

MAR 27 2018

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

ENVIRONMENTAL APPEALS BOARD

In the Matter of:

New Flyer of America Inc.

Respondent.

Docket No.
CAA-HQ-2017-8363

CONSENT AGREEMENT

Preliminary Statement

1. This is a civil administrative penalty assessment proceeding instituted under section 205(c)(1) of the Clean Air Act (“CAA”), 42 U.S.C. § 7524(c)(1). The issuance of this Consent Agreement and attached Final Order simultaneously commences and concludes this proceeding. 40 C.F.R. § 22.13(b).
2. Complainant in this matter is the United States Environmental Protection Agency (“EPA”). On the EPA’s behalf, Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized by lawful delegation to institute and settle civil administrative penalty assessment proceedings under section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1).
3. Respondent in this matter is New Flyer of America Inc. (“New Flyer”). Respondent is a manufacturer of heavy-duty vocational vehicles (*e.g.*, transit buses) in the United States. New Flyer, a North Dakota corporation, has manufacturing facilities in Crookston and

St. Cloud, Minnesota, and Anniston, Alabama. New Flyer manufacturers several models of transit buses that are powered by diesel, diesel-electric hybrid, and compressed natural gas, as well as zero-emission electric buses and trolleys.

4. The EPA and Respondent, having agreed to settle this action, consent to the entry of this Consent Agreement and the attached Final Order before taking testimony and without adjudication of any issues of law or fact herein, and agree to comply with the terms of this Consent Agreement and the attached Final Order.

Jurisdiction

5. This Consent Agreement is entered into under section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), and the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits,” 40 C.F.R. Part 22 (“Consolidated Rules”).
6. The EPA may administratively assess a civil penalty if the penalty sought is less than \$320,000. *See* 42 U.S.C. § 7524(c) (setting the administrative penalty cap at \$200,000); 40 C.F.R. § 19.4 (increasing the cap to \$320,000 for penalties accruing on or after December 6, 2013, through November 2, 2015).
7. The Administrator and the Attorney General jointly determined that this matter, although it involves a penalty amount greater than \$320,000, is appropriate for administrative penalty assessment. CAA §§ 205(c)(1), 42 U.S.C. § 7524(c)(1); 40 C.F.R. §§ 19.4 and 1068.125(b).
8. The Environmental Appeals Board is authorized to issue consent orders memorializing settlements between the EPA and Respondent resulting from administrative enforcement

actions under the CAA, and to issue final orders assessing penalties under the CAA.
40 C.F.R. § 22.4(a)(1); EPA Delegation 7-41-C.

9. The Consolidated Rules provide that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a Consent Agreement and Final Order.
40 C.F.R. §§ 22.13(b), 22.18(b).

Governing Law

10. This proceeding arises under Part A of Title II of the CAA, CAA §§ 202-219, 42 U.S.C. §§ 7521–7554, and the regulations promulgated thereunder. In pertinent part, these laws aim to reduce carbon dioxide (“CO₂”) emissions from vocational vehicles. What follows is a summary of the law that governs these allegations.
11. Definitions, as the terms are used in this Consent Agreement:
- (a) “Medium-Heavy Duty Vehicle (M-HDV)” means a vehicle with a gross vehicle weight rating (GVWR) above 19,500 pounds but below 33,000 pounds. Model year 2014–2016 M-HDVs must comply with a CO₂ emission standard of 234 g/ton-mile. 40 C.F.R. § 1037.105.
 - (b) “Heavy-Heavy Duty Vehicle (H-HDV)” means a vehicle with a GVWR above 33,000 pounds. Model year 2014–2016 H-HDVs must comply with a CO₂ emission standard of 226 g/ton-mile. 40 C.F.R. § 1037.105
 - (c) “Vocational Vehicle” means relating to a vehicle subject to the standards of § 1037.105 (including vocational tractors). 40 C.F.R. § 1037.801.
 - (d) “Low rolling resistant tire” means, among other things, a tire on a vocational vehicle with a TRRL at or below 7.7 kg/metric ton. 40 C.F.R. § 1037.801.

(e) “Person” includes individuals, corporations, partnerships, associations, states, municipalities, and political subdivisions of a state. 42 U.S.C. § 7602(e).

12. Under section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), manufacturers of new motor vehicles are prohibited from selling, offering for sale, or introducing into commerce in the United States new motor vehicles unless such vehicles are covered by a certificate of conformity.
13. EPA issues certificates of conformity to vehicle manufacturers under section 206(a) of the CAA, 42 U.S.C. § 7525(a), to certify that a particular group of motor vehicles conforms to applicable EPA requirements governing motor vehicle emissions.
14. Under section 202 of the CAA, 42 U.S.C. § 7521, EPA promulgated CO₂ emission standards for vocational vehicles. *See generally* 40 C.F.R. Part 1037.
15. Persons violating section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), are subject to a civil penalty of up to \$37,500 for each violation that occurred after December 6, 2013, through November 2, 2015. CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4.

Stipulated Facts

16. New Flyer is a person, as that term is defined in section 302(e) of the CAA, 42 U.S.C. § 7602(e).
17. In response to a Request for Information pursuant to section 208 of the CAA, 42 U.S.C. § 7542, issued to New Flyer on June 4, 2015, and response to a Notice of Violation issued to New Flyer on May 9, 2016, New Flyer stated that between January 1, 2014, and June 9, 2015, despite its understanding and beliefs to the contrary, had sold or introduced into commerce in the United States at least 2,399 transit buses that were not covered by a certificate of conformity as described in the Appendix to this CAFO (the Subject Transit

Buses). The reason that no certificates of conformity were issued with respect to the Subject Transit Buses is that New Flyer inadvertently did not file for the certificates of conformity. In June 2015 New Flyer applied for and obtained certificates of conformity without making any changes to the subject buses. The failure to timely file was not cured by obtaining the certificates of conformity in June 2015 because the CAA and its regulations do not allow for the retroactive issuance of a certificate of conformity to cover vehicles that were already introduced into United States commerce.

Alleged Violations of Law

18. EPA alleges that, between January 1, 2014, and June 9, 2015, New Flyer sold or introduced into commerce in the United States the 2,399 Subject Transit Buses that were not covered by a certificate of conformity. In so doing, New Flyer committed 2,399 violations of section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1).

Terms of Agreement

19. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent: admits that the EPA has jurisdiction over this matter as stated above; admits to the stipulated facts stated above; neither admits nor denies the alleged violations of law stated above; consents to the assessment of a civil penalty as stated below; consents to the issuance of any specified compliance or corrective action order; consents to any conditions specified in this Consent Agreement, and to any stated Permit Action; waives any right to contest the alleged violations of law; and waives its rights to appeal the Final Order accompanying this Consent Agreement.
20. For the purpose of this proceeding, Respondent:

- (a) agrees that this Agreement states a claim upon which relief may be granted against Respondent;
- (b) waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Consent Agreement, including any right of judicial review under section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1);
- (c) waives any rights it may possess at law or in equity to challenge the authority of the EPA to bring a civil action in a United States District Court to enforce this Agreement or Order, or both, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action;
- (d) consents to personal jurisdiction in any action to enforce this Agreement or Order, or both, in the United States District Court for the District of Columbia;
- (e) agrees that Respondent may not delegate duties under this Consent Agreement to any other party without the written consent of the EPA, which may be granted or withheld at EPA's unfettered discretion. If the EPA so consents, the Consent Agreement is binding on the party or parties to whom the duties are delegated;
- (f) acknowledges that this Agreement constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement action;
- (g) acknowledges that this Consent Agreement and attached Final Order will be available to the public and agrees that it does not contain any confidential business information or personally identifiable information;

- (h) acknowledges that its tax identification number may be used for collecting or reporting any delinquent monetary obligation arising from this Agreement (see 31 U.S.C. § 7701);
- (i) certifies that the information it has supplied concerning this matter was at the time of submission true, accurate, and complete; and
- (j) acknowledges that there are significant penalties for knowingly submitting false, fictitious, or fraudulent information, including the possibility of fines and imprisonment (see 18 U.S.C. § 1001).

21. For purposes of this proceeding, the parties each agree that:

- (a) this Consent Agreement constitutes the entire agreement and understanding of the parties and supersedes any prior agreements or understandings, whether written or oral, among the parties with respect to the subject matter hereof;
- (b) this Consent Agreement may be signed in any number of counterparts, each of which will be deemed an original and, when taken together, constitute one agreement; the counterparts are binding on each of the parties individually as fully and completely as if the parties had signed one single instrument, so that the rights and liabilities of the parties will be unaffected by the failure of any of the undersigned to execute any or all of the counterparts; any signature page and any copy of a signed signature page may be detached from any counterpart and attached to any other counterpart of this Consent Agreement.
- (c) its undersigned representative is fully authorized by the Party whom he or she represents to bind that Party to this Consent Agreement and to execute it on behalf of that Party;

- (d) each party's obligations under this Consent Agreement and attached Final Order constitute sufficient consideration for the other party's obligations under this Consent Agreement and attached Final Order; and
 - (e) each party will bear their own costs and attorney fees in the action resolved by this Consent Agreement and attached Final Order.
22. Respondent agrees to pay to the United States a civil penalty of \$575,000 (the Civil Penalty).
23. Respondent agrees to pay the Civil Penalty to the United States within 30 calendar days following the issuance of the attached Final Order (*i.e.*, the effective date of this Consent Agreement and attached Final Order).
24. Respondent agrees to pay the Civil Penalty in the manner specified below:
- (a) Pay the Civil Penalty using any method provided on the following website:
<http://www2.epa.gov/financial/additional-instructions-making-payments-epa>;
 - (b) Identify each and every payment with "Docket No. CAA-HQ-2017-8363; and
 - (c) Within 72 hours of payment, email proof of payment to Jocelyn L. Adair, Attorney-Advisor, at adair.jocelyn@epa.gov ("proof of payment" means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to EPA requirements, in the amount due, and identified with "Docket No. CAA-HQ-2017-8363").

Effect of Consent Agreement and Attached Final Order

25. In accordance with 40 C.F.R. § 22.18(c), Respondent's full compliance with this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged above.
26. Failure to pay the full amount of the penalty assessed under this Consent Agreement may subject Respondent to a civil action to collect any unpaid portion of the proposed civil penalty and interest. In order to avoid the assessment of interest, administrative costs, and late payment penalty in connection with such civil penalty, as described in the following Paragraph of this Consent Agreement, Respondent must timely pay the penalty.
27. If Respondent fails to timely pay any portion of the penalty assessed by the attached Final Order, the EPA may:
 - (a) request the Attorney General to bring a civil action in an appropriate district court to recover: the amount assessed; interest at rates established pursuant to 26 U.S.C. § 6621(a)(2); the United States' enforcement expenses; and a 10 percent quarterly nonpayment penalty, 42 U.S.C. § 7524(c)(6);
 - (b) refer the debt to a credit reporting agency or a collection agency, 40 C.F.R. §§ 13.13, 13.14, and 13.33;
 - (c) collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds (see 40 C.F.R. Part 13, Subparts C and H); and

- (d) suspend or revoke Respondent's licenses or other privileges, or (ii) suspend or disqualify Respondent from doing business with the EPA or engaging in programs the EPA sponsors or funds, 40 C.F.R. § 13.17.
28. Penalties paid pursuant to this Consent Agreement are not deductible for federal tax purposes. 28 U.S.C. § 162(f).
29. This Consent Agreement and attached Final Order apply to and are binding upon the Complainant and the Respondent. Successors and assigns of Respondent are also bound if they are owned, in whole or in part, directly or indirectly, or otherwise controlled by Respondent. Nothing in the previous sentence adversely affects any right of the EPA under applicable law to assert successor or assignee liability against Respondent's successor or assignee.
30. Nothing in this Consent Agreement shall relieve Respondent of the duty to comply with all applicable provisions of the CAA or other federal, state, or local laws or statutes, nor shall it restrict the EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.
31. The EPA reserves the right to revoke this Consent Agreement and accompanying settlement penalty if and to the extent the EPA finds, after signing this Consent Agreement, that any information provided by Respondent was or is materially false or inaccurate, and the EPA reserves the right to pursue, assess, and enforce legal and equitable remedies for the Alleged Violations of Law. The EPA shall give Respondent written notice of such termination, which will be effective upon mailing.

32. The Parties agree to submit this Consent Agreement to the Environmental Appeals Board with a request that it be incorporated into a Final Order.
33. Respondent and Complainant agree to issuance of the attached Final Order. Upon filing, the EPA will transmit a copy of the filed Consent Agreement to the Respondent. This Consent Agreement and attached Final Order shall become effective after execution of the Final Order by the Environmental Appeals Board and filing with the Hearing Clerk.

APPENDIX
(Subject Transit Buses)

Model Year	Propulsion Type	Size Category	Number Sold
2014	Compressed Natural Gas	H-HDV	1,108
	Diesel	H-HDV	452
	Diesel-Electric	H-HDV	468
	Diesel	M-HDV	11
2015	Compressed Natural Gas	H-HDV	81
	Diesel	H-HDV	225
	Diesel-Electric	H-HDV	28
	Diesel	M-HDV	26
Total			2,399

The foregoing Consent Agreement *In the Matter of New Flyer of America Inc.*, Docket No. CAA-HQ-2017-8363, is Hereby Stipulated, Agreed, and Approved for Entry.

For New Flyer of America Inc.:



Signature

FEBRUARY 12, 2018
Date

Printed Name: Paul Soubry

Title: Chief Executive Officer

Address: c/o 6200 Glenn Carlson Drive, St. Cloud, MN 56301

Respondent's Federal Tax Identification Number: 

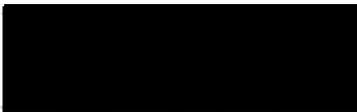
The foregoing Consent Agreement *In the Matter of New Flyer of America Inc.*, Docket No. CAA-HQ-2017-8363, is Hereby Stipulated, Agreed, and Approved for Entry.

For Complainant:



Phillip A. Brooks, Director
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460-0001

3/15/18
Date



Jocelyn L. Adair, Attorney Advisor
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460-0001

2/14/2018
Date

**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:

New Flyer of America Inc.

Respondent

Docket No. CAA-HQ-2017-8363

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18(b)-(c) of the EPA's Consolidated Rules of Practice and section 205(c)(1) of the Clean Air Act, 42 U.S.C. § 7524(c)(1), the attached Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondent is ORDERED to comply with all terms of the Consent Agreement, effective immediately.

So ordered.

ENVIRONMENTAL APPEALS BOARD¹

Dated: _____

[Official Name of Lead Judge]
Environmental Appeals Judge

¹ The three-member panel ratifying this matter is composed of Environmental Appeals Judges _____, _____, and _____.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing "Consent Agreement" and "Final Order," in the matter of New Flyer of America Inc., Docket No. CAA-HQ-2017-8363, were sent to the following persons in the manner indicated:

**By First Class Certified Mail/
Return Receipt Requested [or "By E-mail"]:**

For Respondent:

Mr. Colin Pewarchuk,
Executive Vice President,
General Counsel
New Flyer Industries Inc.
711 Kernagham Avenue
Winnipeg, Manitoba
R2C 3T4 Canada
Colin_Pewarchuk@newflyer.com

and

Barbara Kelly
Attorney at Law
Wilson Elser Moskowitz Edelman
& Dicker LLP
200 Campus Drive
Florham Park, NJ 07932-0668
Barbara.Kelly@wilsonelser.com

and

Robert V. Cornish Jr.
Attorney at Law
Wilson Elser Moskowitz Edelman
& Dicker LLP
700 11th Street, NW, Suite 400
Washington, D.C. 20001
Robert.Cornish@wilsonelser.com

By Interoffice Mail [or by "E-mail"]:

For EPA:

Jocelyn L. Adair
Office of Civil Enforcement

Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code 2242A
Washington, DC 20460
E-mail: Adair.Jocelyn@epa.gov

Dated: _____

Annette Duncan
Administrative Specialist

ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

_____)
In re:)
) Docket No. CAA-HQ-2017-8363
New Flyer of America, Inc.)
)
)
_____)

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18(b)-(c) of EPA’s Consolidated Rules of Practice, the attached Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondent is ORDERED to comply with all terms of the Consent Agreement, effective immediately.

So ordered.¹

ENVIRONMENTAL APPEALS BOARD

Dated: Apr 10 2018



Mary Beth Ward
Environmental Appeals Judge

¹ The three-member panel ratifying this matter is composed of Environmental Appeals Judges Lynch, Stein, and Ward.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing “Consent Agreement” and “Final Order,” in the matter of *New Flyer of America, Inc.*, Docket No. CAA-HQ-2017-8363, were sent to the following persons in the manner indicated:

By E-mail:

Mr. Colin Pewarchuk
Executive Vice President,
General Counsel
New Flyer Industries Inc.
711 Kernagham Avenue
Winnipeg, Manitoba
R2C 3T4
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Mail Code 2242A
Washington, DC 20460
Adair.Jocelyn@epa.gov

Dated: Apr 10 2018



Eurika Durr
Clerk to the Board