

State of California
AIR RESOURCES BOARD

**Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Agency Response**

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

Public Hearing Date: November 19, 2009
Agenda Item No.: 09-9-5

I. GENERAL

A. The Action Taken in This Rulemaking

The Staff Report: Initial Statement of Reasons for Rulemaking ("staff report"), 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, released October 2, 2009, is incorporated by reference herein.

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 by: (1) ensuring that noncompliant vehicles are identified, recalled and repaired to meet the applicable emission standards and comply with the test procedures in customer use; and (2) encourage manufacturers to improve emission control designs and durability to avoid the expense and adverse publicity of recall. The program provided for ARB testing of emissions from properly maintained in-use vehicles to determine whether they comply with emission standards during the useful life period. Once noncompliance was identified in a substantial number of vehicles or engines, a manufacturer could perform a voluntary recall. If a manufacturer was unwilling to implement a voluntary recall, the ARB could order the manufacturer to recall the noncompliant vehicles. Under the initial recall program, manufacturers were also required to report to the ARB known emission-related failures and what was being done to remedy them.

During the early years of the program, the ARB staff identified problem areas in the regulations that resulted in low capture rates, delays in recall implementation, and inconsistent reporting of failed emission-related components, among others. In 1988 the staff proposed and the Board adopted amendments to the in-use recall regulations to improve the efficiency and intent of the program and created the Emission Warranty Information Reporting (EWIR) program.

The EWIR program applied to all on-road 1990 and newer model-year passenger cars, light-, medium-, and heavy-duty trucks, California-certified engines used in such vehicles, and motorcycles. The warranty reporting procedures were a mechanism for identifying, tracking and causing the repair of vehicles with defective emission-control components caused by poor design, materials or workmanship. Manufacturers were required to track warranty claims submitted by their dealers. When the claims rate for a warranted part (or emission-control component) reached a specified rate, the manufacturer was required to review its warranty data for that component to determine if the warranty activity indicated that a valid “defect” exists. When it was determined that a defect existed, the manufacturer had to evaluate the facts and quantify the emissions impact of the defect and, if necessary take action to correct the problem. Corrective action typically involved a recall of a group of vehicles that use the defective component. The first step in the warranty reporting process required that a manufacturer submit an EWIR whenever it determined that an emission-control component for a given engine family or test group reached an unscreened¹ one percent or 25 component replacement rate (whichever is greater). A manufacturer was required to continue their warranty claims analysis and report to ARB on a quarterly basis. When the warranty claims for an emission-control component reached an unscreened four percent or 50 component replacement rate (whichever was greater), the manufacturer was required to submit a Field Information Report (FIR).

The FIR contained the warranty repair rate with any invalid data removed. If this validated failure rate was less than four percent, the manufacturer was required to determine and report the date when the projected replacement rate was expected to reach four percent. If the manufacturer determined that a valid defect existed, the manufacturer was required to submit an Emissions Information Report to quantify the emissions impact of the defect and, if necessary, determine what action was necessary to correct the problem. Corrective action had 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. In one such case, a manufacturer requested an administrative hearing to determine if their identified high failure rate warranted a recall. 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 catalysts was able to narrow down the remedy so that in ARB’s opinion many cars with

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.

defective catalysts were not fixed and the chance of more vehicles having failures during their remaining vehicle life was great. Utilizing this ruling, other manufacturers resisted ARB's attempts to correct other instances of emission control component failures.

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 was reported to ARB. The ARB staff developed a proposal to amend the EWIR regulations to address the issues with implementing the original program.

The rulemaking was initiated by the October 20, 2006 public hearing to consider the adoption of proposed amendments to the EWIR regulation. The hearing notice was entitled "Notice Of Public Hearing to Consider Amendments to California's Emission Warranty Information Reporting and Recall Regulations and Emission Test Procedures" (Notice or Hearing Notice). On October 20, 2006, the staff also published the "Staff Report: Initial Statement of Reasons for Rulemaking, Public Hearing to Consider Amendments to California's Emission Warranty Information Reporting and Recall Regulations and Emission Test Procedures" (the Staff Report or ISOR) and made it available to the public upon request as required by Government Code Section 11346.2. Prior to the publication of the Notice and Staff Report, the staff held a public workshop on May 2, 2006 and held several meetings with stakeholders.

At the December 7, 2006 hearing, the Board considered the staff's proposal and received written and oral comments from the public. At the hearing, a number of witnesses provided testimony in opposition to the staff's proposal and requested a delay to work with staff to resolve the issues they had with the proposal. The staff presented a list of proposed modifications to the staff's originally-proposed amendments. The Board voted to continue the item to allow the additional time the witnesses requested. In doing so, the Board also directed the staff to return within six months with a final proposal for the Board to consider. In response, a notice to continue the December 7, 2006 hearing to March 22, 2007 was published and posted on ARB's website for the rulemaking listed above.

The staff held several additional meetings with stakeholders between December 7, 2006 and January 23, 2007. On January 23, 2007, staff issued a supplement to the October 20, 2006 staff report. This supplement was entitled "Notice of Public Workshop Regarding Proposed Amendments to the Procedures for Reporting Failures of Emission-Related Components and Corrective Actions; Supplement to the Initial Statement of Reasons" (Supplemental Staff Report or Supplemental ISOR). The Supplemental Staff Report gave notice of an additional workshop to be held on the staff's proposal on February 14, 2007. In

the Supplemental ISOR the staff summarized and responded to comments on the proposed amendments received up to that point and, among other things, discussed alternatives to the staff's approach and provided additional analysis of the economic impact of the staff's proposal. The Supplemental ISOR also included regulatory language for the conceptual modifications staff had proposed at the December 7, 2006, hearing and for other changes.

After holding the additional workshop with stakeholders on February 14, 2007, on March 12, 2007 staff posted an updated version of the proposed regulations and incorporated Test Procedures showing all recommended modifications to the originally-proposed text on ARB's Internet site for the rulemaking. The staff continued to meet with stakeholders.

At the Board's March 22, 2007 hearing, the staff presented the modified amendments made available March 12, reflecting over 80 specific changes to its original October 20, 2006 proposal. These modifications addressed many of the stakeholders' concerns; including limiting the duration of extended warranties to the useful life of the applicable vehicles or engines, and providing manufacturers the ability to contest the decision to order extended warranties at an administrative hearing. Unfortunately, however, these modifications did not gain stakeholder's full support for the staff's proposal. At the March 22, 2007 hearing the Board again heard opposing testimony from motor vehicle and engine manufacturers, as well as from the automobile aftermarket parts and service industries, which was similar to the testimony that was presented at the December 2, 2006 hearing.

At the conclusion of the March 22, 2007 hearing, the Board voted unanimously to adopt Resolution 06-44, in which it approved the originally proposed amendments with the modifications presented by staff. The Resolution directed the Executive Officer to incorporate the modifications into the proposed regulatory text, with such other conforming modifications as would be appropriate. In accordance with section 11346.8 of the Government Code, the Board directed the Executive Officer to adopt the modified amendments to sections 1956.8, 1958, 1961, 1976, 1978, 2122, 2136, 2141 and the modified new sections 2166-2174, title 13, California Code of Regulations (CCR).

Subsequently, ARB staff began to implement the amended 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 was 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 failed in use, the manufacturer has violated the certification test procedure and a recall could 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 failed to perform during the warranty period, the vehicle manufacturer was required to 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 failed 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 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, a judge upheld most of the 2007 EWIR amendments, but ruled that the four percent corrective action threshold did not constitute a "test procedure" violation as that term is used in the California Health and Safety Code, section 43105. The judge ordered the ARB to repeal the portions of the regulation that contained the four percent corrective action threshold.

After analyzing the decision's impact on the remaining 2007 EWIR amendments, ARB's staff concluded that the amendments were unenforceable without the four percent failure rate corrective action standard. Since the basis for determining whether a systemic failure of an emission-control component (the four percent failure rate corrective action standard) was legally void and the rest of the amended EWIR regulations in new Article 5, title 13, CCR, sections 2167-2168 that established rules, standards, and procedures for determining a systemic failure were based on the four percent failure rate corrective action standard, the remainder of the amendments had little purpose without the ability to enact corrective action. Therefore, it would be pointless to attempt to implement the EWIR regulations as they were amended in 2007 without the four percent failure rate corrective action standard. Consequently, based on all these circumstances, ARB staff believed that repealing the amendments was necessary and beneficial towards air quality because it would allow the prior version of the EWIR program to remain in effect.

If the repeal was not adopted, the ARB would be in violation of the judge's order and, starting with the 2010 model year vehicles and engines, manufacturers would only have to report EWIRs once a year and only when the warranty failure rate for a given component for a given test group/engine family reached four percent. When these failure rates reached ten percent, the ARB could only

attempt to negotiate a corrective action plan with the manufacturer but there was no authority for ARB to require any such action. The manufacturer could simply disregard the problem and do nothing. Therefore, it was staff's recommendation that the 2007 EWIR regulation amendments be repealed. This would have the effect of readopting or allowing the previous EWIR regulations adopted by the Board in 1988 per Title 13, CCR, sections 2111-2149 to remain in effect for the 2010 and subsequent model year vehicles and engines.

In practice, the EWIR regulations would revert back to the 1988 EWIR regulations that were in effect prior to the 2007 EWIR amendments. Although there are limits and weaknesses in the previous 1988 EWIR regulations, it resulted in many recalls of defective parts and vehicles and increased durability of emission components. Consequently, having the 1988 EWIR program in effect would be a better alternative than having no emission warranty information reporting or recall regulation.

On November 19, 2009, the Board hearing was held and the staff report, as well as the 15-day changes, was considered by the Board under the consent protocol process. The 2007 EWIR amendments and changes were unanimously approved by the Board as part of Resolution 09-54 (Appendix I). Attachment A of Resolution 09-54 contains the amendments as originally proposed, while Attachment B of Resolution 09-54 contains the modifications staff suggested and posted in the Board's Consent Calendar (Consent Item# 09-9-5).

There was a 15-day notice and modifications were completed relating to the regulations. The modifications were non-substantive regarding the repeal language. There were no comments received concerning the 15-day change.

B. Economic and Fiscal Impacts

Since the proposal was to repeal the 2007 EWIR amendments and readopt the prior regulations, the impacts were to reverse the original expected costs and benefits that would have resulted from the adoption of the 2007 EWIR amendments. The economic impacts of the 2007 EWIR amendments were discussed at length in the October 20, 2006 Initial Statement of Reasons (ISOR) and the January Supplemental ISOR supporting the 2007 EWIR amendments. Both the October 20, 2006 ISOR and the January Supplemental ISOR supporting the 2007 EWIR amendments are incorporated by reference here.

Pursuant to Government Code sections 11346.5 (a)(5) and 11346.5(a)(6), the Executive Officer determined that the proposed regulatory action would not create costs to the ARB. The staff had expected there would be a need for two additional staff, at a cost of \$200,000 a year, to implement and enforce the 2007 EWIR amendments starting in 2010. Those two staff would no longer be needed if the amendments were 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 would 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.

C. Consideration of Alternatives

For reasons set forth in the Notice, the Staff Report, and the ISOR, and in this FSOR, ARB has determined that no alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective as and less burdensome to affected private persons than the action taken by the Board.

II. PROPOSED ACTION

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

III. SUMMARY OF COMMENTS AND AGENCY RESPONSE³

The Board received written comments from three individuals/entities during the 45-day comment period relating to the November 19, 2009 hearing. All comments were in support of ARB staff's decision to repeal the Warranty Reporting Amendment Regulations for 2010 and subsequent model years and consequently, there were no agency responses submitted. The following is a list of the individuals/entities who submitted written comments: Kenneth R. Reisinger, Acting Deputy Secretary, Pennsylvania Department of Environmental Protection; Glenn Davis, President, Automotive Service Councils of California Association; and the Automotive Aftermarket Industry Association, which includes its affiliates: Automotive Parts Remanufacturing Association, Automotive Service Association, Automotive Service Councils of California, California Autobody Association, California Automotive Business Coalition, California/Nevada/Arizona Automotive Wholesalers Association, California Service Station and Repair Association, Connie and Dick's Service Center, and Independent Automotive Professionals Association.

There were no written comments submitted prior to the public hearing, nor was there any testimony at the public hearing. Lastly, there were no written comments on the modifications or additional supporting information during the 15-day comment period.