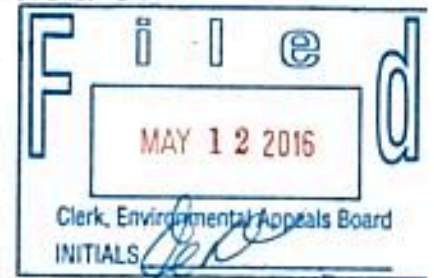


**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



In re:)
)
Peace Industry Group (USA) Inc., Zhejiang)
Peace Industry and Trade Co. Ltd.,)
Chongqing Astronautic Bashan Motorcycle)
Manufacturing Co., Ltd., and Blue Eagle)
Motor Inc.)
)
Respondents)
_____)

CAA Appeal No. 16-01

**ORDER ELECTING TO EXERCISE SUA SPONTE REVIEW
AND ESTABLISHING BRIEFING SCHEDULE**

In June 2014, the Director of the Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance ("Air Enforcement Division") filed the complaint in this matter against two Chinese corporations, Zhejiang Peace Industry and Trade Co., Ltd. ("Zhejiang Peace") and Chongqing Astronautic Bashan Motorcycle Manufacturing Co., Ltd. ("Bashan") (collectively "Respondents") for violations of Title II of the Clean Air Act ("CAA") (42 U.S.C. §§ 7521-7554) and implementing regulations. Following Respondents' failure to file pre-hearing exchanges of information, Administrative Law Judge M. Lisa Buschmann ("ALJ") issued a Default Order and Initial Decision against them ("Default Order"). In that Order, the ALJ assessed a penalty of \$525,988 against Zhejiang Peace and Bashan jointly and severally, and \$1,048,215 against Zhejiang Peace individually for those violations.

The Environmental Appeals Board ("Board") has preliminarily examined the Default Order and is exercising its authority to review the matter *sua sponte*, pursuant to 40 C.F.R.

§§ 22.27(c)(4), .30(b).¹ This Order constitutes notice of the Board's intent to review the Default Order on two issues: (i) whether the penalty assessed is consistent with the CAA and applicable penalty policy, and (ii) whether the Air Enforcement Division properly served Respondents with the complaint. See 40 C.F.R. § 22.30(b).

As to the penalty assessment, the CAA requires that the Environmental Protection Agency ("EPA") "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." CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2). EPA has issued a penalty policy for the type of violations involved in this case, which provides guidelines for calculation of an appropriate penalty amount applying the statutory penalty factors. See U.S. EPA, *CAA Mobile Source Civil Penalty Policy, Title II of the Clean Air Act, Vehicle and Engine Emissions Certification Requirements* (Jan. 2009) ("Penalty Policy").

In its complaint, the Air Enforcement Division included six Counts against Zhejiang Peace and Bashan for introduction into United States commerce of highway motorcycles and recreational vehicles that did not comply with emission requirements of Title II of the CAA and implementing regulations. Counts 1 and 2 addressed a combined total of 10,707 highway motorcycles Bashan and Zhejiang Peace manufactured or assembled, and delivered for

¹ Under the regulations governing the assessment of civil penalties, 40 C.F.R. pt. 22, the Board has 45 days after service of an initial decision to exercise *sua sponte* review. 40 C.F.R. §§ 22.27(c)(4), .30(b). As the ALJ served the Default Order in this matter on March 29, 2016, the Board has until May 13, 2016, to so decide.

introduction into United States commerce. Default Order at 15. Counts 3 through 6 addressed a combined total of 12,252 all-terrain recreational vehicles that Zhejiang Peace manufactured or assembled and delivered for introduction into United States commerce. *Id.*

In her Default Order, the ALJ concluded that “the record supports assessment of penalties against Bashan and Zhejiang Peace jointly and severally for counts 1 and 2, and assessment of penalties against Zhejiang Peace for counts 3 through 6.” *Id.* The ALJ then assessed a penalty of \$1,574,203 for Counts 1 through 6 of the complaint. *See* Default Order at 14-18.

For Counts 1 and 2, the ALJ assessed a penalty of \$525,988 (the amount proposed by the Air Enforcement Division). The penalty for Counts 1 and 2 included an economic benefit component of \$15 for every motorcycle not remediated;² a gravity-based component based on engine horsepower of 3.2 and 2.8 for Counts 1 and 2 respectively; a 6.5-fold increase for the “major” egregiousness of the violations; and a 30% increase for Respondents’ willfulness and non-cooperation. Default Order at 15-17; Complainant’s Rebuttal Prehearing Exchange at 3-6.

For Counts 3 through 6, the ALJ assessed a penalty of \$1,048,215 (again, the amount proposed by the Air Enforcement Division). As with Counts 1 and 2, the penalty for Counts 3 through 6 included an economic benefit component of \$15 for every recreational vehicle not

² Vehicles stopped at import are considered “remediated” and are not used to calculate economic benefit. Default Order at 16. According to the record, 562 of the 10,707 motorcycles in Counts 1 and 2 were detained by the United States Department of Homeland Security’s Bureau of Customs and Border Protection (“CBP”) at the point of importation and generated no economic benefit. *Id.* at 16, Complainant’s Rebuttal Prehearing Exchange at 4.

remediated.³ The penalty further included a gravity-based component based on (i) engine horsepower of 6.3 for Counts 3 and 4, (ii) engine horsepower of 7 for Count 5, and (iii) engine horsepower of 6.3 for Count 6. *Id.* at 17. Lastly, the penalty included a 6.5-fold increase for the “major” egregiousness of the violations for Counts 3 through 5, a 3.25-fold increase for the “moderate” egregiousness of the violations in Count 6, and a 30% increase for Respondents’ willfulness and non-cooperation. *Id.* at 17-18; Complainant’s Rebuttal Prehearing Exchange at 6-8.

The Air Enforcement Division stated that it applied the Penalty Policy in calculating the proposed penalty for Counts 1 through 6, and the ALJ adopted the Division’s proposed penalty as consistent with the Policy. Complainant’s Rebuttal Prehearing Exchange at 3-8; Default Order at 15-18. But the Air Enforcement Division did not provide a work sheet demonstrating how it calculated the penalty on a count-by-count basis. Rather, the record available to the Board contains only a narrative description of the penalty calculation that is insufficient to recreate the proposed penalty for each Count individually, or the Counts as combined. Among other things, the narrative description fails to identify which vehicles in each of the six Counts were remediated, which is needed to calculate economic benefit and the gravity-based components of the penalty. The narrative description further fails to provide sufficient detail on the Policy’s multiple steps in calculating the gravity-based component for the six Counts. In order to ensure that the penalty calculation is consistent with the CAA and the Penalty Policy,

³ According to the record, 534 of the 12,252 recreational vehicles in Counts 3 through 6 were detained by the CBP and generated no economic benefit. *Id.* at 17; Complainant’s Rebuttal Prehearing Exchange at 6.

the Board has decided that further clarification from the Air Enforcement Division is required. Accordingly, the Air Enforcement Division is ordered to file a brief in support of the proposed penalty, including a detailed count-by-count worksheet, demonstrating that the penalty calculated by the Air Enforcement Division is consistent with the CAA and the Penalty Policy. *See* 40 C.F.R. §§ 22.17(b) (motion for default must specify the penalty sought and the legal and factual grounds for the relief requested), .17(c) (relief requested in the complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record).

As to service of the complaint, the ALJ concluded in the Default Order that the Air Enforcement Division did not prove that it had served Respondents. The ALJ ultimately determined, however, that any defect in service of the complaint was waived because Respondents filed an answer to the complaint and were properly served with both the ALJ's order directing all parties to prepare and file prehearing exchanges, and the Air Enforcement Division's motion for a default order. *See* Default Order at 6-7.

Part 22 of the Consolidated Rules of Practice requires that the complainant serve the complaint on respondent or "a representative authorized to receive service on respondent's behalf." 40 C.F.R. § 22.5(b)(1)(i). Service may be accomplished, among other methods, by certified mail with return receipt requested. *Id.* Part 22 further provides that, in the case of a domestic or foreign corporation, service shall be on "an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process," as evidenced by a "properly executed receipt." *Id.* § 22.5(b)(1)(ii), (iii).

Here, the Air Enforcement Division mailed a copy of the complaint to the individual authorized by Respondents to receive service of process at the correct address. Further, a signed return receipt indicates that the copy arrived successfully, although it was signed by an

individual other than Respondents' designated representative. Under these circumstances, it appears that the complaint may have been properly served. See 40 C.F.R. § 22.7(c) (service of the complaint is complete when the return receipt is signed); *In re Polo Dev., Inc.*, CWA Appeal No. 16-01, slip op. at 2 & n.2 (EAB Mar. 17, 2016), 17 E.A.D. at ___ (stating that in order to effectuate service by certified mail, a letter "need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual.") (quoting *Katzson Bros., Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988)); see also *In re Jonway Motorcycle (USA), Ltd.*, CAA Appeal No. 14-03, at 5-10 (EAB Nov. 14, 2014) (Default Order and Final Decision) (unpub. order). In order to ensure that the correct standards are applied in determining if a respondent is properly served with a complaint, the Board's review of the Default Order would benefit from additional briefing on this issue as well. Accordingly, the Air Enforcement Division is ordered to file a brief stating its views on whether it properly served the complaint on Respondents in this case.

The Board establishes the following schedule for briefing the penalty assessment and service issues:

(1) On or before June 16, 2016, the Air Enforcement Division must file with the Clerk of the Board and all parties its brief addressing these two issues, including any supporting documentation;

(2) If Respondents wish to file a response, they must do so no later than July 7, 2016, with the Clerk of the Board and serve on the Air Enforcement Division its brief, if any, in response; and

(3) On or before July 21, 2016, the Air Enforcement Division may file its reply, if any.

Briefs may not exceed 20 double-spaced pages and the reply may not exceed 10-double-spaced pages (excluding exhibits and supporting documentation).

So ordered.⁴

ENVIRONMENTAL APPEALS BOARD

Dated: 5 | 12 | 2016

By: Mary Beth Ward
Mary Beth Ward
Environmental Appeals Judge

⁴ The three-member panel deciding this matter is composed of Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I certify that the foregoing Order Electing to Exercise Sua Sponte Review and Establishing Briefing Schedule in the Matter of Peace Industry Group (USA), Inc., Zhejiang Peace Industry and Trade Co., Ltd., Chongqing Astronautic Bashan Motorcycle Manufacturing Co., Ltd, and Blue Eagle Motor Inc., CAA Appeal No. 16-01, were sent to the following parties in the manner indicated below:

Via Interoffice Mail:

Morgan Rog
Office of Civil Enforcement (Mail Code 2249A)
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency


Evan Belser
Office of Civil Enforcement (Mail Code 2242A)
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Sybil Anderson
Headquarters Hearing Clerk (Mail Code 1900R)
U.S. EPA/ Office of Administrative Law Judges

Via U.S. Certified Mail:

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Tucker, GA 30084

G. Michael Smith
Smith, Collins, & Fletcher, P.A.
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Atlanta, GA 30350



Annette Duncan, Secretary
U.S. Environmental Protection Agency
Environmental Appeals Board

Dated: May 12, 2013