

# MEMORANDUM

Attachment A

Date: April 13, 2018

To: Interested Parties

From: Patrick Dorais, Chief  
Bureau of Automotive Repair (BAR)

Re: Proposed Adoption of Decision as Precedent  
In the Matter of the Citation Against:  
Mohammad Faraji, Smog Check Inspector,  
Smog Check Repair Technician (Respondent)  
Bureau of Automotive Repair Case No. M2015-1666  
Office of Administrative Hearings Case No. 2017010575

In accordance with Government Code section 11425.60, subdivision (b) the Bureau of Automotive Repair (Bureau or BAR) is recommending that paragraphs 3-11 of the Factual Findings portion of the above captioned Decision be designated as a precedent because it contains a legal determination that confirms the Bureau's compliance with the Administrative Procedure Act (APA) in passing new smog check regulations.

## Rationale

Under Government Code section 11425.60, subdivision (b), an agency decision is appropriate for designation as a precedent decision if it contains a significant legal or policy determination of general application that is likely to recur.

The Factual Findings, paragraphs 3-11 in this Decision, are significant because they establish how the BAR complied with the APA rulemaking process in passing new smog check regulations. The Decision points out that the filing of a certified copy of a regulation with the Secretary of State created a rebuttable presumption that the regulation was duly adopted. (Gov. Code § 11343.6.) Furthermore, the Decision explains that the BAR's decision to delay enforcement of a properly noticed regulation rests solely with the administrative agency, and that the BAR was not required to complete a second APA rulemaking process solely to establish the implementation date.

Additionally, this Decision is significant because it clearly explains the reasons for rejection of an underground regulations argument after the issue was fully briefed by both parties.

Finally, since the smog check regulations were implemented on March 9, 2015, there is no published precedent or case law. It is very likely that Respondents will continue to argue that portions of the smog check regulations create “unenforceable underground regulations” until there is a precedent decision on this matter. Designating the Factual Findings, paragraphs 3-11 in this Decision as precedent will prevent future argument on this issue and should foster consistent rulings among administrative law judges when confronted with arguments like those brought in this case.

### **Procedural Background**

The above captioned case was heard before Administrative Law Judge, Humberto Flores, in Los Angeles, California, on July 11, 2017. The Respondent in this matter filed a trial brief relating to the BAR’s compliance with the APA process. BAR filed a response to ensure the issues were fully briefed for the court. Judge Flores prepared a Proposed Decision, which was adopted by the Director of the Department of Consumer Affairs on September 20, 2017 and became effective on October 24, 2017.

### **Facts and Findings**

Citation No. M2015-1666 (Citation) was served on the Respondent, against his Smog Check Inspector (EO) license, for issuing a certificate of compliance using the BAR-97 Emissions Inspection System (BAR-97), instead of the BAR On-Board Diagnostic Inspection System (BAR-OIS). Pursuant to the citation, the Respondent was ordered to cease and desist from violating Health and Safety Code section 44032. The Respondent filed a timely appeal of the citation. The Respondent did not dispute the allegation that he used the BAR-97 platform to perform the smog inspection. However, the respondent argued that the legislature did not expressly authorize the Bureau to establish a roll-out date, or give the BAR authority to impose discipline for failure to use the BAR-OIS.

The Respondent further argued that the BAR did not follow proper procedures for establishing and implementing new smog check regulations relating to the use of the BAR-OIS and that BAR failed to file these regulations with the Secretary of State as required by Government Code section 11340.5. Because of this alleged failure, the Respondent claimed that the “rule relating to the use of the OIS system is tantamount to an underground regulation.” Therefore, the Respondent argued that the BAR did not have authority to impose discipline or issue a citation in this case.

In his Proposed Decision, Judge Flores found that BAR fully complied with the APA process and was not required to complete a second APA rulemaking process solely to establish an implementation date for the BAR-OIS.

### **Precedential Designation**

The recommendation is that only the following portions of the Decision be designated as precedential:

Factual Findings - paragraphs 3 – 11

**Conclusion**

Based on the criterion set forth in Government Code section 11425.60, subdivision (b), and the significance of the Factual Findings, paragraphs 3-11 of this Decision, the Bureau recommends that these sections only, be designated as a precedent.

Attachments:

Adopted Decision, Bureau Case No. M2015-1666