



Comments of the Motorcycle Industry Council

Re: Proposed Amendments to CARB Emission Warranty Information
Reporting and Recall Regulations and Emission Test Procedures
(Hearing Date: December 7, 2006)

The Motorcycle Industry Council (MIC) is a national trade association representing more than 300 members from the motorcycle industry, including manufacturers and distributors of motorcycles, scooters, parts and accessories, and allied trades such as publishing, insurance and consultants.

MIC has a number of comments on the above-referenced regulatory proposal. In section I, we comment on specific sections of the proposal and recommend revisions to address our concerns. In section II, we address our general objections to the new “strict liability” approach, which imposes liability for recall and/or extended warranty for vehicles with defective parts regardless of whether the defect causes the vehicle to exceed the applicable emission standards. Section III proposes two alternative approaches for resolving the apparent conflict between staff and industry on this proposal. MIC requests that the Board not approve the staff proposal at the December 7 hearing, and direct staff instead to work on a revised proposal that addresses the concerns of both staff and industry.

I. Comments on Specific Sections

A. Mistaken Inclusion of Off-Highway Motorcycles and ATVs – As indicated in the “applicability” provision in proposed new section 2166(a)(1), the staff’s regulatory proposal includes off-road motorcycles and ATVs in the new reporting and corrective action regulations. There are similar references to off-road motorcycles and ATVs in proposed new sections 2166.1(p)(7) and 2173.3(d)10). It was MIC’s understanding from the May 2, 2006 workshop and subsequent communications with CARB staff that these vehicles would be excluded from the regulatory proposal, and remain subject to CARB’s current reporting and recall procedures, due to the different registration procedures that apply and the difficulty that manufacturers of these vehicles would have in carrying out recalls and extended warranty requirements.

In November, following release of the staff proposal on October 20, 2006, MIC received a telephone call from CARB staff indicating that off-road motorcycles and ATVs were mistakenly included in the new regulations, and would be deleted from the proposed regulations prior to adoption.

Requested Action: All references to off-road motorcycles and ATVs should be deleted from the regulations in proposed new “Article 5”. MIC requests that the deletions be acknowledged as a revision to the staff proposal at the public hearing prior to any formal action by the Board to adopt the staff proposal.

B. Infeasible Requirement to “Demonstrate” At Time of Certification that Emission Control Devices Will Not Exceed 4%/50 Vehicles Failure Rate – The staff proposal includes wording added to the test procedures for motorcycles (changes to section 86.408-78(b) of incorporated EPA test procedures) that require manufacturers, “...at the time of certification” to “demonstrate that the emission control devices on their vehicles or engines will not exceed a valid failure rate of 4% or 50 vehicles, whichever is greater, in an engine family, test group or subgroup over the useful life of the vehicles or engines they are installed in.”

This requirement is not feasible. It was not included in the regulatory changes covered in the May 2, 2006 workshop, and has suddenly been proposed without any prior discussion with affected manufacturers. This provision appears to be based on the unsupported assumption that manufacturers can somehow affirmatively show that each emission control device, in all its engine families, test groups and subgroups, will not ever experience a failure rate greater than 4% or 50 vehicles. Alternatively, the assumption of staff may be that manufacturers knowingly design and install emission control components that will fail prior to the designated useful life period – an assumption without any basis, and for which the Initial Statement of Reasons (ISOR) provides no discussion and no supporting evidence. This provision should therefore be deleted, along with the accompanying sentence that follows declaring that any device that fails at a 4% rate or has 50 total failures is in violation of the test procedures, and subject to corrective action.

Presently, CARB’s test procedures require motorcycle manufacturers to conduct durability testing and generate a deterioration factor (DF) for each pollutant, which is applied as part of the certification process. This approach has been used and accepted by both CARB and EPA for decades as a reasonable, feasible method for assuring that vehicles will continue to meet applicable emission standards over the full useful life as designated by CARB regulations. The durability demonstration applies to the entire emission control system, operating as a whole. To date, there is no evidence that this approach is not working for motorcycles. In fact, the information available to date indicates that very few defective part problems have been experienced in the motorcycle sector. There is no reason to adopt a more stringent approach.

The test procedure revision in this case appears to be an attempt artificially to graft enforcement provisions for in-use vehicles into a certification test procedure that is applied prior to vehicle production. Because component failure rates are never known until vehicles are driven in-use, this approach is inherently unworkable and should be abandoned.

The revisions to section 86.408-78(b), if adopted, will require MIC manufacturer members to go far beyond the systemic, performance-based durability demonstration now in effect, and show that each emission component will never fail at a rate above 4% or 50 vehicles over the full five-year useful life period defined for motorcycles. MIC is concerned about this requirement for three reasons. First, there is no nexus to the

emissions performance of the vehicle; it is a component-type quality control requirement that is likely to force manufacturers in some cases to take corrective action that will not result in reduced emissions (and therefore is not justified as an emissions control measure). Second, there is no direction on how the “demonstration” is to be made. EPA and CARB regulations currently contain detailed instructions on how to conduct durability testing and generate a proper DF. *See* 40 CFR 86.432-78. The proposed revision provides no instructions on how to make the required demonstration; manufacturers (and CARB certification staff) are left completely in the dark as to what is required. Third, MIC is not aware of any established, accepted methodology for proving a specific failure rate will never be exceeded for any component, as part of the vehicle design and assembly process. There simply is no practical way for a manufacturer to predict failure rates or to demonstrate in advance that a device will not fail at a specified rate in use.

In short, the proposed new requirement to demonstrate that no component will exceed a 4%/50 vehicles failure rate is a radical departure from the durability demonstration procedures currently in place and has not been demonstrated to be feasible. The ISOR does not discuss how this requirement is to be met, and therefore contains no supporting evidence. The costs of complying with this proposal are unknown and the ISOR does not discuss costs. CARB staff has proposed this requirement with no evidence as to its feasibility, and has offered no technical details on how such a demonstration should be made. Nor has staff offered any evidence that it will result in reduced emissions. The California rulemaking process contains a preference for performance-based requirements;¹ this proposal requires specific technologies or components, and fails to show how it will work better than the current performance-based durability requirements, which are clearly working well (especially for motorcycles).

Requested Action: For these reasons, all of the proposed new text to section 86.408-78(b) in the test procedures should be deleted and not adopted. In making this request, we emphasize that this deletion should be made even if the Board decides to retain the 4%/50 vehicles defect rate as the corrective action threshold in its new reporting and recall regulations in Article 5, as this provision is not necessary for implementation of Article 5.

C. Need for Separate Corrective Action Provision for Motorcycles – Section 2171 of the proposed new regulations specifies the recall and corrective action applicable to three types of vehicles: 1) those without OBD systems, 2) those with non-compliant OBD systems, and 3) those with OBD system malfunctions. The first category includes motorcycles, the latter two do not. By combining these three types of vehicles, the regulation results in inconsistent treatment of motorcycles, and fails to carry out staff’s prior commitment that motorcycles should be subject to different requirements.

¹ *See* Govt. Code sec. 11346.2(b)(3)(A). Please refer to the October 30, 2006 letter from Julie Becker of the Alliance of Automobile Manufacturers (ARB Comment Log, Item No. 1, filed 11/2/06) for further discussion of this point.

To correct section 2171, MIC first recommends that the references to non-compliant and malfunctioning OBD systems be entirely deleted. CARB has a separate OBD enforcement regulation, 13 CCR 1968.5, which already comprehensively and in great detail addresses recall and other corrective action requirements for non-compliant and malfunctioning OBD systems. There is therefore no need for Article 5 to cover corrective actions for OBD problems. As proposed, section 2171 overlaps and is inconsistent with the criteria for OBD-based recalls in sec. 1968.5, and creates confusion. Vehicles with OBD problems may be subject to mandatory recall under sec. 1968.5, but not under sec. 2171, and vice versa. The OBD-related provisions should therefore be eliminated, so that the OBD-specific provisions in sec. 1968.5 are controlling. This will not prevent CARB staff from using warranty failure data reported by manufacturers as a basis for taking action under sec. 1968.5, as that section specifically allows the Executive Officer to take remedial action based on any information received from manufacturers. (*See* sec. 1968.5(c)(3)(A).)

Section 2171 should then be re-written² to cover only vehicles without OBD systems, such as motorcycles, and should include a number of motorcycle-specific provisions that were worked out between CARB staff and MIC after the workshop on this proposal. MIC is concerned that these provisions, which represent considerable effort by staff and its members, have been discarded without explanation. At least with respect to motorcycles, the statement in the ISOR that there are “no feasible alternatives” (ISOR, p. 31) is definitely not correct, as MIC and CARB staff worked on alternative provisions for motorcycles and reached general agreement on all but one point (discussed below).

The motorcycle-related provisions that were developed with staff that should be incorporated include the following four concepts:

- The “extended” warranty period will be same as the useful life period (this provision is included in the current staff proposal).
- Recall can be avoided if the manufacturer includes a device that detects the defect within 200 miles after the defect has occurred and will continuously warn the operator that an emissions defect exists (e.g. a catalyst light).
- Recall can be avoided if the defect causes overt driveability problems in substantially all vehicles, and the manufacturer agrees to undertake a warranty field fix through its dealers for the full useful life of the vehicle.
- Recall can be avoided if average emissions for an engine family, group or subgroup, including emissions from vehicles with defective parts, are shown to be in compliance with the applicable certification standards; the manufacturer will have the burden of proof, and defective after-treatment devices will be presumed to cause a violation of standards. (CARB staff did not agree to this provision, but, for the reasons explained in section II below, it was proposed by MIC and should be included.)

² Following the workshop, MIC’s understanding was that CARB staff agreed motorcycles should be addressed in separate provisions. If the OBD-related provisions are not deleted, then motorcycles should be addressed in a separate new section.

MIC is disappointed that the second and third provisions were not included or even discussed in the staff proposal. Exclusion of these provisions will result in motorcycles being treated more harshly than vehicles with OBD systems. MIC also believes that further clarification is needed on how the extended warranty alternative works for motorcycles, given that it is defined to be the same as the useful life period, and that the ISOR provides inadequate justification for not including the fourth provision.

Requested Action: To address the concerns described above, MIC has prepared revised text for section 2171, which is included as **Attachment A** to these comments. MIC requests that its text be adopted by the Board in lieu of the staff's proposed version.

D. Public Hearing Provisions Need Fairness Revisions – The public hearing provisions in proposed new section 2174 are an obvious attempt to shortcut due process fairness rights (and other rights) of manufacturers as preserved in the federal and state constitutions, and to “stack the deck” in CARB staff’s favor in the event a recall is disputed by a manufacturer. This is an ill-advised, counterproductive approach, as it will only provoke legal challenges to the regulation, and lengthen and complicate any hearing. For non-recall corrective action, going to court is the manufacturer’s only option, and will unnecessarily increase costs and cause delays for all parties compared to the more efficient process afforded by administrative hearings. Overall, this provision will increase, not reduce, the burden on CARB staff. The following provisions need to be eliminated:

- The provision preventing a manufacturer from contesting the finding of nonconformity for and necessity for or scope of a corrective action other than recall.
- The provision limiting the record only to information provided under Article 5 and other information presented by CARB staff in the Executive Officer’s corrective action determination.
- The provision preventing disputes over non-recall orders from being heard administratively.

MIC understands that the first restriction may be based on a particular reading of the wording of Health & Safety Code 43105 that suggests a hearing is available only in the event of a recall, but disputes that reading. The staff’s reading fails to take into account constitutional due process requirements that apply to all actions of the Executive Officer, regardless of how the statute reads.³ There is no statutory basis for limiting the record in recall cases, and such a provision clearly violates due process because court review would arguably be limited to the one-sided record in favor of CARB created in the hearing.

Requested Action: CARB’s existing administrative hearing process should apply to all disputed matters under Article 5. There are ample procedural and evidentiary safeguards,

³ Among other things, the staff’s reading cannot be supported because it will result in the statute being declared unconstitutional; such readings are to be avoided in favor of an interpretation that sustains the statute – i.e. one that provides a hearing for any type of corrective action.

for all parties, already in the regulations governing that process. MIC recommends that section 2174 be stripped of all provisions that attempt to favor staff, deprive manufacturers of their rights and otherwise limit the use of the administrative forum. This section should be revised to read simply:

Section 2174. Public Hearing.

“A manufacturer may request a public hearing pursuant to the procedures set forth in Sections 60040 through 60043, Title 17, California Code of Regulations to contest any finding of nonconformity and/or the necessity for or scope of any corrective action, including but not limited to any recall or extended warranty, made, ordered or required under this article.”

II. Comments on New Strict Liability Approach

The staff proposal makes manufacturers strictly liable for recall and/or extended warranty whether or not a defective emission control component causes excess emissions. MIC shares the concerns of the automobile sector that this proposal, to the extent it eliminates the ability of a manufacturer to avoid recall or other corrective action by demonstrating that a particular defect will not cause affected vehicles to exceed the applicable certification emission standards, is not well founded either legally or as a matter of policy. For this reason, MIC recommends that the Board reject the proposal and direct staff either to continue working within the framework of the existing recall regulations or develop a revised proposal that still offers manufacturers the opportunity to demonstrate that a defect does not cause excess emissions.

The case for continuing with the existing regulations or a revised proposal is especially strong for motorcycles, and the Board should therefore consider not including motorcycles within the strict liability proposal even if it decides it is necessary for other vehicles.

Briefly stated, MIC believes the current staff proposal should be rejected (at least for motorcycles) for the following reasons:

A. Motorcycles Are Not OBD-Equipped – One of the primary justifications for the staff proposal is that it is necessary to protect and carry out the objectives of the OBD program, by assuring that OBD systems remain fully functional under all circumstances. The ISOR (pp. 15-19) relies heavily on this point, and speaks of “forging this link” between OBD detection capabilities and the new durability requirement in the revised test procedures (ISOR, at p. 19). Because CARB has not adopted OBD requirements for motorcycles, the staff’s reasoning does not apply to motorcycles, and the case for including motorcycles in the new Article 5 procedures is substantially weakened. For motorcycles, there is no OBD-related “link” to “forge.” The Board should therefore recognize that motorcycles present unique issues with regard to detecting and remedying

defects and allow motorcycles to use the existing recall procedures, or the alternative approaches described below

B. Invalid Amendment to Test Procedures – The primary statutory authority for CARB’s recall regulations is Health & Safety Code (HSC) section 43105, which states that CARB can require corrective action, including recall, “if the manufacturer has violated emission standards or test procedures”. In the case of an emissions-benign defect, which does not cause excess emissions, the first basis for recall, violation of “emission standards”, does not come into play. CARB’s current test procedures would also not be violated in such a case, as they are limited to testing and durability requirements applicable to new vehicles only, and do not address the issue of unintended defects that might crop up years later in-use.

To create a basis for recall where none now exists, CARB staff proposes to amend its test procedures by inserting its defective component recall threshold (4% or 50 vehicles, whichever is greater) as a criterion that has to be met for initial certification. This step is an obvious “boot-strap” amendment which artificially inserts criteria applicable to in-use vehicles into procedures governing new vehicles, and does not pass legal muster for a number of reasons:

- Sec. 43104 of the H&SC defines “test procedures” as methods for determining “compliance with the emissions standards established pursuant to Section 43101”. The four percent/50 vehicles threshold does not actually determine compliance with CARB emission standards, and it therefore is not a “test procedure”. Rather, it is merely a component defect rate, which neither confirms compliance nor eliminates noncompliance with CARB standards. While a defective emissions component may typically be associated with noncompliance, that is not always the case. There can be defects that do not cause excess emissions, and in fact such defects are not all that uncommon, due to the conservative, redundant design of emission control systems. For example, a fuel injection system may lose some precision over time and no longer perform fully to specifications, but the vehicle’s feed-back catalyst system can compensate such that the vehicle remains compliant. Manufacturers also typically certify vehicles with a compliance margin that can absorb emissions increases from parts that suffer minor defects. The key point is that additional information, beyond knowing the defect rate, is always needed to determine compliance with the standards. Such additional information could be provided in the form of vehicle testing and/or engineering evaluations, but the threshold cannot be deemed a test procedure because it does not and cannot by itself determine compliance with the applicable standards.
- The standards referred to in section 43101 are standards for new vehicles, whereas the defect component recall threshold is derived (and actual compliance determined), years after new vehicle certification has been issued, from in-use vehicle warranty reports. As such, the threshold has no place in test procedures that are designed to determine compliance with new vehicle standards. In this regard, the proposal goes well beyond what any rational exercise of CARB’s

discretion to set test procedures might authorize. The proposed amendment has an improper retroactive or *ex post facto* effect, because neither the manufacturer nor CARB can determine with reasonable certainty prior to certification if a component will meet the defect threshold in actual use, and compliance will be determined years or miles down the road. Because the defect threshold, viewed properly, is an after-applied test, it is not a proper “test procedure” for new vehicles.

- The defect rate threshold must be technologically feasible to qualify as an enforceable regulation. *See* HSC sections 43013, 43018. As discussed above, manufacturers must “demonstrate” compliance with the defect rate threshold prior to certification, but staff has neither provided nor referenced a method for making the determination, and in fact there is none. Compliance is not feasible. There is no discussion of the feasibility of the pre-certification demonstration requirement in the ISOR, and the requirement is therefore subject to challenge.
- Similarly, the threshold must be cost-effective and necessary to qualify as an enforceable regulation. *See*, again, HSC sections 43013 and 43018. The ISOR is sorely deficient in this regard, as it contains no cost-effectiveness discussion, and does not disclose the actual costs imposed on a manufacturer by a recall. Obviously, a regulation that requires a recall (potentially costing millions of dollars) for a defect not associated with excess emissions, i.e. a recall imposed on a compliant vehicle, does not result in an air quality benefit, and is therefore not cost-effective. For the same reasons, the staff proposal does not meet the necessity requirement.
- The ISOR cites HSC 43106 as additional authority. This section provides that all newly produced vehicles must be “in all material respects substantially the same” as the test vehicle certified by the Board. This section, however, provides no support because its intent is to prevent “misbuilds”, i.e. vehicles that come off the assembly-line with incorrect or different parts. The defective part threshold proposed by staff is not a misbuild criterion. But the most serious problem with trying to apply this section is that (except in the misbuild case) any part that is installed in a test vehicle inherently has the same statistical propensity to fail in-use as production vehicles that use that part; accordingly, if some vehicles suffer or reveal a defect in-use, they will necessarily meet the substantially-the-same test.
- CARB staff also relies on the Board’s general authority to adopt regulations “necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board.” This power hinges upon what powers and duties are in fact granted to or imposed upon the Board, and must be “proper”. This section does not help the Board defend a regulation that requires recall where there is no emissions noncompliance and no emissions benefit, because the Board has no authority to adopt regulations that do not further the emission reduction goals of the state, which by definition such a regulation would not do. The ISOR

attempts to justify recalls for compliant vehicles by citing the “integrity and intent” of the certification and in-use programs (ISOR, p. 27), but that is not a sufficient justification as there is no nexus to emissions or air quality. Properly viewed, the strict liability approach recommended by staff is a consumer protection measure (at best), and cannot be supported based on air quality grounds. Over three decades ago, after the Board tried to delay its NOx retrofit program for 1966-1970 model year vehicles due to concerns over adverse fuel economy impacts from retrofit devices, the state supreme court invalidated the Board’s action because it was not related to the Board’s statutory authority to implement the state’s air quality program. *See Clean Air Constituency v. ARB*, 11 Cal 3d 801 (1974). The court made it clear that the Board’s discretion was limited to carrying out the purposes of the state’s air pollution control statutes. *Ibid.*, at pp 813-816. The staff proposal, to the extent it tries to enforce recall or other corrective action for vehicles with defective components but which still are compliant with emission standards, does not meet the rule laid down by the supreme court against the Board in the Clean Air Constituency case.

C. Resources Will Not Be Saved – MIC believes the strict liability provision in the staff proposal will promote more hearings, not fewer, and more litigation not less, because manufacturers will be compelled to challenge CARB recall orders in cases where they have evidence that a defect is not associated with excess emissions. The ISOR mentions the severe resource drain imposed by the Toyota and DCC cases; the likelihood is that the staff proposal will generate more such cases.

III. MIC Recommended Alternatives

While as noted above there are significant problems with the staff proposal, MIC is not interested in furthering or participating in any dispute. MIC believes there is a mid-course where both CARB staff and manufacturers’ concerns can be addressed. The solution lies in a regulation that provides an opportunity for manufacturers to show that a defect does not result in excess emissions but that starts with the presumption that all defects cause excess emissions and places the clear evidentiary burden on manufacturers to show otherwise. Equally important, the procedure allowing this must provide for manufacturers to present such information to the Executive Officer before he/she issues an order for recall or other corrective action. This avoids the situation that staff is worried about, where the Executive Officer issues an order without considering such information, and the manufacturer is forced to challenge the order in a formal administrative hearing or in court, with the result that CARB must expend considerable resources to defend its action. MIC believes that if both the Executive Officer and the manufacturer are able to consider and discuss evidence showing compliance with applicable standards despite the existence of a defect that exceeds the 4%/50 vehicles threshold, then the need for hearings or litigation will be greatly reduced, with no compromise to air quality.

MIC offers two alternatives for the Board’s consideration:

Alternative A – In Appendix A, MIC has proposed a revised section 2171 in Article 5 that includes an opportunity for manufacturers to present evidence showing that a defect will not cause excess emissions, placing the burden of proof on the manufacturer and requiring the manufacturer to make that showing by “convincing evidence” in the case of a defective after-treatment device such as a catalyst. MIC is requesting that this provision be adopted for motorcycles, because of their unique situation as non-OBD equipped. Similar verbiage could be included in other sections dealing with other vehicles.

Alternative B – Following the workshop on this item, at the invitation of staff, MIC developed an outline for a revised procedure for warranty defect reporting. Staff reviewed the MIC outline and recommended changes that were acceptable to MIC, except for the issue of how to handle defects not causing excess emissions. A copy of the MIC outline, with the staff edits, is included as **Attachment B**. It is MIC’s sense that (except for the issue of benign defects) its outline was conceptually acceptable to CARB staff. Unfortunately, the MIC proposal is not discussed in the ISOR, and we are concerned that it was not given adequate consideration.

One key part of the MIC proposal is the inclusion of a procedure for manufacturers, as part of the regular warranty defect reporting procedure, to file a separate document, called an Emissions Information Report, or EIR, in cases where the manufacturer believes that a defect will not cause excess emissions. The EIR procedure specifies how the manufacturer must conduct testing to determine the emissions impact of a defect and report the results to CARB. *See* Steps 2 and 3 of the outline. These steps were also in the staff’s May 2 workshop proposal, but have been eliminated without explanation.

Steps 2 and 3 are integral to and mandatory in all cases where recall is sought to be avoided, but as explained above the key to their potential success lies in the fact that they require production of evidence that a defective part does not cause excess emissions before the Executive Officer decides whether to require a recall (or other corrective action such as an extended warranty). Step 4 of the MIC outline specifies the circumstances under which recall is not to be ordered, where the defect does not cause violation of the applicable certification standards. The MIC outline also makes it clear that the manufacturer has the burden of proof.

Action Requested: MIC requests that the Board not adopt the staff proposal, and that it direct staff to work with MIC (and manufacturers in other vehicle categories) to develop a new proposal based on either Alternative A or Alternative B, as described above, that allows recall or other corrective action to be avoided in defect cases with no excess emissions, but clarifies the burden of proof for manufacturers and includes a process for submission of data prior to the Executive Officer’s decision where a manufacturer believes a recall or other corrective action is not necessary. MIC further suggests that other alternatives to recall, such as a field fix where there are overt driveability problems associated with a defect, or where a field fix will address a defect problem substantially as effectively as a recall, should be included (as shown in Attachment A).

Attachment A

Motorcycle Industry Council
Proposed Revised Text for 13 CCR 2171

Section 2171. Recall Action for Vehicles Without On-Board Diagnostic Systems.

(a) If vehicles without on-board diagnostic (OBD) systems (e.g. motorcycles) have a valid systemic failure of any emission control component (including exhaust after-treatment devices or on-board computers that are used for emission control) at a rate that meets or exceeds four percent or 50 vehicles (whichever is greater) of an engine family, test group or subgroup, the manufacturer shall, except as provided in subparagraphs (b), (c) or (d) of this section, recall all vehicles in the affected engine family, test group or subgroup in accordance with this article.

(b) The Executive Officer shall have the discretion to approve an extended warranty covering the defective component(s), in lieu of recall, if the manufacturer shows that there is a reasonable assurance such warranty coverage will be substantially as effective as recall. For motorcycles, the extended warranty period is the same as the useful life.

(c) The Executive Officer shall not require a recall if:

(1) the vehicle has a device that detects the defect within 200 miles after the defect has occurred and will continuously warn the operator that an emissions defect exists (e.g. a catalyst light); or

(2) the defect causes overt driveability problems in substantially all vehicles with the defective component that will likely occur within the useful life of the vehicle, and the manufacturer agrees to require its dealers to repair the defect under warranty for the useful life of the vehicle.

(d) The Executive Officer shall not require a recall if the manufacturer demonstrates that average emissions for all regulated pollutants comply with the applicable certification emission standards for all vehicles in the affected engine family, group or subgroup, including vehicles that have or are projected to have the defective device during the useful life of the vehicle. The demonstration may contain vehicle test data, engineering evaluations, and other information. The Executive Officer shall give the manufacturer advance written notice and an opportunity to make such a demonstration, including at least 90 days to conduct emissions testing, before ordering a recall. The manufacturer shall have the burden of proof in making the demonstration, and it will be presumed that any defective after-treatment device will result in a violation of the applicable standards unless the manufacturer presents convincing evidence showing that the standards will not be exceeded.

Attachment B

[CARB Staff revisions in red from 6/6/06 were not opposed by MIC]

D-R-A-F-T (5/31/06)

MOTORCYCLE INDUSTRY COUNCIL

Motorcycle (Non-OBD)
Recommended Warranty Reporting Process
(All days = working days unless noted otherwise)

1. EWIR Report

- Annually identify each emission-related part with warranty claims rate $\geq 4\%$ or 50 claims, whichever is greater
 - Submit EWIR 25 days after end of each calendar year
- Claims rate rises to $\geq 20\%$ or 200 claims, whichever is greater
 - Submit EWIR 25 days after data shows such rate
- Reporting obligation terminates after end of warranty period

2. EIR Report

- Submit EIR for any emissions-related part if:
 - The EWIR shows a claims rate of $\geq 10\%$ or 100 claims, whichever is greater
 - EIR report due 45 days after EWIR is submitted
- EIR Report requirement waived if mfr agrees to conduct recall
- Contents of EIR
 - Show unscreened claims rate
 - Show true failure rate after screening of invalid claims
 - Discuss whether defect may cause secondary damage to another emissions-related part

- If true failure rate is $\geq 4\%$ or 50 claims, whichever is greater, include a proposed Emissions Impact Evaluation Procedure (EIEP) for determining whether the defect, by itself or through secondary damage if applicable, causes or is likely to cause a certification emission standard to be exceeded during the applicable **warranty period (useful life)**. EIEP may be based on either or both of the following techniques:
 - Engineering analysis (**must characterize the defect in emission results in grams/mile so as can be compared to the emission standards. This could be done as a factor [e.g., 1.3 * STD] with the defect installed.**)
 - Testing of one or more vehicle(s)
 - Can be a certification, durability, in-use, **new production**, or other representative vehicle
 - Can specify deviations from certification test procedure (**deviations would have to show equivalency of certified test**)
- EIR Approval (ARB)
 - Deemed approved if not disapproved in writing in 20 days after submitted
 - If disapproved, manufacturer must submit revisions within 7 working days and CARB must approve/disapprove revisions within 7 working days after revisions submitted (repeat cycle until approval received)

3. Submittal of EIEP Results

- Results of EIEP must be submitted to CARB within **150 90 working days (7 months, if working days, is a long time to run a test program: we'll need clarification on why we need to expand this time this long)** after EIR approved, along with manufacturer's findings and proposed action
 - CARB must approve/disapprove **within 20 days no time period**
 - Manufacturer entitled to meeting with staff (Division Chief or higher) to review/discuss any disapproval
 - If disapproved, and CARB orders a recall, manufacturer may request a hearing to contest necessity for or scope of recall order

4. Action Steps

- If EIEP results shows certification standard is not or will not be exceeded during warranty period, then NO FURTHER ACTION is required
 - Catalyst defect will be presumed to cause standard violation unless convincing evidence to contrary is presented (ARB will discuss this issue internally)
- If results show certification standard is or will be exceeded during ~~warranty the useful life period~~, then RECALL is required unless:
 - Manufacturer has installed a device that will detect the defect within 200 miles after the defect has occurred and will continuously warn the operator that an emissions defect exists (e.g. catalyst light), **in this case the manufacturer shall extend the warranty for the useful life period.**
 - Defect causes overt driveability problems in substantially all vehicles with the defect, and manufacturer agrees to undertake a warranty field fix program through its dealers, **in this case the manufacturer shall extend the warranty for the useful life period.**
 - ~~○ Average emissions of the engine families or vehicle groups with the defect are shown to be in compliance with the applicable certification standards. [We should talk about this separately.]~~