



California New Car Dealers Association

November 6, 2009

Mr. James Goldstene
Executive Director
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on Proposed Tire Pressure Regulation

Dear Mr. Goldstene,

The California New Car Dealers Association (CNCDA) is a statewide trade association which represents the interests of over 1,200 franchised new car and truck dealer members. CNCDA members are primarily engaged in the retail sale of new and used motor vehicles, but also engage in automotive service, repair, and parts sales. We provided comments in March concerning policy and procedural problems with the initial proposed regulation. Despite several improvements made by staff in response to our concerns, the amended draft again contains several fundamental policy, procedural, and practical deficiencies. In addition to our March comments, many of which still apply, we have identified several additional concerns, described below. In light of the following, we ask for ARB to withdraw the proposed regulation and to hold another industry workshop to address the objections raised by CNCDA and other industry groups.

Administrative Procedures Act:

As discussed in our March comments, ARB's statutory authority for implementing the regulation¹ mandates strict compliance with requirements of the Administrative Procedures Act (APA)² when promulgating regulations to implement the Global Warming Solutions Act of 2006 (AB 32). The importance of meeting the emission reduction requirements of AB 32 does not allow ARB to cast aside or water down the APA's procedural requirements. Unfortunately, the amended draft proposal again fails to meet these standards.

- **Regulatory Proposal Undermines Automotive Repair and Consumer Protection Statutes:**

The proposed regulations require all Automotive Service Providers (ASPs) to "check and inflate each vehicle's tires to the recommended tire pressure rating . . . at the time of performing any

¹ Health and Safety Code Section 39601.

² Government Code Sections 11340, *et seq.*

automotive maintenance or repair service.”³ Unless the vehicle or tire meets certain uncommon conditions,⁴ customers may only refuse this service if providing documentation proving that the tire was inflated within the last 30 days, or that their tires are inflated with nitrogen. This mandate conflicts with California’s automotive repair consumer protection statutes, which prohibit commencement of any repair-related service without customer authorization.

Under California law, any person who performs automotive repair⁵ must register with the Bureau of Automotive Repair (BAR) as an Automotive Repair Dealer (ARD). Prior to performing any work on a vehicle (regardless of whether such work meets the definition of automotive repair), the ARD must present the consumer with a written estimate describing all proposed work, and an estimated cost of parts and labor to be performed. Business & Professions (B&P) Code Section 9884.9 specifically states: “No work shall be done and no charges shall accrue *before authorization to proceed is obtained from the customer.*” (Emphasis added).⁶

When presented with this estimate, the customer may either authorize the services by signing the estimate, or decline the service. California Courts, administrative agencies, and law enforcement have consistently held that proceeding with repair work without customer authorization is illegal.⁷ In *Zhadan v. Downtown L.A. Motors* (66 Cal. App. 3d 481), the Second District Court of Appeals provided what is now the most-cited opinion on the subject. In *Zhadan*, the court was faced with the decision of whether to uphold a punitive damages award against a repair facility for commencing and charging for work without providing an estimate to the customer and obtaining their consent. In considering whether to award punitive damages, “due consideration must be given to the importance of the public policy embodied in the statutory provisions the violation of which was the basis of plaintiff’s claim”⁸ The court, citing the California Supreme Court decision in *Vasquez v. Superior Court* (4 Cal.3d 800), stated:

“Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society.” The provisions of [B&P Code] section 9884.9 are, of course, designed to achieve such protection. We must, therefore, consider any violation of its provisions as a serious violation of the public policy of this state.

³ Proposed 17 California Code of Regulations Section 95550(d)(1).

⁴ Vehicles over 10,000 lbs GVWR, or deemed unsafe by ASP.

⁵ Defined by B&P Code Section 9880.1(e) as: “all maintenance of and repairs to motor vehicles performed by an automotive repair dealer including automotive body repair work, but excluding those repairs made pursuant to a commercial business agreement and also excluding repairing tires, changing tires, lubricating vehicles, installing light bulbs, batteries, windshield wiper blades and other minor accessories, cleaning, adjusting, and replacing spark plugs, replacing fan belts, oil, and air filters, and other minor services, which the director, by regulation, determines are customarily performed by gasoline service stations.”

⁶ If the customer is not present, however, the estimate and authorization may be initially provided over the phone.

⁷ See., e.g., *Zhadan v. Downtown L.A. Motors* (66 Cal. App. 3d 481),

⁸ *Zhadan, supra*, at 497.

Accordingly, California's courts have emphasized the importance of this fundamental consumer protection system—one which this regulatory proposal would undermine.

If, as would be effectively required by this regulation, the written estimate contains a line for "tire pressure check and inflate," the option of whether to approve the service is left to the customer. Not only would the proposed regulation prohibit an ARD from repairing a vehicle unless performing the check and inflate service, but would effectively prohibit consumers from having their vehicles repaired unless approving the check and inflate service.

- Inconsistency with Business and Professions Code Violates APA:

As discussed above, AB 32 expressly requires that all regulations promulgated to meet its goals must fully comply with APA requirements. The APA requires that a regulatory proposal must be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."⁹ By creating a direct conflict with the letter and spirit of existing automotive repair statutes and regulations, the importance of which have been specifically highlighted by California's courts, the proposal violates the APA Consistency requirement and is therefore invalid.

- Overlapping Regulatory Scheme:

The revised regulatory proposal creates a parallel regulatory scheme for registered ARDs. ARDs are referred to in the proposal as "ASPs," despite apparently identical meanings. Vehicle Service Invoices are defined in the proposal as "documents issued by the ASP to the customer in the ordinary course of business" Although this necessarily refers to standard repair invoices required by B&P Code Section 9884.8, the reference to this statute has been deleted. CARB provides no reasoning for these overlapping terms and definitions—leading to unnecessary confusion and uncertainty for the industry. Each minor difference in descriptions of commonly-known industry terms leads industry to question whether differences exist between existing practices pursuant to the B&P Code and those practices that ARB now seeks to require. Since ARB's stated goal is to regulate behavior of the existing automotive repair industry, ARB should use existing descriptions and definitions from the B&P Code. If ARB seeks to create an overlapping regulatory scheme, it should justify and clarify exactly what it seeks. Fulfillment of the APA's Nonduplication standard¹⁰ requires a statement of and justification for any overlapping and duplicative regulatory requirements. Neither the Initial Statement of Reasons nor any subsequent ARB documentation provides such statements or justifications. Therefore, the regulatory proposal fails to adhere to the Nonduplication requirement of the APA.

- Invoice Requirements:

The revised proposal requires that ASPs provide tire pressure measurements on documents provided by a vehicle service invoice. For instance, if a vehicle's tires are to be inflated to 30 psi and the

⁹ Government Code Section 11349, 11349.1.

¹⁰ Government Code Section 11349(f)

ASP does so, this actual pressure figure must be reflected on the invoice. Requiring the actual inflation pressure to be provided on the invoice requires additional paperwork, detailed communications with the service writer who types up the invoice using the ASPs computer invoicing system, and yet another chance for an inadvertent mishap. To allow for easier industry compliance, ASPs should be allowed to enter “tires inflated to specifications” or some other standard language instead.

The regulation also requires ASPs which do not perform check and inflate services (for a specified reason) to provide this reason on the invoice. As an apparent drafting error, however, the requirement of proposed section 95550(d)(1)(B) to list this reason is immediately followed by the word “and,” and subparagraph (C), which mandates performance of the check and inflate service. This, confusingly, would appear to require that ASPs not performing the check and inflate service provide the reason for not doing so on the invoice, but then also require the ASP to perform the service.

- Carve-Out for Free Inflation Fails to Meet B&P Requirements:

The revised proposal states that ASPs performing a free check and inflate service at the customer’s request are not required to meet any of the substantive requirements of the provision—including the invoicing requirements. Although the draft proposal is crafted in a manner that ASPs are not defined as ARDs registered under the B&P Code, the definition of ASP effectively includes all such ARDs. In stating that by providing a free check and inflate service, an ASP is not required to meet the invoicing requirements, ARB may confuse an ARD into believing that they are *also* exempted from the B&P Code’s invoicing mandate,¹¹ which does not create an exception for service performed without charge. This confusing carve-out for free services may inadvertently lead to discipline by BAR against such an ARD’s license.

- Proposed “Vehicle Tires” Definition:

While the new draft appropriately clarifies that spare tires in a vehicle trunk are not subject to the check and inflate requirement, the newly-added definition of “Vehicle Tires” refers to “the four operating tires on the vehicle.” A few vehicles with Gross Vehicle Weight Ratings of less than 10,000 lbs have dual-rear wheels—meaning that there will be, in fact, *six* operating tires on the vehicle. ARB should clarify that the “Vehicle Tires” refers to the operating tires on the vehicles without specifying a particular quantity.

- Confusing “Relationship to Other Law” Subdivision:

Subdivision (f) of the proposal provides that the regulation does not allow ASPs to violate other applicable laws, and specifically cites the B&P Code. This leaves ASPs confused as to ARB’s intended aim. Since compliance with the regulation may necessitate violation of the B&P Code, does this mean that ARDs are not required to comply with this regulation if doing so will lead to a violation of other

¹¹ B&P Code Section 9884.1 provides, in part, that “[a]ll work done by an automotive repair dealer, including all warranty work, shall be recorded on an invoice and shall describe all service work done and parts supplied.”

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laws? Or does ARB simply mean that the regulatory proposal does not nullify required compliance with other laws? The APA establishes a "clarity" requirement, mandating that the regulatory language is incapable of being interpreted as having more than one meaning, and that the regulation is readily understandable by those directly affected. Due to the confusing nature of this provision, and the lack of accompanying guidance on the matter, the APA's clarity requirement is not fulfilled.

Conclusion:

ARB should withdraw the proposed regulation for the reasons described above. We have specific proposals to address these deficiencies, and request a meeting or workshop with ARB staff to discuss more appropriate methods of fulfilling ARB's greenhouse gas emission reduction goals while satisfying existing legal and policy requirements.

Thank you for this opportunity to comment on the proposed regulation. We look forward to working with ARB to address our concerns in the near future. If you have any questions or comments concerning this letter or tire inflation issues in general, please feel free to contact me at (916) 441-2599, or at jmorrison@cncda.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Morrison', with a long horizontal line extending to the right.

Jonathan Morrison
Staff Counsel