06-11-5

Public Hearing Statement of
S. Kingsley Macomber
General Counsel, Sierra Research, Inc.

On Behalf 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)

Good afternoon.

MIC has submitted extensive written comments on this proposal. My statement today emphasizes a number of points made in MIC's comments, but MIC's primary recommendation is that this item is not ready for adoption by the Board, and should be sent back for further work-shopping and development of a more practical, less confrontational regulatory scheme that accommodates the concerns of staff as well as MIC and other regulated stakeholders.

First, MIC requests that specific changes be made to a number of provisions in the proposed regulations:

1. Off-road motorcycles and ATVs should be exempted from the new Article 5 reporting and corrective action process, as they are not susceptible to effective recall. Staff contacted MIC prior to this hearing and informed us that this change would be made. [We note that the exemption has been acknowledged in the staff presentation.]

2. The staff proposal would revise the test procedure for motorcycles to require manufacturers to "demonstrate", at the time of certification, that all emission control devices will not exceed a failure rate of 4% or 50 vehicles over the useful life of the vehicle. The revision also states that in-use vehicles that fail to meet this requirement are in violation of the test procedures.

This change was not presented at the May 2 workshop, and MIC has not had an opportunity to discuss it with staff. As proposed, it has one obvious fatal flaw: the required demonstration is not feasible. There is a requirement to "demonstrate", but no details or methodology is given for how the demonstration is to be made. As proposed, neither manufacturers nor staff know what this means or how to comply.

MIC does not believe that infeasibility can be eliminated through further technical discussions, as we are not aware of any technique or method that will allow manufacturers reliably to predict failure rates as required. In essence, this is not a valid test procedure for determining compliance with new vehicle standards; a failure rate does not and cannot determine or verify compliance with standards. Rather, it is an in-use vehicle criterion that has been artificially grafted into the test procedures and it simply does not work.

There are other problems with the required "demonstration": It is not a performance-based standard; rather, it mandates specific types of components. Such a component-based approach can be adopted under California rule-making law only if performance-based alternatives have been considered – in this case, the staff has not offered or discussed performance-based alternatives. Further, using failure rate data obtained from vehicles after they have been in-use for several years or many miles of driving to evaluate compliance with a new vehicle certification procedure is an impermissible *ex post facto* or retroactive form of regulation. It is not reasonable to impose a requirement that cannot be met at the time of certification, and then judge whether a violation has occurred years later based on after-acquired data not available at the time of certification. This revision is also not needed to make the new Article 5 procedures work.

For all these reasons, MIC recommends that the Board direct the staff to drop this revision and develop a new proposal that focuses on improvements to Article 5.

3. As explained in MIC's main comments, section 2171 in Article 5, which specifies recall and corrective action requirements, improperly mixes the requirements for non-OBD vehicles such as motorcycles, with OBD deficiencies in vehicles that do have OBD. The OBD-related provisions are not necessary, as they overlap and potentially conflict with the Board's existing OBD enforcement regulation in 13 CCR section 1968.5.

It was MIC's understanding that staff agreed with MIC's workshop request to treat motorcycles separately, but that commitment has not carried through into the proposal before you. MIC has provided specific alternative wording for revising this section to deal only with non-OBD vehicles in Attachment A to its main comments, and requests that the staff be directed to use that as a template for developing an improved method for dealing specifically with motorcycles.

4. The public hearing provisions in proposed section 2174 do not cover corrective actions other than recall, and unduly exclude manufacturers from presenting information at administrative hearings beyond what is reported in warranty reports, while allowing staff to present any additional information it wants. This limited, one-sided approach to hearings does not meet legal due process requirements, and will lead to more litigation, not less. MIC has provided alternative wording in our main comments.

In addition to the specific revisions just mentioned, there is one overriding issue of great concern to MIC, and that is the purposeful exclusion of any provisions allowing recall or other corrective action to be avoided where a component exceeds the 4%/50 vehicles threshold but does not cause a vehicle to exceed applicable emission standards. MIC does not believe CARB has legal authority to adopt such a "strict liability" provision, for the reasons explained in its main comments. [[The hearing notice and staff report provide no air quality nexus or justification for this approach, do not address cost effectiveness and necessity, and say only that it should be adopted to preserve the "integrity and intent" of CARB programs, which is not a sufficient basis. Requiring recall or other corrective action for compliant vehicles is not sound policy, and does not advance the Board's empowering authority to enforce its emission standards.]]

The staff report and hearing notice state that there is no reasonable alternative to the proposed strict liability approach. MIC wants the Board to understand that in fact there are alternatives, and that they are reasonable.

One alternative is the staff proposal presented at the May 2 workshop, which included a process for emission testing of vehicles and criteria for avoiding recall if the test results show emissions with the defect are less than the applicable standards. The staff report fails to mention this proposal, or explain why it cannot be used at least as a framework for further development. We emphasize that the details of the workshop proposal need improvement (for example, testing should be voluntary, and other grounds for avoiding recall need to be addressed), but it offers a potentially viable route to avoiding unnecessary conflict over the regulations before you.

Another alternative approach is set forth in Attachment A to MIC's main comments, where our proposed revisions to section 2171 specify procedures and grounds for avoiding recall for non-OBD vehicles, under which manufacturers must meet an explicit burden of showing (through testing or otherwise) that a defect is not associated with excess emissions.

Yet a third alternative is the overall process developed by MIC for both improved reporting of defects and fashioning proper remedies for defects for motorcycles (Appendix B to our main comments). MIC developed this proposal after the workshop at the request of staff. Based on the comments received from the staff on our proposal, MIC's understanding was that its process was acceptable, including the possibility of avoiding recall where vehicles comply with standards despite having a defect. Yet, there is no mention of the MIC process, much less an explanation of why it is now no longer viable. From our perspective, the Board is not being provided with the full picture or all the options it has for how this regulation can be constructed, and Board action is premature.

All of these alternatives provide potential mechanisms for addressing defects that may not have adverse emissions impacts. The staff workshop proposal acknowledged that such benign or ninor defects can occur. [[One example given was a defect in a catalyst heat shield; another was a defect that causes excessive or spurious noise but that does not impair the emission control function of a device. Another example, which we know was accepted by staff in the past based on test data provided by the manufacturer, is a cracked manifold that does not lead to excess emissions.]] The staff report also fails to address the other mechanisms that have been successfully used in the past in lieu of recall, such as a dealer repair program (or "field fix"), where there is a demonstration that repairs will be equally as effective, or overt defects that severely affect driveability and will lead to warranty repairs.

MIC's alternatives, as well as the original staff proposal, all offer approaches that, with further refinement, can lead to a reporting and recall regulation that allows the avoidance of recall or other corrective action for defects not causing standards to be exceeded. There are two key elements for such an approach. One is a proper definition of the evidentiary burden that manufacturers must meet to show a defect does not affect emissions. The second is a procedure that requires a manufacturer to make any such

showing BEFORE the Executive Officer makes up her mind on what action, if any, is needed.

This latter requirement, in particular, addresses staff's concern about having to address the issue of emissions impacts in formal hearings or in court. If a process is developed under which the Executive Officer can consider such information BEFORE issuing an order, rather than relegating a manufacturer to presenting air quality impacts evidence in a formal legal challenge after the order has gone out, all parties will benefit. In other words, we suggest turning this problem into one of defining a process that allows consideration of air quality impacts and is workable both to staff and manufacturers.

In sum, MIC's main concern is that staff report does not inform the Board that there are reasonable alternatives to strict liability that do not compromise air quality. MIC and individual manufacturers requested a second workshop on this matter, but it was not granted. This proposal should be sent back for development of a sound process for allowing manufacturers to demonstrate, where appropriate, that a defect does not cause excess emissions. Any other approach is outside of the Board's charter and jurisdiction, and will likely put the Board in the untenable position of having to defend a recall for compliant vehicles with no excess emissions.