

March 24, 2005

## **NOx Reflash Rule Fact Sheet**

### **What action is EMA taking today?**

EMA filed a complaint in the Superior Court of the State Of California for the County of Sacramento asking for declaratory and injunctive relief against the enforcement of the NOx Reflash Rule recently approved by the California Air Resources Board (ARB).

### **Why did EMA file the complaint?**

In 1998, ARB entered into binding agreements with engine manufacturers relating to nitrogen oxide (NOx) emissions from a limited number of 1993-1998 model year heavy-duty engines used in trucks, school buses, and motor homes. Under those Settlement Agreements, engine manufacturers agreed to reduce NOx emissions from those vehicles by upgrading the computer software that manages the operation of the engine. ARB and the manufacturers specifically agreed that the installation of the new software should occur when the engine is rebuilt. It is important to note that all of the engines subject to ARB's rule are certified by both ARB and EPA as fully compliant with applicable regulatory requirements.

Rather than abiding by the terms of the Settlement Agreements and using the conflict resolution provisions included in those agreements, ARB unilaterally has changed the terms of the settlements by adopting the NOx Reflash Rule. The rule not only requires engine manufacturers to provide the new software prior to engine rebuild, but also places mandates and penalties on vehicle owners and dealers.

EMA, on behalf of its members, maintains that:

- ARB should abide by the terms of the negotiated settlements, and
- ARB has exceeded its authority under state law to impose additional retrofit requirements on used vehicles that otherwise meet all applicable federal and state emissions standards.

## **Did ARB adopt the regulation because the terms of the Settlement Agreements were Violated?**

No.

Quite to the contrary, engine manufacturers have not only complied with all of the requirements of the Settlement Agreements, they have voluntarily agreed to do more. Engine manufacturers have made the revised software available and have been installing the software to reduce NOx emissions when owners bring in their vehicles for an engine overhaul or rebuild, as agreed to with ARB. In addition, when staff of the ARB changed their minds and expressed concerns regarding the pace of software replacement, engine manufacturers agreed to a voluntary program to promote accelerated installation of the software in California. This included extending offers to retrofit the software at the request of the vehicle owner or during power upgrades.

It is important to note that all of the engines subject to ARB's rule are certified by both the ARB and EPA as fully compliant with applicable regulatory requirements, were never subject to any recall action, and were never found to be defective in any way. ARB also agrees that engine manufacturers have met all of their obligations under the Settlement Agreements. The requirements mandated by the NOx Reflash Rule and being challenged today go beyond the previous agreements and voluntary programs implemented by the manufacturers.

## **What is the impact of the rule in California?**

Implementation of the NOx Reflash Rule has several impacts. First, it sets a terrible precedent for all parties involved in negotiations with ARB. The terms of the Settlement Agreements were negotiated after lengthy, thorough, and good faith discussions of the issues. ARB and engine manufacturers came to a binding agreement, endorsed by the courts, on the best way to resolve the dispute. Today, ARB unilaterally seeks to change the agreed-upon terms of the settlement through an entirely different regulatory process. If ARB can simply negate its agreements through subsequent regulatory action, it threatens the ability and likelihood that any party, private or public, can work cooperatively with ARB to resolve air quality issues.

Second, the NOx Reflash Rule places an undue burden on vehicle owners and dealers, who like engine manufacturers, have not done anything wrong. The rule forces owners to bring in their vehicles for the software upgrade at times other than rebuild and thus increases the vehicle's downtime and overall costs of compliance. It also imposes penalties and fines on owners and dealers if the work is not completed when ARB says it should be completed.

Third, the rule imposes additional and unauthorized mandates on engine manufacturers to add new emissions control requirements to engines that are already in

commerce and are beyond their control. Further, the rule's mandate to install emission-related retrofits on used engines and vehicles that otherwise meet all of ARB's regulatory and certification requirements exceeds ARB's statutory authority.

Finally, the proposed rule substantially increases costs to the entire regulated community. ARB agreed that costs and operational disruption are minimized if the software retrofits are completed during the time of an engine's first rebuild. By requiring owners to take their vehicles in for service, and for dealers and repair shops to complete the NOx rebuild at specified times prior to engine rebuild, the advantages and economies of the process are lost.

**What outcome is EMA seeking as a result of this action?**

EMA believes that ARB should be held to its original agreement with engine manufacturers and should not attempt to circumvent the terms of the Settlement Agreements. In terms of specific court action, EMA believes that the NOx Reflash Rule should be overturned and invalidated based on the fact that the provisions of the rule exceed ARB's regulatory authority.

**Are other actions contemplated?**

In a separate action filed in California Superior Court, some individual engine manufacturers that are parties to the previous Settlement Agreements with ARB have challenged the NOx Reflash Rule on the basis that it amounts to a breach of the legally binding Settlement Agreements.