

**State of California  
Office of Administrative Law**

**In re:**

**Air Resources Board**

**Regulatory Action: Title 13  
California Code of Regulations**

**Adopt sections:**

**Amend sections: 1956.8, 1958, 1961,  
1976, 1978, 2111, 2122,  
2136, 2141, and  
Incorporated Test  
Procedures**

**Repeal 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**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2009-0518-03 N**

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**I. SUMMARY OF REGULATORY ACTION**

The California Air Resources Board (“Board”) regulations governing emission warranty information reporting and recall (“EWIR”) establish standards and procedures for testing, monitoring and reporting emissions component failures based on the Board’s test procedures and warranty claims records of specified in-use, on-road motor vehicles to determine if the failures exceed specified thresholds within the warranty period for the vehicles emissions components, and require vehicle manufacturers to perform corrective action as determined by the EWIR regulations.

The Board proposed to repeal all title 13 EWIR regulatory provisions amended or adopted by the Board in 2007 (“2007 EWIR Amendments”) as changes without regulatory effect pursuant to section 100 (“Section 100”) of title 1 of the California Code of Regulations (“CCR”).<sup>1</sup> In connection with the complete repeal of the 2007 EWIR Amendments, the Board also proposed to adopt the title 13 EWIR regulatory provisions that were repealed from the CCR in the 2007 EWIR Amendments (generally, “1988 EWIR Regulations”).

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<sup>1</sup> All titles and sections herein are to the California Code of Regulations, or “CCR,” unless specified otherwise.

## **II. BACKGROUND INFORMATION**

### **A. SCOPE OF THE 2007 EWIR AMENDMENTS**

The 2007 EWIR Amendments included amendments to nine existing title 13 EWIR sections and one section each in five existing Board emission standards and test procedures (“test procedures”) related to testing and certification of five categories of vehicles and engine classes under title 13, div. 3, ch.1, arts. 1 - 2, and ch. 2, arts. 2.1 - 2.4. The amended title 13 sections in the 2007 EWIR Amendments were sections 1956.8, 1958, 1961, 1976, 1978, 2111, 2122, 2136, 2141. The amendments to the five test procedures incorporated the newly adopted language in section 1958 by adding subdivision (c). Amendments to these title 13 sections included repealing earlier EWIR regulatory provisions adopted by the Board, primarily in the 1988 EWIR Regulations.

The 2007 EWIR amendments also adopted Article 5, Procedures for Reporting Failures of Emission-Related Equipment and Required Corrective Action, under div. 3, ch. 2, which added 19 sections to the existing Board EWIR regulations. The adopted title 13 sections in the 2007 EWIR Amendments were 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.

The 2007 EWIR Amendments were formally adopted as regulations under the APA by the Board’s rulemaking action in 2006-2007 followed by OAL’s approval and filing of the 2007 EWIR Amendments with the Secretary of State on December 5, 2007. (OAL File No. 2007-1019-02S.) The filing with the Secretary of State raises a rebuttable presumption that all of the above-cited adopted and repealed regulatory provisions of the 2007 EWIR Amendments are presumed to be legally valid and in compliance with the APA. (Gov. Code, sec. 11343.6.)

On May 18, 2009, the Board submitted the current proposed action to the Office of Administrative Law (“OAL”) as changes without regulatory effect pursuant to title 1, California Code of Regulations, section 100 (“Section 100”) based on a ruling by the Los Angeles County Superior court entered on January 14, 2009, in consolidated actions seeking mandamus and other relief in *Automotive Service Councils of California, et al.; Engine Manufacturers Association v. California Air Resources Board*, Los Angeles County Superior court Case Nos. BS11273 and BS 114066, respectively (*ASCC-EMA*). On June 30, 2009, OAL disapproved the proposed action because it failed to satisfy the requirements of Section 100. This Decision of Disapproval sets forth the general reasons for the disapproval.

### **B. SECTION 100**

The adoption, amendment or repeal of regulations is ordinarily accomplished by following the rulemaking procedural and substantive requirements of the Administrative Procedure Act (“APA”). In 1986, OAL adopted a regulation to create a procedure for allowing certain changes that are without regulatory effect in regulations published in the CCR without following the notice and procedural requirements of the APA. OAL’s regulation, found at section 100, is based upon the rationale that changes to rules that have no regulatory effect do not involve

rulemaking and the belief that following the APA for such changes imposes an unnecessary burden with no corresponding benefit.

Section 100 (a)(3) provides,

(a) Subject to the approval of OAL as provided in subsections (c) and (d), an agency may add to, revise or delete text published in the California Code of Regulations without complying with the rulemaking procedure specified in Article 5 of the APA only if the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision. ... Changes without regulatory effect include, but are not limited to:

...

(3) deleting a regulatory provision held invalid in a judgment that has become final, entered by a California court of competent jurisdiction. ...

An agency that action that proposes an action as a change without regulatory effect based on a court judgment needs to show clearly and unambiguously that each proposed change to the CCR was specifically invalidated by the court judgment, such that the proposed changes are consistent with and do not differ substantively from the court judgment.

We are mindful of the court's decision in *Syngenta Crop Protection, Inc. v. Helliker*, 42 Cal.Rptr.3<sup>rd</sup> 191 (2006) (*Syngenta*) that amending regulatory provisions merely to clarify ambiguities in existing, duly adopted regulations may be ruled as substantive, requiring APA rulemaking. *Syngenta* invalidated several Department of Pesticide Regulation amendments to title 3 regulations approved by OAL pursuant to Section 100 in that they "eliminated potential ambiguities in the regulations." (*Id.* at 223.) Seemingly immaterial, clarifying revisions to the CCR are not appropriate under Section 100 when such amendments

are not the sort of clearly nonsubstantive changes or changes compelled by law contemplated by [Section 100]. Even if the amendments were consistent with the Department's practice under the former regulations, the Department was required to inform the public of the proposed formalization of that practice in amended, enforceable regulations. (*Id.* at 223.)

Additionally, Section 100(b)(3) requires that the adopting agency:

(b) In submitting a change without regulatory effect to OAL for review the agency shall:

...

(3) submit a written statement explaining why the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.

### **III. DISCUSSION**

## A. DOCUMENTS SUBMITTED FOR SECTION 100 REVIEW

The documents initially submitted by the Board for review of the proposed action under Section 100 included the following:

1. The Form 400 was submitted but not completed properly as required by title 1, sec. 6. Attached to the Form 400 was the proposed regulatory text with annotations, in accordance with title 1, sec. 46, indicating proposed additions and deletions to the CCR. The proposed text showed deletion of all regulatory provisions adopted in the 2007 EWIR Amendments, addition of all of the 1988 EWIR Regulations regulatory provisions repealed in the 2007 EWIR Amendments, and several, minor text corrections (e.g., punctuation). The proposed text included all five test procedures included in the 2007 EWIR Amendments, showing deletion of all regulatory provisions adopted in the 2007 EWIR Amendments and addition of updated incorporated by reference dates on the title page of each test procedure.
2. The Judgment (“Judgment,” see Exhibit A) and Peremptory Writ of Mandate (“Order,” see Exhibit B)<sup>2</sup> issued by the court on January 14, 2009, were also attached to the Form 400 proposed text. These were apparently intended to be attached to the Board’s Section 100(b)(3) written explanatory statement.
3. The Board’s two-and-a-half page written explanatory statement (“Statement,” see Exhibit C). On one page of the Statement sets forth reasons why the entirety of the proposed changes to the CCR should be approved under Section 100.

## B. JUDGMENT AND ORDER

The Judgment and Order cited specific sections and subsections in the 2007 EWIR Amendments challenged by Engine Manufacturers Association (EMA) (the “Challenged EWIR Amendments”). The Challenged EWIR Amendments are clearly set forth and distinguished and appear to be the only sections pertinent to the court’s ruling in both the Judgment and Order. Specifically, the Challenged EWIR Amendments are listed as “title 13, sections 1958(c)(5), 2111(a), 2122, 2136, 2141 (a), 2166(d) and (e), 2168(k), 2169, 2170, 2171, 2174, and test procedure sections 86.1823-01, 86.004-26, and 86.1825-01.” (Judgment, p. 2, lines 18-21; Order, p. 2, lines 19-22.)

OAL was only able to find test procedure sections 86.1823-01, 86.004-26, and 86.1825-01 in four of the five test procedures submitted with the proposed text. OAL’s review under Section 100(a)(3) is confined to the underlying court documents, particularly when the Judgment and Order appear to have been the product of stipulations by all parties in *ASCC-EMA*, which included the Board. Neither the Board nor OAL can add anything to the underlying court documents under Section 100, however imperfect they may seem. Accordingly, even assuming all regulatory provisions and elements in these test procedure sections were held invalid by the court’s decision, it appears that one of the amended test procedures could not be approved pursuant to Section 100 because it is missing from the list of test procedure sections specifically identified by the court in the Challenged EWIR Amendments.

Additionally, the Order directed the Board to return to the court by June 1, 2009

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<sup>2</sup> The Exhibit B “Peremptory Writ of Mandate” is generally referred to as “Order,” herein.

. . . detailing and demonstrating to the court all of the actions and measures that Respondent [the Board] has initiated and undertaken to ensure full compliance with the *terms of this Peremptory Writ of Mandate*, including setting forth *the specific provisions of the Challenged EWIR Amendments* that have been or shall be amended by rulemaking or set aside to implement fully *the Decision*. (Order, p. 3, lines 10-16; emphasis added.)

Apart from the court's mandate that the Board amend "the specific provisions of the Challenged EWIR Amendments," nothing in the Judgment or Order provides any detailed information about the above-quoted "terms of this Peremptory Writ of Mandate" or "the Decision." The Judgment and Order do not provide any clear, unambiguous instruction to justify the extent that any revisions to the regulations, in either the specific Challenged EWIR Amendments or the proposed action, could be considered changes without regulatory effect under Section 100. Accordingly, the proposed action changes without regulatory effect cannot be approved under Section 100 based merely on the Judgment and Order.

### C. *ASCC-EMA* DECISION

Since both the Explanatory Statement and Order refer to the court's "Decision," OAL obtained a copy of the decision ("Decision," see Exhibit D)<sup>3</sup> from the Board on June 22, 2009, anticipating that the Decision might contain clear, unambiguous language that would elucidate the extent to which any part of the proposed action was clearly consistent with *ASCC-EMA*, and that the Board had no discretion to adopt anything that differs in substance from the court's decision.

However, the Decision did not clarify the Judgment and Order sufficiently to allow OAL to make any conclusive determination about the extent to which any part of the proposed action could be approved under Section 100. The Decision provided no additional information that might have clarified what the court intended in the Order as "the terms of this Peremptory Writ of Mandate" or "to implement fully the Decision," and did not provide clear, unambiguous language regarding the extent to which any regulatory provisions or elements in the 2007 EWIR Amendments or the EMA's Challenged EWIR Amendments were expressly deemed invalid for purposes of Section 100.

We find it instructive, however, that *all* of the apparent challenges to the 2007 EWIR Amendments made by Automotive Service Councils of California (ASCC), including challenges to the Board's authority to adopt specific regulatory provisions and elements, were reviewed and rejected by the court. (Decision, pp. 7-11.) Sections adopted in the 2007 EWIR Amendments that were challenged by ASCC included sections 2166 – 2174. (Judgment, p. 2, lines 10-17; Order, p. 2, lines 11-18.) Although this appears to be dicta to the Decision, it provides credence to the fact that the court ruled in favor of EMA by identifying the "specific provisions of the Challenged EWIR Amendments" in the Judgment and Order. This appears to be in sharp contrast and in conflict with the scope of the Board's proposed action since the court's conclusions regarding the ASCC challenges appear to show that the court specifically held that many of the 2007 EWIR

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<sup>3</sup> The Exhibit D Decision submitted by the Board is the "consolidated Written Tentative Decision on December 1, 2008" which the court adopted as the final "Decision" on January 14, 2009, in both the Judgment and Order.

Amendments are valid. To the extent this is what the court intended, it appears possible that many of the proposed changes to the 2007 EWIR Amendments would be inconsistent with the court's ruling.

#### D. THE BOARD'S SECTION 100(b)(3) STATEMENT

Section 100(b)(3) requires that the adopting agency to "submit a written statement explaining why the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision." Pursuant to Section 100(b)(3), the Board submitted a statement that discusses four essential reasons to support approval of the proposed action under Section 100. ("Statement," see Exhibit C) These four reasons are summarized below.

1. The court "specifically invalidated" the 4% failure rate that constitutes a systemic failure of an emission component, which was the basis of the entirety of the 2007 EWIR Amendments; specifically, the court invalidated sections "2166.1(n), 1956.8, 1958, 1961, 1976, & 1978" of the 2007 EWIR Amendments. The Statement provides no citation to any specific language in the court documents showing where court specifically invalidated the 4% "failure rate" standard or the other EWIR regulation sections cited in this reason. Our review of the Decision resulted in not being able to determine conclusively the extent to which the court invalidated any of the regulatory provisions asserted by the Board. The court discusses, generally, EMA's allegations, the 4% standard, and the cited EWIR sections, but the court discusses them in context of other regulatory provisions and elements in the 2007 EWIR Amendments and related issues. The Board's assertion is plausible and might very well be correct, but does not appear from our review to be the only conclusion that can be drawn from the Decision.

Additionally, there is no direct correlation between the above-cited 4% "failure rate" standard and EWIR regulation sections and the specific provisions of the Challenged EWIR Amendments in the Judgment and Order. To the extent that there is a correlation, we cannot determine conclusively the extent to which the court held invalid any regulatory provisions or elements for purposes of reviewing the proposed action pursuant to Section 100.

2. Since the basis for determining a systemic failure of an emission component is legally void, all of the 2007 EWIR Amendments in new Article 5 (title 13, secs. 2167 and 2168) that establish rules, standards, and procedures for determining a systemic failure are no longer necessary, pointless, or have no purpose.

3. Since the basis for determining a systemic failure of an emission component is legally void, the 2007 EWIR Amendments that establish rules, standards, and procedures for remedial action (including recalls and extended warranties) and manufacturer appeals in new Article 5 (title 13, secs. 2169 - 2174) are meaningless, unnecessary, and essentially void.

For reasons No. 2 and No. 3 above, the Statement provides no citation to any specific language in the court documents or any other authority to support these two reasons. Additionally, the specific provisions of the Challenged EWIR Amendments in the Judgment and Order include only subsection (c) of 2168 and sections 2169, 2170, 2171, and 2174. The Challenged EWIR

Amendments do not include sections 2167, 2172, 2172.1, 2172.2, 2172.3, 2172.4, 2172.5, 2172.6, 2172.7, 2172.8, 2172.9, and 2173, which the Board included in these two reasons. Based on the court's disposition of ASCC's challenges to the 2007 EWIR Amendments,<sup>4</sup> it appears possible that the court specifically held many of the above-cited regulation sections as valid. Any question about the court's decision regarding these sections can only be resolved by the court. Furthermore, the mere opinion by a state agency that its regulations are no longer necessary and are meaningless is insufficient for OAL to approve the state agency's proposed changes to those regulations pursuant to Section 100.

4. Adoption of the rules and standards that were repealed in the 2007 EWIR Amendments will provide the Board and the automotive industry with a cohesive set of rules and standards for warranty reporting and corrective actions, the adoption of which will not alter any requirement, right, responsibility, condition, prescription, or other regulatory element of any CCR provision.

The Statement provides no citation to any specific language in the court documents or any other authority to support this proposition. A state agency may not adopt regulations pursuant to Section 100 that are legally required to go through the full APA rulemaking process. Section 100 cannot be used to fix an incomplete regulatory scheme, even if it is sound public policy or is necessary for an agency to continue implementing its statutory obligations.

After reviewing the Judgment, Order, Decision, and Statement submitted for review in the proposed action, we conclude that none of these documents separately or when read together are sufficient to explain why the proposed changes do not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.

#### **IV. CONCLUSION**

OAL contacted the Board on June 26, 2009, in a second attempt to ascertain whether the Board could provide any additional court documents, supplemental information, or legal citations to support the proposed changes. The Board was unable to provide any additional information by the June 30, 2009 deadline for the proposed action. Since the essential issues to the proposed action were never resolved, OAL disapproved the Board's proposed action in its entirety.

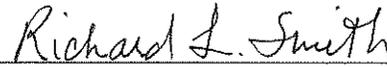
OAL disapproved the Board's proposed amendment of the regulations because the proposed changes appear to have regulatory effect and accordingly do not qualify under the limitations that apply to use the procedure set forth in Section 100. Additionally, neither the written statement provided by the Board pursuant to Section 100(b)(3) nor the court documents upon which the statement relied did not adequately explain why the proposed changes would not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any CCR provision. Changes that have regulatory effect can be made only by complying with all the applicable requirements of the APA.

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<sup>4</sup> See Judgment, p. 2, lines 10-17, Order, p. 2, lines 11- 18, and Decision, pp. 7 – 11.

For these reasons, OAL disapproved the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-6809.

Date: July 7, 2009



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Richard L. Smith  
Staff Counsel

FOR: SUSAN LAPSLEY  
Director

Original: James Goldstene  
Copy: Amy Whiting

Exhibit A

**FILED**  
Superior Court of California  
County of Los Angeles

DEC 17 2008

John A. Clarke, Executive Officer/Clerk  
By A. Fajardo, Deputy  
ANNETTE FAJARDO

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8 Attorneys for Petitioner and Plaintiff  
ENGINE MANUFACTURERS ASSOCIATION

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF LOS ANGELES**

12 AUTOMOTIVE SERVICE COUNCILS OF  
CALIFORNIA, et al.,

13 Petitioners,

14 vs.

15 CALIFORNIA AIR RESOURCES BOARD,

16 Respondent.

17 -----  
18 And Consolidated Case,

19 ENGINE MANUFACTURERS ASSOCIATION,

20 Petitioner

21 vs.

22 CALIFORNIA AIR RESOURCES BOARD,

23 Respondent.  
24 -----  
25  
26  
27  
28

) No. BS112735  
(Consolidated with BS114066)

) Assigned for all purposes to the Honorable James  
C. Chalfant, Dept 85

) ~~PROPOSED~~ JUDGMENT

) Complaint filed: January 4, 2008  
) Trial: December 1, 2008  
) Time: 9:30 a.m.  
) Dept: 85

ORIGINAL

DEC 16 2008  
DEPT 85

1 WHEREAS, Petitioners Automotive Service Councils of California, et al. (the "ASCC  
2 Petitioners") filed their Verified Petition for Writ of Administrative and Traditional Mandate and  
3 Complaint for Declaratory and Injunctive Relief on January 4, 2008, in Case No. BS 112735 (the  
4 "ASCC Action"); and

5 WHEREAS, Petitioner Engine Manufacturers Association ("EMA") filed its Verified Petition  
6 for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief on April 2, 2008, in Case  
7 No. BS 114066 (the "EMA Action"); and

8 WHEREAS, pursuant to an order of the Court filed on April 16, 2008, the ASCC Action and  
9 the EMA Action were consolidated for all purposes; and

10 WHEREAS, the ASCC Action and the EMA Action challenged certain amendments that  
11 Respondent California Air Resources Board ("Respondent") made to the Emission Warranty  
12 Information Reporting and Recall Regulations and Emission Test Procedures applicable to motor  
13 vehicles and motor vehicle engines (California Code of Regulations ("CCR"), title 13, new sections  
14 2166-2174, amended sections 1956.8, 1958, 1961, 1976, 1978, 2111, 2122, 2136, 2141, and  
15 incorporated test procedures, collectively the "EWIR Amendments"), which amendments were  
16 approved by the California Office of Administrative Law on December 5, 2007, and became final on  
17 January 4, 2008; and

18 WHEREAS, EMA challenged the following the specific provisions of the EWIR Amendments  
19 in the EMA Action: CCR, title 13, sections 1958(c)(5), 2111(a), 2122, 2136, 2141(a), 2166(d) and (e),  
20 2168(k), 2169, 2170, 2171, 2174, and test procedure sections 86.1823-01, 86.004-26, and 86.1825-01  
21 (the "Challenged EWIR Amendments"); and

22 WHEREAS, the Court dismissed ASCC Petitioners' and Petitioner EMA's declaratory relief  
23 and injunctive relief claims on May 27, 2008; and

24 WHEREAS, the Court held a hearing on the merits of the ASCC Action and the EMA Action  
25 on December 1, 2008, at which Mark D. Johnson and Dana P. Palmer of Manatt, Phelps & Phillips,  
26 LLP appeared on behalf of ASCC Petitioners, Timothy A. French of Neal, Gerber & Eisenberg LLP  
27 appeared on behalf of Petitioner EMA, and Deputy Attorney General Michael W. Hughes of the  
28

1 Department of Justice, Office of the Attorney General, appeared on behalf of Respondent California  
2 Air Resources Control Board; and

3 WHEREAS, the matter having been briefed, and the Court having reviewed the Administrative  
4 Record along with the pleadings, the briefs submitted by counsel, and the judicially noticed materials,  
5 having considered the oral arguments of counsel, and having issued its consolidated Written Tentative  
6 Decision on December 1, 2008, which the Court adopted as final (the "Decision");

7 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, as set  
8 forth in the Decision, Respondent has exceeded its statutory authority in adopting certain provisions of  
9 the Challenged EWIR Amendments at issue in the EMA Action.

10 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is granted in favor  
11 of EMA and against Respondent on the first cause of action ("Writ of Mandamus - Code of Civil  
12 Procedure §1085") set forth in the EMA Action.

13 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a peremptory writ of  
14 mandate issue from this Court commanding Respondent to implement fully the Decision of the Court.

15 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is granted in favor  
16 of Respondent and against the ASCC Petitioners on each cause of action set forth in the ASCC Action.

17 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court retains  
18 jurisdiction to consider an award of attorneys fees and costs to EMA pursuant to Code of Civil  
19 Procedure Sections 1021.5 and 1032, *et seq.*

20 IT IS SO ORDERED

21  
22 Dated: December 17, 2008.



23  
24 Honorable James C. Chalfant  
25 Judge of the Superior Court of the State of California

26 NGEDOCS: 008753.0001:1585821.1  
27 SAC 441,346,047 v1  
28

Exhibit B

ORIGINAL

DEC 16 2008

DEPT 85

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ENGINE MANUFACTURERS ASSOCIATION

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 FOR THE COUNTY OF LOS ANGELES

13 AUTOMOTIVE SERVICE COUNCILS OF  
14 CALIFORNIA, et al.,

15 Petitioners,

16 vs.

17 CALIFORNIA AIR RESOURCES BOARD,

18 Respondent.

) No. BS112735  
) (Consolidated with BS114066)

) Assigned for all purposes to the Honorable James  
) C. Chalfant, Dept 85

) ~~PROPOSED~~  
) PEREMPTORY WRIT OF MANDATE  
) (Code Civ. Proc. §1087)

19 And Consolidated Case,

20 ENGINE MANUFACTURERS ASSOCIATION,

21 Petitioner

22 vs.

23 CALIFORNIA AIR RESOURCES BOARD,

24 Respondent.

) Complaint filed: January 4, 2008  
) Trial: December 1, 2009  
) Time: 9:30 a.m.  
) Dept.: 85

1 **TO: California Air Resources Board, Respondent**

2 WHEREAS, Petitioners Automotive Service Councils of California, et al. (the "ASCC  
3 Petitioners") filed their Verified Petition for Writ of Administrative and Traditional Mandate and  
4 Complaint for Declaratory and Injunctive Relief on January 4, 2008, in Case No. BS 112735 (the  
5 "ASCC Action"); and

6 WHEREAS, Petitioner Engine Manufacturers Association ("EMA") filed its Verified Petition  
7 for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief on April 2, 2008, in Case  
8 No. BS 114066 (the "EMA Action"); and

9 WHEREAS, pursuant to an order of the Court filed on April 16, 2008, the ASCC Action and  
10 the EMA Action were consolidated for all purposes; and

11 WHEREAS, the ASCC Action and the EMA Action challenged certain amendments that  
12 Respondent California Air Resources Board ("Respondent") made to the Emission Warranty  
13 Information Reporting and Recall Regulations and Emission Test Procedures applicable to motor  
14 vehicles and motor vehicle engines (California Code of Regulations ("CCR"), title 13, new sections  
15 2166-2174, amended sections 1956.8, 1958, 1961, 1976, 1978, 2111, 2122, 2136, 2141, and  
16 incorporated test procedures, collectively the "EWIR Amendments"), which amendments were  
17 approved by the California Office of Administrative Law on December 5, 2007, and became final on  
18 January 4, 2008; and

19 WHEREAS, EMA challenged the following the specific provisions of the EWIR Amendments  
20 in the EMA Action: CCR, title 13, sections-1958(c)(5), 2111(a), 2122, 2136, 2141(a), 2166(d) and (e),  
21 2168(k), 2169, 2170, 2171, 2174, and test procedure sections 86.1823-01, 86.004-26, and 86.1825-01  
22 (the "Challenged EWIR Amendments"); and

23 WHEREAS, the Court dismissed ASCC Petitioners' and Petitioner EMA's declaratory relief  
24 and injunctive relief claims on May 27, 2008; and

25 WHEREAS, the Court held a hearing on the merits of the ASCC Action and the EMA Action  
26 on December 1, 2008, at which Mark D. Johnson and Dana P. Palmer of Manatt, Phelps & Phillips,  
27 LLP appeared on behalf of ASCC Petitioners, Timothy A. French of Neal, Gerber & Eisenberg LLP  
28



1 appeared on behalf of Petitioner EMA, and Deputy Attorney General Michael W. Hughes of the  
2 Department of Justice, Office of the Attorney General, appeared on behalf of Respondent California  
3 Air Resources Control Board; and

4 WHEREAS, the matter having been briefed, and the Court having reviewed the Administrative  
5 Record along with the pleadings, the briefs submitted by counsel, and the judicially noticed materials,  
6 having considered the oral arguments of counsel, and having issued its consolidated Written Tentative  
7 Decision on December 1, 2008, which the Court adopted as final (the "Decision");

8 NOW, THEREFORE, it is hereby ordered, decreed and commanded that Respondent Air  
9 Resources Board, acting through its members, officers, employees and agents, shall promptly upon the  
10 receipt of this Peremptory Writ of Mandate: (i) take any and all necessary steps, actions and measures  
11 to implement fully the Decision of the Court; and (ii) make and file a return to this Peremptory Writ of  
12 Mandate on or before June 1, 2009, detailing and demonstrating to the Court all of the actions and  
13 measures that Respondent has initiated and undertaken to ensure full compliance with the terms of this  
14 Peremptory Writ of Mandate, including setting forth the specific provisions of the Challenged EWIR  
15 Amendments that have been or shall be amended by rulemaking or set aside to implement fully the  
16 Decision.

17 Witness the Honorable James C. Chalfant, Judge of the Superior Court of California, County of  
18 Los Angeles.

19 Attest my hand and the seal of this Court this \_\_\_\_ day of December, 2008

20 JAN 14 2009



[Signature]

\_\_\_\_\_  
Court Clerk

JOHN A. CLARKE, CLERK

By: Kurtam K.W. Kam [Signature]  
Deputy Clerk

25 NGEDOCS: 008753.0001:1585842.1  
26 SAC 441,346,046 v1



Linda S. Adams  
Secretary for  
Environmental Protection

# Air Resources Board

Mary D. Nichols, Chairman  
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Sacramento, California 95812 • www.arb.ca.gov



Arnold Schwarzenegger  
Governor

TO: Office of Administrative Law  
300 Capitol Mall, 12<sup>th</sup> Floor  
Sacramento, California 95814

## Exhibit C

FROM: Amy Whiting  
Regulations Coordinator

DATE: May 15, 2009

SUBJECT: **SECTION 100 AMENDMENT, CHANGES WITHOUT REGULATORY EFFECT – CALIFORNIA'S EMISSION WARRANTY INFORMATION REPORTING AND RECALL REGULATIONS AND EMISSION TEST PROCEDURES**

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This memorandum concerns the Air Resources Board's (ARB or the Board) recent amendments to California's Emission Warranty Information Reporting and Recall Regulations and Emission Test Procedures (Regulatory Action No. 2007-1919-02-S). ARB hereby submits changes to California Code of Regulations, title 13. All changes reflect a recent court decision invalidating the amendments, as summarized below.

On December 12, 2007, the Office of Administrative Law (OAL) approved the adoption of new sections 2166-2174 within article 5, chapter 2, division 3, title 13, California Code of Regulations, amendments to sections 1956.8, 1958, 1961, 1976, 1978, and incorporated test procedures of chapter 1, division 3, title 13, California Code of Regulations, and amendments to Sections 2111, 2122, 2136, 2141 of Chapter 2, Division 3, title 13, California Code of Regulations. On that day, OAL also simultaneously approved nonsubstantive changes (see Register 2007, No. 50-Z.) The resulting regulations have been colloquially referred to as the "Amended Emission Warranty Information Reporting and Recall Regulations." ARB requests that the amendments be deleted from the California Code of Regulations for the reasons discussed below.

Soon after the Amended Warranty Information Reporting and Recall Regulations became effective, representatives of the automotive services industry and the Engine Manufacturers Association filed petitions for writs of mandate challenging the amendments. The two actions were consolidated by consent of the parties in Los Angeles County Superior Court and, after a December 1, 2008, trial on the merits, Superior Court Judge Chalfant issued the enclosed Judgment and Writ on December 16, 2008 (see Attachment A). Judge Chalfant ruled that ARB does not have

*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: <http://www.arb.ca.gov>.*

California Environmental Protection Agency

authority to adopt the most crucial aspect of the amendments, the provision that would require vehicle manufacturers to conduct recalls or provide other corrective action (including extended warranties) when their emission control components fail at a rate of four percent in use, as determined by the amendments' reporting provisions. Although it invalidated the four percent failure rate, Judge Chalfant's ruling effectively invalidated the other aspects of the amendments as well, because they are predicated on the four percent failure rate and are devoid of meaning without it.

The amendments can be broken down into four basic parts:

First, is the four percent failure rate which Judge Chalfant specifically invalidated in his ruling (Cal. Code of Regs., tit. 13, § 2166.1(n), 1956.8, 1958, 1961, 1976, & 1978). Second, is an elaborate reporting process to determine whether component failures exceed the four percent failure rate (Cal. Code of Regs., tit. 13, § 2167 & 2168). Third, are the remedies available to address components that fail in excess of four percent, provisions prescribing how the remedies are to be carried out and the process by which manufacturers may seek hearings to contest the necessity of these remedies (Cal. Code of Regs., tit. 13, § 2169-2174). Each of these parts depends on the four percent failure rate and is inoperable without it. Without the four percent failure rate, reporting warranty data to determine when the failure rate is reached is unnecessary, the remedies for violating the four percent rate (recall or extended warranty) cannot be ordered, and there is no need for either the hearing process to challenge the remedies or the procedures for carrying them out. Without the four percent failure rate, the warranty reporting, remedy, and hearing process have no meaning and are essentially void. Stated another way, without the four percent failure rate, the Amended Warranty Reporting and Recall Regulations cannot effectively be implemented as a viable regulation. It would be pointless to require manufacturers to do the reporting to determine a four percent failure rate that no longer exists. Similarly, is unnecessary to maintain remedies and a hearing process whose very existence depended on emission control component failures reaching a failure rate that Judge Chalfant eliminated from the regulation. Accordingly, the Board requests that the amendments be deleted from the California Code of Regulations because Judge Chalfant's decision held or rendered them invalid within the meaning of California Code of Regulations, title 1, section 100.

The fourth part of the amendments repealed the prior regulations for reporting emissions warranty claims and basing recalls on such information (Cal. Code of Regs., tit. 13, § 2111, 2122, 2136 & 2141). Since their repeal was predicated on the prior regulations being replaced by the amendments, something rendered legally impossible by Judge Chalfant's decision, the Board requests that this portion of the amendments be deleted as well. Deleting the amendments from the California Code of Regulations will not materially alter any requirement, right, responsibility, condition, prescription, or

other regulatory element of the amendments because Judge Chalfant's ruling rendered the amendments invalid, void and inoperable.

Judge Chalfant directed the Board to submit on or before June 1, 2009, a response to the Peremptory Writ of Mandate describing the actions and measures ARB will take to comply with his decision. The Board is requesting OAL to delete the amendments from the California Code of Regulations pursuant to its authority under California Code of Regulations, title 1, section 100. The amendments are contained in the Final Regulation Order attached hereto as (Exhibit B). Deleting the amendments will allow ARB to work with manufacturers under the previous (although less effective) warranty reporting regulations and seek corrective actions for identified systemic emission component problems. The Board is considering seeking the authority to adopt the failure rate that Judge Chalfant invalidated as well as adopting another, different set of regulations.

If you have any questions or concerns, you may contact Mr. Kirk Oliver, Senior Staff Counsel, at (916) 324-4581.

Attachments

# Exhibit D

Automotive Service Councils of California  
v. California Air Resources Board  
BS 112735

Tentative decision on petitions for writs of  
mandate: one granted, one denied

Petitioners Automotive Service Councils of California et al. (collectively, "ASCC") and Engine Manufacturers Association ("EMA") separately challenge the adoption by Respondent California Air Resources Board ("CARB") of new regulations regarding automotive emissions control systems. The court has read the various moving papers, opposition and replies, and renders the following tentative decision.

## **A. Statement of the Case**

### **1. BS 112735**

ASCC filed its Petition on January 4, 2008. ASCC is a California based automotive industry trade group, comprised of and supported by approximately 1,350 individual-owned automotive repair facilities in California.

On December 5, 2007, the California Office of Administrative Law ("OAL") approved CARB's adoption of amendments to the Emission Warranty Information Reporting and Recall Regulations ("EWIR") set forth in Title 13 of the California Code of Regulations ("CCR"), Chapter 1, Article 2 (the "EWIR Amendments"). The EWIR Amendments amend 13 CCR sections 1956.8, 1958, 1961, 1976, 1978, 2111, 2122, 2136 and 2141 and adopt new sections 2166 through 2174. The EWIR Amendments become effective on January 4, 2008.

In pertinent part, the EWIR Amendments allow CARB to authorize automobile manufacturers to offer an extended warranty in lieu of recalls with respect to a purportedly defective automotive emission system component. Automobile manufacturers would be able to extend the warranty on an automotive emission system component to the certified useful life of the vehicle if the component targeted by a warranty report is monitored by an On Board Detection system.

ASCC contends that in adopting the above-described extended warranty provisions of the EWIR Amendments, CARB exceeded its authority under the Health and Safety Code ("H&S"). Specifically, CARB acted in violation of and exceeded its authority under H&S sections 43105 and 43205.

### **2. BS 114066**

EMA filed its Petition on April 2, 2008. EMA is a not-for-profit trade association that represents manufacturers of internal combustion engines utilized in motor vehicles. EMA's members manufacture engines that are covered by the EWIR Amendments.

The Petition by EMA pertains to the portion of the EWIR Amendments which seeks to make the 4% Warranty Claims Rate the sole determinant of whether CARB may order an engine recall. EMA asserts that this is a violation of H&S section 43105, which expressly requires a showing that "the manufacturer has violated emission standards or test procedures."

EMA contends that CARB has exceeded its delegated statutory authority by adopting amended regulations that would: (i) allow CARB to initiate engine recall orders without first establishing that the alleged engine defects at issue are causing excessive engine emissions; and (ii) deny to engine manufacturers their statutory and due process rights to a hearing to present evidence in opposition to a proposed engine recall order.

## **B. Standard of Review**<sup>1</sup>

“A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.” CCP §1085(a).

A traditional writ of mandate under section 1085 is a method of compelling the performance of a legal, usually ministerial duty. Pomona Police Officers’ Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-584. “Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right to performance.” *Id.* at 584 (internal citations omitted). When an administrative decision is reviewed under section 1085, judicial review is limited to an examination of the proceedings before the agency to determine whether its action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether it did not follow the procedure and give the notices required by law. *Id.* Issues of whether an agency has exceeded its statutory authority or has complied with the law in enacting regulations are reviewed *de novo*. Anserv Ins. Services Inc. v. Kelso, (2000) 83 Cal.App.4th 197, 204-05; Duncan v. Dept. of Personnel Administration, (2000) 77 Cal.App.4th 1166, 1174.

## **C. Factual Background and Statutory Scheme**

### **1. CARB’s Authority**

The Legislature established CARB in 1967 to attain and maintain healthy air quality, conduct research into the causes of and solutions to air pollution, and to systematically attack the serious problem caused by motor vehicles, which are the major cause of air pollution in the State. H&S §39003. The Legislature delegated authority to CARB to adopt regulations consistent with “the state goal of providing a decent home and suitable living environment for every Californian.” H&S §§ 39600, 39601(c). Under the statutory scheme, CARB sets numeric limits, referred to as “emission standards,” on the emissions from motor vehicle engines that can cause or contribute to air pollution. H&S §43101.

In order to ensure that the emission reductions and health benefits envisioned by the Legislature are fully realized, manufacturers must equip vehicles with emission-control components that are effective and durable for the vehicles’ certified useful life periods. The manufacturers must submit test data demonstrating that their vehicles and engines meet the numeric standards established by CARB. H&S §43102. The specifications for testing, the duty cycles the test engines are run on, and the methods for sampling and measuring emissions are prescribed by procedures which CARB adopts and implements. *See* H&S §43104.

Manufacturers annually test prototype vehicles and engines under these test procedures to demonstrate that the production vehicles they propose to sell in California meet CARB’s

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<sup>1</sup>ASCC purports to seek relief pursuant to both CCP sections 1085 and 1094.5. Since a quasi-legislative rulemaking is at issue, only traditional mandamus under section 1085 is applicable.

emission standards and that their emissions control components are durable and will last for the vehicles' full useful lives (10 years/120,000 miles for passenger cars, and 10 years/435,000 miles for heavy duty diesel vehicles). 13 CCR. §2166.1(p)(4) & (8). Since manufacturers cannot subject every engine to emission testing, the manufacturer also must warrant that each engine will be free from defects and will conform to the applicable emission standards for a specified period of use. H&S §§ 43106, 43205.5.

CARB reviews the annual test results for compliance with regulatory requirements and, if they comply, CARB grants the manufacturers its certification to sell their vehicles in California for that model year. If the vehicles thereafter are found to violate either CARB's emission standards or test procedures, CARB may order manufacturers to recall them or take other corrective action. H&S §43105. If a manufacturer contests the necessity for, or the scope of, a recall, CARB shall not require such recall unless it first affords the manufacturer the opportunity at a public hearing to present evidence in support of its objections. Ibid.

H&S section 43105 provides in pertinent part that no new automobile shall be sold or offered for sale in California "if the manufacturer has violated emission standards or test procedures and has failed to take corrective action, which may include recall of vehicles or engines...." In 1982, CARB adopted regulations that established CARB's first in-use vehicle recall program. The regulations were designed to reduce vehicular emissions by: (1) ensuring that in-use vehicles that violated applicable emission standards or test procedures were identified, recalled, and repaired; and (2) encouraging manufacturers to improve the design and durability of emission components to avoid the expense and adverse publicity of a recall.

## **2. The 1988 EWIR Regulations**

As a result of problems CARB encountered during the early years of the program, including delays in recall implementation, in 1988 CARB adopted the original EWIR regulations (13 CCR §2141-2149) for tracking emission-control component defects through warranty claims records. AR 79-80, 2575. The 1988 EWIR regulations required manufacturers to track their emission-related warranty claims on a quarterly basis to determine the number of repairs or replacements made for each component. Manufacturers were required to report unverified warranty claims that exceeded a one percent level per component and had additional reporting requirements when a component's verified warranty claims exceeded 4% for a given engine family or test group. 13 CCR §2144. When verified claims concerning an emission-control component exceeded 4%, the manufacturer and CARB were required to assess the emissions impact of the defect. 13 CCR §§ 2146, 2148. Such a defect was deemed systemic in nature. AR 2575.

Despite a systemic defect, CARB had to prove that a substantial number of the class or category of vehicles or engines contained a failure in an emission-related component which may result in the failure to meet applicable emission standards over their useful lives. 13 CCR §2123(a). CARB could not order a recall for the defective component if the manufacturer could show that the component failures "will not result in exceedance of emission standards over the useful life of the vehicle or engine." 13 CCR §2123(b).

CARB's burden to support recall proved difficult to meet. The pivotal issue at hearing often was whether an admittedly defective emission component would result in a failure to meet emission standards. This required CARB to undertake time-consuming, resource-intensive

testing, frustrating the ability to address a known defect and effectively preventing recalls in situations where they were warranted. AR 83.

Although the regulations permitted CARB to obtain data from manufacturers about the emission consequences of failed components, CARB had difficulty obtaining this information. Manufacturers filed few reports, CARB has limited staff and resources to review the reports, and manufacturers faced few consequences for providing incomplete information. AR 86. Further, the regulations encouraged manufacturers to withhold evidence of emissions testing until after CARB had determined that a recall was warranted. AR 87.

The difficulty of conducting in-use vehicle testing, especially in cases involving large vehicle populations or components that failed over time, deterred CARB from ordering recalls. AR 83, 87. This emissions testing was expensive, time-consuming, and seldom dispositive. AR 2907. Problems also arose regarding issues of sample size, vehicle procurement, validity of results, and the meaning of test results. AR 2931. CARB was unable to require manufacturers to carry out corrective action even though there was a demonstrable systemic failure of emissions control components. AR 2888.

The 1988 EWIR regulations suffered from other problems. First, they were outdated because the only corrective action authorized was a recall. The regulations were adopted before the development of OBD (on-board diagnostic) technology and CARB's adoption of regulations requiring OBD systems on most new vehicles sold in the state. 13 CCR §1968.1-1968.5; AR 83, 2872. OBD systems monitor the performance of emission components, making it possible to easily determine the vehicle's compliance with emission standards and test procedure requirements. They warn the vehicle owner when an emission-related component has failed and prompt the owner to seek repairs.

OBD systems combined with an extended warranties can be used to correct emission components that fail at excessive rates beyond the statutory warranty periods. AR 83. Thanks to the advent of OBD systems, an extended warranty may be a superior remedy to recall. Under a recall, the suspect emission component is required to be repaired or replaced in an entire group of vehicles, despite the fact that many of the components may not ultimately fail in use. Vehicle warranties, by contrast, can be more precise and cost-effective because under warranties, only those components that actually fail (as detected by the OBD system) are corrected. Thus, extended warranties ensure that failed components detected by OBD systems after statutory warranty periods expire are corrected at the manufacturer's expense. (AR 2898-2899 & 2939.) These components would have been repaired or replaced anyway, at the manufacturer's expense, under a recall.

Additionally, the 1988 regulations offered no way to recall vehicles for violating CARB's test procedures. While they incorporated federal durability test procedures as required by H&S section 43104, the test procedures did not establish a clear standard to judge whether durability test procedure requirements had been met. *See, e.g.*, 40 CFR §86.1823-01(e).

### **3. The EWIR Amendments**

CARB adopted the EWIR amendments pursuant to a formal rulemaking process in October 2007. The EWIR amendments and related test procedures were adopted by CARB primarily under the authority granted by H&W section 43105 and take effect for year 2010 vehicles. OAL approved the amendments on December 5, 2007. AR 3041.

The EWIR amendments require that manufacturers state, at the time of certification, that the emission components on their vehicles are designed and will be manufactured to operate properly in compliance with all applicable requirements for the useful life (or allowable maintenance interval) of the vehicles or engines. The revised regulations also require that vehicles and engines tested for certification be, in all material respects, substantially the same as production vehicles and engines. *See e.g.* 13 CCR. §1958(c)(5); AR 2989.

The EWIR amendments make it a violation for an emissions-related component to fail at a verified rate of 4% or more during statutory warranty reporting periods. To track emissions component failures, manufacturers must review warranty claims on a quarterly basis. 13 CCR §2167(a)(1). For each calendar year when the unscreened warranty claims for an emissions component reach 4% or 50 in number (whichever is greater) of the vehicles within an engine family or test group, a manufacturer must file an EWIR. 13 CCR §§ 2167(a)(1), 2167(a)(3). When the unscreened warranty claims reach 10 percent or 100 in number (whichever is greater), the manufacturer must file a Supplemental EWIR or initiate corrective action. 13 CCR §2168(a). As part of the Supplemental EWIR, the manufacturer must screen the data to determine whether the valid warranty claims reach 4% or 50 in number (whichever is greater). 13 CCR §2168(a), (b) through (d), (g), and (j)(7).

CARB uses the information in the Supplemental EWIR to determine whether the verified failure rate has reached 4%, which is considered a systemic failure. 13 CCR §2168(k). In making this determination, CARB is not required to consider emission impacts of the systemic emission component failure unless the manufacturer demonstrates that the failure will not have an emissions impact under any conceivable circumstance. 13 CCR §§ 2168(k), 2166(d), 2168(k), 2168(1). Nor is CARB required to consider economic impacts to the manufacturer. 13 CCR §§ 2166(d), 2168(k).

After CARB determines that a systemic failure exists, it may order corrective action. 13 CCR §§ 2169-71. "Corrective action" is defined as "any action taken by the manufacturer to remedy a violation of emissions standards or test procedures." 13 CCR §2166.1(b). Corrective action may include recall, extended warranty, or other action ordered by the Executive Officer." *Ibid.* "Extended warranty" is defined as "corrective action required by the Executive Officer that extends the warranty time and mileage periods for a specific emissions-related component pursuant to this article. For passenger cars, light-duty trucks, medium-duty vehicles and engines, and heavy-duty vehicles and engines used in such vehicles, the extended warranty shall be equal to the applicable certified useful life<sup>2</sup> of that vehicle or engine." 13 CCR §2166.1(h).

A manufacturer may request a public hearing to contest CARB's finding of verified 4% failure of emission-related components and of the necessity for, or the scope of, any ordered corrective action. 13 CCR §2174(a). The record at the hearing is limited to: information previously submitted to CARB in the emissions warranty reports, CARB's response to such information, CARB's notice of corrective action, and new relevant evidence that could not, with reasonable diligence, have been discovered and included in the information previously provided to CARB in the emissions warranty reports. *Ibid.* At the hearing, because the only issue before

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<sup>2</sup>The definition of "useful life" varies. However, in most circumstances it is defined as 10 years or 120,000 miles, whichever is less. 13 CCR §2166.1(p).

corrective action may be ordered is whether a true 4% failure rate occurred; evidence of emissions impacts of the systemic emissions component failure are irrelevant unless the manufacturer demonstrates that the failure will not have an emissions impact under any conceivable circumstance. 13 CCR §§ 2168(f), 2174. In effect, the amendments turn the burden of proof on the manufacturer to show that a clearly defective component will not affect emissions.

#### **D. Analysis - ASCC Claims<sup>3</sup>**

##### **1. Standing**

CARB contends that ASCC does not have standing. Mandate may be issued upon the verified petition of the party beneficially interested. CCP §1086. This is synonymous with standing (*see People ex. Rel. Dept. Of Conservation v. El Dorado County*, (2005) 36 Cal.4th 971), and is equivalent to the federal “injury in fact” test, requiring that a party prove that it has suffered an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *Id.* It involves a two step inquiry: (1) the petitioner must have “some special interest to be served or some particular right to be protected over and above the interest held in common with the public at large.” *Carsten v. Psychology Examining Comm.*, (1980) 27 Cal.3d 793, 796; and (2) the interest that the plaintiff seeks to advance must be within the zone of interests to be protected or regulated by the legal duty asserted.

ASCC is a trade group for approximately 1,350 individual-owned automotive repair shops. ASCC is challenging the extended warranty feature of the EWIR amendments, claiming that an extended warranty will make it more likely for car owners to take their vehicles to a new car dealer for emission component repair. However, as CARB points out, the corrective action alternative to an extended warranty is a recall. Pursuant to a recall, the car owner also will take the car to the dealer for repair. Under either set of EWIR regulations, the dealer performs the repair. Thus, ASCC does not have a special interest over that of the public at large.

ASCC makes a confusing argument in reply. It acknowledges that a recall requires a car owner is required to go to the dealer for repair. Under an extended warranty, the owner will not know whether the car is under warranty for the particular problem when an emission component warning light comes on. The owner will take the car to the dealer to ensure that the warranty has not been violated. Once there, the owner will learn whether the repair is covered. Since the extended warranty covers the repair, ASCC’s members will lose the repair.

This argument is non-sensical. For a recall, the car owner must go to the dealer because only the dealer can perform the repair. For an extended warranty, the owner must go to the dealer because the owner is unsure whether the problem is covered by the warranty. When he/she finds out that it is, the repair is done by the dealer. Even if it is not, the owner is likely to have the dealer perform the repair. *See* AR 2710. Either way, the dealer performs the corrective action.

ASCC also relies on predictions that independent repair shops will continued to grow but

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<sup>3</sup>ASCC asks the court to judicially notice the legislative history of H&S sections 43105 and 43205. The unopposed request is granted. Ev. Code §452(b).

at a slower rate but at a slower rate under the extended warranty. AR 2779. This argument is apparently premised on the conclusion that, upon bringing the car to the dealer for extended warranty repair of the emission component, the car owner will have any additional work that is necessary performed at the same time. This work would ordinarily be done by an independent shop, which handles 70-80% of car repairs after a warranty expires.

As the predictions admit, there is considerable uncertainty in many of the parameters that underlie these predictions. *Id.* More important, this type of speculative harm based on lost follow-on business is not enough to constitute a special interest to be served or particular right to be protected over those of the general public. The only direct impact under both corrective actions (recall and extended warranty) is that car owners will take their vehicles to the dealership to have the defective component replaced. Collateral impacts such as those raised by ASCC are too indistinct to generate standing.

ASCC further relies on the relaxation of beneficial interest where a statute or regulation creates a public right or duty. Where a public right is at issue, it is sufficient for purposes of standing that a petitioner is a citizen who is interested in having a public right or duty enforced. *See Hansen v. Department of Social Services*, (1987) 193 Cal.App.3d 283, 287, n.2 (taxpayer may bring mandamus to compel agency to assist homeless recipients of aid to families with dependent children). ASCC does not seek to protect or enforce a public right. To the contrary, the only public right is a right of car owners to an extended warranty, which ASCC seeks to truncate. There is no relaxed standing to attack a purported public right.

ASCC lacks standing to pursue its claims.

## **2. Merits**

The court will assume *arguendo* that ASCC has standing to challenge the EWIR Amendments, which allow CARB to compel manufacturers to offer an extended warranty in lieu of recalls with respect to a defective emission system component. Under the EWIR Amendments, the extended warranty would be for useful life of the vehicle – in most circumstances 10 years or 120,000 miles, whichever is less.

### **Authority Under Section 43105**

ASCC argues that H&S section 43205 limits the period for which CARB can require an automotive manufacturer to provide a warranty on an emissions controls system component to a maximum of 7 years or 70,000 miles, whichever is less. Therefore, CARB exceeded its statutory authority in allowing an automobile manufacturer to offer an extended warranty of up to 10 years or 120,000 miles.

In assessing the validity of regulations, the function of the court is to determine if the rule in question lay within the lawmaking authority delegated by the Legislature, and whether the challenged regulation is reasonably necessary to implement the purpose of the statute. *Yamaha Corp. v. State Board of Equalization*, (1998) 19 Cal.4th 1, 10-11. These issues come to the court “freighted with the strong presumption of regularity.” *Ralph’s Grocery Co. v. Reimel*, (1968) 69 Cal.2d 172, 175.

Courts grant deferential treatment to an agency’s decision-making process because agencies that issue regulations are considered to possess relevant scientific and technical expertise. A court “does not substitute its judgment for that of an administrative body.” *Pitts v.*

Perluss, (1962) 58 Cal.2d 824, 834-835; *see also*, Fullerton Joint Union High School District v. State Board of Education, (1982) 32 Cal.3d 779, 786 (“trial court does not inquire whether.. it would have taken the action taken by an administrative agency”).

H&S section 43105 (“section 43105”) provides in pertinent part that no new automobile shall be sold or offered for sale in California “if the manufacturer has violated emission standards or test procedures and has failed to take corrective action, which may include recall of vehicles or engines, specified by the state board in accordance with regulations of the state board....”

Issues of statutory interpretation begin with the text of the law. Dubois v. Workers Comp. Appeals Bd., (1993) 5 Cal.4th 382, 387-388. The text ordinarily provides “the most reliable indicator of legislative intent.” City of Burbank v. State Water Resources Control Bd., (2005) 35 Cal.4th 613, 625.

The plain language of section 43105 provides that a recall is but one form of corrective action which CARB may take for violations of emission standards or test procedures. *See, e.g.*, Bodega Bay Concerned Citizens v. County of Sonoma, (2005) 125 Cal.App. 1061, 1071 (interpreting “including, but not limited to” language as granting authority “expressed broadly and without limitation”). Section 43105 implicitly authorizes CARB to require other corrective actions besides recall.

The statute does not define “corrective action.” The fact that the statute says that “corrective action” may include recall means that the Legislature intended CARB considerable discretion in fashioning the corrective action for noncompliance with emission standards and test procedures. Canons of statutory interpretation explain that where terms are not clearly defined in statutes, interpreting such terms is a matter within the agency’s discretion and worthy of due deference. City of Arcadia v. State Water Resources Control Board, (2006) 135 Cal.App.4th 1392, 1415; *see also*, RCJ Medical Services v. Bonta, (2001) 91 Cal.App.4th 986, 1005 (where Legislature leaves gaps in a program, it delegates authority to the agency to fill them in). The phrase is necessarily broad in nature, and obviously grants CARB considerable leeway. An extended warranty is a form of corrective action because it remedies systemic emission component failures. CARB was within the agency’s discretion to included it as a corrective action.<sup>4</sup>

ASCC contends that recall and repair are the only corrective actions contemplated by section 43105.<sup>5</sup> This is a spurious suggestion and contrary to ASCC’s own statements before CARB. *See* AR 62. Section 43105 expressly delegates to CARB the determination of the corrective action that must be taken – “corrective action....specified by CARB]....” The Legislature could have easily limited corrective action to repair and recall if that was the intended scope of corrective action permitted.

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<sup>4</sup>The Legislature’s deferral to CARB to define “corrective action” also negates ASCC’s argument that section 43105 fails to mention the term “warranty.”

<sup>5</sup>ASCC cites the legislative history of section 43105 (Mot. at 9), but nothing in the cited history or ASCC’s argument rebuts the simple fact that a corrective action may include an extended warranty to encourage the repair of defective emission-related components.

ASCC also argues that the EWIR amendments themselves define “corrective action” as “any action taken by the manufacturer to remedy a violation of emissions standards or test procedures” (13 CCR section 2166.1), and an extended warranty will not necessarily remedy the defective emission component because many car owners will not taken advantage of the repair process.

Apparently, ASCC is arguing that there is an inconsistency in the EWIR amendments, but it does not explain how this affects CARB’s authority to do what it plainly has done. Moreover, there is no inconsistency. A corrective action such as an extended warranty intended by CARB to remedy a violation does not mean that the remedy is guaranteed to occur. Issuance of a recall does not guarantee that a defective component will be remedied either.

ASCC further argues that H&S section 43205 precludes CARB from requiring an extended warranty as a form of corrective action. That provision requires manufacturers to provide a full coverage warranty for vehicles and engines of three years or 50,000 miles, whichever is first, and a warranty for a vehicle’s more expensive emission-related components for seven years or 70,000 miles, whichever occurs first. Since the Legislature sought to create a warranty for emission-related components in section 43205, ASCC contends that CARB may not rely on section 43105 to create a longer warranty longer.

ASCC points out that legislative history of section 43205 demonstrates that its full coverage and specific warranty for emission components were the results of compromise. Section 43205 is a specific statute resulting from a legislative compromise that, for purposes of statutory interpretation, takes precedence over section 43105, a more general statute. *See Mitchell v. County Sanitation District*, (1958) 164 Cal.App.2d 133, 141. According to ASCC, the specific section 43205 warranties cannot be trumped by providing a longer warranty under the guise of section 43105's general authority.

The rule of statutory interpretation on which ASCC relies – that a specific statute controls over a general statute – “does not apply unless the language of the two enactments cannot be harmonized...so as to give effect to both statutory provisions.” *Acco v. McNamara & Peepe Lumber Co.*, (1976) 63 Cal.App.3d 292, 295-296. Sections 43105 and 43205 can easily be harmonized. Section 43205 requires manufacturers to warrant emission components on new cars for seven years or 50,000 miles in new vehicles. At the time of warranty, the new car has no known defect and the warranty is a prophylactic measure. Section 43105, on the other hand, permits CARB to require an extended warranty as a corrective action for a class of vehicles that develop systemic emission component failures. The extended warranty, coupled with OBD systems, encourages repair of an actual existing defect. As such, the section 43105 extended warranty operates more like a recall than a new vehicle warranty.

#### **Reasonably Necessary to Purpose of Section 43105**

ASCC next argues that, if CARB had the authority under section 43105 to promulgate the extended warranty as a corrective action in the EWIR amendments, it acted arbitrarily and capriciously and entirely without supporting evidence.

In evaluating a regulation, the court is extremely deferential to the agency. A court must not inquire into the wisdom of the agency’s action (*Stauffer Chemical Co. v. Air Resources Board*, (1982) 128 Cal.App.3d 789, 796), and can only overturn the regulation if there is not substantial evidence that it is reasonably necessary to implement the authorizing statute’s

purpose. Yamaha Corp. v. State Board of Equalization, (1998) 19 Cal.4th 1, 10-11; Gov. Code §11350(b)(1).

ASCC argues that the record lacks evidence, analysis, or explanation that the extended warranty required for a systemic defective component will necessarily (1) improve air quality, (2) improve emission component durability, or (3) result in a car owner's repair or replacement of the defective component.

These arguments are disposed of by CARB's rationale for the extended warranty. CARB premised the extended warranty on a conclusion that when a systemic emissions component failure occurs, excess emissions are likely to occur. AR 95. Presumably, this conclusion is based on the vehicle owner's failure to repair the defective emission component, which does not affect the car's operation. A failed emissions component enables the car to create excess emissions. A corrective action of an extended warranty will make it more likely that the car owner warned of the emissions component failure by the car's OBD system, will have the defect repaired. This will result in lower emissions and better air quality. CARB also concluded that the expense of repairs that result from the extended warranty will cause manufacturers to focus on building more durable emission components. AR 2913. The experience of CARB's staff – that extended warranties are an effective corrective action to systemic emission control defects – supports these conclusions. AR 2899.

This is all that is necessary to conclude that there is substantial evidence that the extended warranty in the EWIR amendments is reasonably necessary to achieve the purpose of section 23105 that CARB provide for corrective action where a manufacturer's emission components violate emission standards or test procedures.

ASCC seems to believe that evidence must exist that the extended warranty will improve air quality and the durability of emission components. This is incorrect. It is sufficient that the extended warranty is reasonably necessary to achieve corrective action for an emission component violation, and that corrective action will serve the Legislature's intent of improving air quality. The extended warranty need not also improve the durability of emission components, although doing so may be a separate reason for the extended warranty's viability because improved durability will also improve air quality.

ASCC speculates that most cars will have been sold as a used car by the time the warranty extension is effective, and will be unlikely to bring it to the dealer for repair. Contrary to ASCC's argument, CARB is not required to be certain that car owners will replace defective components during the extended warranty period. It is enough that the extended warranty coupled with the warning from an OBD system give them an incentive to do so.

ASCC further contends that manufacturers will not have an incentive to make more durable emission component parts because a recall is much more expensive for a manufacturer than a warranty. ASCC cites to a RAND study commissioned by CARB that concludes that there are no empirical studies on the issue of the impact on durability of an extended warranty. However, ASCC also argues that a warranty serves primarily as a loss leader for a dealer to make other repairs when a car owner brings it in for service under the warranty. As CARB's opposition points out, this argument suggests that an extended warranty costs manufacturers money. As a result, manufacturers have an inherent incentive to avoid a warranty by improving the quality of its parts.

In sum, there is substantial evidence that the extended warranty coupled with the OBD

system will enable car owners to repair their defective emission components, thereby improving the emissions of their cars and overall air quality. In turn, this will cause manufacturers to improve the durability of their emission components, also improving air quality. Whether the EWIR amendments will actually serve this purpose a question on which the court must defer to CARB's expertise.<sup>6</sup>

ASCC's petition is denied.

#### **E. Analysis - EMA's Claims**

Where "the manufacturer has violated emission standards or test procedures," CARB may order manufacturers to recall them or take other corrective action. H&S §43105. The EWIR amendments provide that a verified 4% failure of an emissions component during the statutory warranty periods is a systemic component failure. EMA argues that CARB lacks statutory authority to require corrective action because a systemic emission component failure is not an "emission standard" nor a "test procedure" under section 43105.

Plainly, a systemic emission component failure is not an "emission standard," which is defined in H&S section 39027 as "specified limitations on the discharge of air contaminants into the atmosphere." An "air contaminant" is "any discharge, release, or other propagation into the atmosphere...." H&S §39013. The systemic failure of an emissions component may lead to the discharge of air contaminants, but it is not a limitation on such a discharge.

This leaves the issue one of whether a systemic failure of an emissions component is a "test procedure."

As stated, section 43105 provides that CARB may impose corrective action where a manufacturer has violated test procedures. H&S section 43104 provides that CARB shall adopt by regulation "test procedures" for the certification of new motor vehicles or engines to determine whether they are in compliance with emission standards.

The EWIR amendments require that manufacturers state, at the time of certification, that the emission components on their vehicles are designed and will be manufactured to operate properly in compliance with all applicable requirements for the useful life (or allowable maintenance interval) of the vehicles or engines. The revised regulations also require that vehicles and engines tested for certification be, in all material respects, substantially the same as production vehicles and engines. If it is determined that any emission component experiences a systemic failure (verified 4% or more or 50 vehicles), it "constitutes a violation of the foregoing test procedures...." 13 CCR. §1958(c)(5); AR 2989.

EMA argues that the systemic failure of emission components is a performance standard, not a test procedure, as even CARB admits. *See* AR 2038-39, 2524, 2891. EMA points out that the object of section 43104 test procedures is to assess whether motor vehicle engines are in compliance with the numeric limits that CARB has set for certain exhaust emissions. A test procedure is the objective, repeatable and scientific means necessary to determine whether

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<sup>6</sup>ASCC raises an issue under Gov. Code section 11346.5(a)(8) that CARB did not properly assess the adverse economic impact of the EWIR amendments on the independent repair industry. CARB points out that ASCC's Petition does not raise this issue, and it is waived. In any event, CARB did assess this economic impact. AR 2779, 2910-11, 2042-43.

vehicles and engines are in compliance with emission standards. CARB's own test procedures for engine certification include discussion of the equipment necessary to run the test, specification for fuels to be used with the tested engine, instructions on how to prepare the engine for testing, the duty cycles over which the engine must be run, and methodology of measurement. Therefore, the systemic emissions component failure is not a test procedure. EMA Mot. at 8.

CARB points out that H&S does not define "test procedure," but agrees with EMA that sections 43104 and 43105 suggest that the procedure in question is that used by manufacturers to obtain certification of their products. The EWIR amendments refer to the manufacturers' certification testing as the "test procedure" under section 43105, and the systemic emissions component failure is a violation of this test procedure.

CARB argues that the issue is the scope of the certification test procedure, which continues during the vehicle's useful life. The engine certification contains a requirement of durability, and CARB's regulations have long incorporated federal requirement that the emission-related components be designed to operate for the vehicle's useful life.<sup>7</sup> Where there is a systemic failure of an emissions component, this is evidence that the manufacturer did not use good engineering judgment in designing the component to be durable. As such, the manufacturer has failed the certification test procedure continuing throughout the vehicle's useful life.

This is stretching the term "test procedure" in sections 43104 and 43105 beyond all recognition. Generally, a "procedure" is a series of steps or a protocol. It is not a standard of performance. Nor is it the evidence that a standard has been violated. A test procedure or protocol certainly may incorporate a test standard, and CARB has authority to create a standard for emission component testing. However, the plain meaning of the test procedure for certification referred to section 43104, the violation of which creates a corrective action under section 43105, is for certification of a class or category of vehicles/engines. This is a test of prototype vehicles, and it ends when the vehicle or engine is certified. Nothing in section 43104 and 43105 suggests that the test procedure for certification can continue over the useful life or warranty period of the manufacturer's production vehicles.

The court agrees with CARB that it has wide discretion to create the test procedure under section 43104 to determine whether vehicles/engines are in compliance with emission standards.<sup>8</sup> But the discretion must be exercised in creating a test procedure for the purpose of

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<sup>7</sup>Section 43104 requires that CARB's test procedure be based on federal test procedures which include this durability requirement.

<sup>8</sup>Section 43105's provision that CARB shall determine the "procedures" for determining, and the facts constituting, compliance with emission standards is not separate authority to include inclusion of systemic emission component failure within its certification test procedure. As EMA points out, the procedure referred to in the last sentence of section 43105 is not a test procedure, but rather the procedure for manufacturers to follow in, for example, preparing, implementing, and providing verification of compliance with, a recall plan. See 13 CCR §§ 2125-35.

certification. CARB does not have discretion to include vehicle performance in a test procedure for certification.

The federal test procedures on which CARB relies are not to the contrary. They involve environmental testing of "deterioration factors" during certification to evaluate durability over an engine's useful life. CARB is free to develop a similar test procedure to evaluate the durability of emission components at the time of certification. But CARB's contention that certification testing continues throughout the useful life of the vehicle, and the operation of all of a manufacturer's vehicles and engines is just one long certification test, is unsupportable.<sup>9</sup>

In the record, CARB relies on the fact that a manufacturer tests prototype vehicles at the time of certification, and H&S section 43106 requires that production vehicles be the same in construction as the test vehicles. CARB contends that a systemic emissions component failure is "strong evidence" that production vehicles are not the same construction as test vehicles, and the systemic failure rate is a proper part of the test procedure. AR 2890.

This is a *non-sequitur*. A systemic part failure during vehicle/engine performance can be evidence of either a manufacturing flaw or a design flaw. Of the two, only a manufacturing flaw could be considered "not the same construction as test vehicles" and a violation of section 43106. A design flaw would mean that, despite the fact that the production vehicles/engines were manufactured precisely the same as the prototype vehicles/engines, all components are defective and no violation of section 43106 has occurred. Even if *arguendo* a systemic failure is evidence that production vehicles have not been manufactured identically as the test vehicles, this breach of section 43106 does nothing to enable CARB to require certification testing to continue past the time of certification.

The court also agrees with EMA that CARB's requirement that manufacturer's state that their emissions components have been designed to operate for the full useful life of the engine/vehicle (13 CCR §1958(c)(5)) cannot be used to bootstrap systemic emissions component failure into a certification "test procedure" under section 43104.

In sum, CARB had difficulty under the 1988 EWIR regulations in proving that a systemic failure of emission components led to excess emissions. The result was that some vehicles/engines that should have been subject to recall were not. CARB sought to use the development of OBD systems to remedy this problem by coupling them with an extended warranty where there is a systemic emissions component failure. This is a neat and potentially effective remedy. Unfortunately, it is not statutorily authorized as a "test procedure" under section 23104 and therefore not available for remedy as a violation of section 43105.<sup>10</sup>

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<sup>9</sup>The fact that the EWIR amendments may be consistent with other H&S provisions (§§ 43205, 43205.5, 43013, and 43101) is not particularly germane where the issue is whether the systemic emissions component failure is authorized by sections 43104 and 43105.

<sup>10</sup>If the court is wrong, and a systemic emissions component failure is a "test procedure," then due process and section 43105 are satisfied by the hearing provided for in the EWIR amendments. At the hearing, the admissible evidence is limited to whether a systemic failure has occurred. By definition, a systemic failure would be a violation of a test procedure, and subject to section 43105's corrective action. The issue of a violation of emissions standards is irrelevant,

EMA's petition for writ of mandate is granted.

**F. Conclusion**

In BS 112735, CARB's counsel is ordered to prepare a proposed judgment, serve it on ASCC's counsel for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections.

In BS 114066, EMA's counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on CARB's counsel for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment in both cases is set for December 19, 2008.

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and the limitation of the evidence to that which has been previously submitted or which could not have been presented in the exercise of due diligence is perfectly appropriate. There are no concrete standards as to what constitutes due process; the requirement will vary "as the particular situation demands," but ultimately all that is required is notice and a "reasonable opportunity to be heard." Gilbert v. Homar, (1997) 520 U.S. 924, 930; Jonathan Neil & Assoc., Inc. v. Jones, (2004) 33 Cal.4th 917, 936. The hearing procedure provides both.