

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)	
)	Docket No. CAA-05-2024-0004
CUTTING EDGE ENTERPRISES, INC.)	
Forest Lake, Minnesota,)	COMPLAINT AND NOTICE OF
)	OPPORTUNITY FOR HEARING
Respondent.)	
)	
Proceeding to Assess a Civil Penalty)	
Pursuant to Clean Air Act)	
<u>Section 205(c)(1)</u>)	

COMPLAINT

I. PRELIMINARY STATEMENT

1. This Complaint and Notice of Opportunity for Hearing (“Complaint”) initiates a civil administrative penalty proceeding under Section 205(c)(1) of the Clean Air Act (“CAA”), 42 U.S.C. § 7424(c)(1), and 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. 40 C.F.R. §§ 22.13-14.

2. Complainant is the Director of the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency (EPA), Region 5 (“Complainant”), who is authorized by lawful delegation from the Administrator of the EPA to institute civil administrative penalty assessment proceedings under Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1).

3. Respondent is Cutting Edge Enterprises, Inc. (“Respondent”).

4. Respondent is a corporation doing business in the state of Minnesota.

5. Service of this Complaint on Respondent satisfies Complainant’s obligation to provide Respondent with written notice of the proposed issuance of a final order assessing a civil penalty. 40 C.F.R. § 22.34(b).

II. JURISDICTION

6. This action is brought under Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), and the Consolidated Rules.

7. Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), authorizes EPA to administratively assess a civil penalty for violations of Sections 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

8. Pursuant to Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), an administrative civil penalty may not exceed \$460,926 against each violator where violations occurred after November 2, 2015, and a penalty is assessed on or after December 27, 2023, unless the Administrator of the EPA and the Attorney General, through their respective delegees, jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment. 40 C.F.R. Part 19, 88 Fed. Reg. 89311 (Dec. 27, 2023).

9. The Administrator and the Attorney General, through their respective delegees, jointly determined that this matter, although it may involve a penalty amount greater than \$460,926, is appropriate for administrative penalty assessment. CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1); 40 C.F.R. § 19.4.

10. Pursuant to 40 C.F.R. § 22.1(a)(2), the Consolidated Rules govern administrative adjudicatory proceedings for the assessment of any administrative civil penalty under Section 205(c) of the CAA, 42 U.S.C. § 7524(c).

III. GOVERNING LAW AND RELEVANT BACKGROUND

Regulation of Air Pollution from New Motor Vehicles and Motor Vehicle Engines

11. This action arises under Title II of the CAA, 42 U.S.C. §§ 7521 - 7590, and the regulations promulgated thereunder, including regulations promulgated at 40 C.F.R. Parts 85 and 86, relating to the control of emissions of air pollution from mobile sources.

12. Section 216(2) of the CAA, 42 U.S.C. § 7550(2), defines “motor vehicle” to mean any

self-propelled vehicle designed for transporting persons or property on a street or highway. *See also* 40 C.F.R. § 85.1703.

13. Under Section 216(2) of the CAA, 42 U.S.C. § 7550(2), and implementing regulations at 40 C.F.R. § 85.1703, a motor vehicle is defined by its capability, not by how it is used. *See* 39 Fed. Reg. 32609, 32609 (Sept. 10, 1974).

14. Title II of the CAA and the regulations promulgated thereunder establish stringent standards for the emissions of air pollutants from motor vehicles and motor vehicle engines that “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” CAA § 202(a), 42 U.S.C. § 7521(a). These pollutants include oxides of nitrogen (“NO_x”), particulate matter (“PM”), hydrocarbons (“HC”), and carbon monoxide (“CO”). CAA § 202(a)(3)(A), 42 U.S.C. § 7521(a)(3)(A).

15. PM is a form of air pollution composed of microscopic solids and liquids suspended in air. PM is emitted directly from motor vehicles; it is also formed in the atmosphere from the emission of other pollutants by sources including motor vehicles.

16. Non-methane hydrocarbons (“NMHCs”) are a type of HC.

17. NO_x and NMHCs are reactive gasses emitted from motor vehicles that contribute to the formation of PM and ozone.

18. Ozone is a highly reactive gas that is formed in the atmosphere, in part, from emissions of pollutants from motor vehicles.

19. Exposure to PM and ozone is linked to numerous health effects as well as premature death. Children, older adults, people who are active outdoors (including outdoor workers), and people with heart or lung disease are particularly at risk for health effects related to PM or ozone exposure.

20. Nitrogen dioxide (“NO₂”), a form of NO_x, can aggravate respiratory diseases, particularly asthma, and may also contribute to asthma development in children. NO₂ is emitted from motor vehicles

and is also formed in the atmosphere from the emission of NO_x.

21. CO is a toxic gas emitted from motor vehicles that can cause headaches, dizziness, vomiting, nausea, loss of consciousness, and death. Long-term exposure to CO has been associated with an increased risk of heart disease.

22. Section 202 of the CAA, 42 U.S.C. § 7521, and regulations promulgated thereunder, including regulations promulgated at 40 C.F.R. Parts 85 and 86, establish standards for the emissions of certain air pollutants from new motor vehicles or motor vehicle engines, including, but not limited to, PM, NO_x, NMHC, and CO.

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

23. 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 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.

24. Persons other than a manufacturer or dealer who violate Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B), are subject to civil penalties of up to \$5,761 for each violation occurring after November 2, 2015, and assessed on or after December 27, 2023, in accordance with Section 205(a) of the CAA, 42 U.S.C. § 7524(a). 40 C.F.R. § 19.4.

25. Pursuant to Section 205(a) of the CAA, 42 U.S.C. § 7524(a), each part or component manufactured, sold, or offered for sale, in violation of Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B), is a separate violation.

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

26. Manufacturers of new motor vehicles or motor vehicle engines must apply for and obtain

a certificate of conformity (“COC”) from EPA to sell, offer to sell, or introduce or deliver for introduction into commerce any new motor vehicle or motor vehicle engine in the United States.

42 U.S.C. § 7522(a)(1).

27. To obtain a COC, the original equipment manufacturer (“OEM”) must demonstrate that each motor vehicle or motor vehicle engine will conform to established emissions standards for NO_x, PM, NMHC, CO, and other pollutants during the motor vehicle or motor vehicle engine’s useful life.

42 U.S.C. § 7525(a)(2); *see* 40 C.F.R. §§ 86.007-30(a)(1)(i), 86.1848-01(a)(1).

28. The COC application must describe, among other things, the emissions-related elements of design of the motor vehicle or motor vehicle engine. *See* 40 C.F.R. § 86.094-21(b)(1) (“The application . . . shall include the following: . . . a description of [the vehicle’s] . . . emission control system and fuel system components.”); *see also* 40 C.F.R. § 86.144-01(d)-(e).

29. Once issued by EPA to an OEM, a COC only covers those new motor vehicles or motor vehicle engines that conform in all material respects to the specifications provided to EPA in the COC application for such vehicles or engines. 40 C.F.R. § 86.1848-01(c)(6).

Motor Vehicle and Motor Vehicle Engine Emission-Related Elements of Design

30. An “element of design” is “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 interactions, and/or hardware items on a motor vehicle or motor vehicle engine.” 40 C.F.R. §§ 86.094-2 and 86.1803-01.

31. OEMs install a variety of hardware and software elements of design in motor vehicles and motor vehicle engines that control emissions of pollutants to comply with the emissions standards established by regulation under the CAA and obtain certification, hereinafter referred to as “Emission-Related Elements of Design.”

32. Pursuant to Section 202(m) of the CAA, 42 U.S.C. § 7521(m), the OEM is required to

install an Onboard Diagnostics System (“OBD”) on motor vehicles that must monitor, detect, and report malfunctions of all monitored Emission-Related Elements of Design. 40 C.F.R. §§ 86.007-17, 86.010-18, 86.1806-05.

33. The OBD System monitors and detects malfunctions of Emission-Related Elements of Design through a network of sensors installed throughout the motor vehicle and motor vehicle engine.

34. When the OBD System detects a malfunction of an Emission-Related Element of Design, it must illuminate the vehicle’s Malfunction Indicator Light (“MIL”) on the dashboard and record a Diagnostic Trouble Code (“DTC”). *See* 40 C.F.R. § 86.1806-05(b)-(e).

35. The OBD System is an Emission-Related Element of Design that controls, calibrates, detects, and reports all monitored Emission-Related Elements of Design.

36. Exhaust Gas Recirculation (“EGR”) Systems are Emission-Related Elements of Design that reduce NO_x emissions by recirculating a portion of exhaust gas to the engine combustion chamber, thereby reducing peak engine combustion temperature and reducing the formation of NO_x emissions.

37. “Aftertreatment” refers collectively to the Emission-Related Elements of Design “mounted downstream of the exhaust valve . . . whose design function is to reduce emissions in the engine exhaust before it is exhausted to the environment.” *See* 40 C.F.R. § 1068.30. Diesel Particulate Filters (“DPFs”), Diesel Oxidation Catalysts (“DOCs”), Selective Catalytic Reduction (“SCR”) Systems, and NO_x Adsorption Catalysts (“NACs”) are all part of Aftertreatment.

38. Aftertreatment Emission-Related Elements of Design are contained in OEM-installed stock exhaust pipes.

39. DPFs are Emission-Related Elements of Design that reduce the level of PM pollution contained in engine exhaust gas.

40. DOCs are Emissions-Related Elements of Design that reduce CO and NMHC emissions by promoting the conversion of those pollutants into less harmful gases.

41. SCR Systems are Emission-Related Elements of Design that reduce NO_x emissions by chemically converting exhaust gas that contains NO_x into nitrogen and water through the injection of diesel exhaust fluid.

42. OEMs set software parameters, also known as calibrations, that control, among other things, engine combustion and Aftertreatment performance (hereinafter referred to as “Certified Stock Calibrations”). 40 C.F.R. §§ 86.1803-01. OEMs disclose Certified Stock Calibrations to EPA on their application for a COC for each vehicle model because they are part of a motor vehicle’s overall emissions control strategy. Certified Stock Calibrations that must be included on the COC application include “fuel pump flow rate, . . . fuel pressure, . . . EGR exhaust gas flow rate, . . . and basic engine timing.” 40 C.F.R. § 86.1844-01(e)(2); *see also* 40 C.F.R. Pt. 85 App. VIII (listing vehicle and engine parameters and specifications); 40 C.F.R. Pt. 86 App. VI (listing vehicle and engine components). Certified Stock Calibrations are Emission-Related Elements of Design.

43. Motor vehicles are equipped with Electronic Control Units (“ECUs”) (also known as “Engine Control Modules” or “ECMs”), which are computers that monitor and control vehicle operations, including the operation of Emission-Related Elements of Design described in Paragraphs 35–42, above. OBD Systems and other Emission-Related Elements of Design operate in conjunction with ECUs.

44. The Emission-Related Elements of Design described in Paragraphs 35 – 42, above, are installed in motor vehicles or motor vehicle engines in compliance with Title II of the CAA and the regulations thereunder. *See, e.g.*, 42 U.S.C. § 7521 (setting emission and OBD standards and directing EPA to establish standards by regulation); 40 C.F.R. § 86.007-11 (establishing emission standards for 2007 and later diesel heavy-duty engines and vehicles); 40 C.F.R. § 86.1844-01(d)–(e) (listing information requirements for COC applications, including calibration information); and 40 C.F.R. § 86.004-25(a)(6) (defining “critical emissions-related components”).

The Types of Aftermarket Products at Issue

45. Third-party manufacturers have developed products that are designed to alter a vehicle's power, performance, or fuel economy, or reduce the costs related to maintaining a vehicle's Emission-Related Elements of Design (hereinafter "Aftermarket Performance Products").

46. Many Aftermarket Performance Products enhance a vehicle's power, performance, or fuel economy, or reduce maintenance costs, by altering, replacing, or disabling OEM-installed elements of design, including Emission-Related Elements of Design.

47. Aftermarket Performance Products include hardware products that physically interfere with, replace, or remove, Emission-Related Elements of Design (hereinafter, "Hardware Products").

48. Hardware Products physically interfere with, replace, or remove, Emission-Related Elements of Design, such as EGR delete kits, which block or interfere with the EGR provision on the intake of the engine.

49. Hardware Products include devices that are DPF delete kits and straight pipe exhaust sections, which replace the DPF, DOC, and/or SCR systems (including DEF systems) with straight pipe tubing, thus removing the elements of design.

50. Aftermarket Performance Products also include electronic software products that alter or overwrite aspects of a motor vehicle's ECU and/or OBD System, thereby affecting Emission-Related Elements of Design (hereinafter, "Tunes").

51. Tunes that manipulate the ECU and/or OBD System and, in so doing, bypass, defeat, or render inoperative the EGR System, DPFs, DOCs, SCR System, and/or other Aftertreatment are known as "Delete Tunes."

52. Delete Tunes work in conjunction with Hardware Products by manipulating the monitoring function of the OBD System so that it will not detect those Hardware Products or the removal of a vehicle's Emission-Related Elements of Design.

53. Tunes that manipulate a vehicle's ECU and/or the monitoring function of the OBD System and, in doing so, bypass, defeat, or render inoperative Certified Stock Calibrations such as fuel pump flow rate, fuel pressure, EGR exhaust gas flow rate, and basic engine timing are known as "Calibration Tunes."

54. Calibration Tunes may include the same functionality that Delete Tunes would provide, as described in Paragraph 53, above.

IV. FACTUAL ALLEGATIONS

55. Between at least January 1, 2018 and October 30, 2019, Respondent sold and offered to sell Aftermarket Performance Products, consisting of Hardware Products, Delete Tunes and Calibration Tunes

56. Respondent sold these Aftermarket Performance Products to individual consumers over the internet through its website ("<https://cuttingedgeauto.net/>") ("Cutting Edge Website").

57. Between at least January 1, 2018 and October 30, 2019, Respondent marketed these Aftermarket Performance Products as products that enhance a motor vehicle's power or performance, modify a motor vehicle's fuel economy, or reduce the costs associated with maintaining a motor vehicle's emission control system.

58. On September 19, 2019, EPA Region 5 inspectors attempted to perform an inspection of Respondent's facility at 24400 Greenway Avenue N., Forest Lake, Minnesota 55025 ("attempted inspection").

59. During the attempted inspection, Respondent stated that it had performed defeat device work in the previous years.

60. During the attempted inspection, Respondent refused to permit EPA Region 5 inspector to enter its facility and vehicles on the premises being worked on and waiting for work to be performed.

61. On October 29, 2019, Complainant issued a request for information ("2019 RFI") to

Respondent, pursuant to Section 208(a) of the CAA, 42 U.S.C. § 7542(a), requesting documents and information related to services and/or parts or components manufactured, sold, and/or installed by Respondent.

62. Respondent provided a response to the 2019 RFI on January 20, 2020. Respondent provided supplemental responses including emails and verbal conversations with EPA inspectors along with the primary response to the 2019 RFI (collectively “2019 RFI Response”).

63. In the 2019 RFI Response, Respondent disclosed that from at least January 1, 2018 to October 30, 2019, it sold the following Tunes and Hardware Products (identified as “Exhaust” and “EGR,” below). Respondent identified the target motor vehicle and engine application, the associated model years, and quantities of sales for these devices between January 1, 2018 to October 30, 2019:

Component	Defeat device	Motor Vehicle and/or Engine Applications	Number Sold
Tunes	DPFR Tuner (Product Number GBZ-FED40)	FORD, DODGE, GM	121
	PPEI EZ LYNK AUTOAGENT	FORD, DODGE, GM	
	EZ LYNK AUTO AGENT TUNER	FORD, DODGE, GM	
Exhaust	6.6L DIESEL EXHAUST	11-15 GM SILVERADO/SIERRA 2500/3500	240
	6.7L 41N TURBO BACK MUFFLER EXHAUST	13-16 DODGE 6.7L	
	41N CAT/DPF RACE EXHAUST	6.7L11-16 F250/F350/F450	
EGR	6.6L EGR/COOLER BLOCKER KIT	11-15 GM DURAMAX	261
	EGR BLOCKER KIT FORD 6.4L	6.4L Powerstroke 08-10	
	POWERSTROKE EGR DELETE KIT	03-07 FORD 6.0L Powerstroke	

64. In question 1 of the 2019 RFI, EPA requested that Respondent complete a spreadsheet that was attached to the 2019 RFI to provide information about the functionality of the Respondent's Tunes and Hardware Products. Question 1(a) of the 2019 RFI requested, in pertinent part, that Respondent indicate and identify all products that defeat, delete, deactivate, bypass, render inoperative, or allow for the removal of any emission control component, element of design, or emission related part including, but not limited to, the DPF system, EGR system, catalyst system, OBD, SCR (including DEF systems), or sensors, signals, or records related to such systems.

65. In question 2 of the 2019 RFI, EPA requested that Respondent provide information about the functionality of Respondent's Tunes and Hardware Products. Question 2(g) of the 2019 RFI requested, in pertinent part, that Respondent indicate with a "yes" or "no" whether the specific product can do any of the following:

- (i) Disable or allow the removal of the EGR;
- (ii) Disable or allow the removal of a DPF;
- (iii) Disable or allow the removal of a catalyst;
- (iv) Disable or allow the removal of a SCR system;
- (v) Alter fuel timing maps within engine calibrations;
- (vi) Alter engine calibrations for fuel injection pulse width;
- (vii) Alter engine calibrations for fuel injection pressure;
- (viii) Alter engine calibrations for air/fuel ratio during the combustion process;
- (ix) Alter engine calibrations for fuel quantity (amount of fuel injected into the cylinder per stroke); or
- (x) Bypass or alter OBD parameters to prevent DTCs or MILs from being, recorded or illuminated.

66. In the 2019 RFI Response, Respondent answered questions 1 and 2(g)(i) through 2(g)(iv), identified in Paragraphs 64 and 65, above, with "See Spreadsheet."

67. The spreadsheet that Respondent prepared and submitted with its 2019 RFI Response contains information about all of the Tunes and Hardware Products sold by Respondent.

V. GENERAL ALLEGATIONS

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

69. The items that Respondent sold, described in Paragraphs 62 and 63, above, are “Tunes” and “Hardware Products.”

70. The Tunes that Respondent sold, described in Paragraphs 62 and 63, above, disable, bypass, or allow the removal of the EGR, the DOC, the DPF, and/or the SCR.

71. The Hardware Products that Respondent sold, described in Paragraphs 62 and 63, above, physically interfere with, replace, or remove the EGR, the DOC, the DPF, and/or the SCR.

72. The Tunes and Hardware Products identified in Paragraphs 62 and 63, above, are Defeat Device Parts.

73. On March 25, 2020, EPA issued a Finding of Violation (2020 FOV) to Respondent, alleging that from January 1, 2018 to at least October 30, 2019, Respondent committed 622 violations of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), by manufacturing, selling, offering to sell, and/or installing Tunes and Hardware Products intended for use with, or as part of, a motor vehicle or motor vehicle engine, where a principal effect of the Tunes and Hardware Products was to bypass, defeat or render inoperative elements of design that control emissions on motor vehicles and motor vehicle engines that were in compliance with Title II of the CAA, and that Respondent knew or should have known that such parts or components were being offered for sale or installed for such use or put to such use.

VI. COUNTS

Counts 1 to 37: The Manufacture and Sale of Delete Tunes

74. Complainant reincorporates Paragraphs 1 to 73 of this Complaint by reference as though fully set forth herein.

75. 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 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.

76. Between at least May 2, 2019 and October 30, 2019, Respondent manufactured and sold at least 37 Delete Tunes, Calibration Tunes and Hardware Products.

77. The Delete Tunes, Calibration Tunes and Hardware Products are parts or components.

78. The Delete Tunes, Calibration Tunes and Hardware Products were intended for use with motor vehicles or motor vehicle engines.

79. The Delete Tunes, Calibration Tunes and Hardware Products manipulate a vehicle's ECU and/or OBD System and, in doing so, bypass, defeat, or render inoperative the Certified Stock Calibrations.

80. The Delete Tunes, Calibration Tunes and Hardware Products electronically disable or allow removal of Emission- Related Elements of Design, including OBD Systems, EGR Systems, DPFs, DOCs, and SCR Systems.

81. A principal effect of each Delete Tunes, Calibration Tunes and Hardware Products is to bypass, defeat, or render inoperative a vehicle's OBD System, Certified Stock Calibrations, EGR System, DPF, DOC, and/or SCR System.

82. A vehicle's OBD System, Certified Stock Calibrations, EGR System, DPF, DOC, and/or SCR System are devices or elements of design installed on or in a motor vehicle or motor vehicle engines in compliance with Title II of the CAA.

83. Respondent advertised the Delete Tunes, Calibration Tunes, and Hardware Products on the Cutting Edge Website as allowing customers to install Delete Tunes, Calibration Tunes, and Hardware Products without illuminating a MIL.

84. As such, Respondent knew that installing the Delete Tunes, Calibration Tunes and Hardware Products would allow customers to bypass, defeat, or render inoperative a device or elements of design installed on or in a motor vehicle or motor vehicle engines in compliance with Title II of the CAA.

85. Therefore, Respondent knew or should have known that the Delete Tunes, Calibration Tunes and Hardware Products were being offered for sale or installed for such use or put to such use.

86. Each copy of the Delete Tunes, Calibration Tunes, and/or Hardware Products the Respondent manufactured, sold, offered for sale, or installed and intended for use with, or as a part of, any motor vehicle or motor vehicle engine (or the causing thereof) is a separate violation of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). 42 U.S.C. § 7524(a).

87. Therefore, Respondent committed at least 37 separate violations of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). 42 U.S.C. § 7524(a).

VII. RELIEF SOUGHT

88. Section 205(a) of the CAA, 42 U.S.U.S.C. § 7524(a), as amended by the Debt Collection Improvement Act of 1996 and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, provides that any person who violates Section 203(a)(3) (B) of the CAA, 42 U.S.C § 7522(a)(3) (B), of Title II of the CAA shall be subject to a civil penalty of not more than \$5,761 per violation. *See* 88 Fed. Reg. 89311 (Dec. 27, 2023).

89. On the basis of the violations of the CAA alleged in Counts 1 to 37, above, Complainant has determined that Respondent is subject to a civil penalty under Section 205(a) of the CAA, 42 U.S.C. § 7524(a).

90. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii) of the Consolidated Rules, Complainant is not proposing a specific penalty at this time but will do so at a later date after an exchange of information has occurred. *See* 40 C.F.R. § 22.19(a)(4). Complainant seeks a penalty for 37 violations of Section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), alleged in counts 1 to 37, above. Complainant considers each of the alleged violations to be severe.

91. For purposes of determining the amount of any penalty to be assessed, Section 205(c)(2) of the CAA, 42 U.S.C. § 7524(c)(2), requires Complainant to take into account certain penalty factors, namely “the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator’s business, the violator’s history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator’s ability to continue in business, and such other matters as justice may require.”

92. Complainant also takes into account the particular facts and circumstances of the case with specific reference to the January 2021 Clean Air Act Title II Vehicle & Engine Civil Penalty Policy (“Penalty Policy”), *available at* <https://www.epa.gov/enforcement/clean-air-act-title-ii-vehicle-engine-civil-penalty-policy>.

93. The Penalty Policy seeks to provide a rational, consistent and equitable methodology for applying to particular cases the statutory penalty factors set forth above and calculates civil penalties based on the economic benefit derived from noncompliance, the number of violative engines or products and their horsepower, the egregiousness of the violations, company size and remedial actions taken, and other legal and equitable factors.

94. As its basis for calculating a specific penalty after an exchange of information has occurred pursuant to 40 C.F.R. § 22.19(a)(4) of the Consolidated Rules, Complainant will consider, among other factors, facts or circumstances unknown to Complainant at the time of issuance of the Complaint that become known after the Complaint was issued.

95. Complainant may adjust the proposed penalty further if Respondent produces information and/or documentation to demonstrate a *bona fide* issue of ability to pay or to establish other defenses relevant to the appropriate amount of the proposed penalty. It is Respondent's responsibility to come forward with specific evidence regarding any claimed inability to pay a penalty.

96. The penalty to be proposed does not constitute a "demand," as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412.

VIII. RULES GOVERNING THIS PROCEEDING

97. The Consolidated Rules govern this proceeding to assess a civil penalty, a copy of which is enclosed with this Complaint.

IX. ANSWER AND OPPORTUNITY TO REQUEST A HEARING

98. Respondent has the right to request a hearing to contest any matter of law or material fact in this Complaint.

99. To request a hearing, Respondent must file a written Answer to the Complaint within thirty (30) days of receipt of this Complaint and must include in that written Answer a request for a hearing.

100. In counting the 30-day time period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 30-day time period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

101. Any hearing will be conducted according to the Consolidated Rules.

102. To file an Answer, Respondent must file the original written Answer and one copy with the Regional Hearing Clerk using one of the following methods:¹

¹ Procedures for filing and service of documents containing information claimed as business confidential information are found at 40 C.F.R. § 22.5(d).

By Mail:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 W. Jackson Boulevard Chicago, IL 60604

Electronically:

Regional Hearing Clerk
U.S. EPA, Region 5
R5hearingclerk@epa.gov

103. The Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint of which the Respondent has any knowledge. Where Respondent has no knowledge of the facts contained in an allegation, the Answer shall so state. The Answer shall also state: (1) the circumstances or arguments which are alleged to constitute the grounds of any defense, (2) the facts which the Respondent disputes, (3) the basis for opposing any proposed relief, and (4) a statement of whether a hearing is requested. All material facts not denied in the Answer will be considered admitted.

104. If Respondent fails to file a written Answer within thirty (30) days of receipt of this Complaint, such failure shall constitute an admission of all facts alleged against Respondent in this Complaint and a waiver of Respondent's right to a hearing on the factual allegations. Failure to file a written Answer may result in the filing of a Motion for a Default Order and the possible issuance of a Default Order without further proceedings.

105. Any hearing requested by Respondent will be held at a location to be determined at a later date pursuant 40 C.F.R. § 22.21(d) of the Consolidated Rules. The hearing will be conducted in accordance with the provisions of the Consolidated Rules.

106. Respondent must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the Consolidated Rules. Complainant hereby consents to service via email. *See* 40 C.F.R. § 22.5(b)(2).

107. Complainant has authorized Louise Gross, Associate Regional Counsel, to receive any

Answer and subsequent legal documents that Respondent serves in this proceeding. You may contact Ms. Gross via email at gross.louise@epa.gov or via telephone at (312) 886-6844.

X. SETTLEMENT CONFERENCE

108. Complainant encourages settlement of this proceeding at any time after issuance of the Complaint if the settlement is consistent with the provisions and objectives of the CAA.

109. Whether or not a hearing is requested, Respondent may request a settlement conference with Complainant to discuss the allegations of the Complaint, and an appropriate civil penalty.

However, a request for a settlement conference does not relieve Respondent of its responsibility to file a timely Answer to the Complaint.

110. The procedures in the Consolidated Rules for quick resolution of a proceeding do not apply at this time because a specific penalty has not yet been proposed. *See* 40 C.F.R. § 22.18(a). In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order signed by the Regional Administrator or her designee. The filing of a Consent Agreement shall constitute a waiver of Respondent's right to contest the allegations of the Complaint and to appeal the Final Order accompanying the Consent Agreement.

111. If Respondent wishes to arrange a settlement conference, Respondent or its legal counsel should contact Louise Gross at (312) 886-6844 prior to the expiration of the thirty (30) day period following the receipt of this Complaint. Once again, however, such a request for a settlement conference does not relieve Respondent of its responsibility to file an Answer within thirty (30) days following Respondent's receipt of this Complaint.

XI. SEPARATION OF FUNCTIONS AND *EX PARTE* COMMUNICATIONS

112. Pursuant to 40 C.F.R. § 22.8 of the Consolidated Rules, at no time after the issuance of the Complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person.

113. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

114. The requirements of 40 C.F.R. § 22.8 shall not apply to any person who has formally recused himself or herself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to 40 C.F.R. § 22.18(b)(3).

XII. CONTINUING OBLIGATION TO COMPLY

115. Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the CAA and any other applicable federal, state or local law.

Respectfully Submitted,

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