

LOCATION:

Air Resources Board
Byron Sher Auditorium, Second Floor
1001 I Street
Sacramento, California 95814

PUBLIC MEETING AGENDA

November 19, 2009

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November 19, 2009

9:00 a.m.

CONSENT CALENDAR:

The consent calendar agenda item will be voted on by the Board immediately after the start of the public meeting. Consent items may be removed from the consent calendar by a Board member or by someone in the audience who would like to speak on that item. The following agenda item is on the consent calendar:

Consent Item#

09-9-5: Public Hearing to Consider the Repeal of the 2007 Amendments to California's Emission Warranty Information Reporting (EWIR) and Recall Regulations and Emission Test Procedures and Readopt the Prior EWIR Regulations and Emission Test Procedures

Staff has proposed a repeal of the 2007 amendments to the EWIR Regulations and to readopt the original 1988 EWIR Regulations.

Attached is the Proposed Resolution. Please go to <http://www.arb.ca.gov/board/ma/2009/ma111909.htm> for resolution attachments.

DISCUSSION ITEMS:

Note: The following agenda items may be heard in a different order at the Board meeting.

Agenda Item #

09-9-6: Public Meeting to Update the Board on Health Impacts of Diesel Particulate Matter Emissions

Staff will summarize the scientific evidence showing adverse health effects from exposure to diesel particulate matter (PM). In 1998, California identified diesel exhaust PM as a toxic air contaminant based on its potential to cause cancer, premature death, and other health problems. Diesel engines also contribute to California's fine PM 2.5 air quality problems. Those most vulnerable are children whose lungs are still developing and the elderly who may have other serious health problems.

09-9-1: Public Meeting to Present Information on the New Drive Clean Website

Staff will present the Board with an overview of the new Drive Clean website. This website is a buying guide for clean and efficient vehicles, featuring smog and global warming scores for cars certified in California.

09-9-2: Public Meeting to Report to the Board on Regional Targets Advisory Committee Recommendations on Methodologies for Setting Targets Under Senate Bill 375

Staff will present to the Board the Regional Targets Advisory Committee's final recommendations to ARB on methodologies for setting regional greenhouse gas reduction targets pursuant to Senate Bill 375 (Steinberg, Chapter 728, Statutes of 2008).

09-9-3: Public Meeting to Update the Board on 2009 Air Quality Legislation

The Legislative Director and staff from the ARB Legislative Office will present a review of air quality legislation from the first year of the 2009-2010 Legislative Session.

09-9-4: Public Meeting to Update the Board on the Implementation of the California Global Warming Solutions Act of 2006 (Assembly Bill 32) and the Climate Change Scoping Plan

Staff will present the Board with a summary of activities related to climate change, including an update on the implementation of the Assembly Bill 32 and the Climate Change Scoping Plan.

CLOSED SESSION – LITIGATION

The Board will hold a closed session, as authorized by Government Code section 11126(e), to confer with, and receive advice from, its legal counsel regarding the following pending or potential litigation:

Central Valley Chrysler-Jeep, Inc. et al. v. Goldstene, U.S. Court of Appeals, Ninth Circuit, No. 08-17378 on appeal from U.S. District Court (E.D. Cal. - Fresno).

Fresno Dodge, Inc. et al. v. California Air Resources Board et al., Superior Court of California (Fresno County), Case No. 04CE CG03498.

General Motors Corp. et al. v. California Air Resources Board et al., Superior Court of California (Fresno County), Case No. 05CE CG02787.

Green Mountain Chrysler-Plymouth-Dodge-Jeep, et al. v. Crombie, 508 F.Supp.2d 295, U.S. District Court Vermont (2007), appeal to U.S. Court of Appeals, Second Circuit, Nos. 07-4342-cv(L) and 07-4360-cv(CON).

California Business Properties Association, et al. v. California Air Resources Board, et al., Superior Court of California (Sacramento), Case No. 34-2009-80000232.

Pacific Merchant Shipping Association v. Goldstene, U.S. District Court, EDCA, Case No. 2:09-CV-01151-MCE-EFB.

American Trucking Association, et al. v. U.S. Environmental Protection Agency, et al., U.S. Court of Appeals, District of Columbia Circuit, Case No. 09-1090.

Yamaha Motor Corporation, USA v. James Goldstene, et al., Superior Court of California (San Diego County), Case No. 37-2009-00094919-CU-MC-CTL.

Personnel – Potential Litigation

OPPORTUNITY FOR MEMBERS OF THE BOARD TO COMMENT ON MATTERS OF INTEREST

Board members may identify matters they would like to have noticed for consideration at future meetings and comment on topics of interest; no formal action on these topics will be taken without further notice.

OPEN SESSION TO PROVIDE AN OPPORTUNITY FOR MEMBERS OF THE PUBLIC TO ADDRESS THE BOARD ON SUBJECT MATTERS WITHIN THE JURISDICTION OF THE BOARD

Although no formal Board action may be taken, the Board is allowing an opportunity to interested members of the public to address the Board on items of interest that are within the Board's jurisdiction, but do not specifically appear on the agenda. Each person will be allowed a maximum of three minutes to ensure that everyone has a chance to speak.

THE AGENDA ITEMS LISTED ABOVE MAY BE CONSIDERED IN A DIFFERENT ORDER AT THE BOARD MEETING.**TO SUBMIT WRITTEN COMMENTS ON AN AGENDA ITEM IN ADVANCE OF THE MEETING GO TO:**

<http://www.arb.ca.gov/lispub/comm/bclist.php>

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT THE CLERK OF THE BOARD:

OFFICE: (916) 322-5594

1001 I Street, Floor 23, Sacramento, California 95814

ARB Homepage: www.arb.ca.gov

To request a special accommodation or language needs for any of the following:

- An interpreter to be available at the hearing.
- Have documents available in an alternate format (i.e. Braille, large print) or another language.
- A disability-related reasonable accommodation.

Please contact the Clerk of the Board at (916) 322-5594 or by facsimile at (916) 322-3928 as soon as possible, but no later than 10 business days before the scheduled Board hearing. TTY/TDD/Speech to Speech users may dial 711 for the California Relay Service.

Para solicitar alguna comodidad especial o si por su idioma necesita cualquiera de los siguientes:

- Un intérprete que esté disponible en la audiencia.
- Documentos disponibles en un formato alternativo (es decir, sistema Braille, letra grande) u otro idioma.
- Una acomodación razonable relacionados con una incapacidad.

Porfavor llame a la oficina del Consejo a (916) 322-5594 o envíe un fax a (916) 322-3928 lo mas pronto possible, pero no menos de 10 dias de trabajo antes del el dia programado para la audencia del Consejo. TTY/TDD/ Personas que nesessitan este servicio pueden marcar el 711 para el Servicio de Retransmisión de Mensajes de California.

PUBLIC MEETING AGENDA

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November 19, 2009 at 9:00 a.m.

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TITLE 13. CALIFORNIA AIR RESOURCES BOARD

NOTICE OF PUBLIC HEARING TO CONSIDER THE REPEAL OF THE 2007 AMENDMENTS TO CALIFORNIA'S EMISSION WARRANTY INFORMATION REPORTING (EWIR) AND RECALL REGULATIONS AND EMISSION TEST PROCEDURES AND READOPT THE PRIOR EWIR REGULATIONS AND EMISSION TEST PROCEDURES

The Air Resources Board (Board or ARB) will conduct a public hearing at the time and place noted below to consider amendments to repeal the 2007 amendments to California's Emission Warranty Information Reporting and Recall (EWIR) Regulations and emission test procedures (referred to collectively as the "2007 EWIR amendments") and to readopt the prior EWIR regulations and test procedures.

DATE: November 19, 2009

TIME: 9:00 a.m.

PLACE: California Environmental Protection Agency
Air Resources Board
Byron Sher Auditorium
1001 I Street
Sacramento, California 95814

This item will be considered at a one-day meeting of the Board, which will commence at 9:00 a.m. on November 19, 2009. Please consult the agenda for the meeting, which will be available at least 10 days before November 19, 2009 to determine the order of agenda items.

If you require a special accommodation or need this document in an alternate format or language, please contact the Clerk of the Board at (916) 322-5594 or by facsimile at (916) 322-3928 as soon as possible, but no later than 10 business days before the scheduled Board hearing. TTY/TDD/Speech to Speech users may dial 711 for the California Relay Service.

INFORMATIVE DIGEST OF PROPOSED ACTION AND POLICY STATEMENT OVERVIEW

Sections Affected: Amendments to sections 1956.8, 1958, 1961, 1976, 1978, 2111, 2112, 2122, 2136, 2141, title 13, California Code of Regulations (CCR), and the following related test procedures which are incorporated by reference: "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," adopted

August 5, 1999, and as last amended May 2, 2008, "California Evaporative Emission Standards and Test Procedures for 2001 and Subsequent Model Motor Vehicles," adopted August 5, 1999, and as last amended October 17, 2007, "California Refueling Emission Standards and Test Procedures for 2001 and Subsequent Model Motor Vehicles," adopted August 5, 1999, and last amended October 17, 2007, and "California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Otto Cycle Engines," adopted December 12, 2002, as last amended October 17, 2007, and repeal of sections 2166, 2166.1, 2167, 2168, 2169, 2170, 2171, 2172, 2172.1, 2172.2, 2172.3, 2172.4, 2172.5, 2172.6, 2172.7, 2172.8, 2172.9, 2173, and 2174. This will have the effect of readopting title 13, CCR, sections 2111-2149, as they existed prior to the 2007 EWIR amendments.

Background: In 1982, the Board adopted regulations establishing a recall program for in-use vehicles. In this program, staff would procure and test approximately ten similar, well-maintained, low-mileage vehicles (typically three years old, and thus within the five year "useful life" period which, at the time, was the period in which the vehicles were required to meet emission standards.) The tests were identical to tests used by manufacturers to certify the vehicles to ARB's emission standards. If the test vehicles on average exceeded emission standards, ARB ordered a recall for all vehicles produced in the tested group. Manufacturers implemented ARB's order by notifying owners to take their cars to dealers for repair, where manufacturers paid the dealers to take the steps necessary to reduce the vehicles' emissions to below applicable emission standards. This often involved replacing defective parts with parts of improved durability. In the early years of the program, many vehicles failed to meet emission standards and were recalled, but over time manufacturers improved the durability of their emission control components, and the failure rate and number of recalls declined.

Nevertheless, staff found that in a significant number of cases two or three of the ten vehicles in the test group had defective emission control components. Because compliance with emission standards was determined by averaging the results of all ten vehicles tested, in most of these cases the test group did not exceed emission standards on average, and no recall or other corrective action could be ordered. Staff believed, however, that these 20 percent to 30 percent failure rates of important emission control components occurring at low mileage accumulations were unacceptable because they meant that the chance of additional failures was real and would result in high emissions in substantial portions of the in-use fleet. Existing resources limited testing to a small fraction of the several hundred vehicle models the ARB certifies each year. In addition, the useful life period over which the vehicle manufacturer was responsible for maintaining emission compliance was extended by regulation to 100,000 miles or more. This required either testing vehicle models several times over their useful lives, or testing older models and delay detecting problems that may have existed for years. During this period, vehicular on-board diagnostic systems (OBD) became common and began to provide valuable information on what specific emissions parts were failing during emissions warranty periods.

The circumstances led staff to propose a more efficient and comprehensive program to identify and recall vehicles with defective emission related parts and systems, which the Board adopted in 1988. This new program was called the Emission Warranty Information Reporting and Recall (EWIR) program (1988 EWIR regulations). Vehicle manufacturers were required to keep records of emission control parts that were returned under warranty claims, report if the number exceeded a certain threshold and then determine the actual failure rate (e.g., some returned parts replaced under warranty could be excluded because they may not actually be defective due to mechanics having misdiagnosed the problem). When the validated failure rate of an emissions part exceeded 4 percent within the warranty period, ARB ordered a recall and manufacturers usually complied.

Over a hundred recalls resulted from this program. However, in a number of cases, the recalls were so extensive and costly that vehicle manufacturers balked at conducting them. Manufacturers claimed that the law required ARB to show that every subgroup of vehicles with the defective part exceeded emission standards, even though in some subgroups the rate of warranty claims reached 70 percent. Although ARB disagreed with the manufacturers' position, an administrative law judge ruled in the manufacturers' favor. Based on this ruling, another manufacturer with an extensive problem of defective catalytic converters was able to implement such a narrow remedy that, in ARB's opinion, many vehicles with defective catalytic converters were not repaired and the chances of more vehicles experiencing similar failures over their useful lives is great. Utilizing this ruling, other manufacturers resisted ARB's attempts to correct other instances of emission control component failures.

Based on this experience, ARB staff developed a revised emission warranty information reporting regulation. The revised program, adopted by the Board in 2007 (the 2007 EWIR amendments), was based on the requirement that in certifying a vehicle for sale in California, a manufacturer is required to demonstrate the durability of its emission control system design over a vehicle's useful life through a testing program, and, if a substantial number of the allegedly durable parts fail in use, the manufacturer has violated the certification test procedure and a recall can be ordered on the basis of the excessive parts failure alone. As a result, no emission testing by ARB was needed, and neither was a demonstration that the vehicles exceeded emissions standards on average. Simply put, under the 2007 EWIR amendments, if four percent of a particular emission control part fails to perform during the warranty period, the vehicle manufacturer must remedy the defect. Also, the burden of warranty reporting was reduced, and an alternative to recall involving extending the emission warranty was provided as well. These features reduced the cost of compliance for vehicle manufacturers, provided, of course, that the instances of emission control failure were relatively limited. From the staff's standpoint, this revised program provided a greater assurance that defective parts would be replaced, and in instances where the percentage of parts that fail in-use remained low (i.e. parts failure was not expected to occur on every vehicle before the end of the vehicle's life), the consumer was protected by the extended warranty and the manufacturer did not face the cost or stigma of recalling every vehicle.

Following the adoption of the 2007 EWIR amendments, the Automotive Service Councils of California and associated industry groups, and the Engine Manufacturers Association, filed petitions for writs of mandate challenging them. On December 16, 2008, a judge upheld most of the 2007 EWIR amendments, but ruled that the four percent corrective action threshold did not constitute a "test procedure" as that term is used in the Health and Safety Code. As a result, ARB could not order a recall or other remedy under the 2007 EWIR amendments based the failure of emission control parts.

Proposed Amendments: Although the judge's ruling invalidated only this one portion of the amended regulation, ARB staff has concluded that the remaining sections of the amended regulation are unenforceable because they depend on the four percent failure rate corrective action trigger to have any real effect. As a result, the staff is recommending the 2007 EWIR amendments be repealed, and that version of the EWIR regulation adopted by the Board 1988 be readopted. Although there are limits and weaknesses in the previous, 1988 EWIR regulation, it resulted in many recalls of defective parts and vehicles and increased durability of emissions components. Thus, it is a better option than no emission warranty information reporting or recall regulation.

COMPARABLE FEDERAL REGULATIONS

The proposed amendments to the 2007 EWIR regulation and readoption of the prior EWIR regulation have requirements that are similar to the federal defect reporting procedures. (See, generally 40 C.F.R. Part 85, in particular 40 C.F.R. sections 85.1901 and 85.1903.) Federal law requires a onetime report – the Emissions Defect Information Report (EDIR) – describing the defect, the vehicles it affects and its impact on emissions. However, the federal defect reporting requirement is wanting compared to ARB's proposed emission warranty reporting program because under the federal rule manufacturers are permitted to determine their own process for reporting and lacks oversight for determining the true cause of a specific failure.

AVAILABILITY OF DOCUMENTS AND AGENCY CONTACT PERSONS

ARB staff has prepared a Staff Report: Initial Statement of Reasons (ISOR) for the proposed regulatory action, which includes a summary of the economic and environmental impacts of the proposal. The report is entitled: "Staff Report: Initial Statement of Reasons for the Proposed Rulemaking – Public Hearing to Consider the Repeal of the 2007 Amendments to California's Emission Warranty Information Reporting (EWIR) and Recall Regulations and Emission Test Procedures and Readopt the Prior EWIR Regulations and Emission Test Procedures."

Copies of the ISOR and the full text of the proposed regulatory amendment language, in underline and strikeout format to allow for comparison with the existing regulations, may be accessed on the ARB's website listed below, or may be obtained from the

Public Information Office, Air Resources Board, 1001 I Street, Visitors and Environmental Services Center, 1st Floor, Sacramento, California 95814, (916) 322-2990 at least 45 days prior to the scheduled hearing on November 19, 2009.

Upon its completion, the Final Statement of Reasons (FSOR) will be available and copies may be requested from the agency contact persons in this notice, or may be accessed on the ARB's website listed below.

Inquiries concerning the substance of the proposed amendments may be directed to the agency contact persons, Mr. Tom Valencia, Manager, In-Use Compliance Section, at (626) 575- 6741 or Ms. Vickie Stoutingburg-Alewine, Air Pollution Specialist, In-Use Compliance Section, at (626) 575-6802.

Further, the agency representative and designated back-up contact person to who nonsubstantive inquiries concerning the proposed administrative actions may be directed are Ms. Lori Andreoni, Manager, Board Administration and Regulatory Coordination Unit, (916) 322-4011 or Ms. Amy Whiting, Regulations Coordinator (916) 322-6533. The Board has compiled a record for this rulemaking action, which includes all the information upon which the proposed amendments are based. This material is available for inspection upon request to the contact persons.

This notice, the ISOR and all subsequent regulatory documents, including the FSOR, when completed, are available on the ARB's website for this rulemaking at <http://www.arb.ca.gov/regact/2009/ewirpsip09/ewirpsip09.htm>.

COSTS TO PUBLIC AGENCIES AND TO BUSINESSES AND PERSONS AFFECTED

The determinations of the Board's Executive Officer concerning the costs or savings necessarily incurred by public agencies, private persons and businesses in reasonable compliance with the proposed regulations are presented below.

Before taking final action on the proposed regulatory action, the Board must determine that no reasonable alternative considered by the board or that has otherwise been identified and brought to the attention of the board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

Since the proposal is the repeal of the 2007 EWIR regulation amendments and readopt the prior regulations, the impacts are to reverse the original expected costs and benefits that would have resulted from the adoption of the 2007 EWIR regulation amendments.

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 not create costs to the ARB. The staff had expected the need for two additional staff at a cost of \$200,000 a year to implement and enforce the 2007 EWIR regulation amendments starting in 2010.

Those two staff will no longer be needed if the amendments are repealed. In addition, no costs would be created to any other State agency, or in federal funding to the State as a result of the repeal. The repeal/readoption 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 impacted by the proposed repeal would be manufacturers of California motor vehicles. There are presently 35 domestic and foreign corporations that manufacture California-certified passenger cars, light-duty trucks, and medium-duty gasoline and diesel fueled vehicles, 20 heavy-duty engine manufacturers, and over 60 motorcycle manufacturers. Only one motor vehicle manufacturing plant (NUMMI) is located in California. The originally proposed amendments would have resulted in reporting cost savings due to a reduced reporting requirement, however, the repeal would eliminate this benefit to the manufacturers. In addition, since manufacturers are fully expected and required to comply with emission standards and regulations, enforcement costs to manufacturers would have been negligible with the amendments, with the exception for those manufacturers that had high defective emission component rates and their resulting corrective action. While it was speculated the amendments would have resulted in more corrective actions in general, it was also estimated the industry wide cost would have be roughly equivalent. Repealing the 2007 EWIR regulation amendments is expected to result in fewer corrective actions; however, the same effect is expected industry wide, and there will be very little impact compared to what the costs are today.

The Executive Officer has also determined, pursuant to title 1, CCR, section 4, that the repeal of the 2007 EWIR regulation amendments will not affect small businesses. The 2007 amendments had assumed slight, absorbable or positive impacts, and the repeal is simply status quo. Additionally, as with the 2007 EWIR regulation amendments, their repeal should have no potential impact on the independent service and repair industry and aftermarket parts manufacturers since the amended regulations deal with mainly new vehicles and engines that are still within their certified useful life period.

In developing this amendment, ARB staff evaluated the potential economic impacts on representative private persons or businesses. The ARB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. In fact a savings could be realized by business.

The Executive Officer has made an initial determination, pursuant to Government Code section 11346.5(a)(8), 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.

In accordance with Government Code section 11346.3, the Executive Officer has determined that the proposed regulatory action would have minor or no impact on the creation and 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. A detailed assessment of the economic impacts of the proposed regulatory action can be found in the ISOR.

In accordance with Government Code sections 11346.3(c) and 11346.5(a)(11), the Executive Officer has found that the reporting requirements of the regulation which apply to the businesses are necessary for the health, safety, and welfare of the people of the State of California.

SUBMITTAL OF COMMENTS

Interested members of the public may also present comments orally or in writing at the hearing and may be submitted by postal mail or by electronic submittal before the hearing. To be considered by the Board, written comments not physically submitted at the meeting must be received **no later than 12:00 noon, Pacific Standard Time, November 18, 2009**, and addressed to the following:

Postal mail: Clerk of the Board, Air Resources Board
1001 I Street, Sacramento, California 95814

Electronic submittal: <http://www.arb.ca.gov/lispub/comm/bclist.php>

Please note that under the California Public Records Act (Government Code section 6250 et seq.), your written and oral comments, attachments, and associated contact information (e.g., your address, phone, email, etc.) become part of the public record and can be released to the public upon request. Additionally, this information may become available via Google, Yahoo, and any other search engines.

The Board requests, but does not require, 20 copies of any written submission. Also, ARB requests that written and e-mail statements be filed at least 10 days prior to the hearing so that ARB staff and Board Members have time to fully consider each comment. The Board encourages members of the public to bring to the attention of staff, in advance of the hearing, any suggestions for modification of the proposed regulatory action.

STATUTORY AUTHORITY AND REFERENCES

This regulatory action is proposed under that authority granted in Health and Safety Code, sections 39500, 39600, 39601, 43013, 43018, 43100, 43101, 43102, 43104, 43105, 43106, 43107 and 43806; and Vehicle Code section 28114. This action is proposed to implement, interpret and make specific sections Health and Safety Code

sections 39002, 39003, 39500, 39667, 43000, 43009.5, 43013, 43017, 43018, 43100, 43101, 43101.5, 43102, 43104, 43105, 43106, 43107, 43202, 43204, 43205, 43205.5, 43206, 43210, 43211, 43212, 43213 and 43806; and Vehicle Code section 28114.

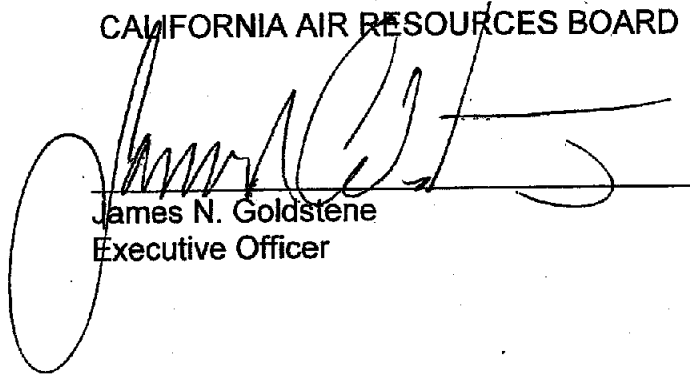
HEARING PROCEDURES

The public hearing will be conducted in accordance with the California Administrative Procedure Act, title 2, division 3, part 1, chapter 3.5 (commencing with section 11340) of the Government Code.

Following the public hearing, the Board may adopt the regulatory language as originally proposed, or with non substantial or grammatical modifications. The Board may also adopt the proposed regulatory language with other modifications if the text as modified is sufficiently related to the originally proposed text that the public was adequately placed on notice that the regulatory language as modified could result from the proposed regulatory action; in such event the full regulatory text, with modifications clearly indicated, will be made available to the public, for written comment, at least 15 days before it is adopted.

The public may request a copy of the modified regulatory text from the ARB's Public Information Office, Air Resources Board, 1001 I Street, Visitors and Environmental Services Center, 1st Floor, Sacramento, California 95814, (916) 322-2990.

CALIFORNIA AIR RESOURCES BOARD



James N. Goldstene
Executive Officer

Date: September 22, 2009

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website at www.arb.ca.gov.

State of California
AIR RESOURCES BOARD

**STAFF REPORT: Initial Statement of Reasons
For Proposed Rulemaking**

**NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO
REPEAL THE 2007 AMENDMENTS TO CALIFORNIA'S EMISSION
WARRANTY INFORMATION REPORTING AND RECALL
REGULATIONS (EWIR REGULATIONS) AND EMISSION TEST
PROCEDURES AND READOPT THE PRIOR EWIR REGULATIONS AND
EMISSION TEST PROCEDURES**

Date of Release: October 2, 2009
Scheduled for Consideration: November 19, 2009

This report has been reviewed by the staff of the California Air Resources Board and approved for publication. Approval does not signify that the contents necessarily reflect the views and policies of the Air Resources Board, nor does mention of trade names or commercial products constitute endorsement or recommendation for use.

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Appendix A Proposed Regulations Changes

EXECUTIVE SUMMARY

Authority

California Health and Safety Code (H&SC) sections 43105 and 43106 authorize the ARB to require manufacturers to comply with emission standards and test procedure requirements as part of the new vehicle or engine certification process. There are several existing H&SC sections that not only address that manufacturers meet emission standards, but also ensures that manufacturers build durable emission-related components. H&SC section 43105 authorizes ARB to order a recall or other corrective action for violations of its emission standards or test procedures. Under this same authority, the California Air Resources Board (ARB or Board) has wide discretion to determine the facts constituting compliance with these emission standards and test procedures, to fashion corrective action, including recalls and other remedies for noncompliance, and to adopt procedures for making these determinations. In addition, H&SC section 43106 requires that production vehicles or engines, must in all material respects, be substantially the same as the test vehicles manufacturers use to obtain ARB's certification. Over the years, the ARB has developed programs and regulations aimed at meeting the objectives of the H&SC.

In-Use Recall Program

In 1982, the Board adopted regulations establishing a recall program for in-use vehicles. In this program staff would procure and test about ten similar, well maintained, lower mileage vehicles (typically three years old, and thus within the five year useful life which at the time defined the period the vehicle manufacturer was obligated to meet emission standards.) The emission tests conducted were identical to those used to originally certify the vehicles. If the test vehicles on average exceeded one or more emission standard, a recall of all the vehicles produced of that group was implemented. Owners were notified to bring their car to a dealer, and the vehicle manufacturer was required to take those steps necessary to reduce the vehicles' emissions to below the applicable standard. This often involved replacement of defective parts with parts of improved durability. Initially, many of the groups of similar vehicles tested failed to meet emission standards, but over time manufacturers improved the durability of the emission controls, and the failure rate and number of recalls decreased.

In the recall testing program, staff would often find two or three of the ten vehicles tested had defective emission controls. Because compliance was determined by the average of all ten vehicles tested, emission standards would not be exceeded and no recall would be ordered. Staff was concerned that with 20 to 30 percent of an important emission control part failing at low mileage, the chance of additional failures during the rest of the vehicle's life and resulting high emissions was real and not being addressed. Furthermore, staff resources restricted testing to only a small fraction of the several hundred models certified each year. In addition, the useful life period in which the vehicle manufacturer was responsible for emission compliance was extended to

100,000 miles or more, which meant either testing models several times during their useful life, or waiting to test until the models were older and thus potentially missing problems that may have existed for many years. Finally, on-board diagnostics (OBD) had become well established and was providing valuable information on what specific parts were failing during the vehicle's warranty period. These factors caused staff to develop an additional, more efficient and comprehensive program to identify and recall vehicles with defective emission related parts and systems. This new program was called the Emission Warranty Information Reporting (EWIR) program.

Original 1988 EWIR Program

In 1988, the Board adopted the original EWIR program to address manufacturers' durability requirements as authorized by the H&SC. The ARB launched the first EWIR program in early 1990 requiring all on-road vehicle and engine manufacturers to review all emission-related warranty claims during the warranty period (applicable warranty period for the type of vehicle or engine – e.g., 3 years/50,000 miles or 7 years/70,000 miles for passenger cars, light- and medium-duty trucks, depending on the part) and on a quarterly basis to determine the number of repairs or replacements made for each component. The first step in the warranty reporting process requires that a manufacturer submit an EWIR whenever it determines that an emission-control component for a given engine family or test group reaches an unscreened¹ one percent or 25 component replacement rate (whichever is greater). A manufacturer must continue to analyze warranty claims and report to ARB on a quarterly basis. When the warranty claims for an emission-control component reach an unscreened four percent or 50 component replacement rate (whichever is greater), the manufacturer must submit a Field Information Report (FIR).

The FIR contains the warranty repair rate with any invalid data removed. If this validated failure rate is less than four percent, the manufacturer must determine and report the date when the projected replacement rate is expected to reach four percent. If the manufacturer determines that a valid defect exists, the manufacturer is required to submit an Emissions Information Report to quantify the emissions impact of the defect and, if necessary, determine what action is necessary to correct the problem. Corrective action has either been a recall or in some cases an extended warranty for the failing component.

Over a hundred recalls resulted from this program. However, in several circumstances the recalls were so extensive and costly that vehicle manufacturers balked at conducting the recall. Industry claimed that the statute required ARB to show that every subgroup of vehicles with the defective part exceeded emission standards, even though in some subgroups the rate of warranty claim reached as high as 70 percent. Although ARB disagreed with the manufacturers' position, an administrative law judge ruled in the manufacturer's favor. Based on this, another manufacturer with an extensive problem of defective catalyts was able to narrow down the remedy so that in ARB's opinion many cars with defective catalyts were not fixed and the chance of more vehicles having failures during their remaining vehicle life was great.

¹ Unscreened – The tabulation of dealership emission warranty service records for emission-related components as they apply to individual engine families or test groups without verification that the part is actually defective.

In each of these cases a systemic failure clearly existed and each manufacturer challenged ARB's authority to require corrective action citing legal interpretations of the EWIR regulations. The staff identified three aspects of the original EWIR regulation that needed improvement, specifically: (1) the proof required to demonstrate violations of ARB's emission standards or test procedures, (2) the corrective actions available to ARB to address the violations and, (3) the way emissions warranty information is reported to ARB. The ARB staff developed a proposal to amend the EWIR regulations to address the issues with implementing the original program.

Amended 2007 EWIR Regulations

The revised program as proposed by staff and adopted by the Board in 2007, was based on the legal concept that in certifying a vehicle for sale in California, a manufacturer is required to demonstrate the durability of its emission control system design through a testing program, and if after sale, a substantial number of the allegedly durable parts fail, the manufacturer has violated the certification test procedure and a recall can be ordered on the basis of the excessive parts failure alone. As a result, no emission testing by ARB was needed, as was no demonstration that the vehicles exceeded emissions standards on average. Simply put, if enough emission control parts break or fail to perform during the warranty period (i.e., a four percent failure rate), the vehicle manufacturer must remedy the defect. In the regulation the Board adopted, the amount of reporting was reduced, and an alternative to recall involving extending the emission warranty was provided as an option. These features reduced the cost of compliance for vehicle manufacturers, provided of course the instances of emission control failure were relatively limited. From the staff standpoint, this revised program provided a greater assurance defective parts would be replaced, and in those instances when the fraction of the part that actually fails in-use remained low (i.e. parts failure was not expected to occur on every vehicle before the end of the vehicle's life), the consumer was protected by the extended warranty and the manufacturer did not have to face the cost and stigma of recalling every vehicle.

The staff's approach had several advantages, including the following: allowing the implementation of swifter recalls or other corrective actions at lower administrative costs, harnessing the powers of on-board diagnostic systems to detect emission component failures and warn drivers to seek repairs, relating the recall/corrective action decision to the durability demonstration that manufacturers must make to obtain ARB's certification, and guaranteeing that the vehicles used by manufacturers for certification testing are substantially the same in all material respects to the vehicles that they sell to the public. Manufacturers disagreed with and were widely opposed to staff's approach to this rulemaking at the December 2006 and March 2007 Board hearings.

Lawsuit

By March 2008, petitions for writs of mandate were filed in Los Angeles Superior Court by the Automotive Service Councils of California and other associated petitioners, and the Engine Manufacturers Association, against ARB challenging the newly amended EWIR regulations on a variety of grounds, including allegations that ARB had no authority to undertake corrective actions based solely on a four percent failure rate. On December 16, 2008, the judge upheld most of the regulation as amended, but ruled

the four percent corrective action threshold did not constitute a "test procedure" as that term is used in the H&SC. As a result ARB could not order a recall or other remedy based on an excessive number of defective emission control parts alone based on this being a violation of the certification test procedures.

Although the judge's ruling invalidated only this one portion of the amended regulation, ARB staff has concluded that the remaining sections of the amended regulation are unenforceable because they depend on the four percent failure rate corrective action trigger to have any real effect. As a result, the staff is recommending the 2007 EWIR amendments be repealed, and that the version of the EWIR regulation adopted by the Board in 1988 be readopted or allowed to remain in effect. Although there are limits and weaknesses in the previous, 1988 EWIR regulation, it resulted in many recalls of defective parts and vehicles and increased durability of emissions components. Thus, it is a better option than having no emission warranty information reporting or recall regulation at all.

Staff Recommendations

The amended EWIR regulations apply to 2010 and subsequent model year on-road vehicles and engines as set forth in sections 1958, 1956.8, 1961, 1976, 1978, 2112, 2122, 2136, 2141 and new Article 5, sections 2166-2174, 13 CCR, set forth in the proposed Regulation Order and the associated test procedures (see Appendix A). Based on the judge's ruling, the staff proposes to repeal these regulations and readopt or allow to remain in effect the previous EWIR regulations per 13 CCR, sections 2111-2149 and related test procedures for the 2010 and subsequent model year vehicles and engines.

State of California
AIR RESOURCES BOARD

**STAFF REPORT: Initial Statement of Reasons
For Proposed Rulemaking**

**NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO
REPEAL THE 2007 AMENDMENTS TO CALIFORNIA'S EMISSION
WARRANTY INFORMATION REPORTING AND RECALL
REGULATIONS (EWIR REGULATIONS) AND EMISSION TEST
PROCEDURES AND READOPT THE PRIOR EWIR REGULATIONS AND
EMISSION TEST PROCEDURES**

Date of Release: October 2, 2009
Scheduled for Consideration: November 19, 2009

I. Introduction

This report addresses the California Air Resources Board (ARB or "Board") adopted amendments to the Recall and Emission Warranty Information Reporting (EWIR) Regulations contained in the California Code of Regulations, Title 13 (13 CCR), Division 3, Chapter 2, sections 2112, 2122, 2136, 2141, 2166-2174, and also, the emission test procedures 13 CCR, sections 1956.8, 1958, 1961, 1976 and 1978 and why they need to be repealed. These amendments were created to streamline, refine, and enhance the prior EWIR program to ensure the adherence with the applicable test procedures, the durability of emission-control components installed by vehicle and engine manufacturers and provide corrective action when components fail to perform properly. The amended EWIR regulations would have increased the effectiveness of the program, and reduced overall administrative costs. Due to a decision rendered in an action filed in Los Angeles Superior Court upholding a challenge to the legal authority supporting one aspect of the amendments, ARB staff believes the amended EWIR regulations must be repealed, and replaced with the regulations that were in place prior to the 2007 amendments.

II. History of the Program

A. 1982 In-Use Recall Program

In 1982, the Board adopted regulations establishing a recall program for in-use vehicles. In this program, staff would procure and test approximately ten similar, well-maintained, low-mileage vehicles (typically three years old, and thus within the five year "useful life" period which, at the time, was the period in which the vehicles were required to meet emission standards.) The tests were identical to tests used by manufacturers to certify the vehicles to ARB's emission standards. If the test vehicles on average exceeded emission standards, ARB ordered a recall for all vehicles produced in the tested group. Manufacturers implemented ARB's order by notifying owners to take their cars to dealers for repair, where manufacturers paid the dealers to take the steps necessary to reduce the vehicles' emissions to below applicable emission standards. This often involved replacing defective parts with parts of improved durability. In the early years of the program, many vehicles failed to meet emission standards and were recalled, but over time manufacturers improved the durability of their emission control components, and the failure rate and number of recalls declined.

Nevertheless, staff found that in a significant number of cases two or three of the ten vehicles in the test group had defective emission control components. Because compliance with emission standards was determined by averaging the results of all ten vehicles tested, in most of these cases the test group did not exceed emission standards on average, and no recall or other corrective action could be ordered. Staff believed, however, that these 20 percent to 30 percent failure rates of important emission control components occurring at low mileage accumulations were unacceptable because they meant that the chance of additional failures was real and would result in high emissions in substantial portions of the in-use fleet. Existing resources limited testing to a small fraction of the several hundred vehicle models the ARB certifies each year. In addition, the useful life period over which the vehicle manufacturer was responsible for maintaining emission compliance was extended by regulation to 100,000 miles or more. This required either testing vehicle models several times over their useful lives, or testing older models and delay detecting problems that may have existed for years. During this period, vehicular on-board diagnostic systems (OBD) became common and began to provide valuable information on what specific emissions parts were failing during emissions warranty periods.

B. Original 1988 EWIR Program

These circumstances led staff to propose a more efficient and comprehensive program to identify and recall vehicles with defective emission related parts and systems, which the Board adopted in 1988. This new program was called the Emission Warranty Information Reporting and Recall (EWIR) program (1988 EWIR regulations). Vehicle manufacturers were required to keep records of emission control parts that were returned under warranty claims, report if the number exceeded a certain threshold