



# Air Resources Board



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July 30, 2009

MAILOUT MSO # 2009-03

TO: ALL MANUFACTURERS OF

- PASSENGER CARS
- LIGHT-DUTY TRUCKS
- MOTORCYCLES
- MEDIUM-DUTY VEHICLES AND ENGINES USED IN SUCH VEHICLES
- HEAVY-DUTY VEHICLES AND ENGINES USED IN SUCH VEHICLES
- ALL OTHER INTERESTED PARTIES

SUBJECT: Repeal of the Warranty Reporting Amendment Regulations for 2010 and Subsequent Model Year (MY) Passenger Cars (PCs), Light-Duty Trucks (LDTs), Medium-Duty Vehicles (MDVs) and Engines Used in These Vehicles (MDEs), And Heavy-Duty Vehicles (HDVs); Engines Used in These Vehicles (HDEs), and Motorcycles

This Mailout provides notice of a proposal to repeal regulatory amendments previously adopted by the Air Resources Board (ARB or the Board) for the Emission Information Warranty Reporting (EWIR) program requirements. The EWIR program collects warranty claim information on emission components, evaluates failure rates and assesses the need for corrective action or recall of emission components on in use on-road vehicles and engines. Industry groups filed lawsuits challenging the amendments after they were adopted by the Board in March of 2007. In a decision issued in December of 2008, a superior court judge invalidated the most crucial aspect of the amendments, the 4% emission control component failure rate standard upon which the amendments authorized the ARB to order recall or other corrective action on the grounds that the judge found that the 4% failure rate corrective action standard was not a "test procedure" within the meaning of Health & Safety Code Section 43105 (H&SC). The December 2008 decision requires the Board to take action to repeal the 4% failure rate as the basis for ordering corrective action and the Board staff proposes to do this by noticing a regulatory amendment to be heard at the Board's November 2009 hearing. The staff also proposes to repeal the rest of the March 2007 amendments at the same time because they are unenforceable without the 4% failure rate corrective action standard. The details are provided below and staff is requesting comments on the proposal to repeal the March 2007 amendments in advance of a Board hearing on the matter.

*The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.*

California Environmental Protection Agency

## Background

The EWIR regulations were originally adopted in November 1988 and established standards and procedures for monitoring, reporting, testing and correcting systemic emission control component failures for on-road motor vehicles and engines. The warranty claim records of in-use vehicles and engines are monitored and then reported to ARB by the certified manufacturer to determine if the failures of emission control components exceed specified thresholds within the warranty period for the vehicles or engines and require appropriate corrective action pursuant to the EWIR regulations.

During 2006 and 2007, Board staff conducted a public process and initiated a formal rulemaking to amend the EWIR regulations. The purpose of the amendments was to improve the Board's ability to enforce its authority granted by Health and Safety Code Section 43105 to recall systemically defective emission control components. Staff identified three aspects of the existing regulation that needed improvement, specifically: (1) the proof required to demonstrate violations of ARB's emission standards or test procedures, (2) the corrective action available to ARB to address the violations and, (3) the manner in which emissions warranty information is reported to ARB. The objective of the proposed warranty reporting amendments was to obtain more corrective actions on more vehicles that have systemic defective emission control components or systems, when compared to the current regulations. After the public workshops, meetings and two hearings, December 2006 and March 2007, the Board unanimously approved the proposal with modifications made to the original October 20, 2006 regulatory proposal. These modifications were approved by the Board as part of Resolution 06-44, submitted to OAL and adopted on December 12, 2007. All public documents can be accessed at <http://www.arb.ca.gov/regact/recall06/recall06.htm> or through a request for hard copies to the ARB staff contacts listed at the end of this document.

## Legal Action Taken Against ARB

Soon after the adoption of the amended EWIR regulations, representatives of the automotive service industry and the Engine Manufacturers Association filed petitions for writs of mandate challenging the adopted warranty reporting regulations. The two actions were consolidated by consent of the parties in Los Angeles County Superior Court and a trial was held on December 1, 2008, on the merits of the actions. The judge ruled and issued his Judgment and Writ on December 16, 2008, upholding most of the amended regulation. However, reasoning that the 4% failure rate corrective action standard did not constitute a "test procedure" as that term is used in H&SC Section 43105, the judge specifically invalidated the four percent failure rate because the amendments purported to establish that emission control component failure rate as a violation of test procedures, authorizing corrective action by the ARB. Specifically the court invalidated California Code of Regulations, Title 13 (13 CCR) Sections 2166.1(n), 1956.8, 1958, 1961, 1976, and 1978 of the amended EWIR regulations. Although the

judge's ruling only directly invalidated a portion of the amended regulation, the ARB determined that the ruling rendered the rest of the amendments unenforceable. For example, since the basis for determining whether a systemic failure of an emission control component (the 4% failure rate corrective action standard) is legally void and the rest of the amended EWIR regulations in new Article 5 (13 CCR, Sections 2167-2168) that establish rules, standards, and procedures for determining a systemic failure are based on the 4% failure rate corrective action standard, the rest of the amendments are no longer necessary and have no purpose without the ability to enact corrective action. Similarly, since the basis for determining a systemic failure of an emission control component has been invalidated, the amended EWIR regulations that establishes rules, standards, and procedures for remedial action (including recalls and extended warranties) and manufacturer appeals in new Article 5 (13 CCR, Sections 2169-2174) premised on the 4% failure rate corrective action standard are also meaningless, unnecessary, and essentially void. To attempt to implement the amended EWIR regulations without the 4% failure rate corrective action standard would be pointless and would bring no benefit to air quality and therefore should be repealed.

#### EWIR Repeal Board Hearing

The amended EWIR regulations are set to apply to 2010 and subsequent model year on-road vehicles and engines. Based on the judge's ruling, the ARB proposes to repeal these regulations and return to the previous warranty reporting procedures (13 CCR, sections 2141-2149) for the 2010 and subsequent model year vehicles and engines. It is staff's intention to only repeal the amended EWIR regulations; no additional regulatory changes regarding this issue will be proposed for this hearing, which will be conducted in November 2009. The Board staff will conduct further public process beyond this hearing to seek future modifications to the current program.

Due to the 2010 model year applicability date of the March 2007 amendments that the judge's decision rendered unimplementable, the Board must consider the proposed repeal in the fall to enable the staff to enforce the previous procedures starting in January 2010, which merely involves continuing the program currently in effect into the 2010 model year and beyond. Since no (or insignificant) regulatory language changes will be developed for the immediate Board hearing, no public workshop is planned. However, written public comments can be submitted to this office on or before August 31, 2009 for ARB's consideration.

Please submit written comments regarding this issue to Ms. Annette Hebert, Chief, Mobile Source Operations Division, Air Resources Board, 9480 Telstar Avenue, Suite 4, El Monte, California 91731. If you have any immediate questions regarding this matter,

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please contact Ms. Vickie Stoutingburg-Alewine, Air Pollution Specialist, In-Use Compliance Section at 626-575-6802 or [vstoutin@arb.ca.gov](mailto:vstoutin@arb.ca.gov).

Sincerely,

A handwritten signature in blue ink that reads "Annette Hebert". The signature is written in a cursive style with a large initial "A".

Annette Hebert, Chief  
Mobile Source Operations Division