

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 catalysts was able to implement such a narrow remedy that, in ARB's opinion, many vehicles with defective catalysts 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 whom 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 been 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

/s/

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.