UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C., 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

JUL 20 2017

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

James T. Florence, Owner and Registered Agent
Valley Performance Distributors, LLC
940 Goshawk Road
Eaton, CO 80615

Re: Notice of Violation of the Clean Air Act

Mr. Florence:

The United States Environmental Protection Agency has investigated and continues to investigate Valley Performance Distributors, LLC ("VPD") for compliance with the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7401–7671q, and its implementing regulations. As summarized in this Notice of Violation, the EPA has determined that VPD sold parts or components for motor vehicle engines that bypass, defeat, or render inoperative elements of design of those engines that exist to comply with CAA emission standards. The EPA has also determined that that VPD knew or should have known that these parts or components were offered for sale or installed for such use or put to such use. Therefore, VPD violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

Law Governing Alleged Violations

This Notice of Violation arises under Part A of Title II of the Act, 42 U.S.C. §§ 7521–7554, and the regulations promulgated thereunder. These laws were enacted to reduce air pollution from mobile sources of air pollution. In creating the Act, Congress found, in part, that "the increasing use of motor vehicles. . . has resulted in mounting dangers to the public health and welfare."[1] Congress' purpose in creating the Act, in part, was "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," and "to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution."[2]

[1] CAA § 101(a)(2), 42 U.S.C. § 7401(a)(2).
[2] CAA § 101(b)(1)–(2), 42 U.S.C. § 7401(b)(1)–(2).

The EPA's allegations here concern parts or components for motor vehicles and engines subject to emission standards.[3] The Act requires the EPA to prescribe and revise, by regulation, standards applicable to the emission of any air pollutant from new motor vehicles or engines that cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare.[4] As required by the Act, the emission standards "reflect the greatest degree of emission reduction achievable through the application of [available] technology."[5] Motor vehicles and engines are subject to specific emission standards for each pollutant, based on a vehicle's or engine's class and model year.[6]

Vehicle and engine manufacturers employ many devices and elements of design to meet emission standards. *Element of design* means "any control system (i.e., computer software, electronic control system, emission control system, computer logic), and/or control system calibrations, and/or the results of systems interaction, and/or hardware items on a motor vehicle or motor vehicle engine."[7]

As an example of an element of design, heavy-duty diesel engine ("HDDE") manufacturers employ retarded fuel injection timing as a primary emission control device for emissions of oxides of nitrogen ("NOx"). EPA, *Heavy-duty Diesel Engines Controlled by Onboard Computers*, VPCD-98-13, at 4 (Oct. 15, 1998); *see also* 59 Fed. Reg. 23,264 at 23,418 (May 5, 1994) ("[I]njection timing has a very significant impact on NOx emission rates, with advanced timing settings being associated with higher NOx . . ."); *id* at 23,380–81 ("A feasible and simple means of reducing NOx from diesel engines is by retarding injection timing. . . . However, disadvantages include higher specific fuel consumption, lower power, harder startability, and higher levels of HC, CO, particulate matter and smoke emissions.").

HDDE manufacturers also employ certain hardware devices as emission control systems to manage and treat exhaust to reduce levels of regulated pollutants from being created or emitted into the ambient air. Such devices include diesel particulate filters ("DPFs"), exhaust gas recirculation ("EGR"), and selective catalytic reduction ("SCR"). Modern vehicles and engines are equipped with electronic control modules ("ECMs"). ECMs continuously monitor engine and other operating parameters and control the emission control devices, such as the fueling strategy.

To ensure that every new motor vehicle or engine legally sold, offered for sale, imported, delivered for introduction into commerce, or introduced into commerce in the United States (collectively, "introduced into commerce") satisfies applicable emission standards, the EPA runs a certification program. Under this program, the EPA issues certificates of conformity ("COCs"), thereby qualifying motor vehicles and engines for introduction into commerce.[8] To obtain a COC, an OEM must submit a COC application to the EPA for each engine family and each model year in which it intends to manufacture or import motor vehicles or engines for introduction into commerce. The COC application must include, among other things, identification of the covered engine family, a description of the HDDEs and their emission

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[3] *See generally* 40 C.F.R. Part 86, Subpart A (setting emission standards for these categories).
[4] CAA § 202(a)(1) and (3)(B), 42 U.S.C. § 7521(a)(1) and (3)(B).
[5] CAA § 202(a)(3)(A)(i), 42 U.S.C. § 7521(a)(3)(A)(i).
[6] *See, e.g.*, heavy-duty diesel engine emission standards at 40 C.F.R. §§ 86.004-11, 86.007-11, 86.099-11 and light-duty vehicle emission standards at 40 C.F.R. § 86.1811-04. *See also* 40 C.F.R. §§ 86.090-8 (1990 and later model year light-duty vehicles); 86.094-9 (1994 and later model year light-duty trucks); 86.001-9 (2001 and later model year light-duty trucks); 86.004-9 (2004 and later model year light-duty trucks); 86.091-10 (1991 and later model year Otto-cycle heavy-duty engines and vehicles); 86.008-10 (2008 and later model year Otto-cycle heavy-duty engines and vehicles).
[7] 40 C.F.R. § 86.094-2.
[8] 40 C.F.R. § 86.007-30.

control systems, all auxiliary emission control devices ("AECDs")[9], and test results from a test engine showing that the engine satisfies the applicable emission standards. 40 C.F.R. §§ 86.004-21, 86.007-21, 86.094-21, 86.096-21; *see also* EPA, *Advisory Circular Number 24-3: Implementation of Requirements Prohibiting Defeat Devices for On-Highway Heavy-Duty Engines* (Jan. 19, 2001).

The Act makes it a violation "for any person to remove or render inoperative any device or element of design installed [by an original equipment manufacturer ("OEM")] on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser."[10] It is also a violation to cause any of the foregoing acts.[11]

In addition, the Act makes it a violation "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use."[12] It is also a violation to cause any of the foregoing acts.[13]

Alleged Violations

Based on evidence gathered from VPD's responses to an Information Request issued by EPA on October 14, 2016 pursuant to section 208(a) of the Act, 42 U.S.C. § 7542(a), the EPA has determined that, from January 1, 2014 to November 9, 2016, VPD has manufactured, offered for sale, sold, and/or installed (or caused the foregoing with respect to) products that have the effect of altering or bypassing emission control systems or elements of design on motor vehicles or engines, primarily motor vehicles with HDDEs manufactured by entities such as Caterpillar, Cummins, Paccar, and Detroit Diesel. VPD sold two main categories of these "defeat device" products: aftermarket ECM software programs (commonly referred to as "tunes"); and EGR removal kits.

A principal effect of these defeat device products was to bypass, defeat, or render inoperative elements of the HDDEs design that control emissions of regulated air pollutants. Specifically, VPD is an authorized distributor of Performance Diesel Inc. ("PDI") products, including PDI's performance tunes. VPD has sold these performance tunes, referred to as "PDI ECM Upgrade" files, that render inoperative the original equipment manufacturers' ECM software and allow HDDEs to function with altered fuel injection timing and/or without emission control devices such as EGR, DPF, and/or SCR installed by the original equipment manufacturers to meet emission standards. As stated above, fuel injection timing and emission control hardware are devices and elements of design that HDDE manufacturers employ to meet emission standards and obtain COCs.

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[9] An AECD is "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." 40 C.F.R. § 86.082-2.

[10] CAA § 203(a)(3)(A), 42 U.S.C. § 7522(a)(3)(A).
[11] CAA § 203(a), 42 U.S.C. § 7522(a).
[12] CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B).
[13] CAA § 203(a), 42 U.S.C. § 7522(a).

The EGR removal kits sold by VPD are designed to allow for the removal of EGR components from an HDDE.

EPA's findings regarding VPD's sales transactions involving defeat devices between January 1, 2014 to November 9, 2016 are identified in the table below:

Defeat Device Product	**Effect on Motor Vehicle and Engine Emission Control Systems and Elements of Design**	**Approximate Quantity of Defeat Device Products Sold**
PDI ECM Upgrade Tune Files	Change, affect, modify, bypass, render inoperative, or allow for the deletion of DPF, EGR, and/or SCR systems; and/or alter ECM fuel injection timing maps.	418
EGR Removal Kits/Components	EGR system removal and/or bypass.	41
	TOTAL	**459**

VPD knew or should have known that these products were offered for sale, sold, or installed to bypass, defeat, or render inoperative elements of the design that control emissions of regulated air pollutants. With respect to EGR removal kits, VPD clearly identified such parts as EGR or EGR cooler "delete kits." With respect to VPD's PDI ECM Upgrade Files, VPD sold software that defeats the OEM-certified ECM programming associated with the operation of emission control devices and/or the engine's fuel injection timing. Both software functions purportedly increase engine power and fuel economy. VPD's primary selling point for these products was to increase horsepower and fuel economy. VPD's advertising states that VPD's ECM tuning offers "the highest horsepower and efficiency gains in the industry."

Furthermore, VPD knew or should have known that these defeat device products were offered for sale or installed "motor vehicle engines." Each product was designed and marketed for use on Caterpillar, Cummins, and Detroit Diesel HDDEs. Caterpillar, Cummins, Paccar, and Detroit Diesel sought and obtained COCs from the EPA for these HDDEs. This certification unequivocally demonstrates that these vehicles and engines are "motor vehicle engines."

VPD has indicated to EPA that it requires customers of its PDI ECM Upgrade tunes that affect emission controls to sign a "Competition-Use Only Verification and Indemnity" form for the sale of a "Competition Device," which the form defines as "any ECM tuning, as well as any method of deleting the diesel particulate filter ("DPF") or other emission control device." Although VPD may have required purchasers of one of its products to sign this form to acknowledge that the product is only for "competition use," this does not change the EPA's determination that PDI committed the violations described above.

As a legal matter, under the CAA there is no "competition only" exemption for motor vehicles or motor vehicle engines. "Motor vehicle" is defined as "any self-propelled vehicle designed for transporting persons or property on a street or highway." CAA § 216(2); 42 U.S.C. § 7550(2); *see also* 40 C.F.R. § 85.1703 (further defining "motor vehicle"). These definitions make no exemption for motor vehicles or motor vehicle engines used for competition. More generally, these definitions are based on vehicle attributes and make no exemption for vehicles based on their use. For decades, the EPA has consistently adhered to this plain language definition of "motor vehicle."

We wanted to specifically address VPD's reference in its response to the section 208 request to particular EPA correspondence for support of VPD's contention that its PDI ECM tune sales are exempt from the Defeat Device prohibition under Section 203(a)(3)(B) of the Clean Air Act. In its response, VPD wrote:

> VPD's interpretation of "competition vehicles" as separate and distinct from "motor vehicles" as defined in Appendix A of EPA's Section 208 Request is reasonable and consistent with legal authorities. The plain language of the Clean Air Act clearly distinguishes between "motor vehicles" and "competition vehicles." *See, e.g.,* 42 USC § 7550(10) (distinguishing between "a motor vehicle" and a "vehicle used solely for competition" in defining categories of vehicles not included in the definition of a "nonroad vehicle"). In fact, EPA has explicitly acknowledged that "competition vehicles" fall outside of the Clean Air Act's definition of "motor vehicles." *See* Letter from Cynthia Giles, EPA Assistant Administrator for Enforcement and Compliance Assurance, to Nicolas W. Craw, President & CEO of the Automobile Competition Committee for the United States at 1 (May 13, 2016) ("a great many vehicles used exclusively for competition in the United States are not subject to the Clean Air Act at all"). Competition vehicles include "vehicles that begin their existence as normal, EPA-certified production vehicles used on public roads and are then permanently converted to sanctioned competition-only vehicles." *Id.*

We disagree with VPD's interpretation of the CAA and its misreading of statements made in the May 13, 2016 EPA letter to Mr. Craw ("Craw Letter"). First, with respect to the definition of "nonroad vehicle" under the CAA, the CAA exempts from the definitions of "nonroad vehicle" and "nonroad engine" those vehicles and engines used solely for competition. CAA § 216(10)–(11); 42 U.S.C. § 7550(10)–(11). The Act's definitions of "nonroad" vehicle" or "nonroad engine" make no reference to nor modify the Act's definition of "motor vehicle." Thus, VPD's reliance upon the "nonroad vehicle" and "nonroad engine" definitions to support its interpretation of "motor vehicle" under the Act is misplaced and not supported by the language of the statuted. Further, for the purpose of implementing the nonroad vehicle and engine provisions of the CAA found under section 213, 42 U.S.C. § 7547, the EPA has implemented regulations describing how to exempt from CAA requirements nonroad vehicles and engines used solely for competition. 40 C.F.R. § 1068.235. These regulations explicitly do not apply for motor vehicles and motor vehicle engines. 40 C.F.R. § 85.1701(a)(1).

Next with respect to the Craw letter itself, this letter in no way represented any change in EPA's long-standing interpretation of the Act concerning motor vehicle defeat devices and tampering. VPD indicates in its section 208 request response that the Craw letter supports its contention that the EPA agrees that there is a "competition vehicle" exemption from the Act's definition of "motor vehicles," but the letter makes no such statement. The Craw letter states that EPA notes "that a great many vehicles used exclusively for competition in the United States are not subject to the Clean Air Act at all," but that

sentence refers to those vehicles manufactured to be dedicated competition vehicles and not motor vehicles designed for use on the public roads. The sentences that follow in the letter state:

> These are purpose-built, dedicated competition vehicles, and they have never been certified to any emission standard. The vehicles raced in NASCAR Sprint Cup Series and IndyCar Series are examples of this.

The Craw letter further indicates that "[f]or motor vehicles that are certified for use on the public road, the Clean Air Act has always prohibited tampering with or defeating those vehicles' emission control systems." What the letter emphasizes however, is that the EPA has no intention to take "enforcement action against vehicle owners for removing or defeating the emission controls of an EPA-certified motor vehicle for the purpose of permanently converting it to a vehicle used solely for sanctioned competition." Importantly, the letter defines the scope of such category of vehicles narrowly as follows:

> For these purposes, *permanent conversion to a vehicle used solely for sanctioned competition* means that at the time the vehicle is altered, the vehicle is neither registered for use on public roads, nor insured for use on public roads. It also means the vehicle is never again used on public roads (except in the limited circumstances when sanctioned, closed-course competitions are held on public roads) even for the purpose of traveling to participate in a competition event.

VPD has not demonstrated that at the time it sold its PDI ECM Upgrade Tune products, it had a reasonable basis to believe that the products were to be used only on vehicles that constituted a *permanent conversion to a vehicle used solely for sanctioned competition.* Concerning VPD's use of a "Competition-Use Only Verification and Indemnity" form with its customers for the sale of a "Competition Device," it is EPA's experience that mere point-of-sale disclaimers, waivers, and similar writings expressing "intent" are inherently unreliable. Such "representations" require no proof by the signatories that their "intentions" are true, are not backed by any verification process, and generally are used by sellers in an attempt to evade the defeat device prohibition by pushing liability on their buyers.

More important, as a factual matter, it appears that most or all of the products identified by this Notice of Violation were not used solely for competition. VPD's products, including its PDI ECM Upgrade Tunes, were designed and marketed to improve fuel economy, which is a selling point for those seeking to save costs associated with "transporting persons or property on a street or highway," but not for competition purposes.

In addition, VPD's website page concerning its ECM tuning products not only prominently markets the fuel economy gains associated with its products, but is written to market its product to HDDE owners and operators generally and not to a select racing or competition community:

> *VPD is a distributor for all PDI Big Boss® Products. Big Boss ECMs offer tuning that is not available anywhere else in the marketplace. The Heavy Duty Diesel ECM Tuning that we offer in a wide variety of applications is the highest horsepower and efficiency gains in the industry.*
>
> *PDI is the trucking leader for fuel efficiency and power! With top-of-the-line tuning available for your engine, PDI has what it takes to keep you rolling past the pump and be the first to the top! Tuning is the simplest and most efficient way to unlock the horsepower and fuel economy that you deserve! Because every truck driver's situation is different, ECM tuning is available in different stages of horsepower to match your driving style, application, and performance upgrades. ECM tuning is available for CAT, Cummins, and Detroit engines in a wide-variety of*

years and applications. Go ahead and add a Big Boss Turbo and Manifold to your engine and you can have the most efficient and powerful engine available! Contact VPD today and ask our staff about the best combination for you and your truck!

The above advertisement is clearly written in a manner to appeal to those seeking fuel economy gains and for use of HDDEs in a variety of applications. There is nothing on VPD's website or in the advertisements for its products that it provided in response to EPA's section 208 information request that demonstrates the above alleged violations concerned vehicles used solely for competition.

Finally, VPD's sales records indicate that multiple PDI ECM Upgrade tune files and EGR removal kits were sold to what appear to be commercial trucking companies, businesses, and diesel repair and service providers and not for any alleged competition only use.

Therefore, VPD's claim of "a competition vehicle" defense with regard to the alleged violations has no basis in this matter in law nor fact.

Enforcement

The EPA may bring an enforcement action for these violations under its administrative authority or by referring this matter to the United States Department of Justice with a recommendation that a civil complaint be filed in federal district court.[14] Persons violating Sections 203(a)(3)(A) or (B) of the Act, 42 U.S.C. §§ 7522(a)(3)(A) or (B), are subject to an injunction under Section 204 of the Act, 42 U.S.C. § 7523, and a civil penalty of up to $3,750 for each violation that occurred prior to November 2, 2015, and up to $4,527 for each violation that occurred on or after November 2, 2015.[15]

The EPA is available to discuss this matter with you in further detail upon your request. Please contact Mark J. Palermo, the EPA attorney assigned to this matter, within 14 days of receipt of this Notice of Violation. Mr. Palermo can be reached at (202) 564-8894 or palermo.mark@epa.gov.

Sincerely,

Phillip A. Brooks
Director
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cc: Eric G. Benson, Esq.
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[14] CAA §§ 204, 205, 42 U.S.C. §§ 7523, 7524.
[15] CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4.