UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

COMPLAINANT'S RESPONSE TO MOTION FOR STAY

The Director of the Region 9 Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency ("Complainant") files this response opposing the Motion to Stay the Proceeding filed by Borla Performance Industries, Inc. ("Borla" or "Respondent") on February 16, 2022 ("Stay Motion"). The Stay Motion asks this Tribunal to stay the Proceeding "pending the resolution of a Petition for Review filed by the Racing Enthusiasts and Suppliers Coalition ("RESC") in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit")."

I. STANDARD FOR REVIEW

The Consolidated Rules of Practice provide no explicit standards for evaluating a motion to stay. Nonetheless, the Consolidated Rules do instruct that the presiding officer "shall…avoid delay" and may take measures necessary "for the efficient, fair and impartial adjudication of issues." 40 C.F.R. § 22.4(c); *In re Caracio*, *et al*, 2011 WL 3251236, at *1 (EPA ALJ Jun. 23, 2011) (Order Denying Complainant's Motion to Stay Proceedings) (citing § 22.4(c) as relevant to stay motions). Ruling on such a motion is a matter of discretion and "incident to [the court's] power to control its own docket." *In re Strong Steel Products,* 2004 WL 1089217, at *1 (EPA

ALJ Apr. 30, 2004) (Order on Respondent's Motion to Stay) (quoting *Clinton v. Jones*, 520 U.S. 681, 706 (1997)).

To decide whether to stay a proceeding, courts consider the following factors: "whether the stay will serve the interests of judicial economy, result in unreasonable or unnecessary delay, or eliminate any unnecessary expense and effort; the extent, if any, of hardship resulting from the stay and of adverse effect on the judge's docket; and the likelihood of records relating to the case being preserved and of witnesses being available at the time of any hearing." *Id.* (collecting cases). Thus, motions to stay are decided considering efficiency and fairness. *Id.* at *2. A grant of stay may be considered where a similar case in another, or higher court "has the 'propensity to be dispositive on *the* issue at hand and a decision has not yet been rendered." *Id.* (emphasis in original) (quoting *Sam Galloway Ford v. Universal Underwriters Ins.*, 793 F. Supp. 1079, 1081 (M.D. Fla. 1992)). However, a stay generally may not be granted that is "so extensive that it is 'immoderate or indefinite' in duration," and it is considered an abuse of discretion by "issuing 'a stay of indefinite duration in the absence of a pressing need.'" *Id.* (quoting *Landis v. North American*, 299 U.S. 248, 255 (1936)). To decide whether to stay proceedings indefinitely, courts generally identify a "pressing need" by "balancing interests favoring a stay against interests frustrated by a stay, but 'overarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases before it.'" *Id.* (quoting *Cherokee Nation of Oklahoma v. U.S.*, 124 F.3d 1413, 1416 (Fed. Cir. 1997)) (Court of Federal Claims' concern for avoiding duplicative litigation and conserving judicial resources did not constitute "pressing need"

sufficient to stay proceedings pending "speculative and protracted" quiet title suits); *Caracio*, 2011 WL 3251236, at *2 (quoting *Cherokee Nation of Oklahoma* in denial of stay motion).

II. ARGUMENT

A. Respondent's Competition Use Legal Argument is Irrelevant Where Respondent Has Failed to Put Forth Proof That the Defeat Devices It Sold Were Used On Vehicles Converted for Competition.

First and foremost, the legal question that Respondent claims is key to disposition of this Proceeding, "whether the statutory definition of 'motor vehicle' in 42 U.S.C. § 7550(2) includes certified production vehicles converted for racing purposes," is not at all dispositive here. This is because that, with the exception of one part, Respondent has not provided any evidence that the specific parts sold by Respondent and alleged as violations in the Amended Complaint were actually installed or used in such vehicles. As noted in page 39 of its Response Brief to Complainant's Motion for Accelerated Decision on Liability, Respondent admits that many of its parts were sold to distributors and "Borla had no contact with the final purchasers." Because Respondent sold these parts indiscriminately and has provided no proof that these violative parts were installed in motor vehicles "converted for racing," the question of whether a Clean Air Act ("CAA") tampering exemption for motor vehicles converted for racing exists is not relevant to the finding of Respondent's liability under Section 203(a)(3)(B) of the CAA. *See U.S. v. Gearbox Z*, No. CV-20-08003-PCT-JJT (D. Ariz. Mar. 18, 2021), at 6-7 (defeat device manufacturer's competition defense held as moot given "Defendant has not produced a single piece of evidence that a single one of its products has been used on a motor sports vehicle").

Respondent may well respond in its reply brief by continuing to assert (as it has in its Opposition Brief to Complainant's Motion for Accelerated Decision), without citing any established legal precedent, that it is the burden of Complainant to prove that Respondent

actually intended that the defeat devices it sold would be installed in a motor vehicle that has *not* been converted for racing, and that Respondent knew or should have known that the defeat device was *not* going to be used solely for competition. No court has found such burden of proof is required to establish liability under the CAA. Rather, in a recent case that went through trial in Federal District Court, and its decision reviewed by the Tenth Circuit, the court found liability of defeat device sellers under Section 203(a)(3) of the Act without considering the sellers' state of mind concerning competition vehicles. *See Utah Physicians for a Healthy Env't v. Diesel Power Gear*, 374 F. Supp. 3d 1124 (D. Utah Mar. 12, 2019); Bench Trial Order, 2000 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). If proving the defendants' state of mind concerning competition was not required of the plaintiff in Federal District Court, it should not be required of Complainant in in this Proceeding.

In sum, Respondent's competition use legal arguments are immaterial to this Proceeding given it has provided no facts showing that a motor vehicle converted for competition was connected with any defeat device sale (save one) at issue in the Amended Complaint. Thus, there is no pressing need to stay this Proceeding to wait for the D.C. Circuit to decide upon RESC's rule review petition.

B. It is Highly Likely That the D.C. Circuit Opinion Will Not Advance Respondent's Legal Argument that a Motor Vehicle Competition Use Defense Exists.

Unlike the circumstances in the cases that Respondent cited as supportive of its Stay Motion, it is not at all likely that the D.C. Circuit's opinion on the RESC rule review petition will settle the key legal question raised by Respondent's defense in this Proceeding—whether the CAA provides for a competition use defense to the CAA's defeat device prohibition. The RESC

petition is seeking vacatur of certain rule amendments the EPA made in 2016 to clarify that the competition exemption under EPA's regulations applies just to nonroad vehicles, not motor vehicles. RESC claims that these rule clarifications changed the law on the competition exemption despite the EPA stating in the 2016 final rule preamble that it was not making regulatory changes it proposed on this topic to avoid confusion. Therefore, according to RESC, the rule clarifications are arbitrary and capricious as inadequately explained. *See* RESC Petition Brief attached to the Stay Motion.

The EPA's Answering Brief explains that 2016 rule clarifications are wholly consistent with the existing regulatory provisions concerning the nonroad competition exemption, which since 2011 explicitly limited the exemption to nonroad vehicles and not motor vehicles. *See* Attached Answering Brief at 9-10, 19 (citing 40 C.F.R. § 1068.235(b), where in 2011 the EPA added the word "nonroad" to the competition exemption to make clear that what is exempted is a "nonroad" vehicle that has been modified for use solely in competition, and 40 C.F.R. § 85.1701(a)(1), which was revised in 2011 to specify "the competition exemption of 40 C.F.R. § 1068.235…do[es] not apply for motor vehicle engines"). Therefore, the RESC petition has a significant standing and redressability problem, as a grant of requested relief regarding the 2016 clarifications would still leave the existing nonroad competition exemption regulations in place, which explicitly exclude motor vehicles from the competition exemption. *Id.* at 20-21. Moreover, the 2016 rule clarifications are wholly consistent with the CAA plain text, which prohibits tampering with motor vehicles—whether they are used in competition or not. *Id.* at 24-31. Finally, RESC's challenge to the EPA preamble language it takes issue with on competition will likely fail as the preamble is not a final rule and lacks legal effect. *Id.* at 32-33

Given the posture of the RESC case and its limited focus on the reasonableness of the 2016 rule clarifications, rather than the scope of the CAA's defeat device and tampering prohibition, a D.C. Circuit decision on the RESC rule petition would likely not advance Respondent's defense. If the D.C. Circuit rules in favor of the EPA, it would be likely on standing, redressability, and/or no final agency action grounds. If the case is not thrown out on such procedural grounds, the D.C. Circuit could conclude that the EPA acted reasonably when making the clarifications because they were consistent with the CAA. Even if the D.C. Circuit rules in favor of RESC, it will most likely be on procedural grounds, not on statutory interpretation of the CAA. In other words, the D.C. Circuit may agree that it was arbitrary and capricious for the EPA to say it decided against making certain clarifications to avoid confusion but then modified the regulations anyway without further explanation. Such a decision would not speak to whether the CAA provides a competition exemption to tampering with motor vehicle emission controls, and thus provide no controlling authority on Respondent's legal defense.

In sum, the RESC D.C. Circuit case focuses on the reasonableness of EPA's 2016 regulatory clarifications that, importantly, Complainant is *not* relying upon in alleging defeat device violations against Respondent. Rather, Complainant is relying upon the statutory prohibition under Section 203(a)(3) of the Act. It is unlikely that the D.C. Circuit opinion would rule on the merits of whether a motor vehicle competition use exemption exists under CAA that warrants staying this Proceeding to wait for such an opinion. *See Strong Steel*, 2004 WL 1089217, at *10 (in denying stay motion, finding that, although a pending Environmental Appeals Board decision "may touch upon" the CAA's Section 113(d)(1) administrative penalty waiver process used by Complainant, it was "no way certain that [the pending EAB decision]

would be dispositive on the issue of jurisdiction in [the instant] case" that was a key defense of the respondent).

C. The Age of This Case and the Indefinite Period of Time Before the D.C. Circuit Would Issue Its Opinion Weigh Heavily Against a Stay.

Additional factors greatly weigh against a stay. It has been nearly 19 months since the Amended Complaint was filed in this Proceeding on August 6, 2020. The sales that are alleged as violations in the Amended Complaint run from January 15, 2015, to September 26, 2018. As such, the acts that gave rise to the alleged violations occurred as much as seven years ago. Several procedural extensions for various filings have been granted to Respondent already. As time goes by, the chance that important evidence and witness testimony is lost becomes significantly higher. *See Strong Steel*, 2004 WL 1089217, at *10 (finding stay inappropriate where relevant documents and the memories of witnesses would least seven years old by the time the case is heard without a stay, and far older if the case was stayed). As such, Complainant's ability to effectively prosecute this case would be prejudiced from the delay caused by a stay.

Moreover, the Respondent is essentially asking for a stay that is indefinite in duration. Of note, in the RESC case, briefing is not completed, no oral argument has been scheduled yet, and it is unknown exactly when the D.C. Circuit would issue its decision. It is not unreasonable to expect that the two-year anniversary of the filing of the Amended Complaint will come and go before the D.C. Circuit issues its opinion. As no pressing need has been established for this stay, a stay of indefinite duration is not warranted. *Id.*

III. CONCLUSION

For the reasons stated above, Complainant respectfully requests that Respondent's Motion to Stay the Proceeding be denied.

Respectfully Submitted,

MARK PALERMO

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March 3, 2022
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CERTIFICATE OF SERVICE

I certify that an electronic copy of the foregoing Complainant's Response to Motion for Stay ("Motion") in the Matter of Borla Performance Industries, Inc., Docket No. CAA-R9-2020-0044, was filed with the Headquarters Hearing Clerk via the OALJ E-Filing System and that a true and correct copy of the Motion was sent via email to:

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