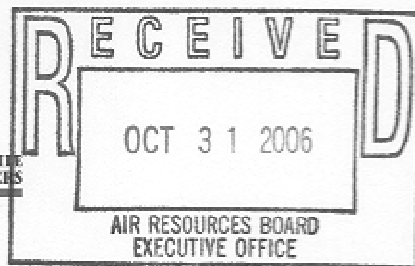

October 30, 2006

Via E-mail and FedEx

Ms. Catherine Witherspoon
Executive Officer
California Air Resources Board
1001 I Street
Sacramento, California 95814

Re: Initial Statement of Reasons ("ISOR") Concerning Proposed Amendments to California's Emission Warranty Information Reporting and Recall Regulations for Emission Test Procedures

Dear Ms. Witherspoon:

I write on behalf of the Alliance of Automobile Manufacturers ("Alliance")[1] to call your attention to several procedural flaws in the Initial Statement of Reasons Concerning Proposed Amendments to California's Emission Warranty Information Reporting and Recall Regulations for Emission Test Procedures ("Proposed EWIR Regulations"), released publicly on October 20, 2006. Both of the procedural flaws identified trace to the agency's obligation to consider alternatives at the ISOR stage -- one set of alternatives tracing to specific Alliance proposals during the public workshop process that staff has ignored (*see* Section I., below) and the other set representing a kind of alternative that must be considered in all situations where an agency is proposing *not* to use flexible performance standards (*see* Section II., below). The Alliance requests that in light of these flaws, the staff should defer the hearing for the rulemaking proposal and issue a revised Initial Statement. We also respectfully request that the Executive Officer respond to this letter on or before November 7, 2006.

I.

Staff has failed to prepare an ISOR that considers the reasonable alternatives specifically presented by the Alliance during the public workshop process. An agency must always consider reasonable alternatives that are brought to its attention prior to the issuance of the ISOR. These obligations are clear both from California Government Code §§ 11346.2(b)(3)(A) and 11346.5(a)(13), and other sources of law. Indeed, as staff indicates, one of the past rulemakings in this very area saw the agency make changes to the recommendations first formulated by staff, based on comments and alternatives proposed during the workshop process. *See* ISOR at 2-3

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[1] The members of the Alliance are BMW Group of North America, Inc., DaimlerChrysler Corporation, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mitsubishi Motor Sales of America, Inc., Porsche Cars North America, Inc, Toyota Motor North America, Inc., and Volkswagen of America, Inc.

BMW Group • DaimlerChrysler • Ford Motor Company • General Motors
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("After meeting with industry and conducting a public workshop, the staff proposed changes to their original recommendations that included: (1) linking recalls based on component failures to emission standard exceedances instead of excess emissions; and (2) withdrawing a provision which linked new vehicle/engine certification to in-use failures. These two actions are related to staff's current proposed modifications."). Having taken that required procedural route before, staff currently gives no reason for departing from it in this new rulemaking. Moreover, because the proposals the Alliance presented were drawn from and/or informed by past industry proposals actually adopted by the Board, it is obvious that their "reasonableness" -- for California Administrative Procedure Act ("CAPA") purposes -- has been already established.

Government Code § 11346.2(b)(3)(A) requires staff and the Board here to include in the ISOR "[a] description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives." And Government Code § 11346.5(a)(13) (emphasis added) is even clearer: "The notice of proposed adoption, amendment, or repeal of a regulation shall include the following: . . . . (13) A statement that the adopting agency must determine that no reasonable alternative considered by the agency *or that has otherwise been identified and brought to the attention of the agency* would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action." It is plain from this language that an agency cannot await the FSOR stage to discuss alternatives for the first time, otherwise these two *separate* requirements would not make no sense, attached as they are specifically to an agency's obligations when disseminating the *ISOR and initial proposal for a rule*.

Recognize as well the structural difference between Government Code § 11346.2 and § 11346.5. Only Section 11346.5, in subsection (c), includes language indicating that "[t]he section shall not be construed in any matter that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary of cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, if there has been substantial compliance with those requirements." But no such proviso appears anywhere in Government Code §11346.2. The obvious conclusion of that structural comparison is that rules may be invalidated for procedural noncompliance with Government Code § 11346.2(b)(3)(A)'s required analysis of alternatives without regard to whether the notice materials for the particular rule otherwise substantially comply with CAPA. "'When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' . . . . (*Brown v. Gardner*, 513 U.S. 115, 120 (1994))." *Garfield Med. Ctr. v. Belshe*, 68 Cal. App. 4th 798, 807 (2d Dist. 1998). By placing the requirement to consider alternatives in two separate statutory sections, only one of which is associated with a "substantial compliance" defense for regulators, the California State Assembly plainly determined that the consideration of alternatives was particularly important to the mandatory process for rulemakings being legislatively established. Hence, the Board and its staff may not ignore those statutory requirements.

In this connection, we also request staff to provide us with a copy of the administrative record as it currently stands. *See* Notice of Public Hearing to Consider Amendments to California's Emission Warranty Information Reporting and Recall Regulations and Emission Test Procedures (Oct. 10, 2006), at 6 ("The Board has compiled a record for this rulemaking, which includes all information upon which the proposal is based. This material is available for inspection upon request to the contact persons."). We note that the plain text of Government Code § 11347.3(b)(11) requires the agency to include in the rulemaking file (i.e., the administrative record) "[a]ny other

information, statement, report, or data, that the agency is required by law to consider or prepare in connection with the adoption, amendment, or repeal of a regulation." Obviously, the material and analysis concerning regulatory alternatives that must be prepared to comply with Section 11346.2(b)(3)(A) and 11346.5(a)(13) must be afforded Section 11347.3(b)(11) treatment. Material presented to staff during the workshop process thus obviously qualifies for such treatment because it was "otherwise been identified and brought to the attention of the agency." Government Code § 11346.5(a)(13). Hence, the alternatives presented by the Alliance during the public workshop and meeting process must be included in the record. We seek confirmation of the fact that the Alliance proposals and workshop submittals have been deemed by staff to be part of the record and therefore request a copy of the actual record as it currently stands. We would also like to obtain a copy of the record as it currently stands for our own general reference as the rulemaking unfolds.

Returning to consideration of the alternatives the Alliance submitted, staff can seek no refuge in California Government Code § 11346.2(b)(3)(C) ("Notwithstanding subparagraph (A) or (B), an agency is not required to artificially construct alternatives, describe unreasonable alternatives, or justify why it has not described alternatives."). This is plainly a reference to alternatives that the agency must self-generate, and not to alternatives that come to it from the outside world, and in particular from interested parties. *Compare* Government Code § 11346.5(a)(13) (using not the verbs "construct" or "describe," but the verbal concepts of the agency "consider[ing]" alternatives that other actors have "brought to the attention of the agency"). The Alliance does not seek exclusively to force staff to "construct" or "describe" on its own initiative any alternatives in the ISOR. Rather, the Alliance seeks in Section I of this letter to have staff discharge their procedural obligation under CAPA to make the required statement under Government Code § 11346.5(a)(13), which requires consideration of alternatives, including those that are not self-generated within the agency.

Furthermore, the Board and all of its staff are bound by their own actions to apply the above-described interpretation of Government Code §§ 11346.2 and 11346.5 in terms of considering material submitted at public workshops. That is because the Board, and indeed, the entirety of the California Environmental Protection Agency, bound itself to this interpretation in 1996 when it adopted the so-called *Economic Analysis Guidance* issued by California EPA. *See Economic Analysis Guidance* at 2 ("HOLD ONE OR MORE PUBLIC WORKSHOPS. Before proposing a major regulation, each agency should conduct one or more public workshops to consult with affected parties. Stakeholders are encouraged to provide input on how the regulation should be structured, supply information to the agency on potential economic impacts, *and suggest regulatory alternatives*.") (emphasis added) (Air Resources Board staff member identified as instrumental in drafting Guidance). *See also id.* at Appendix C ("CAL/EPA Guidelines for Evaluating Alternatives to Proposed Major Regulations (SB 1082 Guidelines)) ("If the proposed regulation is a major regulation, *the agency shall determine if any submitted alternative is equally as effective as the proposed regulation*. The agency shall also determine whether any combination of submitted alternatives is equally as effective as the proposed regulation.") (emphasis added).

It is possible that the staff has decided not to comply with the combined effect of Government Code §§ 11346.2, 11346.5, and the *Economic Analysis Guidance* because it has determined at this preliminary stage that this rule is not a "major rule," since in its view as expressed in the ISOR the economic impact of the Proposed EWIR Regulations is too low. *See* ISOR at 30 ("costs are expected to be negligible"). If this is staff's position, we ask that staff clarify that point in response to this letter. We ask the staff to reconsider even at this time, however, whether it is remotely credible to claim a rulemaking that requires *every* emissions-

related component to perform at a greater-than-96%-reliability level does not impose significant costs on manufacturers, but instead would leave manufacturer costs largely unchanged from the regulatory status quo.

II.

Just as staff have ignored specific alternatives presented during and in connection with the public workshop process, so the Proposed EWIR regulations do not comply with California Government Code § 11346.2(b)(3)(A), because the ISOR's discussion of alternatives makes no attempt to explain why the proposal opts for "prescriptive standards" over "performance standards." The Alliance alerted staff to the fact that the "prescriptive" vs. "performance standards" difference was relevant to this rulemaking. *See* Alliance Legal Memorandum Concerning Possible Amendments Suggested in Mailout 2006-01 to the Procedures for Reporting Failures of Emission-Related Components, at 11 (Sept. 22, 2006) ("The relevant statutes demonstrate that component regulation is a subject ancillary to the primary purpose of emissions regulation by means of performance standards."); *see also id.* at 12 ("The fact that such a delegation to ARB is absent from section 43205 thus shows that ARB may not separate defect regulation as an ancillary program from the main program of emissions regulation by means of performance standards."); *see also id.* at 22-23. (This Memorandum should also be contained in the file or administrative record for this rulemaking.)

In the context of the environmental statutes from which staff's recommendation to the Board proceeds from here, it is clear that "performance standards" are "emissions standards," and thus that any attempt to regulate at a level of specificity beneath emissions standards requires a precise and comparative justification.[2] Such a justification is wholly lacking in the ISOR.

Section 11346.2(b)(3)(A) (emphasis added) unambiguously requires as follows:

> Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action . . . and make available to the public upon request, all of the following: . . . . (b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following: . . . . A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives. *In the*

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[2] *See, e.g.*, Stephan Schmidheiny, *Changing Course: A Global Perspective on Development and the Environment*, 19 n.3 (1992) ("Traditionally, governments have used command-and-control regulations to achieve environmental objectives. 'Performance' standards set a target -- *often for emissions* -- and allow companies flexibility in meeting it; 'prescriptive standards' may prescribe the actual technology to be used, assuming it will achieve the desired result. The former allows companies more scope for innovation and efficiency.") (emphasis added). The specificity that a prescriptive standard can operate at obviously works along a continuum. For that reason, the fact that staff is not mandating the use of particular components here does not make the Proposed EWIR Regulations any less a prescriptive standard. The prevailing view in the academic community that in the environmental area emission standards are performance standards and standards operating at a greater level of specificity are not is the perspective that obviously informed legislative intent in CAPA and the Health & Safety Code, as is clear from those statutes generally, and from Health & Safety Code § 43106 in particular.

case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

Section 11346.2(b)(3)(A) is clearly a reference to CAPA's dichotomy between "performance standards" and "prescriptive standards." A "Prescriptive standard" is defined as "a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means." Government Code § 11342.590. By contrast, a "performance standard" is defined as "a regulation that describes an objective with the criteria stated for achieving the objective." Government Code § 11342.570.

Here, the Proposed EWIR Regulations clearly "prescribe specific actions and procedures" (use of components meeting a greater-than-96%-reliability threshold, or alternatively, submission by manufacturers to automatic recalls or extended warranties) and do not merely state a general objective that gives manufacturers flexibility as to how to meet that objective. Staff admits that they seek to reduce emissions. *See, e.g.,* ISOR at 7-8 (especially Table 1). But nowhere does staff explain why manufacturers are being denied the traditional flexibility they would possess to meet a changed emissions standard, but instead should be forced to ensure that every emissions-related component part meets a quantifiable, measurable reliability standard. Indeed, the fact that this rulemaking applies by its nature only to emissions-related parts shows what the only possible objective to pursue here can be -- namely emissions reductions, and thus the nature of this rulemaking means staff cannot deny the primacy of emissions standards over the components of manufacturer emissions systems designed to meet those standards.

In connection with its ISOR duties under Government Code § 11346.2(b)(3)(A), staff should also consider California Health & Safety Code § 43106 (emphasis added).[3] Staff relies on Section 43106 in both the Proposed EWIR Regulations Notice and its ISOR. This provision obviously establishes that the Legislature has mandated the use of performance standards in the form of an emissions standards, and disallowed agency attempts to require every component part in a vehicle to be identical to the test vehicle or engine, if an emissions standard otherwise continues to be met despite the differences between vehicles in actual construction as compared to the underlying test vehicles or engines. At the very least, however, putting aside the substantive issue the Alliance will address in its comments of whether the Proposed EWIR Regulations are *ultra vires* under Section 43106, *procedurally* Section 43106 at least stands for the proposition that the Air Resources Board must especially sensitize itself to the performance-vs.-prescriptive-standard issue. And that duty under Government Code § 11346.2(b)(3)(A) and Health & Safety Code § 43106 has been completely shirked here because there is no discussion in the ISOR of a performance-standard alternative to the Proposed EWIR Regulations.

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[3] "Each new motor vehicle or engine required pursuant to this part to meet the emission standards established pursuant to Section 43101 shall be, in all material respects, substantially the same in construction as the test motor vehicle or engine, as the case may be, which has been certified by the state board in accordance with this article. *However, changes with respect to new motor vehicles or engines previously certified may be made if such changes do not increase emissions above the standards under which those motor vehicles or engines, as the case may be, were certified and are made in accordance with procedures specified by the state board.*"

The difference between "performance standards" and "prescriptive standards" is that "performance standards" allow regulated parties to decide for themselves how to meet an objective enunciated in relatively broad terms by an agency, whereas "prescriptive standards" indicate more precisely how a regulated party is to proceed by way of "specific actions, measurements, or other quantifiable means" identified by regulators. Here, the Alliance submits that the classic emissions standards that have been employed to great positive environmental effect by the Board and the federal Environmental Protection Agency since the earliest days of regulating mobile sources are appropriately described as "performance standards." Manufacturers are generally free to decide exactly what equipment to install on vehicles in order to meet the numeric emissions limits fixed by the Board.

Such an approach carries with it all of the economic benefits of regulating at lower cost without sacrificing the defined objective of reducing emissions because it allows manufacturers who can design cheaper and more reliable means of complying with numeric emissions standards to retain the benefits of their innovations. It is clear that by enacting this dichotomy first analyzed in various scholarly works, the Legislature was enshrining such economic analysis into California law. *See, e.g.,* Stephen Breyer, *Regulation and Its Reform* 105-06 (1982) (explaining the dichotomy and the economic advantages of performance standards over prescriptive standards); James J. Anton & Dennis A. Yao, *Standard-Setting Consortia, Antitrust, and High-Technology Industries*, 64 Antitrust L.J. 247, 248-49 (1995) (many economic studies have shown that performance standards are superior to prescriptive standards in encouraging innovation). One-size-fits-all regulatory approaches, however, are more costly because they deny manufacturers the flexibility that can reduce comparative costs and spur innovation in designing emissions systems. Furthermore, it is inherent in the economic tradeoff involved between performance standards and prescriptive standards that prescriptive standards are easier to enforce. *See, e.g.,* Cary Coglianese, et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 Admin. L. Rev. 705, 714 (2003) ("regulators who are accustomed to enforcing relatively straightforward prescriptive standards are frequently uncomfortable with the discretion inherent in loosely specified performance-based standards."). Hence, it is not sufficient here for staff to simply claim they are looking for a regulatory approach that is easier for it to enforce. The Legislature obviously knew about what regulators might claim are the benefits of prescriptive standards, but nevertheless placed a thumb on the scale of regulation by performance standards.

In the Proposed EWIR Regulations, staff proposes to depart from the classic emissions-performance-standard approach by decoupling defect regulation from emissions standards and instead requiring that defects cannot exceed a particular level (a 4% "true" defect rate), or enforcement action will swiftly follow. Such a requirement, if adopted, would be equivalent to the Board requiring manufacturers to build every emission-related component in a vehicle's emissions system to a reliability level of greater than 96% and thus make manufacturers the guarantors of any failure to meet such a prescriptive standard.

Conceptually, some degree of emissions reductions would appear to result from adopting the greater-than-96% emissions-related component design guarantee mandate which staff is proposing. But what staff has failed to do is to explain why it must proceed in that fashion as

opposed to simply attempting to obtain equivalent emissions reductions by way of tightening the applicable emissions standards, which then leaves manufacturers their traditional, CAPA- and Health & Safety Code-preferred, flexible route of deciding how to achieve a new emissions standard by way of designing individual emissions components with particular reliability levels.[4]

From an engineering and logical standpoint, what staff has failed to acknowledge is the concept of design redundancy, an aspect of reliability theory in engineering. Sound product design, especially for a complex system with the potential of multiple components to malfunction, does not rely on designing one component to meet a particular design goal by assuming that component will never fail. Instead, well-designed products deliberately build in redundancy so that even if one component fails, an overall product objective or feature will not be compromised, or at least not be unduly compromised. *See, e.g.,* Reuven Y. Rubinstein, et al., *Redundancy Optimization of Static Series-Parallel Reliability Systems Under Uncertainty*, at 1 (Nov. 10, 1998) ("Most books on reliability engineering . . . include a chapter on redundancy models and redundancy optimization."). Indeed, here the flaws of the staff's Proposed EWIR Regulations go beyond *ignoring* design redundancy, but instead make design redundancy a strategy that actually would *penalize* manufacturers, rather than reward them. That is because the Proposed EWIR Regulations appear to seek to penalize *any* case that yields a 4% failure rate in emissions-related components. That means that manufacturers that introduce design redundancy in emissions systems are only introducing more components that must meet the greater-than-96%-reliability threshold. This is self-defeating for manufacturers because at no point does building in design redundancy allow manufacturers to be sure they have met a regulatory objective. Instead, building in greater redundancy only multiples the steepness of the regulatory hurdles involved.

Those general observations about product design are readily applicable to the automotive industry, and also particularly to emissions systems. Manufacturers employ various strategies for reducing emissions to ensure that over a vehicle's useful life it continues to meet emissions standards, even as the vehicle encounters different environmental hazards and different levels of proper maintenance by its owner or drivers. That means that if one (or sometimes even multiple) components within a manufacturer's individual emissions-compliance strategy for a vehicle fails, emissions standards can still be met. In other words, vehicles are not designed right up to the

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[4] We are not suggesting that there should be any revision to the emissions standards. Our point is that there are two alternatives to accomplish the same goal of emissions reduction – the proposed method of requiring greater-than-96% emissions-component reliability or the hypothetical alternative of simply increasing the emissions standard to achieve identical emissions benefits. The legal problem identified in this part of the Alliance's letter is that the ISOR does not even attempt to meet the Board's procedural duty under Government Code § 11346.2(c)(3)(A) to attempt to explain why a prescriptive standard like the greater-than-96% emissions-component reliability approach is superior to the performance-standard approach of simply changing the emissions standard. We note that recognizing this choice of alternatives exists means that staff has also failed to attempt to justify what is functionally an emissions standard increase by application of the traditional criteria for such a rulemaking including analysis of economic and technological feasibility. But this is a substantive flaw in the Proposed EWIR regulations that we intend to address later, as necessary. It is not a procedural flaw in failing to comply with the requirement for ISORs in the Government Code. Again, this letter is focused on certain facial procedural defects that we bring to staff's attention to avert a regrettable situation in which an entire rulemaking is invalidated in the future for failure to perceive a procedural error that could have been corrected much earlier, or that, if avoided, could have led to discussion in the ISOR that could have altered the Board's mind about how to act on staff's recommended course of action here.

razor's edge of applicable emissions standards, such that if one emissions-related component fails, the emissions standard will be exceeded. Instead, manufacturers deliberately build systems that in their pristine condition will have a cushion of compliance which places their vehicles well within the current applicable emissions standard, such that if there are equipment malfunctions in use in the emissions system on particular vehicles, the emissions standard can still be met in practice, especially for the average vehicle. Some manufacturers colloquially call the difference between a vehicle working perfectly and the emissions standard that vehicle's regulatory "headroom." Indeed, manufacturers also build regulatory "headroom" into individual emissions-related components, as well as into the emissions system as a whole.

It is unwise and wasteful for staff to propose, as it has, a set of regulations that would attempt to seize this emissions "headroom" and claim such emissions reductions on the public's behalf. There is a superior regulatory approach – one which can achieve the very same objective, but at lower cost, while allowing manufacturers greater flexibility in vehicle design – namely, the Board using the traditional mechanism of attempting to revise the emissions standard to achieve equivalent emissions reductions. The point for present purposes, however, is not whether staff has met its burden to propose regulations that can avoid being set aside under the substantive "arbitrary and capricious" test of judicial review. The point is that the staff has made no attempt whatever to explain why it has opted for a prescriptive standard (the greater-than-96% reliability standard for emissions-related components) over a performance standard (a simple amendment in the emissions standards).

Staff may respond that its goals are more than just emissions reductions and that unremedied defects in emissions components affect the agency's reputations as regulators and the integrity of the program – concerns adverted to in the ISOR for this proposed rulemaking and in the workshop process in which the Alliance participated. We doubt whether California's citizenry judges the agency other than by the criteria of air quality in practice. We also doubt that the public would fail to understand, if the agency only undertook to explain, that a regulatory approach that allows manufacturers their traditional flexibility to meet emissions standards by design redundancy is a superior approach because it reduces the costs and burdens of regulatory compliance on manufacturers and on the California economy, especially by helping to minimize vehicle prices.

In any event, staff's claims to the contrary are insufficiently explained because the ISOR currently says little on this subject – offering only the conclusory statements that component failures, regardless of the nature of the component or its impact on emissions-standard compliance, threaten the integrity and perception of the program. But far more fundamentally, the Board cannot justify its regulations based on mistakes in public perception. Few in the general public have probably ever devoted much thought to whether regulation in this area is best framed in terms of prescriptive or performance standards. *But the California Legislature in CAPA has done so* (taking advantage of the best learning in economics and in the legal academy concerning in the optimal design of agency regulations). And the Board and its employees are called upon to meet the CAPA standard, not to deviate from that standard by arguing (even without any supporting factual evidence) that the public has a different perception -- somehow concluding that the air is dirty because some emissions-related components, however redundant or trivial, fail.

Nor is there any threat to the integrity of the emissions program the Board administers if it regulates by way of emissions performance standards, rather than by way of prescriptive standards, such as the greater-than-96% reliability regulations currently being proposed. The program's integrity is defined by its track record in securing emissions reductions, not by forcing

manufacturers to abandon or lose the benefits of planned redundancy in emissions system design – a method of vehicle design of which the Board and its staff have long been aware of without ever taking steps to prohibit. Moreover, arguing that prescriptive standards must be set here and that manufacturers must be denied the flexibility of meeting performance standards or programmatic integrity will be threatened is to quarrel with the Legislature's clear policy preference for performance standards. *See* California Government Code § 11340(d) ("The imposition of prescriptive standards upon private persons and entities through regulations where the establishment of performance standards could reasonably be expected to produce the same result has placed an unnecessary burden on California citizens and discouraged innovation, research, and development of improved means of achieving desirable social goals."); *id.* at § 11340.1 ("It is the intent of the Legislature that agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process.").

III.

The flaws described above cannot be remedied by answering the objections identified in this letter at the stage of issuing a final statement of reasons ("FSOR") for the Proposed EWIR Regulations. The California Legislature did not idly specify procedural requirements that the Board must meet for its regulations at the ISOR stage. *See Franzosi v. Santa Monica Community College Dist.*, 118 Cal. App. 4th 442, 451 (2d Dist. 2004) (the Legislature does not enact statutes that are "pointless acts"). Instead, the Legislature *deliberately* specified requirements *both* at the ISOR and FSOR stages. Accordingly, the agency must comply with both sets of requirements, and cannot ignore its duties at the ISOR stage, by arguing those defects can be remedied in the FSOR stage.

The logic behind requiring compliance with both sets of requirements is obvious: It prevents the agency from sandbagging regulatory parties, especially in terms of the consideration of alternatives. If agencies were free to ignore submitted alternatives, and especially if they were free to ignore the mandated need to consider whether their objectives can better be achieved in regulations that adopt performance standards over prescriptive standards, then regulatory parties are deprived of all of their legislatively provided procedural opportunities to explain and place the best and most responsive evidence in the record as to why any initial rationales offered by the agency at the ISOR stage are faulty. In other words, if an agency can illegitimately postpone its ISOR-based obligations to consider alternatives until the FSOR stage, then the first time regulated parties see an explanation of why all or many of their submitted alternatives have been rejected is in that FSOR document. And that is statutorily unacceptable.

Postponing the consideration of alternatives submitted by regulated parties under the FSOR stage foments sandbagging and forces regulated parties to decide whether to challenge a rulemaking in court without ever have seen the agency's responses to the regulated parties' objections to the agency's preferred course of action when compared against other alternatives. The most highly developed area of jurisprudence concerning agency obligations to consider alternatives is in the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA") contexts. In that area, it is clear that alternatives must be considered and agencies must explain early on why any reasonable alternatives brought to their attention were rejected. Otherwise, agencies build up what has been called "bureaucratic inertia" or

develop a "bureaucratic steamroller" behind their preferred approach, even though doing so violates the fundamental tenet of statutes designed to reorder the way agencies do business by requiring the consideration of alternatives – i.e., that the process of considering alternatives can convince an agency that a better approach might be available, that the proposed cure is worse than the disease, or that sufficiently serious weaknesses in the agency's reasoning have been exposed such that the proposed agency action must be withdrawn entirely. *See, e.g., Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (Breyer, J.) ("Once large bureaucracies are committed to a course of action, it is difficult to change that course -- even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.' It is this type of harm that plaintiffs seek to avoid, and it is the presence of this type of harm that courts have said can merit an injunction in an appropriate case.").

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Please do not hesitate to contact me with any questions (Ph: 202-326-5511; jbecker@autoalliance.org). Thank you for your consideration of this letter and its requests.

Sincerely yours,

Julie C. Becker
Assistant General Counsel

cc: Kirk C. Oliver
Tom Jennings
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