

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

Received by
EPA Region 7
Hearing Clerk

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
KC Performance Diesel, LLC)	Docket No. CAA-07-2023-0060
Kansas City, Kansas)	
)	
<u>Respondent.</u>)	

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant) and KC Performance Diesel, LLC (Respondent), have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded under 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, as codified at 40 C.F.R. Part 22.

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 205(c) of the CAA, 42 U.S.C. § 7524(c). Pursuant to Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), EPA may administratively assess a penalty for violations of Section 203(a) of the CAA, 42 U.S.C. § 7522(a), that occurred after November 2, 2015, where the penalty is assessed on or after January 6, 2023, if the penalty sought is less than \$446,456. CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1); 40 C.F.R. § 19.4.

2. This Consent Agreement and Final Order serves as notice that EPA has reason to believe that Respondent has violated Section 203 of the CAA, 42 U.S.C. § 7522, and the regulations promulgated thereunder. Furthermore, this Consent Agreement and Final Order serves as notice pursuant to Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), of the EPA’s intent to issue an order assessing penalties for these violations.

Parties

3. Complainant is the Director of the Enforcement and Compliance Assurance Division, Region 7, as duly delegated by the Administrator of EPA.

4. Respondent is KC Performance Diesel, LLC, a limited liability company organized under the laws of Kansas.

Statutory and Regulatory Background

5. 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).

6. Section 216(a) of the CAA, 42 U.S.C. § 7550(2), defines the term “motor vehicle” as “any self-propelled vehicle designed for transporting persons or property on a street or highway.” *See also* 40 C.F.R. § 85.1703 (further defining “motor vehicle.”) These definitions are based on vehicle attributes (e.g., ability to travel over 25 miles per hour, lack of features that render street use unsafe) and make no exemption for vehicles based on their use (e.g., claim that a vehicle is used solely for competition).

7. EPA promulgated emission standards for particulate matter (PM), nitrogen oxides (NO_x), hydrocarbons (HC), carbon monoxide (CO), 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 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).

8. To meet the emissions standards in 40 C.F.R. Part 86, HDDE manufacturers employ many devices and elements of design. The regulation at 40 C.F.R. § 86.094-2 defines the term “element of design” as “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.”

9. One element of design that HDDE manufacturers employ is retarded fuel injection timing as a primary emission control device for NO_x emissions. Common emission control devices HDDE manufacturers use include diesel particulate filters (DPFs), exhaust gas recirculation (EGR) systems, selective catalyst reduction (SCR) systems, and/or diesel oxidation catalysts (DOCs). Additionally, modern HDDEs are equipped with electronic control modules (ECMs), which continuously monitor engine and other operating parameters and control the vehicle’s emission control devices.

10. 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), 86.1806-05(n).

11. Section 208(a) and (b) of the CAA authorizes the EPA to enter and conduct inspections of persons subject to the prohibitions on manufacturing aftermarket defeat devices.

42 U.S.C. § 7542(a) and (b). Specifically, Section 208(a) of the CAA requires that subject persons shall make reports and provide information the EPA may reasonably require to determine whether the person has acted or is acting in compliance with Title II, Part A, and, shall, upon request, permit such officer or employee at reasonable times to have access to and copy such records. 42 U.S.C. § 7542(a).

12. Section 203(a)(2) of the CAA, 42 U.S.C. § 7522(a)(2), prohibits any person from failing or refusing to make reports, provide information, permit inspection, or permit access to or copying of records required under Section 208 of the CAA.

13. Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), and 40 C.F.R. § 1068.101(b)(2) prohibit any person from manufacturing or selling, or offering to sell, or installing, 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.

14. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines the term “person” as “including an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agency, or employee thereof.”

15. Section 205(a) of the CAA, 42 U.S.C. § 7524(a), states that any person who violates Section 203(a)(2) shall be subject to a civil penalty of not more than \$25,000 per day of violation, and any person other than a manufacturer or dealer who violates Section 203(a)(3)(B) of the CAA shall be subject to a civil penalty of not more than \$2,500 with respect to each part or component. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$55,808 and \$5,580, respectively, for violations that occur after November 2, 2015, and are assessed after January 6, 2023.

16. Pursuant to Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), EPA may compromise, or remit, with or without conditions, any administrative penalty which may be imposed under this section.

Factual Allegations

17. Respondent operates an automotive repair facility at 3002 South 44th Street, Kansas City, Kansas, 66106, that specializes in automotive diesel repair and performance upgrades (the Facility).

18. Respondent is a “person” as defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

19. On August 2, 2022, EPA attempted to conduct an on-site inspection of Respondent's Facility. Respondent denied EPA access to inspect the Facility.

20. On or around August 5, 2022, Respondent consented to an inspection to be conducted by EPA on August 19, 2022. However, during that inspection, Respondent denied EPA access to inspect records related to the company's compliance with the CAA's prohibitions related to aftermarket defeat devices.

21. On September 16, 2022, EPA sent a Request for Information to Respondent pursuant to Section 208 of the CAA, 42 U.S.C. § 7542, to evaluate Respondent's compliance with Title II of the CAA and the regulations promulgated thereunder.

22. On October 3, 2022, Respondent provided a response to EPA's Request for Information. In its response, Respondent stated that it sold and/or installed at least ninety-six (96) exhaust kits that disabled emission controls on diesel trucks.

Alleged Violations

23. Complainant hereby states and alleges that Respondent has violated the CAA and federal regulations promulgated thereunder as follows:

Count 1

24. Paragraphs 17 through 22 are incorporated by reference as if fully set forth herein.

25. Section 203(a)(2) of the CAA, 42 U.S.C. § 7522(a)(2), prohibits any person from failing or refusing to provide information, permit inspection, or permit access to or copying of records required under Section 208 of the CAA.

26. On August 2, 2022, and August 19, 2022, Respondent failed or refused to provide EPA information, permit inspection, or permit access to or copying of records required under Section 208 of the CAA.

27. By failing or refusing to provide EPA information, permit inspection, or permit access to copying of records required under Section 208 of the CAA, Respondent is in violation of Section 203(a)(2) of the CAA, 42 U.S.C. § 7522(a)(2).

Counts 2-97

28. Paragraphs 17 through 22 are incorporated by reference as if fully set forth herein.

29. Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), and 40 C.F.R. § 1068.101(b)(2), prohibit any person from manufacturing or selling, or offering 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.

30. Between January 2020 and December 2021, Respondent sold and/or installed at least ninety-six (96) parts or components on motor vehicles or 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.

31. Respondent knew or should have known that the parts or components it offered for sale or installed would bypass, defeat, or render inoperative elements of design on those engines.

32. By selling and/or installing at least ninety-six parts or components on motor vehicles or 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 when it knew or should have known that the parts or components it offered for sale or installed was to bypass, defeat, or render inoperative elements of design on those engines, Respondent is in violation of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), and 40 C.F.R. § 1068.101(b)(2).

CONSENT AGREEMENT

33. Respondent consents to the issuance of this Consent Agreement and Final Order. In addition, for the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- (a) admits the jurisdictional allegations set forth herein;
- (b) neither admits nor denies the specific factual allegations and alleged violations stated herein;
- (c) consents to the assessment of a civil penalty, as stated herein;
- (d) consents to the issuance of any specified compliance or corrective action order;
- (e) consents to any conditions specified herein;
- (f) consents to any stated Permit Action;
- (g) waives any right to contest the allegations set forth herein; and
- (h) waives its rights to appeal the Final Order accompanying this Consent Agreement.

34. For the purposes of this proceeding, Respondent:
- (a) agrees that this Consent Agreement states a claim upon which relief may be granted against Respondent;
 - (b) acknowledges that this Consent Agreement constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement actions;
 - (c) waives any right of judicial review under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1);
 - (d) consents to personal jurisdiction in any action to enforce this Consent Agreement or Final Order, or both, in the United States District Court; and
 - (e) waives any rights it may possess at law or in equity to challenge the authority of the EPA to bring a civil action in the United States District Court to compel compliance with the Agreement or Order, or both, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action.

35. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

Penalty

36. EPA has considered the appropriateness of the penalty pursuant to Section 205(c)(2) of the CAA, 42 U.S.C. § 7524(c)(2), and the January 21, 2021 Clean Air Act Title II Vehicle & Engine Civil Penalty Policy, and has determined that, based on substantiated ability to pay information, Respondent is unable to pay any penalty in this matter. Because of Respondent's inability to pay the penalty, therefore, Complainant conditionally agrees to resolve the claims alleged herein.

37. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Service Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 162-21(b)(2), performance of Paragraph 38 is restitution, remediation, or required to come into compliance with the law.

Conditions

38. As conditions of settlement and in compromise of the administrative penalty that EPA could otherwise impose herein, Respondent agrees to the following:

- a. By signing this Consent Agreement, the undersigned representative of Respondent certifies that from the date of Respondent's signature: (i) it 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 in violation of Section

203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A); and (ii) it will not manufacture, sell, offer for sale, or install any part or component, including those described in Paragraph 18, in violation of Section 203(a)(3)(B) of the CAA, 42, U.S.C. § 7522(a)(3)(B). Respondent acknowledges that it is aware of EPA's November 23, 2020 "Tampering Policy: The EPA Enforcement Policy on Vehicle and Engine Tampering and Aftermarket Defeat Devices under the Clean Air Act."

- b. By no later than the effective date of this Consent Agreement and Final Order, Respondent shall no longer provide technical support, maintenance, repair, or information pertaining to aftermarket defeat devices, including but not limited to the exhaust kits referenced in Paragraph 22, 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, installed on vehicles brought to the Facility.
- c. Within 30 days of the effective date of this Consent Agreement and Final Order, Respondent will permanently destroy any defeat device remaining in its 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 must submit videographic and photographic evidence in accordance with Paragraph 39.
- d. Within 30 days of the effective date of this Consent Agreement and Final Order, Respondent will remove any advertisements regarding sales or installation of defeat devices from its website, Facebook, and any other social media accounts.

39. Respondent must submit notice that it has complied with Paragraph 38 via e-mail to EPA Compliance Officer Avery Bowers at bowers.avery@epa.gov within six months after the effective date of this Consent Agreement and Final Order.

40. In the notice that Respondent submits as provided by Paragraph 39 of this Consent Agreement and Final Order, it must certify that the notice 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.

Effect of Settlement and Reservation of Rights

41. Performance of the conditions in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant

reserves the right to take any enforcement action with respect to any other violations of the CAA or any other applicable law.

42. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to EPA, as memorialized in the paragraph directly below.

43. Respondent certifies by the signing of this Consent Agreement that it is in compliance with all requirements of the CAA and its implementing regulations.

44. Performance of the conditions in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive relief or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of the CAA and regulations promulgated thereunder.

45. Complainant reserves the right to enforce the terms and conditions of this Consent Agreement and Final Order.

46. This Consent Agreement and Final Order constitutes an "enforcement response" as that term is used in EPA's Clean Air Act Mobile Source Civil Penalty Policy to determine Respondent's "history of compliance" under Section 205 of the CAA, 42 U.S.C. § 7524.

General Provisions

47. The parties consent to service of this Consent Agreement and Final Order electronically at the following e-mail addresses: *barton.kasey@epa.gov* (for Complainant) and *jmcgroder@gravesgarrett.com* (for Respondent). Respondent understands that the CAFO will become publicly available upon filing.

48. By signing this Consent Agreement, the undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement and to legally bind Respondent to it.

49. This Consent Agreement shall apply to and be binding upon Respondent and Respondent's agents, successors, and/or assigns. Respondent shall ensure that all contractors, employees, consultants, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement.

50. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

COMPLAINANT:

U.S. Environmental Protection Agency

Date: _____ By: _____
David Cozad
Director
Enforcement and Compliance Assurance Division

Date: _____ By: _____
Kasey Barton
Assistant Regional Counsel
Office of Regional Counsel

RESPONDENT:

KC Performance Diesel, LLC

Date: 5/8/2023

By: 
Signature

Michael Shartzner
Printed Name

Owner
Title

FINAL ORDER

Pursuant to Section 205(c) of the CAA, 42 U.S.C. § 7524(c), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date: _____ By: _____
Karina Borromeo
Regional Judicial Officer
United States Environmental Protection Agency
Region 7

CERTIFICATE OF SERVICE

To Be Completed by the EPA

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy via Email to Complainant:

Kasey Barton
U.S. Environmental Protection Agency, Region 7
barton.kasey@epa.gov

and

Milady Peters
U.S. EPA, Region 7
peters.milady@epa.gov.

Copy via Email to Attorney for Respondent:

Joseph McGroder
Attorney
Graves Garrett LLC
1100 Main St., Ste. 2700
Kansas City, MO 64105
jmcgroder@gravesgarrett.com

Dated this _____ day of _____, 2023.

Signed