

TITLE 13. CALIFORNIA AIR RESOURCES BOARD

NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO CALIFORNIA'S EMISSION WARRANTY INFORMATION REPORTING AND RECALL REGULATIONS AND EMISSION TEST PROCEDURES

The Air Resources Board (the Board or ARB) will conduct a public hearing at the time and place noted below to consider amendments to California's Emission Warranty Information Reporting (EWIR) and recall regulations and emission test procedures. The proposed amendments would revise, clarify and make specific vehicle and engine manufacturers' responsibilities regarding the reporting of emission-related warranty activities and required corrective action for systemic emission-control defects identified through the EWIR Program.

DATE: December 7, 2006

TIME: 9:00 a.m.

PLACE: Kern County Board of Supervisors
Board Chambers
1115 Truxtun Avenue, 1st Floor
Bakersfield, CA 93301

This item will be considered at a two-day meeting of the Board, which will commence at 9:00 a.m., December 7, 2006, and may continue at 8:30 a.m., December 8, 2006. This item may not be considered until December 8, 2006. Please consult the agenda for the meeting, which will be available at least 10 days before December 7, 2006, to determine the day on which this item will be considered.

For individuals with sensory disabilities, this document is available in Braille, large print, audiocassette or computer disk. Please contact ARB's Disability Coordinator at (916) 323-4916 by voice or through the California Relay Services at 711, to place your request for disability services. If you are a person with limited English and would like to request interpreter services, please contact ARB's Bilingual Manager at (916) 323-7053.

INFORMATIVE DIGEST OF PROPOSED ACTION AND POLICY STATEMENT OVERVIEW

Sections Affected: Proposed amendments to title 13, California Code of Regulations (CCR), sections 1958(c), 2111, 2122, 2136 and 2141; adoption of new article 5, "Procedures for Reporting Failures of Emission-Related Equipment and Required Corrective Action," with new sections 2166-2174, in title 13, CCR, division 3, chapter 2; and proposed amendments to the following title 13 regulations and the documents incorporated therein: section 1961(d) and the "California Exhaust Emission Standards And Test Procedures For 2001 And Subsequent Model Passenger Cars, Light-Duty Trucks And Medium-Duty Vehicles," section 1956.8(b) and the "California Exhaust

Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Diesel-Engines and Vehicles,” section 1956.8(d) and the “California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Otto-Cycle Engines,” section 1976(c) and the “California Evaporative Emission Standards and Test Procedures for 1978 and Subsequent Model Motor Vehicles,” and section 1978(b) and the incorporated “California Refueling Emission Standards and Test Procedures for 2001 and Subsequent Model Motor Vehicles.”

Background: California Health and Safety Code (H & S Code) 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, ARB 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. H & S Code section 43106 requires that production vehicles or engines must in all material respects be substantially the same as the certification test vehicles manufacturer use to obtain ARB’s certification.

In 1982, the Board adopted regulations that established ARB’s first in-use vehicle recall program. The regulations were intended to reduce vehicular 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) encouraging manufacturers to improve the design and durability of emission control components to avoid the expense and adverse publicity of a recall.

In 1988, as an expansion to the 1982 in-use program, ARB adopted the Emissions Warranty Information Reporting (EWIR) regulations (title 13, CCR, sections 2141-2149) for tracking emission-control component defects affecting on-road vehicles. The EWIR regulations require manufacturers to review all emission-related warranty claims on a quarterly basis to determine the number of repairs or replacements made for each component. Each manufacturer must report warranty activity that exceeds a one percent level and has additional reporting requirements when a component’s warranty claim rate exceeds four percent on an engine family or test group basis. When an emission-control component’s EWIR rate exceeds a true four percent level, the defect is considered to be systemic in nature. Should in-use vehicles or engines exhibit a systemic defect and the manufacturer’s EWIR submittals acknowledge that fact, the staff considers the situation to be a violation of test procedure requirements and possibly emission standards. The warranty reporting regulations apply 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.

In some cases, usually involving relatively small vehicle populations or simple defects, in which manufacturers have reported valid warranty claims in excess of four percent for an emission control device manufacturers have agreed to correct the situation by recalling the affected vehicles and installing more durable emission control devices. In other cases manufacturers have agreed to extend the emission control warranties on

the components in question. In many other cases, however no corrective action has occurred. In two notable cases that involved large vehicle populations and more complex defects, Daimler-Chrysler Corporation and Toyota Motor Corporation claimed (over ARB's objection) that despite evidence of a pervasive defect in the emission control components or systems of their vehicles, the ARB was not authorized to order that the defect be corrected since the affected vehicles allegedly did not exceed emission standards, on average for all vehicles, over their useful lives.

The Toyota case was litigated and an administrative law judge upheld Toyota's claim. As a result, Toyota did not correct the defects ARB had determined to exist in the on-board diagnostic (OBD) systems in over 300,000 of its vehicles in California. In response, the Board amended the OBD regulations to enhance their enforceability so that should a similar OBD defect occur in the future, corrective action would result.

The Daimler-Chrysler case involved dozens of models, sold over several years, many of whose catalytic converter substrates disintegrated in use. Despite ample evidence that the catalyst design was defective and that catalysts were failing in-use, ARB was not able to show that for each individual model the catalyst failure would result in the subject vehicles exceeding emission standards, on average, during the vehicles' useful life. The result was a 2005 settlement agreement in which Daimler-Chrysler agreed, among other things, to remedy only 27 percent of the vehicles that contained the catalyst that ARB had determined to be defective. Had the proposed amendments discussed below been in place, staff believes most of the Chrysler vehicles involved in that matter would have undergone corrective action and that corrective action would have been implemented in many other cases where high warranty claims rates occurred.

Proposed Amendments: Based on the Board's statutory authority and its experience in the implementation and administration of the EWIR regulations, the staff has identified three aspects of the existing regulation that need 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 proposed amendments target these aspects of the current regulations and, if adopted, will result in corrective action to more vehicles that have defective emission control devices or systems, thereby reducing emissions.

After it adopted the EWIR regulations, the Board adopted regulations (title 13, CCR, sections 1968.1-1968.5) requiring OBD systems on most new vehicles sold in the state. These requirements offer ways of determining vehicles' compliance with emission standards and test procedure requirements that were not taken into account when the EWIR regulations were originally adopted. The proposal would capitalize on the ability of the now mature OBD program to detect failing components, prompt drivers to seek repairs and ensure that vehicles with systemic emission control defects are corrected by the vehicle manufacturers in a more timely and effective manner than is occurring under the current regulations. The staff's proposal would also streamline administration and

reduce program reporting. The staff also proposes to link directly the exceedances of emissions warranty reporting levels with ARB's durability certification test procedures. The proposed amendments would take effect with the 2010 model year.

(1) Proof of Violations: Staff proposes a change in the proof necessary for determining if a group of vehicles is in violation of emission standards or test procedures. Under staff's proposal, once a group of vehicles exceeds a valid warranty claim rate threshold of four percent or 50 vehicles, whichever is greater, ("warranty claims threshold") it would be considered to be in violation of test procedures and possibly emission standards and the manufacturer would be required to implement a recall and/or other corrective action, as specified. The existing standard that a class or category of vehicles must exceed an emission standard on average over its useful life would be eliminated.

(2) Corrective action: Under the staff's proposal, if the warranty claims threshold is exceeded for an exhaust after-treatment device, the Executive Officer may order a recall and/or other corrective action, including an extended warranty, but recall would be the remedy that would be considered first. If the warranty claims threshold is exceeded for emissions components other than exhaust after-treatment devices, the Executive Officer may also order a recall and/or other corrective action, including an extended warranty, but the extended warranty would be the remedy that would be considered first. For vehicles with malfunctioning on-board computers, vehicles not equipped with OBD, or vehicles equipped with OBD systems that do not function properly, a recall and/or corrective action, including an extended warranty, would be required when the warranty claims threshold is exceeded for any emissions component, with the recall remedy being considered first. All replacement parts would be required to be of improved quality and durability. In some cases, extended warranties could be required for periods beyond the affected vehicles' useful lives. 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. 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.

(3) Reporting: The proposal would increase the threshold for which an EWIR is required from one percent to four percent or 50 claims (whichever is greater) for all model vehicles subject to reporting requirements. Follow up EWIR reports would be required on an annual basis, rather than quarterly. When the unverified warranty claims rate reaches ten percent, a Supplemental Emissions Warranty Information Report (SEWIR) would be required. The SEWIR replaces the FIR, which currently is issued when an unverified claims rate exceeds four percent. The SEWIR would determine the valid claims rate, and if above four percent would trigger the corrective action process. The FIR report would no longer be required.

COMPARABLE FEDERAL REGULATIONS

Current California emissions warranty reporting requirements are more stringent and comprehensive than their federal counterparts. (See, generally 40 C.F.R. Part 85, in particular 40 C.F.R. sections section 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. California law calls for similar information to the EDIR, but requires the manufacturer to file follow-up reports for escalating failure rates – the three progressive reports (EWIR, FIR and EIR) which are discussed above. Unlike federal law, California law explicitly ties the warranty information to the recall process, requiring the ARB to evaluate the need for a recall after the submission of the EIR. (title 13, CCR, section 2148.) 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).)

Although they are somewhat different, the two reporting regimes and the two recall standards have been comparably effective in prompting recalls where manufacturers have agreed to assume responsibility for correcting emissions related defects – but both the federal and state regulations have had limited success where manufacturers object to and contest the recalls, especially in complex cases. If adopted, the proposed amendments would modify and streamline California's requirements for defect reporting. These requirements would still be more extensive than the comparable federal requirements. The proposed amendments would also provide additional grounds for requiring a vehicle recall or other corrective action to remedy systemic defects revealed in emissions warranty reporting which could be proven without the resource intensive emissions testing that is required under current federal law and California regulations. This might lead to the implementation of more recalls or remedial actions when high rates of warranty failures are reported, than would be the case under current California or federal law in this area.

AVAILABILITY OF DOCUMENTS AND AGENCY CONTACT PERSONS

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

Copies of the ISOR and the full text of the proposed regulatory 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 December 7, 2006.

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 regulation may be directed to the designated agency contact persons: Mr. Tom Valencia, Air Pollution Specialist, Field Inspection and Testing Section, at (626) 575-6726, or tvalenci@arb.ca.gov, or Mr. Tony Dickerson, Air Resources Engineer, Field Inspection and Testing Section, at (626) 459-4350 or tdickers@arb.ca.gov.

Further, the agency representative and designated back-up contact person to whom non-substantive inquiries concerning the proposed administrative action may be directed is Alexa Malik, Regulations Coordinator, (916) 322-4011. The Board has compiled a record for this rulemaking action, which includes all the information upon which the proposal is 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 Internet site for this rulemaking at www.arb.ca.gov/regact/recall06/recall06.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 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

are presently 35 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, 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.

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 businesses are necessary for the health, safety, and welfare of the people of the State of California.

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.

SUBMITTAL OF COMMENTS

The public may present comments relating to this matter orally or in writing at the hearing, and in writing or by email before the hearing. To be considered by the Board, written submissions not physically submitted at the hearing must be received **no later than 12:00 noon, December 6, 2006**, 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>

Facsimile submittal: (916) 322-3928

The Board requests but does not require that 30 copies of any written statement be submitted and that all written 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 39600, 39601, and 43105. This action is proposed to implement, interpret and make specific sections Health and Safety Code sections 43000, 43009.5, 43018, 43101, 43104, 43105, 43106, 43107 and 43204-43205.5.

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 nonsubstantial 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 the 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, CA 95814, (916) 322-2990.

CALIFORNIA AIR RESOURCES BOARD

Catherine Witherspoon
Executive Officer

Date: October 10, 2006