

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

| | | |
|---|---|-----------------------------|
| In the Matter of: |) | |
| |) | |
| |) | DOCKET NO. CAA-10-2022-0123 |
| Greasy Greg’s, LLC, |) | |
| Posey’s Mech-Elec Repair, LLC, |) | |
| & |) | DEFAULT ORDER |
| Greg S. Posey, |) | AND INITIAL DECISION |
| |) | |
| Lewiston, Idaho, |) | |
| Respondents. |) | |
| |) | |
| Proceeding pursuant to Section 205(c) |) | |
| of the Clean Air Act, 42 U.S.C. § 7524(c) |) | |
| _____ |) | |

I. INTRODUCTION

The United States Environmental Protection Agency (“EPA”), Region 10 (“Complainant”), filed a Complaint and Notice of Opportunity for Hearing (“Complaint”) in this matter on March 15, 2022, thereby initiating an administrative proceeding that is subject to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Rules”), 40 C.F.R. Part 22. 40 C.F.R. § 22.1(a)(2). Complainant has the delegated authority under Section 205(c) of the Clean Air Act (“CAA”), 42 U.S.C. § 7524(c), to issue the Complaint. Complaint ¶¶ 1.1, 1.2.

Complainant contends that Greasy Greg’s, LLC, Posey’s Mech-Elec Repair, LLC, and Greg S. Posey (together “Respondents”) are subject to the assessment of a civil penalty under Sections 205(a) and (c) of the CAA, 42 U.S.C. §§ 7524(a) & (c), for alleged violations of Sections 203(a)(2)(A) and 203(a)(3)(B) of the CAA, 42 U.S.C. §§ 7522(a)(2)(A) & 7522(a)(3)(B). Complaint ¶¶ 1.1, 1.2, 1.3, 5.1, 5.2, 5.3, 4.13, 4.21. The alleged violations include the failure to comply with prohibitions for motor vehicles or motor vehicle engines that are required by Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), and the failure or refusal to provide information requested by EPA pursuant to Section 208(a) of the CAA, 42 U.S.C. § 7542(a). *Id.* ¶¶ 4.2 to 4.21.

Complainant has now filed a Motion for Default Order (“Motion”) in this matter. Accompanying the Motion are Complainant’s Memorandum in Support of Motion for Default Order (“Comp. Memo.”) and supporting exhibits (“Comp. Ex.”). The basis for the Motion is that Respondents failed to file an answer to the Complaint. Comp. Memo. at 3. The undersigned Regional Judicial Officer has authority as the Presiding Officer at this stage of the proceeding to rule on the Motion. 40 C.F.R. §§ 22.4(b), 22.16(c), 22.17(a)-(c).

The Motion was served by Complainant on Respondents via certified mail as prescribed by the Rules. Comp. Ex. CX 4; 40 C.F.R. § 22.5(b)(2). Service of the Motion was effective on August 24, 2022. Comp. Ex. CX 4; 40 C.F.R. § 22.7(c). Respondents had 19 days from service of the Motion, or until September 12, 2022, to file a response. 40 C.F.R. §§ 22.16(b), 22.7(a), 22.7(c). Respondents did not file a response to the Motion by the due date.

Complainant requests resolution of this entire proceeding. Motion at 1. The specific requested liability relief is that Respondents be found to have committed the violations alleged in the Complaint. *Id.* Such a result is allowed by the Rules when, as it turns out to be the case here, Complainant has stated the legal and factual grounds for the requested relief. 40 C.F.R. § 22.17(b). Complainant also requests the assessment of a civil penalty against Respondents in the amount of \$25,000, and it is recommended by the undersigned Presiding Officer that such an amount be accordingly assessed in this matter.

Default has occurred due to the failure of Respondents to file a timely answer to the Complaint, thereby warranting issuance of a default order. 40 C.F.R. §§ 22.17(a), 22.17(c). Based on the Rules and the record, and for the reasons set forth below, the Motion is hereby granted, and this Default Order and Initial Decision is issued in this matter.

II. LEGAL FRAMEWORK

Underlying this matter are contentions by Complainant that Respondents have violated two requirements of the CAA. Although Complainant demonstrates that Respondents committed numerous violations of the same two provisions, Complainant has nonetheless synthesized the noncompliance into two counts. Complaint ¶¶ 4.1 to 4.21. The charges are that Respondents failed to abide by emission standards for motor vehicles or motor vehicle engines and neglected to provide EPA with requested information about those transgressions. *Id.*

As a backdrop to these claims, it is important to recognize that a stated purpose of the CAA is “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 the population.” 42 U.S.C. § 7401(b)(1). With that purpose serving as a mandate, emission and fuel standards and regulations for motor vehicles have been established pursuant to Subchapter II, Part A, of the CAA. 42 U.S.C. §§ 7521-7554. Among these standards is the statutory prohibition:

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 42 U.S.C. § 7522(a)(3)(B).

Mindful that a stated purpose of the CAA is to prevent harmful air pollution, Complainant explains how the actions of Respondent in failing to abide by standards for motor vehicles or motor vehicle engines thwart that purpose:

Vehicles equipped with defeat devices can produce significantly more air pollution than compliant vehicles. Therefore, removing emission controls from vehicles present a threat to public health. Comp. Memo. at 4.

To assess compliance with the prohibition on interfering with the emission requirements for motor vehicle or motor vehicle engine, EPA is provided with information gathering authority in Section 208(a) of the CAA, 42 U.S.C. § 7542(a) (“persons subject to the requirements of this part...shall establish and maintain records..., make reports and provide information the Administrator may reasonably require to determine whether the...person has acted or is acting in compliance with this part...). Giving that authority some enforcement strength, it is further prohibited “for any person...to fail to make reports or provide information required under section 7542 of this title.” 42 U.S.C. § 7522(a)(2)(A).

III. FACTUAL BACKGROUND

The trouble in this matter ostensibly began when EPA received information from third parties showing that Respondents Posey’s Mech-Elec Repair, LLC, and Greg S. Posey had acquired products that are used to impair the pollution prevention functions of motor vehicles or motor vehicle engines. Complaint ¶¶ 3.38, 3.39, 3.41, 3.42, 3.43; Comp. Memo. at 5; Comp. Ex. CX 21 at 34. This information revealed that between January 23, 2013, and August 26, 2020, Respondents Posey’s Mech-Elec Repair, LLC, and Greg S. Posey obtained 151 such products. *Id.* These products are sometimes referred to in common nomenclature as “defeat devices,” because they impede the effectiveness of EPA-approved emission controls in motor vehicles or motor vehicle engines. Complaint ¶ 2.31.

EPA proceeded to exercise its statutory authority by requesting information from Respondents for the purpose of assisting in the determination of compliance with the vehicle emission standards of the CAA. Comp. Memo. at 11; Comp. Ex. CX 21. So long as the requested information was reasonably required to make such a determination, it is precisely the type of request that is authorized by the CAA. *See* 42 U.S.C. § 7522(a)(2)(A). However, what transpired from that point forward is a series of actions by Respondents over the course of two years that serve to defy EPA and avoid Respondents’ legal obligations.

On September 15, 2020, EPA issued an information request to Respondents Posey’s Mech-Elec Repair, LLC, and Greg S. Posey. Complaint ¶ 3.16; Comp. Memo. at 5; Comp. Ex. CX 1. The information request was issued pursuant to the authority delegated to the Administrator of EPA under Section 208(a) of the CAA, 42 U.S.C. § 7542(a), and further redelegated to regional EPA officials. Comp. Ex. CX 10. Essentially, EPA asked for answers to questions and copies of records about the sale or installation of “defeat devices” that occurred between January 1, 2019, and September 15, 2020. Comp. Ex. CX 1. The information request was sent to Respondents

Posey's Mech-Elec Repair, LLC, and Greg S. Posey via certified mail. Complaint ¶ 3.19; Comp. Ex. 1.

The information request was delivered to Respondents Posey's Mech-Elec Repair, LLC, and Greg S. Posey on September 18, 2020. Comp. Ex. CX 2; Comp. Ex. 20 at 40. Respondents Posey's Mech-Elec Repair, LLC, and Greg S. Posey were provided 45 days to respond to the request but were also given the opportunity to ask for more time to respond. Complaint ¶¶ 3.16, 3.18.1; Comp. Ex. 1. The due date for a response to the information request was November 2, 2020. Comp. Ex. CX 21 at 40. Respondents Posey's Mech-Elec, Repair, LLC, and Greg S. Posey did not initially ask for additional time and did not respond to the information request by the due date. Complaint ¶ 3.20.

On November 18, 2020, EPA contacted Respondent Greg S. Posey by telephone to inquire about the failure to respond to the information request. Complaint ¶ 3.21, Comp. Ex. CX 21 at 41. Greg S. Posey asked why he had been sent the information request and when informed that EPA was looking into "delete devices," Greg S. Posey indicated he was "not doing deletes anymore." *Id.* EPA was further told that Greg S. Posey had misplaced the original information request, so EPA sent a copy of the information request via electronic mail to Greg S. Posey. Comp. Ex. CX 20, Comp. Ex. CX 21 at 41, 42.

EPA was informed that Respondents Posey's Mech-Elec Repair, LLC, and Greg S. Posey would provide a response to the information request by January 1, 2021. Complaint ¶¶ 3.21, 3.22; Comp. Ex. CX 21 at 41. EPA was not opposed to this two-month extension of time to respond to the information request, but nonetheless EPA did not receive such a response by the January 1, 2021, extension date. Complaint ¶ 3.24; Comp. Ex. CX 21 at 45.

On December 31, 2020, Greg S. Posey sent an electronic mail message to EPA indicating that Posey's Mech-Elec Repair, LLC, had been dissolved due to "personal circumstances" and "COVID 19." Comp. Ex. 20. Greg S. Posey further indicated he was going "to go another direction in life." *Id.* EPA thereafter discovered that Greg S. Posey had dissolved Posey's Mech-Elec Repair, LLC, on December 21, 2020, but has subsequently formed Greasy Greg's, LLC, on January 20, 2021. Comp. Memo. at 6; Comp. Ex. CX 13, Comp. Ex. CX 14, Comp. Ex. CX 21.

EPA then sent Respondents Greg Posey and Posey's Mech-Elec Repair, LLC a letter dated January 28, 2021, which stated that despite the dissolution of Posey's Mech-Elec Repair, LLC, Respondents Greg Posey and Mech-Elec Repair, LLC were still obligated to comply with the EPA request for information. Comp. Ex. CX 3. EPA further informed Respondents Greg Posey and Posey's Mech-Elec Repair, LLC that they may now have up to 14 days from the date of the January 28, 2021, letter to respond to the information request. *Id.*; Complaint ¶ 3.23. EPA also asked for information about the dissolution and whether there was an intent to continue in the engine service or repair business. Comp. Ex. CX 3.

The January 28, 2021, letter was returned to EPA due to refusal of the addressee to accept it. Comp. Ex. CX 4; Complaint ¶ 3.24. EPA had inadvertently addressed the letter to "Gary" rather than "Greg" Posey but otherwise sent the letter to the same address as the September 15, 2020,

letter that was received by Greg S. Posey. *Id.*; Comp. Ex. CX 1; Comp. Ex. CX 2. EPA made a second attempt to deliver the January 28 letter via certified mail. *Id.* ¶¶ 3.26, 3.27, 3.28; Comp. Ex. CX 5. But Respondents Greg S. Posey and Posey’s Mech-Elec Repair, LLC refused to accept delivery of the letter this time as well. *Id.*; Comp. Ex. CX 5.a.

On August 17, 2021, EPA issued another information request pursuant to Section 208(a) of the CAA, 42 U.S.C. § 7542(a), with this request going to Respondents Greg Posey and Greasy Greg’s, LLC. Complaint ¶ 3.29; Comp. Ex. CX 6. This information request was delivered to these Respondents by personal service on September 6, 2021. Complaint ¶ 3.31; Comp. Ex. CX 7; Comp. Ex. CX 8; Comp. Ex. CX 9.

The August 17, 2021, information request included the same questions as the September 15, 2020, information request but extended the applicable end point for the responsive information from September 15, 2020, to August 17, 2021. Comp. Ex. CX 6; Comp. Ex. CX 21 at 56. The August 17, 2021, information request also sought answers to questions about the dissolution of Posey’s Mech-Elec Repair, LLC, and the nature of the business of Greasy Greg’s, LLC. *Id.* Respondents Greg Posey and Greasy Greg’s, LLC were provided up to 14 days from the August 17, 2021, issuance date of the information request to respond but failed to respond by the due date. Comp. Memo. at 6; Comp. Ex. CX 21 at 60.

After several more months passed by with no response from Respondents to the either of the information requests, Complainant initiated this proceeding by filing of the Complaint. Comp. Ex. CX 16; Comp. Ex. CX 17. The Complaint was personally served on Respondents. Comp. Memo. at 7; Comp. Ex. CX 18; Comp. Ex. CX 19.

On or about March 1, 2022, EPA became aware that Respondents had retained legal counsel. Comp. Memo. at 9. By uncontested motions submitted through legal counsel, Respondents sought and obtained two extensions of time to file an answer to the Complaint. *Id.*; Comp. Ex. CX 22; Comp. Ex. CX 23. Together, these extensions provided Respondents until June 10, 2022, to file an answer. *Id.* However, Respondents did not file an answer to the Complaint by June 10, 2022. Comp. Ex. CX 26.

Legal counsel for Respondents withdrew from this matter on June 10, 2022. Comp. Memo. at 7-8. Prior to withdrawal, legal counsel provided two submissions to EPA on behalf of Respondents that were purported to be responsive to the information requests. *Id.* at 14; Comp. Ex. CX 24; Comp. Ex. CX 25. However, these responses were evasive and incomplete as Respondents refused to answer several questions and provided no responsive records. Comp. Memo. at 14.

The lack of a substantive response by Respondents to the information requests is illustrated by considering the responses to following questions that were posed by EPA:

- “1. Respond **YES or NO**: Since January 1, 2019, have you manufactured, offered for sale, sold and/or installed any part, component or product that, individually or in conjunction with other products, permanently or temporarily:

- (a) Bypass, defeat or render inoperative any emission control component, element of design or emission related part or component including the DPF system, EGR or CGI systems, catalyst system, OBD, SCR or sensors, signals or records related to such systems;
 - (b) Simulate the operation of any emission control component and/or related parts including the DPF system, EGR or CGI systems, catalyst, OBD, SCR or sensors, signals or records related to these systems; and/or
 - (c) Modify engine operating parameters, such as fuel injection timing, fuel rail pressure and/or pulse width, emission control parameters or OBD functions, including those parameters sensed or controlled by the ECM
Examples of such products include, but are not limited to EGR block plate, straight exhaust pipe, tune, tuner, ECM re-calibration or other product. See Enclosure A, Definitions, Paragraphs 10 and 11.
2. For each product identified in response to Request 1, above, provide copies of all purchase receipts/invoices, work orders, sales receipts/invoices and any other documents involving the purchase, sale and/or installation of each product.”

In their first response to the information requests, Respondents answered questions 1(a), 1(c), and 2 above, as well as other questions, by refusing to provide the requested information based on a claim that they had a right to refuse to protect themselves from self-incrimination under the Fifth Amendment to the United States Constitution. Comp. Ex. CX 24. EPA informed Respondents these were insufficient responses, and that Respondents had no such right. Comp. Memo. at 14.

In their supplemental response to the information requests, without indicating which questions they were responding to and while avoiding acknowledging that they sold or installed “defeat devices,” as had been requested by EPA, Respondents generally stated they had participated in approximately 50 “potential transactions” involving “potentially impacted emissions equipment” between January 1, 2021, and August 17, 2021. Comp. Ex. CX 25. Respondents once again failed to provide any accompanying records, such as receipts or invoices, and neglected to provide information about similar business transactions that occurred during the two years prior to January 1, 2021, as had been requested by EPA. *Id.*

IV. LIABILITY

A. Generally

For a default order to be entered against Respondents, Complainant must establish a prima facie case of liability. To do so, Complainant must “present evidence sufficient to establish a given fact...which if not rebutted or contradicted, will remain sufficient...to sustain judgment in favor of the issue which it supports, but which may be contradicted by other evidence”, Black’s Law Dictionary 1190 (6th Edition, 1990). Complainant has met this burden in this matter.

According to the Rules, the failure of Respondents “to admit, deny, or explain any material factual allegation in the complaint constitutes an admission of the allegation,” 40 C.F.R. § 22.15(d). By not filing an answer to the Complaint, Respondents have, for purpose of this proceeding, admitted the facts alleged in the Complaint and forfeited their right to contest those factual allegations. 40 C.F.R. § 22.17(a); *see also, In re: Silky Associates, LLC*, Docket No. RCRA-03-2018-0131, 2021 WL 2912094 (July 6, 2021); *In the Matter of Bar Development Water User’s Association, et al*, 2006 WL 4093131 (January 10, 2006).

With respect to the claim that Respondents were required to respond to the information requests issued by EPA, but did not do so, Complainant has established the elements to this claim. Similarly, Complainant has established the elements of the claim that Respondents were required to comply with the prohibitions against selling or offering to sell a part or component which impairs the pollution control device or element of design in a motor vehicle or motor vehicle engine but failed to do so.

Respondents are all liable for violations of both emission standards and information request requirements in this matter. These transgressions were committed at different times by Greg’s Mech-Elec Repair, LLC, and Greasy Greg’s, LLC, but both corporations committed both transgressions. Greg S. Posey had complete control over the actions of both corporations such that there was no distinction between the corporations and the individual for the purpose of liability. *See, i.e., Sirius LC v. Erickson*, 150 Idaho 80, 85, 244 P.3d 224, 229 (2010); *Vanderford Co. v. Knudson*, 144 Idaho 547, 556-57, 165 P.3d 261, 270-71 (2007); *Lunneborg v. My Fun Life*, 421 P.3d 187 (2018); *Hutchinson v. Anderson*, 130 Idaho 936, 940, 950 P.2d 1275, 1279 (Ct. App. 1997).

B. Emissions Violations

The term “person” is defined in Section 302(e) of the CAA, 42 U.S.C. § 9602(e), to include “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent or employee thereof.” As either an individual or a corporation, Respondents are each a “person” as defined by the CAA. Complaint ¶¶ 2.1, 3.1-3.9, 3.12-3.15.

As a “person,” Respondents are each subject to the requirements of Section 203(a)(3)(B) of the CAA, 42 U.S.C § 7522(a)(3)(B), which specify that it is prohibited:

for any person to manufacture or sell, or offer to sell, or install, any part component intended for used 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 knew or should know that such part or component is being offered for sale or installed for such use of put to such use;

EPA has promulgated regulations which provide emission standards for manufacturers of motor vehicles and motor vehicle engines. Complaint ¶¶ 2.7; *see generally* 40 C.F.R. Part 86. Manufacturers must receive a certification from EPA indicating that the motor vehicles and motor vehicle engines they produce have controls that limit the emission of designated air pollutants. Complaint ¶¶ 2.8 to 2.30; Comp. Ex. CX 21.

Based on information obtained by EPA from third parties, between January 23, 2013, and August 26, 2020, Respondents Mech-Elec Repair, LLC, and Greg S. Posey obtained 151 products whose function is to defy EPA-approved emission controls. Complaint ¶¶ 3.28 to 3.43; Comp. Ex. CX 21. The installation and use of these products would cause motor vehicles and motor vehicles engines that had been certified by EPA as compliant with CAA emission standards, to become noncompliant with these standards. *Id.* Respondents have not denied selling, offering to sell, or installing the 151 noncompliant products as alleged by Complainant. Complaint ¶¶ 4.14 to 4.20.

Greg S. Posey was the owner, operator, organizer, registered agent, member, and manager of Posey's Mech-Elec Repair, LLC, and Greasy Greg's LLC. Comp. Ex. CX 24; Comp. Ex. CX 11; Comp. Ex. CX 12; Comp. Ex. CX 14; Comp. Ex. CX 15; Comp. Ex. CX 30b. Legal counsel for Respondents explains that the business of both Posey's Mech-Elec, LLC and Greasy Greg's, LLC was to provide automotive mechanic services for diesel trucks. Comp. Ex. CX 24; Comp. Ex. 30b. Counsel further explains that there were no employees in either of these businesses and that the businesses were run out the residence of Greg S. Posey. *Id.*

The sale, installation, and use of the 151 products obtained by Respondents Posey's Mech-Elec Repair, LLC, and Greg S. Posey would serve to impair the emission controls in motor vehicles or motor vehicle engines. The business of these Respondents was to provide automotive mechanic services, and Greg S. Posey was the lone individual who performed this work. These Respondents have had opportunities to deny or refute the allegation that they obtained these products and then sold or installed them in motor vehicles or motor vehicle engines but have failed to do so. It may therefore be reasonably concluded as a legal matter that Respondents Posey's Mech-Elec Repair, LLC, and Greg S. Posey sold or installed as many as 151 products in violation of the CAA. *See* 40 C.F.R. § 22.15(d); 40 C.F.R. § 22.17(a).

Respondents admit to participating in 50 "potential transactions" between January 1, 2021, and August 17, 2021, that involved products which "bypass, defeat, or render inoperative any device or element of design installed or in a motor vehicle or motor vehicle engine." Comp. Ex. CX 24; Comp. Ex. CX 25. These "potential transactions" would have occurred at a time when Greasy Greg's, LLC, was being operated solely by Greg S. Posey. *Id.* Respondents Greasy Greg's, LLC, and Greg S. Posey further admit to being paid "approximately \$26,750" as part of these "potential transactions." *Id.*

Respondents are noticeably vague in referring to the 50 transactions as "potential" rather than actual, but Respondents have again had ample opportunities to deny that these transactions took place or that they did not involve the sale or installation of noncompliant products.

Respondents did not avail themselves of these opportunities and so it may reasonably be concluded as a legal matter that Respondents Greasy Greg's, LLC, and Greg S. Posey sold or installed as many as 50 products in violation of the CAA. *See* 40 C.F.R. § 22.15(d); 40 C.F.R. § 22.17(a).

The improper actions by Respondents Greasy Greg's, LLC, and Greg S. Posey are made worse by the fact that these actions took place after Greg S. Posey had received the first information request from EPA alerting him to the emission prohibitions and after he had been told during a follow-up telephone call that EPA was concerned about the improper sales or installation of "defeat devices." Comp. Ex. 1; Comp. Ex. 21 at 41. During that telephone call on November 18, 2020, Greg S. Posey had assured EPA that he was "not doing deletes anymore." *Id.* Then, in an electronic mail message sent to EPA on December 31, 2020, Greg S. Posey explained that with respect to his business he was going "to go another direction in life." Comp. Ex. CX 20. Those representations turned out to be false as from January 1 through August 17, 2021, Respondents Greg S. Posey and Greasy Greg's, LLC, committed as many as 50 infractions of the CAA emission standards by selling or installing illegal "defeat devices" in motor vehicles or motor vehicle engines. Comp. Ex. CX 24; Comp. Ex. CX 25.

The record shows Respondents participated in the sales or installations of products that are prohibited by the CAA and its implementing regulations. These sales or installations ran afoul of emission standards for motor vehicles or motor vehicle engines. As a result, Respondents are liable for violations of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

C. Information Requests Violations

As a "person," Respondents are each subject to the requirements of Section 203(a)(2)(A) of the CAA, 42 U.S.C. § 7522(a)(2)(A), which specify that it is prohibited "for any person to fail or refuse to permit access to or copying of records or to fail to make reports or provide information required under section 7542 of this title." The corresponding information collection requirements of Section 208(a) of the CAA, 42 U.S.C. § 7542(a), that apply to any "person," including Respondents, state as follows:

Every manufacturer or new motor vehicles or new motor vehicle engines, and every manufacturer of new motor vehicle or engine parts or components, and other persons subject to the requirements of this part or Part C of this subchapter, shall establish and maintain records, perform tests where such testing is not otherwise reasonably available under this part and part C of this subchapter (including fees for testing), make reports and provide information the Administrator may reasonably require to determine whether the manufacturer or other person has acted or is acting in compliance with this part and part C of this subchapter and regulations thereunder, or to otherwise carry out the provision of this part and subpart C of this subchapter, and shall, upon request, of an officer or employee duly designated by the Administrator, permit such officer or employee at reasonable times to have access to and copy such records.

The information requests were issued by the EPA, Region 10, official who had been delegated the authority to issue such requests. Delegation of Authority 7-8, EPA Administrator, January 18, 2017; Delegation of Authority R10 7-8, EPA Regional Administrator, Region 10, May 11, 2020. It has been demonstrated by Complainant, as reflected above, that Respondents are subject to the requirements in Part A of Subchapter II of the CAA, because of the activities of Respondents involving the sale or installation of parts or components for motor vehicles or motor vehicle engines.

The initial information request issued by EPA provided three pages of questions which focused on the activities of Respondents in selling, offering to sell, or installing parts or components for motor vehicle or motor vehicle engines. Comp. Ex. CX 1. The first follow-up information request issued by EPA presented the same questions as the initial information request, since Respondents had failed to respond to the initial request and added a few questions about the dissolution of Respondent Posey's Mech-Elec Repair. Comp. Ex. CX 3. The final information request asked again for answers to the questions in the initial information request since Respondents had still not yet responded to those questions and posed a few additional questions about the dissolution of Respondent Posey's Mech-Elec Repair and the current business operations of Respondent Greg Posey. Comp. Ex. CX 6.

In addition to asking for answers to questions, EPA sought the production of records related to the purchase, sale, or installation of noncompliant products. Comp. Ex. CX 1. Respondents produced no such records to EPA. Comp. Memo. at 14-15; Comp. Ex. CX 21 at 60. Legal counsel for Respondents explained that Respondents did not keep any records about products purchased by Respondents. Comp. Ex. CX 25. Even if that representation were true, EPA also asked for the names of vendors from whom Respondents purchased products. Comp. Ex. CX 1. Rather than provide such names, Respondents referred EPA to the generic retail websites "Ebay.com, Sameday Tuning, U.S. Freedom Diesels," from which Respondents would purchase products from vendors who sold through those websites. Comp. Ex. CX 25.

The combined requests issued by EPA sought information "reasonably required" within the meaning of Section 208(a) of the CAA, 42 U.S.C. § 7542(a), to determine whether Respondents and others had acted in compliance with the motor vehicle and motor vehicle engine emissions requirements of the CAA. Even with extensions of time provided by EPA, Respondents neglected to respond to the information requests for months, and when Respondents finally did respond, they provided an evasive and incomplete response. Comp. Memo. at 14-15.

Respondents initially explained that their refusal to respond to certain questions posed by EPA was based on the protection against self-incrimination afforded by the 5th Amendment to the United States Constitution. Comp. Ex. CX 24. Protections against self-incrimination are not available to Limited Liability Companies, such as Greasy Greg's, LLC and Posey's Mech-Elec Repair, LLC, or custodians, such as Greg S. Posey, under the collective entity doctrine. *See Braswell v. United States*, 487 U.S. 99, 108-12 (1988) (holding that a corporate "custodian may not resist a subpoena for corporate records on Fifth Amendment grounds," regardless of whether the custodian could "show that his act of production would entail testimonial self-

incrimination”); *Wilson v. United States*, 221 U.S. 361 (1911) (holding that a corporate officer could not invoke his personal privilege against self-incrimination to resist compelled production of corporate books, even though the contents may incriminate him); *In re Twelve Grand Jury Subpoenas*, 908 F. 3d 525, 529 (2018)(stating that “an exception for custodians of small, closely held collective entities, including one-person corporations or LLCs would be inconsistent with the reasoning and holding of *Braswell*”).

Based on the foregoing, Respondents are liable for violations of Section 203(a)(2)(A) of the CAA, 42 U.S.C. § 7522(a)(2)(A).

V. PENALTY

According to Section 205(a) of the CAA, 42 U.S.C. § 7524(a), a person who violates the information request requirements of Section 203(a)(2) of the CAA, 42 U.S.C. § 7522(a)(2), is subject to a civil penalty in the amount of \$25,000 per day of violation, and a person who commits violations of the emission requirements in Section 203(a)(3) of the CAA, 42 U.S.C. § 7522(a)(3), is subject to a civil penalty in the amount of \$2,500 per violation. Accounting for inflation, these statutory civil penalty amounts are currently set at \$51,796 and \$5,179, respectively. Comp. Ex. CX 28; Comp. Ex. CX 29b; *Federal Civil Penalties Adjustment Act of 1990*, Pub. L. 101-410, as amended; *Civil Monetary Penalty Inflation Adjustment Rule*, 40 C.F.R. § 19.4, Table 1.

There are factors identified in Section 205(c)(2) of the CAA, 42 U.S.C. § 7524(c)(2), that are to be considered when determining the amount of a civil penalty for the violations committed in this matter. These statutory factors include “the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator’s business, the violator’s history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator’s ability to continue in business, and such other matters as justice may require.” 42 U.S.C. § 7524(c)(2).

Complainant did not propose the assessment of a specific penalty amount in the Complaint, choosing instead to do so as part of the Motion. Comp. Memo. at 19. This approach is authorized by the Rules. *Id.*; 40 C.F.R. § 22.14(a)(4)(ii). Complainant has considered the statutory factors and proposes the assessment of a civil penalty in the amount of \$25,000. Comp. Memo. at 19, 27; Comp. Ex. CX 29b at 1, 13. In so doing, Complainant has followed EPA’s *January 2021 Clean Air Act Title II Vehicle & Engine Civil Penalty Policy* (“Penalty Policy”). Comp. Memo. at 19, 24; Comp. Ex. CX 29b at 10.

The Penalty Policy applies to both the emissions and information request violations in this matter. Comp. Ex. CX 27; Comp. Ex. CX 29b at 2. Use of the Penalty Policy provides for a consistent application of the penalty factors from case to case. Comp. Memo. at 19; Comp. Ex. CX 27 at 5. Following the Penalty Policy in this proceeding is therefore important because it allows fair and reasonable treatment of Respondents relative to parties in other CAA matters involving emissions and information request violations. *Id.*

Initially setting aside “the effect of the penalty on the violator’s ability to continue in business” statutory factor, Complainant applied the other statutory factors in accordance with the Penalty Policy and arrived at a penalty amount of \$837,985 for the violations in this matter. Comp. Memo. at 24; Comp. Ex. CX 29b at 9-13. Complainant correctly recognized; however, that there is a limitation in Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), on the maximum amount of a civil penalty that may be obtained in an administrative proceeding. Comp. Ex. CX 29b at 7, 12. Accounting for this limitation, Complainant reduced the calculated penalty amount to \$414,364, which is referred to as the “preliminary deterrence amount.” *Id.*

In terms of “the gravity of the violation” statutory factor, Complainant analyzed the egregiousness and harm of Respondents’ actions as prescribed by the Penalty Policy. *Id.* at 2, 9, 10. Complainant concluded there were high degrees of both egregiousness and harm given that Respondents’ action resulted in excess emissions of air pollutants and impeded EPA’s regulatory program by undermining the ability of EPA to review information and assess compliance with the law. *Id.* at 9, 10. Also, Complainant recognized there were multiple days of information request violations and multiple occurrences of the emission standard violations. *Id.* at 10. As a result, consideration of the “gravity of the violation” statutory factor resulted in a significant initial penalty amount. *Id.* at 11.

The consideration by Complainant of five of the statutory factors had very little impact on the “preliminary deterrence amount.” *Id.* at 9-10. In this regard, the “economic benefit or savings” to Respondents resulting from the violations was calculated to be only \$11.38, an amount which was added by Complainant to the “preliminary deterrence amount.” *Id.* at 9. There was no known “history of noncompliance” by Respondents with the emissions and information requests requirements at issue in this matter, so there was no increase the “preliminary deterrence amount” based on this factor. *Id.* at 4, 6, 11. With respect to the “action taken to remedy the violation” statutory factor, Respondents did nothing to correct the emissions violations and were slow, evasive, and eventually only partly responsive to the information request violations. *Id.* at 3, 10. As a result, no reduction in the “preliminary deterrence amount” was warranted based on this statutory factor. *Id.* Lastly, as to the “size of the violator’s business” statutory factor, the relatively small size of Respondents’ business did not provide a basis for increasing the “preliminary deterrence amount.” *Id.* at 4, 10.

The “such other factors as justice may require” statutory factor has been interpreted in the Penalty Policy to mean consideration of “culpability, cooperation, and other unique factors.” *Id.* at 1, 4, 5, 6. Complainant concluded there was significant “culpability” and lack of “cooperation” in this matter because Respondents had control over business activities and yet they failed to respond to the EPA information requests and failed to refrain from committing numerous emission standard violations, even after being notified by EPA of these problems. *Id.* at 11. There were no other “unique factors” considered to be at play in this matter. *Id.*

Complainant completed consideration of the statutory factors by evaluating the “ability to continue in business” of Respondents. *Id.* at 7, 8, 12, 13. To do so, Complainant requested financial information from Respondents. Comp. Memo. at 24-25; Comp. Ex CX 29 at 12-13; Comp. Ex. CX 31; Comp. Ex. CX 32. Respondents provided some but not all the requested information. Comp. Memo. at 25; Comp. Ex. CX 29 at 12-13. Despite this lack of full cooperation by Respondents, Complainant was able to adequately assess this final statutory factor. *Id.*

Complainant enlisted the assistance of a consultant with experience and expertise in evaluating financial information for the purpose of determining a party’s payment capability. *Id.* at 12-13. Complainant was thereby able to conclude that Respondents have the financial ability to pay a \$25,000 penalty while remaining in business. Comp. Memo. at 25-27; Comp. Ex. CX 29 at 12-13. As a result, Complaint requests the assessment of a \$25,000 civil penalty in this matter. Comp. Memo. at 19, 27; Comp. Ex. CX 29 at 1, 13.

VI. FINDINGS OF FACT/CONCLUSIONS OF LAW

- A. At all times relevant to this matter, Respondents operated an automotive mechanic service and repair business.
- B. Respondents are each a “person” as defined by Section 302(e) of the CAA, 42 U.S.C. § 9602(e).
- C. As a “person,” Respondents may be subject to the requirements of Sections 203(a)(2)(A), 203(a)(3)(B), and 208(a) of the CAA, 42 U.S.C. §§ 7522(a)(2)(A), 7522(a)(3)(B), & 7542(a).
- D. Respondents sold or installed parts or components intended for use with, or as part of, motor vehicles or motor vehicle engines, where a principal effect of the parts or components was to bypass, defeat or render inoperative a device or element of design installed on or in the motor vehicles or motor vehicle engines in compliance with the regulations” under Subchapter II, Part A, of the CAA, where Respondents knew or should have known that such parts or components were being offered for sale or installed for such use or put to such use.
- E. By selling or installing products which Respondents knew or should have known impair the emission controls in motor vehicles or motor vehicle engines that are required by the CAA, Respondents committed acts which are prohibited by Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).
- F. Respondents sold or installed as many as 201 products in violation of the emission standards of the CAA.
- G. The failure to comply with Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), subjects Respondents to the assessment of a civil penalty in accordance with Sections 205(a) and (c) of the CAA, 42 U.S.C. §§ 7524(a) & (c).
- H. Respondents were appropriately issued requests for information by EPA pursuant to Section 208(a) of the CAA, 42 U.S.C. § 7542(a), because Respondents committed acts which subject Respondents to the requirements of Subchapter II, Part A, of the CAA.

- I. Respondents did not comply in a timely or complete manner with the information requests.
- J. Respondents did not have just cause to fail to fully comply with the information requests.
- K. By failing to comply with information requests, Respondents committed acts which are prohibited by Section 203(a)(2)(A) of the CAA, 42 U.S.C. § 7522(a)(2)(A).
- L. The failure to comply with Section 203(a)(2)(A) of the CAA, 42 U.S.C. § 7522(a)(2)(A), subjects Respondents to the assessment of a civil penalty in accordance with Sections 205(a) and (c) of the CAA, 42 U.S.C. §§ 7524(a) & (c).
- M. Complainant proposes the assessment of a civil penalty in the amount of \$25,000 for the violations committed by Respondents in this matter.
- N. The civil penalty proposed by Complainant has been calculated taking into consideration all the required statutory factors in Section 205(c) of the CAA, 42 U.S.C. § 7524(c).
- O. In determining the civil penalty amount, Complainant has followed the Penalty Policy issued by EPA.
- P. The civil penalty amount requested by Complainant is the maximum amount which may be assessed by the undersigned Presiding Officer in this matter. 40 C.F.R. § 22.27(b).
- Q. Respondents were properly served a copy of the Complaint in this matter and failed to submit an answer to the Complaint as prescribed by the Rules.
- R. Respondents are in default for failing to file a timely answer to the Complaint.
- S. Respondents are liable for payment of the civil penalty proposed by Complainant.

VII. HOLDING

Complainant has presented a prima facie case of the liability of Respondents in this matter. In so doing, Complainant has established failures by Respondents to comply with requirements of the CAA that subject Respondents to the assessment of a civil penalty.

Complainant has persevered in establishing both emissions and information request violations despite receiving significant resistance by Respondents. The United States Supreme Court has aptly recognized both the importance and difficult task of a government agency, such as EPA, in obtaining information about a party's noncompliance with the law:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence that is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it too, may take steps to inform itself as to whether there is probable violation of the law. *United States v. Morton Salt Co.*, 338 U.S. 632, 643, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

The failure of Respondents to fully respond to the information gathering authority of EPA not only forced EPA to go to extraordinary lengths for over 18 months to try to secure important information about noncompliance by Respondents with the CAA, this failure may have also effectively thwarted the ability of EPA to identify other parties who received improper products from Respondents which are likely currently working to impair the environment. For all EPA knows, Respondents may be carrying on the same noncompliant behavior. A finding of liability and the associated assessment of a civil penalty may serve to deter such actions.

Complainant's Motion is granted, and Respondents are found to be in default for failing to file an answer to the Compliant. Respondents are liable for violations of Sections 203(a)(2)(A) and 203(a)(3)(B) of the CAA, 42 U.S.C. §§ 7522(a)(2)(A) and 7522(a)(3)(B).

It is recommended that a civil penalty in the amount of \$25,000 be assessed against Respondents in accordance with Sections 205(a) and (c) of the CAA, 42 U.S.C. §§ 7524(a) and (c). The recommended civil penalty of \$25,000 is due and payable by Respondents within 30 days after this Default Order and Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d).

VIII. INITIAL DECISION

This Default Order and Initial Decision resolves all outstanding claims in this proceeding and therefore constitutes an initial decision under the Rules. 40 C.F.R. § 22.17(c). This Default Order and Initial Decision shall become final order 45 days after service upon the parties to this proceeding unless Respondents move to set aside this Default Order and Initial Decision or appeal this Default Order and Initial Decision, or for one of the other reasons provided in 40 C.F.R. § 22.27(c)(1)-(4).

A motion by Respondents to set aside this Default Order and Initial Decision must be filed no later than 20 days after service of this initial decision and must otherwise be in accordance with the Rules. 40 C.F.R. § 22.28(b). An appeal by Respondents of this Default Order and Initial Decision to the Environmental Appeals Board must be filed within 30 days of service and must otherwise be in accordance with the Rules. 40 C.F.R. § 22.30(a).

Should Respondents fail to appeal this Default Order and Initial Decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30 and should this Default Order and Initial Decision thereby become a final order pursuant to 40 C.F.R. § 22.27(c), Respondents will have waived their rights to judicial review. 40 C.F.R. § 22.27(d). An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board issuance of a final order. *Id.*

IX. PENALTY PAYMENT INSTRUCTIONS

Payment of the full amount of the civil penalty shall be made within thirty (30) days after this Default Order and Initial Decision becomes a final order. Payment of the civil penalty may be made by check (U.S. Postal Service mail or overnight delivery), wire transfer, ACH, or online

payment. Payment instructions are for wire transfer, ACH and online payment are available at: <https://www.epa.gov/financial/makepayment>. Payments made by a cashier's or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

Respondents must note on the check the title and docket number of this matter. Concurrently with payment, Respondents must serve photocopies of the check or proof of other payment method on the Regional Hearing Clerk and Complainant at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10
R10_RHC@epa.gov

and

Brett Dugan and Lena Freij
Assistants Regional Counsel
U.S. Environmental Protection Agency
Region 10 (Mail Code 11-C07)
1200 Sixth Avenue
Seattle, Washington 98101
Dugan.brett@epa.gov
Freij.lena@epa.gov

If Respondents fail to pay the full penalty within the prescribed period after this Default Order and Initial Decision become a final order, interest on the penalty and other charges and penalties may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

It is so ORDERED.

Richard D. Mednick
Regional Judicial Officer
Presiding Officer
United States Environmental Protection Agency
Region 10