UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE ADMINSTRATOR

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

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO STAY THE PROCEEDING

Rather than wait for the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") to address one of the central issues in this case, the U.S. Environmental Protection Agency ("EPA") seeks to charge ahead and impose ever-increasing costs on Respondent in its ongoing efforts to extract payment of excessive and inappropriate fines for selling racing parts long understood to be perfectly legal by the auto-parts industry, EPA, and Congress. EPA's arguments for such uneconomical expenditure of resources, however, are misplaced, and this Court should enter a limited stay of proceedings to allow time for the D.C. Circuit to decide whether converted competition-only vehicles are motor vehicles under the Clean Air Act ("CAA"). *Racing Enthusiasts and Suppliers Coalition ("RESC") v. EPA*, No. 16-1447 (D.C. Cir.) (filed Dec. 27, 2016, order lifting abeyance entered Dec. 6, 2021). If the D.C. Circuit holds that they are not, as Respondent has consistently maintained, that will significantly narrow the issues in this case and is likely to be dispositive or, at a minimum, provide clarity so that the parties can reevaluate their positions going forward.

I. *RESC v. EPA* IS LIKELY TO HAVE A SIGNIFICANT IMPACT ON THIS CASE

As noted in Respondent's motion, the Petitioner in *RESC* is challenging EPA's claims that the CAA applies to any vehicles that have ever been motor vehicles, regardless of whether they are converted to non-road vehicles used solely for competition. Respondent's Mot. for Stay at 3-

4. That claim by EPA lies at the heart of this case and its resolution will dispose of many issues in this case and will significantly narrow the scope of proceedings for any issues that remain.

A. EPA's Legal Arguments Are Wrong and Misplaced.

Notwithstanding the extensive time devoted to briefing the definition of "motor vehicle," EPA claims it is irrelevant because Respondents have not offered proof regarding the final use of each of the parts being challenged. Complainant's Resp. to Mot. for Stay at 3. That position is disingenuous and assumes the correctness of EPA's erroneous argument that it is Respondent's burden to track the final use of each part sold (a duty never required by EPA by rule or otherwise) rather than EPA's burden to show that Respondent's parts were used on "motor vehicles." Respondent's parts were designed, marketed, and sold expressly for use on non-road competition-only vehicles, not for use on "motor vehicles." Moreover, there is ample evidence in this case that Respondent designed, sold, and marketed its parts with the intent that they be used expressly for non-road competition-only vehicles,[1] wholly apart from the unrealistic and post-hoc tracking obligation EPA now seeks to impose.[2] EPA's assertion that Respondent sold its parts

[1] *See* Respondent's Opposition to Motion for Accelerated Decision on Liability and to Strike Affirmative Defenses (Dkt. # 40), at 27-30. Moreover, EPA's citation to the preliminary injunction opinion in *United States v. Gear Box Z, Inc.*, No. CV-20-08003-PCT-JJT, 2021 WL 1056396 (D. Ariz. Mar. 18, 2021), misstates the relevance of that opinion here. While the district court in *Gear Box Z* noted that no evidence was presented there regarding use of the alleged defeat devices in competition vehicles, the court's focus on that issue indicated that had such evidence existed it would be relevant. Ultimately, the district court described its decision to treat the racing vehicle issue as moot as based on the absence of "any evidence that there is a motor sports use for Defendant's products." 2021 WL 1056396 at *4. There can be no dispute in this case that Respondent's parts have a specific and highly prized motor sports use.

[2] Such a post-hoc duty is particularly disingenuous given that EPA never once told parts manufacturers that they would need to track the final installation of their parts by third or fourth parties. And it is particularly unfair to demand such proof and impose the substantial cost of such post-market tracking of the thousands of parts at issue long after their legitimate sale. EPA's unilateral and unchallengeable decision to put this case through the administrative process rather than straight into district court, thus multiplying the number of proceedings and the costs of defense, has further squeezed Respondent by threatening to impose defense costs greater than the actual fines EPA could impose as a means of leveraging a settlement. Given such heavy-handed imposition of costs by EPA, concerns over judicial (and party) economy weigh heavily in favor of a stay here.

"indiscriminately" is false, and while that issue can be litigated eventually if necessary, it is irrelevant to the issue of a stay. Whether Respondent had, much less violated, a separate duty to ensure its parts were ultimately installed properly and on the racing vehicles for which they were expressly designed, sold, and marketed is a separate question from whether such racing vehicles are "motor vehicles," as defined under the CAA, 42 U.S.C. § 7550(2). That question implicates burdens of proof, fair notice, and other factors that will significantly change depending on whether it was indeed lawful for Respondent to sell its parts for use on converted competition-only vehicles.

EPA further contends that no court has held that it is EPA's burden to show intent or knowledge that otherwise legal parts were illegally installed on motor vehicles, and that a recent case from the Tenth Circuit holds otherwise. Complainant's Resp. at 4 (citing *Utah Physicians for a Healthy Env't v. Diesel Power Gear*, 374 F. Supp. 3d 1124 (D. Utah Mar. 12, 2019); Bench Trial Order, 2020 WL 4282148 (D. Utah Mar. 6, 2020), *aff'd in part*, penalty assessment reversed in part and remanded, 21 F.4th 1229 (10th Cir. 2021)). EPA conveniently neglects to cite any specific page or provide any quotes and with good reason. Those cases do not remotely say what EPA claims.

First, the district court said nothing about potential competition-only vehicles one way or the other because defendants (who were selling and installing parts for diesel monster trucks, not racing vehicles) did not raise that issue and largely conceded the facts relating to the sale of on-road vehicles and parts for on-road use. *See, e.g.*, 374 F. Supp. 3d at 1140-41 (diesel truck dealer defendant admitting to knowledge of intended use of defeat parts sold by parts manufacturer co-defendant). Furthermore, when discussing the sales of parts specifically, the court cited in the Bench Order the relevant statutory provision that makes clear that knowledge that parts would be put to a prohibited use is indeed part of the elements of the violation: "Section 7522(a)(3)(B)

prohibits by its plain language the sale of an emissions defeat part 'as part of' a vehicle where the seller knows or should know the part is being 'put to such use.'" 2020 WL 4282148 , at *17; *see also* 374 F. Supp. 3d at 1138 ("The individual Defendants in this case can therefore be held liable if they had authority to prevent or correct CAA violations and failed to exercise that authority, *provided they had knowledge of the facts giving rise to the violation*.") (emphasis added)).

EPA's misleading description of the Tenth Circuit decision similarly obscures the fact that there was no claim that the sales were for *legal* use on competition vehicles. *See* 21 F.4th 1229 at 1240 (competition use not part of the five issues on appeal). Indeed, the Tenth Circuit did not discuss the sale of *parts*, and in discussing the sale of street vehicles that had in fact been tampered with, the court again pointed to the scienter element in the statute. *See id.* at 1254 ("We recognize that the provision contains a scienter requirement—liability does not attach unless the manufacturer or seller '*knows or should know* that such part or component is being offered for sale or installed for such use or put to such use.' 42 U.S.C. § 7522(a)(3)(B))." (emphasis in original)). That EPA imagines this case supports their argument that the Agency does not need to show such intent or knowledge, much less stands for the proposition for which it is cited, is simply remarkable.

In any event, EPA's misplaced effort to avoid its burden of proof can be litigated in due course (or potentially can be avoided entirely if the D.C. Circuit agrees with EPA's definition of a "motor vehicle" as including converted race cars not designed for or used on the streets). Whichever way the court rules, however, will significantly narrow the issues remaining and thus will serve the interests of judicial economy. *See Landis v. North American Co.*, 299 U.S. 248, 255, 256 (1936) (granting stay where independent proceedings would not resolve every issue in the pending case, but "will settle many and simplify them all").

B. *RESC v. EPA* Directly Addresses the Application of the CAA to Converted Competition-Only Vehicles.

EPA next claims that the D.C. Circuit is unlikely to reach the issue of converted competition-only vehicles due to procedural disputes and the limited scope of the challenge to the 2016 Final Rule. EPA's undoubtedly fervent hope for a procedural victory is wishful thinking, and its description of the challenges presented is false.

First, EPA attempts to cloud the direct relevancy of *RESC* to this case by pointing to its challenge to RESC's standing, Complainant's Resp. to Mot. for Stay at 5, which is already squarely addressed in RESC's opening brief. *See RESC,* Corrected Opening Brief of Pet'r at 24-27. RESC's members are directly and plainly impacted by the 2016 Final Rule. And a finding that the regulatory amendments are incompatible with the CAA would preclude enforcement of EPA's expansive application of "motor vehicle" restrictions to converted competition-only vehicles. The existence of a prior regulatory structure supposedly saying the same thing does not impact redressability. Indeed, the scope of the prior regulatory structure is being litigated as part of the appeal, and to the extent it is the same as the challenged amendments, a finding that the amendments violate the CAA would also render the prior regulation unenforceable as contrary to the Act, and thus provide ample redress.[3]

Second, EPA attempts to cabin the applicability of *RESC* to this proceeding by incorrectly framing the *RESC* challenge as merely objecting to a lack of explanation for EPA's claimed clarifications. Complainant's Resp. to Mot. to Stay at 5-6. While it is true that RESC disputes

[3] EPA seems to imply that RESC is only challenging the preamble to the Final Rule rather than the regulatory changes themselves and that the preamble is not final agency action. *See* Complainant's Resp. to Mot. for Stay at 5-6. But RESC expressly challenges multiple amendments to the regulations themselves as contrary to the CAA (in addition to being inadequately justified), and a ruling that such changes were "contrary to law" would invalidate such regulations and create significant precedent relevant to the central issues in this case. *See RESC,* Corrected Opening Brief of Pet'r at 1, (attached as Exhibit 1 to Respondent's Motion).

EPA's unexplained shift in its decades-old acceptance of converted racing vehicles as being without statutory support and precedent, it does far more than that. RESC also claims that EPA's current position, whether an improper shift or simply a "clarification," is wrong and inconsistent with the CAA. *See RESC*, Corrected Opening Brief of Pet'r at 1 (presenting statement of issues as "[w]hether EPA's determination that the CAA does not allow any person to disable, remove, or render inoperative (i.e., "tamper with") emission controls on an EPA-certified motor vehicle that is converted to be used solely for purposes of competition is arbitrary and capricious, an abuse of discretion, or not in accordance with law"). In fact, EPA's attempt to shrink the scope of the *RESC* issues here is directly at odds with the Agency's own express description of the issues in its *RESC* briefing. EPA could not be more clear in its *RESC* Answering Brief that the statutory interpretation questions regarding the definition of motor vehicles are front and center, explicitly stating its second, question-begging "Issue Presented" as: "Does the Clean Air Act allow tampering with motor vehicles if they are used solely for competition?" EPA's Proof Answering Brief at 2. The properly framed issue, of course, is whether a vehicle used solely for non-road competition is a motor vehicle at all, but both parties fully agree that the pure legal questions regarding the scope of the statutory term "motor vehicle" and the application of the CAA to competition-only vehicles are squarely presented in the *RESC* appeal.

Third, EPA wrongly assumes that it will win on the issue above — that the changes in the 2016 Final Rule discussing the exclusion for competition-only vehicles are mere clarifications of its earlier position. Indeed, the 2011 regulation it cites simply begs the question of whether racing-only vehicles are indeed, motor vehicles. Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011) (adding the word "nonroad" to the competition exemption in 40 C.F.R.

§ 1068.235(b) to make clear that what is exempted is "nonroad" vehicle that has been modified for use solely in competition). The far more obvious conclusion is that vehicles converted for exclusive use on a racetrack *both* are non-road vehicles and competition-only vehicles but are not vehicles intended for use, or actually used, on streets or highways. Whether EPA's 2016 Final Rule sought to answer that begged question by now codifying its dubious once-a-motor-vehicle-always-a-motor-vehicle stance and whether EPA's answer is compatible with the CAA are, once again, exactly the issues before the D.C. Circuit.

Fourth, EPA's argument that it might simply lose on the narrower grounds of having run a poor rulemaking and failed to sufficiently explain itself is implausible. Complainant's Resp. to Mot. to Stay at 6. The entire premise of the claim that EPA did not adequately explain itself is that its current position is a radical change in the law and in the Agency's enforcement practice and a departure from the statute, so such a departure *needed* an explanation. In order to hold that EPA needed to explain itself, the D.C. Circuit, at a minimum, would have to rule on the scope of the statute, because if the 2016 Final Rule is indeed merely clarifying what the statute already says, no explanation would have been needed and no remand would be necessary. EPA's hope that it will merely "lose small" is a poor reason for moving forward ahead of the far more likely guidance to be had from the D.C. Circuit, whether that guidance ultimately agrees with EPA's views or with the views of Respondents here.

II. JUDICIAL ECONOMY FAVORS A LIMITED STAY

EPA complains that the age of this case and the uncertain duration of a stay weigh against waiting for a decision from the D.C. Circuit. Complainant's Resp. to Mot. to Stay at 7. But the age of the case is relatively modest, and EPA is as responsible as Respondent for the speed of its progress to this point. It was EPA's decision to waive the normal penalty caps for administrative

actions and bring this case in this venue, a strategic choice that multiplies the necessary proceedings before the key legal issues can be heard by a federal court. Awaiting D.C. Circuit guidance on the key legal questions will at least partially mitigate the costs to Respondent of EPA's decision to defer ultimate judicial resolution.

As for supposed concerns with evidence and witnesses, the parties have already made their pretrial submissions, and EPA fails to identify any factual testimony from witnesses that could be forgotten. If EPA is correct that it is illegal for Respondent to sell its parts for converted competition-only vehicles, then there will be far fewer facts to litigate and witness memories will play little, if any, role. If EPA is wrong and the dispute concerns the intended purpose and marketing of the parts being sold, then there is little chance that Respondent's personnel will forget what it was they did, and relevant documents have already been gathered and presented with the pretrial submissions. That the sales EPA challenges are nearly seven years old is hardly Respondent's fault, but rather EPA's fault for having waited more than five years to file its Amended Complaint from the date of the first alleged violations. As soon as EPA issued its Notice of Violation, Respondent stopped the disputed sales and cooperated fully in producing sales records. There is thus a limited universe of parts at issue and no ongoing alleged violations, so a brief delay will have little or no impact on any party's practical ability to litigate this case.

Finally, EPA's suggestion that the delay would be indefinite is disingenuous. Complainant's Resp. to Mot. to Stay at 7. Respondent's requested stay is tied directly to a ruling in the *RESC* case and that litigation is moving apace. The final brief will be submitted by the end of this month (March 30, 2022), oral argument in the D.C. Circuit is typically scheduled fairly promptly,[4] and EPA cites no reason to expect an unusual delay in the decision. Stays have been

[4] *See* 2020 Judicial Business Report, Table B-4, U.S. Court of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits by Circuit During the 12-Month Period Ending September 30, 2020,

granted in cases where briefing in the D.C. Circuit was less advanced than it is here, and any concerns with an unusual delay can be addressed by imposing an outer limit on the stay. *See e.g.*, *Fonville v. District of Columbia*, 766 F. Supp. 2d 171, 172-72 (D.D. C. 2011) (granting stay where briefing in one of the appeals was scheduled to conclude approximately three months after motion to stay was filed); *In the Matter of Unitex Chemical Corp.*, EPA Docket No. TSCA 92-H-08, 1993 EPA ALJ LEXIS 146 (Mar. 18, 1993) (granting a stay of one year or until decision by the D.C. Circuit, whichever occurs first, where the D.C. Circuit had already scheduled briefs and oral argument and where the decision would affect most or all claims in the administrative proceeding).

For the foregoing reasons, Borla respectfully requests that this Court grant its Motion to Stay the Proceeding until a decision has been issued by the D.C. Circuit in the *RESC* case.

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Respectfully Submitted,

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available at https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2020.pdf, (reporting for the D.C. Circuit, 3.8 months to conduct oral argument after final brief and 2.3 months to issue opinion after oral argument).

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CERTIFICATE OF SERVICE

I, Kent Mayo, hereby certify that on this 14th day of March 2022, that a true and correct electronic copy of the foregoing Respondent's Reply in Support of Its Motion for Stay of Proceeding was filed and served on the Presiding Officer this day through the Office of Administrative Law Judges' E-Filing System. I further certify that an electronic copy of the foregoing Respondent's Motion for Stay of Proceeding was sent this day by email to the following email addresses for service on Complainant's counsel:

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