Roger Gault

06-11-5
March 22, 2007

STATE OF CALIFORNIA
AIR RESOURCES BOARD

Public Hearing to Consider	)	
Amendments to California's	)	Hearing Date: March 22, 2007
Emission Warranty Information	)	
Reporting and Recall Regulations	)	Agenda Item #: 06-11-5
and Emission Test Procedures	)	

SUPPLEMENTAL COMMENTS OF THE ENGINE MANUFACTURERS ASSOCIATION

Date: March 19, 2007

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The Engine Manufacturers Association (EMA) hereby submits these supplemental comments on ARB's proposed Amendments to California's Emission Warranty Information Reporting and Recall Regulations and Emission Test Procedures (hereinafter, the "Defect Reporting Rule" or "the proposed Rule"). EMA incorporates herein its December 6, 2006 written comments and its December 7, 2006 oral comments.

At the December 7, 2006 hearing, EMA expressed its substantial concerns about the proposed Rule. Those concerns were both substantive and procedural. In order to cure the procedural shortcomings, and address the substantive concerns, the Board directed the staff to work with the various stakeholders. Unfortunately, the proposed Rule's major substantive problems, including significant procedural defects, have not been corrected and, in some cases, are now worse.

We urge the Board to direct the staff to develop workable solutions to all of the issues that have been raised including, without limitation:

1. The lack of legal authority.

The proposed Rule unlawfully divorces engine recall requirements from any form of demonstration that an emissions exceedance has occurred or is occurring, and unlawfully vests ARB with the power to extend unilaterally the duration of emissions warranties. Those substantive objections have not been addressed, let alone resolved, by the latest changes in the proposed regulatory language that the Board is being asked to consider.

In addition, there is another legal point that bears further mention in light of the manner in which ARB is attempting to expand the extent of its delegated authority under the controlling statutes. Through its continuing efforts to shoehorn the emissions-component defect limits into the standards and test procedures requirements under Health and Safety Code sections 43105 and 43106, ARB, in essence, is establishing the 4% or 50 vehicle "valid failure" limit as a new and separate emissions-related certification standard -- i.e., a new emissions durability standard -- that engine manufacturers must meet, in addition to the numerical limits on specified pollutants such as PM and NOx, in order to obtain certification of their engine families in California. (See, e.g., Proposed Regulation §86.004-26 (setting forth certification requirements for heavy-duty engines).)

Thus, ARB's calculated manipulation of the underlying statutes (unlawful as it is on other grounds) has converted the emissions-related defect limits into certification standards. (See EMA v. SCAQMD, 541 U.S. 246, 252-53 (2004) ("standards" include "criteria [that] relate to the emissions characteristics of a vehicle or engine...[including a] design feature related to the control of emissions.") ARB's own ISOR confirms as much when it compares the pending regulatory proposal to the 2003 OBD amendments, and states that "[t]he staff's proposal establishes, on the whole, *test procedures and standards* to determine compliance with the test procedures and possibly emission standards that ARB has adopted or will adopt." (ISOR, p. 13, emphasis added.)

As such, ARB must provide four-years' leadtime and three years' period of regulatory stability for the new emissions durability standard at issue. But, ARB is not providing that requisite leadtime and stability, which constitutes yet another reason why the proposed regulations are unlawful.

ARB also must seek and obtain a preemption waiver from EPA before attempting to enforce the new defect-related durability standard, something which, at least to this point, ARB has not committed to do.

2. The extended warranty provision for heavy heavy-duty diesel engines.

There was significant discussion at the December 7, 2006 hearing about the length of the various proposed extended warranty provisions. All of the comments and discussion focused on the concern that the periods for passenger cars, medium duty vehicles, light heavy-duty diesel engines, and medium heavy-duty diesel engines were too long. No one expressed concern that the proposed 200,000 mile extended warranty period for heavy heavy-duty diesel engines (HHDDE) was too long. And, even more important, no one complained that it was not long enough. The clear direction from the Board to the staff was to reconsider the length of the proposed extended warranty periods for all applications other than HHDDEs.

Despite the fact that there was no objection to the 200,000 mile HHDDE extended warranty period and despite the fact that the Board directed the staff to address the extended warranty period objections that were raised at the Hearing, the staff, without consultation with industry, unilaterally has decided to raise the HHDDE extended warranty period from 200,000 miles to 435,000 miles. Such a proposed change is not supported by any factual or cost data, is contrary to the Board's direction, and is an obvious attempt to punish HHDDE manufacturers with an overly stringent remedial action that provides no relief from, and no real alternative to, mandatory recall.

Besides the lack of any data or analysis in the record, and the fact that a proposed 435,000 extended warranty is contrary to the Board's direction, such an extended warranty for HHDDEs is completely out of balance with that imposed on other engines and vehicles. For no other application is the extended warranty more than twice the base emissions warranty. For HHDDEs, the extended warranty is more than four times the emissions warranty.

If ARB decides to include an extended warranty option, the extended warranty for HHDDEs should not exceed 200,000 miles. Finally, in all cases, the extended warranty provision, if included at all, should only be available in lieu of recall, not imposed as an additional corrective action on top of recall.

3. The unique circumstance facing heavy-duty diesel engine beginning in 2010.

ARB has failed to acknowledge or address the fact that in 2010 heavy-duty on-highway engines will be required to meet very stringent, aftertreatment-forcing NOx emission limits and, for the first time, stringent OBD requirements. ARB should recognize that, during the initial implementation of the new NOx aftertreatment technology and the phase-in of the new OBD technology, heavy-duty engine manufacturers, and their customers, should be protected from corrective action thresholds that could trigger mandatory recall, where no corrective action is warranted or, possibly, even available. In order to address this situation, we strongly recommend that the unscreened emission warranty threshold for heavy-duty diesel engines be set at 20% for 2010-2012, 15% for 2013-2015, and 10% beginning in 2016.

4. The availability of a fair and reasonable public hearing.

ARB's proposed procedures for a public hearing to challenge ARB's determination that corrective action is required (Section 2174) fail to meet fundamental principles of fairness and due process. ARB's proposal so severely limits the hearing record as to make the hearing a mockery. The manufacturer is faced with a classic Catch-22: The public hearing record is limited solely to what ARB staff allow the manufacturer to raise in the SEWIR process (see Section 2168), but the staff won't allow the manufacturer to include in the SEWIR information that could or should be relevant to the public hearing. As a practical matter, then, staff gets to consider only what they want to consider and gets to deny those who review their decision the opportunity to consider anything else. That is a totalitarian approach which deprives manufacturers of their property without due process of law.

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The proposed Rule has not been improved to the point where it is practical or workable for engine manufacturers. Not only will the modifications that we have suggested improve the efficacy of the defect reporting and corrective action process, but they will improve ARB's ability to legally and fairly address systemic failures where such failures really and truly exist. ARB must correct the legal and programmatic shortcomings in its proposal as identified by EMA and other commenters.

Respectfully submitted,

ENGINE MANUFACTURERS ASSOCIATION

EMADOCS: 29855.2

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ORAL STATEMENT OF THE ENGINE MANUFACTURERS ASSOCIATION

Good morning/afternoon. I am Roger Gault, Technical Director of the Engine Manufacturers Association. As you know from our comments last December, the heavy-duty engine industry had substantial concerns about the staff's proposal. While some minor improvements have been proposed, other aspects of the rule have been made worse. Overall, we think today's proposal is fundamentally flawed because, among other reasons, it:

- adopts new standards and test procedures without providing the required leadtime and period of stability
- imposes unauthorized and unfair certification obligations on manufacturers
- fails to recognize that a warranted part could have warranty claims on separate assemblies or functions which, if aggregated, could trigger a systemic failure where no failure or cure exists
- imposes an unauthorized and inappropriate 435,000 mile extended warranty period for HHDDEs. (The Board directed the staff to review and lower the extended warranty periods for other applications. There was no issue about the proposed 200,000 mile period for HHDDEs. The staff unilaterally and punitively has proposed to increase it to over four times the emission warranty.)
- fails to recognize that in 2010 heavy-duty engine manufacturers face unique burdens of new NOx aftertreatment and OBD technology. (ARB is imposing new procedures and standards that could impede the successful roll-out of both new technologies and could lead to mandatory recalls of product not in need of repair, or not repairable.)
- proposes an unfair adjudicatory appeal process in which every effort is made to preclude the manufacturer from having a fair and reasonable opportunity to challenge staff's action

The proposed changes to the Rule have moved far beyond its statutory basis which is to protect against excess emissions that result from defective parts. The Board should reject the staff's proposed changes.

If you have any questions, I would be pleased to answer them.