasons and with approval of the Executive Officer; however, the manufacturer shall not be obligated to repair a component which has been removed or altered so that the recall action cannot be performed without additional cost." Proposed Regulation Section 2172.3(e). There is a similar provision in current law, but when that sort of provision is placed into the context of the other proposed regulatory amendments offered here, it changes character and results in denying manufacturers their right to exclude in the screening process warranty claims by vehicle owners that have not properly maintained or used their vehicles. See Health & Safety Code § 43205(a)(3) ("the warranty shall not apply if the manufacturer demonstrates that the failure of the motor vehicle or motor vehicle engine to pass the test was directly caused by the abuse, neglect, or improper maintenance or repair of the vehicle or engine."

Under the current system, manufacturers can screen claims and exclude claims stemming from improper maintenance or use. But if valid recalls are ordered, manufacturers are precluded from conditioning repair on proper vehicle maintenance and use. Yet, recalls can only be ordered after manufacturers get to apply the screening process without restriction from ARB and after manufacturers have the opportunity to present an affirmative defense under 13 C.C.R. § 2147. See 13 C.C.R. §§ 2143, 2146. In the Proposed Rule, by contrast, once claims hit an unscreened level of 10% or 100 claims (whichever is greater), then corrective action is automatic at the Executive Officer's option. See ISOR at 24 ("Unscreened warranty claim rates that are ten percent or greater nearly always result in a valid four percent failure level, and this triggers the process of determining appropriate corrective action."). Hence, the proposed system violates the terms of Section 43205(a)(3) of the Health & Safety Code. Enforcement action could be taken without regard to whether vehicles have been properly maintained and used.

D. SERIOUS QUESTIONS UNDER THE FIRST AMENDMENT ARISE WHERE MANUFACTURERS ARE REQUIRED TO MAKE CERTAIN FALSE STATEMENTS AND/OR REFRAIN FROM MAKING CERTAIN TRUE STATEMENTS AFTER CORRECTIVE ACTION IS ORDERED.

Under the Proposed Rule, staff has included provisions that impose two important restrictions on the speech rights of manufacturers after a violation of the substantive provisions of the Proposed Rule (especially the 4% threshold) is found to have occurred:

[Proposed Section 2172.3 Notification of Owners] (d) The notification of vehicle or engine owners shall contain the following:

(1) The statement: "the California Air Resources Board has determined that your (vehicle or engine) (is or may be) releasing air pollutants which exceed (California or California and Federal) standards, or that the manufacturer violated emissions test procedures. These standards were established to protect your health and welfare from the dangers of air pollution."

* * *

(f) No notice sent pursuant to Section 2172(b)(8), above, nor any other communication sent to vehicle or engine owners or dealers shall contain any statement, express or implied, that the nonconformity does not exist or will not degrade air quality.

The general problem with both the 2172.3(d) provision that compels speech and the 2172.3(f) provision that forbids speech is that both requirements apply regardless of the truth of the underlying matter. Both requirements could be inaccurate or lead to inaccuracy -- either by compelling false speech or prohibiting true speech. For this reason, neither provision is narrowly tailored to be consistent with the First Amendment, and instead burdens far more speech than is necessary. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (invalidating complete state ban on alcohol price advertising as a violation of the First Amendment as incorporated into the Fourteenth Amendment).

The first requirement in subsection (d) is misleading because it forces manufacturers to engage in speech which suggests that they have violated ARB requirements in such a way as to harm the health and welfare of California's populace -- specifically by increasing the dangers of air pollution. Given that staff in the Proposed Rule is defending the notion that enforcement can occur without regard to whether emissions standards have been violated, mention of such standards in any kind of compelled statement is unnecessary, and apparently calculated so as to mislead consumers into thinking that when they receive such a notification the manufacturer that produced their affected vehicle has violated California law in a way to injure the public health in California. Staff may defend this on the ground that what they are requiring here is no different than the Surgeon General's warning on cigarette packaging. But while it is true that the Surgeon General has determined that smoking is injurious to health, it simply will not be true under this Proposed Rule that the Board will have determined "that your (vehicle or engine) (is or may be) releasing air pollutants which exceed (California or California and Federal) standards." Indeed, it would only be accurate to say, if the Proposed Rule is adopted, that the California Air Resources Board has *refused* to determine whether the violation at issue resulted in an exceedance of emissions standards.

The second requirement in subsection (f) is even looser and more troubling in terms of the degree of factual inaccuracy it encourages or tolerates. This requirement prohibits truthful speech because manufacturers are not permitted to tell consumers that a particular violation will not degrade air quality. Since the Proposed Rule purports to decouple the conditions required to show a violation of the defect regulations from any demonstration that emissions standards are violated, staff cannot be assured that every violation will degrade air quality. Thus, there is no basis possible for restricting the right of manufacturers to communicate true information to consumers.

Specifically, proposed Section 2172.3(d) is unconstitutional because it compels speech. See *United States v. United Foods, Inc.* 533 U.S. 405 (2001) (mandatory government program requiring fresh mushroom handlers to pay assessments to be used to fund advertising promoting mushroom sales violated the First Amendment, even though the compelled speech in question carried no particular ideological content). See also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1990); *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990). In *United Foods*, the Supreme Court noted that there was no suggestion in that case that the assessments were needed to prevent voluntary advertisement from being misleading, distinguishing *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985). Because the subsection (d) provision compels speech that is not needed in all cases to avoid misleading the public, it is unconstitutional.

Proposed Section 2172.3(f) is also unconstitutional because it prohibits truthful speech. Even assuming *arguendo* that speech by manufacturers claiming that violations of the Proposed Rule would not degrade air quality in a particular situation was commercial speech (which we do not concede), ARB may not constitutionally restrict *truthful* commercial speech.⁸ “[B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth . . . The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.” 44 *Liquormart*, 517 U.S., at 503 (citation omitted). Here, ARB may not assume that the public will question all air-quality laws and regulations merely were a manufacturer to contest that in a particular case a finding of violation carried with it no air quality benefit.

Staff may respond that proposed subsection (d) must be deemed constitutional because 13 C.C.R. § 2127(d)(1), as presently constituted, is similar. See, e.g., 13 C.C.R. § 2127(d)(1) (in-use ordered recalls, once proven or acceded to lead to a statement by the manufacturer that “the California Air Resources Board has determined that your (vehicle or engine) (is or may be) releasing air pollutants which exceed (California or California and Federal) standards. These standards were established to protect your health and welfare from the dangers of air pollution.”). But that provision, Section 2127(d), exists inside a framework of a set of regulations that as a status quo matter allow manufacturers to defend themselves on the basis that particular claimed violations do not lead to an emissions impact. See 13 C.C.R. § 2123(b) (cross-referencing the § 2147 affirmative defense for manufacturers).

⁸ Manufacturers do not believe that communicating to consumers or the public as a whole that a particular enforcement action by ARB does not carry emissions benefits (or refusing to be forced to convey a contrary message by regulatory fiat) is commercial speech. Instead, it is speech on a topic of public concern. See *Kasky v. Nike, Inc.*, 79 Cal. App. 4th 165 (1st Dist. 2000) (concluding that speech made by for-profit companies is not commercial if made on matters of public concern), *rev'd*, *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *cert. granted and later dismissed*, *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003). Justices Kennedy, O'Connor, and Breyer dissented from that dismissal.

Here, of course, staff is proposing to eliminate the § 2147 affirmative defense beginning in model year 2010. See Proposed Regulation § 2141(a) (providing that all provisions of 13 C.C.R., Division 3, Chapter 2, Article 2.4 become inapplicable to model year 2010 and later vehicles). Hence, the same compelled statements which would be true in connection with a valid Section 2127(d) recall up until the end of model year 2009, could well be false in the context of the Proposed Rule for model year 2010 and later, when an emissions-based defense will no longer be available. Similarly, until the end of model year 2009, only false statements are prohibited, but after model year 2010, true statements could also be prohibited. Finally, even were ARB to establish that the compelled or prohibited speech provisions in existing law are *entirely analogous* to those in Proposed Regulations, that would not save them from First Amendment scrutiny, because the unstated premise of such an argument would be that manufacturers could not challenge any provisions of existing law as invalid.

In sum, the Board cannot abolish the affirmative emissions defense in Section 2147 of the existing regulations and then deny manufacturers the right to speak out in relevant cases to explain to the public why corrective action ordered by the Board has no emissions impact.

IX. PROCEDURAL DEFECTS IN THE PROPOSED RULE

A. STAFF'S PROPOSED RULE DID NOT PROPERLY CONSIDER REGULATORY ALTERNATIVES AT THE ISOR STAGE.

The Alliance incorporates by reference the analysis in its October 2006 letter to the Alliance, *see* Attachment B (all pages), and its November 2006 letter, *see* Attachment C (all pages). The October 2006 letter explains why a failure of staff to analyze: (1) the status quo ("no action") alternative; (2) the Alliance's alternative; and (3) a type of alternative arising whenever regulators propose to adopt prescriptive standards instead of enforcement standards, violated clear procedural requirements in the California Administrative Procedure Act ("CAPA"). Most importantly, the October 2006 letter explains why a failure to analyze alternatives then available at the ISOR stage sandbags opponents and is legally compelled by CAPA. The November 2006 letter explains that the Alliance brought these procedural defects to staff's attention soon after the Proposed Rule was announced, giving staff the opportunity to postpone the Board hearing and rewrite the Proposed Rule to comport with CAPA's requirements concerning the consideration of alternatives, yet the staff ignored this opportunity, and refused to respond to the October 2006 letter. The Alliance had kindly requested a reply to the October 2006 letter on or before November 8, 2006. Even assuming *arguendo* that ARB had no CAPA duty to respond to the October 2006 letter by withdrawing the Proposed Rule, clearly all of those issues must be responded to now. For purposes of explaining ARB's duties under CAPA in terms of how reasonable alternatives must be addressed and analyzed, specifically, pursuant to a means-end fitness test, the Alliance also hereby incorporates by reference the September letter and accompanying legal analysis. *See* Attachment A (Legal Memorandum), at 22-24, and 27-29.

1. Staff Failed to Properly Consider the Status Quo Alternative

The Alliance incorporates by reference its call for staff to properly analyze the status quo or no-action alternative. *See* Attachment A (Legal Memorandum), at 22. Staff's analysis of the no-action alternative and its conclusion that such an alternative would not achieve the valid goals

set for the rulemaking rests exclusively on two isolated examples in a twenty-plus year history -- the Toyota case and the DaimlerChrysler case. As explained below (*see* Section X.C.), those two examples do not prove that the current system is failing, and in addition to the conclusion in Section X.C. that staff's analysis of those cases is arbitrary and capricious, such a failure of explanation also becomes a procedural violation of CAPA's requirement to adequately consider regulatory alternatives.

2. Staff Entirely Failed to Consider a "Performance Standard" Alternative.

Once again, the Alliance incorporates by reference Attachments B (pages 4-9, and 9-10) and C (entirety). In short, staff has utterly failed to consider the substantive and procedural issues in those letters as they bear on the mandatory duty under CAPA to analyze whether a prescriptive standard such as these regulations establishing what is functionally a greater-than-96%-product-reliability standard might be more cost-effectively and flexibly formulated as a performance standard. Staff's failure also cannot be remedied at this time except by withdrawing the rulemaking entirely and issuing at the ISOR stage a consideration of alternatives.

3. Staff Entirely Failed to Consider the Alliance's Proposal During the Workshop Process.

Once more, the Alliance incorporates by reference Attachments B (pages 1-4, and 9-10) and C (entirety). The Alliance proposed a detailed alternative to staff and offered to work with staff to refine or amend that proposal. *See* Attachment D (Alliance Workshop Proposal). At a meeting held between staff and representatives of the Alliance on November 3, 2006, it became clear that staff would not respond to Attachment D because they deemed it not to meet staff's concerns about flaws in the current system. Regardless of whether that was true, staff has procedurally defaulted by failing to say anything about the Attachment D alternative at the ISOR stage. But even if it had, staff's apparent conclusion that radical solutions are required to meet their concerns rests on the premise that the current system has been horribly dysfunctional -- a conclusion that cannot be supported on the basis of the Toyota and DaimlerChrysler examples alone, as explained below in Section X.C.

4. Staff Entirely Failed to Consider Its Own April 2006 Proposal Offered in the Workshop Process.

Although not pointed out specifically in the October and November 2006 letters, staff should also have considered at the ISOR stage an alternative that it developed itself and now ignores. That alternative is the alternative proposed in the original April 2006 Mailout and the follow-up slide show presentation that staff provided shortly thereafter. That alternative had the virtue of at least not attempting to totally cut loose the Proposed Rule from any moorings in the emissions standards set by the Board. Failure to consider it at the ISOR was a procedural default for the reasons stated on pages 9-10 of the October 2006 letter (Attachment B). But even if a procedural default had not already occurred, ARB and its staff must surely explain now why the April 2006 staff proposal was rejected in favor of the Proposed Rule in October 2006.

B. STAFF HAS NOT EXPLAINED WHY IT RECOMMENDS ADOPTING A "PRESCRIPTIVE STANDARD" IN THE PROPOSED RULE, AND CANNOT INSTEAD ACHIEVE THE SAME ENDS BY WAY OF A "PERFORMANCE STANDARD."

For these purposes, the Alliance incorporates by reference Attachments B (pages 4-9, and 9-10) and C (entirety). In Section XI.A.4., however, the legal defect caused by the failure to properly consider the performance standard alternative to the prescriptive standards here is a violation of CAPA procedures. Such a failure is also a substantive legal violation of the arbitrary-and-capricious standard. See, e.g., *Baldwin v. City of L.A.*, 70 Cal. App. 4th 819, 836 (2d Dist. 1999) ("The ultimate question, whether the agency's action was arbitrary or capricious, is a question of law . . ."); *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 782 (1997) ("The Rent Board argues that the due process protection focuses on method. It requires that a regulation not be arbitrary or capricious and that the regulatory agency give due consideration to conflicting interests."). See also *Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1098 (9th Cir. 2005) (court will overturn a final agency action if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *California Hotel & Motel Ass'n v. Industrial Welfare Comm.*, 25 Cal. 3d 200, 221 (1979) ("Professor Davis writes that the courts 'have been at their creative best' in helping to shape what is 'unquestionably one of the greatest inventions of modern government' by fashioning statutory and common law rules that enable a court to set aside orders and regulations if . . . '4) affected persons have had insufficient opportunity to know and to meet important facts the agency has considered'").

C. STAFF'S ASSERTION THAT THE PROPOSED RULE WOULD BE COSTLESS AND/OR SAVE MANUFACTURERS MONEY ON BALANCE IS FACIALLY INCREDIBLE.

The Alliance hereby incorporates by reference its October 2006 letter and accompanying legal analysis. See Attachment A (Legal Memorandum) at 24-26 (discussing the required framework for analysis of cost and burden issues under CAPA).

Given that discussion, there is no reason that staff could not have performed a realistic cost analysis of the Proposed Rule, or delayed release of that rule until such time as such an analysis could be performed. Staff makes no credible effort to assess costs, and asserts, remarkably, that the costs of the Proposed Rule will be at or near zero, or that the Proposed Rule will actually save manufacturers money on balance. According to staff:

- Cost to the manufacturers should be reduced by the significantly minimized reporting requirement. However, to the extent the regulations increase the number of corrective actions implemented, costs to those manufacturers that have produced vehicles with defective components will increase. However, staff estimates the industry wide cost will be roughly equivalent to today's cost. (ISOR at iv).
- The businesses to which the proposed requirements are addressed and for which compliance would be required are manufacturers of California motor vehicles.

There are presently 34 domestic and foreign corporations that manufacture California-certified passenger cars, light-duty trucks, and medium-duty gasoline and diesel fueled vehicles that would be subject to the proposed amendments. Only one motor vehicle manufacturing plant (NUMMI) is located in California. For motor vehicle manufacturers to comply with the proposed regulatory action, the costs are expected to be negligible. Moreover, manufacturers are expected to comply with all applicable laws. For manufacturers that continue to produce vehicles or engines with defective components, recall and/or warranty costs will increase. The amount cannot be quantified at this time. Manufacturers will experience some savings in decreased warranty reporting costs. (ISOR at 30)

- The determinations of the Board's Executive Officer concerning the costs or savings necessarily incurred by public agencies and private persons and businesses in reasonable compliance with the proposed regulations are presented below. Pursuant to Government Code sections 11346.5(a)(5) and 11346.5(a)(6), the Executive Officer has determined that the proposed regulatory action will create costs to the ARB. The ARB is expected to incur ongoing costs of approximately \$200,000 per year for two additional staff to implement the regulation and enforce compliance. Costs would not be created to any other state agency, or in federal funding to the state. The regulation will not create costs or mandate to any local agency or school district whether or not reimbursable by the state pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code, or other nondiscretionary cost or savings to state or local agencies. The businesses to which the proposed requirements are addressed and for which compliance would be required are manufacturers of California motor vehicles. There passenger cars, light-duty trucks, and medium-duty gasoline and diesel fueled vehicles that would be subject to the proposed amendments, 20 heavy-duty engine manufacturers, and over 60 motorcycle manufacturers. Only one motor vehicle manufacturing plant (NUMMI) is located in California. In developing this regulatory proposal, the ARB staff evaluated the potential economic impacts on representative private persons or businesses. Costs to the manufacturers should be reduced by the significantly minimized reporting requirement. Because manufacturers are fully expected, and required, to comply with the regulations, enforcement costs to manufacturers should also be negligible. However, to the extent the regulations increase the number of corrective actions implemented, costs to those manufacturers that have produced vehicles with defective components may increase. Staff estimates that the industry wide cost will be roughly equivalent to current costs, however. The Executive Officer has made an initial determination that the proposed regulatory action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, or on representative private persons. Again, any cost impacts are expected to be slight, absorbable or positive. In accordance with Government Code section 11346.3, the Executive Officer has determined that the proposed regulatory action will not affect the creation or elimination of jobs within the State of California, the creation of new businesses or elimination of existing businesses within the State of California, or the expansion of businesses

currently doing business within the State of California. Any impact on businesses in California is expected to be slight, absorbable or positive. A detailed assessment of the economic impacts of the proposed regulatory action can be found in the ISOR. The Executive Officer has also determined, pursuant to title 1, CCR, section 4, that the proposed regulatory action will not affect small businesses because the cost impacts are expected to be slight, absorbable or positive. (Notice of Public Hearing at 6-7.)

The Alliance makes the following observations/objections to the plainly inadequate job that staff has done to address the cost issue. *First*, on its face the claim that manufacturers will not experience increased costs is not credible. This rulemaking creates a presumption that vehicle groups with screened warranty claims exceeding 4% may trigger an enforcement action and turns that into a hard-and-fast standard, effectively requiring every emissions-related component to achieve greater-than-96% reliability in practice, without regard to whether defects were foreseeable or not. It is simply beyond the pale to claim that such a Proposed Rule is costless. Either the Proposed Rule will impose costs in vehicle redesign or in improved quality-control measures, or to the extent defects that emerge in practice are unforeseeable (as they largely are), then manufacturers will experience increased back-end costs for performing recall and extended warranty campaigns they could not have avoided by advance planning.

Second, staff actually contradicts itself on the issue of costs when it states the following when speaking of the status quo regulatory system elsewhere in the ISOR: "In cases involving large vehicle populations or components that fail gradually, it is virtually certain that manufacturers will request hearings and contest the EO's recall order rather than implementing a recall, *given the stakes involved*." ISOR at 10 (emphasis added). The reference to the stakes involved for manufacturers is obviously the out-of-pocket and other costs to manufacturers, as well as the administrative burden of conducting recall campaigns or offering extended warranties. Staff provides no reason why those "stakes" suddenly evaporate based on their newly Proposed Rule.

Third, staff suggests in the shorter Notice of Public Hearing document that if one consults the ISOR, one will find a detailed analysis of cost. Instead, one finds an even more anemic and purely conclusory set of statements about cost, and that the statements about cost in the Notice of Public Hearing are lengthier than those contained in the ISOR.

Fourth, staff suggests that manufacturers should be pleased with the Proposed Rule because the revisions to the reporting system will save them money compared to compliance costs with other proposed amendments. That is a statement that cannot pass the red-face test, and no basis in empirical data is offered for such a conclusion. Manufacturers are the best judges of the comparative and net cost of the changes to the reporting requirements as against the changes wrought by the greater-than-96% reliability standard. It is obvious to any observer with common sense that such a far-reaching requirement will be more costly than a modest streamlining in the mere obligation to compile and file paper reports. The Alliance members would gladly give up the cost-savings to its members from streamlining the report obligations if it could avoid the additional costs associated with a dramatic increase in stringency in the level of reliability staff is demanding for every emissions-related component in California vehicles.

Fifth, the suggestion that costs will be zero or negligible because manufacturers are "expected to comply with all applicable laws" makes no sense at all. On that kind of logic ARB could require vehicles to literally be lined everywhere in gold and never experience any failures covered under warranty, and the costs for such requirements would remain zero or negligible because manufacturers are "expected to comply with all applicable laws." The duty of manufacturers to comply with valid laws is undeniable, but irrelevant to the *cost* of complying with such laws, or to the issue of whether ARB has discharged its obligations to reasonably assess and report costs so that the reasonableness of proposed rules can be assessed by regulated parties, by the Office of Administrative Law, and by the general public.

Sixth, while staff is able to quickly estimate the costs of hiring two new requested employees to administer the Proposed Rule's system at \$200,000, staff makes no effort whatsoever to estimate costs imposed on manufacturers.

Seventh, while staff states several times that the NUMMI facility is located in California, it never applies the required CAPA and Economic Guidance Bulletin analysis to that facility, and instead simply offers conclusory statements that California businesses will not be affected significantly by the Proposed Rule. Such statements are entirely lacking in any evidentiary basis in the record or any reasonable discussion by staff.

Eighth, even if manufacturers were capable of determining when a component would prove 96% or more reliable, the cost of testing to attempt to ensure that such a level of reliability would be reached for every emissions-related component, however minor, is extremely high, if not unobtainable given the value of the product to be sold. The same is even more true once one recognizes that no manufacturer- or ARB-designed test can anticipate all real-world conditions. There is no indication that staff has even considered whether the testing burden they appear ready to impose is feasible, and/or how expensive it might prove to be.

Respectfully, the purported cost analysis conducted by staff is nothing more than rationalization and a transparent attempt at going through the motions. It is hard to believe that staff realistically thinks that such a treatment could be approved by the Office of Administrative law or any reviewing court. Staff's procedural and substantive errors in analyzing cost issues are also compounded by the failure to allow manufacturers enough time to commission a study of such effects, as discussed in the next section. Nevertheless, the Alliance is informed that at least one of its members will be submitting the cost data it was able to pull together in the brief time available for commenting on this Proposed Rule in the form of an individual submission and request for treatment as confidential business information under the Public Records Act.

D. STAFF HAS NOT PROVIDED ADEQUATE TIME FOR MANUFACTURERS TO PREPARE AN ECONOMIC AND/OR TECHNICAL STUDY CRITIQUING THE PROPOSED RULE.

The 1982 rulemaking history reveals that substantial questions were raised by manufacturers about ARB's legal authority to adopt the in-use standards that were a precursor to the status quo system here. ARB wisely responded to those issues by providing a fulsome process for analysis and specific findings to be made by a staff member on a case-by-case basis. Specifically, the Board delegated the power to the Executive Officer to hold a hearing and

receive briefing materials on the legal issues involved, and then issue a hearing report for digestion by the Board. The Executive Officer then delegated that hearing responsibility to his Deputy.

Here, despite a request for delay in light of staff's procedural errors, the Board provided less than a two-month period between the release of the Proposed Rule and the Board hearing to consider whether to adopt that proposal. The comparison in the degree of process provided to manufacturers is revealing. Because the legal issues and economic implications presented by this radical revision to the defect and warranty reporting (and other in-use) regulations are even more significant than those raised by more deliberate and measured action by ARB in 1982, it would be appropriate to provide a hearing officer process once again. The Alliance hereby requests the opportunity for such process once again, and requests that ARB explain why it is denying such a request in light of the 1982 historical precedent for such a process.

The Alliance was also frustrated in commissioning and performing a proper study of costs here because it was proceeding on the basis of something like the proposal in the April 2006 Mailout being what staff would put before the Board. Hence, as described in the October 2006 Becker Letter to Executive Officer Witherspoon, industry was "sandbagged" by the actual proposal released by staff on October 10, 2006.

The Alliance contacted individuals working on the relevant compliance programs in their member companies to collect data that might be used for a study of the costs and/or emissions benefits of the Proposed Rule. The Alliance also contacted a potential expert to discuss preparing a report analyzing such issues. It quickly became clear that a high-quality and reliable report could not be prepared in the short period for review that manufacturers were given by staff concerning the Proposed Rule. Hence, the review period between the time of promulgation and the time of adoption here was insufficient.

Staff caused the Board to commit reversible error by refusing to permit an adequate period of time for comment on the Proposed Rule. Interested parties desire not merely *any* opportunity to comment, but a *meaningful* opportunity to comment. See, e.g., *Horsehead Resource Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (vacating and remanding EPA standard where "possibility of meaningful participation [was] lacking"); *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995). In particular, an agency must provide a meaningful "opportunity to develop evidence in the record." *National Mining Assoc. v. Mine Safety and Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997). Accordingly, establishment of an unduly short period of time to comment is arbitrary and capricious, and requires a remand to the agency for consideration of evidence that could not be prepared in time to satisfy the agency's deadline. See *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1170-72 (D.C. Cir. 1987). After conferring with our members, we believe that a further 90 days would be necessary to compile and analyze the relevant data.

E. STAFF HAS NOT EXPLAINED WHY IT IS RADICALLY DEPARTING FROM THE FEDERAL APPROACH TO THE REGULATION OF EMISSIONS-RELATED VEHICLE DEFECTS.

The Alliance incorporates by reference here its October 2006 letter and accompanying legal analysis. See Attachment A (Legal Memorandum), at 26-27. CAPA wisely requires, especially in highly technical areas where manufacturers producing and distributing their products nationwide benefit from consistent regulatory regimes, that California agencies think twice before adopting regulatory schemes that differ from the federal approach to such regulation. Here, staff has completely failed to address this issue and to consider whether it is constrained by legal restrictions similar to those facing EPA. Moreover, staff failed to consider whether the federal system is on balance superior to the Proposed Rule because the federal system is less burdensome on manufacturers.

F. CONSISTENT WITH ITS FAILURE TO ASSESS EMISSIONS BENEFITS, ARB HAS NOT ATTEMPTED TO DISCHARGE ITS DUTIES UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

The Alliance or its members have often presented arguments to ARB in past rulemakings based on the fleet-turnover effect. Hence, that effect is well known to the Board and staff. Also well known is the industry's position with respect to the application of the California Environmental Quality Act ("CEQA") to issues where changes in the stringency of emissions-related regulation delay fleet turnover, and therefore can have environmentally counterproductive effects. Here, ARB's failure to analyze and attempt to quantify the environmental effects of the rule to any extent preclude an precise analysis of how the fleet turnover effect applies and could cause adverse environmental effects. Whether on the basis of that failure, or the more fundamental failure, however, that staff has simply not attempted to apply the CEQA statute to this rulemaking in any respect, the rulemaking becomes procedurally defective by operation of law. See, e.g., *Mountain Lion Found v. Fish & Game Comm'n*, 16 Cal. 4th 105, 137 (1997); *Friends of the Old Trees v. Department of Forestry & Fire Protection*, 52 Cal. App. 4th 1383, 1405 (1997). As ARB is aware, the case law under CEQA is extensive, as are the number of agency determinations set aside for failure to comply with CEQA, so these citations are merely intended to be illustrative. Furthermore, because CEQA requires a consideration of the effects of reasonable alternatives, the failures considered in Section IX.A. above are also procedural defaults under that statute.

X. ARBITRARY-AND-CAPRICIOUS FAILURES OF EXPLANATION

A. STAFF IS AMENDING ALL IN-USE RECALL PROGRAMS, NOT SIMPLY THOSE IN ARTICLE 2.4 CONCERNING DEFECT AND WARRANTY-REPORTING, WITHOUT EXPLAINING WHY SUCH CHANGE IS NECESSARY.

Staff is billing the Proposed Rule as "Amendments to California's Emission Warranty Information Reporting and Recall Regulations and Emission Test Procedures." See Title of the ISOR. Such advertising is misleading. In reality, the Proposed Rule alters the substance and procedure for *all* in-use recalls (while authorizing for the first time the Executive Officer to

unilaterally order extended warranties). In other words, staff's decision to attempt enforcement action against any form of vehicles in-use would be covered beginning in MY 2010 by the newly proposed system regardless of whether such an enforcement action arose out of defect and warranty reporting or not. That is because staff's Proposed Rule amends the California Code of Regulation provisions not only in Article 2.4 dealing with the advertised emission warranty information reporting system, but also Article 2.1 for voluntary and influenced recalls, effectively abolishing that system in MY 2010, and making all recalls mandatory. *See* Proposed Rule Section 2111(d) (abolishing article 2.1 beginning in MY 2010). Similarly, Article 2.2 for in-use ordered recalls is abolished beginning in MY 2010. *See* Proposed Rule Section 2122. Finally, the in-use enforcement test procedures are abolished beginning in MY 2010 as well. *See* Proposed Rule Section 2136.

Staff offers no reason at all, especially since this Proposed Rule grew out of a proposal in April 2006 to amend only Article 2.4, that it has decided to drastically alter the way all in-use enforcement proceeds. Examples and discussions drawn from the warranty reporting area cannot remotely satisfy the duty of explanation ARB has with respect to such an enormous and far-reaching change. *See State Farm*, 463 U.S. at 34 ("Briefly summarized, we hold that the agency failed to present an adequate basis and explanation for rescinding the passive restraint requirement and that the agency must either consider the matter further or adhere to or amend Standard 208 along lines which its analysis supports.").

B. STAFF'S DISCUSSION OF THE TOYOTA AND DAIMLER CHRYSLER CASES CANNOT SATISFY ARB'S HEIGHTENED BURDEN TO EXPLAIN CHANGES IN AGENCY COURSE.

The Toyota case cited in the ISOR did *not* involve warranty and defect reporting. Thus, it cannot bear the weight that staff places on it as an example of a failure in the status quo that would justify creating the proposed warranty and defect reporting regulatory regime. If the Toyota case is being cited for the purpose of making changes to ARB's in-use regulatory system *beyond* the area of warranty and defect reporting, then staff has failed to explain such a connection. Beginning the rulemaking anew would be required to correct this deficiency. In short, the precise connection of this case to the Proposed rule has not been adequately explained. Therefore, placing the proposed rule on the foundation of this case, which did not involve warranty or defect reporting and was not contested by ARB, fatally undermines its validity.

The DaimlerChrysler settlement that ARB refers to did arise in the defect and warranty-reporting area, so at least it is more or less on point. DaimlerChrysler will be addressing why its confidential settlement with ARB cannot form the basis for the rulemaking proposed here in greater detail in separate comments. But it is plain that *one example* of a case that did not come out to staff's satisfaction in the twenty-plus years of the program does not demonstrate what staff asserts -- that the system is seriously broken and staff cannot get the level of enforcement required to protect California's citizenry. Having already subtracted the Toyota case, one situation where manufacturers are deemed by staff as having gotten a "good deal" cannot be the basis for a massive new rulemaking of this magnitude. Staff's explanation as to this issue is plainly insufficient. *See State Farm*, 463 U.S. at 41 (agencies changing course have a heightened duty to explain why the older approach they used needs to be replaced). Additionally, we note that during the workshop process we repeatedly challenged the staff to provide additional

examples to prove their assertion that the status quo system is broken. The Toyota case and the DaimlerChrysler case are the only two examples that have been offered in the roughly eight-month period since April.

C. STAFF CANNOT EXCUSE ITSELF FROM ITS OBLIGATION TO ASSESS EMISSIONS REDUCTIONS FROM ITS PROPOSAL (AND RESULTING HEALTH BENEFITS) BY ASSERTING THAT SUCH ANALYSIS WOULD BE INHERENTLY SPECULATIVE.

Recognizing that it seeks to justify this rulemaking largely on the basis that it would provide emissions benefits, staff fails even to define the term it throws around “excess emissions.” See ISOR at 2 (noting that the program at issue was founded on the goal of reducing emissions: “In December of 1982, the Board adopted regulations which established the in-use vehicle recall program. The regulations were intended to reduce manufacturer-related excess emissions”); see *id.* at 18 (“the staff believes that the improvements it is proposing and other proposed improvements such as clarifying when hearings are available consistent with Health and Safety Code section 43105 would increase the likelihood that failing emissions components will be corrected and excess emissions attributable to them will be avoided.”).

The concept of an emissions standard and how to measure compliance with such a standard is well defined. But by “excess emissions” staff apparently means any emissions that occur as a result of a defective emissions-related component, even if such a defect does not cause the vehicle in question (let alone the engine family) to exceed emissions standards. As the Alliance explained in its October 2006 letter, that is an improper attempt to seize the “headroom” that manufacturers build into vehicles based on design redundancy and to provide a cushion against unforeseeable events that might degrade emissions performance. See Attachment B at 7-9 (incorporated into this section by reference).

Having set up emissions as the *raison d’être* for the Proposed Rule, staff then proceeds never to define the term “excess emissions,” and then never to attempt to calculate the excess emission benefits that it can attribute to the Proposed Rule. To justify this lacuna, staff argues as follows: “Second is that while it is inherently speculative to forecast the future emissions consequences of failed emissions components that fail over time it is beyond dispute that as motor vehicles age and accumulate high mileage, their emission control systems deteriorate and increasingly malfunction, causing emissions from motor vehicles to increase, and for these reasons, the ARB needs to be able to order recalls on the basis of failing emissions-related components, not just on the basis of average emissions exceedances in an affected vehicle group” ISOR at 15.

But this kind of claim amounts to an argument that estimating component-related excess emissions avoided is just “too hard.” This is simply not a credible claim by an agency that postures itself as expert and regularly models various phenomenon. No technically sophisticated or even lay person believes such models are precise and have eliminated all points of speculation because every model is built on assumptions. But the very point of using such models is that using statistics or econometrics or other technical know-how, the best possible estimates of emissions (or costs for that matter) must be made using available the evidence. Staff simply cannot stick its head in the sand and argue that it cannot estimate emissions-related impacts. That does not comport with ARB’s duties under CAPA or the incremental cost-effectiveness

analysis that allows a rational comparison of alternatives demanded by the Economic Analysis Guidance that binds ARB here. See Attachment A (Legal Memorandum), at 24-26 (incorporated herein by reference and reviewing the applicable administrative law on the analysis of costs and emissions benefits).

Here, it was all one member of the Alliance could do to locate the applicable cost information. One reason insufficient time was permitted to allow the performance of an incremental cost-effectiveness analysis is that estimating emissions impacts from past recall and warranty campaigns would take far more time. Apparently, staff did not have enough time to perform such an analysis either. But that does not mean that staff is free to go ahead with this proposed rulemaking anyway. Instead, it demonstrates that the Proposed Rule was submitted to the Board prematurely.

D. STAFF'S PROPOSED RULE IS ARBITRARY AND CAPRICIOUS BASED ON A NUMBER OF SELF-CONTRADICTIONS.

The Proposed Rule is based on a number of internal contradictions. We pointed the *first* one out above -- staff's claim that the rule is costless, or even more incredibly a bona fide economic boon for manufacturers, yet manufacturers are said to have an incentive to tenaciously fight any recalls or extended warranties ordered because of the high "stakes" involved. ARB must decide which of those two contradictory positions to take. It cannot simultaneously advance both positions.

Second, staff claims that its rulemaking will reduce administrative costs, yet requests \$200,000 more in funding for two additional employees. We fail to see how those two points can be squared. But even if they could, we fail to see why ARB would need additional employees when staff has fashioned in the Proposed Rule a system that ignores emissions standards and simply requires employees to be able to read emissions reports filed with them by manufacturers in order to initiate corrective action.

Third, staff has decided to extend warranties to periods in excess of useful life, yet it states in the ISOR that the aftermarket will not negatively be impacted by the Proposed Rule because that proposal primarily affects "new" vehicles: "The proposed amendments should not have an impact on the independent service and repair industry and aftermarket parts manufacturers since the proposal deals with relatively new vehicles and engines that are most commonly serviced at new car dealerships." ISOR at 28. Perhaps staff has done this to attempt to avoid the limitation on their only express remedial power under Health & Safety Code Section 43105 to "new" motor vehicles and engines. But it is not credible or logically sound for staff to maintain that a rulemaking that seeks the power to impose remedies that run beyond the useful life of vehicles (with an ultimate goal of regulating vehicles for their entire span on the roadways) affects only relatively new vehicles.

Internal contradictions of this nature are quintessential demonstrations of arbitrary and capricious behavior and thus reversible error. See, e.g., *Concerned Citizens of Calaveras County v. Board of Supervisors*, 166 Cal. App. 3d 90, 103 (3d Dist. 1985) ("In addition, these two elements of the plan are internally inconsistent and contradictory in violation of section 65300.5. The adoption of these elements was arbitrary and capricious."); see also *Air Line Pilots Ass'n v.*

FAA, 3 F.3d 449, 450 (D.C. Cir. 1993) ("The Department's conclusion that the employee dislocation at Braniff International Airlines was not a "qualifying dislocation" under the Act is internally inconsistent, arbitrary and capricious, and not supported by substantial evidence on the record.").

E. IN GENERAL, STAFF HAS NOT ADEQUATELY EXPLAINED THE PURPOSES OF THE PROPOSED REGULATION, PRESENTING THE RISK THAT UNSTATED PURPOSES THAT WOULD INVALIDATE THE PROPOSED RULE REMAIN HIDDEN.

Table 3 in the ISOR is very revealing. It shows what the Alliance believes to be one of the key, but unstated purposes of this proposed rulemaking. Notice that it would dramatically increase, by staff's own estimation, the number of required extended warranties issued both for light duty vehicles and heavy duty vehicles. See ISOR at 25. The purpose behind obtaining the spikes on Table 3 in post-Proposed Rule enforcement seem to be a naked purpose of protecting consumers from having to repair any emissions-related components that develop a defect. The closest staff comes to forthrightly acknowledging such a purpose is on page 18 of the ISOR: "The staff believes that when emissions components fail in significant numbers in use it is very likely that excess emissions will occur and, further, that it is reasonable for manufacturers to be required to correct these components, or at least to extend the emissions warranty applicable to them *so that consumers, warned of the failures by their vehicles' on-board diagnostic systems, will be able to have the failing components repaired or replaced under warranty. The proposed amendments would accomplish these goals.*" (emphasis added). Agencies may not engage in post hoc rationalizations because they think that such purposes appear more palatable than the real ones. See *Temecula Band of Luiseno Mission Indians v. Rancho Calif. Water Dist.*, 43 Cal. App. 4th 425, 437-38 (4th Dist. 1996) ("The courts are prohibited from cobbling together such "post hoc rationalizations" of agency decisions.")

Respectfully submitted,

The Alliance of Automobile Manufacturers

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