UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE ADMINSTRATOR

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

RESPONDENT'S MOTION TO STAY THE PROCEEDING

Respondent Borla Performance Industries, Inc. ("Respondent" or "Borla") respectfully files this Motion 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"). *See RESC v. EPA, et al,* No. 16-1447 (D.C. Cir.) (filed Dec. 27, 2016, order lifting abeyance entered Dec. 6, 2021).

The *RESC* case addresses the interpretation of key CAA provisions that underlie EPA's allegations in the instant case, specifically including whether the statutory definition of "motor vehicle" under Clean Air Act ("CAA") 42 U.S.C. § 7550(2) includes certified production vehicles converted for racing purposes. The statutory issues are complex, and despite the fierce disputes they have generated between EPA and the amateur racing industry and suppliers, there is little judicial precedent on point. A limited stay is appropriate to allow this tribunal the benefit of the D.C. Circuit's guidance before ruling on EPA's pending Motion for Accelerated Decision and proceeding to hearing in this case.

The benefits of judicial economy and conservation of resources outweigh any potential impacts of a stay. Borla has long since ceased sales of the parts at issue, and the stay will be of limited duration as the D.C. Circuit has entered a schedule in the *RESC* case with final briefing due on March 30, 2022. For these reasons, this tribunal is well within its discretionary authority

to enter a limited stay pending the D.C. Circuit's ruling in *RESC*. Counsel for Respondent consulted with counsel for Complainant EPA and was informed that Complainant objects to this Motion.

I. BACKGROUND

A. Current Proceedings

On August 6, 2020, EPA commenced the instant administrative action against Borla alleging violation of the so-called "Defeat Device Prohibition" under the CAA and demanding a significant penalty. *See* 42 U.S.C. § 7522(a), 7524. The Defeat Device Prohibition forbids the manufacture, sale, offering for sale, or installation of an automotive part or component for use with a "motor vehicle . . . where a principal effect of the part or component is to bypass, defeat, or render inoperative a device or element of design installed on a "motor vehicle." 42 U.S.C. § 7522(a)(3)(B). Thus, EPA lacks enforcement authority under this provision for components that are intended for use with a vehicle that is not properly categorized as a "motor vehicle" under the CAA. *See* 42 U.S.C. § 7550(2) (defining "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway"). Borla contends that the parts at issue were designed and intended for use on competition vehicles only—specifically, vehicles originally certified for use on-road but permanently converted for racing use and never used on-road. Borla maintains that such vehicles are not, and were never intended to be, covered by the CAA definition of "motor vehicle." EPA contends that any vehicle originally certified for sale as a motor vehicle must always be considered a "motor vehicle" under the CAA regardless of any changes in design, characteristics or use dedicating the vehicle to solely to non-street competition use. *See* Dkt. # 33 (Complainant's Rebuttal Prehearing Exchange) at 6-7.

On April 20, 2021, EPA filed a Motion for Accelerated Decision on Liability and to Strike Affirmative Defenses ("MAD"). Dkt. # 37. As a threshold issue for its MAD, EPA seeks a legal ruling from this tribunal regarding the scope of the definition of "motor vehicle" under the CAA. EPA specifically asserts the following:

> The CAA's definition of motor vehicle turns on the motor vehicle's design capabilities as built by the OEM [Original Equipment Manufacturers] and certified by the EPA. A vehicle is a "motor vehicle" if it is designed for transportation of persons or things on a street. 42 U.S.C. § 7550(2). *The CAA is clear that a certified motor vehicle remains a motor vehicle even if it is modified for competition motorsports or is not used on public roads.* The definition of "motor vehicle" includes EPA-certified motor vehicles, such as the vehicles at issue in this case, and provides no exclusion for EPA-certified motor vehicles used in competition motorsports." MAD at 22, *Borla Performance Industries,* EPA Docket No. CAA-09-2020-0044 (emphasis added).

Borla filed its Response to the MAD on June 11, 2021 and disputed EPA's characterization of the "motor vehicle" definition under the CAA. *See, e.g.*, Dkt. # 40, at 12 (asserting that vehicles designed and used solely for competition "are not 'motor vehicles' under the CAA, regardless whether they were built for racing from the outset or whether they began their existence as motor vehicles but were later redesigned and used solely for competition"). Briefing was completed on July 26, 2021 and the issues are pending with the tribunal. No hearing date has been set at this time.

b. The *RESC* Petition for Review

The *RESC* proceeding, which is actively pending before the D.C. Circuit, directly addresses the same threshold legal issue addressed in this case and in EPA's MAD—whether EPA's stated interpretation 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 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. Initial Opening Brief of Pet'r at 1, *RESC v. EPA,* No. 16-1447 (D.C. Cir.,

filed Jan. 5, 2022) (attached as Exhibit 1 to this Motion). *RESC* arises from a Petition for Review filed by a coalition of businesses that manufacture, distribute, and sell automotive aftermarket parts challenging portions of a 2015 proposed rulemaking by EPA that primarily focused on greenhouse gas emissions standards for heavy-duty on-road vehicles ("Proposed Rule"). *See* Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles-Phase 2, 80 Fed. Reg. 40,138 (Jul. 13, 2015). The Proposed Rule, consisting of 600 *Federal Register* pages, included only two paragraphs on motor vehicle tampering culminating in the statement that, "if a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicle for competition use." *Id*. at 40,527.

Following strong pushback from the regulated community (*e.g.*, manufacturers of light-duty vehicles, aftermarket automotive parts, and related entities) regarding the unprecedented and unsupported nature of EPA's statement, EPA chose not to adopt the proposed tampering language in the Final Rule. *See* 81 Fed. Reg. 73,478 (Oct. 25, 2016). However, in the context of withdrawing this regulatory language, EPA included in the preamble to the Final Rule an assertion that the tampering proposal was "not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles." *Id*. at 73,957. The Agency also included in the Final Rule other material changes to several key regulatory provisions related to tampering that were not specifically identified or explained in the Preamble but arguably could be used to shore up EPA's interpretation of "motor vehicle." *See e.g.*, *id*. at 74,227 (revising 40 C.F.R. § 1068.235 on emission testing related to certification to expressly state that the "competition exemption" for nonroad vehicles does not apply to motor vehicles).

Contrary to EPA's explanation, the tampering proposal was, in fact, the first time EPA has stated its current position that motor vehicles cannot lawfully be converted into competition-use-only vehicles. In response to these hotly disputed actions by EPA, RESC filed a timely petition for review with the D.C. Circuit on December 27, 2016. The RESC case was combined with a case challenging the greenhouse gas portions of the Final Rule and held in abeyance beginning August 1, 2017. On December 26, 2019, the RESC case was severed from the greenhouse gas challenge and remained in abeyance while that challenge proceeded to an opinion by the D.C. Circuit on November 12, 2021. RESC subsequently filed an unopposed motion to lift abeyance and set a briefing schedule, and the D.C. Circuit returned the case to its active docket by order dated December 6, 2021 and issued a briefing schedule that provides for final briefing to be completed by March 30, 2022 (attached as Exhibit 2 to this Motion).

II. STANDARD FOR STAYING THE PROCEEDING

A stay of the proceeding during the pendency of similar actions in other courts is ultimately a matter of discretion for the presiding judge. *See e.g., Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *Fonville v. District of Columbia*, 766 F. Supp. 2d 171, 172-73 (D.D.C. 2011) (citing *Hisler v. Gallaudet Univ.*, 344 F. Supp. 2d 29, 35 (D.D.C. 2004) ("A trial court has broad discretion to stay all proceedings in an action pending the resolution of independent proceedings elsewhere.")). "The court 'must weigh competing interests and maintain an even balance,' when determining whether to stay a proceeding." *Fairview Hosp. v. Leavitt*, 2007 WL 1521233, *1 (D.D.C. 2007) (quoting *Landis*, 299 U.S. at 254). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* The issue to be resolved in the independent proceedings need not be identical to the issue pending in the case sought to be

stayed, nor must it resolve all of the issues in that case. *See Landis*, 299 U.S. at 255, 256 (granting stay where independent proceedings would not resolve every issue in the pending case, but "will settle many and simplify them all").

In determining whether to grant a motion for stay of the proceeding pending a decision in another court, EPA presiding judges have looked to the following factors: "whether or not 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 [d]ocket; and the likelihood of records relating to the case being preserved and of witnesses being available at the time of the any hearing." *In the Matter of John Crescio*, EPA Docket No. 5-CWA-98-004, 1992 WL 363862 (Feb. 26, 1999). EPA presiding officers have deemed the pending resolution in another court of an issue or issues central to the administrative proceeding as sufficient grounds to support a discretionary stay. *See id.* (granting a stay of seven months or until decision by the Environmental Board of Appeals ("EAB"), whichever occurs first, where the EAB decision addressed the same Clean Water Act issue that was pending in the administrative proceeding); *In the Matter of Unitex Chemical Corporation*, 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).

III. ARGUMENT

This tribunal should grant Borla's request for a stay pending the D.C. Circuit's resolution of the *RESC* case. The relevant factors support a limited stay while the D.C. Circuit considers legal issues presented in *RESC* that are also central to this case.

First, the interests of judicial economy will be served by awaiting guidance from the D.C. Circuit on how to interpret the key CAA provisions at issue in EPA's pending MAD, including whether the statutory definition of "motor vehicle" in 42 U.S.C. § 7550(2) includes certified production vehicles converted for racing purposes. Borla contends that:

> EPA, however, reads the phrase "motor vehicle" well beyond its statutory and regulatory definition to include racing cars that are designed and "used solely for competition," 42 U.S.C. § 7550(2), (10)-(11), rather than for "transporting persons or property on a street or highway." . . . EPA is entitled to no deference for its broader view that cars *converted* from street vehicles to competition-only vehicles remain included in the covered category of "motor vehicles."

Dkt. # 32 (Respondent's Initial Prehearing Exchange) at 7 (emphasis in original). That same issue will be addressed in *RESC*, where the Petitioners aver:

> [T]he CAA does not authorize a prohibition on converting motor vehicles into competition-use-only vehicles. The statutory definition of "motor vehicle" does not encompass competition-use-only vehicles because such vehicles are not designed to transport people or things on streets or highways. Likewise, competition-use-only vehicles are carved out of the statutory definition of "nonroad vehicles." Hence, competition-use-only vehicles are not subject to the CAA."

Initial Opening Brief of Pet'r at 24, No. 16-1447 (D.C. Cir.).

There is further overlap between *RESC* and this matter because the parties here have addressed EPA's 2016 rulemaking at issue in *RESC* in the context of arguments regarding both liability and penalty issues. *See, e.g.*, Dkt. # 40 (Response to MAD) at 55-61. In fact, EPA makes the very same hotly disputed argument here—that its statement in the preamble to the 2015 proposed rule was merely restating prior EPA policy—that RESC is directly challenging in the D.C. Circuit. *See* Dkt. # 44 (EPA Reply to MAD) at 17.

These common legal issues pending before this tribunal are complex and of great significance to the amateur racing industry and associated parts manufacturers. Though EPA is actively advancing enforcement actions in this space, there is little judicial precedent bearing on

the interpretation of the critical CAA provisions underlying EPA's allegations. This tribunal will benefit from, and judicial economy will be served by, taking into account the upcoming guidance from the D.C. Circuit before addressing these defining legal issues in this proceeding. Moving forward with a decision on the MAD and proceeding to a hearing without waiting for the *RESC* decision could create inconsistent outcomes that lead to further challenges and delays in this matter. A limited stay will conserve the parties' and this tribunal's resources. A stay also would potentially mitigate some of the added financial burdens borne by Borla as a result of EPA having made an exception to put this case into the administrative process when it normally would have gone straight to court. Guidance from the D.C. Circuit may narrow costly further administrative proceedings and may also impact the parties' positions regarding early resolution of this matter. *See, e.g.*, *Fonville*, 766 F. Supp. 2d at 172-73 (granting stay where case presents nearly identical issues to two appeals before the D.C. Circuit and where stay pending the final resolution of the appeals would foster efficiency and conservation of resources); *Fairview Hospital*, 2007 WL 1521233, *1 (granting stay where case presents nearly identical issues as those currently briefed and pending on cross-motions for summary judgment in another pending D.D.C. case and where stay would foster efficiency and conservation for both the parties and the court).

Second, there would be no hardship to either party or any harm resulting from the requested stay. EPA is a party to both cases and will be advocating its interpretation before the D.C. Circuit in the *RESC* case. Moreover, there is no potential for environmental impact from staying these proceedings. Borla has not sold any of the parts at issue in this matter since EPA issued the Notice of Violation in 2019 and the requested relief is limited to penalties for alleged prior violations.

Third, there would be no adverse effect on this tribunal's docket because the requested stay, if granted, is for a specified duration. The D.C. Circuit has already scheduled briefing in *RESC*, with the final briefs due on March 30, 2022. *See* Exhibit 2. This schedule presents reasonable assurances that the time period of a stay would be limited in scope. *See In the Matter of Unitex Chemical Corporation*, 1993 EPA ALJ LEXIS 146 (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). The parties have already completed all prehearing submissions in this matter and completed briefing on EPA's MAD, so no specific impact is anticipated with respect to records preservation or witness availability.

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.

Dated: February 16, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Kent Mayo, hereby certify that on this 16th day of February 2022, that a true and correct electronic copy of the foregoing Respondent's Motion to Stay the Proceeding and accompanying exhibits 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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