



California New Car Dealers Association

March 25, 2009

Mr. Michael Miguel
Manager
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on Proposed Tire Pressure Regulation

Dear Mr. Miguel,

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 are writing on behalf of our dealer members to provide comments relative to the above-referenced regulatory proposal on tire inflation. While we support ARB's goal of improving vehicle fuel efficiency through tire inflation improvement measures, we strongly oppose the measure as drafted due to the multiple substantive and procedural deficiencies described below.

Administrative Procedures Act: ARB properly cites Health and Safety Code Section 39601 as authority for promulgation of the proposed regulation. This statute requires ARB to comply with Government Code Sections 11340, *et seq.* (APA) in the promulgation of regulations implementing the Global Warming Solutions Act of 2006 (AB 32). Under the APA, each regulatory proposal must adhere to six standards for approval by the Office of Administrative Law (OAL)¹ including the standards of authority, clarity and consistency.² Unfortunately, the proposed regulations fail to satisfy these fundamental APA requirements, as described throughout this comment letter.

¹ Government Code Section 11349.1

² Authority: The APA requires a regulatory agency to cite a provision of law that permits the agency to adopt, amend, or repair a regulation. Although all agencies are given some general authority to implement regulations through some statute (e.g., Health and Safety Code Section 39601, as appropriately cited in the regulatory proposal), such general enabling statutes do not grant regulatory agencies with carte blanche power to impose any law they deem fit.

The regulations clarifying the APA recognize that while an administrative agency's interpretation of its rulemaking authority is generally presumed conclusive, this is not the case when either a public comment challenges such authority, or the agency's interpretation of its authority "alters, amends, or enlarges the scope of power conferred upon it." 1 California Code of Regulations 14(c)(1).

Regulatory Proposal Undermines Automotive Repair and Consumer Protection Statutes: For several decades, California has based its consumer protection law concerning automotive repair around a simple premise: Automotive Repair Dealers (ARDs) registered with the Bureau of Automotive Repair (BAR) must present the consumer with a written estimate describing all proposed services, and the estimated cost of parts and labor to be performed. If the customer does not consent to any proposed services, he or she may direct the ARD to rewrite the estimate to reflect the services the customer wants, or eliminate services that the customer does not want. Before beginning any automotive repair service, the ARD must obtain the customer's signature on the estimate, which denotes approval to proceed with the proposed services.³ This provides the customer with important protection by providing an estimated cost for parts and labor for each service performed, and gives the customer control over which services the ARD is to perform and how such services are to be performed—as the customer will not sign the written estimate until it reflects a price and outlined scope of services with which the customer is comfortable.

The proposed regulation throws this longstanding consumer protection measure on its head: the proposal would force ARDs to perform services without customer consent, and potentially against the customer's express instructions. The seriousness of this problem can best be illustrated by way of example. Customer X enters ABC Repair Shop to have her transmission replaced. ABC Repair Shop puts together a written estimate describing the transmission replacement service and estimated cost, as well as checking and inflating her tires. Customer X checked and inflated her tires just before visiting the shop, and refuses to allow ABC Repair Shop to perform the service. **ABC now has two choices: satisfy the requirements of the proposed regulation and violate existing automotive repair law (by checking and inflating the tires against the customer's wishes), or fail to comply with the proposed regulation and satisfy both the customer and existing law.** Failure to comply with the proposed regulation could lead to thousands of dollars in fines and imprisonment for the ASP as well as the owner or operator of the vehicle being serviced,⁴ while failure to comply with existing law could lead to revocation of ABC

Clarity: The APA also requires that regulations be written in a manner such that they will be easily understood by persons directly affected. A proposed regulation violates this standard if it can "be reasonably and logically interpreted to have more than one meaning," or "the language of the regulation conflicts with the agency's description of the effect of the regulation," or "the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar, or punctuation." 1 California Code of Regulations 16.

Consistency: The APA imposes two separate consistency requirement upon a regulatory proposal. First, Government Code Section 11342.2 states that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute." Second, 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." Government Code Section 11349, 11349.1. Simply stated, a regulation cannot require behavior that would undermine or lead to a violation of existing law.

³ Business and Professions Code Section 9884.9; 16 California Code of Regulations Section 3353.

⁴ Subdivision (e) of the proposed regulation states that "Any *automotive service provider or owner or operator* who fails to comply with the requirements of this regulation may be subject to penalties pursuant to Section 38580 of the Health and Safety Code." (emphasis added). Section 38580 states that violations are subject to penalties set forth in Article 3 of Chapter 4 of Part 4 of Chapter 1.5 of Part 5 of Division 26, which provides for potential fines of at least \$1,000 per violation and 6 months imprisonment.

Repair Shop's registration with the Bureau of Automotive Repair and a potential lawsuit from the customer.

The legislature long ago decided that consumers should have complete control over the manner in which their vehicles are repaired; if approved, the proposed regulation would have an unelected regulatory agency usurp the will of the democratically-elected legislature. As discussed above, AB 32 regulations must fully comply with all requirements of the APA. 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."⁵ By creating direct conflict with existing automotive repair statutes and regulations, the proposal violates the APA Consistency requirement and is therefore invalid.

While this problem is reason enough for OAL to disapprove of the regulatory proposal, the following procedural and substantive deficiencies provide further reason for ARB to withdraw and rethink the proposal as drafted.

Proposed Definitions are Unclear:

Several of the definitions contained in the proposed regulation are ambiguous and will lead to much confusion by those who would be forced to comply with the regulations. As discussed above, a regulatory proposal must satisfy the APA's Clarity requirement to be approved by OAL.

Proposed 10 California Code of Regulations Section 95550(c)(3): Auto Body and Paint Facility: The proposed language seeks to exempt "auto body and paint facilities" from the regulatory requirements, but the definition of such facilities is problematic. The definition reads as follows: "Auto Body and Paint Facility" means a business that *repairs*, reconstructs, or paints motor vehicles and *does not perform or offer to perform automotive maintenance or repair services.*" (emphasis added). By referring to a "business that repairs" vehicles, in the same definition that appears to exclude such businesses from the exemption, the definition is confusing and inconsistent. Furthermore, autobody facilities regularly engage in the repair of crash parts (bumpers, body panels, etc.) as well as vehicle frames and some mechanical parts, such as radiators.

Without clarifying which repairs are meant to be allowed, ARB will create widespread confusion in the industry as to which businesses are exempt from the substantive regulatory requirements. Furthermore, the regulation uses undefined terms in a manner with which industry is not generally familiar and requires additional clarification. Accordingly, the regulatory proposal is written in a manner such that the meaning of the regulations is not easily understood by those directly affected, and thereby fails to fulfill the Clarity requirement of the APA.

Proposed 10 California Code of Regulations Section 95550(c)(7) and (8): Automotive Maintenance or Repair Services; Automotive Service Provider: The proposal states that Automotive

⁵ Government Code Section 11349, 11349.1.

Service Providers (ASPs) are subject to the proposed regulatory requirements. ASPs are defined as “any business or person who performs or offers to perform automotive maintenance or repair services,” and provides a limited list of examples. The regulation further states that “Automotive Maintenance or Repair Services” includes, but is not limited to, the performance of any automotive diagnostics of or repairs made to a motor vehicle.” (emphasis added). This language fails to provide any definition whatsoever, merely providing a limited example of people and services subject to the regulatory requirement.

As drafted, the regulatory language appears to cover *anybody* performing *any* service on an automobile, and applies equally to “do-it-yourself” repairs performed by the vehicle owner and free repair assistance from a neighbor, as well as repairs performed by automotive professionals for a fee. Without further clarification, it would appear that any service performed on a vehicle would render the service provider (unless expressly exempted) subject to the check and inflate requirements. A vehicle owner changing their own oil in the driveway, a person helping change a flat tire on the highway, and even a person checking and inflating their own tire would appear to be caught up in the over-broad scope of this regulation.

By failing to provide a clear definition of either “Automotive Maintenance or Repair Services” or “Automotive Service Provider,” the proposed language can be reasonably and logically interpreted to have more than one meaning, and is therefore presumed not to comply with the APA’s Clarity standard.⁶

Proposed 10 California Code of Regulations Section 95550(c)(11): Under Inflated Tire: The proposed language defines an underinflated tire as a tire that is at least one PSI below the “manufacturer’s recommended pressure.” Industry is left uncertain as to which manufacturer this refers—the tire manufacturer or the vehicle manufacturer.

By failing to clarify whether “manufacturer’s recommended pressure” refers to the vehicle manufacturer or the tire manufacturer, the proposed language can be reasonably and logically interpreted to have more than one meaning, and is therefore presumed not to comply with the APA’s Clarity standard.⁷

Wrong Citation: In the definition of “Vehicle Service Invoice,” the proposed regulation refers to “Business and Professions Code Section 9884.8 of the California Code of Regulations Section 3356,” which does not exist. We assume that ARB means Business and Professions Code Section 9884.8 and/or 16 California Code of Regulations Section 3356.

Furthermore, proposed 95550(d)(1)(F) refers to “Business and Professions Code Section 9884.11 of the California Code of Regulations Section 3356.” We assume that ARB means Business and Professions Code Section 9884.11, which governs ARD record retention requirements, but 16 California

⁶ Government Code Section 11349, 11349.1; 1 California Code of Regulations Section 16.

⁷ Government Code Section 11349, 11349.1; 1 California Code of Regulations Section 16.

Code of Regulations Section 3356 makes no reference to record retention requirements. ARB may have instead intended to refer to 16 California Code of Regulations Section 3358.

The regulations adopted by the Office of Administrative Law (OAL) to provide guidance concerning the APA's Clarity requirement specify that a regulation shall be presumed not to comply with the Clarity requirement if it uses language incorrectly, if it can be reasonably and logically interpreted to have more than one meaning, or if it does not use citation styles which clearly identify published material cited in the regulation. The proposed language violates each of these elements of the Clarity requirement, and therefore fails to satisfy the requirements of the APA.

Substantive Problems with the Regulation:

"Manufacturer's Recommended Pressure": The proposed regulation requires ASPs to check and inflate each tire to the "manufacturer's recommended pressure" when performing an automotive service. Industry is left uncertain as to which manufacturer this refers—the tire manufacturer or the vehicle manufacturer.

In the same manner as with the definition of "underinflated tire," by failing to denote which manufacturer recommendation ARB intends ASPs to use, ARB fails to meet the APA's Clarity requirement.

This also creates practical problems for an ASP. If ARB intend the pressure recommendation to refer to the vehicle manufacturer, the recommended pressure may not apply to vehicles that have been altered or have had wheels replaced. If the pressure recommendation refers to the tire manufacturer, the recommended pressure may apply only to a particular vehicle, or may be interpreted as referring to the tire's maximum inflation pressure, potentially leading to overinflation damage.

Invoice Requirement: The proposed regulation requires the ASP to include certain information on the repair invoice. As discussed above, the language appears to include non-professional "do-it-yourself" repairers within the scope of the regulation—to whom an ARD registration is not otherwise required.⁸ By subjecting a large number of non-ARD repairers to invoicing requirements, ARB is greatly exceeding the scope of its authority granted by statute, in violation of the APA.

Tire Gauge Requirement: The proposed regulation would require ASP to use and maintain an ANSI B40.1 Grade B tire gauge for checking tire pressure. Although such gauges are considered accurate, the proposed language would appear to require ASPs using higher-quality Grade A gauges to purchase and use a lower-quality Grade B gauge instead.

⁸ See definition of Automotive Repair Dealer in Business and Professions Code Section 9880.1(a), which states that an ARD is "a person who, *for compensation*, engages in the business of repairing or diagnosing malfunctions of motor vehicles". (emphasis added). Accordingly, "do-it-yourself" repairs and maintenance, as well as repairs and maintenance performed by another party without charge, do not subject the repairer to ARD registration and therefore exempt such repairers from invoice requirements.

Access to Invoices: The proposed language requires ASPs to provide “documentation of the vehicle service invoice” to “authorized enforcement personnel” upon demand.

First, the regulation does not provide a definition of “authorized enforcement personnel,” in violation of the APA’s Clarity requirement. Assuming that the regulation is intended to be enforced as described in proposed 95550(f)⁹, this creates much cause for concern. Repair invoices contain nonpublic confidential information, including the customer’s name in conjunction with their address, phone number, and in some cases payment information. Accordingly, such invoices are subject to rigorous state and federal laws requiring ASPs to protect information.¹⁰ Such information is only to be provided in specific circumstances to even government agencies. By requiring ARDs to provide access to such information “upon demand” to any “ARB personnel” or “authorized representatives,” the proposed regulation would force ASPs to violate multiple state and federal statutes and regulations. As such, the proposed language fails to meet the APA requirement that a regulatory proposal be “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”¹¹

Second, a long history of state and federal case law from the U.S. Supreme Court down to local Superior Courts supports the notion that business records are subject to the U.S. Constitution’s Fourth Amendment protections against warrantless searches and seizures, and are not openly available to inspectors or even police officers without either a warrant or subpoena.¹² The proposed regulation would attempt to usurp such constitutional protection by requiring ASPs to provide such information to any party authorized by ARB “upon demand.” As such, the regulation would greatly expand the scope of authority granted to ARB by the legislature, in violation of the APA’s authority requirement, and would create conflict with existing law, in violation of the Consistency requirement.

Penalties: As discussed above, violation of the proposed regulation would lead to potential penalties of at least up to \$1,000 per violation and six months imprisonment. Furthermore, the enforcement section referred to by ARB in the proposed regulation states that a violation of the check and inflate requirement shall be “deemed to result in an emission of air contaminants,” leading to even harsher penalties.¹³ These penalties are grossly excessive relative to the violation involved.

⁹ This subdivision states that enforcement is to be “carried out by ARB personnel, and any authorized representatives of ARB.”

¹⁰ See, e.g., California Civil Code Section 1798.81.5(b) “A business that owns or licenses personal information about a California resident shall implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure.”

¹¹ Government Code Section 11349, 11349.1.

¹² See, e.g., *Camara v. Municipal Court* (387 U.S. 523), in which the U.S. Supreme Court held that warrantless searches by governmental inspectors for the purpose of enforcing administrative regulations were as subject to the Fourth Amendment as those by law enforcement personnel conducting a criminal investigation”; See *v. City of Seattle* (387 U.S. 541); *Terry York Imports, Inc v. Department of Motor Vehicles* (197 Cal. App 3d 307);

¹³ Health and Safety Code Section 38580(b)(2).

Severability: ARB has included a provision stating that if any provision of the proposed regulation is determined to be invalid, unconstitutional, or otherwise unenforceable, that portion of the regulation will not affect the validity of the remainder of the regulation. Severability clauses are inappropriate in regulatory proposals subject to the APA, as regulatory proposals must be analyzed in their entirety, and severing one provision of a regulation may alter the appropriateness of the regulatory proposal as a whole. For instance, assume that the current proposal meets the APA's necessity requirement only because it exempts certain industries from the scope of the regulation. If this exemption were nullified by a court decision, the severability clause would allow the regulation to stand despite the fact that the necessity requirement would no longer be satisfied. Including a severability clause provides a backdoor means for ARB to leapfrog APA requirements.

Accordingly, the severability clause impermissibly expands the scope of authority granted by the legislature, in violation of the APA's authority requirement. Since Health and Safety Code Section 39601 requires that any regulation implementing AB 32 must comply with the provisions of the APA, the severability clause also conflicts with the implementing statute, thereby violating the APA's Consistency requirement as well. If a court declares a provision of the regulation to be invalid, ARB must follow the normal APA process and introduce a replacement regulation, which should stand or fall on its own merits.

Conclusion:

For the reasons discussed above, ARB should withdraw the proposed regulation. We have specific proposals to address these deficiencies, and would be happy to participate with ARB in redrafting the regulation to achieve 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. Although we have many concerns with the regulation, we are not opposed to a well-constructed regulation that would provide guidelines on tire inflation. 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.

Best Wishes,

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

Jonathan Morrison