

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105**

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

**EXPEDITED JOINT MOTION FOR EXTENSION OF TIME FOR FILING
RESPONDENT’S PREHEARING EXCHANGE AND COMPLAINANT’S REBUTTAL**

Pursuant to 40 C.F.R. § 22.7, Respondent Borla Performance Industries, Inc. and Complainant U.S. Environmental Protection Agency jointly request that the Presiding Officer extend the time set forth in the Prehearing Order dated October 19, 2020, as amended by the Order dated November 23, 2020, for filing Respondent’s Prehearing Exchange and Complainant’s Rebuttal Prehearing Exchange by three weeks as set forth below.

Due to the short time period before the upcoming deadline of February 12 for submission of Respondent’s Prehearing Exchange, the parties respectfully request that the Presiding Officer address this joint motion on an expedited basis.

Section 22.7(b) provides that the Presiding Officer “may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties.” All of these criteria support granting this tailored extension request.

1. The parties originally sought a five-week extension of the deadlines for submitting their respective prehearing exchanges on the basis of challenges created by holiday schedules and

pandemic-related limitations. The Presiding Officer granted that extension request and established new deadlines in its Order dated November 23, 2020.

2. Consistent with the revised schedule, EPA submitted its Prehearing Exchange on January 8, 2021. In that Prehearing Exchange, EPA stated as follows with respect to its intended basis for calculating a proposed penalty: “Complainant’s proposed penalty will be calculated according to the EPA’s Clean Air Act Mobile Source Civil Penalty Policy [dated January 16, 2009], . . . as amended to account for inflation and in consideration of the statutory factors identified in CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2).” Compl’s PHE at 16. EPA reserved the calculation of its proposed penalty until submission of its Rebuttal Prehearing Exchange. *Id.*

3. On January 18, 2021, EPA issued a revised mobile source penalty policy entitled “Clean Air Act Title II Vehicle and Engine Civil Penalty Policy.”¹ The new policy specifically states that it is immediately effective on January 18, 2021 and supersedes the prior 2009 penalty policy.

4. The issuance of the new policy, while posted on EPA’s website, was not widely publicized. Respondent did not become aware of the new policy until February 2, 2021. Counsel for Respondent then reached out to counsel for EPA to determine whether EPA intended to rely on the new policy in making its penalty calculation in this proceeding. Counsel for EPA confirmed that EPA does intend to rely on the new policy in lieu of the superseded 2009 policy.

5. Among other modifications, the new policy makes substantive changes to the methodology for evaluating the gravity component of a proposed penalty for alleged violations of CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), which is the provision alleged to have been

¹ Available online at <https://www.epa.gov/sites/production/files/2021-01/documents/caatitleiivehicleenginepenaltypolicy011821.pdf>

violated in this action. Appendix C of the new policy incorporates a new gravity calculation methodology specific to these types of alleged violations.

6. Respondent has been working to develop its Prehearing Exchange submission that is presently due on February 12, 2021, with the understanding that EPA would be basing its penalty calculation on the 2009 penalty policy. The issuance of the new penalty policy and its application in this case will require Respondent to analyze the new policy and adjust its Prehearing Exchange to reflect the potential impacts of that new policy on EPA's positions and Respondent's defenses. Given that Respondent was not aware of this very significant change in circumstance until ten days before the deadline for submitting its Prehearing Exchange, **good cause exists** for granting a three-week extension of the February 12 deadline.

8. No prejudice to any party will occur as the parties are in agreement with respect to the proposed schedule extension. EPA must also adjust the preparation of its proposed penalty assessment to reflect the modifications in the January 2021 policy, and the parties jointly request that the deadline for EPA's Rebuttal Prehearing Exchange, presently set for February 26, 2021, be extended by an equal amount of time.

For these reasons, the parties jointly request that the Presiding Officer revise the following deadlines set forth in the November 23, 2020 Order as follows:

March 5, 2021	Respondent's Prehearing Exchange
March 19, 2021	Complainant's Rebuttal Prehearing Exchange

Respectfully submitted,

Dated February 4, 2021



Kent Mayo
BAKER BOTTS L.L.P.
700 K Street, NW
Washington, D.C. 20001
Phone: (202) 639-7700
kent.mayo@bakerbotts.com

Erik S. Jaffe
SCHAERR | JAFFE LLP
1717 K St. NW Suite 900
Washington, D.C. 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

Julie Cress
BAKER BOTTS L.L.P.
101 California Street,
Ste. 3600
San Francisco, CA 94111
Phone: (415) 291-6242
Julie.cress@bakerbotts.com

**COUNSEL FOR
RESPONDENT**

Allan Zabel, Attorney Advisor
Air & Toxics Section II
Office of Regional Counsel EPA
Region 9
75 Hawthorne Street (ORC-2)
San Francisco, CA 94105
415-972-3902
zabel.allan@epa.gov

**COUNSEL FOR
COMPLAINANT**

CERTIFICATE OF SERVICE

I, Kent Mayo, hereby certify that on this 4th day of February 2021, I have served a true and correct copy of the Joint Motion for Extension of Time for Filing Prehearing Exchange as set forth below:

Copy by OALJ Electronic Filing System to:

Mary Angeles, Headquarters Hearing Clerk
United States Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, DC 20004

Copy by Electronic Mail to:

Allan Zabel
Attorney-Advisor
United States Environmental Protection Agency, Region 9, Office of Regional Counsel
zabel.allan@epa.gov

Mark Palermo
Attorney-Advisor
United States Environmental Protection Agency, Office of Civil Enforcement
palermo.mark@epa.gov

Nathaniel Moore
Attorney-Advisor
United States Environmental Protection Agency, Region 9, Office of Regional Counsel
moore.nathaniel@epa.gov

Alyssa Katzenelson
Attorney-Advisor
Office of Administrative Law Judges
katzenelson.alyssa@epa.gov



Kent Mayo