UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

SEP 18 2019

REPLY TO THE ATTENTION OF

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Evan Lang, Owner
E.L.M. Repair and Refrigeration
W141 Opportunity Lane
Edgar, Wisconsin 54426

Dear Mr. Lang:

Enclosed is a file-stamped Consent Agreement and Final Order (CAFO) which resolves E.L.M. Repair and Refrigeration docket no. **CAA-05-2019-0030**. As indicated by the filing stamp on its first page, we filed the CAFO with the Regional Hearing Clerk on September 18, 2019.

Pursuant to paragraph 35 of the CAFO, E.L.M. Repair and Refrigeration must pay the civil penalty within 30 days of the filing date. Your electronic funds transfer must display the case name and case docket number.

Please direct any questions regarding this case to Josh Zaharoff, Associate Regional Counsel, 312-886-4460

Sincerely,

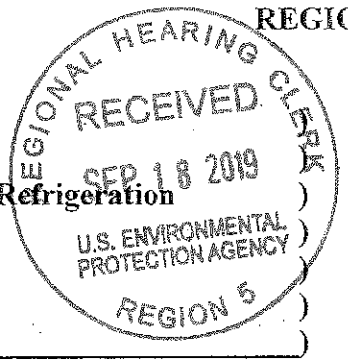
Brian Dickens

Brian Dickens, Chief
Air Enforcement and Compliance Assurance Section (MN/OH)

Enclosure

cc: Ann Coyle, Regional Judicial Officer/via electronic mail
Regional Hearing Clerk/via electronic mail
Josh Zaharoff/via electronic mail
Maria Hill, Wisconsin Department of Natural Resources/via email

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5



In the Matter of:	**Docket No. CAA-05-2019-0030**
E.L.M. Repair and Refrigeration **Edgar, Wisconsin**	**Proceeding to Assess a Civil Penalty Under Section 205(c)(1) of the Clean Air Act, 42 U.S.C. § 7424(c)(1)**
Respondent.	

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 205(c)(1) of the Clean Air Act (the CAA), 42 U.S.C. § 7424(c)(1), and Sections 22.1(a)(2), 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), as codified at 40 C.F.R. Part 22.

2. Complainant is the Director of the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondent is E.L.M. Repair & Refrigeration, Inc., a corporation doing business in Wisconsin.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. For the purpose of this proceeding, Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO and its right to appeal this CAFO.

Statutory and Regulatory Background

9. Title II of the CAA, 42 U.S.C. §§ 7521–7554, was enacted to reduce air pollution from mobile sources. In enacting the CAA, Congress found, in part, that "the increasing use of motor vehicles…has resulted in mounting dangers to the public health and welfare." CAA § 101(a)(2), 42 U.S.C. § 7401(a)(2).

10. EPA promulgated emission standards for particulate matter (PM), nitrogen oxides (NO_x), and other pollutants emitted by motor vehicles and motor vehicle engines, including Heavy Duty Diesel Engine (HDDE) trucks, under Section 202 of the CAA, 42 U.S.C. § 7521. *See generally* 40 C.F.R. Part 86. HDDE emission standards "reflect the greatest degree of emission reduction achievable through the application of [available] technology." CAA § 202(a)(3)(A)(i), 42 U.S.C. § 7521(a)(3)(A)(i).

11. Section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), prohibits a vehicle manufacturer from selling a new motor vehicle in the United States unless the vehicle is covered by a Certificate of Conformity (COC). EPA issues COCs to vehicle manufacturers under Section 206(a) of the CAA, 42 U.S.C. § 7525(a), to certify that a particular group of motor vehicles and motor vehicle engines conform to applicable EPA requirements governing motor vehicle emissions. A manufacturer's application for a COC will include, among other things, a

description of the HDDE, its emission control systems, all auxiliary emission control devices and the engine parameters monitored.

12. To meet the emission standards in 40 C.F.R. Part 86, HDDE manufacturers employ many devices and elements of design. "Element of design" means "any control system (*i.e.*, computer software, electronic control system, emission control system, computer logic), and/or control system calibrations, and/or the results of systems interaction, and/or hardware items on a motor vehicle or motor vehicle engine." 40 C.F.R. § 86.094-2.

13. One element of design that HDDE manufacturers employ is retarded fuel injection timing as a primary emission control device for emissions of oxides of nitrogen (NO_x). Common emission control devices used by HDDE manufacturers include diesel particulate filter (DPF), exhaust gas recirculation (EGR) systems, selective catalytic reduction (SCR) systems, and/or diesel oxidation catalyst (DOC). Additionally, modern HDDEs are equipped with electronic control modules (ECMs), which continuously monitor engine and other operating parameters and control the emission control devices.

14. EPA promulgated regulations for motor vehicles manufactured after 2007 that require HDDE trucks to have onboard diagnostic systems to detect various emission control device parameters and vehicle operations. *See* Section 202(m) of the CAA, 42 U.S.C. § 7521(m), and 40 C.F.R. §§ 86.010-18(o) and 86.1806-05(n).

15. Section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A), states that it is prohibited "for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under [Title II of the CAA] prior to its sale and delivery to the ultimate purchaser, or for any person

knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser."

16. Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), states that it is prohibited "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under [Title II of the CAA], and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use."

17. EPA may administratively assess a civil penalty, with or without conditions, for violations of section 203(a) of the CAA, 42 U.S.C. § 7522(a). Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1).

18. EPA may assess a civil penalty of up to $3,750 for each applicable CAA violation that occurred between January 12, 2009 and November 2, 2015, and up to $4,735 for each applicable CAA violation that occurred after November 2, 2015 and for which a penalty is assessed on or after January 15, 2019, in accordance with Section 205(a) of the CAA, 42 U.S.C. § 7524(a), and 40 C.F.R. Part 19.

EPA's Factual Allegations and Alleged Violations

19. Respondent is a corporation organized under the laws of the State of Wisconsin with its primary place of business located at W141 Opportunity Lane, Edgar, Wisconsin (the Facility).

20. Respondent is a person, as that term is defined in Section 302(e) of the CAA. 42 U.S.C. § 7602(e).

21. On June 4, 2015, EPA representatives inspected Respondent's Facility in Edgar, Wisconsin. During the inspection, EPA representatives requested invoices related to Respondent's sale and installation of tuners and work performed on exhaust systems. Respondent provided EPA representatives with 35 invoices for the period beginning in January 2013 through March 2015.

22. On July 5, 2016, EPA issued a request for information to Respondent, requesting additional documents related to invoices of work performed and sales of tuners.

23. On September 21, 2016, Respondent provided an additional 50 invoices and documents related to Respondent's purchases, sales, and work that impacted emission control devices on HDDEs.

24. Based upon the information collected during the inspection and Respondent's response to the request for information, Respondent knowingly removed and/or rendered inoperative at least 47 devices or elements of design installed on or in a motor vehicle or motor vehicle engine that were installed by the original equipment manufacturer in order to comply with CAA emission standards between January 10, 2013 and July 18, 2016, in violation of section 203(a)(3)(A) of the CAA, § 7522(a)(3)(A). Further, Respondent sold and/or installed at least 61 parts or components on motor vehicle engines where the principal effect of the part or component is to bypass, defeat, or render inoperative elements of design of those engines between January 10, 2013 and July 18, 2016. Respondent knew or should have known that the work performed on motor vehicles or motor vehicle engines and these parts or components were offered for sale or installed for such use or put to such use, in violation of section 203(a)(3)(B) of the CAA, § 7522(a)(3)(B).

25. On February 10, 2017, EPA issued a Notice of Violation (NOV) to Respondent for violating sections 203(a)(3)(A) and (a)(3)(B) of the CAA, 42 U.S.C. §§ 7522(a)(3)(A) and (a)(3)(B), between January 2013 and July 2016.

26. On March 15, 2017, representatives from EPA and Respondent met to discuss the February 10, 2017 NOV.

Conditions

27. By the effective date of this CAFO, Respondent shall not manufacture, sell, offer for sale, or install any aftermarket defeat devices, including ECM tuning products ("tuners"), exhaust aftertreatment delete kits, and EGR delete kits, where a principal effect of the device is to bypass, defeat, or render inoperative any emission-related device or element of design installed on or in a motor vehicle or motor vehicle engine, and will not remove or render inoperative any emissions-related device or element of design installed on or in a motor vehicle or motor vehicle engine.

28. By the effective date of this CAFO, Respondent shall not provide technical support, maintenance, repair, or information pertaining to defeat devices and/or tuners installed on vehicles brought into the Facility.

29. Respondent shall follow the Compliance Plan in Appendix A as a guide to maintain compliance. In case of any conflict between the terms of the Compliance Plan and this CAFO, the terms of the CAFO shall govern.

30. Within 30 days of the effective date of this CAFO, Respondent shall permanently destroy any defeat device remaining in ELM's inventory and/or possession, including but not limited to tuners, by compacting or crushing the defeat devices and all of the associated parts and

components to render them useless. Respondent shall submit videographic and photographic evidence in accordance with paragraph 32.

31. Within 30 days of the effective date of this CAFO, Respondent shall contact all customers on work orders cited in the February 10, 2017 NOV using the Service Recall Letter in Appendix B. Respondent shall provide all parts and labor associated with work performed in response to the Service Recall Letter at no cost to the customer. Respondent shall submit to EPA in accordance with paragraph 32 the following information regarding work performed on each vehicle in response to the Service Recall Letter: (1) vehicle owner with contact name, address, and phone number; (2) vehicle make and model and model year; (3) engine manufacturer; (4) engine size (horsepower); (5) emission control equipment reinstalled (e.g., catalyst, DPF, EGR, SCR); (6) cost of reinstallation of emission control equipment per vehicle (separate parts from labor costs); and (7) copies of all invoices for purchase of reinstallation equipment.

32. Respondent must submit notices and reports required by paragraphs 30 and 31 this CAFO via electronic mail to miller.patrick@epa.gov and r5airenforcement@epa.gov every six months (by the 30th of the month that follows each six-month period) for two years after the effective date of this CAFO.

33. In each report that Respondent submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its officers:

> I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Civil Penalty

34. Based on analysis of the factors specified in Section 205(c) of the CAA, 42 U.S.C. § 7424(c), the facts of this case and cooperation, prompt return to compliance, and agreement to perform a supplemental environmental project, Complainant has determined that an appropriate civil penalty to settle this action is $47,592.

35. Within 30 days after the effective date of this CAFO, Respondent must pay a $47,592 civil penalty by electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read: "D68010727 Environmental Protection Agency"

In the comment or description field of the electronic funds transfer, state Respondent's name and the docket number of this CAFO.

36. Respondent must send a notice of payment that states Respondent's name and the docket number of this CAFO to EPA at the following addresses when it pays the penalty:

Attn: Compliance Tracker (AE-18J)
Air Enforcement and Compliance Assurance Branch
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

Josh Zaharoff (C-14J)
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

Regional Hearing Clerk (E-19J)
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

37. This civil penalty is not deductible for federal tax purposes.

38. If Respondent does not pay timely the civil penalty or any stipulated penalties due under paragraph 50, below, EPA may request the Attorney General of the United States to bring an action to collect any unpaid portion of the penalty with interest, nonpayment penalties and the United States enforcement expenses for the collection action under Section 205(c)(6) of the CAA, 42 U.S.C. § 7424(c)(6). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

39. Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2). Respondent must pay the United States enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection proceedings. In addition, Respondent must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue. This nonpayment penalty will be 10 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter. 42 U.S.C. § 7413(d)(5).

Supplemental Environment Project

40. Respondent must complete a supplemental environmental project (SEP) designed to protect public health and the environment by implementing a wood-burning appliance replacement, retrofit or upgrade project to replace older, inefficient wood-burning appliances reducing emissions of PM.

41. No later than December 31, 2020, Respondent must complete the SEP as follows. Respondent must provide for the replacement, retrofit, or upgrade of inefficient, higher polluting wood-burning appliances with cleaner-burning, more energy-efficient heating appliances and technologies within the geographic region near Respondent's Facility. Respondent must ensure that all the inefficient wood-burning appliances are properly disposed or recycled such that the appliances cannot be resold or reused. Respondent must provide individuals receiving the replacement, retrofit, or upgrade with EPA's Burn Wise information regarding the benefits of cleaner burning appliances, use of dry, appropriate wood fuel, and proper appliance operation. Respondent may select and enter into an agreement with a third party that has substantial experience in replacing or upgrading wood-burning appliances to implement the SEP. The SEP must prioritize children, elderly, and income-qualified individuals. The Respondent is responsible for completion of the SEP. Respondent must provide EPA with notice of a selection of a third-party implementer and description of the entity's qualifications prior to implementing the SEP. EPA has the right to disapprove a SEP implementer if it does not have substantial experience in replacing or upgrading inefficient wood-burning appliances.

42. Respondent must spend at least $142,776 to replace, retrofit, or upgrade older, inefficient wood-burning appliances.

43. With regard to the SEP, Respondent certifies the truth and accuracy of each of the following:

a. That all cost information provided to the EPA in connection with the EPA's approval of the SEP is complete and accurate and that Respondent in good faith estimates that the cost to implement the SEP is $142,776;

b. That, as of the date of executing this Decree, Respondent is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;

c. That the SEP is not a project that Respondent was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;

d. That Respondent has not received and will not receive credit for the SEP in any other enforcement action;

e. That Respondent will not receive reimbursement for any portion of the SEP from another person or entity;

f. That for federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP;

g. Respondent certifies that it is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP; and

h. Respondent certifies that it has inquired of the SEP recipient (and implementor if applicable) whether it is a party to an open federal financial assistance transaction that is funding or could fund the same activity as the SEP and has been informed by the recipient that it is not a party to such a transaction.

44. EPA may inspect the facility and/or request records at any time to monitor Respondent's compliance with this CAFO's SEP requirements.

45. Respondent must submit a SEP completion report to EPA by January 31, 2021. This report must contain the following information:

a. Detailed description of the SEP as completed;

b. Description of any operating problems and the actions taken to correct the problems;

c. Itemized cost of goods and services used to complete the SEP documented by copies of invoices, purchase orders or cancelled checks that specifically identify and itemize the individual cost of the goods and services;

d. Documentation that all the inefficient wood-burning appliances are properly disposed or recycled such that the appliances cannot be resold or reused;

e. Certification that Respondent has completed the SEP in compliance with this CAFO; and

f. Description of the environmental and public health benefits resulting from the SEP (quantify the benefits and pollution reductions).

46. Respondent must submit all notices and reports required by this CAFO by first-class mail to the Compliance Tracker of the Air Enforcement and Compliance Assurance Branch at the address provided in paragraph 36, above.

47. In each report that Respondent submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its officers:

> I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

48. Following receipt of the SEP completion report described in paragraph 45, above, EPA must notify Respondent in writing that:

a. It has satisfactorily completed the SEP and the SEP report;

b. There are deficiencies in the SEP as completed or in the SEP report and EPA will give Respondent 30 days to correct the deficiencies; or

c. It has not satisfactorily completed the SEP or the SEP report and EPA will seek stipulated penalties under paragraph 50.

49. If EPA exercises option b above, Respondent may object in writing to the deficiency notice within 10 days of receiving the notice. The parties will have 30 days from EPA's receipt of Respondent's objection to reach an agreement. If the parties cannot reach an agreement, EPA will give Respondent a written decision on its objection. Respondent will comply with any requirement that EPA imposes in its decision. If Respondent does not complete the SEP as required by EPA's decision, Respondent will pay stipulated penalties to the United States under paragraph 50, below.

50. If Respondent violates any requirement of this CAFO relating to the SEP, Respondent must pay stipulated penalties to the United States as follows:

a. Except as provided in subparagraph b, below, if Respondent did not complete the SEP satisfactorily according to the requirements of this CAFO, including the schedule in paragraph 41, Respondent must pay a penalty of $150,000.

b. If Respondent did not complete the SEP satisfactorily, but EPA determines that Respondent made good faith and timely efforts to complete the SEP and certified, with supporting documents, that it spent at least 90 percent of the amount set forth in paragraph 42, Respondent will not be liable for any stipulated penalty under subparagraph a, above.

c. If Respondent completed the SEP satisfactorily, but spent less than 90 percent of the amount set forth in paragraph 42, Respondent must pay a penalty of the difference between what was spent by the Respondent and $142,776, or $14,278, whichever is greater.

d. If Respondent did not submit timely the SEP completion report or any other report required by paragraph 45, Respondent must pay penalties in the following amounts for each day after the report was due until it submits the report:

Penalty per violation per day	Period of violation
$500	1st through 14th day
$750	15th through 30th day
$1,000	31st day and beyond

51. EPA's determinations of whether Respondent completed the SEP satisfactorily and whether Respondent made good faith and timely efforts to complete the SEP will bind Respondent.

52. Respondent must pay any stipulated penalties within 15 days of receiving EPA's written demand for the penalties. Respondent will use the method of payment specified in paragraph 36, above, and will pay interest and nonpayment penalties on any overdue amounts.

53. Any public statement that Respondent makes referring to the SEP must include the following language: "E.L.M. Repair and Refrigeration undertook this project under the settlement of the United States Environmental Protection Agency's civil enforcement action

against E.L.M. Repair and Refrigeration for violations of Sections 203(a)(3)(A) and 203(a)(3)(B) of the Clean Air Act, by removing emission control devices and modification of heavy-duty diesel engines."

54. If an event occurs which causes or may cause a delay in completing the SEP as required by this CAFO:

a. Respondent must notify EPA in writing within 10 days after learning of an event which caused or may cause a delay in completing the SEP. The notice must describe the anticipated length of the delay, its cause(s), Respondent's past and proposed actions to prevent or minimize the delay and a schedule to carry out those actions. Respondent must take all reasonable actions to avoid or minimize any delay. If Respondent fails to notify EPA according to this paragraph, Respondent will not receive an extension of time to complete the SEP.

b. If the parties agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, the parties will stipulate to an extension of time no longer than the period of delay.

c. If EPA does not agree that circumstances beyond the control of Respondent caused or may a delay in completing the SEP, EPA will notify Respondent in writing of its decision and any delays in completing the SEP will not be excused.

d. Respondent has the burden of proving that circumstances beyond its control caused or may cause a delay in completing the SEP. Increased costs for completing the SEP will not be a basis for an extension of time under subparagraph b, above. Delay in achieving an interim step will not necessarily justify or excuse delay in achieving subsequent steps.

55. For federal income tax purposes, Respondent will neither capitalize into inventory or basis, nor deduct any costs or expenditures incurred in performing the SEP.

General Provisions

56. The parties consent to service of this CAFO by e-mail at the following e-mail addresses: zaharoff.josh@epa.gov (for Complainant), and dieseldoctor@elmrepair.com (for Respondent).

57. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in this CAFO.

58. The CAFO does not affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

59. This CAFO does not affect Respondent's responsibility to comply with the CAA and other applicable federal, state and local laws. Except as provided in paragraph 57, above, compliance with this CAFO will not be a defense to any actions subsequently commenced pursuant to federal laws administered by EPA.

60. Respondent certifies that it is complying fully with Sections 203(a)(3)(A) and (a)(3)(B) of the CAA, 42 U.S.C. §§ 7522(a)(3)(A) and (a)(3)(B).

61. This CAFO constitutes an enforcement action for purposes of considering Respondent's compliance history under Section 205 of the CAA, 42 U.S.C. § 7524, in any subsequent enforcement actions.

62. The terms of this CAFO bind Respondent, its successors and assigns.

63. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

64. Each party agrees to bear its own costs and attorneys fees in this action.

65. This CAFO constitutes the entire agreement between the parties.

E.L.M. Repair and Refrigeration, Respondent

9/10/19
Date

Evan Lang, President
E.L.M. Repair and Refrigeration

United States Environmental Protection Agency, Complainant

9-13-19
Date

Sara Breneman
for Michael D. Harris
Acting Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 5

Consent Agreement and Final Order
In the Matter of: E.L.M. Repair and Refrigeration
Docket No. CAA-05-2019-0030

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

9/23/19
Date

Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

Appendix A:

Compliance Plan to Avoid Illegal Tampering and Aftermarket Defeat Devices

This document explains how to help ensure compliance with the Clean Air Act's prohibitions on tampering and aftermarket defeat devices. The document specifies what the law prohibits, and sets forth two principles to follow in order to prevent violations.

The Clean Air Act Prohibitions on Tampering and Aftermarket Defeat Devices

The Act's prohibitions against tampering and aftermarket defeat devices are set forth in section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3) (hereafter "§ 203(a)(3)"). The prohibitions apply to all vehicles, engines, and equipment subject to the certification requirements under sections 206 and 213 of the Act. This includes all motor vehicles (e.g., light-duty vehicles, highway motorcycles, heavy-duty trucks), motor vehicle engines (e.g., heavy-duty truck engines), nonroad vehicles (e.g., all-terrain vehicles, off road motorcycles), and nonroad engines (e.g., marine engines, engines used in generators, lawn and garden equipment, agricultural equipment, construction equipment). Certification requirements include those for exhaust or "tailpipe" emissions (e.g., oxides of nitrogen, carbon monoxide, hydrocarbons, particulate matter, greenhouse gases), evaporative emissions (e.g., emissions from the fuel system), and onboard diagnostic systems.

The prohibitions are as follows:

> "The following acts and the causing thereof are prohibited–"
>
> > **Tampering:** CAA § 203(a)(3)(A), 42 U.S.C. § 7522(a)(3)(A), 40 C.F.R. § 1068.101(b)(1): "for any person to remove or render inoperative any device or element of design installed on or in a [vehicle, engine, or piece of equipment] in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser;"
> >
> > **Defeat Devices:** CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), 40 C.F.R. § 1068.101(b)(2): "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any [vehicle, engine, or piece of equipment], where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a [vehicle, engine, or piece of equipment] in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use."

Section 203(a)(3)(A) prohibits tampering with emission controls. This includes those controls that are in the engine (e.g., fuel injection, exhaust gas recirculation), and those that are in the exhaust (e.g., filters, catalytic convertors, and oxygen sensors). Section 203(a)(3)(B) prohibits (among other things) aftermarket defeat devices, including hardware (e.g., certain modified exhaust pipes) and software (e.g., certain engine tuners and other software changes).

EPA's longstanding view is that conduct that may be prohibited by § 203(a)(3) does not warrant enforcement if the person performing that conduct has a documented, reasonable basis for knowing that the conduct does not adversely affect emissions. *See* Mobile Source Enforcement Memorandum 1A (June 25, 1974).

EPA evaluates each case independently, and the absence of such reasonable basis does not in and of itself constitute a violation. When determining whether tampering occurred, EPA typically compares the vehicle after the service to the vehicle's original, or "stock" configuration (rather than to the vehicle prior to the service). Where a person is asked to perform service on an element of an emission control system that has already been tampered, EPA typically does not consider the service to be illegal tampering if the person either declines to perform the service on the tampered system or restores the element to its certified configuration.

Below are two guiding principles to help ensure Respondent commits no violations of the Act's prohibitions on tampering and aftermarket defeat devices.

Principle 1: Respondent Will Not Modify Any OBD System

Respondent will neither remove nor render inoperative any element of design of an OBD system.[i] Also, Respondent will not manufacture, sell, offer for sale, or install any part or component that bypasses, defeats, or renders inoperative any element of design of an OBD system.

Principle 2: Respondent Will Ensure There is a *Reasonable Basis* for Conduct Subject to the Prohibitions

For conduct unrelated to OBD systems, Respondent will have a *reasonable basis* demonstrating that its conduct[ii] does not adversely affect emissions. Where the conduct in question is the manufacturing or sale of a part or component, Respondent must have a *reasonable basis* that the installation and use of that part or component does not adversely affect emissions. Respondent will fully document its *reasonable basis*, as specified in the following section, at or before the time the conduct occurs.

Reasonable Bases

This section specifies several ways that Respondent may document that it has a "reasonable basis" as the term is used in the prior section. In any given case, Respondent must consider all the facts including any unique circumstances and ensure that its conduct does not have any adverse effect on emissions.[iii]

A. **Identical to Certified Configuration:** Respondent generally has a reasonable basis if its conduct: is solely for the maintenance, repair, rebuild, or replacement of an emissions-related element of design; and restores that element of design to be identical to the certified configuration (or, if not certified, the original configuration) of the vehicle, engine, or piece of equipment.[iv]

B. **Replacement After-Treatment Systems:** Respondent generally has a reasonable basis if the conduct:

(1) involves a new after-treatment system used to replace the same kind of system on a vehicle, engine or piece of equipment and that system is beyond its emissions warranty; and

(2) the manufacturer of that system represents in writing that it is appropriate to install the system on the specific vehicle, engine or piece of equipment at issue.

C. **Emissions Testing:**[v] Respondent generally has a reasonable basis if the conduct:

(1) alters a vehicle, engine, or piece of equipment;

(2) emissions testing shows that the altered vehicle, engine, or piece of equipment will meet all applicable emissions standards for its full useful life; and

(3) where the conduct includes the manufacture, sale, or offering for sale of a part or component, that part or component is marketed only for those vehicles, engines, or pieces of equipment that are appropriately represented by the emissions testing.

D. **EPA Certification:** Respondent generally has a reasonable basis if the emissions-related element of design that is the object of the conduct (or the conduct itself) has been certified by EPA under 40 C.F.R. Part 85 Subpart V (or any other applicable EPA certification program).[vi]

E. **CARB Certification:** Respondent generally has a reasonable basis if the emissions-related element of design that is the object of the conduct (or the conduct itself) has been certified by the California Air Resources Board ("CARB").[vii]

ENDNOTE

[i] *OBD system* includes any system which monitors emission-related elements of design, or that assists repair technicians in diagnosing and fixing problems with emission-related elements of design. If a problem is detected, an OBD system should record a diagnostic trouble code, illuminate a malfunction indicator light or other warning lamp on the vehicle instrument panel, and provide information to the engine control unit such as information that induces engine derate (as provided by the OEM) due to malfunctioning or missing emission-related systems. Regardless of whether an element of design is commonly considered part of an OBD system, the term "OBD system" as used in this Appendix includes any element of design that monitors, measures, receives, reads, stores, reports, processes or transmits any information about the condition of or the performance of an emission control system or any component thereof.

[ii] Here, the term *conduct* means: all service performed on, and any change whatsoever to, any emissions-related element of design of a vehicle, engine, or piece of equipment within the scope of § 203(a)(3); the manufacturing, sale, offering for sale, and installation of any part or component that may alter in any way an emissions-related element of design of a vehicle, engine, or piece of equipment within the scope of § 203(a)(3), and any other act that may be prohibited by § 203(a)(3).

[iii] General notes concerning the Reasonable Bases: Documentation of the above-described reasonable bases must be provided to EPA upon request, based on EPA's authority to require information to determine compliance. CAA § 208, 42 U.S.C. § 7542. EPA issues no case-by-case pre-approvals of reasonable bases, nor exemptions to the Act's prohibitions on tampering and aftermarket defeat devices (except where such an exemption is available by regulation). A reasonable basis consistent with this Appendix does not constitute a certification, accreditation, approval, or any other type of endorsement by EPA (except in cases where an EPA Certification itself constitutes the reasonable basis). No claims of any kind, such as "Approved [or certified] by the Environmental Protection Agency," may be made on the basis of the reasonable bases described in this Policy. This includes written and oral advertisements and other communication. However, if true on the basis of this Appendix, statements such as the following may be made: "Meets the emissions control criteria in the United States Environmental Protection Agency's Tampering Policy in order to avoid liability for violations of the Clean Air Act." There is no reasonable basis where documentation is fraudulent or materially incorrect, or where emissions testing was performed incorrectly.

[iv] Notes on Reasonable Basis A: The conduct should be performed according to instructions from the original manufacturer (OEM) of the vehicle, engine, or equipment. The "certified configuration" of a vehicle, engine, or piece of equipment is the design for which EPA has issued a certificate of conformity (regardless of whether that design is publicly available). Generally, the OEM submits an application for certification that details the designs of each product it proposes to manufacture prior to production. EPA then "certifies" each acceptable design for use, in the upcoming model year. The "original configuration" means the design of the emissions-related elements of design to which the OEM manufactured the product. The appropriate source for technical information regarding the certified or original configuration of a product is the product's OEM. In the case of a replacement part, the part manufacturer should represent in writing that the replacement part will perform identically with respect to emissions control as the replaced part, and should be able to support the representation with either: (a) documentation that the replacement part is identical to the replaced part (including engineering drawings or similar showing identical dimensions, materials, and design), or (b) test results from emissions testing of the replacement part. In the case of engine switching, installation of an engine into a different vehicle or piece of equipment by any person would be considered tampering unless the resulting vehicle or piece of equipment is (a) in the same product category (e.g., light-duty vehicle) as the engine originally powered and (b) identical (with regard to all emissions-related elements of design) to a certified configuration of the same or newer model year as the vehicle chassis or equipment. Alternatively, Respondent may show through emissions testing that there is a reasonable basis for an engine switch under Reasonable Basis C. Note that there are some substantial practical limitations to switching engines. Vehicle chassis and engine designs of one vehicle manufacturer are very distinct from those of another, such that it is generally not possible to put an engine into a chassis of a different manufacturer and have it match up to a certified configuration.

[v] Notes on emissions testing: Where the above-described reasonable bases involve emissions testing, unless otherwise noted, that testing must be consistent with the following. The emissions testing may be performed by someone other than the person performing the conduct (such as an aftermarket parts manufacturer), but to be consistent with this Appendix, the person performing the conduct must have all documentation of the reasonable basis at or before the conduct. The emissions testing and documentation required for this reasonable basis is the same as the testing and documentation required by regulation (e.g., 40 C.F.R. Part 1065) for the purposes of original EPA certification of the vehicle, engine, or equipment at issue. Accelerated aging techniques and in-use testing are acceptable only insofar as they are acceptable for purposes of original EPA certification. The applicable emissions standards are either the emissions standards on the Emission Control Information Label on the product (such as any stated family emission limit, or FEL), or if there is no such label, the fleet standards for the product category and model year. To select test vehicles or test engines where EPA regulations do not otherwise prescribe how to do so for purposes of original EPA certification of the vehicle, engine, or equipment at issue, one must choose the "worst case" product from among all the products for which the part or component is intended. EPA generally considers "worst case" to be that product with the largest engine displacement within the highest test weight class. The vehicle, engine, or equipment, as altered by the conduct, must perform identically both on and off the test(s), and can have no element of design that is not substantially included in the test(s).

[vi] Notes on Reasonable Basis D: This reasonable basis is subject to the same terms and limitations as EPA issues with any such certification. In the case of an aftermarket part or component, there can be a reasonable basis only if: the part or component is manufactured, sold, offered for sale, or installed on the vehicle, engine, or equipment for which it is certified; according to manufacturer instructions; and is not altered or customized, and remains identical to the certified part or component.

[vii] Notes on Reasonable Basis E: This reasonable basis is subject to the same terms and limitations as CARB imposes with any such certification. The conduct must be legal in California under California law. However, in the case of an aftermarket part or component, EPA will consider certification from CARB to be relevant even where the certification for that part or component is no longer in effect due solely to passage of time.

NAME
COMPANY (IF APPLICABLE)
STREET ADDRESS
CITY STATE XXXXXX

Re: Service Recall Letter

To Whom It May Concern:

Our records indicate your vehicle(s) (listed below) was serviced by E.L.M. Repair and Refrigeration (E.L.M.) at least once between January 2013 and August 2016. During your service appointment we removed emission control devices from your vehicle and/or modified your vehicle's emission control system.

We are offering to reinstall all emission control devices and restore the emission control system to its original manufacturer's specification at no cost to you on any of the vehicles listed below that are still in service and in your custody and control.

Vehicle Make Model Year
VIN/License (if available from records)
Any Other Discerning Information

E.L.M. is offering this service under the settlement of the United States Environmental Protection Agency's civil enforcement action against E.L.M. for alleged violations of Sections 203(a)(3)(A) and 203(a)(3)(B) of the Clean Air Act, by removing emission control devices and modifying the vehicle's emission control system on heavy-duty diesel engines.

Please call [Phone Number] to schedule your appointment to bring your vehicle in and have us reinstall the emission controls. If you have any questions regarding this letter, please ask for [ELM Representative].

Thank you,
[ELM Representative]

Consent Agreement and Final Order
In the matter of: **E.L.M. Repair and Refrigeration**
Docket Number: **CAA-05-2019-0030**

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing **Consent Agreement and Final Order**, docket number CAA 05 2019 0030 which was filed on September 18, 2019, in the following manner to the following addressees:

Copy by E-mail to Respondent:	Evan Lang dieseldoctor@elmrepair.com
Copy by E-mail to Attorney for Complainant:	Josh Zaharoff zaharoff.josh@epa.gov
Copy by E-mail to Attorney for Respondent:	Charles V. Sweeney CSweeney@axley.com
Copy by E-mail to Regional Judicial Officer:	Ann Coyle coyle.ann@epa.gov
Copy by E-mail to State Contact:	Maria Hill maria.hill@wisconsin.gov

Dated: September 18, 2019

LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5

CERTIFIED MAIL RECEIPT NUMBER(S): N/A