

**TITLE 16. PROFESSIONAL AND VOCATIONAL REGULATIONS
DIVISION 33. BUREAU OF AUTOMOTIVE REPAIR**

**FINDING OF EMERGENCY
RE-ADOPTION OF EMERGENCY REGULATIONS
(Government Code Section 11346.1, subdivision (b);
California Code of Regulations, Title 1, Section 50)**

CONSUMER ASSISTANCE PROGRAM UPDATES

The Bureau of Automotive Repair (Bureau) finds that an emergency continues to exist, as defined in Government Code section 11342.545. Accordingly, the Bureau finds that immediate action to readopt the Bureau's emergency regulatory amendments is required to avoid serious harm to the public peace, health, safety, and general welfare.

Government Code section 11346.1(a)(2) requires that at least five (5) working days prior to submission of a proposed emergency regulation to the Office of Administrative Law (OAL), the adopting agency shall provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency.

After submission of the proposed emergency regulation, the OAL shall allow interested persons five (5) calendar days to submit comments, on the proposed emergency regulations, as set forth in Government Code section 11349.6.

BACKGROUND

Background Prior to the Initial Adoption of this Emergency Rulemaking

In December 2019, an outbreak of respiratory illness due to a novel coronavirus (a disease now known as COVID-19), was first identified, and has spread, impacting more than 75 countries including the United States. The most common symptoms of COVID-19 are fever, tiredness, and dry cough. Some patients may have aches and pains, nasal congestion, runny nose, sore throat or diarrhea. Most people (about 80%) recover from the disease without needing special treatment. However, around 1 out of every 6 people who gets COVID-19 becomes seriously ill and develops difficulty breathing. Older people, and those with underlying medical problems like high blood pressure, heart problems or diabetes, are more likely to develop serious illness.

On March 4, 2020, Governor Gavin Newsom (Governor) declared a State of Emergency based on COVID-19 (SOE).¹ According to the SOE, officials expect the number of cases in California, the United States, and worldwide to increase. Experts anticipate that while a high percentage of individuals affected by COVID-19 will experience flu-like

¹ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>

symptoms, some will have more serious symptoms and require hospitalization, particularly individuals who are elderly, or already have underlying chronic health conditions. The Governor declared it imperative to prepare for and respond to suspected or confirmed COVID-19 cases in California, to implement measures to mitigate the spread of COVID-19, and to prepare for an increasing number of individuals requiring medical care and hospitalization.

On March 11, 2020, the World Health Organization declared COVID-19 a pandemic, signifying the worldwide spread of COVID-19.

On March 19, 2020, Governor Newsom imposed a statewide stay at home order. Exempted from the order was activity as needed to maintain continuity of operation of the federal critical infrastructure sectors, critical government services, schools, childcare, and construction, including housing construction.

Background for the Re-adoption of this Emergency Rulemaking

As of April 26, 2021, California had 3,631,740 confirmed cases of COVID-19². Although the general statewide stay at home order has now been lifted, schools and some businesses are closed at the direction of either state or local government. Many of the businesses that remain open are operating at reduced capacity with fewer employees.

The Consumer Assistance Program Update emergency regulations that underlie the proposed rulemaking package, and the Finding of Emergency therein were originally approved by the Office of Administrative Law (OAL) on August 31, 2020. Governor Gavin Newsom issued two executive orders, N-40-20 and N-66-20, each of which authorized 60-calendar-day extensions, which applied to emergency and emergency readopt actions. The end date of these extensions is June 30, 2021.

Since the approval of the Consumer Assistance Program Update emergency regulations, the Bureau has been working diligently to submit the Certificate of Compliance package through the standard rulemaking process to obtain approval by OAL by the required certification period deadline, as prescribed by the Administrative Procedure Act.

To date, the Bureau has received preliminary approval from the Department of Consumer Affairs (DCA). The Certificate of Compliance Package is currently under review with the Business, Consumer Services, and Housing Agency (Agency). Since the submission of the package, the Bureau has worked closely with DCA to expedite the process. As of March 23, 2021, the Certificate of Compliance Package was pending review by Agency.

² COVID-19 Statewide Update, April 26, 2021 (<https://update.covid19.ca.gov/>)

The Bureau has further consulted with OAL and the DCA Regulations Unit, and it has been recommended that the Bureau submit a request to re-adopt the emergency Consumer Assistance Program Update regulations to extend the effectiveness of the emergency regulations and to allow adequate time for final review of the Certificate of Compliance package by DCA, Agency, and OAL.

The initial filing of the emergency rulemaking for the Fee Schedule was necessary to protect the public and offer critical support to California’s workforce in a time of great need, and to prevent immediate harm that may have come to eligible participants in the program in the absence of expanded assistance.

Since the approval of Repair Assistance (RA) emergency regulation changes, program participation has increased significantly. BAR expects participation to continue increasing as pandemic-related travel restrictions are reduced.

The regulation changes reduced the cost of Smog Check compliance for participating low-income consumers and resulted in the more timely repair of vehicles that were polluting California’s air.

Specifically, the increased contribution amount has allowed the program to complete more durable and complex repairs. The modified consumer copay has reduced upfront costs for low-income consumers and encouraged consumer participation. The relaxation of vehicle registration related eligibility requirements has resulted in the approval of a higher percentage of RA applications.

The number of RA vehicles repaired between September 1, 2020 and March 31, 2021 is more than double the number repaired during the same period the previous year. The average increase in per-vehicle repair cost is consistent with expectations.

Period	Applications Received	Applications Approved	Number of Vehicles Repaired	BAR RA Expenditures	Average CAP Contribution Per Vehicle
9/1/2020 through 3/31/2021	9,190	4607	2248	\$1,700,865.94	\$756.61
9/1/2019 through 3/31/2020	7,187	2,443	1094	\$453,829.31	\$414.83

For these reasons, it is crucial this program continues, and this emergency rulemaking be readopted.

Contents of this Emergency Rulemaking

The Bureau's Smog Check Program is designed to reduce emissions by identifying and repairing vehicles that exceed specific emissions standards as set by the California Air Resources Board. A vehicle that has failed its Smog Check inspection must be repaired and pass a subsequent Smog Check inspection in order to complete the Department of Motor Vehicles' (DMV's) registration renewal process.

In order to assist vehicle owners in complying with the provisions of the Smog Check Program, the Bureau is also charged with administering the Consumer Assistance Program (CAP) pursuant to Health and Safety Code (HSC) sections 44062.1 and 44062.3. CAP has two components: Vehicle Retirement (VR) and Repair Assistance (RA). Through VR, a vehicle owner can retire a failing vehicle for either \$1,000 or \$1,500, if they meet income eligibility requirements. Through RA, a low-income vehicle owner who meets CAP's eligibility requirements and chooses to repair a vehicle after it fails a biennial Smog Check inspection may receive up to \$500 toward emissions-related repairs at a STAR-certified test-and-repair station operating under an agreement with the Bureau. The goals of these programs are to reduce air pollution and assist vehicle owners whose vehicles fail the Smog Check inspection.

In this emergency proposal, the Bureau proposes amendments to the California Code of Regulations (CCR) sections related to the Bureau's Consumer Assistance Program (CAP). This emergency proposal affects CCR sections 3394.3 and 3394.4 by increasing repair assistance contribution limits to income-eligible vehicle owners with pre-approval from the Bureau, by restructuring the consumer copay for repairs, by allowing participation in CAP of a vehicle with vehicle registration expired up to 365 days, and by eliminating eligibility requirements pertaining to prior registration lapses.

In order to conform to statutory requirements, ensure consistency with existing regulation, control expenditures, and fully describe program limitations, this emergency proposal describes situations in which repair assistance contributions will not be awarded, permissible charges for diagnosis, and permissible charges for the post-repair Smog Check inspection. Additionally, it requires that a pre-repair baseline Smog Check inspection is part of the diagnosis.

This emergency proposal also amends CCR section 3394.6 and the CAP application form incorporated by reference therein. Section 3394.6 is being revised to reflect an updated revision date for the form, and the form is being updated to reflect the Bureau's correct website, and to update the repair assistance amounts to the amounts established through this rulemaking. This proposal would also incorporate the changes into the Consumer Assistance Program application, CAP/APP (07/12), which would have a revision date of (04/2020).

Facts Supporting a Finding of Emergency

The Bureau has been aware of a decline in participation in its Consumer Assistance Program in the last decade; during the past seven years, utilization of the repair assistance option of CAP by low-income vehicle owners has decreased dramatically. There are fewer applicants, and a smaller percentage of those that do apply are approved. The participation rate among approved applicants dropped from 92% in Fiscal Year 2011/12 to 44% in Fiscal Year 2018/19. Further, between January 1994 and September 2019, the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Motor Vehicle Maintenance and Repair increased 101.5% compared to 74% for the overall Consumer Price Index. This means that a repair which cost \$450 in 1994, now costs over \$900.

Prior to the onset of the COVID-19 situation in the United States, the Bureau was in the process of proposing the changes in this emergency proposal. However, striking and acute changes in the employment environment in California, and the particular need to ensure critical workers are able to do their jobs, create a unique set of circumstances giving rise to this finding of emergency.

Since mid-March 2020, millions of Californians have lost their jobs. The significance of this number of claims cannot be overstated. As noted by the Governor's Office, in the four weeks preceding April 9, 2020:

“California has processed about 2.3 million unemployment insurance claims, which is more than the total number of claims filed in 2019. Just for the week ending on Saturday, April 4, 2020, the California Employment Development Department (EDD) processed 925,450 claims, which is a 2,418% increase over the same week last year.”³

That number has since raised to over 8.2 million.⁴ Those fortunate enough to remain employed may face reduced work hours, furloughs, or other negative employment consequences caused by the ongoing effects of COVID-19. These stressors will put untold numbers of Californians into situations where they are no longer able to pay for legally required vehicle repairs. The longer this situation persists, the greater the risk of vehicles falling out of operability and the less the capability of California's workforce to use their motor vehicles. Moreover, the pressing need for access to required repairs will persist after the immediate danger of COVID-19 passes. Unemployed Californians seeking to return to the work force may be unable to do so if they cannot access reliable and legal transportation. Alternatively, such individuals may be compelled to operate high-polluting vehicles in violation of law or may be compelled to operate unregistered vehicles due to economic pressures.

³ <https://www.gov.ca.gov/2020/04/09/governor-newsom-announces-additional-unemployment-benefits-for-workers-impacted-by-covid-19-as-unemployment-claims-reach-record-levels/>

⁴ https://www.edd.ca.gov/About_EDD/pdf/news-20-33.pdf (July 16, 2020.)

There is tremendous need for repair assistance among individuals with low income. In Fiscal Year (FY) 2019/20, the Bureau received over 12,000 applications for repair assistance, yet unnecessary restrictions pertaining to vehicle registration allowed the approval of fewer than 4400 applications. It is estimated that the proposed regulation changes would allow the Bureau to approve double the amount of applications.

Over time, there has been a reduction in program participation because vehicle owners must pay for any repairs in excess of the \$500 contribution. Many vehicle owners no longer apply for CAP because they cannot afford the necessary repairs, even with the \$500 contribution. A 2015 Bureau survey of approved applicants who failed to participate in the program revealed that approved applicants are discouraged from participating in CAP because recommended repairs often exceed the maximum repair contribution. It also showed that applicants were discouraged by the high cost of diagnosis.

Bureau estimates developed prior to COVID-19, indicated that the proposed changes to the repair assistance program would increase the demand for repair assistance applications to 25,000 each year over the next three years. Given the increases in unemployment, it is clear that the demand for this service will increase even more.

There is a clear relationship between COVID-19 and the projected demand for repair assistance services. Unemployment caused by COVID-19 will increase demand for repair assistance because there has been no relaxation of Smog Check requirements. Regardless of income, all California vehicle owners are required to obtain a Smog Check Certificate every two years in order to register their vehicles. Those with reduced household income have no choice but to repair their vehicle or drive without registration. Ensuring the maximum number of Californians have access to transportation will have systemic benefits to the health and welfare of the state going forward. More legally drivable cars means more participation in the workforce, which in turn means less long-term pressure on social welfare programs statewide. The sooner a Californian can return to work, the sooner the relief will come to California's unemployment insurance system.

At the same time, persons still employed and providing essential services must be provided access to timely subsidized vehicle repair where appropriate. The Bureau has already been aware of the need for improved assistance. The COVID-19 virus has brought that need into stark relief.

Limitations Necessitated by Cost Effectiveness and Consistency Considerations

This proposal contains a number of changes designed to improve the cost effectiveness of the Consumer Assistance Program. Collectively, these changes will ensure the increased need for service as described above in this Finding of Emergency is paired with a monetarily efficient system for delivering that service. These changes work

toward the end of providing the most service to the most people in a time of increased need.

Under this proposal repair assistance contributions will not be awarded for untestable vehicles and vehicles with tampered emissions equipment. That is because CCR title 16 section 3394.5 states those vehicles are ineligible.

Charges for unnecessary repairs, above average labor times for repair operations, above average parts mark-up, and above average sublet operation mark-up will not be permitted because it would not be cost effective. Health and Safety Code section 44062.1 specifies that repair assistance shall be based upon cost effectiveness and air quality benefit. Additionally, it allows the Bureau to increase repair assistance contributions beyond the statutory maximum defined by Health and Safety Code section 44094, provided it determines the expenditure is cost effective.

This proposal sets the diagnostic fee at 1.5 times the STAR test-and-repair station's posted hourly labor rate for repairs and requires that a pre-repair baseline Smog Check inspection be performed as part of the diagnosis.

A fixed diagnostic fee is necessary because there is no standard diagnostic time applicable to most emission failures. Diagnostic times vary according to technician expertise, the sophistication of repair facility diagnostic testing equipment, and the difficulty of the diagnostic problem.

The pre-repair baseline Smog Check inspection is a crucial part of the diagnosis. It is necessary to verify the current condition of the vehicle, as the vehicle's operating characteristics and emissions may have changed since the initial failing inspection. A fixed fee is also required for this inspection because there is no standard inspection time. The Bureau has set the diagnostic fee at a rate sufficient to cover the historical costs for this inspection.

This proposal requires performance of a post-repair Smog Check inspection to confirm the effectiveness of repairs at no additional charge. The test is required because it is considered a best practice in the automotive repair industry to confirm the effectiveness of repairs. There is no additional charge because the diagnostic fee is set at a rate sufficient to cover the historical costs of both pre-repair and post-repair inspections. If the vehicle passes, the vehicle owner will pay the certificate of compliance fee as specified in CCR title 16 sections 3340.35 and 3340.35.1.

BAR recognizes that the actual time spent on diagnosis, pre-repair baseline Smog Check inspections, and after repair inspections will vary from station to station and according to the difficulty of the diagnosis. However, the flat diagnostic fee is set at 1.5 hours times the hourly rate for repairs because 1.5 hours was roughly the average time charged to motorists by STAR test-and-repair stations for diagnosis, a pre-repair

baseline Smog Check inspection, and a post-repair Smog Check inspection for all vehicles participating in CAP in fiscal years 2018-19 and 2019-20.

The purpose of setting a fixed fee for CAP diagnosis and testing is to prevent unreasonable price increases in diagnostic or testing fees which may occur when the State of California takes responsibility for eighty percent (80%) of the fee. The Bureau has found no other way to ensure reasonable charges for diagnosis and testing. The 1.5-hour multiplier is reasonable because it is set based upon thousands of historical charges negotiated between STAR test-and-repair stations and motorists during the past two years. Additionally, basing the fee upon a multiple of the hourly rate accounts for different overhead costs between STAR test-and-repair stations.

AUTHORITY AND REFERENCE

Business and Professions Code (BPC) section 9882 authorizes the Bureau to “adopt and enforce those rules and regulations that he or she determines are reasonably necessary to carry out the purposes of” the Automotive Repair Act (BPC sections 9880 *et seq.*). Separately, Health and Safety Code Section 44002 grants the Department all the powers and authority granted under Division 1 (commencing with Section 1) and Division 1.5 (commencing with Section 475) and Chapter 20.3 (commencing with Section 9880) of Division 3 of the Business and Professions Code and under Chapter 33 (commencing with Section 3300) of Title 16 of the California Code of Regulations.

These grants together provide the Bureau the authority to regulate the Consumer Assistance Program.

The proposed regulation implements, interprets, and makes specific Health and Safety Code section 44062 which, among other things, allows the Department to increase its Repair Assistance contribution above its current maximum threshold if it determines the repairs are cost-effective.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

This rulemaking action increases repair assistance contribution limits to income-eligible vehicle owners with pre-approval from the Bureau, restructures the consumer copay, allows participation in the Consumer Assistance Program (CAP) of a vehicle with vehicle registration expired up to 365 days, eliminates eligibility requirements pertaining to prior registration lapses, defines when repair assistance contributions shall not be awarded, specifies that the pre-repair baseline Smog Check inspection is a required part of the diagnosis, defines permissible charges for diagnosis and the after repair Smog Check inspection, and updates the CAP application to reflect the Bureau’s current website and the revised amounts receivable through repair assistance as established through this emergency rulemaking.

Anticipated Benefit of the Proposed Regulations

In addition to the immediate benefits noted above in this document, the Bureau has made an initial determination that the proposed regulatory action will have a positive impact on the health and welfare of California citizens to the extent it promotes compliance with laws and regulations.

Further, the Bureau has made an initial determination the proposed regulatory action will tend to reduce air pollution and have a positive effect on the environment.

The Bureau has also determined the proposed regulatory action will not affect worker safety.

Evaluation of Inconsistency/Incompatibility with Existing State Regulations

During the process of developing these regulations and amendments, the Bureau has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Bureau has made the following initial determinations:

COSTS TO ANY LOCAL AGENCY OR SCHOOL DISTRICT FOR WHICH GOVERNMENT CODE SECTIONS 17500-17630 REQUIRES REIMBURSEMENT:

None.

LOCAL MANDATE

None.

FISCAL IMPACT ON PUBLIC AGENCIES INCLUDING COSTS OR SAVINGS TO STATE AGENCIES AND COSTS/SAVINGS IN FEDERAL FUNDING TO THE STATE:

The Bureau anticipates that the proposed regulatory action will result in increased program expenditures for vehicle repairs. However, the implementation, administration, and enforcement of the proposed changes will be fully absorbed by existing Bureau personnel working within existing resources.

The proposed regulations would result in increased expenditures beginning in fiscal year (FY) 2020/21.

The Bureau estimates the program will repair approximately 3340 vehicles during FY 2020/21 under new regulations. This contrasts with the estimate of 1950 vehicles to be repaired in FY 2019/20 under the old regulations.

The number of vehicles repaired for FY 2020/21 is limited to 3340 only by the size of the repair assistance schedule of the High Polluter Repair or Removal Account, which is currently set at \$2,768,000.

Bureau estimates indicate that the number of vehicles repaired would increase to approximately 11,950 vehicles per-year, provided the repair assistance schedule of the High Polluter Repair and Removal Account was augmented by \$7,000,000.

This proposal will result in no costs or savings in federal funding to the state.

NONDISCRETIONARY COSTS/SAVINGS TO LOCAL AGENCIES:

None.

EFFECT ON HOUSING COSTS:

None.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE:

None.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

1. Chart showing percent change of the Consumer Price Index (CPI) (Motor Vehicle Maintenance and Repair) January 1994 through September 2019. Produced from the US Department of Labor, Bureau of Labor Statistics *Consumer Price Index - All Urban Consumers: Series ID CUUR0000SETD (Motor Vehicle Maintenance and Repair)*.
2. United States Department of Labor, Bureau of Labor Statistics: *Consumer Price Index - All Urban Consumers: Series ID CUUR0000SETD (Motor Vehicle Maintenance and Repair)*. Downloaded from the BLS web site <https://data.bls.gov/pdq/SurveyOutputServlet> on 10/31/19.
3. Bureau of Automotive Repair Cost Survey of Typical Repairs Needed to Correct Smog Check Failure (Data collected June 2017, Report updated November 2019)

4. California Air Resources Board Fact Sheet: Air Pollution and Health (December 2009)
5. California Air Resources Board Fact Sheet: Air Pollution Sources, Effects, and Controls (December 2009)
6. California Air Resources Board Fact Sheet: On Board Diagnostics II (October 28, 2015)
7. CAP Annual Supplemental Report to Legislature
8. Denial Reasons Related to Vehicle Registration
9. Governor's Proclamation of a State of Emergency in California, dated March 4, 2020. Printout from <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.
10. World Health Organization Informational Printout on Corona Virus from <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>, dated March 19, 2020.
11. World Health Organization Informational Printout on Corona Virus from <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>, dated March 19, 2020.
12. Los Angeles Times news article, dated March 19, 2020, regarding Corona Virus death toll from <https://www.latimes.com/california/story/2020-03-17/california-death-toll-from-coronavirus-rises-to-11-amid-extraordinary-rules-to-slow-spread>, dated March 19, 2020.
13. Governor's Executive Order N-33-20, issued March 19, 2020. Printout from <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.
14. Publication of the Governor's Office regarding unemployment benefits for workers impacted by Corona Virus and numbers of workers seeking assistance, dated April 9, 2020, from <https://www.gov.ca.gov/2020/04/09/governor-newsom-announces-additional-unemployment-benefits-for-workers-impacted-by-covid-19-as-unemployment-claims-reach-record-levels/>.