CHRYSLER CORPORATION

Chrysler Technology Center

STATE OF CALIFORNIA
AIR RESOURCES BOARD
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February 28, 1996

Ms. Pat Hutchens
Board Secretary
Air Resources Board
PO Box 2815
Sacramento, CA 95812

Dear Ms. Hutchens:

Chrysler would like to comment on the proposed regulatory changes for the September 28, 1995 Air Resources Board Hearing (M.O. 96-02). We are a member of the American Automobile Manufacturers Association and support their comments submitted to the Air Resources Board on this issue. Chrysler also requests that you consider the following comment.

The changes made to Section J of the "California Exhaust Emission Standards and Test Procedures for 1988 and Subsequent Model Passenger Cars, Light-duty Trucks, and Medium-duty Vehicles" could lead to significant confusion. Specifically, the changes to Section J.9 states that the intermediate in-use standards for medium-duty vehicles begin in 1998 model year whereas they began in 1992 model year under the original regulation. The new wording pertaining to 1998 model year raises the question of what the intermediate in-use standards are in the 1996 and 1997 model years. While Chrysler would interpret the new wording to mean that there is no in-use requirement prior to the 1998 model year for LEVs or ULEVs, we request the actual regulatory text be modified to clarify the Air Resources Board's intention.

I appreciate you consideration of this issue. If you have any questions regarding Chrysler's comments, please contact Michael Berube at (810) 576-5499 or me at (810) 576-8076.

Sincerely,

Eric Ridenour, Director
Environmental and Energy Planning

c. Steve Albu
Annette Guerrero

800 Chrysler Drive East
Auburn Hills MI 48326-2757

CALIFORNIA MOTOR CAR DEALERS ASSOCIATION

GOVERNMENT AFFAIRS OFFICE
915 L Street, Suite 1480, Sacramento, CA 95814
916/441-2599 • FAX 916/441-5612

February 27, 1996

Board Secretary
California Air Resources Board
P.O. Box 2815
Sacramento, California 95812

Re: Mail-Out #96-02 (including Attachment #1)
Comments on Modifications to Amendments to the Certification Requirements and Procedures for Low-Emission Passenger Cars, Light Duty Trucks and Medium Duty Vehicles. Section 1965, Title 13, California Code of Regulations. [Deadline for Public Comment: February 29, 1996.]

Dear Board Secretary:

The California Motor Car Dealers Association (CMCDA) is a statewide trade association that represents the interests of over 1400 franchised new car and truck dealer members. CMCDA members are primarily engaged in the retail sale of new and used motor vehicles, but also engage in automotive service, repair, and parts sales. We are writing today to renew our objections to the proposed regulatory amendments to Section 1965, Title 13, California Code of Regulations (hereinafter referred to as "Section 1965").

As first proposed in its notice of rulemaking released August 11, 1995, the California Air Resources Board's (CARB) proposed modification of Section 1965, which incorporates by reference the "California Motor Vehicle Emission Control and Smog Index Label Specifications", contained provisions which conditioned the requirement of smog index labeling upon fulfillment of several conditions specified in Section 32 of S.B. 2050, Chapter 1192, Statutes of 1994 (hereinafter referred to as "S.B. 2050"). However, CARB's October 12, 1995 Notice of Public Availability of Modified Text and Supporting Documents contained a deletion of the original language which provided that smog labeling requirements would only be operative upon fulfillment of the legislatively specified conditions. In the Second Notice of Public Availability of Modified Text (Mail Out #96-02), CARB continues to omit the statutorily required conditions set forth by the Legislature as prerequisites for a smog index labeling program.

CARB Lacks Authority to Mandate Smog Index Decals

California Government Code Section 11342.2 provides as follows:

> Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. (Emphasis Added.)

California courts have relied on Section 11342.2 to strike down regulations that exceed statutory authority. In *Association for Retarded Citizens v. Department of Developmental Services*, 211 Cal. Rptr. 758 at 761, 696 P.2d 150, 38 Cal. 3d 384 at 392 (1985), the California Supreme Court invalidated actions by defendant administrative agency on the grounds that: "Administrative action that is not authorized by, or is consistent with, acts of the Legislature is void." Furthermore, in *Cullinan v. McColgan*, 80 Cal. App. 2d 976 at 979, 183 P. 2d 115 (1947), the appellate court ruled: "[W]hile the interpretation of a statute by an administrative agency will be accorded great respect by the courts and will be followed if not clearly erroneous, it will be overthrown by the courts, if erroneous, where such a question of law is properly presented."

In 1994 the Legislature enacted S.B. 2050, which, subject to conditions subsequent, may make operative various amendments to the Health and Safety Code to establish, as a five year pilot program, a smog index labeling program. S.B. 2050 also authorizes CARB, subject to the same conditions precedent, to promulgate smog index labeling regulations consistent with provisions of the act. CARB is well aware of the statutory conditions precedent set forth in S.B. 2050 in that its original rulemaking proposal included the same conditions precedent and its current proposed modification specifically cites as authority for its rulemaking authority Health and Safety Code Sections 44254(b) [which specifically authorizes CARB to adopt regulations specifying a form of decal] and 43200.5 [mandating that new motor vehicles may not be sold or registered unless a smog index decal is affixed to the vehicle by the manufacturer].

Section 43200.5 was added to the Health and Safety Code pursuant to Section 11 of S.B. 2050 and Section 44254 was added to the Health and Safety Code pursuant to Section 30 of the same act. Section 32 of S.B 2050 states:

> SEC. 32. (a) This act, except Section 29, shall not become operative until both of the following occur:
>
> (1) The system required by subdivision (b) of Section 44060 of the Health and Safety Code for the electronic filing of certificates of compliance or noncompliance is determined to be operational by the

> Department of Consumer Affairs and that fact is reported by the department to the California Secretary of Sate.
>
> (2) The San Diego County Air Pollution Control District and the Ventura County Air pollution Control District have sufficient funds available to implement the pilot program established pursuant to subdivision (b) of Section 43705 of the Health and Safety Code, as determined by each of those districts and reported by each district to the Secretary of State.
>
> (b) On the date that all of the reports have been received by the Secretary of State pursuant to subdivision (a), subject to the exceptions stated in Section 33 of this act, this act shall be operative. (emphasis added.)

None of the contingencies specified in Section 32 of S.B. 2050 have been fulfilled and therefore, Health and Safety Code Sections 43200.5 and 44254 remain inoperative as of this date.

CARB's proposed modification of Section 1965 is both inconsistent with and in direct conflict with a specific enactment of the Legislature and CARB's attempted substitution of its will for that of the Legislature usurps a fundamental power of the Legislature in violation of the basic constitutional principle of separation of powers. Any authority CARB may have had to promulgate unfettered smog index labeling regulations prior to enactment of S.B. 2050 have been preempted by the Legislature's specific enactment of that act. Therefore, as a matter of law, CARB's proposed deletion of the statutorily required conditions precedent originally contained in its proposed rulemaking will render the rule invalid.

Should you have any questions or comments, please do not hesitate to give me a call.

Very truly yours,

Peter K. Welch
Director of Government
and Legal Affairs

PKW:la

American Automobile Manufacturers Association

CHRYSLER CORPORATION | Ford | General Motors

February 19, 1996

Ms. Pat Hutchens
Board Secretary
Air Resources Board
PO Box 2815
Sacramento, CA 95812

Subject: **AAMA Comments on Mail-Out #96-02 Regarding Proposed Amendments to the Certification Requirements and Procedures for Low-Emission Passenger Cars, Light Duty Trucks and Medium Duty Vehicles**

Dear Ms. Hutchens:

After reviewing the proposed changes for the September 28, 1995, California Air Resources Board (CARB) Hearing (Mail-Out 96-02), the American Automobile Manufacturers Association (AAMA) would like to reiterate our position for the record regarding the Smog Index Label Specifications. AAMA continues to believe that the conditions contained in the Smog Index Label Bill (Senate Bill 2050), passed on September 30, 1994, limit CARB's authority to require a Smog Index Label until certain conditions are met. A detailed legal analysis is attached.

Thank you for considering this change. If you have any questions, please do not hesitate to call Steven Douglas at (916) 444-1487, or me at (313) 871-2304.

Sincerely,

Gerald A. Esper

for Gerald A. Esper
Director,
Vehicle Environmental Department

Attachment

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ARB Does Not Possess The Statutory Authority To Unconditionally Require Inclusion Of A Smog Index On The Window Label Of 1998 And Subsequent Model Year Light-Duty Vehicles

Background

At a public hearing held September 28, 1995, the Air Resources Board ("ARB") considered and approved a number of regulatory amendments, including "California Motor Vehicle Emission Control and Smog Index Label Specifications" (hereinafter, "smog index requirements").[1] As originally proposed by ARB staff, the purpose of the smog index requirements was "...to implement the requirements of Senate Bill 2050 (Stats-1994, Chapter 1192) ... [by] requiring that smog index labels be affixed to new motor vehicle windows as provided in Health and Safety Code Section 43200.5." [2] Consistent with the provisions of S.B. 2050, the original proposed smog index labeling requirements were to apply 90 days after both of the following occur:

> (1) The system required by subdivision (b) of Section 44060 of the Health and Safety Code for the electronic filing of certificates of compliance or noncompliance is determined to be operational by the Department of Consumer Affairs and that fact is reported by the department to the California Secretary of State.
>
> (2) Both the San Diego County Air Pollution Control District and the Ventura County Air Pollution Control District have sufficient funds available to implement the pilot program established pursuant to subdivision (b) of Section 43705 of the Health and Safety Code, as determined by each of those districts and reported by each district to the California Secretary of State.[3]

The labeling requirement was to become inoperative five years from the date determined above. [4]

The applicability provisions of the original proposal, accordingly, tracked precisely Sections 32 and 31 of S.B. 2050 which contain identical conditions affecting the starting and ending dates of operation of the smog index labeling program established by the Legislature.

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[1] ARB Resolution 95-40 (September 28, 1995).
[2] See Staff Report: Initial Statement of Proposed Rulemaking, August 11, 1995.
[3] Section 2(b) of the proposed California Motor Vehicle Emission Control and Smog Index Label Specifications.
[4] Ibid.

Prior to the September 28, 1995 ARB hearing on the proposal, however, ARB staff suggested a number of changes to the original proposal, including deletion of the S.B. 2050 provisions setting the starting and ending dates of the smog index labeling requirements. Instead, staff proposed that the labeling requirements be effective starting with the 1998 model year. The Board, in adopting Resolution 95-40, approved the changes recommended by staff.

Discussion

The Legislature has specified in Sections 32 and 31 of S.B. 2050 when the smog index labeling requirements are to apply, conditions which ARB has apparently ignored. Resolution 95-40 makes no finding whatsoever regarding whether the Department of Consumer Affairs or the Air Pollution Control District certifications have been made.[5] The model year 1998 effective date of the ARB labeling requirements is, therefore, unauthorized by S.B. 2050, the authority cited by ARB in Resolution 95-40. As an administrative agency, ARB may not "make a rule or regulation that alters or enlarges the terms of a legislative enactment." [6]

Resolution 95-40 also cites as authority to adopt regulations relating to smog index labeling Sections 39600, 39601 and 43200 of the Health and Safety Code. None of these sections provides any basis for the unconditional 1998 implementation of the smog index labeling requirements.

The general authority of Sections 39600 and 39601 to "do such acts" and to adopt regulations "necessary for the proper execution" of its powers, and the provisions in Section 43200 do not permit ARB to bypass the specific limitations of the relevant statute. A court would construe these provisions with reference to all relevant statutes, including S.B. 2050, so that the entire scheme of law would be harmonized.[7]

Even if ARB had the authority to implement a "smog index" label requirement prior to the enactment of S.B. 2050, its disregard of the subsequent legislative direction is arbitrary and capricious. [8] The Legislature has spoken directly to the issue of the applicability of the smog index labeling requirements. ARB's purported adoption of the requirements outside of those statutory limitations is illegal.

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[5] As of the September 28 adoption of Resolution 95-40, those reports had not, in fact, been received by the Secretary of State.

[6] *Whitcomb Hotel, Inc. v. California Employment Commission*, 24 Cal.2d 753, 757 (1944).

[7] See *Bowland v. Municipal Court,* 18 Cal. 3d 208 (1976).

[8] Resolution 95-40 contains no findings concerning why implementation of the labeling program outside of the time-frame prescribed by S.B. 2050 is necessary or appropriate.