

**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 UNOPPOSED MOTION FOR LEAVE TO AMEND COMPLAINT

The Director of the Enforcement and Compliance Assurance Division, of the U.S. Environmental Protection Agency Region 9, ("Complainant") files its Second Amended Complaint together with this Motion for Leave to Amend Complaint (the "Motion"), to request leave to amend the administrative Complaint against Respondent Borla Performance Industries, Inc. (“Borla” or “Respondent”). This Motion is made pursuant to Rule 22.14(c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), for the purpose of modifying the number of violations of section 203(a)(3)(b) of the Clean Air Act (the "Act"), 42 U.S.C. § 7522(a)(3)(b), for which assessment of administrative penalties are sought, as well as making some additional modifications as discussed in this Motion.

Complainant’s counsel shared with Respondent’s counsel the Second Amended Complaint and the Motion on February 22, 2021, and Respondent’s counsel has indicated that Respondent does not oppose the Motion.

I. Background

On June 30, 2020, Complainant filed the original Complaint against Respondent, alleging that Respondent committed 5,547 violations of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(b). On July 15, 2020, Respondent filed an Uncontested Motion to Extend Time to Answer Complaint to extend the due date to file an Answer to August 31, 2020. On July 24, 2020, the Region Judicial Officer of EPA Region 9 issued an Order Granting Extension of Time to File Answer, granting an extension to the due date to file an Answer to August 31, 2020.

Consistent with right to amend the Complaint once any time before the Answer is filed provided by the Consolidated Rules at 40 C.F.R. § 22.14(c), Complainant filed an Amended Complaint on August 8, 2020. In the Amended Complaint, Complainant dropped certain exhaust

parts from this Proceeding, and included an amendment to Paragraph 55, which in the original Complaint included Complainant's allegation that between January 15, 2015 and September 26, 2018, Respondent manufactured, sold, and offered for sale at least 5,547 Exhaust System Defeat Devices (as defined in the Complaint) including, but not limited to, those products identified in Appendix A of the Complaint. Compl., ¶ 55. Paragraph 55 of the Amended Complaint revised the number of Exhaust System Defeat Devices alleged as being manufactured, sold, or offered for sale to 5,296. Am. Compl., ¶ 55. On August 17, 2020, Respondent filed an Uncontested Motion to Extend Time to Answer Amended Complaint seeking an extension to file an Answer to the Amended Complaint on or before September 28, 2020. The Regional Judicial Officer of EPA granted this motion in an Order Granting Second Extension of Time to File Answer issued on August 27, 2020. On September 28, 2020, Respondent filed its Answer to the Amended Complaint.

On January 8, 2021, Complainant filed its Initial Prehearing Exchange. In the Initial Prehearing Exchange Brief, Complainant indicated that, in preparing the Initial Prehearing Exchange and re-reviewing the sales information Respondent has provided, Complainant identified the number of Subject Exhaust Parts Respondent manufactured, sold, and offered for sale between January 15, 2015 and September 26, 2018 to be at least 5,338, not 5,296 as alleged in the Amended Complaint. Complainant's Init. Prehr. Exch. Br. at 15. Complainant also found that, when it had amended the Complaint, it inadvertently did not amend the alleged number of violations for which Complainant seeks an administrative penalty in Paragraph 62 to match the number of alleged violations in Paragraph 55. *Id.* In its Initial Prehearing Exchange Brief, Complainant indicated that it intended to file for leave to amend the Complaint a second time to correct these errors. *Id.*

On December 23, 2020, the EPA published its 2021 Civil Monetary Penalty Inflation Adjustment Rule. 85 Fed. Reg. 83,818 (Dec. 23, 2020). This rule modified the maximum statutory civil penalties for violations that occurred after November 2, 2015, where penalties are assessed on or after December 23, 2020, including the statutory penalty provisions at issue in this Proceeding, namely sections 205(a) and (c)(1) of the Clean Air Act, 42 U.S.C. §§ 7524(a) and (c)(1). 85 Fed. Reg. at 83,821.

Finally, on January 18, 2021, the EPA published a new penalty policy for violations under Title II of the Clean Air Act, called the Clean Air Act Title II Vehicle & Engine Civil Penalty Policy. <https://www.epa.gov/sites/production/files/2021-01/documents/caatitleiivehicleenginepenaltypolicy011821.pdf>. (last accessed Feb. 16, 2021). This penalty policy supersedes the Clean Air Act Mobile Source Civil Penalty Policy – Vehicle and Engine Certification Requirements (Jan. 16, 2009).

II. Complainant's Requested Revisions to the Complaint

Complainant requests leave to amend the Amended Complaint to make the following revisions:

- A. Global change references of "Amended Complaint" to "Second Amended Complaint."
- B. Add a new Paragraph 7 stating: "The EPA and Respondent have executed and entered into a Tolling Agreement which establishes that the period commencing January 15,

2020 and ending on July 1, 2020 (inclusive), will not be included in computing the running of any statute of limitations that might be applicable to this action.”

Complainant seeks to identify this tolling agreement in the Second Amended Complaint as it asserts it is relevant to the application of the statute of limitations to this Proceeding.

- C. Revise the numbering of Paragraphs to account for the newly added Paragraph 7.
- D. Revise Paragraph 8 (formerly Paragraph 7) to state: “Where violations occurred after November 2, 2015, and a penalty is assessed on or after December 23, 2020, an administrative civil penalty may not exceed \$390,092 against a violator, unless the Administrator of the EPA and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment. CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1), 40 C.F.R. § 19.4 tbl. 1; Civil Monetary Penalty Inflation Adjustment Rule, 85 Fed. Reg. 83,818, 83,821 (Dec. 23, 2020).” This revision reflects the promulgation of the Civil Monetary Penalty Inflation Adjustment Rule published December 23, 2020.
- E. Revise Paragraph 9 (formerly Paragraph 8) to state: “The Administrator and the Attorney General jointly determined that this matter, although it may involve a penalty amount great than \$390,092, is appropriate for administrative civil penalty assessment. CAA § 205(c)(1), 42 U.S.C. § 19.4.” This revision reflects the new maximum administrative penalty subject to waiver under section 205(c)(1) of the CAA, \$390,092, established by the Civil Monetary Penalty Inflation Adjustment Rule published December 23, 2020.
- F. Revise Paragraph 32 (formerly Paragraph 31) to state: “Any person violating section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), is subject to a civil penalty of up to \$3,750 for each violation that occurred on or before November 2, 2015, and up to \$4,876 for each violation that occurred after November 2, 2015, where penalties are assessed on or after December 23, 2020. CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4; Civil Monetary Penalty Inflation Adjustment Rule, 85 Fed. Reg. 83,818, 83,821 (Dec. 23, 2020).” This revision reflects the new maximum civil penalty that can be assessed for a violation under section 203(a)(3)(B) of the CAA pursuant to section 205(a) of the CAA, established by the Civil Monetary Penalty Inflation Adjustment Rule published December 23, 2020.
- G. Revise Paragraph 56 (formerly Paragraph 55) to state: “Between January 15, 2015, and September 26, 2018, Respondent manufactured, sold, and offered for sale at least 5,338 Exhaust System Defeat Devices including, but not limited to, those products identified in Appendix A to this Second Amended Complaint.” This revision reflects Complainant’s revised count of alleged violations as discussed in the Background Section of this Motion above.

- H. Revise Paragraph 58 (formerly Paragraph 57) to state: “The Exhaust System Defeat Devices that Respondent manufactured and/or sold and/or offered for sale are intended for use with the motor vehicles or motor vehicle engines identified in Paragraphs 36-45 of this Second Amended Complaint.” This revision reflects the change of Paragraph numbers in the Second Amended Complaint.
- I. Revise Paragraph 61 (formerly Paragraph 60) to state: “Respondent knew or should have known that the Exhaust System Defeat Devices were being offered for sale or installed for such use or put to such use as described in Paragraphs 58-60 of this Second Amended Complaint.” This revision reflects the change of Paragraph numbers in the Second Amended Complaint.
- J. Revise Paragraph 63 (formerly Paragraph 62) to state: “Complainant seeks an administrative penalty to be assessed against Respondent for approximately 5,338 violations of section 203(a)(3)(B) of the CAA alleged in Count One that occurred between January 15, 2015 and September 26, 2018.” This revision reflects Complainant’s revised count of violations as discussed in the Background Section of this Motion above.
- K. Revise Paragraph 65 (formerly Paragraph 64) to state: “Respondent is subject to a civil penalty of up to \$3,750 for each violation that occurred on or before November 2, 2015, and up to \$4,876 for each violation that occurred after November 2, 2015, where penalties are assessed on or after December 23, 2020. CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4; Civil Monetary Penalty Inflation Adjustment Rule, 85 Fed. Reg. 83,818, 83,821 (Dec. 23, 2020).” This revision reflects the promulgation of the 2021 Civil Monetary Penalty Inflation Adjustment Rule.
- L. Revise Paragraph 68 (formerly Paragraph 67) to state: “Where applicable, Complainant proposes to account for the CAA's penalty factors by using the EPA's Clean Air Act Title II Vehicle & Engine Civil Penalty Policy (2021) ("Penalty Policy"), available at <https://www.epa.gov/sites/production/files/2021-01/documents/caatitleiivehicleenginepenaltypolicy011821.pdf> (last visited on February 16, 2021). This Penalty Policy calculates civil penalties based on the number of violative products, the size category of affected vehicles and engines, the egregiousness of the violations, remedial action, and other legal and equitable factors.” This revision reflects the supersession of the previous Title II penalty policy with the January 2021 Clean Air Act Title II Vehicle & Engine Civil Penalty Policy.

III. Analysis

After an answer has been filed, a complaint may be amended "upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). "The Environmental Appeals Board has 'expressly adopted' the liberal policy regarding pleadings and amendments found in Federal Rule of Civil Procedure 15 and described in *Foman v. Davis*, 371 U.S. 178 (1962)." *Chem-Solv, Inc.*, EPA

Docket No. RCRA-03-2011- 0068, 2014 EPA ALJ LEXIS 14, at **16-17 (ALJ, June 5, 2014) (citing *Lazarus, Inc.*, 7 E.A.D. 318, 333 (EAB 1997); *Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002)). Leave to amend should be "freely given" absent "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [or] undue prejudice to the opposing party by virtue of allowance of the amendments, [or] futility of amendments." *Carroll Oil Co.*, 10 E.A.D. at 649- 50 (quoting *Foman*, 371 U.S. at 182).

Complainant has not unduly delayed bringing this Motion and is not acting in bad faith or with dilatory motive. The change in the alleged violation count that Complainant seeks to make in its Complaint was discovered as Complainant prepared its Initial Prehearing Exchange, and Complainant informed this Tribunal and Respondent of Complainant's revised alleged violation in its Initial Prehearing Brief. Complainant is moving forward with seeking leave to amend its Amended Complaint now before its Rebuttal Prehearing Exchange is due, as the number of violations is pertinent to Complainant's proposed penalty calculation that will be provided as part of the Rebuttal Prehearing Exchange.

With respect to the proposed amendments concerning the Civil Monetary Penalty Inflation Rule and the new Penalty Policy, these actions were published after the Amended Complaint and Complainant wants to take the opportunity while seeking leave to amend the Amended Complaint to revise Complaint Paragraphs relevant to these actions. Respondent is aware that Complainant will be applying the new Penalty Policy for its proposed penalty calculation as it has sought for and received an extension of its prehearing exchange in part due to the release of this new Penalty Policy in January. *See* Order on Joint Motion for Extension of Time (Feb. 5, 2021).

Finally, with respect to the proposed amendment concerning the tolling agreement, Complainant wants to take the opportunity while amending the Amended Complaint to add new Paragraph 7 as it is noncontroversial but pertinent to the Tribunal's ability to assess civil penalties for the violations alleged by Complainant.

This Motion, if granted, will not unduly delay this proceeding, or cause Respondent undue surprise or prejudice. As discussed above, Respondent has had notice regarding these sought-for changes to the Amended Complaint and thus its ability to complete its prehearing exchange should not be unduly affected by this Motion.

Conclusion

For the reasons set forth in this Motion, Complainant requests that the Motion to Amend the Amended Complaint be granted, and Respondent ordered to answer the Second Amended Complaint, as provided by 40 C.F.R. § 22.15(c).

Respectfully Submitted,

February 23, 2021

Date

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CERTIFICATE OF SERVICE

I certify that an electronic copy of the foregoing Complainant’s Unopposed Motion for Leave to Amend Complaint (“Motion”) *In the Matter of Borla Performance Industries, Inc.*, Docket No. CAA-R9-2020-0044, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judges’ E-Filing System. I certify that an electronic copy of this Motion was sent this day by e-mail and links to a file transfer system to the following e-mail addresses for service on Respondent’s counsel: Erik S. Jaffe at ejaffe@schaerr-jaffe.com; Kent Mayo at kent.mayo@bakerbotts.com; Julie Cress at Julie.cress@bakerbotts.com.

February 23, 2021
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