

Steven Douglas

BEFORE THE AIR RESOURCES BOARD

**COMMENTS OF
THE ALLIANCE OF AUTOMOBILE MANUFACTURERS (THE ALLIANCE)
(LEGAL APPENDIX)**

**NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO CALIFORNIA'S
EMISSION - WARRANTY INFORMATION REPORTING AND RECALL
REGULATIONS AND EMISSION TEST PROCEDURES (RELEASED OCTOBER 10,
2006) (Additional Comments)**

**NOTICE OF PUBLIC WORKSHOP REGARDING PROPOSED AMENDMENTS TO
THE PROCEDURES FOR REPORTING FAILURES OF EMISSION-RELATED
COMPONENTS AND CORRECTION ACTIONS; SUPPLEMENT TO THE INITIAL
STATEMENT OF REASONS (RELEASED JANUARY 23, 2007) (Initial Comments)**

**STAFF SUGGESTED MODIFICATION TO THE REGULATIONS AND TEST
PROCEDURES FOR THE BOARD'S CONSIDERATION (RELEASED FEBRUARY 8,
2007) (Initial Comments)**

**STAFF SUGGESTED MODIFICATION TO THE REGULATIONS AND TEST
PROCEDURES FOR THE BOARD'S CONSIDERATION (RELEASED MARCH 12,
2007) (Initial Comments)**

Board Hearing March 22, 2007

For Further Information Contact:

Steven Douglas
Director, Environmental Affairs
Alliance of Automobile Manufacturers
1415 L Street, Ste 1190
Sacramento, CA 95814
(916) 266-4532
sdouglas@autoalliance.org

Julie C. Becker
Assistant General Counsel
Alliance of Automobile Manufacturers
1401 Eye Street, N.W., Suite 900
Washington, D.C. 20005
(202) 326-5511
jbecker@autoalliance.org

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	EXECUTIVE SUMMARY	2
III.	ADDITIONAL COMMENTS ON ISSUES THAT STAFF ADDRESSED IN SOME FORM IN THE SUPPLEMENTAL ISOR.....	6
A.	OVERVIEW.....	6
B.	COMPLIANCE STATEMENT.....	7
C.	ELIMINATING CONSIDERATION OF EMISSIONS STANDARDS	8
D.	UNLAWFUL CLAIM OF "TEST PROCEDURE" AUTHORITY TO ADOPT A SUBSTANTIVE PRODUCT RELIABILITY STANDARD	9
E.	DUE PROCESS AND THE UNLAWFUL IRREBUTTABLE PRESUMPTION	12
F.	STAFF NOW CONCEDES THAT THE PROPOSED RULE IS ESTABLISHING A SUBSTANTIVE REGULATORY STANDARD AND IS NOT A MERE PROCEDURE, OR MORE SPECIFICALLY A "TEST PROCEDURE."	15
G.	IN THE FULL CONTEXT OF CAPA AND THE HEALTH & SAFETY CODE MOBILE SOURCE PROVISIONS, THE FORM OF STANDARD STAFF HAS ADMITTED TO PROPOSING IS NOT PROPERLY CHARACTERIZED AS A MERE "PERFORMANCE STANDARD" INSTEAD OF A "PRESCRIPTIVE STANDARD."	17
IV.	ANALYSIS OF ALTERNATIVES.....	19
A.	OVERVIEW.....	19
B.	STAFF IGNORES MANY ALTERNATIVES OR PROVIDES ONLY A CURSORY RESPONSE.....	24
C.	NEW ALTERNATIVES.....	27
V.	STAFF'S ANALYSIS OF COSTS IS DEFICIENT, AND STAFF MAKES NO EFFORT TO ESTIMATE EMISSIONS BENEFITS COMPARED TO COSTS OR TO EVALUATE ALTERNATIVES BASED ON COST EFFECTIVENESS.	27
VI.	LISTING OF ISSUES IN THE ALLIANCE'S LEGAL COMMENTS COMPLETELY IGNORED IN THE SUPPLEMENTAL ISOR	32
VII.	ISSUES CONCERNING THE CONTENTS OF THE RECORD.....	33

Before The Air Resources Board

**Legal Appendix for Additional Comments Of
The Alliance Of Automobile Manufacturers (Alliance) on**

**NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO CALIFORNIA'S
EMISSION WARRANTY INFORMATION REPORTING AND RECALL
REGULATIONS AND EMISSION TEST PROCEDURES (RELEASED OCTOBER 10,
2006)**

~~**NOTICE OF PUBLIC WORKSHOP REGARDING PROPOSED AMENDMENTS TO
THE PROCEDURES FOR REPORTING FAILURES OF EMISSION-RELATED
COMPONENTS AND CORRECTION ACTIONS; SUPPLEMENT TO THE INITIAL
STATEMENT OF REASONS (RELEASED JANUARY 23, 2007)**~~

**STAFF SUGGESTED MODIFICATION TO THE REGULATIONS AND TEST
PROCEDURES FOR THE BOARD'S CONSIDERATION (RELEASED FEBRUARY 8,
2007)**

**STAFF SUGGESTED MODIFICATION TO THE REGULATIONS AND TEST
PROCEDURES FOR THE BOARD'S CONSIDERATION (RELEASED MARCH 12,
2007)**

I. INTRODUCTION

The Alliance of Automobile Manufacturers ("Alliance") respectfully submits these legal comments to explain why the draft emission warranty information reporting and recall regulations and emission test procedures ("Proposed Rule") released by Air Resources Board ("ARB") staff on (1) October 10, 2006 (*see* <<<http://www.arb.ca.gov/regact/recall06/rnotice.pdf>>>), and (2) amended on February 8, and most recently on March 12, 2007, with (3) the October 10, 2006 Initial Statement of Reasons also supplemented on January 23, 2007, are unlawful as a matter both of limitations on ARB's substantive authority, and of various procedural defects in the Proposed Rule itself. *See* <<<http://www.arb.ca.gov/regact/recall06/recall06.htm>>> (collecting various iterations of the rulemaking documents).

The Alliance notes at the outset that it reiterates, readopts, and hereby reincorporates all of its comments in the Legal Appendix filed by the Alliance in connection with the December 7, 2007 hearing, unless those comments are specifically retracted herein or deemed by the Alliance to have been superseded by later changes in this ever-moving rulemaking proceeding. *See also* Notice of Continuation, Title 13. California Air Resources Board, Notice of Public Hearing to Consider Amendments to California's Emission Warranty Information Reporting and Recall Regulations and Emission Test Procedures, available at <<<http://www.arb.ca.gov/regact/recall06/contnotice.pdf>>> ("All comments submitted for the December 8 [*sic*], 2006, hearing will remain part of the rulemaking record.").

II. EXECUTIVE SUMMARY

At the December 7, 2007 Board Hearing, the Board instructed staff to continue working with industry to try to reach an agreement with industry on a proposed rulemaking in this area. Several Board members indicated that the rulemaking may have various problems that should continue to be worked on, while several other Board members indicated that they thought the rulemaking as originally proposed by staff was generally correct. Overall, however, the Board put this rulemaking over for another hearing on March 22, 2007, suggesting that the Board consensus was that the rulemaking required significant reconsideration.

Seizing on the statements of a few Board members who were substantially satisfied with the October 10, 2006 version of the rulemaking, however, staff ignored the directives of the other Board members to work closely with industry to try to reach an accommodation. See January 23, 2007 Supplemental ISOR at 2 ("The Board emphasized that the proposal presented by staff at the December hearing is on the correct path for addressing systemic emission component failures and the decision to continue the item to a future date was not intended to result in a restructuring or change in the scope of the proposal."). The Alliance disagrees that that statement accurately describes a consensus of the Board; else it would have made little sense to direct the staff to continue working with industry to reach an accommodation. If the Board had wanted staff to modify the October 10, 2006 proposal in relatively minor ways, that could have been done in the course of making necessary modifications to a final rule and explained in the Final Statement of Reasons, and would not have required a multi-month delay and another Board hearing.

In fact, the Board postponed this matter for another Board hearing for the purpose of encouraging staff to work with industry toward true compromise. Instead of doing so, however, in a spirit of reconsidering some of industry's most basic objections to the nature and details of this rulemaking, staff by its own admission spent the December 2006-January 2007 holiday period diligently working on a revised proposed rule in the spirit of believing that they were "on the correct path." So frenetic were the efforts at producing a new proposal that staff issued a supplemental statement of reasons for changed regulatory language several weeks before the relevant language was even ready (compare January 23, 2007 Supplemental ISOR to February 8, proposed new regulatory language). That kind of approach does not remotely accord with the spirit in which the Board instructed staff to engage with industry to resolve disputed issues in the rulemaking. Instead, the effort of staff since the December 7, 2006 Board hearing appears to have been to make the minimum amount of changes to the rule that would secure adoption of the form of a rule that staff proposes. The Board should not allow staff to operate in such a fashion.

Staff will likely argue in response to these points that they held a public workshop on February 14, 2007. But as the chronology of that process shows, it *post-dated* the January 23, 2007 Supplemental ISOR and the February 8, 2007 proposed regulatory language. (Staff also had a private in-person and telephonic meeting with Alliance representatives on January 18, 2007, but draft language similar to that released publicly on February 8, 2007 was shared with the Alliance prior to that meeting.) If staff had truly engaged in a spirit of reaching a constructive compromise instead of engaging in the mere extension to industry of procedural formalities, it would have scheduled the workshop process to be held *before* the issuance of proposed new regulatory language, and certainly before the issuance of a Supplemental ISOR.

The chronology alone demonstrates the emptiness of the process afforded and the fact that the staff had dug in its heels on a rulemaking in the same basic form they had proposed it on October 10, 2006.

In light of that procedural history, it is not surprising that the changes to the rulemaking from October 10, 2006 to the most recent proposed language on March 12, 2007 is essentially cosmetic and addresses few of the Alliance's major objections to the rule in December 2006 and before. For that reason, the Alliance must reiterate its objections to the Proposed Rule. And procedurally, the Alliance must also point out that staff has established a presumptive 10-day period that is sufficient for Board review of public comments. See Notice of Continuation at 2. Of course, with proposed regulatory language being issued most recently itself only 10 days prior to the March 22, 2007 Board hearing, it would be impossible for the public to comment on that same to allow time for the Board to digest such comments. The procedural rush that staff appears to be in to complete this rulemaking has been a puzzle from the outset. No environmental emergency attends the Proposed Rule, as staff even refuses to attempt to calculate the environmental benefits it could predict to be associated with the rulemaking.

Turning to the substance of the Alliance's objections, staff has insufficiently addressed the following issues:

First, staff continues to insist on some form of a compliance statement. Originally, staff proposed a "compliance demonstration," and has now retreated from that proposal. Contrary to the California Administrative Procedure Act, and other norms of administrative law, staff fails to explain why it changed its proposal in the Supplemental ISOR. But from our meetings with staff, it is clear that they have concluded that staff came to agree with the Alliance's position that such a demonstration was impracticable. But nowhere does staff explain how it can be that a demonstration of compliance is impracticable, while a statement to the same effect should be retained. For if manufacturers have no feasible way to demonstrate at the time of certification that their vehicles will never exceed the 4% threshold, then it follows logically that they will have no way to state, in the sense of promise under pain of enforcement if they fail to meet the conditions of the promise, their vehicles will never exceed the 4% threshold. Or put rhetorically, how can manufacturers vouch in the statement that they will comply with the 4% threshold, if they cannot objectively demonstrate by any available means that they will so comply? As the Alliance noted in its December 7, 2006 legal comments, what is now a compliance statement calls for an impossible prediction of the future with complete accuracy, even though many variables that could affect whether the 4% threshold is crossed are wholly beyond manufacturer control.

Second, staff has admitted that the goal of this rulemaking is to obtain more corrective actions to the end of improving the environment and reducing emissions. Yet it steadfastly refuses to offer any estimate of the emissions benefits. Staff's only concession in this area has been to create a defense, tied to the whim of the Executive Officer, that allows manufacturers to avoid corrective actions if the 4% threshold is exceeded only if they can demonstrate that the relevant component has "no conceivable emissions impact." That additional defense granted to manufacturers is practically worthless, since the very notion of having a list of emissions-related parts is that they could have some "conceivable" emissions effect -- that's why they are on the

relevant list. What staff refuses to reckon with is that the *quantity* of emissions effects is vitally important. A binary test of “no conceivable emissions effects” vs. “any conceivable emissions effects” cannot capture situations where emissions benefits are small, particularly as compared to the costs of corrective action. Staff has outlined no rational reasons to convert the status quo system, which can take account of the *quantity* of emissions effects into a binary system. Stating that such a move is an improvement before it will increase the number of enforcement actions does not discharge the Board’s duties of explanation under administrative law requirements, or the substantive requirement not to act in an arbitrary and capricious way when there are superior alternatives available.

Third, staff has now admitted that they seek to ground the claimed authority for this rulemaking under the heading of “test procedures” as referred to in Health and Safety Code § 43105 and § 43106 because the term “emissions standards” will not provide them with authority to adopt the 4% product reliability standard they seek to create. The test “test procedures,” understood in light of the definition of that term in Health & Safety Code § 43104, in light of various uses of the term in California law, and in federal law, simply cannot bear the weight that staff assigns to it. A “test procedure” are obviously specific sequences designed to *measure* compliance with “emissions standards.” ARB “test procedure” authority is not an authority to adopt any kind of substantive product standard staff may wish to experiment with. What staff has completely failed to do is to provide an alternative definition of the term “test procedure” and then to argue that this rulemaking fits within that definition. Instead, staff has simply asserted by way of mere conclusion that this rulemaking is a “test procedure.” But how can that square with the definition of Health & Safety Code § 43104 and all other past usages of this important term of art that is always inextricably associated with “emissions standards”?

Fourth, manufacturers are provided only an empty hearing right. As was made especially clear at the February 14, 2007 public workshop, staff intends that the only issue in any hearing will be whether the 4% threshold is exceeded or not based on the past reports filed by manufacturers. Contrary to California law, that approach creates an irrebuttable presumption that crossing the 4% threshold yields a product “defect.” But “defect” is a term of art in the law, and staff never explains the basis for why the arbitrary 4% threshold can fix with precision the point at which a particular type or number of failures cross the line into becoming a product defect. Until recently, it was particularly clear that staff sought to impose an irrebuttable presumption, because the compliance statement clearly stated that crossing the 4% threshold was “conclusive proof” of a defect. That language was deleted (presumably in a cynical attempt to improve the legal defensibility of the rule), but the fact that staff seeks to establish the 4% threshold as “conclusive proof” has not changed. Staff cannot impose an irrebuttable presumption unless they can establish that something is always true or that there is no reasonable alternative means of making the demonstration. The staff’s own April 2006 proposal, which retained a role for emissions standards in determining whether a product was defective, as well as the current regulatory status quo establish beyond dispute that there are reasonable available forms of regulation that would not use an irrebuttable presumption. And it is also clear from the existence of those alternative systems, that exceeding a 4% threshold does not invariably (in the way day gives way to night) force a logical conclusion that a component is defective. Moreover, even if staff thinks that it can defend its irrebuttable presumption on the ground that defect always exists at the 4% threshold, staff has put no evidence in the record to establish why the 4%

number (as opposed to 2%, 6%, or 9.9%) has such magical significance. The fact that the Board selected the 4% number in 1988 does not provide the missing factual record support because the 4% number in the 1988 (status quo) version of the defect-reporting system never had the irrebuttable significance that staff proposes to give it. And that is precisely the point of why the change is unlawful.

Fifth, as the culmination of a long-running dispute in this rulemaking record concerning whether staff adequately considered alternatives at the ISOR stage, staff has now conceded in the Supplemental ISOR that the 4% threshold is a "standard." That admission is fatal to the claim that the 4% threshold is merely a "test procedure." And hence, that admission is equivalent to an admission that this rulemaking is beyond the statutory powers of the Board.

Sixth, staff continues to argue that the form of its standard is a "performance standard" because they are not telling any manufacturer how to achieve compliance with the new 4% product reliability standard. That much is true, but staff has an overly simplistic understanding of what the California Administrative Procedure Act establishes as the difference between a "performance standard" and a "prescriptive standard" in the context of the Health & Safety Code provisions defining ARB authority. That full context, as well as the text of the Health & Safety Code make clear that any standard that is more specific and detailed than an "emissions standard" is a "prescriptive standard." Staff fully admits here that it is abandoning a systems-based approach to regulation that measures the success or failure of an emissions system, as a totality, by whether it meets an emissions standard. What staff is proposing to substitute in its place is a component-by-component regulatory system that creates strict liability for exceeding an arbitrary 4% failure rate for any emissions-related component broadly defined. That exponentially increases the complexity of compliance and the level of detail that manufacturers must attend to in order to produce a compliant system. Such an approach robs manufacturers of the headroom they built into vehicles, deprives them of an incentive to build in more headroom (damaging the environment), and most importantly for purposes of the California Administrative Procedure Act point here -- prescriptively micro-manages decisions that used to be left to manufacturer discretion. Building in systematic redundancy in an emissions system is no longer a virtue that ensures that broadly defined emissions performance standards can be met. Instead, building in systematic redundancy counterproductively disadvantages manufacturers, because it increases the number of parts that cannot be allowed to cross the 4% failure rate threshold. In full context and effect, the 4% product reliability standard staff would adopt is a "prescriptive standard," and not a "performance standard," like an emissions standard. Hence, the staff's proposed standard is unlawful for lack of an explanation as to why such a prescriptive standard is required in this area.

Seventh, staff's analysis of and consideration of alternatives continues to be unlawfully anemic. In new material emerging in the Supplemental ISOR and at the February 14, 2007 public hearing, staff has now begun to attack emissions standards, calling them expensive, inaccurate, and too difficult for staff to administer. Such arguments are unprecedented and seem tailor-made simply to buttress this rulemaking. Because what staff nowhere explains is why emissions standards work fine in dozens and dozens of other contexts in the whole Health & Safety Code and Code of California Regulatory scheme that ARB administers. Overall, emissions standards seem to be a deficient regulatory tool only here, because staff seeks the

unfettered authority to order corrective action whenever they desire if a 4% arbitrary failure threshold is crossed. Therefore, staff's approach is arbitrary and capricious.

Eighth, staff's position on costs has "evolved," to say the very least. Beginning with assertions in October 2006 that the Proposed Rule would be costless or even a boon to manufacturers, by staff's own current estimate, the Proposed Rule would cost an additional \$1.8 million annually, and substantially more (multiple orders of magnitude more) in any year in which a recall was ordered. Such an estimate is more than enough to trigger ARB's duties to select the "less costly alternative or combination of alternatives which would be equally as effective in achieving increments of environmental protection in a manner that ensures full compliance with statutory mandates within the same amount of time as the proposed regulatory requirements." Health & Safety Code § 57005(a). (Of course, staff's inability to perform the analysis required by Section 57005 is hampered not only by performing a fundamentally flawed estimate of costs, but because staff refuses to estimate the overall emissions-benefits of the rule. Hence, incremental analysis comparing costs and benefits cannot be performed.) Moreover, as Dr. Scott Carr of LECG demonstrates in an independent report that the Alliance is submitting under a separate cover, staff's cost analysis is wildly inaccurate because it ignores data, bias cost estimates downwards, and uses poor assumptions. Additionally, Dr. Carr, who is an expert engineer as well as product-design economist concludes that the Proposed Rule is contrary to good engineering principles, counterproductive environmentally, and not based on sound science or economics.

Ninth, staff wholly ignored entire categories of comments from the Alliance. As just two examples, the staff ignored the argument that this rulemaking is preempted by the Clean Air Act because it is inconsistent with Clean Air Act Section 202(a). And the staff ignored the Alliance's argument that because this rulemaking creates the perverse incentive to reduce or abolish "headroom" (the amount beneath emissions standards that manufacturers typically certify their vehicles to) -- an effect that could swamp any environmental benefits of the Proposed Rule (which again, staff steadfastly refuses to estimate in any event) -- ARB has a duty to consider application of the California Environmental Quality Act ("CEQA"). Given the lack of robust explanations for the environmental effects of the Proposed Rule in any effect. It is clear that CEQA is being violated here.

III. ADDITIONAL COMMENTS ON ISSUES THAT STAFF ADDRESSED IN SOME FORM IN THE SUPPLEMENTAL ISOR

A. OVERVIEW

In the Supplemental ISOR, staff began by their response to 11 specific industry objections to the Proposed Rule. The 11 issues addressed are, in short-hand form, as follows: (1) delays in submitting corrective action plans; (2) infant mortality; (3) credit in the defect counting process for manufacturer self-initiated corrective action; (4) limitation of extended warranty period equal to the useful life period for all vehicle and engine categories as they were certified; (5) missing definitions for "defective emission-control component" and "defective emission-related component"; (6) removal of a required demonstration at the certification stage; (7) missing definitions for "emission-control component" or "emission-related component"; (8) contravention of agreement on shorter warranty period for HEV battery packs; (9) certification

statement referred to within vehicle useful life as opposed to warranty period; (10) corrective action should be tied to an exceedance of emission standards; and (11) non-substantive regulatory language changes for clarification purposes.

This list is not all-inclusive of Alliance objections or even all-inclusive of the most significant Alliance objections. As ARB is aware, the Alliance advanced four major objections in its summary presentations to the Board orally on December 7, 2007. These objections were: (A) no tie to emissions standards; (B) no authority to order extended warranties, especially beyond the useful life of a vehicle; (C) no authority to require a certification statement that required a prediction of the future; and (D) the Proposed Rule did not comport with due process under the federal or California Constitutions. The list of 11 issues above rejects issue (A), makes adjustments relevant to issues (B) and (C) that do not address the core Alliance concern; and as to issue (D), adds extended warranty to the hearing process, but does not address the empty shell hearing process.

Staff's changes on issues (1)-(3) are favorable changes, though they are relatively small and do not address the Alliance's core concerns. The same is true of issues (5), (7), (8), and (11). Each of those changes are favorable, but on relatively minor issues. Issue (4) eliminates the problem of the Proposed Rule requiring extended warranties beyond the useful life of vehicles, but it ignores entirely the legal objection of the Alliance that ARB lacks the authority altogether to order extended warranties. The Alliance reiterates its objection to that claim of authority by staff. *See Alliance Legal Comments*, at 15-19. *See also Supplemental ISOR* at 4, 7. As such, the Supplemental ISOR is defective on its face as to that issue.

B. COMPLIANCE STATEMENT

Staff has responded to issue (6) by requiring only a statement, and not a "demonstration" when vehicles are certified that is intended to link the defect reporting regulations to the vehicle certification process. That is a favorable change as far as it goes, because staff nowhere attempted to define the type of demonstration required, and thus implicitly accepted the Alliance's criticism that making an objective demonstration that the 4% defect level would never be exceeded at the time of certification would be impossible. (The reason for this, as the Alliance has explained numerous times, is that many vehicle defects are unforeseeable. *See Alliance Legal Comments*, at 19, 28-31, 38, 43.) But staff nowhere responds to the Alliance's core objection that ARB lacks the authority to require any kind of prediction concerning defect rates at the time a vehicle is certified. In sum, staff simply cosmetically transformed the compliance demonstration in a compliance statement, but still maintained all of the potential penalties that come from wrongly prognosticating the future based on the best facts available at the time of certification. *See Alliance Legal Comments*, at 28-31. Once again, as such, the Supplemental ISOR is defective on its face as to that core issue. Furthermore, the March 12 version of the regulatory language deletes the following language from the previous version: "over the applicable warranty period of the vehicles or engines they are installed in." Hence, in the newest version, staff without explanation is apparently expanding the time horizon over which an already unlawful compelled compliance statement must embrace. This is arbitrary and capricious. And if it is not what was intended, staff should restore the language.

C. ELIMINATING CONSIDERATION OF EMISSIONS STANDARDS

Finally, on the most important Alliance objection -- in issue (10), staff rejects that the defect reporting enforcement system should be tied to exceedances of the emissions standard at all. The entirety of what staff says on this point is worth recounting:

Manufacturers commented that the proposal should tie corrective action for emission component defects to only exceedances of the applicable emission standards and not a violation of test procedures. The staff disagrees with the manufacturers' position. Health and Safety Code Sections 43105 and 43106 give the ARB authority to invoke corrective action for violations of test procedures as well as emission standards and therefore the staff proposal is appropriate. However, regulatory language has been added that would allow manufacturers to ~~submit information as part of the SEWIR to demonstrate for the review and approval of the Executive Officer that under no conceivable circumstance may a specific emission control component defect result in an increase in emissions over that of a properly operating vehicle or engine without the defect. For example, if a manufacturer discovered that catalysts were being replaced due to a cracked or broken heat shield, this failure could be argued that the defect would not cause any conceivable emissions impact. In proven cases, the Executive Officer may elect to withdraw any corrective action requirement. (See proposed Section 2168(f)(6) in Attachment A; This relates to Main Point 1, discussed above.)~~

Supplemental ISOR at 5.

At the January 18, 2007 meeting held between ARB staff and Alliance representatives, Mr. Kirk Oliver, staff counsel on the Proposed Regulation stated in sum that the Board possessed two types of authority under the Health & Safety Code -- to set "emissions standards" and to establish "test procedures." Since the Proposed Rule on defect reporting is not an "emissions standard," said Mr. Oliver, therefore the defect reporting rulemaking constitutes a "test procedure. *See also* Proposed Section 2166(e) ("emissions standards" text greyed out, indicating that it is text associated with the January 23, 2007 version of the Proposed Rule, thereby resting exclusive reliance in new Article 5 on "test procedures based on emissions warranty information"); Proposed Section 2166.1(l) (similar). The Alliance agrees with Mr. Oliver's parsing of the two headings of Board authority, but disagrees that this Proposed Rule on defect reporting can qualify as a "test procedure" within the meaning of Health & Safety Code Sections 43105 and 43106.

Before exploring that argument in greater detail, the Alliance notes that it already set forth the relevant points in great detail in its Legal Comments, and that the statement quoted in the block above does not even attempt to respond to it. *See* Alliance Legal Comments, at 5-11 (indeed, this was the first substantive legal objection covered in detail in the Alliance's Legal Comments).

Additionally, the Alliance notes that the proposal to allow manufacturers to demonstrate that a particular failure in an emission-related component will have "no conceivable effect" on emissions is insufficient to address the Alliance's practical or legal objections. Legally, it is

insufficient because it does not attempt to explain how a 4% substantive defect reporting threshold for requiring corrective action is a "test procedure" procedure within the meaning of the Health & Safety Code. And practically, the concession that components that are failing but have no actual effect on emissions begs the questions: (1) why minimal emissions effects, especially that would be extremely burdensome to repair in exchange for minimal emissions benefits, should trigger ordered corrective action; or (2) why any emissions effect that does not cause an exceedance of the emissions standard to which a vehicle is certified and thus is still within the field of manufacturer "headroom" built into vehicle emissions systems as a whole should trigger automatic corrective action. See Alliance Legal Comments, at 12-13. Furthermore, both practically and legally, we are aware of no such legal standard allowing agencies to make any "conceivable" choices they might imagine. Something that is "conceivable" need not be "reasonable" or even "rational," but could originate from mere whimsy.

Finally, the Alliance notes that the language in proposed Section 2168(f) indicates that the demonstration of an already-tiny exception for "no conceivable emission benefit" must be "to the satisfaction of the Executive Officer." Linking up with one of the Alliance's core themes that this rulemaking provides insufficient due process, manufacturers will not be allowed to contest such an "eye of the beholder" test, and thus its minimal value is further diminished by the subjectivity of the exception that staff touts, as if it were some kind of major concession. It is nothing of the kind. In practice, manufacturers would find this exception nearly worthless.

D. UNLAWFUL CLAIM OF "TEST PROCEDURE" AUTHORITY TO ADOPT A SUBSTANTIVE PRODUCT RELIABILITY STANDARD

Turning to the legal merits of why the 4% substantive standard for product reliability established in the Proposed Rule cannot qualify as a "test procedure," the Alliance first reinforces that it incorporates its prior comments on that subject by reference. See Alliance Legal Comments, at 12 (in turn incorporating by reference Letter from Steven P. Douglas to Kirk Oliver, Re Possible Amendments to the Procedures for Reporting Failures of Emission-Related Components (Attachment, at 8-13)). To supplement those comments, we note that the explanation that staff gives above for refusing to keep the defect reporting system tied to emissions standard exceedances, as it always has been in the past, fails to grapple at all with the obvious fact that the grant of authority for "test procedures" is not an independent heading of authority to create any form of "test" or any form of "procedure" that ARB desires. Indeed, nowhere does staff enunciate an interpretation of the beginning stopping points and ending points -- or boundaries -- of the term "test procedures." Staff simply asserts as a matter of *ipse dixit*, that the defect reporting rulemaking falls within the span of ARB test procedure authority. What is missing is an explanation *why* this is so, with reference to actually interpreting the term "test procedure" and setting out an affirmative case for what the term was intended to allow ARB to do.

Contrary to staff's argument that the defect reporting rule falls within the concept of a "test procedure," it is obvious from the statutory context and from the entire history of emissions regulation that the reference to "test procedure" is a grant of authority that is *ancillary* to the main grant of authority to set "emission standards." Compare 68 Ops. Cal. Att'y Gen'l 189, Op. No. 85-106, 1985 WL 167476, at *5 (discussing a "test procedure" as an ancillary matter to the

substantive legal question of whether the blood levels so tested (the analogue of an “emission standard” for present purposes) exceed the lawful limit for blood alcohol level); 17 C.C.R. § 2641.57 (“‘HIV test algorithm’ means any multi-test procedure that determines the presence of HIV infection using tests approved by the federal Food and Drug Administration for that purpose.”); 22 C.C.R. § 64801(a) (“‘Alternate Test Procedure’ means an analytical test method, or procedure that is different in technic [sic] from the method(s) cited in Section 64811(a), (b), or (c), but detects and quantifies to the same degree of precision, accuracy, and level of detection.”).

The point of a “test procedure” in this precise context of the state law regulating mobile sources is to objectively test whether a group of vehicles comports with the “emissions standards,” not to authorize ARB to regulate *beyond* the area of emissions standards, and to accomplish what ARB staff has, in fact, now conceded cannot be accomplished under the heading of an “emission standard.”¹ Federal law also uses the term “test procedure” as a mere measuring stick to determine if a substantive emissions or other type of standard has been met.²

¹ See, e.g., 13 C.C.R. § 1960.1 n.4 (“SFTP means the additional *test procedure* designed to measure emissions during aggressive and microtransient driving, as described in section 86.159-00, Title 40, Code of Federal Regulations, as adopted October 22, 1996, over the US06 cycle, and also the *test procedure* designed to measure urban driving emissions while the vehicle’s air conditioning system is operating, as described in section 86.160-00, Title 40, Code of Federal Regulations, as adopted October 22, 1996, over the SC03 cycle.”) (emphasis added). See also *id.* n.6; 13 C.C.R. § 2431(a)(10) (definitions) (“‘Deterioration Factor’ means the calculated or assigned number that represents the certification engine’s *emissions change* over the durability period. It is multiplied by zero hour (new) engine test results to determine the engine family compliance level. *The deterioration factor is determined as per the Test Procedures.*”) (emphasis added); *id.* 2431(a)(30) (“‘Production Line Test’ is defined as the *emissions test* performed on a sample of production engines produced for sale in California and *conducted according to the Test Procedures.*”) (emphasis added); 13 C.C.R. § 2752(a)(4) (definitions) (“‘Diurnal Emissions’ means evaporative emissions resulting from the daily cycling of ambient temperatures and include resting losses, and permeation emissions, *as measured according to test procedures* incorporated in this Article.”) (emphasis added); *id.* at § 2752(a)(10) (“‘Evaporative Model Emission Limit (EMEL)’ means the diurnal *emissions level* declared by the manufacturer for a model within an evaporative family. The declared level must be based on diurnal emissions test results for a worst case model of engine or equipment within the evaporative family, *obtained by following Test Procedure 902.*”) (emphasis added); *id.* at 2752(a)(20) (“‘Permeation Emissions’ means *evaporative emissions* that result from reactive organic gas molecules penetrating through the walls of fuel system components and evaporating on outside surfaces, *as measured by test procedures* incorporated in this Article. *Permeation emissions* are a component of diurnal emissions, *as measured by test procedures* incorporated in this Article.”) (emphasis added); *id.* at § 2752(a)(21) (“‘Permeation Rate’ means the total mass of reactive organic gas molecules passing through the internal surface area of a fuel tank in a 24-hour period, *as measured by test procedures* incorporated in this Article.”).

² See also, e.g., 15 C.F.R. § 9.2(d) (“‘energy efficiency’ means the energy use of appliances or equipment relative to their output of services, as determined through test procedures contained or identified in a final Voluntary Energy Conservation Specification”); 40 C.F.R. § 63.2 (“Test method means the validated procedure for sampling, preparing, and analyzing for an air pollutant specified in a relevant standard as the performance test procedure”); 40 C.F.R. pt. 63, app. A (“A separate or modified test procedure must be used to measure these reaction products or cure volatiles in order to determine the total volatile HAP emissions.”) (Method 311, 1.1); 40 C.F.R. § 79.50 (definitions) (“Federal Test Procedure (FTP) means the body of exhaust and evaporative emissions *test procedures* described in 40 CFR 86 for the certification of new motor vehicles to Federal motor vehicle *emissions standards.*”) (emphasis added); 40 C.F.R. § 86.1010-2001(c)(1) (“Once a pass decision has been made for a particular pollutant associated with a particular *test procedure* pursuant to § 86.1008-2001(a), the number of vehicles or engines whose final deteriorated test results *exceed the emission standard* for that pollutant may not be considered any further for purposes of the audit.”) (emphasis added).

See 40 C.F.R. § 80.164 (referring to “test procedures which conform to reasonable and customary standards of repeatability and reproducibility, and reasonable and customary limits of detection and accuracy”). The Board’s approach to construing the Health & Safety Code must be to approach its text and context carefully and respectfully -- not, as increasingly seems to be proven as the case in this rulemaking, to simply try to “pin the tail on the donkey” of any provision of law that justifies a predetermined outcome to increase the stringency of the defect reporting system and decouple it from its historic and required connection to emission standards. In short, there is no authority for ARB to use the heading of “test procedure” authority to regulate in the area of defect reporting, creating new substantive numeric product reliability standards however it sees fit. The Proposed Rule’s 4% defect threshold is demonstrably not a measuring stick, like a true “test procedure,” it is a substantive standard in its own right -- a substantive standard of product reliability.

The Supplemental ISOR points to Health & Safety Code 43106 as buttressing its broad reading of Section 43105 “test procedure” authority. See Supplemental ISOR at 5. But Section 43106 only reinforces the Alliance’s obvious reading of the Legislature’s limited commitment of authority to ARB. See Health & Safety Code § 43106 (“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.”) (emphasis added). In other words, Section 43106 directly adverts to the testing of a particular “test vehicle” for compliance with the emission standards. It does not indicate that the Board may adopt “test procedures” to regulate in any substantive way or degree it sees fit.

Elsewhere, especially in justifying the compliance statement it proposes to require (which is independently problematic from a legal standpoint), staff notes that vehicles as tested must be “in all material respects, substantially the same in construction as the test motor vehicle or engine.” Staff’s argument presupposes that a vehicle that exceeds a 4% defect rate necessarily ceases to be the same as the test vehicle on which certification testing was performed. But that is certainly not the case. Manufacturers are not systematically building vehicles that are substantially dissimilar that prototype testing vehicles and then seeing the 4% defect rate exceeded when their illicit substitution is exposed through the defect reporting process. No, manufacturers build prototype vehicles, test them in accord with California regulations and test procedures, and then build substantially similar vehicles. Whether the vehicles so build and certified later cross the 4% defect threshold is an entirely separate matter.

All along, staff has neglected the obvious fact that the term “defect” must be given the meaning it has as a matter of general law, especially common law, since it is not a term or heading of authority specifically given to ARB in the Health & Safety Code. As we pointed out in our earlier comments, defects as a matter of common law fall under two headings -- manufacturing defects and design defects.³ It is possible that in the case of a massive

³ See, e.g., *McCabe v. American Honda Motor Co.*, 100 Cal. App. 4th 1111, 1119-20 (2d Dist. 2002) (“California recognizes two distinct categories of product defects: manufacturing defects and design defects. A manufacturing (Continued...)”) (Continued...)

manufacturing defect, the 4% threshold could be crossed. In that circumstance, because there had been an inadvertent deviation from a vehicle as it was designed to be built and as it was actually built, there could be a link between the requirement to build a vehicle substantially similar to the prototype vehicle and what was actually constructed. But as the Alliance has pointed out, situations where defects exceed 4% in the field are far more likely to be situations where vehicles encounter unforeseeable driving patterns, unforeseeable road conditions, unforeseeable fuels, or other unforeseeable conditions that cause particular components to fail. Vehicles can only be designed to the conditions that are reasonably foreseeable at the time, and therefore, such failures are neither manufacturing defects nor design defects. ARB lacks the authority to regulate in this area unless it can demonstrate there is a defect. See 64 Ops. California Att'y Gen. 425, Op. No. 80-718, 1981 WL 126765 (May 27, 1981) ("If, however, rule 2039 provides a warranty for failure to perform at any time during the useful life of the vehicle or engine without regard to any defect in material or workmanship, then it constitutes a substantial departure from, and finds no counterpart in the enabling statutes.") (emphasis added). The status quo regulations reflect this fact, and staff provides no reason to deviate from that approach. See 13 C.C.R. § 2148(b)(1).

Moreover, the existence of such failures certainly breaks any attempt to claim conceptually, as staff is apparently doing, that every exceedance of its 4% defect threshold results in vehicles deviating substantially from the "test vehicle" that was certified. Indeed, if staff continues to stand by counterfactual assumptions such as the notion that a vehicle that exceeds the 4% defect reporting threshold must be, *ipso facto*, substantially different than the "test vehicle" within the meaning of Health & Safety Code § 43106, then staff should not object to manufacturers being given a defense to avoid any corrective action for exceeding the 4% defect reporting threshold whenever they could demonstrate that the vehicles for a particular engine family or group have not deviated substantially from the prototype, or "test vehicle" on which certification testing was performed. Indeed, to test the staff's adherence in reality on the logic of what they are asserting for legal purposes, we hereby offer precisely that defense as an alternative to the Proposed Rule as described on March 12, 2007. See also Section IV. below, summarizing alternatives.

E. DUE PROCESS AND THE UNLAWFUL IRREBUTTABLE PRESUMPTION

Next, in a section of the Supplemental ISOR entitled "Other Proposed Changes," staff indicates that they had "added language to the proposed regulations that would allow a manufacturer to challenge any corrective action including extended warranties through the public hearing process." Supplemental ISOR at 7. That is certainly a minor improvement in the area of providing due process, because there would be no basis for concluding that ARB had the authority to order extended warranties without a hearing at any time, but would not be allowed to

defect exists when an item is produced in a substandard condition. Such a defect is often demonstrated by showing the product performed differently from other ostensibly identical units of the same product line. A design defect, in contrast, exists when the product is built in accordance with its intended specifications, but the design itself is inherently defective.") (citations and internal quotations omitted). See Restatement (Third) Torts: Product Liability, at § 3.

compel a recall without first providing a hearing. At the December 7, 2006 hearing, the Board saw the fundamental indefensibility of such a difference and suggested it be changed to the staff, which has now occurred.

What staff never addresses, however, is the far more significant argument that the due process being provided (originally only for recalls, now as to both recalls and extended warranties) is an empty shell. See Alliance Legal Comments, at 24-26 (including analysis incorporated by reference). Constitutional Due Process is a simple concept, which the U.S. Supreme Court has stated best. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."⁴ As has become increasingly clear -- from both the Alliance-Staff meeting on January 18, 2007 and the public workshop on February 14, 2007 -- is that staff intends that the hearing right they are extending to manufacturers will be quite empty. Instead of a manufacturer being able to set forth any of the traditional defenses that it has possessed, or that common sense and the law demand, manufacturers will be limited at the hearing to arguing about whether reports submitted under this rulemaking exceed 4% or not. That is a ministerial determination that anyone with the ability to read could likely perform. It is not what constitutional due process requires in this context. Instead, the staff proposal is an artificial restriction on the presentation of any evidence that could show that enforcement action being insisted on by the Executive Officer was an abuse of discretion. This proposed rule affords no meaningful opportunity to be heard, and contradicts the foundation of government accountability.

The ultimate question for any public hearing should be whether the vehicle or engine family or group has been shown to be defective *as a class*. See Alliance Legal Comments at 11-13. ARB certainly possesses some form of authority to help define what a classwide defect is. But it cannot select an arbitrary number of 4% and deem that to be irrebuttable evidence of a classwide defect without more. Staff has argued that the 4% number was selected by the Board. But that mere historical point cannot justify the *current* Proposed Rulemaking. First and foremost, staff has never explained why 4% constitutes evidence of a classwide defect, and not 2% or 10%. There is no engineering basis for this threshold, and it has no basis of which we are aware in any other source of law, whether statutory, regulatory, or common law. Moreover, as the Alliance has explained on numerous occasions, the 4% threshold as set in the 1988 rulemaking that is the status quo staff seeks to change here was not a substantive threshold that, once crossed, conclusively established a classwide defect. Quite the contrary, the 4% threshold was a mere presumption and a signaling device to the Executive Officer to investigate whether corrective action may be warranted. In addition to an exceedance of the 4% level, the conditions for enforcement in 13 C.C.R. § 2148(a)-(b) must currently be met by the Executive Officer, and in addition manufacturers possessed an affirmative defense under 13 C.C.R. § 2147. See Letter from Steven P. Douglas to Kirk Oliver, Re Possible Amendments to the Procedures for Reporting Failures of Emission-Related Components (Attachment, at 3-4, 15-16).

⁴ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (international quotation omitted)).

It cannot be emphasized enough that this Proposed Rule would do away with the Section 2148(a)-(b) limitations and with the Section 2147 affirmative defense. Hence, the difference between the current system and Proposed Regulation is enormous and the Board cannot simply rely on whatever basis it had for selecting 4% as a signaling device to support this rulemaking, where 4% becomes its own substantive standard that is enforceable without any more evidence.

Overall, what the Proposed Rule does is to reify the 4% threshold into an irrebuttable presumption of a classwide defect. The Board both lacks the substantive authority to do this under the Health & Safety Code and cannot accomplish that end, consistent with due process, because the Board has not met the constitutional test for establishing an irrebuttable presumption. See *Vlandis v. Kline*, 412 U.S. 441 (1973).

The two-part test of *Vlandis* requires a demonstration that by the government adopting an irrebuttable presumption either that the disputed matter is universally true or that the State does not possess a reasonable means of making the determination at issue. Here, staff can make neither demonstration. It is clear that exceeding a 4% defect level is not universally accepted evidence of a classwide defect, else the prior approach -- the approach of the current regulatory status quo -- would be unlawful, since it did not mandate corrective action in all instances where the 4% threshold was crossed. Similarly, the federal system under the Clean Air Act of regulating defects would not universally class all exceedances of a 4% level as constituting a classwide defect. And finally, it is also plain from the current ARB status quo system and from the federal system that reasonable means exist for making a determination of whether there is a classwide defect by considering a variety of variables, especially the key variable of whether the emissions standard is exceeded by virtue of any particular defect level. Hence, under *Vlandis*, it would be unconstitutional for ARB to abolish the Section 2148(a)-(b) limitations and the Section 2147 affirmative defense, and turn the 4% level, on the basis of no technical evidence or even legal argument, into an irrebuttable presumption.

Apparently recognizing the vulnerability of the Proposed Rule for adopting such an irrebuttable presumption, staff deleted a clarification that was added to the certification statement in the February 8, 2007 version of rulemaking language from the version released on March 22, 2007. Compare February 8, 2007 version of California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks and Medium Duty Vehicles, Part I.F.4.1, § 86.1823 ("If production vehicles have warranty claims rates in use that exceed four percent or fifty (whichever is greater) it is *conclusive proof* that vehicles and engines tested for certification are not, in all material respects, substantially the same as production vehicles and engines.") with March 12, 2007 version of same (at page 36 of the March 12 document) ("If it is determined pursuant to title 13 CCR, Division 3, Chapter 2, Article 5, sections 2166 through 2174 that any emission control component or device experiences a systemic failure because valid failures for that component or device meet or exceed four percent or 50 vehicles (whichever is greater) in a California-certified engine family or test group, it constitutes a violation of the foregoing test procedures and the Executive Officer of the Air Resources Board may require that the vehicles or engines be recalled or subjected to corrective action as set forth in title 13 CCR, Division 3, Chapter 2, Article 5, sections 2166 through 2174.") (emphasis added).

Staff does not explain why the precise wording of "conclusive proof" was deleted, but it does state in the March 12, 2007 document entitled "Warranty Reporting Amendment Proposal Summary of Regulatory and Test Procedure Changes," available at <<http://www.arb.ca.gov/regact/recall06/summary_of_regulatory_changes_3-9-07.pdf>>, that the change to Part I.F.4, § 86.1823-01 was for the following reason: "Modified language to shorten paragraph for clarity but still require a statement of compliance and acknowledgement of a test procedure violation for a valid 4 percent emission component failure." Taking that explanation at face value, the change in language deleting the assertion of "conclusive proof" was not intended to be substantive -- only a change to improve brevity and clarity. An additional supplement to the ISOR (and thus a postponement of the March 22, 2007 hearing date) would be required here for the staff or the Board to reach another conclusion.

In any event, we think that the language of the March 12, 2007 version of Section 86.1823-01 of the test procedures is fairly clear in its intention that whenever the 4% threshold is crossed, it would be ARB's position, if the Proposed Regulation were adopted, that the Executive Officer could order a recall or extended warranty, *or both*, whenever he desired. See Proposed Sections 2169(b) ("*At the sole discretion of the Executive Officer*, the manufacturer shall perform corrective action, including, but not limited to extended warranty . . . either as an alternative to or supplement to the corrective action specified in (a) [i.e., a recall]) (emphasis added), 2170(b) (similar), 2171(b) (similar). In other words, when Section 86.1823-01 says the Executive Officer "may require that the vehicles or engines be recalled or subjected to corrective action," that means that at the sole discretion of the Executive Officer manufacturers will be required to take corrective action of any or all forms. It does not mean that manufacturers will be given an opportunity to argue, based on the criteria in status quo Sections 2147 and 2148, that a recall or extended warranty should not be ordered. And most importantly, it does not mean that manufacturers are permitted to take such arguments, if they believe they have not had a fair airing of those issues by the Executive Officer, in the form of legal objections to a neutral decisionmaker, such as an administrative law judge, for resolution.

If the Alliance is mistaken about how the late-breaking March 12, 2007 amendment to Section 86.1823-01 is to be read, it is incumbent upon the staff to postpone and reschedule the hearing, after explaining what it is they had in mind instead. Otherwise, it is clear that the March 12, 2007 change to Section 86.1823-01 was intended not to be substantive, and whether it expressly says so or not, was intended to equate crossing the 4% threshold with "conclusive proof" of a systemic, or classwide defect. And on that basis, the Alliance maintains that such a "conclusive proof" requirement is the creation of an unlawful irrebuttable presumption.

F. STAFF NOW CONCEDES THAT THE PROPOSED RULE IS ESTABLISHING A SUBSTANTIVE REGULATORY STANDARD AND IS NOT A MERE PROCEDURE, OR MORE SPECIFICALLY A "TEST PROCEDURE."

On page 7 of the Supplemental ISOR, staff includes a paragraph that has the effect of conceding that the Board lacks the authority to adopt the 4% threshold as a "test procedure": "The October 20, 2006 proposed amendments, including the amendments discussed above, would set a performance standard, the four percent failure rate, establishing an 'objective with the criteria stated for achieving the objective.' Government Code section 11342.570." Staff's statement comes as the culmination of an argument that the Alliance had been conducting with

staff by way of letter. *See, e.g.,* Letter from Julie C. Becker to Catherine Witherspoon, Re: Initial Statement of Reasons ("ISOR") Concerning Proposed Amendments to California's Emission Warrant Information Reporting and Recall Regulations and Test Procedures," at 4-9 (Oct. 30, 2006). The purpose of staff's response is to argue that it setting a "performance standard" and not a "prescriptive standard" within the meaning of the California Administrative Procedure Act ("CAPA"). We disagree with staff's argument that the 4% threshold constitutes a "performance standard," rather than a "prescriptive standard" within the meaning of CAPA (see subsection G. below), but the important point for present purposes is that staff concedes that the 4% threshold is a standard setting a level of compliance that manufacturers must achieve.

For the reasons stated above and throughout the Alliance's various legal comments (reincorporated herein by reference), a substantive "standard" and a "procedure" are two, very different things in the law. *See* Alliance Legal Comments, at 11 (invoking the substance-procedure dichotomy); *see also id.* 5-11. The standards the Health & Safety Code authorizes ARB to set are "emission standards." *See, e.g.,* Health & Safety Code § 43105. ARB is not empowered by the Health & Safety Code to set product reliability standards. For it to have that kind of authority, it would have to be delegated the power to regulate for consumer-protection purposes. And as the Alliance has explained, ARB lacks that power. *See* Letter from Steven P. Douglas to Kirk Oliver, Re Possible Amendments to the Procedures for Reporting Failures of Emission-Related Components (Attachment, at 16-17). Yet, staff now admits they seek to fix "a performance standard, the four percent failure rate, establishing an 'objective with the criteria stated for achieving the objective.'" Supplemental ISOR at 7.

Also, as noted in the Alliance's Legal Comments, the Legislature has defined the term "test procedure" even more specifically:

For the certification of new motor vehicles or new motor vehicle engines, the state board shall adopt, by regulation, test procedures and any other procedures necessary to determine whether the vehicles or engines are in compliance with the emissions standards established pursuant to Section 43101. The state board shall base its test procedures on federal test procedures or on driving patterns typical in the urban areas of California.

Health & Safety Code § 43104. The purpose of Section 43104 to establish test procedures as a measurement mechanism "to determine whether the vehicles or engines are in compliance with the emissions standards" could not be clearer. Nowhere is the power to set "test procedures" described by the Legislature as embracing the power to enact a substantive product reliability "standard," whether of a "performance" or a "prescriptive" nature. ARB staff's concession here that they intended precisely to do what the Alliance has been contending that staff was aiming to accomplish all along -- to create a 4% *substantive product reliability standard* -- is dispositive of the fact that this rulemaking must be withdrawn as *ultra vires* under the California Health & Safety Code.

G. IN THE FULL CONTEXT OF CAPA AND THE HEALTH & SAFETY CODE MOBILE SOURCE PROVISIONS, THE FORM OF STANDARD STAFF HAS ADMITTED TO PROPOSING IS NOT PROPERLY CHARACTERIZED AS A MERE "PERFORMANCE STANDARD" INSTEAD OF A "PRESCRIPTIVE STANDARD."

Turning from the most significant point -- that staff has admitted that their 4% threshold is a "standard" and not a "procedure" (and specifically not a "test procedure" designed for measurement purposes) -- we are constrained to point out that staff is incorrect in their characterization of the type of "standard" they propose to adopt. The Alliance was careful in its October 30, 2006 letter to specify that the terms "performance standard" and "prescriptive standard" in the Health and Safety Code could not be understood in the abstract. *See* Letter from Julie C. Becker to Catherine Witherspoon, Re: Initial Statement of Reasons ("ISOR") Concerning Proposed Amendments to California's Emission Warrant Information Reporting and Recall Regulations and Test Procedures," at 4 (Oct. 30, 2006) ("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."). The footnote coming off of that assertion cited to traditional understandings among legal and environmental experts as to the contextual meaning of a performance standard in the environmental area, concluding that,

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 emissions 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.

Id. at 4 n.2. Staff simply fails to grapple with this argument and all, proceeding as if the Alliance simply cited to the CAPA provisions defining "performance standards" and "prescriptive standards." The Alliance's argument was considerably more nuanced and staff does not discharge its administrative law obligation to respond to significant comments by imagining a simpler comment and then brushing it aside with an irrelevant explanation. When the Legislature stated that "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," it made clear its intention to regulate vehicles and engines as an emissions system and not on a component-by-component basis.

It is true that the Proposed Regulation does not require a particular emission related part to meet some criterion. Instead, the Proposed Regulation requires *every* emissions-related component to stay below the 4% threshold. In full context, that is plainly a "prescriptive standard" as compared against a system-based "emission standard," which operates by contrast as a "performance standard." This is true also under the textual definition of a "prescriptive standard." The Legislature in Government Code § 11342.590 defined a "prescriptive standard"

as “ a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means.” Every part of that definition is significant. By stating that a “prescriptive standard” “specifies the sole means of compliance with a performance standard,” it is clear that a primary, performance standard must be located in the organic statute that gives rise to agency authority. Hence, “performance standards” and “prescriptive standards” do not comprise an abstract dichotomy that can be readily perceived without more. First one must identify the relevant “performance standard,” and then judge whether a “prescriptive standard” is being created against that baseline.

Staff’s argument that they were entitled to term their 4% defect threshold a “performance standard” would make sense if they possessed the authority to set such standards in the Health & Safety Code. But ARB does not have that power. Instead, the only kind of standard that ARB can set in this area is an “emissions standard.” See Health & Safety Code §§ 43105-43106. Hence, that is the baseline against which a “prescriptive standard” is measured. In that regard, the 4% defect standard tells manufacturers that the only way they will comport with the new standard in the Proposed Rule is if each of their components does not fail at a level greater than 4%. Hence, the Proposed Rule is a “prescriptive standard” because it “specifies . . . measurements, or other quantifiable means” that go beyond the “performance standard[s]” -- i.e., pollutant emissions standards -- that the Legislature authorized ARB to fashion.

The *relative* nature of the performance-vs.-prescriptive standard dichotomy is also apparent from Government Code § 11346.2(b)(3)(A) (emphasis added): “In the 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.” Even based on the staff’s profession that its 4% defect threshold is simply a new “test procedure” then creates a “specific procedure,” and hence qualifies as a “prescriptive standard.” At the very least, the 4% threshold requires particular actions -- the design (and subsequent insurance-like guarantee) that each and every emissions-related component (literally hundreds of separate pieces of a working emissions system) must not exceed the 4% threshold. In proper context that judges “prescriptive standards” against the baseline of a relevant “performance standard,” and reading “performance standards” in the classic situation of environmental regulation to equate to an “emissions standard,” it is clear that staff is proposing a “prescriptive standard.” Hence, staff must explain why equivalent emissions benefits could not be achieved by way of adjusting the relevant emission standards, instead of by trying to break down regulation of the emissions system (judged by an overall standard) into regulation of the component parts of that system, by way of a product reliability standard imposed on each of those components.

As the Alliance noted in the October 30, 2006 Letter, what staff has failed to address themselves to is the engineering concept of design redundancy. See October 30, 2006 Letter at 7. Up to this point, emissions systems have been regulated precisely in that fashion -- as a system. In this Proposed Rulemaking, staff proposes to require each component of the system to function at a greater than 96% reliability level. That prevents manufacturers from taking advantage of design redundancy -- the idea that multiple parts in the emissions system are designed to collectively ensure that the emissions standard is met at all times, even if particular components cease to function or are functioning sub-optimally for some reason. Since the goal

of the Health & Safety Code is to set emissions standards and thereby limit emissions, it is far from clear why manufacturers should not be permitted to regulate to hit that target instead of seeing the reliability of the components they build into their emissions systems micro-managed.

It is as if the Board told staff not just to produce a proposed rulemaking on a particular subject, but set a requirement for each and every step in that process. Or as if a chef were told not just to prepare a meal, but if each and every ingredient were required to meet a particular standard or the whole meal would be deemed faulty. Staff would resent being micro-managed at that level, and so would the chef. The proper measure of the quality of a proposed rulemaking can be judged, for the most part, as a finished whole, and just so with a meal. And that is also true of an emissions system. As long as the emissions system does not exceed the emissions standard, it is a high-quality, effective, and law-abiding emissions system. Any attempt to regulate at a layer beneath the overall emissions system micro-manages an already difficult technical task done under conditions of technology-forcing (conditions that neither regulators nor chefs are required to contend with), increasing the difficulty exponentially with each additional component that must be made greater than 96% reliable.

To the extent staff disagrees that a properly functioning vehicle or engine from the Health & Safety Code standpoint is not to be measured based on a system-wide emissions standard, it is incumbent upon them to explain why in *precise* terms. That explanation is lacking. We suspect the answer is because what truly motivates this rulemaking is the belief that even if an engine is meeting emissions standards, if a customer brings in a vehicle for repairs to emissions-related components outside the warranty period and must pay for those repairs out of pocket, the customer is being treated unfairly. The important point there, however, is that ARB lacks the authority to regulate for consumer-protection purposes. Moreover, ARB completely ignores the letter of Section 43205 of the Health and Safety Code and the intent of the legislature, which reached a compromise by fixing the warranty period, recognizing that manufacturers are not "insurers" of vehicles, and to expect so would strip value from the vehicle repair industry. By reasoning in such a fashion, staff and/or the Board exceeds the Legislature's mandate. Moreover, they ignore that there are independent legal remedies for such matters. Consumers can bring suits for real product defects under product liability laws, lemon laws, or other federal consumer protection laws in the nation. (ARB lacks the authority to regulate for consumer-protection purposes. *See, e.g.,* 64 Ops. California Att'y Gen. 425, Op. No. 80-718, 1981 WL 126765 (May 27, 1981)). More importantly, in situations where consumers truly are impacted negatively by a component with a high failure rate, manufacturers often willingly repair those kinds of problems, even outside of the warranty period. Nowhere does staff explain why a redundant set of remedies by an agency with a very different type of expertise than designing warranties and repairing vehicles should be established in California law by ARB.

IV. ANALYSIS OF ALTERNATIVES

A. OVERVIEW

On pages 7-12 of the Supplemental ISOR, staff responds to some general issues raised in connection with the Proposed Rule and also responds to specific regulatory alternatives. First in that regard, staff provides further reasoning explaining why it opposes the traditional defect reporting tie-in to emission standard exceedance. Says staff:

[We] believe[] that basing the availability of recall or other corrective action on the emissions impact of a systemic failure of emissions-related components is undesirable and unnecessarily frustrates the implementation of proper remedies. Emissions testing needed to demonstrate emissions impacts of failures of emissions-related components is expensive, time-consuming, seldom dispositive and is fraught with issues regarding the validity of any particular test plan. Taking these circumstances into account, the staff believes that it is desirable to base the availability of recall or other corrective action on a clearer *standard*

Supplemental ISOR at 8 (emphasis added) (note again the admission that staff has created a new substantive standard). The Alliance first points out that it is highly unusual for staff to criticize emissions standards, since they are at the heart of the federal and California regulatory regimes for improving the air. If the Clean Air Act and the California Health & Safety Code are to be deemed successful, it is precisely because they established emissions standards and imposed them on industry. If the staff (and the Board, if it adopts the Proposed Rule and Supplemental ISOR as its own) believes that emissions standards are flawed and that it is cumbersome to measure them, then staff needs a far more extensive explanation of what that is not true across the board, wherever emissions standards appear in the California Code of Regulations or the Health & Safety Code. The question the staff must address in that instance, but has not addressed, is: "Why is it uniquely difficult to use emissions standards as the touchstone for compliance with the defect-reporting system, but not as difficult or undesirable to use the emissions standards everywhere else they are used?"

Staff next says that using emissions standards is: "expensive, time-consuming, [and] seldom dispositive." *Id.* The Alliance has proposed to eliminate the objection that using emissions testing is expensive by offering up an alternative by which the relevant manufacturers would pay for any required testing program. *See* Alliance Main Comments (March 22, 2007) (Attachment A Proposal). Hence, expense cannot be used as a rationale to decouple the defect-reporting rules from emissions standards. Staff also argues that emissions standards are seldom dispositive, but the Alliance and its members are willing to make them dispositive. Indeed, the Alliance does not see why continued compliance of a vehicle or engine's emissions system with the emissions standard is not dispositive of any relevant legal or policy questions in this area. Thus, staff must mean that it would still like to order corrective action even when emissions standards are met. But if so, then arguing that a desire to order recalls or extended warranties persists on the part of staff even if emissions standards are satisfied is a circular argument, and not a reason for rejecting emissions standards as the benchmark.

Staff is correct that running an in-use procurement programs to obtain representative vehicles that were properly maintained and used can be time-consuming. But the Board does not explain why such programs as currently in force federally and in California are not subject to precisely the same criticism. Extremely simple systems that take virtually no time to enforce can be imagined, but those alternatives do not necessarily make any logical sense or comport with the law. If a group of vehicles have a failing component on less than a classwide basis, and continue to meet emissions standards, the Alliance does not see on what possible basis they can be deemed to be defective. Moreover, the status quo regulatory system allows manufacturers to make arguments based on good engineering judgment arguing based on back-of-the-envelope

calculations about the likely impact of particular types of defects. Staff proposes to eliminate such demonstrations by engineering judgment as well, and provides no explanation for doing so. The engineering-judgment analyses that have been typical avoid the costs and delays associated with a full-blown testing program, including procuring the vehicles to be tested. Nowhere does staff explain why the benefits of that approach should be jettisoned, or why, if it has value, that does not wholly answer staff's requirement to have a system that gets the best of both worlds out of objective measurements (full-blown emissions tests where ARB requires them) and processes of estimation of emissions impacts (good engineering judgment-type approaches).

Staff then explains what it sees as the relevant advantages of its proposed approach:

Accordingly, the staff developed the *proposed standard* which is based on the simple showing that an emissions-related component failed in use at a particular percentage rate, as evidenced in the emissions warranty reports that vehicle manufacturers file with the ARB the staff believes that the approach it proposes has several other advantages: allowing the implementation of swifter recalls or other corrective actions at lower transaction costs, harnessing the powers of on-board diagnostic systems to detect emission component failures and warn drivers to seek repairs, relating the recall/corrective action decision to the durability demonstration that manufacturers must make to obtain ARB's certification, and guaranteeing that the vehicles that manufacturers use for certification testing are substantially the same in construction in all material respects to the vehicles that they sell to the public (Main Points - Section I. 5). Staff believes that emission-control components are installed by the manufacturers to control emissions. Those components are required to be durable for the certified useful life; and, if they fail at systemic rates early in customer use, they violate certification test procedures and will lead to increased emission levels. Those defects should be addressed quickly and the current proposal serves these purposes more effectively than the alternatives, which are based on emissions impact and emissions testing.

Supplemental ISOR at 8 (emphasis added) (note again the admission that staff has designed a substantive "standard"). The first advantage is swifter recalls at "lower transaction costs." This is simply the flip side of the claimed disadvantage of using an emission-standard tie in. The Alliance therefore offers the same response as above. Alliance members are willing to bear the cost of testing, and the advantages of judging enforcement actions based on their emissions impact should not be thrown out simply because sometimes it makes sense to estimate such effects, rather than measure them exhaustively through a full-blown testing program.

Second, staff says that its proposal harnesses the power of OBD systems. It eludes the Alliance how a "simple showing that an emissions-related component failed in use at a particular percentage rate" has any particular tie-in to the OBD system. The OBD system and its regulation exists independently of the defect-reporting regulations, either as they stand now or as staff proposes to amend them. Furthermore, and to the extent that the OBD triggers warranty claims of emission-related components for which reporting must occur, the effect is already in place. Hence, there is no particular OBD-related advantage associated with the Proposed Regulation.

Third, staff argues that the Proposed Rule better “relat[es] the recall/corrective action decision to the durability demonstration that manufacturers must make to obtain ARB’s certification.” Supplemental ISOR at 8. Here, in the second alternative the Alliance presents to the rulemaking in its March 22, 2007, any benefits of this advantage are also nullified. See Alliance Main Comments (March 22, 2007) (Attachment B). There, the Alliance indicates that it would be willing to accept the compliance statement proposed by staff as long as the Alliance also had various types of affirmative defenses, especially one based on meeting the emissions standard. In short, the Alliance agrees with staff that “emission-control components are installed by the manufacturers to control emissions.” Supplemental ISOR at 8. That is why the Alliance is incredulous that staff would not only propose to decouple the defect reporting system from emissions standards, but advance affirmative arguments as to why a system based on regulating by emissions standards is flawed. There is no reason that staff cannot have a compliance statement, based on “good engineering judgment and available information” at the time, that manufacturers will attempt to design vehicles that do not have failing components at a greater than 4% level. Indeed, manufacturers already design their vehicles with components to fail in practice at rates far below that. What the Alliance cannot accept is a system that eliminates a consideration of emissions-standard compliance, which is completely separable from requiring some form of compliance statement. Nowhere does staff explain why a compliance statement and use of an emissions standard in defect-reporting regulation are fundamentally incompatible, as the explanation they give above presupposes.

Finally, staff argues that the Proposed Rule would “guarantee[] that the vehicles that manufacturers use for certification testing are substantially the same in construction in all material respects to the vehicles that they sell to the public.” This argument has already been addressed above. It rests on a counterfactual presupposition that all defects are manufacturing and not design defects, and that many exceedances of the 4% threshold will occur when no defects are present at all, but simply unforeseeable circumstances. Put another way, the prototype vehicle may be identical in every way to production vehicles, yet not encounter the unforeseen durability problem that may cause it to fail prematurely. As noted above, if staff desires to stick to its guns that the dispute here boils down to whether vehicles in use, marked by greater than 4% defect rates, are substantially the same as prototype testing vehicles, then staff should have no exception to granting manufacturers as an alternative to its Proposed Rule an affirmative defense to demonstrate the substantial identity of vehicles produced in a particular engine family or group to the prototype test vehicle.

Therefore, overall, taking the responses above into account, there are no reasons that remain for staff to eliminate consideration of emissions standards and insist on its form of a Proposed Rule.

Perhaps recognizing the thin rationales offered in the Supplemental ISOR for why emissions testing can be eliminated from the defect-reporting system, staff offered some additional arguments in Slide #14 of the presentation it made at the February 14, 2007 public workshop:

Why Not Consider Emissions Testing?

- Testing cannot be streamlined into one generic test plan to accurately predict the impacts of failed emission components over the certified useful life
- Cannot rely on emissions testing to determine the true emissions impact of a defective component or impacts on other emission control parts over time
- Invalid testing could occur as a result of component failure
- ARB may have to conduct additional testing to prove a violation exists -- if so, when is corrective action proven?

The Alliance responds to each of these bullets in turn as follows. *First*, ARB staff ignores some very important issues with this statement. Instead of a single test plan, industry will agree to propose a test plan when the failure rate of a component exceeds 4 percent. ARB staff can then approve or modify the test plan to ensure the test plan accurately predicts the impacts of the failed emission component. Moreover, industry did not intend to suggest that only one test would be conducted. In fact, ARB has many test plans to test the various driving conditions vehicles undergo, including: the Federal Test Procedure ("FTP") for normal driving, US06 to test high-speed, high-load conditions, evaporative emissions testing for evaporative emissions, unified cycle, SC03, etc. Industry expects that ARB would work with industry to choose the most appropriate test program. Finally, the entire history of vehicle emission controls is based on testing with one generic test plan. To suggest that it is impossible to accurately test for emissions ignores decades of work by both industry and agencies. The following is a list of some of the "generic test plans" that manufacturers and agencies currently conduct:

1. FTP, certification testing
2. US06, certification testing
3. SC03, certification testing
4. Evap, certification testing
5. Compliance testing
6. IUVP testing
7. Roadside testing
8. Cold CO 50 degrees Fahrenheit

Second, the purpose of the testing is to determine if the whole vehicle exceeds the emission standards. Again, for over three decades manufacturers and agencies have relied on emissions testing to determine the true impact of components. Moreover, vehicle manufacturers design to ensure the whole vehicle meets the emission standards recognizing that they must ensure the sum of the parts do not exceed the standard. To ensure this is the case, manufacturers always include some margin (or "headroom") so that variation in manufacturing or unforeseen vehicle operating conditions do not cause the whole vehicle to exceed the emission standards. The process of determining how one part interacts with another and its affect on the system as a whole is the exact process manufacturers use to develop, validate, and certify new vehicles to the emission standards. Finally, while there are some components whose failures would cause complex interaction with other parts and systems, the vast majority of failures would be

relatively simple to analyze and their effects very limited. Because of the variation, the Alliance recommended an engineering evaluation accompany the test program (or in some cases, in lieu of the test program).

Third, it is difficult to understand the issue raised here. Presumably, ARB staff believes that a failed component could *prevent* a test from being conducted. No examples have been provided and again, these can be handled as they have been for the past two decades with engineering analysis and discussions between manufacturers and ARB.

Fourth, a violation exists if a defect causes the vehicle to exceed the emission standards. Corrective action should begin as soon as a violation is proven. Unlike the staff's proposal, which *prohibits* a manufacturer from conducting emission testing, the Alliance proposal allows ARB to conduct any testing it believes appropriate. Nonetheless, manufacturers have agreed to conduct the testing at their expense.

B. STAFF IGNORES MANY ALTERNATIVES OR PROVIDES ONLY A CURSORY RESPONSE

By the Alliance's own count, it has offered three alternatives to the Proposed Rule (whether defined in any of the forms from October 10, 2006 until March 12, 2007). It offers an additional alternative (and more details on its third alternative) below. Also, staff must always analyze a no-action alternative. Also, staff needs to analyze its own April 2006 proposal at the workshop process. To date, the analysis staff has provided of alternatives has been cursory and conclusory, or worse yet, entirely absent. Here are a listing of alternatives that staff must consider:

(1) The no-action or status quo alternative The Alliance pointed out in its Legal Comments that the examples of the Toyota and Chrysler cases in the ISOR were insufficient. *See Alliance Legal Comments*, at 34-35. Staff has provided no response in the Supplemental ISOR.

(2) Revising the Proposed Rule to achieve equivalent emissions benefits by way of a minor adjustment to existing emissions standards Quite apart from the dispute staff has with the Alliance over how CAPA requires the Proposed Rule to be characterized -- i.e., as either a "performance standard" or "prescriptive standard," staff has an independent obligation to consider an alternative that would alter emissions standards slightly, which the Alliance avers would achieve the same objectives, but at lower cost. *See Alliance Legal Comments* at 36, 36. Staff has provided no response in the Supplemental ISOR. The Alliance is not here recommending that the emissions standards are in need of change. We do not believe they are. The point is that any change to the regulatory system in this area that adopts a new substantive standard must consider an amendment to the emissions standards as a benchmark for comparison purposes so that the relative disadvantages (and advantages, if there are any) of going beyond regulation by emission standard may be exposed.

(3) Alliance May 2006 Workshop Proposal -- The Alliance proposed using a projected failure level rate and building that into staff's proposed flowchart approach. *See Alliance Legal Comments*, at 35 & Attachment D. Staff has provided no response in the Supplemental ISOR.

Staff did address this issue in the Supplemental ISOR. Staff argued that “a vehicle would have to fail the standard(s) by an extreme amount and be driven in this condition for thousands of miles before corrective action would be considered.” Supplemental ISOR at 9. Staff nowhere explains why such an alternative is flawed given the longstanding use in ARB regulations of family-based emission limits and averaging. *See, e.g.,* 51 Ops. California Att’y Gen. 20, Op. No. 68-47 (Mar. 13, 1968) (providing a strong rationale for concluding that the Legislature ratified emissions averaging. “It must be presumed that the aforesaid interpretation has come to the attention of the Legislature, and if it were contrary to the legislative intent, that some corrective measure would have been adopted in the course of the many enactments on the subject in the meantime.”) (quoting *Millsap v. San Pasqual Union Sch. Dist.*, 232 Cal. App. 2d 333, 336 (1965)). What would allow some subset of vehicles with failed components to emit in excess of the standard for some period of time before being repaired without necessitating corrective action on all vehicles in the affected family is to hypothetically compare that situation to one in which manufacturers had simply built less headroom into the vehicles for that same engine family -- something they are clearly entitled by law to do as all vehicles would still be operating beneath the standard.

Consider an example in which a particular engine family emits 1 ton of a regulated emission with a particular large level of headroom. Then an emissions-related component on 10% of those vehicles fail for a period of 10% of the useful life of the vehicles. The total emissions increase of the family is therefore 1% (10% multiplied by 10%). Thus total emissions are 1.1 ton in consequence. If manufacturers could reduce the amount of headroom and still emit a total of 1.2 tons or 1.3 tons, or even far more, than what is dubious, and what staff has failed to explain, is why the vehicles with the failed emissions component, even if that percentage of vehicles exceeds emissions standards by a great degree and are driven for thousands of miles, should matter from a family-based emissions standpoint. Also, because staff refuses to calculate the emissions benefits they simply assert are present in the Proposed Rule, there is no way for the staff to establish that abandoning a family-based emissions standard is wise air policy. That is particularly true in light of the fact that disincentivizing manufacturers from building additional headroom into vehicles, which is clearly one effect of this Proposed Rule, *harms* the environment. *See, e.g.,* Report of Dr. Scott Carr, LECG, at 12 (“This provides manufacturers with a very real incentive to minimize emissions from all their vehicles – the lower a vehicle’s emissions when all components are intact, the more likely the vehicle is to avoid a corrective action if one of its components surpasses the 4% threshold. Or, to look at this another way, the proposed regulations remove incentives for manufacturers to minimize vehicle emissions.”). That disincentive alone may swamp any benefits that would ostensibly accrue from abandoning the decades-approved family-based emissions limit approach. Again, however, staff would not be able to focus on this issue, because they have neglected to perform any overall emissions analysis that would be able to sum and then net all emissions effects of the Proposed Rule, positive and negative.

(4) Staff’s Own April 2006 Workshop Proposal -- Staff has not explained why its original April 2006 proposal, which kicked off this rulemaking process informally, was not a viable alternative. The Alliance is at a loss to understand how staff could have floated an alternative in April, but within six months (by October 10, 2006), that proposal somehow became untenable. Staff does not address this issue in the Supplemental ISOR. Presumably, staff’s only response is

the generic one it gives as to why any use of emissions standards as a touchstone for defect-reporting enforcement is inappropriate. If so, consideration of this alternative stands or falls based on the adequacy of that analysis by the staff.

(5) Alliance November 20, 2006 Alternative -- Staff rejects this alternative only for the reasons it has given for decoupling the defect-reporting system from the emissions standard generally. See Supplemental ISOR at 9-10. Hence, the Supplemental ISOR's consideration of that alternative stands or falls based on whether staff's explanation for eliminating consideration of emissions standards generally, is sufficient, which in the Alliance's view, it is not.

(6) Alliance January 16, 2007 Alternative -- Although it is unclear, staff rejects this alternative because it requires a minimum of five tests of typical failures. See Supplemental ISOR at 10. As the Alliance indicates in its main comments, staff never engaged the Alliance on what an appropriate number of tests would be. Hence, it is no position to claim that five is too many. Staff also appears to suggest that a seven-month delay associated with performing five tests is too long. Obviously, the time to complete a test program depends on how many tests will be performed and so staff's failure to engage on that point similarly disqualifies their objection to the delay of performing the testing. Staff then indicates that it anticipates disagreements with manufacturers about typical failure modes. See *id.* But disagreement with staff anywhere should not be an excuse for eliminating manufacturers' ability to engage with staff about what the nature of some objective fact is. If that were true, ARB could reduce its enforcement to a series of determinations that avoided all potentially "inconvenient" debates about the nature of underlying facts. But it is not possible to determine if a classwide defect does or does not exist by ignoring all potential facts that manufacturers could use in their defense.

Staff next argues that the disagreements may lead them to have to perform their own tests. The Alliance sees no reason why this is true. If there are true disagreements about the nature of typical failure modes that cannot be resolved prior to testing, then testing could be run under both a staff-proffered failure mode and a manufacturer proffered failure mode, and the results compared. If there remained a disagreement about potential corrective action, the two types of test results could be submitted to a neutral decisionmaker for resolution.

Finally, staff argues that there are "discrepancies and inaccuracies of emission test results due to laboratory quality control procedures." Supplemental ISOR at 10. Test procedures are as objective and well-carried out as manufacturers or independent laboratories can take them. Staff proposes to substitute a Proposed Rule giving vast "sole discretion" to the Executive Officer. It is inexplicable to the Alliance how staff can reject alternatives to the Proposed Rule, which creates a vast system of unreviewable administrative discretion, because they are insufficiently objective and might contain errors. What the staff ignores, and what the Alliance is entitled to pose as questions to ARB is -- "What about errors made by the Executive Officer? Why should the Executive Officer's determinations not only be presumed to be infallible, but actually be established as infallible (since under the current Proposed Rule, they are unreviewable)?" Anglo-American law long ago dispensed with the fiction that the King can do no wrong. Instead, all governments must be accountable to the people by way of transparency and the ability to review arbitrary, capricious, manifestly unjust, or abusive decisionmaking. What is missing from the rejection of this alternative is an analysis of why laboratory test results, even if

they may be erroneous or sub-optimal in some cases produce systematically inferior results to allowing unfettered Executive Officer discretion as to when to require corrective action or not. *See, e.g., Proposed Section 2168(f) ("If a manufacturer demonstrates to the satisfaction of the Executive officer that a systemic emission component failure will not have an emissions impact under any conceivable circumstance, then no corrective action shall be required for the affected vehicles or engines. The Executive Officer need not base this determination on emissions testing.")* (emphasis added).

Attachment A to the Alliance's Main Comments provides additional details on the January 16, 2007 alternative, but obviously staff cannot respond to those, since they are being submitted on March 22, 2007, until a later date.

(7) Alliance "Fair Hearing" Alternative -- The last alternative the Alliance has presented is Attachment B to the Main Alliance Comments (March 22, 2007). Staff (and/or the Board) must address this alternative before adopting a final rule.

C. NEW ALTERNATIVES

Given the persistence of staff in pressing their compliance statement, which rests on logic that any fault that appears in a vehicle causes it to be substantially different than the prototype vehicle causes us to offer this new alternative that ARB must evaluate:

Manufacturers should be afforded an affirmative defense in Proposed Section 2174 to any ordered corrective action by the Executive Officer if the manufacturer can prove by a preponderance of the evidence that the vehicle engine family or group in question is, in fact, substantially the same as the prototype vehicle used for certification purposes of that engine family or group with ARB.

The other new alternative is in Attachment B to the Alliance's Main comments. With regard to that alternative, we note that the Supplemental Staff Report issued in connection with the Nov. 18, 1988 Board hearing on the status quo version of these regulations clearly stated that any requirements of these rules should be waivable "if they constitute an unwarranted burden on manufacturers without a corresponding emission reduction." 1988 Supplemental Staff Report at 8.

V. STAFF'S ANALYSIS OF COSTS IS DEFICIENT, AND STAFF MAKES NO EFFORT TO ESTIMATE EMISSIONS BENEFITS COMPARED TO COSTS OR TO EVALUATE ALTERNATIVES BASED ON COST EFFECTIVENESS.

In the Supplemental ISOR, staff retreats from its self-evidently incorrect assertions that the Proposed Rule would prove costless or in fact may save manufacturers money. Staff now admits that the Proposed Rule will have positive costs. Staff nowhere explains why they are

abandoning those assertions, which is action of an arbitrary and capricious nature.⁵ They simply assert a new analysis without any explanation of why the previous analysis was flawed.

Specifically, staff estimates costs of corrective actions in 2002 at a total of \$41 million. Says staff:

Had the proposed revisions to the warranty reporting program been in effect for the 2002 model year, 700,000 vehicles would have been identified as having systematic defects, a 63 percent increase compared to the current program. All affected models would have had extended warranties as the corrective action; none would have clearly met the requirement for recall. Using the same assumptions discussed above, the cost of the program for 2002 would have been \$66 million, a 61 percent increase.

Supplemental ISOR at 12-13.

Staff goes on to assert that the full 61% increase from \$41 million to \$66 million will not occur because the warranty program will generally become less costly by 2010 when, by staff's prediction, approximately 43% of vehicles will be PZEVs. *See id.* at 13. Respectfully, this explanation makes no sense. The PZEV requirements are entirely separate from this warranty defect-reporting rulemakings and the changes being proposed to it therein. Hence, whatever effects the PZEV program will have on the costs of the defect reporting program will occur whether the form of that program is the status quo or the one in the Proposed Rule. Hence, any cost reductions associated with that program cannot be taken credit for under the Proposed Rule. Failing to recognize this commits one of the cardinal errors of cost-benefit analysis -- double-counting. *See E.J. Mishan, Cost-Benefit Analysis*, at 4-4 (4th ed. 1988) ("Any rise in land values resulting from the new [subway] is not, however, to be counted among the benefits: to do this would be to count a given benefit twice, once as a flow and once as a stock. For a rise in the value of land in a particular location, arising from the faster communication to the town centre and other locations, reflects only the capitalized value of the expected future benefits of faster communications."). Hence, there is no reason not to conclude that by the staff's own estimate,

⁵ *See, e.g., Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1111-12 (4th Dist. 2004) ("A statement of reasons is necessary to assure meaningful judicial review in the event, as here, the EIR is challenged in court. 'Mere conclusions simply provide no vehicle for judicial review.' (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171, 217 Cal. Rptr. 893.) Here, for example, because there is no statement of reasons we cannot discern whether the Agency reached its 'less than significant' conclusion regarding the reduction in surface flow of local streams based on substantial evidence in the administrative record or because, as plaintiff asserts, it rotely applied standards of significance that did not address reduction in stream flow as a potential environmental effect of the project. Thus, the absence of the required statement of reasons prevents us from determining whether the Agency abused its discretion in the manner plaintiff claims. That absence itself, however, demonstrates an abuse of discretion by the Agency, because in omitting the required statement of reasons, the Agency failed to proceed in the manner required by law.").

the rule would cost \$25 million per year annually than the existing system, assuming 2002 to be a representative year.⁶

Moreover, staff recognizes that the year 2002 is not representative because it included no recalls whatsoever. See Supplemental ISOR at 13. Staff then estimates how much a recall would have cost in the Chrysler case. The estimate arrived at was an additional \$17 million (from \$21 million to \$38 million). (Additionally, the estimate of costs imposed on DaimlerChrysler in the relevant case are about 1/3 of the actual costs of approximately \$50 million.) Says staff: "Although this type of failure and recall is relatively rare, staff's assessment provides an estimate of how the annual cost of the program could vary." *Id.* What this means, in sum, then, is that in any year where there is one recall, costs could increase by a factor of 41% (\$17 million out of \$41 million), and of course increases would be substantially greater for any year in which there were multiple recalls.

Additionally, the staff's analysis does not account for the reservation in the Proposed Rule of the "sole discretion" of the Executive Officer to require recalls in his option. This could dramatically increase costs, since the current calculations in the Supplemental ISOR are based on a baseline that assumes all corrective actions would be orders for extended warranties. Nor does the staff's analysis take account of the reservation for the Executive Officer to order *both* an extended warranty and a recall, increasing potential costs still further. Staff did not even attempt a sensitivity analysis -- i.e., to determine as a bookend, what the cost of the program would be if the Executive Officer decided in every case to enforce to the hilt and require the maximum corrective action. That is a cost number that should at least be included in the record for analysis purposes, because manufacturers, of course, have no assurances that this or a future Executive Officer will not exercise his or her discretion to the maximum possible extent. This is especially true and has a synergy with the due process issue, because manufacturers are given no way in the Proposed Rule to effectively check abuses of Executive Officer discretion.

Staff attempts to offset against its cost estimates (and perhaps against the factors it has not even grappled with, like the fact that manufacturers face wide-ranging discretion that can inflate the costs estimated by multiples), by noting that manufacturers are being relieved of a minor reporting burden. See Supplemental ISOR at 13. Here, however, staff recognizes that "cost . . . is expected to be a very small savings." Staff then asserts that manufacturers have had differential experience in terms of whether they face costs under the defect reporting system. See *id.* Right or wrong, however, that assertion is irrelevant to the fact that the rule will cause increased costs, based even on staff's own estimates, over historic levels. Or put differently, if there are historic differences between manufacturers in terms of costs paid under the program,

⁶ Additionally, although less material than the double-counting issue, the Alliance takes issue with the optimistic assumptions about PZEV durability technology being passed on to other vehicles. Vehicle components are already designed to fail at far less than a 4% rate, and there is thus no magic in a regulatory command to increase warranty periods for PZEVs. Manufacturers will surely have to comply with that law or bear the increased warranty expenses, but nowhere does staff justify that the underlying assumption that the PZEV 150,000 mile warranty requirement will magically induce the development of new durability technologies that can be passed on to other vehicles at any particular rate.

the Proposed Rule offers no basis to assume that that history is not the best guide of the future or that the changes to the status quo will somehow eliminate inter-manufacturer cost differentials, assuming they exist. Staff next reiterates the PZEV issue that runs into the double-counting fallacy. *See id.* at 13-14. Such an assertion is not supported by record evidence, and in any event is arbitrary and capricious because whatever cost benefits the PZEV program will have on the defect-reporting program will accrue quite nicely without changing the defect-reporting program.

Finally, staff asserts that "the cost of improving a part is relatively small compared to the total cost of the parts and labor levied for a corrective action." Supplemental ISOR at 14. Staff provides no empirical evidence to support that assertion, which boils down in practice to an assertion that manufacturers act irrationally. If it were really true that the costs of designing parts of improved durability and reliability were less than those experienced in existing corrective actions, then manufacturers would be foolish not to undertake such steps *sua sponte* without ARB regulation. That should lead the staff to ask, on their assumption, what explains manufacturers not taking such steps. The most plausible explanation, as the Alliance has indicated based on the record of past corrective actions, is that the defects that led to corrective action were in most instances unforeseeable. It is not possible to solve for a design defect that is unforeseeable, which is why the common law does not penalize unforeseeable problems under the rubric of design defects; and, in fact, does not even consider them to be design defects. Staff's suggestion that part-redesign as a response to reducing the costs of the Proposed Rule is a ready solution thus is arbitrary and capricious.

For these reasons, we think that it is obvious that the Proposed Rule triggers the Board's obligations in Health & Safety Code § 57005. That statute defines a "major regulation" as one costing more than \$10,000,000. Based on the staff's own figures at this point, especially after eliminating the PZEV double-counting issue, the following legal obligation comes into effect for the Board:⁷

Commencing January 1, 1994, each board, department, and office within the agency, before adopting any major regulation, shall evaluate the alternatives to the requirements of the proposed regulation that are submitted to the board, department, or office pursuant to paragraph (7) of subdivision (a) of Section 11346.5 of the Government Code and *consider whether there is a less costly alternative or combination of alternatives which would be equally as effective in achieving increments of environmental protection in a manner that ensures full compliance with statutory mandates within the same amount of time as the proposed regulatory requirements.*

⁷ Section 57005 also does not limit its reach to rules with an *annual* cost of \$10 million. Hence, even if all of the staff's cost analysis in the Supplemental ISOR were credited, and the cost was only \$1.8 million per year additional from the Proposed Rule, that would still foreseeably cross the \$10 million threshold in approximately 5.5 years. Thus, there can be no basis for staff to argue that Section 57005 is inapplicable.

Health & Safety Code § 57005(a) (emphasis added). Staff has nowhere attempted to discharge this duty. One impediment to staff doing so is that it has resisted performing any sort of emissions analysis that would allow an examination of the cost of this Proposed Rule per unit of expected emissions reduction to be obtained. Without that analysis, Section 57005(a) cannot be complied with and this Proposed Rule is legally infirm. The Alliance explained why staff was violating Health & Safety Code Section 57005 and 57004 in its comments. *See Alliance Legal Comments*, at Attachment A (Attachment, at 24-26). The Section 57005 violation is reiterated above. The Section 57004 violation is that staff needs to engage the peer-review requirement there on two issues, both of which do not have the requisite scientific support at present: (1) the basis for the 4% substantive product reliability standard staff now confesses to creating; and (2) the basis for the cost-benefit analysis it has performed. *See Health & Safety Code § 57004*:

The agency, or a board, department, or office within the agency, shall enter into an agreement with the National Academy of Sciences, the University of California, the California State University, or any similar scientific institution of higher learning, any combination of those entities, or with a scientist or group of scientists of comparable stature and qualifications that is recommended by the President of the University of California, to conduct an external scientific peer review *of the scientific basis for any rule* proposed for adoption by any board, department, or office within the agency.

Health & Safety Code § 57004(b). *See also id.* § 57004(d) (explicitly prohibiting adoption of final rules not subjected to peer review). Section 57004(a)(2) defines “scientific basis” as “those foundations of a rule that are premised upon, or derived from, empirical data or other scientific findings, conclusions, or assumptions establishing a regulatory level, standard, or other requirement for the protection of public health or the environment.” The cost-benefit analysis is clearly based on “empirical data,” therefore, that requires peer-reviewed analysis. And the “findings, conclusions, or assumptions establishing a regulatory, level, standard, or other requirement” in the form of the 4% threshold for defect reporting corrective action is nowhere provided by staff.

Finally, the Board argues that the confidential cost information submitted by General Motors can be discounted because it is based on stale data. *See Supplemental ISOR* at 14. That assertion is rebutted by Dr. Scott Carr’s analysis. *See Report of Dr. Scott Carr, LECG*, at 11-12 (“I have reviewed these confidential documents, and the staff’s comments appear to be directed towards the exhibits that were attached to the submitted documents. The first of these exhibits lists all of the manufacturer’s recalls and extended warranties that were related to California’s warranty and defect reporting requirements; this exhibit also gives the manufacturer’s estimate of total cost for each corrective action. The second exhibit in this document provides cost estimates of recent corrective actions under several different scenarios. Thus, while some of the data submitted by the manufacturer is from the 1990s, the *manufacturer also made a concerted and thoughtful effort to estimate the cost of recent corrective actions and this information was ignored and misrepresented by the ARB staff.*”) (emphasis in original). Additionally, as noted above, the rationale connected to PZEVs again fails because it represents arbitrary-and capricious double-counting.

In addition to the points made above, and the points made in the Alliance's December 2006 legal comments, which have gone unanalyzed, staff must respond to the expert analysis performed by Dr. Carr, a professor on leave from the University of California system -- UCLA Anderson Graduate School of Management. He concludes that staff's cost analysis is "fundamentally flawed and should be given no weight" because it: (1) is based on insufficient data; (2) uses unrealistic and inappropriate assumptions; (3) ignores large and important categories of cost, thereby biasing downwards the estimates in predictable ways; and (4) disregards information specifically submitted to ARB in public comments or otherwise readily available to ARB. *See* Report of Dr. Scott Carr, LECG, at Executive Summary. Additionally, Dr. Carr, who is an expert engineer and specialist in product design economics, concludes that the Proposed Rule, because it removes consideration of the vehicles' overall emissions performance, actually contradicts good engineering practice. Finally, Dr. Carr concludes that ARB staff has not satisfied the necessary goal of proceeding in rulemakings to apply sound science and economic analysis.

Contrast Dr. Carr's report with staff's continued failure to follow the peer-review requirements of Health & Safety Code § 57004 (discussing use of California university review by peer experts of any form of scientific or technical analysis). Effectively, the Alliance and its members are being forced to bear the costs of performing the legal analysis that the Board must undertake to prepare this rule, because staff is shunting those duties itself. As we have pointed out before, it is for staff to make a good-faith effort in the first instance to discharge its legal obligations under CAPA and related provisions of law and then for regulatory parties to react thereto. So many aspects of this rulemaking see staff taking shortcuts and the Alliance attempting to fill in the record with the missing material. This is not the way rulemaking is supposed to unfold.

VI. LISTING OF ISSUES IN THE ALLIANCE'S LEGAL COMMENTS COMPLETELY IGNORED IN THE SUPPLEMENTAL ISOR

Where staff said something on a particular issue, but may not have responded to all necessary details of a particular Alliance legal comment, such matters were analyzed above. However, as to numerous other significant issues, staff simply has provided no response whatsoever. Such action is arbitrary and capricious.

1. ARB lacks the authority to order recalls in situations where the entire engine family has not been shown to fail applicable emissions standards. *See* Alliance Legal Comments at 12-13
2. ARB lacks the authority to order recalls (or extended warranties) for vehicles that are not new. *See* Alliance Legal Comments at 13-15.
3. The Proposed Rule is invalid under the Clean Air Act because it is inconsistent with EPA's authority under Clean Air Act Section 202(a). *See* Alliance Legal Comments at 26-28.

4. ARB cannot require manufacturers to take corrective action as to vehicles that were not properly maintained and used, if it has based an enforcement action on ignoring such considerations. *See Alliance Legal Comments at 31.*
5. Serious questions under the First Amendment arise where manufacturers are required to make certain false statements and/or refrain from making certain true statements after corrective action is ordered. *See Alliance Legal Comments at 31-34.* It is true that the March 12, 2007 version of the regulatory language eliminates the compelled speech in Proposed Section 2172.3(d)(1). But the unlawful restriction on manufacturers stating, where true, that particular corrective action will not degrade air quality remains. *See Proposed Section 2172.3(f).*
6. Staff has not provided adequate time for manufacturers to prepare an economic and/or technical study critiquing the Proposed Rule. *See Alliance Legal Comments at 39-40.* While the Alliance has commissioned the LECG study noted above, this Study merely explains why staff's simplistic assumptions and assertions about cost are incorrect. It does not undertake a full-blown analysis of costs and relative emission-to-cost benefits. The LECG study is all that could be completed in the available time. And moreover, it is ARB's obligation to perform the necessary peer-reviewed economic and technical/scientific analyses, and for regulated parties to critique that analysis, not the other way around. It is unfair for staff to force private parties to bear the cost of performing the initial stages of an analysis the Board is required to perform by law.
7. Staff has not explained why it is radically departing from the federal approach to the regulation of emissions-related vehicle defects. *See Alliance Legal Comments at 41-42.*
8. Consistent with its failure to assess emissions benefits, ARB has not attempted to discharge its duties under the California Environmental Quality Act. *See Alliance Legal Comments at 41.*
9. Staff is amending all in-use recall programs, not simply those in the Article 2.4 concerning defect and warranty-reporting, without explaining why such change is necessary. *See Alliance Legal Comments at 41-42.*
10. In general, staff has not adequately explained the purposes of the proposed regulation, presenting the risk that unstated purposes that would invalidate the Proposed Rule remain hidden. *See Alliance Legal Comments at 45.*

VII. ISSUES CONCERNING THE CONTENTS OF THE RECORD

Staff has made several statements about the content of the record in this matter to the general public in the rulemaking documents, and to the Alliance in letter exchanges that we expect staff to live up to and not backtrack about if there is some form of further review of this Proposed Rule. One danger sign is a notation on ARB's website that we include here as Attachment I. That Attachment indicates that certain portions of a letter the Alliance wrote to staff and responses thereto in connection with this rulemaking "have not been added to the

record.” We see no basis for taking such a position consistent with the California Administrative Procedure Act. Everything considered by staff (even if they rejected it) must be made part of this rulemaking file. The matter of Attachment 1 should be explained.

The Alliance also hereby requests that staff consider and designate as an official part of the record (which it is based on this request, regardless of what action staff takes) all of the documents that were part of the records for the past rulemakings in this area, especially the one in 1988. The essence of the problems with this troubled Proposed Rule, already sent back once by the Board to staff, trace to an insufficient appreciation for the issues dealt with and resolved in earlier versions of this same rule. ARB has a duty to consider that prior information, and consistent with administrative law principles, to explain why it is radically changing course in this rulemaking. Obviously, that requires a baseline for comparison purposes so that the changes can be identified and the differential explanations for what was good and lawful policy before and after are revealed.

Respectfully submitted,

The Alliance of Automobile Manufacturers

DATE: March

22,

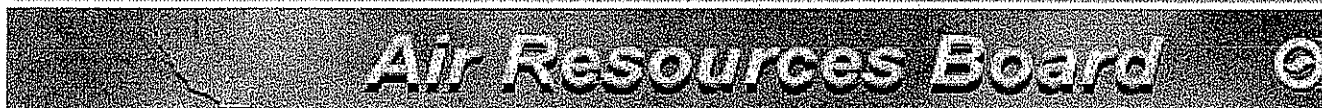
2007

ATTACHMENT 1

[California Home](#)

[ARB Home](#)

[Contact Us](#) [Software](#) [Links](#) [A-Z](#)



Comment Log Display

Below is the comment you selected to display.

Comment 27 for Emission Warranty Info. Reporting and Recall Regulations and Emission Procedures (recall06) - 45 Day.

First Name: Steven

Last Name: Douglas

Email Address: sdouglas@autoalliance.org

Affiliation: Alliance of Automobile Manufacturers

Subject: Defect & Warranty Reporting

Comment:

The attached documents have not been added to the record.

Attachment: www.arb.ca.gov/lists/recall06/48-122206_malik_attachment_3.zip

Original File Name: 122206 Malik Attachment 3.zip

Date and Time Comment Was Submitted: 2007-02-01 12:12:09

If you have any questions or comments please contact [COTB](#) at (916) 322-5594.

[Board Comments Home](#)

[Top of Page](#)

A Department of the California Environmental Protection Agency