



Enforcement Alert

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Manufacturers of Highway Motorcycles and Nonroad Vehicles and Engines Fall Short of Recordkeeping and Reporting Requirements

Purpose

This Enforcement Alert is intended to help those involved with certifying, assembling, importing, distributing, and servicing highway motorcycles and nonroad vehicles and engines understand their recordkeeping and reporting requirements under the Clean Air Act (CAA). It describes who must keep records and make reports, as well as the Environmental Protection Agency's (EPA's) authority to take enforcement actions when companies fail to comply with these requirements.

The emissions standards and compliance and enforcement provisions for highway motorcycles are found in 40 C.F.R. Parts 85 and 86 and 42 U.S.C. §§ 7521-7542. The same provisions for nonroad recreational vehicles and nonroad small gasoline engines are found in 40 C.F.R. Parts 1051, 1054, 1060 and 1068 and 42 U.S.C. § 7547.

Introduction

The CAA requires EPA to promulgate regulations reducing harmful emissions from mobile sources of air pollution, such as vehicles and engines. Pollutants, including carbon monoxide, nitrogen oxides, and hydrocarbons, pose significant health and environmental concerns, and contribute to smog, respiratory illnesses, cancer, and in extreme cases, even death.

To achieve the CAA's goals to protect human health and the environment, EPA administers a vehicle and engine certification program. The program is designed to ensure that every vehicle and engine sold in,

Proper recordkeeping and reporting facilitates compliance, enables the EPA to assess compliance, and, where necessary, allows the EPA to take an enforcement action to correct violations. Most importantly, recordkeeping and reporting are required by law.

or imported into the United States conforms to the design specifications that apply to vehicles or engines that have been demonstrated to meet emission standards and have been approved by EPA.

EPA approves vehicles and engines by issuing certificates of conformity (COCs). EPA's decision to issue a COC is based on a review of a detailed COC application, which describes exactly how vehicles or engines are designed, tested, and will be produced under that COC.

Recordkeeping and reporting requirements are critical to the success of this program because they help ensure that vehicle and engine manufacturers are in compliance with the law and that their products are legal to sell in the United States. The CAA and its regulations impose recordkeeping and reporting obligations on a broad range of parties involved with certifying, assembling, importing, distributing, and servicing vehicles, engines, and parts.

Recent EPA investigations have revealed widespread recordkeeping and reporting violations. Many vehicle and engine manufacturers failed to keep and maintain records of emission testing and other information that is necessary to support the applications for their COCs. Companies also neglected to keep records of the vehicle identification numbers and the quantities of vehicles produced under their COCs. Such recordkeeping failures are explicitly prohibited by the CAA and its regulations. Additionally, these recordkeeping failures often mask more serious violations, including the importation and sale of uncertified vehicles or engines. Thus, it is important that the vehicle and engine manufacturing industry understand their recordkeeping and reporting obligations.

Who Must Keep Records and Make Reports

Parties involved in the certification, assembly, or distribution of vehicles and engines must keep records and make reports. Generally, EPA regulations state that "manufacturers," "certificate holders," and sometimes "certifying manufacturers" are responsible for recordkeeping and reporting. These regulations give flexibility to industry participants to choose how to structure their businesses.

These regulations do not, however, allow parties in the

industry to avoid recordkeeping and reporting obligations by virtue of the naming or characterization of their business. The term “manufacturer” is defined broadly in the CAA and its regulations. The term includes not only “any person engaged in the manufacturing or assembling” of vehicles or engines (“assemblers”), but also anyone who imports vehicles or engines or who is “under the control of any such person in connection with the distribution” of vehicles or engines. 42 U.S.C. § 7550(1); 40 C.F.R. §§ 1051.801, 1054.801, 1060.801. Also, the COC applicant must certify in its application—regardless of the applicant’s affiliation with the company that assembles the vehicles or engines—that all vehicles or engines intended to be covered by the COC will conform to the description in the COC application and otherwise comply with the law.

EPA is aware that the certification, assembly, and distribution of a vehicle or engine sometimes involves multiple companies with varying degrees of affiliation. Especially in the case where foreign companies assemble vehicles or engines, a second company may hold a COC for the vehicles or engines, and a third company hired by that COC holder may have performed emission testing and prepared and submitted the COC application to EPA, which would enable any number of additional companies to import and distribute the vehicles or engines.

EPA requires that all COC holders, vehicle and engine assemblers, and importers meet the recordkeeping and reporting requirements of the CAA and its regulations.

Although there are many possible business relationships, at a minimum, every company that holds a COC and every company that assembles vehicles or engines covered by that COC is a “manufacturer” when it comes to the recordkeeping and reporting requirements. Therefore, *both* COC holders and assemblers must keep and maintain the required records and any other information relevant to showing compliance. Upon request by EPA, these parties must promptly produce these records and information. In addition, these parties bear the responsibility to ensure that every vehicle or engine that is produced conforms to the design specifications that apply to the vehicle or engine described in the COC application. This requirement demands careful attention by the assembler to ensure that vehicles or engines are manufactured to the certified design, and careful attention by the COC holder to ensure that the certified design is, at a minimum, communicated to the assembler and any changes in production are reported to EPA.

Notably, where a COC holder relies on an outside consultant to perform emission testing, prepare and submit COC applications, or communicate with EPA, the COC holder is nevertheless

Reliance on an outside consultant does not relieve the COC holder of its obligations; nor does it protect the COC holder from liability under CAA.

required to keep and maintain all records required by law. Where a consultant refuses to provide a COC holder with this information, EPA considers that consultant to have caused that COC holder to fail in its recordkeeping obligations, and causing violations of the CAA is itself a violation of the law. Thus both the COC holder *and* its consultant can be held liable for the failure of the COC holder to retain the required records.

Finally, a company that imports vehicles and engines (regardless of whether it assembles or certifies them) must also maintain, for at least five years, records sufficient to allow the United States government to determine exactly what vehicles and engines were imported (including, for example, EPA Declaration Forms 3520-1 and 3520-21) and whether the importation was lawful. 19 C.F.R. §§ 141.0, 142.3, 163.4.

Records to Keep and Reports to Make

Highway motorcycle manufacturers must establish, maintain, and retain certain adequately organized and indexed records that are explicitly listed in the EPA regulations. These records include: (1) completed COC applications; (2) identification and description of test vehicles (called emission data vehicles or EDVs); (3) a complete record of all emission tests performed on EDVs including test results; (4) the date of each service accumulation run; (5) a record and description of all maintenance and other servicing performed on the EDV; (6) a record and description of each test performed to diagnose engine or emissions control system performance; and (7) a brief description of any significant events affecting the vehicle during testing. Generally, this data must be kept for six years from the date of issuance of the applicable COC. 40 C.F.R. § 86.440-78.



Types of Nonroad Vehicles and Engines

Similarly, nonroad vehicle and engine manufacturers must keep certain records including: (1) COC applications and accompanying summary information; (2) records specified in 40 C.F.R §§ 1051.205, 1054.205, and 1060.205 that are not included in the COC application; (3) a detailed history of each EDV; (4) production figures for each engine family organized by assembly plant; and (5) vehicle identification numbers for all the vehicles produced under each COC. 40 C.F.R. §§ 1051.250(b), 1054.250(b). Generally, this data must be kept for eight years from the date of issuance of

the applicable COC. 40 C.F.R. §§ 1051.250(c), 1054.250(c), 1060.250(b).

Note that EPA may allow test data to be reused for subsequent model year COCs if the vehicle or engine designs do not change (carry-over of test data). In the case of a carry-over COC, the requirement to maintain the supporting records applies from the date of issuance of the carry-over COC. These records should be written in English, kept organized and readily available so that they can be promptly provided to EPA upon request.

In addition to the records explicitly listed in the regulations, all manufacturers must provide other information that EPA may reasonably require to determine whether the manufacturer has acted, or is acting, in compliance with the CAA and its regulations. 42 U.S.C. § 7542(a). This includes, for example, importation documents and descriptions of a company's business structure and ownership. Where a COC holder is a separate business entity from the company that assembles vehicles or engines under that COC, the CAA authorizes EPA to require both companies to provide, for example, correspondence regarding whether the companies coordinate to ensure that the production vehicles or engines conform to the description in the COC application.

In addition to recordkeeping obligations, manufacturers must report certain information to EPA. For example, manufacturers must investigate and report emission-related defects in vehicle or engine design, materials, or workmanship. 40 C.F.R. §§ 85.1903, 1068.501. Also, motorcycle and nonroad vehicle and engine manufacturers must report total production volumes and production line testing, where such testing is required. 40 C.F.R. §§ 86.414-78(a), 1051.250(a), 1054.250(a), 1051 Subpart D, 1054 Subpart D.

Recordkeeping and reporting obligations concern all stages of the certification, production, and distribution of vehicles and engines



Certification (e.g. Emission Testing)



Production



Distribution (e.g. Shipping)

Consequences of Failing to Keep Records and Make Reports

If a company fails to maintain records or make reports, EPA may void, suspend or revoke its COC, assess civil penalties, require remedial action, or initiate a criminal investigation.

First, in the case of nonroad vehicles and engines, EPA may void a COC upon finding that the COC holder failed to create or maintain the required records. 40 C.F.R. §§ 1051.255(d), 1054.255(d), 1060.255(d). If the COC holder knowingly failed to create required records, EPA may initiate a criminal investigation which could result in criminal penalties pursuant to 42 U.S.C. § 7413(c)(2)(A). Additionally, for nonroad vehicles and engines and highway motorcycles, upon finding that the COC holder knowingly or intentionally submitted false, incomplete, or inaccurate information, EPA may void a COC pursuant to 40 C.F.R. §§ 86.442-78(c), 1051.255(e), 1054.255(e), 1060.255(e), and initiate a criminal investigation which could result in criminal penalties pursuant to 42 U.S.C. § 7413(c)(2)(A). A voided COC is considered never to have been granted. Thus, voiding a COC renders all vehicles or engines imported or sold under that COC, whether before or after the voiding, to be uncertified.

Case Example: In April 2013, EPA voided 44 nonroad vehicle COCs and 37 motor vehicle COCs, and in June 2010, EPA voided 12 nonroad vehicle COCs, in part because the COC holders did not maintain the records required by EPA regulations pertaining to vehicle emissions testing.

EPA may also take an enforcement action to assess civil penalties and require remedial action. The CAA and implementing regulations prohibit parties from failing to keep records and make reports, and authorize civil penalties up to \$37,500 per day per violation. These penalties also apply to anyone who causes another party to fail to comply with its recordkeeping obligations.

EPA often discovers that a party does not possess the required records when it fails to provide records, or submits incomplete records, in response to an EPA-issued Request for Information authorized by section 208 of the CAA. 42 U.S.C. § 7542. EPA presumes that a party does not have certain records if that party does not provide them in response to EPA's request for them. The egregiousness of recordkeeping and reporting violations increases with the number of missing records, the number of vehicles or engines involved, the risk of unlawful emissions from those vehicles or engines, and the importance of the missing information to documenting vehicle emissions, assessing compliance, and facilitating recalls and other remediation.

Three examples illustrate recent EPA enforcement actions for recordkeeping violations:

- January 2012: EPA settled a case against Loncin (USA), Inc. and Longting USA LLC, who held three COCs that the EPA voided, based, in part, on recordkeeping violations. The company paid a \$680,000 penalty to resolve its violations of the CAA and implemented an emissions mitigation project.
- October 2011: The United States filed a civil complaint against MotorScience, Inc., a California-based certification services consulting firm, and its owner, for allegedly failing to create, or refusing to provide, records that its clients were required to keep. The United States also alleges that MotorScience caused the illegal importation of all of the vehicles that were imported under subsequently-voided COCs.
- July 2012: EPA settled a case against Pacific Rim International West Inc., Haili Icebear Inc., and Huzhou Daixi Zhenhua Technology & Trade Co., Ltd. These companies paid a \$325,000 penalty. Though they eventually provided EPA with most of the records they were required to keep, EPA took this enforcement action for their failure to do so within a reasonable timeframe.

Conclusion

EPA has broad authority to void COCs, assess civil penalties, initiate a criminal investigation, and seek remedial action where companies fail to keep required records and make required reports. EPA enforces these recordkeeping and reporting requirements to deter violations, maintain a level playing field in the industry, and ensure that EPA's certification program effectively prevents illegal air pollution from vehicles and engines that can be harmful to people's health and the environment.

Disclaimer: This document attempts to clarify in plain language some EPA regulatory provisions. Nothing in the Enforcement Alert revises or replaces any regulatory provisions in the cited part, any other part of the Code of Federal Regulations, the Federal Register, or the Clean Air Act. For more information go to: www.epa.gov/enforcement