

December 12, 2008

Mr. Daniel C. Smith  
Associate Administrator for Enforcement  
National Highway Traffic Safety Administration  
1200 New Jersey Avenue, SE  
Washington, DC 20590

**Re: EA08-020; BMW MINI Cooper S Exhaust Pipe Tips**

Dear Mr. Smith:

This responds to your letter of November 26, 2008 advising BMW of your Initial Decision that model year (MY) 2007 and certain MY 2008 MINI Cooper S motor vehicles (subject vehicles) manufactured by BMW contain a defect related to motor vehicle safety due to the design of the subject vehicles' exhaust pipe tips.

BMW has decided to acquiesce to NHTSA's Initial Decision in order to resolve this investigation. Therefore, BMW will conduct a voluntary safety recall in conformity with the specifications of 49 CFR Parts 573 and 577.

We are acquiescing in order to avoid confusing our customers, particularly in recognition of the fact that the company has already offered owners of the subject vehicles the same redesigned exhaust pipes at no charge that would be provided under a safety recall, and to avoid the necessity for time-consuming and costly legal proceedings. We are also taking this action in order to cooperate with the Agency on matters relating to consumer safety.

BMW is conducting the recall despite the fact that we have not concluded that a safety defect exists. We do not believe we have sufficient data to make that determination. The attachment explains why we believe we do not have sufficient data.

Despite our difference of opinion on this issue, BMW remains committed to the safety of our owners and looks forward to working constructively with the Agency in the future.

The information required by Part 573 of your regulations is enclosed with this letter.

Sincerely,



Thomas C. Baloga  
Vice President  
Engineering, US

Attachments

**Company**  
BMW of North America, LLC

BMW Group Company

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2008 DECEMBER 12 – 1:00 PM  
OFFICE OF RECALL  
MANAGEMENT DIVISION



**Attachment  
To  
BMW Letter of Dec. 12, 2008**

1.     Manufacturer:             Bayerische Motoren Werke AG (BMW AG)  
  
       Designated Agent:     BMW of North America, LLC  
                                      Woodcliff Lake, NJ 07677
  
2.     Make:   MINI  
  
       Model Year / Model                             Inclusive dates of manufacture  
  
       2007-08 MINI Cooper S                             Nov. 18, 2006 – Jul. 8, 2008
  
3.     The number of vehicles affected is approximately 28,450.
  
4.     The percentage of vehicles with the longer tailpipe is 28,450 minus the 6,000+ vehicles already fitted with the shorter tailpipe from the Service Campaign.
  
5.     The issue involves the tailpipe extension. The centrally-located tailpipe extension protrudes slightly beyond the rear bumper. As a consequence, it is possible for inadvertent contact to occur to a person's leg. If the tailpipe extension is hot during inadvertent contact, then a burn could occur.
  
6.     This issue was the subject of NHTSA PE08-031, and EA08-020. On November 26, 2008, NHTSA's Associate Administrator for Enforcement made an Initial Decision that the subject vehicles contained a safety related defect. On December 12, 2008, BMW decided to acquiesce in the Initial Decision.
  
7.     Not applicable.
  
8.     The tailpipe extension will be replaced with a new, shortened version.  
  
       BMW expects to begin and complete dealer notification in December 2008, and begin and complete owner notification in January 2009.
  
9.     Not applicable.
  
10.    A copy of the Service Bulletin will be submitted when available.
  
11.    A draft copy of the owner notification letter will be submitted when available.
  
12.    Not applicable.

## Attachment to BMW Letter of Dec. 12, 2008

For the following reasons, BMW has not decided that the subject vehicles contain a safety-related defect, and continues to believe that NHTSA's Initial Decision is factually unsupported and legally unsound.

BMW strenuously disagrees with the Initial Decision. For the reasons set forth below, BMW believes that the National Highway Traffic Safety Administration (NHTSA) did not have a sufficient legal or factual basis for its Initial Decision, and that the record does not at this time support a conclusion that there is a safety-related defect in the design of the exhaust pipes on the subject vehicles as that term has been construed by the Federal courts and by NHTSA in the past.

BMW recognizes that there have been a number of incidents in which individuals have received burns from contact with the tips of the exhaust pipes of the subject vehicles. However, the fact that such incidents have occurred does not in itself demonstrate the existence of the safety-related "design defect" alleged in the Initial Decision. Rather, such incidents can – and do – occur in many other vehicle models with a wide variety of different exhaust pipe designs. And the fact that BMW modified the design of the exhaust pipes in the subject vehicles several months ago – and decided to conduct a service campaign to minimize the possibility of any such burns in the future – has no relevance to the issue of whether the original design is "defective." Vehicle manufacturers often make design improvements as running changes, and NHTSA has consistently recognized that such prospective changes are not evidence, or an admission, that an original design is "defective."

The investigation of this alleged defect by the Office of Defects Investigation (ODI) was remarkably brief compared to its usual practice, and it was not sufficiently thorough to support a determination by NHTSA or BMW that the subject vehicles contain a safety related defect. The Initial Decision was apparently based on the fact that there were more consumer complaints to NHTSA and to BMW of burns from the exhaust pipes of MY 2007 and MY 2008 MINI Cooper S vehicles than there were from the exhaust pipes of Cooper S vehicles from prior model years, which had a somewhat different design. But the report accompanying the Initial Decision (Report) notably does not contain comparable data regarding the problem experience of other vehicle models. This is a significant departure from ODI's usual practice, particularly in investigations where the existence of the alleged defect is based primarily (or solely) on the frequency of incidents.

Although the Report contains a perfunctory analysis of the consumer complaints *to ODI* involving similar occurrences, NHTSA has recognized in the past that the number of complaints in the ODI database is not reflective of true problem experience, since most consumers complain to the manufacturer of their vehicles rather than to ODI. Moreover, the minimal number of complaints to ODI precludes any valid statistical comparison based on that information.<sup>1</sup> BMW provided NHTSA with information during the Preliminary Evaluation (PE) stage and Engineering Analysis (EA) stage confirming that other vehicle models have exhaust pipes that extend beyond the bumper face, which is apparently the design defect identified by NHTSA. BMW believes that, under these circumstances, ODI should have sent information requests (IR) to the manufacturers of peer vehicles seeking information about the complaint experience in those vehicles.

This concern is not merely academic or procedural. The federal courts have explained that NHTSA may be able to establish a *prima facie* case of a safety-related defect based on the

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<sup>1</sup> The NHTSA Report also refers to an analysis of field reports submitted in accordance with NHTSA's Early Warning Reporting (EWR) regulations. However, it is unclear what, if anything, this analysis purports to show, since the Report does not reveal which vehicle models were covered by the six field reports that contained a reference to exhaust pipe burns or similar words.

existence of a “significant” number of failures in the vehicles. But, the question of whether a significant number of failures have occurred in a vehicle “must be answered in terms of the facts and circumstances of each particular case. Relevant considerations include the failure rate of the component in question, **failure rates of comparable components**, and the importance of the component to the safe operation of the vehicle.” *United States v. General Motors (Wheels)*, 518 F.2d 420, 438 n. 84 (D.C. Cir. 1975) (emphasis added). Thus, neither BMW nor NHTSA could conclude whether the reports of burns from MINI tailpipes constituted a “significant” number of failures without knowing the failure rates of comparable components on other makes/models, information that is ordinarily developed through a peer review.

Moreover, it is not at all clear that a burn resulting from contact with a hot exhaust pipe is a “failure” within the meaning of the *Wheels* case. The “failure” in *Wheels* was the separation of a wheel from an axle – clearly something that is not supposed to happen. However, it is well known that exhaust pipes will be very hot after a vehicle has been operated for a period of time and that contact with such hot surfaces should be avoided. As the D.C. Circuit has held, “the Government must demonstrate that failures had occurred, not merely that consumers had complained.” *United States v. General Motors (X-Cars)*, 841 F.2d 400, 411 (D.C. Cir. 1988) (internal quotations and citations to District Court opinion omitted). Just as cars are known to skid under a variety of circumstances, and skidding alone was not deemed to be a “failure” in the X-Cars case, so too, burns caused by contact with a hot exhaust pipe are not in itself evidence of a “failure.”

On page 10 of the Report, NHTSA states that it did not solicit information from the manufacturers of peer vehicles “due to the absence of data [in the ODI database] indicating any potential defect trend in other vehicles.” However, that is circular reasoning; how can the agency know whether complaints were made to the manufacturers of peer vehicles unless it asks? Moreover, reliance on the complaints in the ODI database for **any** purpose is particularly dubious in the context of this investigation, given the strong evidence that the complaints to ODI were influenced by Internet-driven publicity.

As NHTSA may know, many owners of MINI Cooper vehicles are true enthusiasts, and Internet websites have been created to allow such owners to communicate among themselves about their experiences with their vehicles, both positive and (occasionally) negative. *See, e.g.,* <http://www.northamericanmotoring.com/forums/>. There are several threads on this website in which owners of MY 2007-2008 MINI Cooper vehicles have discussed the issue of tailpipe burns. *See, e.g.,* <http://www.northamericanmotoring.com/forums/coupe-talk-2007/102494-ouch-watch-those-exhaust-pipes.html> (beginning on May 27, 2007); <http://www.northamericanmotoring.com/forums/coupe-talk-2007/108264-who-got-burn-from-the-exhaust-tip.html> (beginning on July 23, 2007); and <http://www.northamericanmotoring.com/forums/general-mini-talk/111506-injured-by-my-mini.html> (beginning on August 21, 2007).

Although most of the postings on these websites recognize that exhaust tailpipe burns can be received from any vehicle (including the MY 2002-2006 Cooper S models and the Cooper vehicles with tailpipes on the side that NHTSA has not found to contain a defect), and that the vast majority of people know that exhaust tailpipes are hot and should be avoided, there are several postings – beginning in September 2007 – that urged individuals who had experienced such burns to file complaints with NHTSA, including at least one (Number 44 on the second thread) that provided a link to the ODI website and specific instructions on how to file a complaint. It is noteworthy that although there had been a number of burn incidents involving the subject vehicles, there were no consumer complaints filed with ODI prior to the initiation of these threads, and only three complaints filed prior to the reference to the ODI website (one of which was submitted by the person who included that reference (see Number 77)).

## Attachment to BMW Letter of Dec. 12, 2008

Given this publicity influence, NHTSA had the burden to obtain substantial evidence to overcome the likelihood that what may appear to be a higher complaint rate for the subject vehicles is in fact explained by this Internet publicity. As the Court of Appeals held in *X-Cars*, in light of the adverse publicity associated with a network television program showing a subject vehicle spinning out of control and newspaper and magazine articles referring to allegations of a defect, “the trial court could appropriately find that the Government’s evidence failed to show that the **actual incidence** of the phenomenon complained of was greater for the X-car than for comparable vehicle classes.” 841 F. 2d at 414 (emphasis in original).

Moreover, because ODI did not seek information about the complaint experience of other peer vehicles, BMW was unable to determine whether the complaint experience of the subject vehicles was significantly different from that of other vehicles, which is critical information for a manufacturer to consider in making its own decision as to the presence (or absence) of a safety-related defect. BMW is not able to obtain problem experience data from its competitors; only NHTSA can do that.

The Report identifies a total of 28 recalls during the past 11 years that address defects involving a vehicle’s exhaust system, apparently in an effort to show that other manufacturers have conducted similar recalls in the past. However, only four of those recalls involved burns from contact with an exhaust pipe, and three of those involved motorcycles. The only recall to address exhaust pipe burns in a light vehicle over this period was conducted by Volvo and covered station wagons with a dealer installed rear-facing third row of seats (NHTSA Recall No. 98V-254). The facts and circumstances underlying that recall are very distinguishable from the present circumstances for several reasons. First, the complaint rate was much higher than the rate for the subject vehicles. Second, there apparently was a manufacturing defect in the Volvo vehicles (i.e., tolerance problems for the tailpipe caused some of the exhaust pipes to be significantly longer than others). Third, most of the incidents involved children exiting the vehicle through the rear liftgate. Finally, it is noteworthy that although the recall nominally covered 50,000 vehicles, only 10,000 of those vehicles had a dealer-installed third seat, and those were the only vehicles that were eligible to receive the remedy, even though the manufacturing tolerance problem applied to all 50,000 vehicles. This demonstrates that the Volvo recall was not undertaken to address a design or manufacturing defect found to exist in the vehicle, but rather was only conducted to minimize the likelihood of children being burned as they exited through the rear liftgate, a situation that is not present here.