

**Comments of the Alliance of Automobile Manufacturers
Proposed Revisions to the Malfunction and Diagnostic System Requirements for
Heavy-Duty Engines (HD OBD) and Passenger Cars, Light-Duty Trucks, and
Medium-Duty Vehicles and Engines (OBD II)
August 22, 2012**

The Alliance of Automobile Manufacturers (the “Alliance”) appreciates this opportunity to provide comments to the Air Resources Board (“ARB”) concerning the proposed changes in California’s onboard diagnostics (“OBD”) regulations applicable to light-duty vehicles.

THE ARB STAFF’S PROPOSAL AND RATIONALE

The Alliance is specifically concerned that the ARB has proposed a new definition of “emission standard” in the light-duty OBD II regulations as follows:

“Emission standard,” as it applies to OBD compliance, relates to the emission characteristics of a motor vehicle and engine and means:

(1) a numerical limit on the amount of a given pollutant that a motor vehicle or motor vehicle engine may emit into the atmosphere; or

(2) a requirement that a motor vehicle or motor vehicle engine be equipped with a certain type of pollution-control device or some other design feature related to the control of emissions.

Proposed Regulation Order, 13 CCR § 1968.2(c).¹ ARB has proposed to add the same definition to its heavy duty OBD regulations. Proposed Regulation Order, 13 CCR § 1971.1(c).

In its Initial Statement of Reasons, the ARB staff has explained: “Stakeholders have recently argued that OBD system requirements are not emission standards or test procedures and that ARB does not have authority to order manufacturers to recall motor vehicles or engines if ARB were to determine that an installed OBD system was found to be in noncompliance with the HD OBD regulation.” Initial Statement of Reasons for Proposed Rulemaking (“ISOR”) at 8, available at <http://www.arb.ca.gov/regact/2012/hdobd12/hdobd12.htm>. The ARB staff explained that it is proposing the new definition of “emission standard” to avoid “confusion and misunderstanding as to whether the OBD requirements include emission standards” and to

¹ ARB is also proposing to add the following definitions: “*Evaporative emission standards*’ are a subset of emission standards that refer to the specific motor vehicle fuel evaporative emission standards and test procedures incorporated by reference in title 13, CCR section 1976 to which a vehicle is certified”; “*Exhaust emission standards*’ or *tailpipe emission standards*’ are a subset of emission standards that collectively refer to the specific FTP standards and SET standards to which a vehicle is certified.” Proposed Regulation Order, 13 CCR § 1968.2(c). Because these proposed definitions are subsets of the proposed modified definition of “emission standard,” they should be considered included as the subject of our comments and equally affected by the flaws we observe with respect to the proposed “emission standard” definition.

conform with the federal definition under Title II of the federal Clean Air Act, as interpreted by the U.S. Supreme Court in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246, 253 (2004).” *Id.* Later, the ARB staff explained: “The proposed definition, which modifies the definition of ‘emission standard’ as set forth in Health and Safety Code section 39028 (sic), is authorized by Health and Safety Code sections 39010 and 39601 in that the proposed definition conforms with existing federal definitions.” *Id.* at 18.² Under Health and Safety Code section 39027 (not section 39028), “[e]mission standards means specified limitations on the discharge of air contaminants into the atmosphere.”

As the ARB staff acknowledges, the proposed new definition is in response to stakeholders’ arguments that OBD system requirements do not constitute emissions standards and therefore ARB may not order a recall where there is only an OBD system malfunction (absent a demonstration that there are excess emissions over the applicable emissions limit). ISOR at 8. Health and Safety Code section 43105 limits ARB recall authority to circumstances where a manufacturer “has violated emission standards or test procedures and has failed to take corrective action.”

More specifically, the Truck and Engine Manufacturers Association (“EMA”) recently prevailed in its challenge to the ARB’s mandatory recall requirement under the heavy duty OBD rules on the grounds that the OBD malfunction criteria do not constitute “emission standards” and thus there is no authority for recall under section 43105. *Engine Mfrs Ass’n v. California Air Resources Board*, No. 2010-00082774-CU-MC (Cal. Sup. Ct., July 18, 2012). In that case, the court ruled that a “Nonconforming OBD System,” defined in ARB regulations “irrespective of whether engines in the engine class, on average, meet applicable tailpipe or evaporative emission standards,” does not qualify as an “emission standard” as then defined only at Health and Safety Code section 39027 to mean “the specified limitation on discharge of air contaminants into the atmosphere.” *Id.* at 4. The court reasoned that, based on these definitions, the determination that a vehicle or engine contains a Nonconforming OBD System may have no relation to the existence of excess emissions affecting the environment or attainment of air quality standards. *Id.* at 6. As nonconformance is defined irrespective of exceedances of tailpipe emission standards, the court ruled that ARB does not have authority to mandate recalls on these grounds. *Id.* at 5. Likewise, the court ruled that an OBD malfunction criterion is not an “emission standard.” *Id.*

The ARB staff apparently intends its new definition of emissions standard to displace the existing definition under Health and Safety Code section 39027. The result, presumably, is that noncompliance with OBD malfunction criteria would be considered a failure to meet an “emission standard,” and thus trigger ARB’s recall authority under Health and Safety Code section 43105.

² Health and Safety Code Section 39010 provides that, “[u]nless the context requires otherwise,” the definitions in Chapter 2 govern “unless and until rules and regulations are adopted by the state board pursuant to Section 29601 which revise such definition.” Section 39601(b), in turn, provides that “[t]he state board, by rules and regulations, may revise the definitions of terms set forth in Chapter 2 (commencing with Section 29010) of Part 1 in order to conform those definitions to federal laws and rules and regulations.”

THE ALLIANCE'S VIEW

The Alliance respectfully believes that the ARB staff's proposal to displace the statutory definition at Health and Safety Code section 39027 with the proposed definition is both unauthorized and inadequate to qualify OBD malfunction criteria as emission standards to which a recall would apply under Health and Safety Code section 43105.

First, the ARB has no authority to displace the section 39027 statutory definition of "emission standard" with the staff's proposed definition. The ARB staff explains that its proposal is to conform the regulatory definition of "emission standard" to the federal EPA definition of "emission standard." That is all that is allowed under Health and Safety Code Section 39601(b), which only authorizes the ARB to revise definitions "to conform those definitions to federal laws and rules and regulations." But neither the Clean Air Act nor U.S. EPA regulations define, as now the ARB staff proposes, "'emission standard' as it applies to OBD compliance." Moreover, neither the U.S. Code nor the Code of Federal Regulations contains a federal definition of "emission standard" that includes, as the ARB staff proposes to include in its new definition, "some other design feature related to the control of emissions."

The ARB staff's goal of conforming its definition to "the federal definition applied to Title II by the U.S. Supreme Court in [EMA v. SCAQMD]" is misplaced. The Supreme Court in that case was not interpreting the term "emission standard" in Title II. Rather, the Court in that case interpreted the meaning of Section 209(a), which preempts states from adopting or attempting to enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." SCAQMD, 541 U.S. at 251. The question before the SCAQMD Court was whether rules imposing emission-related purchase requirements on owners of vehicle fleets in the South Coast were "standards relating to the control of emissions" and thus preempted. Starting with the dictionary definition of the word "standard," the Court concluded that the purchase requirements were preempted under the language of Section 209(a). But the Court did not hold that the fleet purchase requirements were "emission standards" (as such a conclusion would be counterintuitive), as the term "emission standard" was not before the Court. The phrase that the SCAQMD Court did interpret -- "any standard relating to the control of emissions" -- is, by design, more expansive than the term "emission standard." The Section 209(a) preemption provision sweeps broadly to preclude states from adopting their own emission-related requirements, to avoid balkanizing the regulation of the design of new motor vehicles across the country. That preemption provision presumably does preclude states from adopting their own OBD requirements as a preempted "standard relating to the control of emissions." But an acknowledgment that OBD requirements might "relate" to emissions does not mean that OBD requirements are "emission standards" under federal law, or that the ARB can legally redefine "emission standard" to include any "design feature related to emissions."

In short, the staff may not rely on the broad scope of Section 209(a) preemption of "standards relating to emissions" aimed at preventing a proliferation of state motor vehicle emissions requirements to serve the ARB staff's own objective of displacing California's statutory definition of "emission standards" to justify an OBD recall requirement under Health and Safety Code section 43105.³

³ In the *EMA v. ARB* case, the ARB sought to rely on a 1996 EPA decision waiving federal preemption under Section 209(b) of the Clean Air Act. In the 1996 waiver proceeding, EPA considered whether

Second, OBD requirements do not qualify as an “emission standard” under the existing California statutory definition, any Clean Air Act definition that the ARB is authorized to adopt, or any common sense definition. The existing California statutory definition of “emission standard” at Health and Safety Code section 39027, “specified limitations on the discharge of air contaminants into the atmosphere,” makes common sense and creates no conflict with the Clean Air Act or its underlying regulations. As the Superior Court in *EMA v. ARB* ruled, OBD requirements are not such limitations. Similarly, the Clean Air Act imposes a number of emissions monitoring requirements like OBD, not only for motor vehicles and engines but also for stationary sources. For example, a continuous emissions monitoring system (“CEMS”) may be required to detect emissions levels in a smokestack. But it is common sense that such a device is required to monitor compliance with emissions standards and that such a monitoring requirement is not an emissions standard itself. Nor do EPA’s mobile source regulations define “emission standard” to include OBD.

Emissions monitoring and detection requirements such as OBD are not emission standards and the ARB staff may not legally define OBD as such simply to shoehorn OBD into the ARB’s limited statutory recall authority under Health and Safety Code section 43105.

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The Alliance appreciates the ARB’s attention to these comments and our concern that the ARB would overstep its authority in changing the section definition of “emission standard” in health and Safety Code section 39027 to encompass OBD requirements. Any questions regarding these comments should be directed to Julie Becker, Vice President for Environmental Affairs (jbecker@autoalliance.org; Ph: 202/306-7307).

certain California OBD requirements were “standards relating to emissions” subject to preemption under Section 209(a) and thus requiring a preemption waiver under Section 209(b). In that proceeding, the ARB actually took the position that the OBD requirements were enforcement procedures rather than standards relating to emissions. 1996 waiver decision at 19-20. In concluding that OBD requirements “should be treated as a standard under section 209,” EPA specifically emphasized that the classification of the OBD requirements was “as a standard *for purposes of section 209.*” 1996 decision at 20. Like the *SCAQMD* Supreme Court case, this EPA waiver decision interpreted the scope of Section 209(a) preemption; it is not an EPA interpretation that OBD requirements are “emission standards.”