

2/2/22

2:11

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

Received by
EPA Region 1
Hearing Clerk

In the Matter of:

Penson & Co. LLC
Taunton, Massachusetts

Respondent.

Docket No. CAA-01-2022-0025

CONSENT AGREEMENT

Preliminary Statement

1. This is a civil administrative penalty assessment proceeding instituted under section 205(c)(1) of the Clean Air Act (“CAA”), 42 U.S.C. § 7524(c)(1). The issuance of this Consent Agreement and attached Final Order (“CAFO”) simultaneously commences and concludes this proceeding. *See* 40 C.F.R. § 22.13(b).

2. Complainant in this matter is the United States Environmental Protection Agency (“EPA”). On EPA’s behalf, Karen McGuire, Director of EPA, Region 1, Enforcement and Compliance Assurance Division, is authorized by lawful delegation to institute and settle civil administrative penalty assessment proceedings under CAA Section 205(c)(1).

3. Respondent in this matter is Penson & Co. LLC (“Penson” or “Respondent”). Penson is a corporation organized under the laws of the Commonwealth of Massachusetts. Penson’s filing with the Massachusetts Secretary of the Commonwealth, Corporations Division for Filing Year 2020 identifies the location of its principal office as 960 Turnpike Street, Unit 17 in Canton, Massachusetts and describes its general character of business as “Auto Parts and Sports Goods Sales.”

4. As described more fully below, EPA alleges that Penson offered for sale and sold motor vehicle emission control systems in violation of CAA section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B).

5. EPA and Penson agree that settlement of this matter is in the public interest, and that entry of this CAFO without further litigation is the most appropriate means of resolving Penson's alleged violations of CAA section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), discussed below.

6. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Penson: admits that the EPA has jurisdiction over this matter as stated above; neither admits nor denies the factual allegations below; consents to the assessment of a civil penalty as stated below; waives any right to contest the alleged violations of law; and waives its rights to appeal the Final Order accompanying this Consent Agreement.

7. This Consent Agreement is entered into under section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), 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.

Governing Law

8. This proceeding arises under Part A of Title II of the CAA, CAA §§ 202-219, 42 U.S.C. §§ 7521–7554, and the regulations promulgated thereunder. These laws aim to reduce emissions, including non-methane hydrocarbons ("NMHC"), nitrogen oxides ("NOx"), particulate matter ("PM"), and carbon monoxide ("CO"), from sources of air pollution such as motor vehicles.

9. “Motor vehicle” is defined in section 216(2) of the CAA, 42 U.S.C. § 7550(2), 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”).

10. Under section 202 of the CAA, 42 U.S.C. § 7521, EPA promulgated emission standards for NMHC, NO_x, CO and PM. *See generally* 40 C.F.R. Part 86.

11. Section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), prohibits a motor vehicle manufacturer from selling a new motor vehicle in the United States unless the motor vehicle is covered by a certificate of conformity. EPA issues certificates of conformity to motor vehicle and motor vehicle engine 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.

12. The certificate of conformity will include, among other things, a description of the motor vehicle engines, their emission control systems, all auxiliary emission control devices, and the engine parameters monitored.

13. Motor vehicle and motor vehicle engine manufacturers employ many devices and elements of design to meet emission standards. 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.” *See* 40 C.F.R. §§ 86.094-2 & 86.1803-01.

14. To meet the emission standards in 40 C.F.R. Part 861, and qualify for a certificate of conformity, diesel-powered motor vehicle and motor vehicle engine manufacturers may utilize

¹ *See, e.g.*, 40 C.F.R. § 86.004-11 (emission standards for model year 2004 and later diesel heavy-duty engines and vehicles), § 86.007-11 (emission standards for model year 2007 and later model year diesel heavy-duty engines and vehicles).

control devices or elements of design such as Exhaust Gas Recirculation systems (“EGR”). An EGR is an element of design in motor vehicles that reduces NOx emissions, which are formed at high temperatures during fuel combustion. By recirculating exhaust gas through the engine, EGRs reduce engine temperature and NOx emissions.

15. Under the CAA, the term “person” includes individuals, corporations, partnerships, associations, states, municipalities, and political subdivisions of a state. 42 U.S.C. § 7602(e).

16. Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), prohibits any person from manufacturing, selling, 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, “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. A “defeat device” is a 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 a motor vehicle emission control device or element of design, including such emission control devices or elements of design required by regulation under Title II of the CAA. *See* CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B).

18. It is also a violation for any person to cause any of the acts set forth in CAA section 203(a), 42 U.S.C. § 7522(a).

19. Persons violating sections 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), are subject to a civil penalty of up to \$4,876 for each violation that occurred on or after November 2, 2015, where penalties are assessed on or after December 23, 2020. CAA § 205(a), 42 U.S.C.

§ 7524(a); 40 C.F.R. § 19.4; Civil Monetary Penalty Inflation Adjustment Rule, 85 Fed. Reg. 83,818, 83,821 (Dec. 23, 2020).

20. Any violation of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), shall constitute a separate offense with respect to each part or component. CAA § 205(a), 42 U.S.C. § 7524(a).

Factual Background

21. Penson is a Massachusetts limited liability company.

22. Penson's 2020 filing with the Massachusetts Secretary of the Commonwealth, Corporations Division identifies the location of its principal office as 960 Turnpike Street, Unit 17 in Canton, Massachusetts.

23. Penson currently operates one warehouse, which is located at 305 Constitution Drive Suite B in Taunton, Massachusetts.

24. Penson is a "person," as defined in section 302(e) of the CAA, 42 U.S.C. § 7602(e).

25. Penson is an online vender that offers for sale and sells a variety of products.

26. On December 28, 2020 EPA issued a CAA information request to Penson.

27. On February 20, 2021, Penson provided its response to this information request to EPA.

28. Penson's response to the information request indicated that Penson advertised for sale on its Shopify website, as well as on Amazon.com, four products that are designed to remove or render inoperative EGR systems ("EGR defeat devices"):

- (a) EGR Delete Valve Kit for Ford Powerstroke 2003-2010 6.0L E350 E450 F550 F350 F450 F250 Super Duty;
- (b) EGR Valve and Throttle Kit for 2010-2017 Dodge Cummins 6.7 6.7L;
- (c) EGR Delete Valve Kit for Ford 2008-2010 F250 F350 F450 V8 6.4L Powerstroke Engine Pipe; and

- (d) EGR Delete Valve Kit for Ford Powerstroke 2011-2017 F250 F350 F450 6.7L Engine Pipe

29. Penson's response to the information request indicated that between 2018 and the end of 2020, Penson sold 9,685 EGR defeat devices.

Alleged Violations of Law

30. From 2018 through 2020, Penson offered for sale EGR defeat devices for light-duty and medium-duty diesel trucks and engines.

31. From 2018 through 2020, Penson sold 9,685 EGR defeat devices for light-duty and medium-duty diesel trucks and engines.

32. The EGR defeat devices referenced in the preceding paragraphs are parts or components intended for use with, or as part of, motor vehicles or motor vehicle engines, where a principal effect of the parts or components is to bypass, defeat, or render inoperative emission related devices or elements of design that are installed on a motor vehicle or motor vehicle engine in compliance with CAA regulations.

33. Penson knew or should have known that it is a violation of the CAA to offer for sale, sell, or install defeat devices in "motor vehicles" or "motor vehicle engines," and that these EGR defeat device products would be used to bypass, defeat or render inoperative emissions-related devices or elements of design.

34. Accordingly, EPA alleges that Penson has violated Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B).

Terms of Agreement

35. As a condition of settlement, Penson certifies that from the date of signature Penson will not manufacture, sell, offer for sale, or install any part or component whose principal effect is to bypass, defeat, or render inoperative any device or element of design installed on or in a

vehicle or engine in compliance with Title II of the CAA, including those described in Paragraph 28 above.

36. Civil Penalty: Taking into account the particular facts and circumstances of this matter, with specific reference to the penalty factors set forth in Section 205(c) of the CAA, 42 U.S.C. § 7524(c), EPA has determined that it is fair and proper to assess a civil penalty of \$80,000 for the violations alleged in this CAFO, which EPA has determined is appropriate considering “the effect of the penalty on the violator’s ability to continue in business” and other penalty factors. Respondent shall pay the civil penalty of \$80,000 in twenty-four (24) installments. In accordance with 40 C.F.R. § 13.18 and EPA’s *Guidance on Evaluating a Violator’s Ability to Pay a Civil Penalty in an Administrative Enforcement Action* (2015), EPA has determined that Respondent adequately substantiated its claimed inability to pay the entire penalty amount within 30 days and that this payment mechanism is in the best interest of the United States. The first payment shall be \$40,000 and shall be made within thirty (30) days of the effective date of this CAFO. Interest shall accrue at a rate of 3% on the balance remaining after the first payment. The second through twenty-fourth installment payments shall each be \$1,791.30. The second installment payment shall be due by April 1, 2022, and the third through twenty-fourth installment payments shall be paid monthly thereafter and shall each be due by the first calendar day of the subsequent month. For each payment, Respondent shall submit a check or make an electronic payment, as described below. Any check or other payment shall note the case name and docket number of this matter (“*In the matter of*: Penson & Co. LLC, Docket No. CAA-01-2021-0081”), and shall be payable to “Treasurer, United States of America.” The penalty can be paid using any method provided on this website:

<https://www.epa.gov/financial/makepayment>. These include, among others:

Sending a check via regular mail to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Sending a check via express mail to:

U.S. Bank
Government Lockbox 979077
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Penson shall simultaneously provide copies of the payment to:

Wanda Santiago, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100 (Mail Code 04-6)
Boston, MA 02109-3912
santiago.wanda@epa.gov

and

Christine Foot, Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100 (ORC04-3)
Boston, MA 02109-3912
foot.christine@epa.gov

37. If Respondent fails to make any of the payments required by Paragraph 36 by the required due dates, all remaining installments shall become immediately due and payable as of the missed payment date. Interest on such unpaid penalty amounts shall accrue from the missed payment date until the total amount due has been received by the United States. Respondent shall be liable for such amounts regardless of whether EPA has notified Respondent of its failure to pay or made demand for payment. All payments to the United States under this paragraph shall be made by cashier's or certified check as described in Paragraph 36.

38. For purposes of this proceeding, the parties each agree that:

- (a) its undersigned representative is fully authorized by the Party whom he or she represents to bind that Party to this Consent Agreement and to execute it on behalf of that Party; and
- (b) each party will bear its own costs and attorney fees in the action resolved by this Consent Agreement and attached Final Order.

39. The Parties each consent to the use of digital signatures on this document and acknowledge that electronic signatures carry the legal effect, validity, or enforceability of handwritten signatures. Respondent may deliver electronically signed documents by email to the EPA at foot.christine@epa.gov. Respondent further consents to receipt of service of the executed CAFO, once filed, by electronic mail. Respondent understands that its provided email address may be publicly available when the CAFO and Certificate of Service are filed and uploaded to a searchable database.

Effect of Consent Agreement and Attached Final Order

40. This CAFO constitutes a settlement by EPA of all claims for federal civil penalties pursuant to Section 202 of the CAA for the violations alleged in Paragraphs 30 through 34 of this CAFO. Compliance with this CAFO shall not be a defense to any other actions subsequently commenced pursuant to federal laws and regulations administered by EPA for matters not addressed in this CAFO, and it is the responsibility of Respondent to comply with all applicable provisions of federal, state, or local law. EPA reserves all its other criminal and civil enforcement authorities, including the authority to seek injunctive relief and the authority to respond to conditions that may present an imminent and substantial endangerment to public health, welfare, or the environment.

41. Nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this agreement or of the statutes and regulations upon which this

agreement is based, excluding any violations resolved by this CAFO, or for Respondent's violation of any applicable provision of law, excluding any violations resolved by this CAFO, nor waiver of any defense, objection, or response the Respondent may assert in response to any claim that the agreement is violated.

42. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

43. Pursuant to 42 U.S.C. § 7524(c)(6), EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

44. In the event that any portion of the civil penalty amount described in Paragraph 36 is not paid when due without demand, under 42 U.S.C. § 7524(c)(6) of the CAA, Respondent will be subject to an action to compel payment, plus interest, enforcement expenses, and a nonpayment penalty. Interest will be assessed on the civil penalty if it is not paid when due. In that event, interest will accrue from the due date at the "underpayment rate" established under 26 U.S.C § 6621(a)(2). In the event that the penalty is not paid when due, an additional charge will be assessed to cover the United States' enforcement expenses, including attorney's fees and collection costs. In addition, a quarterly nonpayment penalty will be assessed for each quarter during which the failure to pay the penalty persists. Such nonpayment penalty shall be 10 percent of the aggregate amount of Respondent's outstanding civil penalties and nonpayment penalties hereunder accrued as of the beginning of such quarter. In any such collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

Penson & Co. LLC
Taunton, Massachusetts

Respondent.

Docket No. CAA-01-2022-0025

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18(b) and (c) of the EPA's Consolidated Rules of Practice, the foregoing Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified. Respondent is ordered to pay the civil penalty amount specified in the Consent Agreement in the manner specified. The terms of the Consent Agreement will become effective on the date it is filed with the Regional Hearing Clerk.

Date: _____

LeAnn Jensen
Regional Judicial Officer
U.S. EPA, Region 1