



CERT POSITION PAPER ON CARB ENFORCEMENT REFORM

(DECEMBER 16, 2009)

CERT – Californians for Enforcement Reform and Transparency – is made up of approximately 16 organizations,¹ representing thousands of California businesses, many of which are small businesses. CERT’s mission is to work with CARB and other stakeholders to adopt needed reforms to CARB’s enforcement program. This paper reflects input from CERT members in response to CARB’s November 30th letter requesting additional information.

I. PRIORITIZING ENFORCEMENT RESOURCES

First, CERT was asked how CARB and the AG could better prioritize and focus its enforcement program against deliberate “bad actors” (that import and sell grossly non-compliant products). In response, George Lawrence, the prior head of EPA’s Mobile Source Enforcement Branch, has prepared the enclosed talking points. Mr. Lawrence successfully developed and implemented numerous inter-related strategies to re-focus EPA’s enforcement program to

¹ CERT members include: American Home Furnishing Alliance (AHFA); California Chapter of the American Fence Contractors Association; California Dump Truck Owner Association (CDTOA); California Motorcycle Dealers Association (CMDA); California Moving and Storage Association (CMSA); California Retailers Association (CRA); Construction Industry Air Quality Association (CIAQC) – and several of their affiliates; Engineering Contractors Association; Flasher/Barricade Association; Independent Waste Oil Collectors and Transporters; Marine Builders Association; Moving and Storage Association; National Marine Manufacturers Association (NMMA); Outdoor Power Equipment Institute (OPEI); Compliant Car Builders Association; Southern California Contractors Association

address the challenge of targeting and enforcing against grossly non-compliant products from new market entrants from Asia. (See George Lawrence talking points attached as Exhibit A).

CERT would also like to discuss with CARB the new bonding provisions that EPA will require as of January 1, 2010. These bonding provisions (which the Outdoor Power Equipment Institute – OPEI – strongly supported) require either the importer or off-shore producer to post a bond to cover the projected costs of penalties, recalls or remedial actions. (See the enclosed EPA FAQ – which OPEI helped develop and distribute – to make sure importers and off-shore manufacturers were well aware of their new obligations and liabilities – attached as Exhibit B).

CERT would also like to answer any questions and discuss policy and legal issues related with the EPA Penalty Policy analyzed in Mr. Lawrence’s enclosed “Note” (see Exhibit C) as well as in the Position Paper the CERT Coalition submitted to CARB in early October (see Exhibit D). As you know, CERT strongly urges CARB to use the EPA’s Penalty Policy as a model so that it can clearly and consistently distinguish between those violations of grossly-non compliant products that cause adverse impacts on air quality from administrative or paperwork violations.

II. CERT’S GOALS WITH REGARD TO CARB’S PENALTY POLICY

A. “Universal” Penalty Criteria

CERT would like to discuss the extent to which CARB currently has the legal authority to adopt a clear and consistent penalty policy (like EPA’s), or whether CERT and CARB would need to work together to obtain necessary legislative clarification towards improving the transparency and predictability of CARB’s mobile source penalty assessments. The last time the Legislature directed CARB to enforce penalties for violations under the fuels program, it set forth the “universal” criteria similar to those contained in EPA’s Penalty Policy. *See* Health and

Safety Code § 43031, (promulgated in 1996, requires CARB to consider the extent of the environmental harm, the nature and persistence of the violation, the compliance history, the mitigation efforts taken, the effort required to comply, the cooperation of the violator, and in some cases the size of the business).

It is unclear what criteria CARB uses to pursue penalties under its mobile source authorities. For example, in a September meeting with CERT, CARB Chief Counsel referenced § 43152 and the following language—“no person . . . shall intentionally or negligently import, deliver, purchase, receive, or otherwise acquire a new motor vehicle . . . which has not been certified”—as the mechanism it uses to implement CARB’s “penalty criteria” under its mobile source enforcement program. We do not understand how considerations of “intent” or “negligence” would somehow translate into “universal penalty” criteria – like the nature of environmental harm, excess emissions, past compliance, or economic benefit from avoided compliance costs.

B. HSC Provisions Applicable to Engines, Vehicles and Equipment

CERT would like to discuss the different statutory provisions upon which CARB relies to assess mobile source penalties. CARB most frequently uses authority under three sections of the Health and Safety Code to assess penalties for mobile source violations—sections 43016, 43154, and 43212. (See pp. 8-11 of CERT Position Paper and Exhibit A to that Position Paper). The potential penalties under these sections vary from up to \$50 per vehicle for a violation all the way to up to \$5,000 per vehicle. The direction under these statutes is vague and CARB seems to use them inter-changeably to address similar factual patterns. For example, § 43154 - \$5,000/vehicle – arguably may be used against manufacturers/dealers for certification violations, while § 43212 - \$50/vehicle – arguably may be used against manufacturers/dealers for

mislabeled, emissions standards or test procedure violations, two seemingly similar violations, but the penalty amount differs by an order of magnitude of 100. CERT members do not understand under what circumstances CARB chooses one provision (and penalty amount) over another. (See Section III. C. below)

Moreover, CARB routinely cites all three Health and Safety code penalty authorities for the same violation involving the same products, effectively duplicating or trebling the potential penalty per vehicle. It is unclear whether this approach reflects legislative intent or is an appropriate policy.

CARB also often imposes duplicate penalties for the same product violation (*i.e.*, penalties imposed on both the manufacturer and dealer/retailer for the sale of the same products). It is unclear under the current legislative scheme whether CARB has such authority or whether this is an appropriate policy.

III. CASE ILLUSTRATIONS OF UNFAIR AND INCONSISTENT PENALTIES

In order to avoid systemic problems in the future, CARB has asked for specific “settlements or cases that demonstrate inconsistent or unfair results.” Based on input from CERT members, different types of common “generic” cases are highlighted below. Penalties that harm the environment should be proportional to administrative paperwork violations and other violations with no attendant emissions impacts.

It is becoming increasingly clear that when viewed holistically, it is difficult to understand how CARB distinguishes (if at all) between major air quality violations and minor paperwork violations relative to emissions impacts or avoided compliance costs. For example, for some carry-over or mislabeling violations, CARB imposes low penalties (*see below* Bajaj U.S.A.), while for other similar violators, it seeks hundreds of thousands and even multi-millions

of dollars. In some cases CARB has imposed significant penalties on violations that involved emissions exceedences (*see below* Navistar), while in other emissions exceedence cases CARB has been more lenient.

A. Cases Involving Adverse Environmental Impacts

CERT's goal is to engage in a constructive discussion with CARB about the examples highlighted below. It would be a mutually beneficial exercise for George Lawrence to be provided the facts necessary to run comparable analyses under EPA's Penalty Policy. Accordingly, we would like to discuss how, for at least all the examples below CARB can make available: (1) the number of units implicated; (2) the emissions impact (or potential emissions impact); (3) avoided compliance costs; and (4) CARB's statutory authority for the settlements described below.

In a case involving the sale of "many" non-compliant, uncertified ATVs and OHRVs – that exceeded emission standards – CARB settled with Venom Motors for \$40,000. CERT would like to understand the number of units involved, the emissions impacts, the avoided compliance costs, and the statutory authority upon which CARB based this penalty.

In April, 2004 CARB announced a \$106,337 settlement with Wal-Mart for the sale of 2,415 uncertified engines. Additional information regarding this settlement would be helpful because it appears there were adverse environmental impacts. If so, then why did CARB apply per-unit penalty (approximately \$45) more consistent with a mis-labeling violation (see next section) rather than a certification violation with emissions exceedences?

In August 2005, CARB announced a settlement with American Power Products (APP) and CSK auto for \$100,000 per party for the sale of an unspecified number of non-compliant and non-California certified scooters. As APP replaced the scooters in question with California

certified models and re-powered returned scooters with California engines, it is clear that these engines were both non-compliant and non-certified. CERT requests confirmation of the emissions impacts of these non-certified scooters and further details on the number of units addressed in the settlement, including the penalty amount apportioned to these scooters.

In April, 2009 CARB announced a settlement with Bourget's Bike Works for approximately \$93,000 for an unspecified number of motorcycles sold without required evaporative control equipment. More information on this case, including the number of impacted units, is requested.

In March 2004, CARB announced a \$356,650 settlement with Workhorse Custom Chassis for the sale of 86 un-certified and 253 mis-labeled vehicles. It is unclear whether there were any environmental impacts associated with this penalty. In addition, the per unit penalty, avoided compliance costs, and statutory authority for CARB's settlement are unclear. More information on this case is requested.

Finally, a review of CARB's 2008 Enforcement Report indicates there are no mobile source settlements that exceed \$500,000, and only very few that exceed \$100,000. Of the settlements that exceed \$100,000, only one is relevant – the Navistar \$250,000 settlement – and it involved the failure to implement required emissions controls and inconsistencies with prior model years (*i.e.*, emissions exceedences and non-carry-over engines). Again, more information on the Navistar settlement would be appreciated.

B. Case Example Involving No Adverse Environmental Impact

CERT members have suggested the following case example appears to contain no attendant environmental impact or avoided compliance costs. If so, this case indicates that CARB's penalties are not tied, as they should be, to impacts on emissions.

Recently there was a \$180,000 settlement involving GP Motorcycles and Moto Forza for allegedly selling off-road motorcycles for use on-road. According to this CERT member, Moto Forza believes it was unlawfully targeted for enforcement action despite its full compliance with DMV regulations. Apparently, DMV wrongly issued the wrong on-road vehicle registrations for these vehicles, which were admittedly retailed as off-road. For DMV's actions, Moto Forza was pursued over four years, resulting in the \$180,000 settlement. There appears to have been no emissions impacts or avoided compliance costs for Moto Forza's alleged violations. CERT would like to obtain from CARB the pertinent facts in this case (i.e. how many affected vehicles and then engine size).

The above mentioned August 2006 American Power Products/CSK Auto settlement of \$100,000 per party also involved a citation for the premature release of generators before the certification was issued, but after the application was submitted. CERT requests further information on this settlement, including how much of the penalty was apportioned to the generators, the number of generators involved and whether the certification in question was an original certification or a carry-over certification.

C. Mislabeling and Certification Glitches Covering Emissions Compliant Products.

In every model year across all product categories, there will always be carry-over certifications for emissions compliant products that were previously certified to the same current standards – where there are glitches in the certification process. Accordingly, several CERT members are concerned that (unlike EPA) CARB does not have any clear policy or position to address this type of problem. CERT has confirmed that U.S. EPA has consistently applied a penalty in the range of \$10,000 per engine family in similar “carry-over” cases which involve a “certification” glitch of an otherwise emission-compliant product. (See Note from George

Lawrence – prior Director of EPA’s Mobile Source Enforcement Office – attached hereto as Exhibit “D”) (“EPA charged a penalty of \$10,000 per engine family for which a proper carry-over certificate was not obtained, instead of a penalty based on the number of vehicles/engines in the engine family and their engine size.”). CERT urges CARB to adopt a similar policy designed to address carry-over cases to ensure they are handled in a clear and consistent manner and to ensure proportionality with air quality impacts.

The summary below suggests that CARB does not treat carry-over certification violations in a consistent manner and that the penalties are not proportional to air quality impacts (or the lack thereof). As discussed above in Section II.B., in some of the cases below, the penalties are such that it appears CARB applied a \$50/unit mislabeling penalty. In others, which don’t appear to contain materially different facts, it appears CARB applies at least a \$5,000/unit penalty if not more. In nearly all these cases, CARB fails to identify the number of units involved, the emissions impacts or the avoided compliance costs. For all the cases below, CERT would like to understand the methodology applied by CARB, including the number of units involved, the emissions impacts, the avoided compliance costs, and the statutory authority used.

On February 17, 2009, CARB settled a case with Bajaj USA for a total of \$4,350 for a motor scooter family that was emission-compliant, certified and properly labeled for sale and use in 2005, but was sold in 2006 without proper “carry over” certification and labeling. It appears the mislabeling penalty of \$50 per unit was applied in this case.

In 2007, CARB entered two different settlements with retailers that allegedly sold “many” OHRVs prior to being issued an EO by CARB. CARB settled these cases for total penalties of \$12,000 and \$27,566 respectfully. (*See* 2007 settlements with O2 Sports Inc and Sun L Group Inc).

In 2008, McCune Chrysler Jeep sold certain “uncertified” vehicles in California, with no apparent emissions violation, which they settled with CARB for \$15,000. Also in 2008, CARB announced a \$45,000 settlement with Vicoo Industry for the sale of off-road highway recreational vehicles that were uncertified or mis-labeled. Can CARB confirm that the Vicoo settlement did not involve any emissions violations and provide the necessary facts?

IV. CONCLUSION

It is critical for regulatory agencies to send clear signals regarding the agency’s regulatory priorities, and penalties are one major vehicle for sending those signals. Right now, however, CARB’s penalty signals are so unclear and inconsistent that the regulated community is confused and has no sense of CARB’s enforcement priorities.

It is CERT’s hope that we can work together through these issues to improve CARB’s enforcement program so that it most efficiently utilizes CARB’s limited resources, effectively addresses air emissions and the grossly non-compliant products, and results in a fair, predictable, and transparent regulatory environment for all stakeholders.