UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
Spartan Diesel Technologies, LLC,	)	**Docket No. CAA-HQ-2017-8362**
	)	
Respondent	)	**Issued: September 7, 2018**

ORDER ON MOTION FOR DEFAULT

I. Statement of the Case

This civil administrative penalty proceeding arises under Title II of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. §§ 7521-7590, governing mobile sources. On October 19, 2017, the Director of the Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency ("Complainant" or "EPA"), initiated this proceeding by filing a Complaint against Spartan Diesel Technologies, LLC. ("Respondent" or "Spartan") under Section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1).

The Complaint alleges that Respondent manufactured, sold, offered to sell or installed (or caused the foregoing with respect to) at least 5,000 Spartan Phalanx Flash Consoles ("Subject Components") each of which disables, defeats, or renders inoperative devices or emissions-related elements of design installed in Ford diesel trucks for compliance with Title II of the CAA. The Subject Components were designed for Ford Diesel truck models F250, F350, F450, and F550 for model years 2008 through 2012. The Complaint states that the manufacture, sale, offering for sale or installation of, or causing the foregoing with respect to, each such Subject Component constitutes one or more separate violations of section 203(a)(3)(A) or (B) of the Act, 42 U.S.C. § 7522(a)(3)(A) or (B). The Complaint states further that pursuant to Sections 204(a) and 205(a) of the CAA, 42 U.S.C. §§ 7523(a) and 7524(a), Respondent is liable for civil penalties up to $3,750 for each violation.

No response to the Complaint was filed. Consequently, on February 9, 2018, Complainant filed a Motion for Default ("Motion"), requesting that Respondent be found in default and that a default order be issued requiring Respondent to pay a civil administrative penalty in the amount of $4,154,805 for the violations alleged in the Complaint. Respondent did not file any response to the Motion, and to date has not filed anything in this proceeding.

For the reasons discussed below, I find Respondent to be in default, pursuant to Section 22.17 (a) and (c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40

C.F.R. § 22.17(a) and (c). Furthermore, I find that the facts alleged in the Complaint, and admitted by Respondent on the basis of its default, establish that Respondent is liable for the violations alleged in the Complaint. However, I decline to impose a civil penalty without further information provided by Complainant in support of the calculation of the penalty.

II. Standards for Default

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice" or "Rules"), 40 C.F.R. Part 22. Section 22.17(a) of the Rules provides that "A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. §22.17(a).

A finding of default requires a showing that the party against which default is sought has been properly served. *Mid-Continent Wood Products, Inc. v. Harris,* 936 F.2d 297, 301 (7th Cir. 1991) (default judgment vacated where complaint not properly served; "actual knowledge of existence of a lawsuit is insufficient to confer personal jurisdiction over a defendant in the absence of valid service of process").

On the issue of service, the Rules of Practice require that "Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint . . . . Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written notification of delivery." 40 C.F.R. §22.5(b)(1)(i). "Where respondent is a domestic . . . corporation, . . .complainant shall serve an officer, . . .a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process." 40 C.F.R. § 22.5(b)(1)(ii)(A). "Proof of service of the complaint shall be made by affidavit of the person making personal service, or by the properly executed receipt." 40 C.F.R. § 22.5(b)(1)(iii). Service of the complaint is complete when the return receipt is signed. 40 C.F.R. §22.7 (c).

The Rules provide that "[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). The consequences of default are as follows:

> When the Presiding Officer finds that default has occurred, [she] shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. . . . The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17(c).

As to a determination of whether good cause exists for not issuing a default order, the Environmental Appeals Board ("EAB" or "Board") "has traditionally applied a 'totality of circumstances' test to determine whether a default order should be . . . entered . . . ." *JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005). The Board considers several factors under this test, including the alleged procedural omission, namely whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there was a valid excuse or justification for not complying with the procedural requirement. *Id.*

The fact that a party is not represented by counsel is not an excuse for failure to file an answer to the complaint. In administrative proceedings under the Rules, "[a]ny party may appear in person or by . . . other representative" and such representative "must conform to the standards of conduct and ethics required of practitioners before the courts of the United States." 40 C.F.R. § 22.10. Accordingly, the EAB has rejected the contention that a party's lack of legal representation excuses its failure to comply with the Rules or with orders of the administrative law judge. *See, e.g.*, *Rybond, Inc.*, 6 E.A.D. 614, 626-627 (1996) ("[A] litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance."); *House Analysis & Assocs.*, 4 E.A.D. 501, 505 (1993) ("The fact that [the individual respondent], who apparently is not a lawyer, chooses to represent himself and [the business entity respondent] does not excuse respondent from the responsibility of complying with the applicable rules of procedure.").

If a respondent is found in default, it has waived the right to contest factual allegations, but nevertheless default "does not constitute a waiver of respondent's right to have [an administrative law judge] evaluate whether the facts as alleged establish liability or whether the relief sought is appropriate in light of the record." *Peace Industry Group (USA), Inc.*, 17 E.A.D. 348, 354 (EAB 2016) (quoting *Mountain Village Parks, Inc.*, 15 E.A.D. 790, 798 (EAB 2013)). The judge "must ensure that in the pending case the [EPA] has applied the law and the Agency's policies consistently and fairly." *Id.*, 17 E.A.D. 348, 362 (quoting *Mountain Village Parks, Inc.*, 15 E.A.D. 790, 797 (EAB 2013)).

III. Findings, Conclusions and Analysis as to Default

On a motion for default, particularly in the situation where a respondent has not filed anything in the proceeding, the initial question is whether the respondent was properly served with the complaint. In the Motion, Complainant states how it served the Complaint on Respondent, and the Appendix to the Motion ("Appx.") includes supporting documents.

Records of the North Carolina Secretary of State show that Respondent's registered agent, manager and member is Matthew Geouge. Motion ¶¶ 21, 23, 27, 33; Appx. at 2. The records also show that the mailing address of the registered office and the principal corporate office is 518 South Allen Rd., Flat Rock, NC 28731, that the address for Matthew Geouge as

manager is 578 Upward Rd. Suite 7, Flat Rock, NC 28731, and that the address for Matthew Geouge as member is 328 Trenholm Road, Hendersonville, NC 28739. Motion ¶¶ 23, 27, 30; Appx. at 2.

The Complaint was sent on October 19, 2017, by United Parcel Service ("UPS") to Mr. Geouge at each of these three addresses. Motion, ¶¶ 25, 27, 30, 35; Appx. at 4, 5. The package addressed to Mr. Geouge at 328 Trenholm Road, Hendersonville, NC, was delivered and signed for, according to the UPS Delivery Notification and Proof of Delivery documents, at the residential address by "Dona," on October 20, 2017. Motion ¶¶ 31, 36; Appx. p. 17, 18. The packages addressed to Mr. Geouge's corporate address as registered agent, and his address as manager were each corrected by UPS to "107 Education Dr., Flat Rock, NC 28731," and each package was delivered and signed for at that address, according to Delivery Notification and Proof of Delivery documents, at "customer's front desk" by "Lee" on October 24, 2017. Motion ¶¶ 25, 28, 37; Appx. at 6-10, 15, 16.

Service on a corporation "does not require that the named addressee be the person who signs the return receipt," as the Rules only require that it be "properly executed" under 40 C.F.R. § 22.5(b)(1)(iii) and do not require "restricted delivery" to the specific person. *In re Peace Indus. Group (USA), Inc.*, 17 E.A.D. 348, 363 (2016). Service is proper under the Rules of Practice where a secretary employed by the corporation signs the return receipt. *In re Katzson Bros., Inc.*, 2 E.A.D. 134 135 (1986), *rev'd on other grounds*, *Katzson Bros., Inc. v. United States Environmental Protection Agency*, 839 F.2d 1396, 1399-1400 (10th Cir. 1988) (approving of the Rules regarding service of a corporation under 40 C.F.R. § 22.5(b)(1)).

In the present case, UPS shipment documents explain that for one of the original Flat Rock addresses, "The street number is incorrect . . . . We're attempting to update the address. The address was corrected," and for the other, "The receiver has moved. We're attempting to obtain a new delivery address for this receiver./The address was corrected." Appx. at 8, 13.

Service of a complaint on a respondent's registered agent has been held to be sufficient where he actually received the complaint and delivery to the registered address failed, but the complaint package was delivered and signed for by an individual, not the agent, at an address where the agent was known to conduct business. *In re Jonway Motorcycle (USA) Co., Ltd.*, CAA Appeal No. 14-03, at 8 n.13 (EAB Nov. 14, 2014) (Default Order and Final Decision) ("Where respondents fail to accept service at their officially designated addresses, . . .there is nothing in the rules that prevents EPA from serving their designated agent at an address where he can be found. . . . To conclude otherwise would allow parties to avoid service by refusing to accept service at their official service addresses or by listing sham service addresses."); *Eagle Commercial Builders v. Milam & Co. Painting*, No. 07-01-0310- CV, 2002 Tex. App. LEXIS 5851, at *6-9 (Tex. App. Aug. 12, 2002) (holding service valid where registered agent was served in person at home address; statute does not require service at registered address).

Given the facts as a whole regarding service as described above, I find that Complainant

properly served the Complaint on Respondent's "officer, . . managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process," by a "reliable commercial delivery service" that provided written verification of delivery and "a properly executed receipt," as required under the Rules, 40 C.F.R. § 22.5(b). Because Respondent failed to respond to the Complaint, I further find that Respondent is in default.

IV. Respondent's Liability

The next step is to determine whether the factual allegations in the Complaint demonstrate *prima facie* that Respondent is liable for the alleged violations.

A. Statutory and Regulatory Background

Title II of the CAA and regulations promulgated thereunder establish limits for the emissions of certain air pollutants from motor vehicles, including nitrogen oxides, non-methane hydrocarbons, particulate matter, and carbon monoxide. Manufacturers of new motor vehicles or motor vehicle engines must obtain a certificate of conformity ("COC") from EPA to sell, offer to sell, or introduce or deliver for introduction into commerce any new motor vehicle or motor vehicle engine in the United States. 42 U.S.C. § 7522(a)(1). The COC application must describe the emissions-related elements of design of the motor vehicle or motor vehicle engine, including all auxiliary emission control devices ("AECDs"), which are defined as "any element of design which senses temperature, vehicle speed, engine [revolutions per minute], transmission gear, manifold vacuum, or any other parameter for the purposes of activating, modulating, delaying, or deactivating the operation of any part of the emission control system" of the motor vehicle. 40 C.F.R. §§ 86.1803-01, 86.1844-01(d)(11). To obtain a COC for a given motor vehicle test group or engine family, the original engine manufacturer must demonstrate that each motor vehicle or motor vehicle engine will not exceed established emissions standards for nitrous oxides, particulate matter, carbon monoxide, non-methane hydrocarbons, and other pollutants. 40 C.F.R. §§ 86.004-21, 86.1811-04, 86.1844-01.

The CAA at Section 203(a)(3), 42 U.S.C. § 7522(a)(3), provides as follows:

> (a) The following acts and the causing thereof are prohibited:
> * * *
> (3)
> (A) For any person to remove 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 [Title II of the CAA], prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device

or element of design after such sale and delivery to the ultimate purchaser; or

(B) 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 [Title II of the CAA], 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 . . . .

B. Findings of Fact

The following Findings of Fact are based on allegations in the Complaint, ¶¶ 5, 9, 28-51:

1. Respondent is a corporation organized under the laws of North Carolina, and is a "person" under Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

2. EPA-certified motor vehicles and motor vehicle engines include a variety of hardware and software devices or elements of design that control emissions of air pollution.

3. New motor vehicles are equipped with engine control units ("ECUs") which are computers that monitor and control vehicle operations, including the operation of emission control devices and elements of design.

4. A standard requirement in modern motor vehicles and motor vehicle engines is an onboard diagnostics ("OBD") system, which must detect and report malfunctions of all monitored emission-related powertrain systems or components. 40 C.F.R.§ 86.1806-05(b).

5. Exhaust gas recirculation ("EGR") is an element of design in diesel-fueled motor vehicles that reduces emissions of nitrogen oxides, which are formed at the high temperatures caused during fuel combustion. By recirculating exhaust gas through the engine, EGR reduces engine temperature and emissions of nitrogen oxides.

6. Fuel mass, fuel injection pressure, and fuel injection timing are among the elements of design incorporated in diesel fueled motor vehicles that can affect the quantity of regulated pollutants that are created by the diesel engine.

7. Diesel particulate filters (DPFs") are elements of design that reduce particulate matter

("PM") pollution by collecting soot contained in engine exhaust gas. Proper operation of the DPF requires periodic regeneration of the filter to prevent accumulated PM from clogging the filter.

8. Diesel oxidation catalysts (DOCs") are elements of design that reduce PM, carbon monoxide, and non-methane hydrocarbons ("NMHC") emissions by promoting the conversion of those pollutants into less harmful gases in diesel-fueled motor vehicles.

9. Selective catalytic reduction ("SCR") is an element of design that reduces emissions of nitrous oxides by chemically converting exhaust gas that contains nitrous oxides into nitrogen and water through the injection of diesel exhaust fluid. Diesel exhaust fluid must be periodically refilled, which requires sensors in the diesel exhaust fluid tank to communicate with the OBD to ensure the SCR is properly controlling emissions of nitrogen oxides.

10. The OBD must detect and report malfunctions of EGR, oxygen sensors, DPFs, and DOC in motor vehicles so equipped by, among other means, illuminating the "check engine light." 40 C.F.R. § 86.1806-05.

11. Since January 2011, Respondent manufactured, sold, offered to sell, or installed (or caused the manufacture, selling, offering to sell or installation of) Spartan Phalanx Flash Consoles ("Subject Components").

12. Each Spartan Phalanx Flash Console was designed and marketed for use with, or to become part of, a specific make, model and year (or range of years) of Ford trucks powered by heavy duty diesel engines ("HDDEs"). Namely, the Subject Components were designed for model years 2008 through 2012 Ford Diesel models F250, F350, F450, and F550 trucks.

13. The model years 2008 through 2012 Ford Diesel models F250, F350, F450 and F550 trucks are each a "motor vehicle" with a "motor vehicle engine." 42 U.S.C. § 7550(2); 40 C.F.R. § 85.1703.

14. Ford Motor Company ("Ford") obtained a COC from the EPA for each such HDDE.

15. Each Ford model and model year specified above have installed on or in them the following emissions-related elements of design which Ford installed in compliance with Title II of the Act, and in conformance with the relevant EPA-issued COC: EGR, SCR, OBD, and specific calibrations for fueling.

16. Since January 2011, Respondent manufactured, sold, offered to sell, or installed (or caused the manufacture, selling, offering to sell or installation of) at least 5,000 Subject Components.

17. Each Subject Component erases or overrides certain specifications of the software of the ECU and transmission control module ("TCM"), as installed by Ford, and replaces it with different software specifications designed by Respondent.

18. Each Subject Component disables, defeats, or renders inoperative devices or elements of design installed on or in Ford's motor vehicles or motor vehicle engines in compliance with Title II of the CA, including but not limited to elements of design related to the following:

(a) Ford-specified torque management parameters;

(b) Engine fueling parameters;

(c) Engine fueling timing;

(d) Turbocharger boost controls and other parameters;

(e) Transmission shift scheduling;

(f) Transmission shift pressures;

(g) Transmission torque converter lockup parameters;

(h) EGR;

(i) OBD monitoring function for the EGR, thereby also allowing the physical removal of the EGR from the vehicle;

(j) DPF regeneration functionality; and

(k) OBD monitoring function for the DPF, thereby also allowing the physical removal of the DPF.

19. Respondent offered the purchasers of the Subject Components a software file to restore the vehicle to Ford's original programming in the event Respondent's software had to be removed so that the vehicle would be qualified to receive warranty services from Ford.

20. Respondent advertised that its products were to be used for "towing, power, fuel economy, drag racing, sled pulling, dyno competition" using relative increases in "power levels" of "40HP [horsepower], 75HP, 120HP, 175HP." Complaint ¶ 47; Appx. at 30-31.

21. Testing of a Ford truck with a Subject Component installed in accordance with Respondent's instructions and with emissions equipment removed caused significant increases in emissions of nitrogen oxides, NMHCs, and PM. Complaint ¶ 48; Appx. at 38.

22. A principal effect of each Subject Component is to disable, defeat, or render inoperative devices or elements of design installed on or in motor vehicle or motor vehicle engines in compliance with Title II of the CAA.

23. Respondent knew or should have known that each Subject Component was manufactured, sold, offered for sale, or installed to bypass, defeat, or render inoperative devices or elements of design installed on or in motor vehicles or motor vehicle engines in compliance with Title II of the CAA.

24. The manufacture, offer for sale, sale or installation of (or causing the manufacture, offer for sale, sale or installation of) each Subject Component constitutes one or more separate violations of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522 (a)(3)(B). 42 U.S.C. § 7524.

25. Pursuant to Section 205 of the CAA, 42 U.S.C. § 7524, Respondent is liable for civil penalties for each such violation.

26. The Administrator of the EPA and the Attorney General jointly determined that this matter, though it may involve a penalty amount greater than $320,000, is appropriate for administrative penalty assessment. Complaint ¶ 9; Appx at 1.

C. Discussion and Conclusions as to Liability

The Complaint alleges that Respondent violated either Section 203(a)(3)(A) or 203(a)(3)(B). To prove a violation of Section 203(a)(3)(A), Complainant must show that the respondent is a person who removed or rendered inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with Title II, prior to its

sale or delivery to the ultimate purchaser, or knowingly removed it or rendered it inoperative after sale and delivery to the ultimate purchaser, or that the respondent caused such action. The Complaint does not allege that Respondent actually removed or rendered inoperative any device or element of design. Complainant also has not provided specific factual allegations or explanation supporting a finding that Respondent caused such action. Therefore, I find no basis to find Respondent liable for violating Section 203(a)(3)(A) of the CAA.

Instead, Complainant has alleged the elements of a violation of Section 203(a)(3)(B). The Complaint alleges that Respondent is a person who manufactured, sold, offered to sell, or installed, or caused the manufacture, selling, offering to sell or installation of, the Subject Components. Complaint ¶¶ 5, 38; Findings of Fact ("FF") 1, 11. The Complaint alleges further that the Subject Components were intended for use with or as part of a motor vehicle or motor vehicle engine. Complaint ¶¶ 39, 40; FF 12, 13. Additionally, the Complaint alleges that each Subject Component disables, defeats, or renders inoperative certain devices or elements of design installed on the Ford motor vehicle or motor vehicle engine in compliance with CAA Title II requirements, and that a principal effect of the Subject Components is to disable, defeat, or render inoperative such devices or elements of design. Complaint ¶¶ 45, 49; FF 18, 22. Finally, the Complaint alleges that Respondent knew of should have known that each Subject Component was manufactured, sold, offered for sale or installed to bypass, defeat or render inoperative such devices or elements of design. Complaint ¶ 50; FF 23. Accordingly, I find that the facts alleged in the Complaint establish Respondent's liability for violating Section 203(a)(3)(B) of the CAA.

By its default, Respondent is deemed to have admitted all facts alleged in the Complaint and to have waived its right to contest such factual allegations. 40 C.F.R. § 22.17(a). The failure of Respondent to file a response to the Complaint is a proper basis for a default order, and Respondent has not provided any excuse or justification for such failure. There is no showing of good cause to decline issuance of a default order. Therefore, it is appropriate to issue a default order against Respondent, finding that Respondent is liable for violating section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

V. Penalty

Having been found in default and liable for violating section 203(a)(3)(B) of the CAA, Respondent is subject to the assessment of a civil penalty pursuant to Section 205 of the CAA, 42 U.S.C. § 7524, for each violation. Under the Rules of Practice, the relief proposed in the Motion, namely a penalty of $4,154,805, "shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c). I must evaluate

"whether the relief sought is appropriate in light of the record" and whether Complainant "has applied the law and the Agency's policies consistently and fairly." *Peace Industry Group (USA), Inc.,* 17 E.A.D. at 354; *Mountain Village Parks, Inc.,* 15 E.A.D. at 797-798.

A. Penalty Assessment Standards

The CAA provides that "any person who violates section 7522(a)(3)(B) of this title shall be subject to a civil penalty of not more than $2,500. . . . Any such violation with respect to section 7522(a)(3)(B) of this title shall constitute a separate offense with respect to each part or component." Section 205(a) of the CAA, 42 U.S.C. § 7524(a). The maximum penalty of $2,500 has been increased to $3,750 for violations occurring on or after January 13, 2009 through November 2, 2015, pursuant to the Civil Monetary Penalty Inflation Adjustment Rule. 40 C.F.R. § 19.4; 82 Fed. Reg. 3633, 3636 (Jan. 12, 2017). The Act provides further as follows, with respect to assessment of civil administrative penalties:

> In determining the amount of any civil penalty assessed under this subsection, the Administrator shall take into account 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).

To facilitate the calculation of penalties using these factors as applied to mobile sources, the U.S. Environmental Protection Agency has issued guidance in the Clean Air Act Mobile Source Civil Penalty Policy, dated January 2009 ("Penalty Policy").[1] The Penalty Policy provides a basic framework of computing a penalty by first assessing a "preliminary deterrence amount" consisting of the sum of two components: the gravity of the violation and the economic benefit resulting from the violation.

As to the economic benefit component, the Penalty Policy provides that in cases of sale of emission control defeat devices, the economic benefit should be calculated considering the benefits from business transactions that would not have occurred but for the illegal conduct, that is, the net profits from the sale of illegal devices. Penalty Policy at 7, 11.

[1] *Available at* https://www.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf.

The gravity component considers either the importance to the regulatory scheme or the actual or potential harm from the violation, which reflects whether the violator's activity actually resulted in, or was likely to result in, the emission of a pollutant in violation of the standards for that engine. Penalty Policy at 11. The actual or potential harm is based on the number of engines at issue and engine size in horsepower, egregiousness of the violation, and any actions taken to remedy or mitigate the violation. *Id*. at 12-14. This is calculated by determining a base per-vehicle penalty based on horsepower of the engine as provided in Table 1 of the Penalty Policy, and then, as provided in Table 2, to account for the egregiousness of the violation, multiplying it by 1 for "minor," 3.25 for "moderate," or 6.5 for "major" level of egregiousness. *Id.* at 12, 16-17, Tables 1 and 2. The latter category, "major," applies where vehicles or engines where excess emissions are "likely to occur," such as where emission control devices are missing or ineffective, where engines are uncertified and there is no information about their emissions, or where test data of uncertified engines shows they "exceed emissions standards." *Id.* at 13, 17, Table 2. The "major" category also is applied if there is uncertainty about the proper egregiousness category, and then it can be changed to moderate or minor based on new information. *Id.* at 13. The "moderate" category applies to violations involving uncertified vehicles or engines where their emissions "are likely to be similar to emissions from certified vehicles or engines," such as where engines were produced before the emissions certificate was issued, or where the emissions label is missing or deficient to the extent that the certification status of the vehicle or engine cannot be determined, but it is covered by a certificate. *Id.* The "minor" category applies where emissions control labels are defective but the certification status of the engine can be determined from the label. *Id.* at 14.

Next, the number of vehicles or engines is accounted for by applying a scaling factor, shown in Table 3 of the Penalty Policy, which is 1 the first ten vehicles or engines, and is incrementally reduced for the number of vehicles or engines greater than ten. *Id.* at 17-18.

This methodology also applies to defeat devices, such as the Subject Components, as the Penalty Policy provides as follows:

> The gravity-calculation approach described above is also appropriate for calculating the gravity penalty-component for violations of . . . the prohibition against manufacturing, offering for sale, selling or installing emission control defeat devices under Section 203(a)(3)(B) of the Act.
> * * *
> In the case of violations of the defeat device prohibition, the gravity would be based on the vehicles or engines on which the defeat devices are installed or intended to

> be installed, and calculated as if these vehicles or engines had been introduced into commerce . . . with the defeat device installed. A separate penalty would be assessed for each defeat device manufactured, offered for sale, sold, or installed.

Id. at 22.

The gravity component may be increased or decreased by up to 20 percent to account for the violator's degree of willfulness and/or negligence, and up to 10 percent for the degree of cooperation or non-cooperation in resolving the violation, and may be increased to reflect any history of noncompliance. *Id.* at 23-24.

The gravity component may be further increased by up to 30 percent to reflect lack of remediation "if the violations are not corrected through appropriate remedial actions," such as uncertified vehicles being sold into commerce. *Id.* at 14, 20. Next, a value representing the size of the business is added for businesses with a net worth of more than $50,000. *Id.* at 20-21, Table 4. Other unique factors may also be considered in adjusting the penalty. *Id.* at 28.

The next step is to add the adjusted gravity component to the economic benefit component. Finally, the violator's ability to pay is considered, with the burden to demonstrate inability to pay on the violator.

B. Complainant's Calculation of the Penalty

The Complaint alleged generally that Respondent is liable for "civil penalties up to $3,750 for each violation of section 203(a)(3)(A) or (B) occurring on after January 13, 2009, through November 2, 2015." Complaint ¶ 52. In the Motion, Complainant requests a civil penalty of $4,154,805, calculated by applying the Penalty Policy, as follows. Motion ¶¶ 57, 59.

First, the Agency calculated a value representing the economic benefit of Respondent's noncompliance. Using Respondent's reasonable estimates of its profits and gross sales for the years 2013 through 2015 as stated in a letter from an attorney to EPA, the Agency calculated an average percent profit margin. Motion ¶ 67, Appx. at 19. The Agency stated that to determine the total profit from selling the Subject Components, it applied that figure to revenue information obtained from "Sales by Item" summaries for the years 2011 through 2013 that Respondent submitted in response to an information request letter. Motion ¶ 67; Appx. at 20-26.

The Complaint alleged that Respondent manufactured, sold, offered to sell or installed "at least 5,000 of the Subject Components." Complaint ¶ 43. EPA asserts that the number 5,000 was based on Respondent's response to the Agency's information request letter. Motion ¶ 65.

Complainant reduced the estimate of the total profit from sale of the Subject Components to a figure of $719,373 to reflect the estimated profit from the sale of 5,000 Subject Components, or an average of $144 per Subject Component. Motion ¶¶ 67, 68.

Next, the Agency calculated a gravity-based penalty to reflect actual or potential harm from the violation, starting with a base per-vehicle penalty based on engine size and the horsepower of the engines on which the defeat devices at issue were to be installed. Motion ¶ 69; Penalty Policy at 12, 16. The Agency stated that the horsepower of the vehicles on which the Subject Components would be installed ranged from 350 to 400, but that it calculated the penalty conservatively, based on 350 horsepower, although the Subject Components are designed to increase the horsepower by up to 50%. Motion at 18-19 (¶70), n. 6 (citing Appx. at 30-31). According to the Penalty Policy's methodology (Penalty Policy at 16, Table 1), Complainant computed a figure of $80 multiplied by 10 for the first 10 horsepower, $20 for multiplied by 90 for the next 90 horse power, and $5 multiplied by 250 for the next 250 horsepower, yielding a figure of $3,850 for each vehicle in which a Subject Component is installed. Motion ¶¶ 69-70.

As to the egregiousness of the violations, the Complaint (¶ 48) alleged that "[t]esting of a Ford truck with a Subject Component installed in accordance with Respondent's instructions caused regulated pollutant NO_x to increase over 30,000 percent, caused regulated pollutant NHMCs to increase over 100,000 percent, and caused regulated pollutant PM to increase over 3,700 percent." The Motion cited that paragraph and an Investigation Summary Report of Spartan Diesel Technologies, dated November 7, 2014 ("Investigation Report"), submitted to EPA by Eastern Research Group, Inc., and in particular, referenced page 38 of the Appendix. Motion ¶ 71; Appx. at 32-38. Based on that information, Complainant concluded that it is appropriate to assess a "major" level of egregiousness, and thus multiplied the base per-vehicle figure by 6.5, resulting in a penalty of $25,025 per vehicle.

In the next step, using Table 3 of the Penalty Policy, Complainant scaled the per-vehicle figure to reflect the affected number of vehicles. For the first ten vehicles, the $25,025 penalty was applied, resulting in a total of $250,250; for the next 90 vehicles, a scaling factor of 0.2 was applied, resulting in a total of $450,450; for the next 900 vehicles, a scaling factor of 0.04 was applied, resulting in a penalty of $900,900; and for the next 4,000 vehicles, a scaling factor of 0.008 was applied, resulting in a penalty of $800,800. The sum of these figures is $2,402,400. Motion ¶ 72.

Complainant increased that sum by 30 percent to account for Respondent's lack of any remediation of the violations, specifically, its "failure to recall products and mitigate excess

emissions in any way." Motion ¶ 73. With the 30 percent increase, the penalty was computed as $3,123,120. *Id*.

Complainant did not make any upward adjustment to account for the size of Respondent's business, as Complainant asserts that it lacks information as to Respondent's net worth or assets.

The Agency states that for the Penalty Policy's adjustment factor of "degree of cooperation/non-cooperation," it increased the gravity portion of the penalty by 10 percent, that is, by $312,312. It did not make any further adjustments to reflect the factors of "willfulness and/or negligence" or "history of noncompliance. Motion ¶ 76.

Adding the gravity component including the increases for lack of remediation and for non-cooperation, or $3,435,432, to the economic benefit component of $719,373, yielded the total proposed penalty of $4,154,805.

In regard to ability to pay, Complainant asserts that it requested Respondent to provide evidence as to any claim of inability to pay a penalty, and provides documentation of Complainant's efforts to solicit such evidence over the course of 15 months. Motion ¶ 77, Appx. at 39-54. The Agency states that no formal documentation has been submitted by Respondent as of the date of the Motion, but that Respondent's counsel, prior to ceasing representation of Respondent, had stated that Spartan "has ceased to exist as an entity" and ceased operations when they received EPA's notice of violation. Motion ¶ 77; Appx at 49, 51. Complainant presents a Dunn and Bradstreet financial report "showing that Spartan ceased reliably paying debts in August 2017." Motion ¶ 77 (citing Appx. at 55-70 at 65 (top), 59, 60, 61 (top), 69 (bottom)). Complainant states that the assertion that Respondent already has ceased its business suggests that the penalty would not affect its ability to continue in business. Complainant also points to the Penalty Policy guidance that "a company found in violation of the defeat device prohibition should not receive a reduced penalty to stay in business if the company intends to continue selling defeat devices." Penalty Policy at 27.

Finally, Complainant asserts that it is "aware that multiple sources suggest Spartan and/or its principal. Matthew Geouge, has merely changed the name under which the same business is being conducted," and presents a press release from a website, www.dieselops.com, announcing that "Patriot Diagnostics has acquired Spartan Diesel Technologies," and websites for Spartan's retailers shoring that Patriot Diagnostics is now offering "Phalanx Console Tuners," which, Complainant asserts, appear to be a direct continuation of Spartan's Phalanx Flash Consoles. Motion ¶ 79; Appx. at 71, 74, 76. Complainant points out that according to Yellowpages.com,

Patriot Diagnostics is located at the same residential address as Mr. Geouge. Motion ¶ 79; Appx. at 2, 77. Given the lack of financial information from Respondent despite numerous requests, and lack of information regarding the legal and financial relationship with Patriot Diagnostics, Complainant argues that no adjustment for ability to pay is warranted.

C. Discussion and Conclusion as to Penalty

With regard to the egregiousness of the violation, Complainant assesses all of the violations as "major," multiplying each per-vehicle penalty by 6.5 on the basis of the testing of one Subject Component in "race mode." Specifically, Complainant alleges that "testing of *a* Ford diesel truck with *a* Subject Component installed in accordance with Spartan's instructions and operating in 'race mode' caused emission of . . . [No_x]to increase over 30,000 percent (300-fold), emissions of [NHMCs] to increase over 100,000 percent (1,000-fold), and emissions of [PM] to increase over 3,700 percent (37-fold)." Motion ¶ 71; Complaint ¶ 48 (emphasis added). However, Complainant has not demonstrated or explained how these values support a finding of "major" egregiousness with respect to each Subject Component at issue in the Complaint.

Complainant refers to page 38 of the Appendix, on which appears Table 10 of the Investigation Report, entitled, "Test Results for Model Year 2011 6.7 Liter Ford Powerstroke at Ford with the Spartan 6.7L Phalanx." Appx. at 38. The Subject Components include not only the Spartan 6.7L Phalanx tuner, which according to the Investigation Report is compatible with Model Years 2011 and newer 6.7 Liter Ford Powerstroke diesel engines, but also a different version, the 6.4L Phalanx tuner, compatible with a 6.4 Liter Powerstroke, which the Investigation Report describes as typically installed on Ford trucks for Model Years 2008 to 2010. Appx. at 35-36, 37; see also, Appx. at 21-26 and Motion at 17 n.5 ("The Subject Components are listed as 'Console Tuner 6.4D'; 'Console Tuner 6.7D (where 'D' []indicates 'dealer' pricing"); 'Console Tuner (or 'Tuner') 6.4R' (where 'R' indicates 'retail pricing'); 'Console Tuner 6.7R'; and 'Packages.'"). There is no indication in the Motion or the portions of the Investigation Report attached to the Motion as to whether or not there is any significant distinction among the different Subject Components (e.g., between the 6.7 and the 6.4 tuners, or "packages") and types of installation or operation ("race mode" or otherwise) that may result in the level of emissions resulting from the installation being merely "likely to be similar to emissions from certified vehicles or engines," warranting a "moderate" egregiousness category. While an inference ultimately may be made that emissions exceeding certified levels or applicable standards are likely to occur from installation of all of the Subject Components, Complainant must present a factual basis for drawing such an inference. The record at this point does not provide a basis to infer that the level of egregiousness of all of the violations should be assessed as "major."

Table 10 of the Investigative Report shows tailpipe emissions of NO_x, NMHC and PM in three test scenarios: "baseline (or stock OEM)," "Emissions equipment-present calibration," and "Emissions equipment- removed calibration." Appx. at 38. As to the latter test scenario, the Investigation Report states that the investigator purchased a "delete pipe to evaluate the Spartan 6.7L Phalanx emission equipment-removed calibration on the test vehicle . . . ." Appx. at 37. Table 10 shows that in that scenario, emissions of NO_x increased over 30,000 percent, emissions of NMHC increased over 113,000 percent, and emissions of PM increased by 3,718 percent over the "baseline." However, in the "Emissions equipment-present calibration" scenario, the percentages of increase over the "baseline" were much lower: NO_x emissions increased by 91 percent, NMHC emissions increased by zero percent, and PM increased by 47 percent from the "baseline." Appx. at 38. Complainant does not explain whether test results for installations in the latter scenario show emissions exceeding certified levels or applicable standards, warranting a "major" egregiousness level. If such installations do not show emissions exceeding such levels or standards, then Complainant must demonstrate to what extent the penalties for the violations at issue should represent installations of Subject Components with a "delete pipe" or emissions control equipment removed or ineffective, and to what extent the penalties should represent installations with emissions control equipment present or effective.

Attached to the Motion is only an excerpt from the Investigation Report. Pages 8 through 23 and 25-29 of the Investigation Report were not included in the record. In particular, except for Table 10, the record does not include pages showing the Emissions Testing Results, Part V of the Investigation Report. With incomplete information from the Investigation Report and insufficient explanations from Complainant as to the assessment of the egregiousness factor in this case, I cannot fully evaluate whether the relief sought is appropriate in light of the record or whether Complainant properly applied the applicable policies to the facts of this case.

Accordingly, it is appropriate at this point not to issue an order assessing a penalty, but to direct Complainant to supply the explanations and supporting documentation, including the Investigation Report. After Complainant has supplied them, a decision as to the penalty may be issued.

VI. Order

1. Complainant's Motion for Default is hereby **GRANTED, in part**, as follows:

   (a) Respondent, Spartan Diesel Technologies, LLC, is hereby found in **DEFAULT.**

   (b) Respondent is hereby found to have violated Section 203(a)(3)(B) of the Clean Air Act, 42 U.S.C. § 7522(a)(3)(B), as charged in the Complaint.

2. Complainant's Motion for Default is **DENIED, in part,** with respect to the request to issue an order for Respondent to pay the proposed civil penalty.

3. Complainant is hereby **ORDERED** to file, **on or before September 18, 2018**, the following:

   (a) A copy of the full Investigation Summary Report, dated November 7, 2014, or at least pages 8 through 29 thereof.

   (b) A statement explaining in detail the likelihood that the emissions from the vehicles or engines on which each of the Subject Components have been installed may exceed certified levels or applicable standards. The statement should include:

      (1) a statement, and any documents in support, describing the relevant certified levels or applicable standards of emissions as referenced in the Penalty Policy;

      (2) a detailed explanation, and any documents in support, as to whether there is any significant distinction among the different Subject Components and types of installation or operation ("race mode" or otherwise) that may result in the level of emissions resulting from the installation being merely "likely to be similar to emissions from certified vehicles or engines," as described in the Penalty Policy for a "moderate" egregiousness category;

      (3) an explanation, and any documents in support, of whether the test results for installations in the "Emissions equipment-present calibration" scenario on Table 10 of the Investigation Summary Report show emissions exceeding certified levels or applicable standards, warranting a "major" egregiousness level. If the test results for such installations do not show emissions exceeding such levels or standards, Complainant must explain in detail, with any documents in support, the

extent to which the penalties for the violations at issue should represent installations of Subject Components with a "delete pipe" or emissions control equipment removed or ineffective, and to the extent to which the penalties should represent installations with emissions control equipment present or effective.

M. Lisa Buschmann
Administrative Law Judge

In the Matter of *Spartan Diesel Technologies, LLC*, Respondent.
Docket No. CAA-HQ-2017-8362

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Motion for Default**, dated September 7, 2018, and issued by Administrative Law Judge M. Lisa Buschmann, was sent this day to the following parties in the manner indicated below.

Matt Barnwell
Attorney Advisor

Original and One Copy by Personal Delivery to:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copy by Electronic and Regular Mail to:
David E. Alexander, Attorney Advisor
U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Office of Civil Enforcement
Air Enforcement Division
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For Complainant

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For Respondent

Dated: September 7, 2018
Washington, D.C.