

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105**

**** FILED **
28 SEP 2020
U.S. EPA - REGION IX**

In the Matter of:)
)
Borla Performance Industries, Inc.,)
)
Respondent.)
_____)
Docket No. CAA-R9-2020-0044

ANSWER

Pursuant to the consolidated Rules of Practice, 40 C.F.R. § 22.15, Respondent Borla Performance Industries, Inc. (“Respondent” or “Borla”), by counsel, offers the following Answer to the U.S. Environmental Protection Agency’s Amended Complaint.

RESPONSES TO NUMBERED PARAGRAPHS¹

1. Denied, as this paragraph consists of a legal conclusion to which no response is required.
2. Denied, as this paragraph consists of a legal conclusion to which no response is required.
3. Admitted.
4. Denied that Respondent provided information to Complainant that shows Respondent violated the CAA. Otherwise, without information and knowledge.

Jurisdiction

5. Admitted only that the Amended Complaint speaks for itself. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is needed.
6. Denied, as this paragraph consists of a legal conclusion to which no response is needed.

¹ The Amended Complaint contains headings and subheadings. To the extent that a response may be required, Respondent denies every allegation in each Amended Complaint heading or subheading.

7. Denied, as this paragraph consists of a legal conclusion to which no response is needed.

8. Without knowledge or information.

Governing Law

9. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

10. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

11. Denied.

12. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

13. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

14. Without knowledge or information.

15. Without knowledge or information.

16. Without knowledge or information.

17. Without knowledge or information.

18. Without knowledge or information.

19. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

*EPA's Certificate of Conformity Program for New Motor Vehicles
and Motor Vehicle Engines*

20. Denied, as this paragraph consists of a legal conclusion to which no response is required.

21. Denied, as this paragraph consists of a legal conclusion to which no response is required.

22. Denied, as this paragraph consists of a legal conclusion to which no response is required.

23. Denied, as this paragraph consists of a legal conclusion to which no response is required.

24. Denied, as this paragraph consists of a legal conclusion to which no response is required.

Emissions-Related Elements of Design

25. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

26. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

27. Denied that catalytic converters are an emission related part and element of design because that statement is a legal conclusion to which no response is required. Otherwise, without knowledge or information.

Acts Prohibited by Section 203(a)(3)(B) of the Clean Air Act

28. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

29. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

30. Denied, as this consists of a legal conclusion to which no response is required.

31. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

32. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.

General Allegations

Motor Vehicle Emissions-Related Elements of Design

33. Admitted.

34. Without information or knowledge.

35. Without information or knowledge.

36. Without information or knowledge.

37. Without information or knowledge.

38. Without information or knowledge.

39. Without information or knowledge.

40. Without information or knowledge.

41. Without information or knowledge.

42. Without information or knowledge.

43. Without information or knowledge.

44. Without information or knowledge.

45. Denied, as this paragraph consists of a legal conclusion to which no response is required. Otherwise, without information or knowledge.

The Type of Defeat Device at Issue

46. Denied with respect to Respondent; otherwise, without information or knowledge.

47. Without information or knowledge.

48. Denied that Respondent's January 31, 2018 response was seriously inadequate.

Otherwise, admitted.

49. Admitted only that Borla's October 29, 2018 response included an Excel spreadsheet that included a column entitled "Function"; that EPA's request speaks for itself; and that EPA attached excerpts from the Excel spreadsheet as Attachment A to the Amended Complaint.

50. Denied.

51. Denied.

52. Admitted that Respondent previously sold and offered for sale the products identified in Appendix A through its website. Denied that the products identified in Appendix A are Exhaust System Defeat Devices.

53. Admitted that EPA issued a Notice of Violation and that the Notice of Violation speaks for itself; otherwise, denied.

COUNT ONE

Violation for Manufacture and/or Sale and/or Offer for Sale of Exhaust System Defeat Devices

54. Respondent restates its responses to the preceding Paragraphs.

55. Admitted that Respondent manufactured, sold, and offered for sale the products identified in Appendix A.² Denied that the products identified in Appendix A are Exhaust System Defeat Devices.

56. Denied.

57. Denied.

² Borla notes that EPA has not included any specific product sales numbers in Attachment A. The number of alleged devices identified in this Paragraph 55 (5,296) differs from the number of alleged devices included in Paragraph 62 (5,547).

58. Denied.
59. Denied, as this paragraph consists of a legal conclusion to which no response is required.
60. Denied.
61. Denied.
62. Denied that Respondent has violated section 203(a)(3)(B) of the CAA or that any penalties should be assessed against Respondent; otherwise, without information our knowledge.
63. Admitted that the Amended Complaint makes no specific penalty demand. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.
64. Denied that Respondent is subject to any civil penalties; otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.
65. Denied that Respondent is subject to any civil penalties; otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.
66. Admitted only that the statutory language and the applicable law speak for themselves. Otherwise denied, as this paragraph consists of a legal conclusion to which no response is required.
67. Admitted only that the Penalty Policy speaks for itself. Denied that Respondent is subject to any civil penalties; otherwise, without information or knowledge.

GENERAL STATEMENT OF DENIAL

To the extent that Respondent failed to answer any allegation of fact—material or otherwise—Respondent denies those allegations.

DEFENSES

Without assuming any burden that it would otherwise bear, Respondent asserts the following defenses to the Amended Complaint:

First Defense: EPA lacks statutory authority to enforce the Clean Air Act against Borla.

Borla's products were designed and intended to be used, and sold for restricted use, only in vehicles designed, intended, and used solely for competition, which Congress expressly exempted from the Clean Air Act. Accordingly, neither the Clean Air Act nor its valid implementing regulations give the EPA enforcement power over Borla's conduct.

Second Defense: EPA's interpretation of the statutory provisions on which it bases its allegations is incorrect as a matter of law and is not entitled to any deference.

EPA's interpretation and application of Section 203(a)(3)(B) and other provisions of the Clean Air Act, including the term "motor vehicle," is not consistent with the statutory language or involves ambiguous language, and is not entitled to deference.

Third Defense: EPA cannot meet its burden to demonstrate a violation of Section 203(a)(3)(B) of the Clean Air Act by Respondent.

EPA bears the burden to demonstrate actionable violations of Section 203(a)(3)(B) of the Clean Air Act by Respondent. On the facts of this case, EPA cannot satisfy its burden, including but not limited to demonstrating that (a) the products identified in EPA's Amended Complaint were intended for use with "motor vehicles," (b) a principal effect of the identified products is to bypass, defeat, or render inoperative any device or element installed on or in a motor vehicle, or (c) that Respondent knew or should have known that any such product was being offered for sale or installed for such use or put to such use.

Fourth Defense: EPA’s actions in pursuing enforcement against Respondent are inconsistent with and contradict Executive Order 13924 and associated guidance from the White House Office of Information and Regulatory Affairs.

On May 19, 2020, the President signed Executive Order 13924, *Executive Order on Regulatory Relief to Support Economic Recovery* (“EO 13924”). On August 31, 2020, the White House Office of Information and Regulatory Affairs (“OIRA”) Administrator issued a “Memorandum for the Deputy Secretaries of Executive Departments and Agencies” (“Memorandum”) directing agencies to weigh revisions to their enforcement policies to restrict potential enforcement actions against regulated entities and individuals. EO 13924 Section 6 directs agency heads to “consider principles of fairness in administrative enforcement and adjudication” and to “revise their procedures and practices in light of them, consistent with applicable law.”

The Memorandum identifies recommended best practices including as follows:

- The Government should bear the burden of proving an alleged violation of law; the subject of enforcement should not bear the burden of proving compliance.
- Agencies should consider applying the rule of lenity in administrative investigations, enforcement actions, and adjudication by reading genuine statutory or regulatory ambiguities related to administrative violations and penalties in favor of the targeted party in enforcement.
- Penalties should be proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.
- Administrative enforcement should be free of improper Government coercion.
- Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.
- Administrative enforcement should be free of unfair surprise.

EPA has failed to act consistently with the Executive Order and the recommended practices in prosecution of this case, has failed to consider such best practices, and thus has acted in an arbitrary and capricious manner.

Fifth Defense: Statute of Limitations

The Statute of Limitations bars the prosecution of all activities that occurred more than five years (plus any tolled period) before the valid initiation of these proceedings. 28 U.S.C. § 2462.

Sixth Defense: Violation of Separation of Powers

Insofar as the Clean Air Act is properly construed to delegate legislative powers to the EPA to resolve ambiguous provisions or to define illegal conduct, the Act violates Article III and is an improper delegation of legislative power.

Seventh Defense: Lack of Fair Notice

The EPA's decades-long practice of permitting conduct similar to that alleged in the Amended Complaint affirmatively misled Borla and the public or, at a minimum, failed to provide Borla notice that the EPA considered Borla's actions unlawful, making EPA's current enforcement action for pre-fair-notice conduct a violation of due process as protected by the Fifth Amendment. In addition, EPA's failure to publicly specify what actions a manufacturer must take for EPA to exercise its discretion not to enforce against racing-only sales likewise constituted a lack of fair notice or opportunity to seek such non-enforcement.

Eighth Defense: Violation of Due Process and Sixth Amendment Rights

Because the penalties that the complaint imposes are essentially penal in character, this proceeding violates Borla's Sixth Amendment rights to confrontation, compulsory process for obtaining witnesses, and a trial by jury and related procedural rights. It would also violate a panoply of due process protections relating to the burden of proof, obligations to disclose adverse evidence, and others.

Ninth Defense: Violation of the Ex Post Facto Clause

Because the penalties that the complaint imposes are essentially penal in character, imposing them on Borla for conduct that was legal or otherwise permitted before the EPA's new interpretation and enforcement policy violates the Ex Post Facto Clause.

Tenth Defense: The Rule of Lenity

The Clean Air Act and regulations promulgated under its authority are ambiguous, particularly as applied to this case. Because the penalties that the complaint imposes are essentially penal in character, and because the terms of the statute and regulations can also determine application of criminal penalties under other provisions of the Act, those ambiguities should be resolved in Borla's favor.

Eleventh Defense: Violation of Due Process and of the Seventh Amendment Right to a Jury Trial

Even if the penalties in this case are deemed "civil," this proceeding violates Borla's Seventh Amendment right to a jury determination of disputed issues of fact. That an executive officer part of the same agency seeking to impose fines is permitted near conclusive authority to resolve disputed issues of fact also constitutes a due process violation, notwithstanding the limited judicial review provided by the Administrative Procedure Act.

Twelfth Defense: Violation of the Excessive Fines Clause

The penalties EPA seeks against Borla are grossly disproportionate to the nature of the alleged offense and injury and thereby violate the Eighth Amendment's Excessive Fines Clause.

Thirteenth Defense: Arbitrary and Capricious Penalties

The EPA's selective enforcement of penalties assessed in the complaint are unreasonable, arbitrary, and capricious, contrary to the ultimate standard of review of EPA actions set forth in 5 U.S.C. § 706(2)(A).

Fourteenth Defense: Estoppel

Because the EPA has not consistently enforced these provisions of the Clean Air Act against parties engaged in the same or more egregious conduct than Borla, it is estopped from applying its new interpretation of the Clean Air Act retroactively.

Fifteenth Defense: Compliance with Laws

Civil penalties are not appropriate under the applicable facts because Borla at all relevant times was acting consistent with and in compliance with applicable laws and regulations.

Sixteenth Defense: Good Faith

Civil penalties are not appropriate because Borla at all relevant times acted in good faith and in reliance on its good faith understanding of the applicable statutory structure and ceased all of the actions at issue upon notice from EPA of EPA's enforcement interpretation.

Seventeenth Defense: EPA cannot demonstrate a legal or equitable basis for imposing civil penalties.

Civil penalties are not appropriate or should be substantially mitigated because EPA cannot demonstrate meaningful impacts associated with the alleged violations or an equitable basis for imposing a civil penalty, including harm to human health or the environment, economic benefit to Respondent, or a history of noncompliance by Respondent.

Eighteenth Defense: EPA cannot base its penalty calculation on the Penalty Policy.

EPA cannot rely on its *Clean Air Act Mobile Source Civil Penalty Policy – Vehicle and Engine Certification Requirements* (2009) (“Penalty Policy”) for purposes of calculating or justifying a civil penalty because (a) the Penalty Policy is not listed on EPA’s Guidance Document Portal and thus under Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” cannot be relied upon by the Agency except to establish historical facts; and (b) the technical bases and assumptions used for calculation of certain recommended penalties in the Penalty Policy are not applicable to the specific factual circumstances in this case.

Nineteenth Defense: EPA’s adjudicatory structure and procedures violate the appointments clause and the separation of powers.

By permitting adjudication and internal appellate review by persons who constitute officers of the United States but who have not been properly appointed, and by restricting the removal and replacement of some or all of those officers, the process by which enforcement actions are adjudicated and appealed within the EPA violates the Appointments Clause and the separation of powers.

* * *

The pleading of the defenses described above shall not be construed as an undertaking by Respondent of any burden that would otherwise be the responsibility of the Complainant. Respondent has not waived any defenses and reserves its right to amend or supplement the above defenses or to delete and withdraw such defenses as may become necessary as the matter progresses.

RESPONDENT’S REQUEST FOR HEARING

Pursuant to the consolidated Rules of Practice, 40 C.F.R. § 22.15(c), Respondent requests a hearing in which it will contest (1) the Amended Complaint’s allegations of material fact; (2) its applications of law; and (3) its proposed penalties.

PRAYER

Respondent asks that the Amended Complaint be withdrawn with prejudice in whole or in part, and for such other relief to which Respondent shows itself to be entitled.

Dated: September 28, 2020

Respectfully submitted,



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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Kent Mayo, hereby certify that on this 28th day of September 2020, I have served, by electronic mail, a true and correct copy of Respondent's Answer to the U.S. EPA's Amended Complaint on the Regional Hearing Clerk at R9HearingClerk@epa.gov and on the following counsel for Complainant:

Allan Zabel
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United States Environmental Protection Agency, Region 9, Office of Regional Counsel
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Kent Mayo