



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590
April 14, 2022

VIA E-MAIL
DELIVERY RECEIPT REQUESTED

Jason Chise, President
OTR Performance, Inc.
51619 Industrial Drive
Macomb, Michigan, 48042

Email: Zachary.Fayne@arnoldporter.com

Dear Jason Chise:

Enclosed is a file-stamped Consent Agreement and Final Order (CAFO) which resolves OTR Performance, Inc., docket no. CAA-05-2022-0014. As indicated by the filing stamp on its first page, we filed the CAFO with the Regional Hearing Clerk on April 14, 2022.

Pursuant to paragraph 36 of the CAFO, OTR Performance, Inc. must pay the civil penalty in 3 installments with interest within the specified time frame. 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,

JASON

SCHENANDOAH

Digitally signed by JASON
SCHENANDOAH
Date: 2022.04.01
12:39:43 -05'00'

Nathan Frank, Supervisor

Air Enforcement and Compliance Assurance Section (IL/IN)

Enclosure

cc: Ann Coyle, Regional Judicial Officer / via electronic mail
Coyle.ann@epa.gov

Regional Hearing Clerk / via electronic mail
R5hearingclerk@epa.gov

Josh Zaharoff, Region 5 ORC / via electronic mail
Zaharoff.Josh@epa.gov

Jenine Camilleri, Michigan EGLE / via electronic mail
CamilleriJ@michigan.gov

Joyce Zhu, Michigan EGLE / via electronic mail
Zhuj@michigan.gov

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Docket No. CAA-05-2022-0014
)	
OTR Performance, Inc.)	Proceeding to Assess a Civil Penalty
Macomb, Michigan)	Under Section 205(c)(1) of the Clean Air Act,
)	42 U.S.C. § 7524(c)(1)
Respondent.)	
<hr style="border: 1px solid black;"/>)	

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. § 7524(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 OTR Performance, Inc., a company doing business in Michigan.

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. 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. 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).

10. “Motor vehicle” means any self-propelled vehicle designed for transporting persons or property on a street or highway. *See* Section 216(2) of the CAA, 42 U.S.C. § 7550(2); *see also* 40 C.F.R. § 85.1703.

11. “Motor vehicle engine” means an engine that is designed to power a motor vehicle. *See* Section 216(3) of the CAA, 42 U.S.C. § 7550(3).

12. EPA issues COCs to motor vehicle and motor vehicle engine manufacturers to certify that a particular group of motor vehicles or motor vehicle engines conforms to applicable EPA requirements governing motor vehicle emissions. *See* Section 206(a) of the CAA, 42 U.S.C. § 7525(a).

13. EPA promulgated emissions standards for particulate matter, nitrogen oxides, hydrocarbons, and other pollutants applicable to motor vehicles and motor vehicle engines, including standards for heavy-duty diesel engines (HDDE). *See* Section 202 of the CAA, 42 U.S.C. § 7521; 40 C.F.R. Part 86.

14. To meet the emission standards in 40 C.F.R. Part 86 and qualify for a COC, HDDE motor vehicle and engine manufacturers may utilize devices and elements of design such as Exhaust Gas Recirculation systems (EGR) or Clean Gas Induction systems (CGIs), Diesel Oxidation Catalysts (DOCs), Diesel Particulate Filters (DPFs), and/or Selective Catalytic Reduction systems (SCRs).

15. Modern HDDE motor vehicles and engines are equipped with electronic control modules (ECMs). ECMs continuously monitor engine and other operating parameters and control the emission control devices and elements of design, such as the engine fueling strategy, EGRs, CGIs, DOCs, DPFs, and SCRs.

16. Under Section 202(m) of the CAA, 42 U.S.C. § 7521(m), EPA promulgated regulations for motor vehicles manufactured after 2007 that require HDDE motor vehicles and engines to have numerous devices or elements of design that, working together, can detect problems with the vehicle's emission-related systems, alert drivers to these problems, and store electronically-generated malfunction information. *See* 40 C.F.R. §§ 86.005-17, 86.007-17, 86.1806-05. These devices or elements of design are referred to as "onboard diagnostic systems" or OBDs.

17. It is unlawful 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." *See* Section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A), 40 C.F.R. § 1068.101(b)(1). This is also referred to as "tampering."

18. It is unlawful “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.” *See* Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), 40 C.F.R. § 1068.101(b)(2). These parts or components are also referred to as “defeat devices.”

19. The 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), under Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1).

20. The Administrator of EPA (the Administrator) may assess a civil penalty of up to \$4,876 per motor vehicle, motor vehicle engine, or part or component up to a total of \$390,092 for violations of Section 203(a) of the CAA, 42 U.S.C. § 7522(a) that occurred after November 2, 2015, where penalties are assessed on or after December 23, 2020, under Section 205(a) of the CAA, 42 U.S.C. § 7524(a); and 40 C.F.R. Part 19.

21. The Administrator may assess a penalty greater than \$390,092 where the Administrator and the Attorney General of the United States jointly determine that a matter involving a larger penalty is appropriate for an administrative penalty action. 42 U.S.C. § 7524(c)(1) and 40 C.F.R. Part 19.

22. The Administrator and the Attorney General of the United States, each through their respective delegates, have determined jointly that this matter involving a penalty greater than \$390,092 is appropriate for this administrative penalty action.

EPA's Factual Allegations and Alleged Violations

23. Respondent is a corporation organized under the laws of the State of Michigan, with its office at 51619 Industrial Drive, Macomb, Michigan.

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

25. On April 23, 2018, EPA sent a written Request for Information to Respondent pursuant to Section 208 of the CAA.

26. In response to the Request for Information, Respondent provided invoices and other information indicating that between January 1, 2016 and April 23, 2018, Respondent manufactured, sold, offered for sale, and/or installed at least 5,040 parts or components (Subject Products) where a principal effect of each part or component is to disable, remove, bypass, defeat, or render inoperative air pollution emission control systems installed on or in HDDE motor vehicles. Subject Products are identified in Appendix A. Additionally, OTR's response indicated that it installed devices or performed services that removed and/or rendered inoperative the engine fueling strategy, DOC, DPF, EGR system, SCR system, and/or OBD systems on at least 44 HDDE motor vehicles (Modified Trucks).

27. The Subject Products that the Respondent manufactured, sold, offered for sale, and/or installed were intended for use with, or as part of, motor vehicles or motor vehicle engines in compliance with the CAA for which the manufacturer had obtained a certificate of conformity with HDDE emission standards.

28. Each Modified Truck for which the Respondent removed or rendered inoperative a device or element of design constitutes a "motor vehicle," as that term is defined by the CAA,

for which the manufacturer had obtained a certificate of conformity with HDDE emission standards.

29. On August 24, 2018, EPA issued a Finding of Violation letter (FOV) to Respondent alleging violations of CAA § 203(a)(3)(A) and 203(a)(3)(B).

30. On September 24, 2018, representatives from EPA and Respondent held a teleconference to discuss the FOV.

31. In subsequent communications following the September 24, 2018 FOV, representatives from EPA and Respondent discussed Respondent's actions to address the violations alleged in the August 24, 2018 FOV and comply with the CAA.

32. On October 7, 2020, Respondent certified the following:

- a. Respondent ceased sales in the United States of the Subject Products on or before May 24, 2018;
- b. Respondent ceased manufacturing of the Subject Products on June 24, 2020;
- c. Respondent ceased selling the Subject Products outside of the United States on or before August 1, 2020;
- d. As of August 1, 2020, Respondent had 395 electric control boxes and approximately 5,000 harnesses for the Subject Products in its inventory; and
- e. As of October 7, 2020, Respondent had scrapped 318 electric control boxes, electronically wiped and repurposed 77 electric control boxes, and scrapped all of the approximately 5,000 harnesses for the Subject Products that were in its inventory as of August 1, 2020.

33. Respondent knowingly removed or rendered inoperative devices or elements of design that were installed on or in at least 44 motor vehicles or motor vehicle engines to comply

with emission standards promulgated under Title II of the CAA, in violation of Section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A).

34. Respondent manufactured, sold, offered to sell, and/or installed at least 5,040 parts or components that effectively bypassed, defeated, and/or rendered inoperative emission control devices or elements of design that were installed on or in motor vehicles or motor vehicle engines to comply with the emission standards promulgated under Title II of the CAA, and the Respondent knew or should have known that such products were installed for such use or put to such use, in violation of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

Civil Penalty

35. Based on analysis of the factors specified in Section 205(c) of the CAA, 42 U.S.C. § 7524(c), the facts of this case, the compliance steps that Respondent has taken and agrees to take, Respondent's cooperation in resolving this matter, and Respondent's demonstrated inability to pay a higher penalty, Complainant has determined that an appropriate civil penalty to settle this action is \$770,000.

36. Respondent must pay the \$770,000 civil penalty in 3 installments with interest as follows: \$257,950.00 within 30 days of the Effective Date of this CAFO; \$257,950.00 within 180 days of the Effective Date of this CAFO; and \$257,950.00 within 360 days of the Effective Date of this CAFO. Respondent must pay the installments 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.

37. 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:

Air Enforcement and Compliance Assurance Branch
U.S. Environmental Protection Agency, Region 5
r5airenforcement@epa.gov

Josh Zaharoff
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
Zaharoff.Josh@epa.gov

Regional Hearing Clerk (E-19J)
U.S. Environmental Protection Agency, Region 5
r5hearingclerk@epa.gov

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

39. If Respondent does not pay timely any installment payment as set forth in Paragraph 36, above, the entire unpaid balance of the civil penalty and any amount required by Paragraph 40, below, shall become due and owing upon written notice by EPA to Respondent of the delinquency. 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 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

40. 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).

Other Conditions

41. By signing this Consent Agreement, Respondent agrees to the following: (i) Respondent 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); (ii) Respondent will not manufacture, sell, offer for sale, or install any defeat device, including Subject Products, in violation of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B); and (iii) Respondent certifies that it has reviewed EPA's November 23, 2020 "Tampering Policy: The EPA Enforcement Policy on Vehicles and Engine Tampering and Aftermarket Defeat Devices under the Clean Air Act."

42. By signing this Consent Agreement, Respondent understands that the violations addressed in this CAFO may be considered as a "History of Noncompliance" for any future violations of Title II of the CAA, 42 U.S.C. § 7522(a)(3)(A) and (B), by Respondent or any other business entity owned or operated by officers of Respondent, as addressed in the January 18, 2021, Clean Air Act Title II Vehicle & Engine Civil Penalty Policy.

43. By the date of its signature on this CAFO, Respondent shall no longer provide any technical support, maintenance, or repair for defeat devices, including Subject Products, for use with motor vehicles or motor vehicle engines.

44. By signing this Consent Agreement, Respondent certifies that it has permanently destroyed or electronically wiped all defeat devices in its inventory and/or possession, including, but not limited to, all Subject Products.

45. By signing this Consent Agreement, Respondent certifies that it has removed from its webpages and any social media platform(s) all advertisements, photos, videos, and information that relate to performing tampering and/or selling, offering to sell, and/or installing defeat devices except advertisements, photos, videos, or information relating to how to comply with the CAA.

46. Within 14 calendar days of the Effective Date, Respondent shall post a publicly-accessible announcement about Respondent's settlement with EPA prominently on Respondent's current website homepage(s) and Respondent's social media homepage(s), including, but not limited to, all Facebook, Twitter, Pinterest, and Instagram accounts associated with Respondent. The announcement shall remain posted for at least 60 calendar days from the date the announcement is posted. Respondent shall use the text contained in Appendix B (Announcement) in at least 12-point font, or another notice reviewed and approved by EPA, to provide such announcement. Respondent shall provide EPA with proof of posting the announcement within 30 calendar days from the Effective Date of this CAFO.

47. Failure to comply with Paragraph 41 of this CAFO may constitute a violation or violations of Section 203(a)(3)(A) and/or (B) of the CAA, 42 U.S.C. § 7522(a)(3)(A) and/or (B),

and Respondent could be subject to penalties up to the statutory civil penalties in 40 C.F.R. § 19.4.

48. Respondent certifies that any information or representation it has supplied or made to EPA concerning this matter was, at the time of submission, true, accurate, and complete and that there has been no material change regarding the truthfulness, accuracy or completeness of such information or representation. EPA shall have the right to institute further actions to recover appropriate relief if EPA obtains evidence that any information provided and/or representations made by Respondent to the EPA regarding matters relevant to this CAFO are false or, in any material respect, inaccurate. This right shall be in addition to all other rights and causes of action that EPA may have, civil or criminal, under law or equity in such event. Respondent is aware that the submission of false or misleading information to the United States government may subject a person to separate civil and/or criminal liability.

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

General Provisions

50. The parties consent to service of this CAFO by e-mail at the following valid e-mail addresses: Zaharoff.Josh@epa.gov (for Complainant), and Zachary.Fayne@arnoldporter.com (for Respondent).

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

52. The effect of the settlement described in Paragraph 51, above, is conditioned upon the accuracy of Respondent's representations to EPA.

53. 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.

54. 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 51, above, compliance with this CAFO will not be a defense to any actions subsequently commenced pursuant to federal laws administered by EPA.

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

56. This CAFO constitutes an "enforcement response" as that term is used in EPA's January 18, 2021, Clean Air Act Title II Vehicle & Engine Civil Penalty Policy to determine Respondent's "full compliance history" under Section 205(b) of the CAA, 42 U.S.C. § 7524(b).

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

58. 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.

59. Each party agrees to bear its own costs and attorney's fees in this action.

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

OTR Performance, Inc., Respondent

03/28/2022

Date



Jason Chise, President
OTR Performance, Inc.

United States Environmental Protection Agency, Complainant

**MICHAEL
HARRIS**

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MICHAEL HARRIS
Date: 2022.04.06
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Michael D. Harris
Division Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 5

Consent Agreement and Final Order
In the Matter of: OTR Performance, Inc.
Docket No. CAA-05-2022-0014

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective (“Effective Date”) 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.

Date

**ANN
COYLE**

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COYLE
Date: 2022.04.14
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Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

Consent Agreement and Final Order
In the matter of: OTR Performance, Inc.
Docket Number: [CAA-05-2022-0014](#)

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing **Consent Agreement and Final Order**, docket number [CAA-05-2022-0014](#), which was filed on April 14, 2022, in the following manner to the following addressees:

Copy by E-mail to Respondent: Jason Chise
Zachary.Fayne@arnoldporter.com

Copy by E-mail to Attorney for Complainant: Josh Zaharoff
Zaharoff.Josh@epa.gov

Copy by E-mail to Attorney for Respondent: Zachary Fayne
Zachary.Fayne@arnoldporter.com

Copy by E-mail to Regional Judicial Officer: Ann Coyle
coyle.ann@epa.gov

Isidra Martinez
Acting Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5