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

JAN 28 2019

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Alligator Diesel Performance, LLC
c/o Jayme Kemmish, Member
11783 N. Warren St.
Hayden, ID 83835

Alligator Diesel Performance, LLC
c/o Jayme Kemmish, Registered Agent
(b) (6)

Re: Notice of Violation of the Clean Air Act

Dear Ms. Kemmish:

The U.S. EPA has investigated and continues to investigate Alligator Diesel Performance, LLC ("Alligator"), 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 Alligator sold or offered for sale parts or components for motor vehicles and engines with a principal effect of bypassing, defeating, or rendering inoperative devices or elements of design of those engines that were installed by the original equipment manufacturer in order to comply with CAA emission standards. The EPA has also determined that Alligator 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, Alligator violated Section 203(a)(3)(B) of the Act, 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's purpose in creating the Act, in part, was "to protect and enhance the quality of the

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

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]

The EPA's allegations here concern parts or components for motor vehicles and engines subject to emission standards.[3] The Act requires 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] For example, manufacturers employ retarded fuel injection timing as a primary emission control device for emissions of oxides of nitrogen ("NOx"). 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") and onboard diagnostic systems ("OBDs"). ECMs continuously monitor engine and other operating parameters and control the emission control devices, such as the fueling strategy. The OBD monitors and detects malfunctions of emission-related elements of design through a network of sensors installed throughout a motor vehicle or motor vehicle engine.[8]

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

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[2] CAA § 101(b)(1)–(2), 42 U.S.C. § 7401(b)(1)–(2).
[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] CAA § 202(m), 42 U.S.C. § 7521(m); *see* 40 C.F.R. §§ 86.007-17, 86.010-18, 86.1806-05.

should know that such part or component is being offered for sale or installed for such use or put to such use."[9] It is also a violation to cause any of the foregoing acts.[10]

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.[11] To obtain a COC, a manufacturer 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 motor vehicle or engine and its emission control systems, all auxiliary emission control devices ("AECDs") and the engine parameters they sense, as well as test results from a test vehicle or engine showing that it satisfies the applicable emission standards.[12] 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."[13]

Alleged Violations

Based on evidence gathered during an inspection on September 15, 2016, and through an Information Request issued May 18, 2018, under Section 208 of the Clean Air Act, 42 U.S.C. § 7542, Alligator sold or offered for sale from January 1, 2017, to May 17, 2018, software and hardware designed for use on motor vehicles or engines, primarily heavy-duty diesel trucks and engines, manufactured by entities such as Cummins Inc. ("Cummins"); FCA US LLC and its predecessors ("FCA"); General Motors Co. ("GM"); and Ford Motor Co. ("Ford"). This software and hardware, when used, bypasses or disables elements of design that motor vehicle manufacturers employ to meet emission standards. EPA's review of the information provided in response to the Information Request identified products with the highest sales volumes that met the above criteria. Based on this review, Alligator sold four main categories of products of concern: crankcase emission control removal products; electronic software or programming products ("tunes" and/or "tuners"); exhaust replacement pipes; and exhaust gas recirculation removal products.

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[9] CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B).
[10] CAA § 203(a), 42 U.S.C. § 7522(a).
[11] 40 C.F.R. § 86.007-30.
[12] 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).
[13] 40 C.F.R. § 86.082-2.

The Alligator sales of software and hardware described above are summarized in the table below:

PRODUCT	EFFECT ON EMISSION CONTROL DEVICES	QUANTITY
Crankcase Emission Control Removal Products	Removes crankcase emission controls and vents crank case emissions directly to the atmosphere.	2,358
Electronic Software or Programming Products	Override OBD codes and/or facilitate removal of diesel oxidation catalyst (DOC), diesel particulate filter (DPF), exhaust gas recirculation (EGR), and/or Selective Catalytic Reduction (SCR) system.	11,615
Exhaust Replacement Pipes	Remove and bypass DOC, DPF, and/or SCR system.	9,638
Exhaust Gas Recirculation Removal Products	EGR removal and bypass	7,932
	TOTAL	**31,543**

Alligator knew or should have known that these products were offered for sale or installed to bypass, defeat, or render inoperative devices or elements of design that control emissions of regulated air pollutants. The electronic tuning products defeat, bypass, or render inoperative emission control devices by overwriting emission-related calibrations or overriding OBD to allow the removal of emission-related devices or elements of design without illuminating a Malfunction Indicator Lamp, prompting a Diagnostic Trouble Code, or causing an engine power reduction due to a missing or malfunctioning element.

For example, Alligator sold crankcase emission control removal products manufactured by Wehrli[14] that are advertised as follows: "This kit reroutes the PCV lines that normally feed the intake horn, now to the atmosphere . . . ." Alligator described this product, in response to EPA's Information Request, with the following language: "The re-route routes crankcase vent to atmosphere."

[14] https://www.alligatorperformance.com/wehrli-100846-pcv-reroute-kit-w-plug-04-5-10-gm-6-6l-duramax

Alligator advertises for sale the RaceME ULTRA – 07.5-17 DODGE 6.7L CUMMINS (SKU RMUltra). The manufacturer describes the product on its website as "Disables Entire EGR By Turning Off Without Removing Any Parts (Hard Part Removal Recommended And Supports Removal Of Entire EGR System Including Valve And Cooler With No Trouble Codes)" and "Disable The DPF/DEF System And ALL Related Sensors – No Sensors Required To Be Plugged In Or Installed In Race Exhaust." The product's description on Alligator's website includes this same language.

The exhaust replacement pipes and EGR removal products physically replace emission control devices such as DPFs and EGR systems. An example of an exhaust replacement pipe installation instruction for one of Alligator's products is the "AFE ATLAS 4 Down Pipe Back Aluminized Exhaust Kit 11-15 GM Duramax" (SKU: AFE-49-04003NM). The manufacturer's instructions describe how to physically remove emission control components, including the DPF. Alligator's website states that this product "Requires Race Tuning" and has a requirement to click a radio button to Agree that the product is "For Offroad Use only."

Alligator sold numerous EGR removal products. One such product was part number 95110 that Alligator described in response to EPA's Information Request as allowing the customer "to remove the factory installed EGR system in a vehicle that came equipped with that system from the factory, in an Off-Road or Race Only application."

Furthermore, Alligator knew or should have known that these products were offered for sale or installed on "motor vehicles" or "motor vehicle engines." Many products were designed and marketed for use on a specific make, model, and year of Cummins, FCA, GM, or Ford motor vehicle or engine.[15] Cummins, FCA, GM, or Ford sought and obtained COCs from the EPA for these motor vehicles or engines. This certification unequivocally demonstrates that these vehicles and engines are "motor vehicles" and "motor vehicle engines."

[15] Cummins engines were used in Dodge brand motor vehicles manufactured by FCA.

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.[16] Persons violating Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B), are subject to injunctive measure sunder Section 204 of the Act, 42 U.S.C. § 7523, and a civil penalty of up to $4,619 for each violation.[17]

The EPA is available to discuss this matter with you in further detail, upon your request. Please contact Julie Vergeront, the EPA attorney assigned to this matter, within 14 days of receipt of this Notice of Violation. Ms. Vergeront can be reached at (206) 553-1497 or Vergeront.Julie@epa.gov.

Sincerely,

Phillip A. Brooks
Director
Air Enforcement Division
Office of Civil Enforcement

cc: Murray Feldman, Holland & Hart
Emily Schilling, Holland & Hart

[16] CAA §§ 204, 205, 42 U.S.C. §§ 7523, 7524.
[17] CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4.