



**Addendum to the
Final Statement of Reasons for Rulemaking
Including Summary of Comments and Agency Responses**

**PUBLIC HEARING TO CONSIDER THE REGULATION TO
REDUCE GREENHOUSE GAS EMISSIONS FROM VEHICLES
OPERATING WITH UNDER INFLATED TIRES**

**Public Hearing Date: March 26, 2009
Agenda Item No.: 09-3-2**

TABLE OF CONTENTS

<u>SECTION</u>	<u>PAGE NUMBER</u>
I. BACKGROUND INFORMATION	3
II. SUMMARY OF OAL FINDINGS AND AGENCY RESPONSE	5
a. Issue No. 1 – Clarity and Necessity Standards of the APA.....	5
b. Issue No. 2 – Substantial Change was Unavailable for Public Comment.....	5
c. Issue No. 3 – Failure to Submit Complete Documentation	6
d. Issue Nos. 4 and 5 – Inadequate Response to Public Comment and Lack of an Explanation of the Need for the Regulation’s Severability Provision.....	6
e. Issue No. 6 – Statement of Mailing.....	9
f. Issue No. 7 – Local Mandate Statement.....	9
III. SUMMARY OF PROPOSED THIRD 15-DAY MODIFICATIONS	11
a. Substantive Modifications to the Regulatory Text.....	11
b. Non-substantive Modifications to the Regulatory Text.....	12
IV. THIRD 15-DAY PERIOD PUBLIC COMMENTS AND AGENCY RESPONSES	13
APPENDIX A	24
Exhibit 1: Certification of Mailing for Second 15-Day Public Notice of Availability of Modified Text.....	25

LIST OF TABLES

Table 1: Individuals Submitting Third 15-Day Period Public Comments.....	13
--	----

State of California
AIR RESOURCES BOARD

Addendum to the
Final Statement of Reasons for Rulemaking
Including Summary of Comments and Agency Response

**PUBLIC HEARING TO CONSIDER THE REGULATION TO REDUCE
GREENHOUSE GAS EMISSIONS FROM VEHICLES
OPERATING WITH UNDER INFLATED TIRES**

Public Hearing Date: **March 26, 2009**
Agenda Item No.: **09-3-2**

I. BACKGROUND INFORMATION

This Addendum to the Final Statement of Reasons (Addendum) provides a supplement to the *Final Statement of Reasons for Rulemaking - Public Hearing to Consider the Regulation to Reduce Greenhouse Gas Emissions from Vehicles Operating with Under Inflated Tires (FSOR)*.¹ The FSOR and the proposed Final Regulation Order² (Regulation) were submitted to the Office of Administrative Law (OAL) for regulatory approval on February 4, 2010, and are incorporated by reference herein. On March 22, 2010, OAL disapproved the regulatory action for the reasons discussed below, and this Addendum was prepared in response to the OAL decision.

OAL Decision of Disapproval

In the Decision of Disapproval of Regulatory Action (Decision),³ OAL listed the following reasons for the disapproval:

1. Failure to comply with the clarity and necessity standards of Government Code section 11349;
2. Failure to follow the required procedure; the Regulation submitted to OAL contained a change that was not made available to the public.

¹ ARB, 2010. California Air Resources Board. Final Statement of Reasons for Rulemaking, Public Hearing to Consider the Regulation to Reduce Greenhouse Gas Emissions from Vehicles Operating with Under Inflated Tires. February 2010.

² <http://www.arb.ca.gov/regact/2009/tirepres09/tirepressfro.pdf>

³ <http://www.arb.ca.gov/regact/2009/tirepres09/tirepresdd.pdf>

3. The regulatory file did not contain all required documents, and/or required documents included in the file are defective;
4. The agency failed to adequately respond to each public comment made regarding the proposed action;
5. The *Staff Report: Initial Statement of Reasons*⁴ (Staff Report) did not contain an explanation of the need for the severability provision in subsection (g) of proposed section 95550 of the Regulation;
6. In their concluding remarks, OAL cited staff for failing to include the statement of mailing required by section 44(b) of title 1 of the California Code of Regulations for the second 15 day availability period; and
7. OAL further cited that staff misunderstood that the local mandate statement in the FSOR required by Government Code section 11346.9(a)(2) applied only to the regulatory changes made in the 15 day availability periods. OAL reiterated that the local mandate statement is applicable to the entire regulatory proposal.

A summary of the reasons cited in the OAL Decision along with the agency responses that include the proposed mitigating action is discussed in the following section.

⁴ ARB, 2009. California Air Resources Board. Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Proposed Regulation for Under Inflated Vehicle Tires, February 2009.

II. SUMMARY OF OAL FINDINGS AND AGENCY RESPONSE

A summary of the reasons cited in the OAL decision, along with agency responses, are set forth below.

II.a Issue No. 1 - Clarity and Necessity Standards of the APA:

OAL, citing Government Code section 11349, found that the Air Resources Board (ARB or Board) failed to comply with the clarity and necessity standards established by the California Administrative Procedure Act (APA) that governs rulemaking by a State agency. Specifically, OAL determined that the definition provided for an Automotive Service Provider (ASP) in the Regulation does not clarify whether the Regulation is applicable to government maintenance providers and government fleets, and a person directly affected by the regulation would not easily understand that the Regulation applies to businesses and public sector operations alike. Further, OAL found that the proposed language is difficult for a person to understand why an ASP is required to record the reasons for not performing the tire pressure service on the vehicle service invoice when an exemption from complying with the requirements of the Regulation has been provided to the ASP specifically servicing customers requesting only a courtesy, no-cost check and inflate service.

Agency Response to Issue No. 1 (Clarity and Necessity Standards of the APA):

Modifications were made to the regulatory text to address the definition of an ASP, as well as the exemption to ASPs performing no cost, courtesy check and inflate services for their clients. A description of these changes can be found in the Summary of the Proposed Third 15-Day Modifications that follow (see Section III).

II.b Issue No. 2 - Substantial Change was Unavailable for Public Comment:

OAL contended that the regulation submitted to OAL for filing with the Secretary of State contained a change that was not made available to the public for comment as required by the APA. Subdivision (c) of Government Code section 11346.8 and section 44 of title 1 of the California Code of Regulations require that substantial changes to the original text be made available to the public for comment before the changes are adopted. The change in question was found in subsection 95550(d)(5) of the proposed Final Regulation Order which provided that a customer may decline the check and inflate service if the ASP proposes a separate discrete charge for the service.

Agency Response to Issue No. 2 (Substantial Change was Unavailable for Public Comment):

An incorrect version of the Final Regulation Order was inadvertently filed with OAL. On recognizing the error, immediate corrective steps were taken by staff and the correct version of the Final Regulation Order for the proposed regulation was re-filed with OAL. Additionally, language in the correct version of the Final Regulation Order was previously made available to the public for comment during the entire Second 15-Day Modifications public comment period (see FSOR).

II.c Issue No. 3 - Failure to Submit Complete Documentation:

OAL further stated that the documents submitted to OAL for filing with the Secretary of State contained an incomplete collection of documents referenced in the Staff Report. The reference document in particular cited in the Staff Report was related to EMFAC2007, the Air Resources Board Emissions Factors Model used by staff to estimate the population of California vehicles affected by the Regulation.

Agency Response to Issue No. 3 (Failure to Submit Complete Documentation):

Staff acknowledges the omission of the reference document in the final regulatory filing with the OAL. The reference document is provided as required.

II.d Issues Nos. 4 and 5 - Inadequate Response to Public Comment and Lack of an Explanation of the Need for the Regulation's Severability Provision:

In reviewing the FSOR, OAL found that staff had provided an incomplete response to one of the comments⁵ submitted during the 45-day public comment period. The comment relates to subsection (g) of the proposed regulation, which contains a severability clause that if any portion of the regulation is held invalid by a court of competent jurisdiction, such holding will not affect the validity of the remaining portions of the regulation. The commenter asserts that such severability clauses are inappropriate in regulations subject to APA (Government Code section 11340 et seq.), and advances several reasons why this is so.

First, the commenter contends that severability clauses are inappropriate in regulatory proposals subject to the APA, because 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. The commenter also argues that severability clauses impermissibly expand the scope of authority granted by the Legislature, in violation of the APA's authority requirement. The commenter further states that because Health and Safety

⁵ See Comment No. 2-3 [Morrison, CNCDA] in Section II of the FSOR (Footnote # 3).

Code (HSC) section 39601 requires that any regulation implementing AB 32 must comply with the provisions of the APA, severability clauses also conflict with the implementing statute, thereby violating the APA's consistency requirement as well. The commenter believes that 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.

In addition, OAL stated that ARB did not comply with the "necessity" standard of the APA because the Staff Report did not contain an explanation of the need for the severability clause.

Agency Response to Issues Nos. 4 and 5 (Inadequate Response to Public Comment and Lack of an Explanation of the Need for the Regulation's Severability Provision):

Both of the issues raised by OAL concern the severability clause in subsection (g) of the proposed regulation. Since these two issues are closely related, ARB offers the following explanation to both respond to the public comment and explain why the severability clause is necessary.

Most ARB regulations approved by OAL contain severability clauses. Severability clauses have become so commonplace that Professor Singer, in his editing of *Statutes and Statutory Construction* described severability clauses as "...little more than a mere formality."⁶ As recognized by the United States Supreme Court and the highest state court in virtually every state, severability clauses provide an interpretive tool expressing the intent of the rulemaking body that in the event a statute (or in this case a regulation) is determined to be partially invalid, the remainder of statute should be given effect (see, for example *Danskin v. San Diego Unified School Dist.* (1946) 28 Cal.2d 536 and *Bacon Services Corp. v. Huss* (1926) 199 Cal. 21).

In adopting the Mulford–Carrell Air Resources Act over a quarter of a century ago, the Legislature noted that the degradation of California's air quality was becoming an increasingly harmful problem, detrimental to health, safety and welfare of the people of California (HSC §39000). That concern is just as true today. In fulfilling its mission of promoting and protecting the public health, welfare and ecological resources through the effective and efficient reduction of air pollutants while recognizing and considering the effects on the economy of the state, ARB is often called upon to defend in court its efforts to assure all Californians have safe, clean air to breathe. The inclusion of severability clauses in ARB regulations helps ensure that the maximum air quality benefits from each regulatory action are preserved for California by minimizing the impacts of an adverse judicial determination. In short, a severability clause is

⁶ See generally, 2 Sutherland Statutory Construction, 6th Ed. §44.8

necessary to ensure that public health and safety benefits are achieved by the regulation to the greatest extent possible.

The commenter seems to take the position that, despite being recognized by the numerous courts as a means for legislative bodies to convey their intent, the inclusion of a severability clause results in the bypassing of legal requirements and/or increases an agency's authority. The commenter is arguing that severability clauses can never be included in regulations adopted under the APA, because including a severability clause allegedly does not comply with APA requirements. It is worth noting that severability clauses are contained in a large number of regulations that have been adopted by many State agencies and approved by OAL. If the commenter is correct in his novel legal argument, all of these regulatory provisions are illegal under California law.

As mentioned above, a severability clause is nothing more than an expression of intent by the body that has adopted a law or regulation. As discussed by the courts in the cases noted above, a severability clause is not binding on the courts.⁷ If a court determines that the offending portion of the regulation cannot be severed without doing fatal damage to the regulation as a whole, then the court will strike down the entire regulation regardless of the presence of a severability clause. Even without a severability clause, courts have demonstrated a practice of severability when it is appropriate to do so. The commenter appears to assume that it is the severability clause that provides a court with the authority to sever a portion of a regulation. This is not true; courts have the inherent power to do so,⁸ and can determine whether severing a portion of a challenged regulation is appropriate in the context of the particular case before the court.

The claim that a severability clause expands ARB's authority under the HSC is also incorrect. The commenter's argument is based on HSC section 39601, which basically requires ARB to adopt regulations in accordance with the APA. This is exactly what ARB does when it adopts a regulation that includes a severability clause. The commenter's argument confuses ARB's authority under the HSC to adopt regulations with the procedural requirements of the APA that must be followed when a regulation is adopted. ARB's authority to adopt a regulation is separate and distinct from the procedural steps that ARB must follow when it adopts a regulation.

⁷ "Although such language cannot be read as an inexorable command it is well settled that "The use of such language may rightly be considered by the court as a declaration of intention on the part of the legislature that in so far as lay within its power a separable invalid portion of the act should not destroy the whole." *Danskin v. San Diego Unified School District* (1946) 28 Cal. 2d. 236 at 555 citing *Bacon Service Corp. v. Huss* (1926) 199 Cal. 21."

⁸ See generally, 2 Sutherland Statutory Construction, 6th Ed. §44.8

In summary, the commenter provides no legal precedent supporting his opinions, and they represent a radical departure from current law and the long established practices of California government agencies. Severability clauses simply provide evidence of intent, and have been recognized by both the United States and California Supreme Courts as a viable means of expressing the intent of the adopting authority. Severability clauses have no bearing on the authority of ARB to adopt regulations and do not violate APA requirements. Finally, as discussed above, ARB has good cause, or need, for the inclusion of severability clauses in its regulations.

II.e Issue No. 6 - Statement of Mailing:

OAL also found that staff failed to include the statement of mailing required by section 44(b) of title 1 of the California Code of Regulations for the second 15 day availability period.

Agency Response to Issue No. 6 (Statement of Mailing):

Pursuant to section 44(b) of title 1 of the California Code of Regulations, the Executive Office is providing the required Certification of Mailing for the Second 15-Day Public Notice of Availability of Modified Text as requested (see Appendix A - Exhibit 1 of this document).

II.f Issue No. 7 - Local Mandate Statement:

In addition to the findings listed above, OAL commented that the Decision that the local mandate statement in the Final Statement of Reasons required by Government Code section 11346.9(a)(2) should be for the entire regulatory proposal, not just for the changes made in the 15-day availability periods.

Agency Response to Issue No. 7 (Local Mandate Statement):

With respect to the entire regulatory proposal, the Board has determined, pursuant to Government Code Section 11346.9(a)(2), that local government agencies that manage, own or lease, or maintain vehicle fleets are subject to the provisions of the Regulation, and therefore the regulatory action imposes a mandate on such agencies. Examples include city, county, and State vehicle fleet and asset management services or departments, vehicles used by public employees in public service and maintained by the public agencies, and public utility vehicles subject to the Regulation and operated by the local agencies. While most private ASPs are expected to incur minor capital and operating costs which may be recoverable from service fees or increased labor rates charged to their customers, local government agencies are expected to incur net cost savings from complying with the Regulation, since all fuel and tire

savings benefits are realized by the beneficial owners (local government agencies) of the vehicles.

In addition, many local government agencies already have policies or practices in place that require some form of a tire pressure service be performed either as part of their preventive maintenance practices on vehicles, or during pre- or post-trip inspection of the vehicles. Such agencies could comply with the requirements of the Regulation by making only procedural modifications to their existing policies and practices by ensuring that a tire pressure service (check and inflate) is performed every time the vehicle is brought in for service or repair, and that the tire pressure measurements are recorded with the service.

Pursuant to Government Code section 11346.9(a)(2), the Executive Officer has therefore determined that the proposed regulatory action will not impose a reimbursable mandate on any local agency or school district pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code.

III. SUMMARY OF PROPOSED THIRD 15-DAY MODIFICATIONS

The OAL Decision required ARB to re-open the public comment period for the proposed regulation, and propose additional regulatory changes in response to OAL findings. These proposed changes were available for public comment during a supplemental Third 15-Day period. The Notice of Public Availability of Modified Text for the Regulation to Reduce Greenhouse Gas Emissions from Vehicles Operating with Under Inflated Tires (Third 15-Day Notice), which is incorporated by reference herein, was released for public comment on June 21, 2010 and remained open through the close of business on July 6, 2010. A summary of the regulatory changes subject to the third 15-day public comment period is presented below:

Staff proposed additional substantive and non-substantive modifications to the regulatory text that are needed to better reflect the underlying intent of the Regulation, and to address OAL's concerns. A summary of these proposed changes to the Proposed Regulation Order is presented below:

III.a Substantive Modifications to the Regulatory Text

Staff modified the Definitions (subsection (c)), and Requirements and Compliance Deadlines (subsection (d)) to provide further clarity on the applicability, intent, and requirements of the Regulation. Specifically, the following substantive modifications are being proposed for section 95550:

- **Section 95550 (c)(7).** Staff modified the definition of "Automotive Service Provider" in subsection (c)(7) to clarify that an ASP is any business, or government or private vehicle fleet maintenance provider that performs or offers to perform automotive maintenance or repair services.
- **Section 95550 (c)(15).** Staff provided a definition for "Vehicle Fleet" in subsection (c)(15) to clarify that "Vehicle Fleet" is one or more vehicles that is owned, leased, or managed as a unit within or by a business or government agency.
- **Section 95550 (d)(1).** Staff is proposing that the effective date for ASPs to begin complying with the regulation be changed from July 1, 2010 to September 1, 2010. The change is being made to ensure the regulated community has sufficient time to implement procedures for meeting the regulatory requirements.
- **Section 95550 (d)(6).** The regulatory requirement in subsection (d)(6) was modified to require the ASP to indicate on the vehicle service invoice why the tire pressure service was not completed only when the vehicle is subject to the conditions established in subsections (d)(3)-(5), and not subsections (d)(2)-(4) as previously indicated. This modification clarifies that the ASP is not required to document the reasons for not providing the

tire pressure service if only a courtesy, no-cost check and inflate service requested by the customer has been provided.

III.b Non-Substantive Modifications to the Regulatory Text

Staff is providing additional clarification that the proposed language in the Final Regulation Order will be adopted as subarticle 8 and new section 95550 of article 4, chapter 1, subchapter 10, division 3, title 17 in the California Code of Regulations (CCR), and not article 1 as previously stated in the original Proposed Regulation Order.

IV. THIRD 15-DAY PERIOD PUBLIC COMMENTS AND AGENCY RESPONSES

Written comments were accepted by ARB during the third 15-day public comment period following the issuance of the Third 15-Day Notice. The modified regulation was released for public comment on June 21, 2010. The public comment period remained open until the close of business on July 6, 2010. All persons that commented during the third 15-day public comment period by submitting written comments are identified in Table 1 below.

Table 1
Individuals Submitting Third 15-Day Period Public Comments

Comment Number	Name	Affiliation	Date of Comment
1	Gott, Joseph	Private Citizen	June 21, 2010
2	Burgess, Mike	Private Citizen	June 21, 2010
3	Saleh, Fred	Private Citizen	June 21, 2010
4	Brooks, Aaron	Private Citizen	June 28, 2010
5	Murphy, Rob	Auto Mechanic	July 2, 2010
6	Johnson, Craig	Private Citizen	July 5, 2010
7	Kenely, Randi	Auto Care by Kenely	July 5, 2010
8	ONeill, Jim	Chino Autotech, Inc	July 5, 2010
9	Appler, Joseph	ASCCA (Chapter 5)	July 5, 2010
10	Kiesendahl, Jeff	ASCCA, Shop Owner	July 5, 2010
11	Gilbert, Darren	ASCCA	July 5, 2010
12	Smith, Nathan	Nate Smith's Optimal Auto Care	July 5, 2010
13	Ward, Thomas	ASCCA	July 5, 2010
14	Moore, Larry	ASCCA, ASA, ARC	July 5, 2010
15	Newkirk, David	Business Owner	July 5, 2010

**Table 1 (Continued)
Individuals Submitting Third 15-Day Period Public Comments**

Comment Number	Name	Affiliation	Date of Comment
16	Gonzalez, Luis	Auto Shop Manager	July 5, 2010
17	Engel, Justin	Private Citizen	July 5, 2010
18	Pierce, Richard	Private Citizen	July 5, 2010
19	Fourier, Phillip	ASCCA	July 5, 2010
20	Scrafield, Jack	North Hollywood Auto Repair	July 5, 2010
21	Kelly, Greg	ASCCA	July 5, 2010
22	Salerno, Robert	Owner, Salerno's Auto Servicenter	July 5, 2010
23	Constant, Robert	Private Citizen	July 5, 2010
24	Renee, Tracy	Gene's Auto Repair	July 5, 2010
25	Mercier, Chuck	ASCCA	July 6, 2010
26	Montalbano, Dennis	ASCCA	July 6, 2010
27	Duplicate	-	-
28	Ward, Jim	ASCCA	July 6, 2010
29	Miller, Jackie	Automotive Service Councils of California	July 6, 2010
30	Boyer, Tyson	Midas International	July 6, 2010
31	Stauder, Bob	Private Citizen	July 6, 2010
32	Slavich, Jeff	Private Citizen	July 6, 2010
33	Custeau, James	Private Citizen	July 6, 2010
34	O'Neill, Jan	Private Citizen	July 6, 2010
35	Frech, Paul	Private Citizen	July 6, 2010

Table 1 (Continued)
Individuals Submitting Third 15-Day Period Public Comments

Comment Number	Name	Affiliation	Date of Comment
36	Donohoe, Kevin	ASCCA	July 6, 2010
37	Duranty, Mark	Private Citizen	July 6, 2010
38	Encinas, Dan	Los Angeles Community College District	July 6, 2010
39	Iwama, Dan	ASCCA	July 6, 2010
40	Davis, Glenn	GDA Enterprises, ASCCA	July 6, 2010
41	Denholm, John	Oil Changer, Inc.	July 6, 2010
42	Stuart, Terry	ASCCA	July 6, 2010
43	Morrison, Jonathan	CNCDA	July 6, 2010

Staff notes that Government Code section 11346.9(a)(3) requires the agency to summarize each objection or recommendation only if they are specifically directed at the ARB's proposed action or the procedures followed in proposing or adopting the action. ARB may dismiss irrelevant comments as a group. A comment is irrelevant if it is not specifically directed at the proposed action or the procedures followed in proposing or adopting of the action. Staff evaluated every comment to determine if it pertained to the regulatory modifications proposed during the third 15-day public comment period, or to the staff response establishing need for the severability provision in the Regulation.

Staff determined that several comments received from individuals and stakeholders identified in Table 1 above during the third 15-day public comment period reflect a general opposition to the Regulation and did not pertain to the modifications proposed in the Third 15-Day Notice, or to the staff response provided establishing need for the severability provision in the Regulation. Therefore, no staff response is being provided to address their concerns.

For the record, the list of individuals submitting such comments in the third 15-day public comment period, along with the text of their comments in their entirety can be accessed at the following link:

<http://www.arb.ca.gov/lispub/comm/bccommlog.php?listname=tirepres09>

Staff has made a determination that the following comments pertain to proposed changes in the Third 15-Day Notice. Summaries of each comment grouped by subject, the individual or group of individuals presenting or sharing the same concern, as well as staff responses to the objections and recommendations made are presented below. Each staff response is an explanation of either the changes made as a result of an objection or recommendation, or the reasons for making no change.

1. Regulatory Applicability and Requirements

Comment No. 1-1 (Enforceability):

- What happens to the consumer when the check and inflate is not done within the next 7 days or was performed prior to the past 30 days? Who is going to keep track of that information? [Renee, Gene's Auto Repair].
- Requiring the customer to affirm and the repair shop to document this is simply unnecessary. The customer should have a right to decline the check and inflate service, with no questions asked. Is it the intent of the Air Resources Board to make criminals out of customers that don't inflate their vehicle tires? Requiring affirmations and documentation should be deleted from the regulatory proposal [Miller/Johnson, ASCCA].
- How would automotive repair dealerships (ARDs) get a disgruntled consumer to sign an affirmation that they checked their tires or will check them? Does ARB care at all that they are exposing ARDs to massive liability from frivolous legal actions [ONeill, Chino Autotech]?

Staff Response to Comment No. 1-1:

Customers may decline the tire pressure service (check and inflate) if they have had their tires checked in the past 30 days, or intend to have them checked or serviced in the next 7 days. The affirmation required from customers who have had their tires serviced in the past 30 days or will have their tires checked or serviced in the next 7 days is a good faith affirmation. In the interest of minimizing fuel waste and reduction of GHG emissions, the affirmation serves as a reminder to individuals to have their tires checked for proper inflation if they do want them serviced by the ASP.

The proposed regulation does not mandate that a customer sign an affirmation that they declined service. The proposed regulation simply requires that the ASP indicate on the vehicle service invoice why the service was not completed. There is no other provision in the Regulation for making a false affirmation or enforcing an affirmation made by a consumer. Additionally, when documented by the ASP that the tire pressure service was refused by the customer, staff expects such documentation will only serve to help protect the ASP from frivolous lawsuits.

Comment No. 1-2 (Applicability):

- Is the Regulation applicable under the following conditions:
 - We are an ASP and no labor is assessed or a work order created for a part purchased by a customer and installed by our technicians as a courtesy.
 - When a vehicle not owned by an auto body shop is brought in for air bag restoration service? [Smith, Nate Smith's Optimal Auto Care].

Staff Response to Comment No. 1-2:

The Regulation is applicable under both the conditions identified above. Replacement of a part by a technician working for the ASP, or by the ASP qualifies as an "automotive maintenance or repair service," and therefore the ASP is subject to the requirements of the Regulation. Staff believes that the vehicle brought in for service to the ASP by the auto body shop is also subject to the requirements of the Regulation, irrespective of its ownership.

Comment No. 1-3 (Accuracy of Tire Pressure Gauges):

- Section 95550(c)(13) defines "Under Inflated Tire" as "...a tire that is one pound per square inch (psi) or more below the recommended tire pressure rating." Section 95550 (d)(1)(c) mandates the pressure be read using a pressure gauge that is accurate to +/- two pounds per square inch (+/- 2 psi). It would seem that specifying an instrument to read the required 1 psi pressure rating that is inherently 200 percent in error, is counter intuitive to the regulation's intent [Duranty, Private Citizen].

Staff Response to Comment No. 1-3:

This comment is not related to any of the proposed modifications in the Third 15-Day Notice or to staff's response establishing the need for the severability provision of the proposed regulation. However, a staff response is being provided as a courtesy to the commenter to clarify the intent. The Regulation specifies that the tire pressure service must be performed by using a gauge with a total permissible error no greater than +/- 2 psi. The total permissible error is the allowable accuracy error indicated by the total difference in the true value and the indicated value during measurement. In specifying a standard for the accuracy of in-use tire pressure gauges, the Regulation limits the amount of error to an acceptable level of performance. Staff recognizes that in practice some amount of under inflation may exist even after the tire pressure service has been performed. The intent of the Regulation is to minimize this discrepancy in a cost-effective manner.

Comment No. 1-4 (Recordkeeping and Invoicing):

- The amendment to the definition of “Automotive Service Provider” includes the applicability of the proposed Regulation to government and private fleet maintenance providers. The proposed amendment would require our members to not only check and inflate the tires of our fleet vehicles every time we perform a repair or maintenance service, but also to reflect this service on an invoice. Many dealers do not issue invoices for minor internal repairs or services. The proposed amendment would completely change internal recordkeeping requirements for such repairs—imposing a significant, costly, and unnecessary burden. Since many of these fleet vehicles, particularly those in our retail inventory, are rarely driven but often maintained, this proposal does not make much sense. Imposing new invoicing requirements for minor internal repairs is not necessary to achieve the goals specified by ARB, and ARB has failed to demonstrate the necessity of this proposal. [Morrison, CNCDA].

Staff Response to Comment No. 1-4:

While Section 95550(d)(1)(B) of the proposed Regulation specifically states that the vehicle service invoice shall indicate that a tire pressure service (check and inflate) was completed, and the measurements recorded after any automotive maintenance or repair service was performed on the vehicle, a vehicle service invoice can imply an internal work order, or checklist, or maintenance log issued or utilized by the government or private fleet maintenance provider. Staff believes that such documents are routinely issued or utilized in the normal course of business, and therefore, ARB is not imposing any extraordinary costs or undue burden with this requirement. Staff further believes that the costs to vehicle fleet owners to comply with the recordkeeping requirements are not very different from those costs to an ASP identified in the Staff Report.

Examples of acceptable forms of recordkeeping will be illustrated in the Compliance Guidance Document to be issued by ARB to assist ASPs in complying with the Regulation. This compliance Guidance Document is expected to be made available for public comment prior to the effective date of the proposed Regulation.

2. Miscellaneous Comments

Comment No. 2-1 (Special Tire Conditions):

- No one knows exactly how much inflation pressure is to be applied at each temperature or vehicle load, and for after market tires and wheels [Kenely, Auto Care by Kenely].

- ARB has made it impossible for industry to comment on your proposed "Best Practices" document - prior to adopting this regulation. ASPs do not have the ability to examine and comment on how ARB proposes to address the issues of non-original tire sizes, non-original wheel sizes, non-original load ratings, and all temperatures other than cold. This is unfair to industry. ARB should not proceed with this regulation until the "best practices" document has been created and commented upon by industry [Smith, Nate Smith's Optimal Auto Care].
- There are additional risks with the complexity of prescribing the right air pressure for non-OEM tires that increases the liability of the ASP business. Repair shops are not tire shops, and do not have the expertise of a dedicated tire professional. For a repair shop to become an expert for every tire is an additional tax and burden for small businesses in California [Engel, Private Citizen].
- If the vehicle has modified wheels or oversized tires, the regulation will not be enforceable [Scrafield, North Hollywood Auto Repair].
- Vehicles with aftermarket tire modifications may have larger and wider tires and rims. ASPs do not have tire inflation specifications from the vehicle manufacturer for such aftermarket modifications, so how can an ASP administer the proper tire inflation pressure? By mandating ASPs to perform a tire pressure service, ARB is subjecting the ASP to additional liability and potential law suits, which could result in loss of business and loss of income [Salerno, Salerno's Auto Servicenter].
- There is no reference guide to provide the correct tire pressure for every permutation of tire, wheel, and vehicle on the road today. Custom applications are constantly being developed with guidance manuals lagging behind. A mechanism to deal with such tires must be developed [Denholm, Oil Changer].

Staff Response to Comment No. 2-1:

The comments above are not related to any of the proposed modifications in the Third 15-Day Notice or to staff's response establishing the need for the severability provision of the proposed regulation. However, a staff response is being provided as a courtesy to the commenters to clarify the intent. The proposed Regulation specifies that the check and inflate service be performed by inflating the vehicle tires to their Recommended Tire Pressure Rating, the specification recommended by the vehicle manufacturer. This specification can be found on the vehicle's door placard, glove box door, or owner's manual. If the vehicle manufacturer's Recommended Tire Pressure Rating is not available or the vehicle is equipped with a tire not meeting the vehicle manufacturer's tire

specifications for that vehicle, then the Recommended Tire Pressure Rating shall mean the Tire Inflation Reference.

The Tire Inflation Reference is a resource meant to assist the ASP in determining the proper inflation pressure for OEM as well as non-OEM size tires and wheels. All ASPs are expected to have access to such a resource. Some chain store automotive service centers have developed their own tire inflation reference resource in-house. Most choose to use Tire Inflation Reference resources such as the Tire Guide⁹ or the Tire and Rim Association's (TRA) Yearbook¹⁰. Both documents contain load and inflation tables to assist the ASP in determining the appropriate tire inflation pressure for the non-OEM tire or wheel application.

Furthermore, staff is developing a Compliance Guidance Document to assist ASPs in complying with the Regulation. The document will provide guidance on determining the proper inflation pressure for non-OEM size tires, the use of the TRA Load and Inflation Tables, and will also identify some industry "best practices" for ASPs. The Compliance Guidance Document is presently under ARB review and will be made available to the public for comment prior to the proposed effective date of the Regulation.

3. Legal Authority and Other Legal Issues

Comment No. 3-1 (Severability Clause):

- The amended draft proposal again fails to meet strict compliance with the standards of the Administrative Procedures Act (APA) by including a severability clause, and for expanding the regulation to cover the service of vehicles in business and government fleets. ARB should remove these provisions from the draft regulation.

The Severability Clause in the proposed Regulation order is a violation of the APA. The staff response provided by ARB as Attachment 2 to the Third 15-Day Notice cites discussions of severability clauses in legislation, not regulations. ARB is not a legislative body but an administrative agency not accountable to the public. ARB is limited by the constitution, the scope of power granted by the legislature to promulgate a regulation, and the APA.

Government Code Section 11346(a) states that "[i]t is the purpose of [the APA] to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations" When a court

⁹ The Tire Guide is Bennett Garfield Publication and can be purchased at the following website: <http://www.tireguides.com/>. The 2010 Tire Guide retails for approximately \$20.

¹⁰ The Tire and Rim Association 2010 Year Book can be purchased at the following website: <http://www.us-tra.org/traPubs.html>. The 2010 Tire Guide retails for \$85 and is also available on CD-ROM.

deems a provision of a regulatory package to be invalid, for any reason, the regulation is amended — the law is not the same as it was prior to part of the regulation being declared illegal. By inserting a severability clause into the regulation, ARB seeks to allow the remaining amended portion of the regulation to take effect without meeting the basic minimum procedural requirements of the APA. Before an amended regulation can take effect, the APA process must be followed, and the proposed amended regulation must face public scrutiny and OAL review, and stand or fall on its own merits. The example cited in our previous comment letter provides a good example of our concern: assuming that the current tire pressure proposal meets the APA's necessity requirement only because certain industries are exempted from the scope of the regulation. If this exemption were nullified by a court, the severability clause would allow the amended regulation to take effect immediately despite the fact that the APA's necessity requirement would no longer be satisfied. This amendment would take effect without providing the public the opportunity to comment on the amended regulation, and without giving OAL the opportunity to review the amended regulation for APA compliance. The previously exempt industry would be subject to the regulatory requirements without any ability to exercise rights guaranteed under the APA.

By including a clause that allows ARB to avoid the basic minimum procedural requirements of the APA in circumstances described above, ARB seeks to impermissibly expand the scope of their authority beyond that granted by the legislature, in violation of Government Code Section 11342.1. Furthermore, the proposed clause violates the consistency requirements of Government Code Sections 11342.2 and 11349.1(a) due to the inconsistency with Government Code Section 11346, as described above.

ARB stated that such (severability) clauses are “necessary to ensure that public health and safety benefits are achieved by the regulation to the greatest extent possible.” CNCDA supports ARB efforts to reduce emissions of greenhouse gases and other criteria pollutants. So does the California legislature. But the legislature did not intend to allow CARB to achieve emissions reductions through non-compliant regulations. As discussed previously, a severability clause is not necessary to achieve the GHG emission reductions sought by ARB through this regulation. All ARB must do to achieve these reductions is to promulgate a regulation that meets APA's basic minimal procedural requirements. Removing the severability provision will be a major step toward APA compliance. While we recognize ARB's desire and perceived “good cause” to include such a provision, ARB fails to demonstrate the necessity of including the provision to effectuate the purpose of AB 32, as required by Government Code Section 11342.2, nor has ARB provided substantial evidence of this necessity, as required by Government Code Section 11349.1.

ARB mentioned that several existing regulations contain severability clauses. This has no bearing on whether the inclusion of such clauses is permissible under the APA. Approval of a regulation by OAL does not carry precedential value, nor does it necessarily mean that a regulation is completely compliant with the APA. Given limited resources, OAL's regulatory review may decide only to investigate issues raised in public commentary—which may not have addressed the inclusion of a severability clause [Morrison, CNCDA].

Staff Response to Comment No. 3-1:

The commenter's allegations express no new argument or legal theory. Nor has commenter provided any precedent or support for his theories. Therefore, ARB's prior response is applicable to this comment (see section 11.d of the Final Statement of Reasons (FSOR)).

The commenter now tries to argue that a severability clause may only be used in legislation and not regulations. The commenter argues that ARB is not a legislative body and therefore may not include a severability clause in its regulations. ARB disagrees. It is well established that the adoption of regulations is a quasi-legislative function. In any event, courts took up the issue of severability in the context of regulations decades ago (see for example, *Schenley Affiliated Brands Corp. v Kirby* (1971) 21 Cal. App 3rd. 177, at p. 198). The commenter's unsupported legal analysis is simply not correct.

The commenter argues that ARB is not accountable to the public and somehow that precludes ARB from including a severability clause in its regulations. To the contrary, ARB is held to a very high level of accountability and takes that responsibility very seriously. Regardless, however, ARB's accountability to the public has no bearing on the legality of the inclusion of a severability clause in its regulations.

The commenter argues that a severability clause allows a judicial alteration of a regulation, which alteration somehow constitutes an amendment of the regulation by ARB. ARB disagrees. As stated in section 11.d of this FSOR, a severability clause does not empower the court. The court has authority to sever provisions of a regulation regardless of whether there is a severability clause in the regulation or not. ARB further explained that the inclusion of a severability clause does not require a court to sever a provision. The courts have established a three part test to determine whether severability is appropriate on a case by case basis. A severability clause is simply an expression of the enacting body's intent as to the regulation.

The commenter argues that severability by judicial action somehow results in a violation of the APA by ARB. Again the commenter provides no legal basis for such a theory and indeed the commenter's conjecture does not make sense. In

any event, basic notions of separation of powers would preclude such a conclusion.

As before, Commenter provides no legal justification or support for any of his arguments. Based on the commenter's failure to provide even some basis for his theories, ARB continues to believe that it has acted consistent with all applicable legal requirements.

Comment No. 3-2 (Expanded Scope of Regulation):

- The amendment to the definition of "Automotive Service Provider" includes the applicability of the proposed Regulation to government and private fleet maintenance providers. This amendment to cover government and business fleets constitutes a significant change to the substantive provisions of the regulation—greatly expanding the scope of the regulation—and was neither previously discussed nor apparent from the initial draft regulation. Pursuant to Government code Section 11349.4, ARB should readopt the regulation by re-noticing the regulation and allowing government and business fleet owners and service providers the ability to comment on the proposal [Morrison, CNCDA].

Staff Response to Comment No. 3-2:

In accordance with APA requirements, ARB noticed the proposed changes as discussed above. The commenter argues that the inclusion of government fleets requires that the regulation be "re-adopted". The commenter is incorrect. The APA allows changes, significant or otherwise, to be made in the course of the regulatory adoption process. If the adoption process results in a regulation differing from that described in the initial notice, even if such changes are substantial, but devoted to the same subject or issue, there is no violation of the APA (See *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal. App. 3rd 177). All of the proposed changes relate to the same subject or issue as the original proposal. The APA process has been correctly followed and it is not necessary to re-notice or re-adopt the regulation.

APPENDIX A

EXHIBIT 1
Certification of Mailing for
Second 15-Day Public Notice of Availability of Modified Text

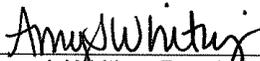
CERTIFICATION OF MAILING

**SECOND 15-DAY NOTICE OF PUBLIC
AVAILABILITY OF MODIFIED TEXT**

(§ 44 of title 1 of the California Code of Regulations, and Government Code 11347.1)

On January 14, 2010 the Air Resources Board mailed the attached modified text and the second 15-Day Notice to those persons specified in section 44, title 1, California Code of Regulations and Government Code 11347.1. The second 15-day public availability period was from January 14, 2010 through January 29, 2010. In addition, the notice and modified text were available to the public from January 14, 2010 through January 29, 2010, at the Air Resources Board Public Information Office, Environmental Services Center, 1001 "I" Street, First Floor, Sacramento, California.

Date: January 29, 2010



Amy J. Whiting, Regulations Coordinator
Board Administration &
Regulatory Coordination Unit

Attachment