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

In re:	)	
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Jonway Motorcycle (USA) Co., Ltd., Shenke USA, Inc., Jonway Group Co., Ltd. Shanghai Shenke Motorcycle Co., Ltd., Zhejiang JMStar Shenke Motorcycle Co., Ltd., and Zhejiang Jonway Motorcycle Manufacturing Co., Ltd.	)	CAA Appeal No. 14-03
	)	
Docket No. CAA-HQ-2014-8032	)	

DEFAULT ORDER AND FINAL DECISION

Pursuant to 40 C.F.R. § 22.17(a), the Environmental Appeals Board ("Board") finds Jonway Motorcycle (USA) Co., Ltd. ("Jonway USA"), Shenke USA, Inc. ("Shenke USA"), Jonway Group Co., Ltd. ("Jonway Group"), Shanghai Shenke Motorcycle Co., Ltd. ("SSM"), Zhejiang JMStar Shenke Motorcycle Co. ("ZJS"), and Zhejiang Jonway Motorcycle Manufacturing Co., Ltd. ("ZJM") (collectively "Respondents") to be in default for failure to file an Answer to the Complaint in this administrative enforcement action, which was served on all Respondents on November 20, 2013. The default by Respondents constitutes an admission of all facts alleged in the Complaint. 40 C.F.R. § 22.17(a). Based on these facts, the Board concludes that Respondents violated title II, part A, of the Clean Air Act, 42 U.S.C. §§ 7521-7590, and associated regulations at 40 C.F.R. parts 86, 1051, and 1068.

The Board assesses a total penalty of $1,258,582, the amount sought by Complainant U.S. Environmental Protection Agency ("EPA" or "Agency") in its Motion for a Default Order ("Motion for Default"), against Respondents as follows: (1) $908,962 against all Respondents,

jointly and severally, and (2) an additional $349,620 against Jonway USA and Shenke USA, jointly and severally.

I. *PROCEDURAL HISTORY*

EPA initiated this case on November 20, 2013, by filing a Complaint on domestic corporations Jonway USA and Shenke USA, and foreign corporations of the People's Republic of China Jonway Group, SSM, ZJS, and ZJM (collectively, the "foreign corporations"),[1] pursuant to section 205(c)(1) of the Clean Air Act, 42 U.S.C. § 7524(c)(1), and 40 C.F.R. part 22.[2] EPA charged Respondents with numerous violations of Clean Air Act certification, labeling, and warranty requirements in connection with the import and introduction into U.S. commerce of "approximately" 10,607 highway motorcycles and 388 recreational vehicles. Compl. ¶¶ 27-30 (Counts 1-11) (charging violations of CAA tit. II, 42 U.S.C. §§ 7521-7590, and 40 C.F.R. pts. 86 (subpt. E), 1051). The Complaint further charged Jonway and Shenke with Clean Air Act recordkeeping violations. *Id.* ¶ 31 (Counts 12-14) (charging violations of CAA § 203(a)(2)(A), 42 U.S.C. § 7522(a)(2)(A), and 40 C.F.R. § 1068.101(a)(2)). The Complaint sought imposition of a civil penalty against Respondents for each violation in an amount up to $32,500 or $37,500 per day, but did not demand a specific total amount. *Id.* ¶¶ 32-34, 37.

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[1] The foreign manufacturers' business identities have changed during the course of their business activities with EPA. In November 2008, Jonway Group and SSM merged to form ZJS. Motion for Default ("Motion") App. at 97. The following year, ZJS was renamed Zhejiang Jonway Motorcycle Manufacturing Co., Ltd. (i.e., ZJM). *Id.* App. at 53, 68, 79, 81, 107, 117.

[2] The Director of the Air Enforcement Division of the Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, who is located at EPA Headquarters, filed the initial Complaint on EPA's behalf.

None of the Respondents has filed an Answer to the Complaint, which was required within thirty (30) days of the service of the Complaint, *i.e.* by December 23, 2013.[3] *See* 40 C.F.R. § 22.15. On April 10, 2014, EPA filed a Motion for Default with the Board[4] against Respondents, requesting that the Board issue an order finding Respondents liable for all the violations alleged in the Complaint and imposing a civil penalty of $908,962 against all Respondents, jointly and severally, and a civil penalty of $349,620 against Jonway and Shenke, jointly and severally, for a total civil penalty of $1,258,582. Motion at 26, 36 (¶¶ 64, 69).

On September 2, 2014, the Board issued an Order directing EPA to provide supplemental briefing demonstrating that the Complaint was properly served on Respondents. The Board also served this Order on all Respondents.[5] EPA timely filed its supplemental brief on September 19, 2014. Respondents filed no response.

On October 29, 2014, the Board received a letter from Guo Wei (also identified as James Guo), who asserts that he is the manager of Zhe Jiang Jonway Motorcycle Manufacturing Co. Ltd (the foreign corporation identified above as ZJM) and the manager of "Shen Ke USA" (presumably the same as Respondent "Shenke USA"). The letter states that "we" (presumably

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[3] The Complaint in this action mistakenly stated that Respondents' Answer to "this First Amended Complaint" was required to be filed within 20 days, citing 40 C.F.R. § 22.14(c) as well as 40 C.F.R. § 22.15. This is incorrect, as there is no amended complaint in this action. Respondents' deadline for responding to the Complaint was 30 days. However, the Board finds this erroneous recitation to be harmless error in this case, as Respondents did not attempt to file an Answer within 20 days, 30 days, or any other time.

[4] In a proceeding commenced at EPA Headquarters, such as the present case, the Board as the Presiding Officer "rule[s] on all motions filed or made before an answer to the Complaint is filed." 40 C.F.R. § 22.16(c); *accord id.* § 22.4(a)(1).

[5] The Board mailed a copy of the Order to Respondents at their official mailing addresses at 1501 and 1503 Kelly Blvd., Carrollton, Texas, 75006. The mailings were returned, however, as undeliverable.

referring to ZJM and Shenke USA) recently received the Motion for a Default Order from EPA, and alleges that their late response results from the failure of their service agent, Mr. "Qixiao Tong,"[6] to provide any information to them about the Motion for Default. The letter further alleges that Qixiao Tong has not worked for them for several years. Mr. Guo's letter was not accompanied by any proof of service of the letter on Complainant nor by any supporting affidavits or other evidence to support its factual assertions.

II. *DEFAULT*

The Board reviews EPA's Motion for Default under the rules provided in EPA's Consolidated Rules of Practice at 40 C.F.R. part 22 ("Part 22").

A. *Standards Governing Default*

Part 22 provides that the Presiding Officer – in this case, the Board – may find a party to be in default "after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17(a). The rules clearly state that the Presiding Officer "*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." *Id.* § 22.17(c) (emphases added). A "good cause" determination takes into account the "totality of the circumstances." *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 661 (EAB 2004) (citing *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992), and *In re B&L Plating,* 11 E.A.D. 183, 191-92 (EAB 2003)). Thus, the Board will

[6] The reference to "Qixiao Tong" appears to be a variation in the English spelling of the Chinese name listed in the record as "Xiaotong Qi," whose role as Respondents' agent is discussed below.

issue a default order in this matter unless the record demonstrates that Respondents had "good cause," under the "totality of the circumstances" presented here, for their failure to file an Answer to the Complaint.

B. *EPA Properly Served Respondents' Agent*

Before the Board will enter a finding of default, the complainant must demonstrate that the respondent was properly served with the complaint. *See* 40 C.F.R. § 22.15(a) (requiring an answer be filed "within 30 days after *service* of the complaint") (emphasis added); *see also, e.g., In re Las Delicias Community*, 14 E.A.D. 382, 387 (EAB 2009) (service must be valid to enter a default judgment). As explained below, EPA encountered repeated difficulties with locating Respondents to effect service of the Complaint in this action. After careful consideration of the applicable rules and the facts in the record, however, the Board finds that the Complaint was properly served on all Respondents.

The Part 22 rules require the complainant to 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).

EPA's Clean Air Act regulations specifically require all applicants for certificates of conformity for imported vehicles/engines to designate an authorized representative in the United

States. *Id.* §§ 80-416-80(a)(2)(ix) (for highway motorcycles), 1051.205(w) (for recreational vehicles). The laws of the State of Texas, under which Jonway USA and Shenke USA are incorporated, require all corporations incorporated in Texas to designate an agent and a registered office. Tex. Bus. Orgs. Code Ann. § 5.201(a). EPA regulations explain that service on the designated agent "constitutes service on you or any of your officers or employees for any action by EPA or otherwise by the United States related to the requirements of this part."[7] 40 C.F.R. §§ 80-416-80(a)(2)(ix), 1051.205(w).

All the corporate Respondents in this case legally designated Mr. Xiaotong Qi as their agent and representative in the United States. Domestic corporations Jonway USA and Shenke USA listed Xiaotong Qi as their registered "agent," "president," "director," and/or "secretary" in their corporate filings with the Office of the Texas Secretary of State.[8] Both Jonway USA and Shenke USA also referred to Mr. Qi as their "general manager" in the certificate of conformity applications they filed with EPA.[9] The Respondent foreign corporations, in turn, identified either Jonway USA or Shenke USA, or both, as their authorized representatives in their applications for

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[7] Similarly, the Texas statute states that "[t]he registered agent *** is an agent of the [filing or foreign filing] entity on whom may be served any process, notice, or demand required or permitted by law to be served on the entity." Tex. Bus. Orgs. Code Ann. § 5.201(b).

[8] *See* Motion at 5-6 & App. at 8, 9, 12-13, 15, 17-18, 20-21.

[9] *See* Motion at 6-8 & App. at 42, 49, 62, 69, 100, 101, 110, 112, 113, 121.

EPA certificates of conformity.[10] As the designated agent for Jonway USA and Shenke USA, Mr. Qi is therefore also the agent for service on the four foreign corporations.

EPA mailed the Complaint in this case to Mr. Qi, as the designated agent for the Respondents, to the addresses that Jonway USA and Shenke USA, respectively, listed for service with the Texas Secretary of State: 1501 and 1503 Kelly Blvd., Carrollton, Texas, 75006. In addition, EPA mailed the Complaint by certified mail to Mr. Qi at a nearby address where EPA knew he also conducted business – Nitro PowerSports LLC, 1942 I-35 E.-North, Carrollton, Texas 75006.[11] The Complaint packages sent to the Kelly Blvd. addresses were not accepted, but the package sent to the 1942 I-35 E.-North address was accepted by an individual named Tina Yang, who signed the certified mail receipt on November 23, 2013.[12] Subsequently, Mr. Qi acknowledged to EPA that he had in fact received the Complaint. Motion at 11-13, 17 & App. at 2-7.

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[10] Motion at 6-8 & App. at 39, 49 (Jonway Group identifying Jonway USA as its "Authorized Representative relative to the requirements of the US EPA"), 103 (SSM identifying Shenke USA as their "agent for service of process from EPA" in paragraph five of the agreement), 143 (ZJS identifying Shenke USA as their "agent for service of process from EPA" in paragraph five of the agreement); *see also id.* App. at 59, 69, 80, 88, 92, 113, 123, 133 (ZJM identifying both Jonway USA and Shenke USA as its "agent for service of process," "authorized representative," and "US agent" in various filings with EPA).

[11] EPA became aware of Mr. Qi's presence at the 1942 I-35 E.-North address in the course of performing an inspection. Motion App. at 165 (Affidavit of Evan M. Belser ¶ 5). The Board notes that Nitro PowerSports, like Jonway USA, also lists its official address with the Texas Secretary of State as 1501 Kelly Blvd., Carrollton, TX. Suppl. App. at 171.

[12] The record does not identify Ms. Yang's title or position with Nitro PowerSports, or whether she has any position with or relationship to any of the Respondents. The Board notes that the Complaint identifies members of a "Yang" family among the owners, managers or representatives of some of the foreign corporations involved in this matter, *see* Motion ¶¶ 27-28, but does not identify Tina Yang as a member of that family.

The Board finds that, under these facts, EPA met the part 22 requirements for service of a complaint on a corporation. The Board accepts the certified mail receipt signed by Ms. Yang as a "properly executed receipt," as required by 40 C.F.R. § 22.5(b)(1)(iii), for service on a domestic or foreign corporation whose address of record does not accept mailings, especially in light of Mr. Qi's acknowledgment of his actual receipt of the complaint.[13] Mr. Qi's signature on the return receipt, rather than Ms. Yang's, was not a necessary prerequisite to a finding of valid service on a corporation. *See, e.g., In re Ross Transport Co.*, RCRA (9006) Appeal No. 14-01, at 1-2 (Apr.10, 2014) (Final Order); *In re Thermal Reduction Co.*, 4 E.A.D. 128, 129-30 (EAB 1992) (finding service valid where Complaint was mailed to respondent's corporate address and corporation president admitted receipt).[14]

EPA's practice and the Board's ruling in this regard are consistent with the practices of other federal agencies that allow service by mail, as well as with federal court decisions

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[13] The Board generally expects EPA to serve complaints on respondents or their authorized agent at the official address of record designated for service, as EPA did here. Where respondents fail to accept service at their officially designated addresses, however, there is nothing in the rules that prevents EPA from serving their designated agent at an address where he can be found. *Cf. 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 at another address; statute does not require service at registered address). Under the circumstances presented in this case, the Board deems EPA's service on Mr. Qi at his known business address to be an acceptable method of service. 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.

[14] Notably, the part 22 rules authorizing service of a complaint on a corporation by certified mail do not require EPA to take the further step of using "restricted delivery," which would require the signature of the specific person listed as the addressee. *See* U.S. Postal Service, *A Customer's Guide to Mailing* 9, 21 (Sept. 2014), *available at* http://pe.usps.com/text/dmm100/extra-services.htm. As the Board has previously noted, "[w]hen serving a Complaint by mail, Complainant has control over how the mail is addressed but none whatsoever over who receives and signs for it on behalf of the Respondent." *In re Medzam, Ltd.*, 4 E.A.D. 87, 93 (EAB 1992). *Thermal Reduction* and *Medzam* were decided under an earlier version of the current part 22 rules, under which service was considered effective upon mailing as long as it was "directed to" the proper person. *See Medzam*, 4 E.A.D. at 93; *see also Katzson Bros. v. U.S. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988).

regarding who may accept service under the Federal Rules of Civil Procedure.[15] *See, e.g., Queens Village Day School, Inc.*, 2011 NLRB LEXIS 330, at *9-12 (NLRB ALJ July 6, 2011) (evidence of actual receipt held sufficient to satisfy rule allowing service by mail); *see also Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688-89 (9th Cir. 1988) (finding service of a complaint under the Federal Rules of Civil Procedure sufficient where receptionist, who was the only person staffing the office, received it and defendant had actual notice); *Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa*, 428 F. Supp. 1237, 1251 (S.D.N.Y. 1977) (holding service on secretary to be valid where she was in effect an assistant manager; "[g]enerally, service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service").

The Board's ruling in accepting the proof of service on this motion is limited to the context of service on a corporation. Cases involving other types of organizations or individuals may present other considerations or circumstances that the Board will consider in determining the validity of service under the applicable Part 22 rules.[16] Having determined that EPA properly

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[15] The Federal Rules of Civil Procedure do not govern proceedings before the Board. The Board references these rules merely for comparison purposes, as they contain service provisions that are similar in many respects to the part 22 rules that govern this proceeding.

[16] For example, the Board is not hereby overruling or modifying its precedent in *In re Las Delicias Community*, 14 E.A.D. 382 (EAB 2009). That case involved an unincorporated community association, where a community member other than the official representative had signed the certified mail receipt. In upholding service in that case, the Board examined whether the member who signed the receipt was also a general agent of the unincorporated association, noting that the structure and function of unincorporated associations are very different from that of corporations. *Id.* at 394 n.22 ("An unincorporated association, by definition, is not structured in the same manner as a corporation.").

served the Complaint on the Respondent corporations, the Board turns to whether there is any "good cause" for not entering a default order against Respondents.

C. *Respondents Have Failed to Establish "Good Cause" for Their Failure to File an Answer*

The record shows that Respondents have failed to file an Answer to the Complaint. This is sufficient ground for finding default under 40 C.F.R. § 22.17(a). Respondents's Answer, which was required to be filed by December 23, 2013, is now more than 10 months overdue. The record contains no facts showing "*good cause* why a default order should not be issued" within the meaning of 40 C.F.R. § 22.17(c) (emphasis added).

The October 29, 2014 letter from Wei Guo (a/k/a James Guo), purporting to represent Respondents ZJM and Shenke USA, is not sufficient to demonstrate "good cause" for failure to answer the Complaint. First, the Board declines to admit this informal letter into the official record of this case. In addition to being 10 months late, this letter does not provide any evidence to support Mr. Guo's factual allegations and does not meet the Part 22 requirements for filing answers or motions with the Board. Without supporting evidence, the Board cannot accept as true the facts alleged in that letter, including Mr. Guo's contentions that Mr. Qi is no longer the agent for some of the Respondents or that these Respondents received no information about the Motion for Default from Mr. Qi. The Board further notes that the letter is silent as to the critical fact of whether Respondents received notice of the Complaint.

Second, some of the facts alleged in Mr. Guo's letter are contradicted by the record. For example, the record shows that Mr. Qi remains the legally designated agent of all the Respondents in their filings with EPA and the State of Texas. Finally, even if Mr. Guo's

allegations concerning Mr. Qi were accepted as true, they do not suffice to demonstrate "good cause" for failing to file an answer to the Complaint. If Respondents changed their official agent, they had a duty to so notify EPA and to identify their new agent. *See* 40 C.F.R. §§ 86.416-80(a)(1) (requiring motorcycle manufacturers to update and correct their application information), 1051.225 (requiring recreational vehicle manufacturers to amend their application if any changes occur with respect to *any* information in their application). As domestic corporations, Jonway USA and Shenke USA had a duty to notify the Secretary of State of Texas, their state of incorporation, of any change of agent. *See* Tex. Bus. Orgs. Code Ann. § 5.202. These are essential requirements for doing business in the United States. A corporation, domestic or foreign, cannot simply ignore its duty to designate and maintain an official agent for service of process, then claim its own failure to do so is "good cause" for its failure to respond to a legally filed and served complaint.

Therefore, the Board finds that the record does not demonstrate "good cause" for any of the Respondents' failure to answer the Complaint. Further, the Board will not exercise its discretion, on the tenuous basis of Mr. Guo's belated letter, to extend Respondent's time to answer the Complaint or to respond to the Motion for Default.

III. *FINDINGS OF FACT AND CONCLUSIONS OF LAW ON LIABILITY*

Having found Respondents to be in default, the Board accepts all the factual allegations in the Complaint as true. 40 C.F.R. § 22.17(a) ("Default 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."). Based on those facts and its review of

the record and applicable provisions of law, the Board concludes that Respondents are liable for the violations alleged in the Complaint. This section sets forth the Board's findings of fact and conclusions of law for each count in the Complaint.

A. *Findings of Fact and Conclusions of Law on Issues Common to Multiple Counts*

EPA brought this case under title II of the Clean Air Act, Part A (Motor Vehicle Emission and Fuel Standards), 42 U.S.C. §§ 7521-7554, and the associated regulations promulgated thereunder at 40 C.F.R. parts 86, 1051, and 1068. The statute requires that new or imported motor vehicles or engines be covered by "certificates of conformity" to demonstrate their compliance with U.S. air emission standards, and sets forth a number of testing and recordkeeping requirements. *See, e.g.,* CAA § 203(a), 42 U.S.C. §§ 7522(a). "Motor vehicles" are defined as "any self-propelled vehicle designed for transporting persons or property *on a street or highway.*" CAA § 216(2), 42 U.S.C. §7550(2) (emphasis added); *accord* 40 C.F.R. § 85.1703(a). This includes highway motorcycles such as those at issue in this case. *See* Compl. ¶ 27; 40 C.F.R. §§ 86.402-98; *see also generally* 40 C.F.R. pt. 86, sbpt. E (setting emission standards for highway motorcycles). Each of the motorcycles described in the Complaint is a "highway motorcycle" within the meaning of the CAA. Compl. ¶17.

As authorized by section 213 of the Clean Air Act, 42 U.S.C. § 7547, EPA also promulgated regulations governing nonroad engines and vehicles, including regulations governing "recreational" vehicles, set forth at 40 C.F.R. parts 1051 and 1068. Each of the recreational vehicles described in the Complaint is a "recreational" vehicle, as defined at

40 C.F.R. § 1051.801, that is subject to the Clean Air Act statutory and regulatory requirements. Compl. ¶ 28.

The requirements of Part A of Clean Air Act title II apply both to manufacturers and to persons who import motor vehicles or engines for distribution in commerce in the United States. *See, e.g.,* CAA §§ 203, 205, 42 U.S.C. §§ 7522, 7524. "Manufacturer" is broadly defined to include "any person engaged in the manufacturing or assembling of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines, or importing such vehicles or engines for resale, or who acts for and is under the control of any such person in connection with the distribution of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines." CAA § 216(1), 42 U.S.C. §7550(1); *accord* 40 C.F.R. § 1051.801 (relying on section 216 definition for recreational vehicles). The definition of "person" includes "corporations." CAA § 302(e), 42 U.S.C. §7602(e).

Respondents Jonway Group, ZJM, SSM, and ZJS are foreign vehicle manufacturers who are incorporated under the laws of the People's Republic of China. Compl. ¶¶ 5, 6. These four Respondents manufactured every vehicle at issue in this case. *Id.* ¶ 26. Respondents Jonway USA and Shenke USA are domestic corporations who are (or were) incorporated under the laws of Texas.[17] *Id.* ¶ 6.

[17] "Jonway Motorcycle USA Co., Ltd." was incorporated in the state of Texas on January 18, 2005. *See* Motion App. at 8 (John Steen, Secretary of State, Texas, Certificate of Fact (Jan 2, 2014)). Jonway USA recently filed a Certificate of Termination with the Texas Secretary of State on September 11, 2014. Motion Suppl. App. at 168-69. "Shenke USA, Inc." was incorporated in the state of Texas on October 23, 2007, but appears to be inactive. *See* Motion App. at 17 (John Steen, Secretary of State, Texas, Certificate of Fact (Jan 2, 2014) (confirming Shenke USA was incorporated in 2007, but noting that it is currently inactive)).

Jonway USA and Shenke USA applied for and obtained from EPA certificates of conformity ("COCs") required by the Clean Air Act to introduce the four foreign manufacturers' vehicles into United States commerce. *Id.* ¶ 5. Jonway USA or Shenke USA submitted COC applications for every engine family at issue in this case, which EPA granted. *Id.* ¶¶ 5, 25. Jonway USA and Shenke USA also imported some of the foreign manufacturers' vehicles. *Id.* ¶ 5.

Based on these facts, the Board concludes that all six Respondents are "manufacturers" or other "persons" subject to the Clean Air Act's statutory and regulatory requirements for the sale or introduction of motor vehicles into commerce. *See* CAA § 203(a)(1), (a)(2), 42 U.S.C. § 7522(a)(1), (a)(2); *see also* 40 C.F.R. § 1068.101.

B. *Highway Motorcycle Certification Violations (Counts 1 through 6)*

Complaint Allegations and Applicable Law: In counts 1 through 6 of the Complaint, EPA alleges that Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – a total of 10,607 *uncertified* highway motorcycles in violation of section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. part 86, subpart E. Compl. ¶ 27 & tbl. A. Section 203(a)(1) of the Act, which contains certification requirements for highway motorcycles, prohibits the following:

> [I]n the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine * * * *unless such vehicle or engine is covered by a certificate of conformity* issued (and in effect) under regulations prescribed [by EPA] under this part.

CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1) (emphasis added); *accord* 40 C.F.R. § 86.407-78.

Under EPA's motorcycle emission regulations, to obtain a certificate of conformity, or "COC," a manufacturer must submit an application to EPA for each model year and each engine family that it intends to manufacture and sell in the United States. *See* 40 C.F.R. §§ 86.416-80(a)(1)-(2), .420-78. The COC application must identify and describe the vehicles to be covered by the COC and must contain "a description of their engine, emission control system and fuel system components," including "a detailed description of each auxiliary emission control device." *Id.* § 86.416-80(a)(2)(i). The application must also include "[t]he range of available fuel and ignition system adjustments." *Id.* § 86-416.80(a)(2)(ii).

EPA issues COCs for one model year. *Id.* § 86.437-78(a)(2). COCs contain terms the EPA believes "necessary to assure that any new motorcycle covered by the certificate will meet the [statutory and regulatory] requirements." *Id.* § 86.437-78(a)(2)(ii). A COC covers only those highway motorcycles that are "represented by the test vehicle," in other words, that conform in all material respects to the tested vehicle. *Id.* § 86.437-78(a)(2)(iii). In a COC, EPA "will certify compliance with only one set of applicable standards." *Id.*

1. *Count 1*

In count 1, EPA alleges that 3,445 highway motorcycles, which were purportedly covered by the COC for engine family 9JNYC0.05NFG, did not materially conform to their certified configuration and thus were not covered by that COC. Compl. ¶ 27(a).

Under the Clean Air Act and relevant regulations, in order for Respondents to have lawfully sold, offered for sale, introduced into commerce, delivered for introduction into

commerce or imported any new highway motorcycle, such motorcycle must have been covered by a COC. In identifying and describing the vehicles to be covered by a COC, the applicant must include a description of the "fuel system components." 40 C.F.R. § 86.416-80(a)(2)(i). The definition of "fuel system" includes the "carburetor." *Id.* § 86.402-78. The application must also include "[t]he range of available fuel * * * system adjustments." *Id.* § 86-416.80(a)(2)(ii). Thus, if a carburetor has a component that can be adjusted, the regulations require that the range of these adjustments be included in the application for the engine family.

Findings of Fact: The COC for engine family 9JNYC0.05NFG described a carburetor that had a nonadjustable idle air-fuel mixture screw. Compl. ¶ 27(a). The carburetors in the 3,445 highway motorcycles at issue in count 1, however, contained an idle air-fuel mixture screw that could be adjusted in a reasonable amount of time using common hand tools. *Id.* Importantly, adjustments to an engine's air-to-fuel ratio affect emissions. *Id.* The presence of this *adjustable* fuel system parameter in these 3,445 highway motorcycles, which was not described in the application for engine family 9JNYC0.05NFG, makes these engines materially different from the certified configuration. Because these 3,445 highway motorcycles did not materially conform to their purported certified configuration, the COC for engine family 9JNYC0.05NFG did not cover them. No other COC covered them. Compl. ¶ 27(a).

Conclusions of Law: Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – 3,445 uncertified highway motorcycles in violation of section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. part 86, subpart E.

2. *Count 2*

In count 2, EPA alleges that 1,867 highway motorcycles, which were purportedly covered by the COC for engine family 9JNYC0.15NFG, did not materially conform to their certified configuration and thus were not covered by that COC. Compl. ¶ 27(b). Under the Clean Air Act and relevant regulations, in order for Respondents to have lawfully sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported any new highway motorcycle, such motorcycle must have been covered by a COC.

Findings of Fact: The COC for engine family 9JNYC0.15NFG described a carburetor that had a nonadjustable idle air-fuel mixture screw. *Id.* ¶ 27(b). The carburetors in the 1,867 highway motorcycles at issue, however, contained an idle air-fuel mixture screw that could be adjusted in a reasonable amount of time using common hand tools. *Id.* For the same reasons discussed above under count 1, the presence of this adjustable fuel system parameter, which was not described in the application, makes these 1,867 engines materially different from the certified configuration. Because these 1,867 highway motorcycles did not materially conform to their (purported) certified configuration, the COC for engine family 9JNYC0.15NFG did not cover them. No other COC covered these vehicles. *Id.* ¶ 27(b).

Conclusions of Law: Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – 1,867 uncertified highway motorcycles in violation of section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. part 86, subpart E.

3. *Count 3*

In count 3, EPA alleges that 84 highway motorcycles, which were purportedly covered by the COC for engine family AJNYC.050SA1, were not, in fact, covered by that or any other COC. Compl. ¶ 27(c).

Under the Clean Air Act and relevant regulations, in order for Respondents to have lawfully sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported any new highway motorcycle, such motorcycle must have been covered by a COC. Significantly, EPA issues COCs for a limited time. 40 C.F.R. § 86.437-78(a)(2) (explaining that COCs are issued for a particular model year).

Findings of Fact: Respondents manufactured these 84 highway motorcycles after the COC for engine family AJNYC.050SA1 had expired. Compl. ¶ 27(c). Therefore, they were sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported after expiration of that COC. No other COC covered these vehicles. *Id.*

Conclusions of Law: Because these 84 highway motorcycles were not covered by a COC at the time Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – them, Respondents violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. part 86, subpart E.

4. *Count 4*

In count 4, EPA alleges that 254 highway motorcycles, which were purportedly covered by the COC for engine family AJNYC0.05NFG, were not, in fact, covered by that or any other COC. Compl. ¶ 27(d).

Findings of Fact: The 254 motorcycles in question were manufactured after the COC for engine family AJNYC0.05NFG had expired. Compl. ¶ 27(d). Therefore, they were sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported after expiration of the COC for engine family AJNYC0.05NFG. No other COC covered these vehicles. *Id.*

Conclusions of Law: Because these 254 highway motorcycles were not covered by any COC at the time they were offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – as required by statute, for these 254 highway motorcycles, Respondents violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. part 86, subpart E.

5. *Count 5*

In count 5, EPA alleges that 4,995 highway motorcycles, which were purportedly covered by the COC for engine family BJNYCO.05NFG, did not materially conform to their certified configuration and thus were not covered by that COC. Compl. ¶ 27(e).

As already noted, the COC application must identify and describe the vehicles to be covered by the COC and must contain "a description of their engine, emission control system and fuel system components," including "a detailed description of each auxiliary emission control

device." 40 C.F.R. § 86.416-80(a)(2)(i). Catalysts are generally considered part of an engine and/or engine's emission control system. *See id.* § 86.420-78(a), (b)(7) (noting that to be in a group of engines with similar emissions characteristics (i.e., the same engine family), an engine must be identical in the "number of catalytic converters, location, volume, and composition").

Findings of Fact: The 4,995 highway motorcycles at issue in this count contained catalysts with significantly less volume or cell density than the certified catalyst design for engine family BJNYCO.05NFG. Compl. ¶ 27(e). A smaller, less dense catalyst has less of the surface area needed to chemically react with vehicle exhaust and reduce levels of regulated pollutants leaving the vehicle's tailpipe. *Id.* Thus, such a change would affect emissions. The presence of a significantly different catalyst than was described in the application for engine family BJNYCO.05NFG makes these 4,995 engines materially different from the certified configuration. Because these 4,995 highway motorcycles did not materially conform to their (purported) certified configuration, the COC for engine family BJNYCO.05NFG did not cover them. No other COC covered these vehicles. *Id.* ¶ 27(e).

Conclusions of Law: Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – 4,995 uncertified highway motorcycles in violation of section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. part 86, subpart E.

6. *Count 6*

In count 6, EPA alleges that two highway motorcycles, which were purportedly covered by the COC for engine family CSHKCO.15NFG, did not materially conform to their certified configuration and thus were not covered by that COC. Compl. ¶ 27(f).

Findings of Fact: The two highway motorcycles at issue in this count contained catalysts with significantly less volume or cell density than the certified catalyst design for engine family CSHKCO.15NFG. *Id.* ¶ 27(f). For the same reasons provided in our discussion of count 5, the presence of a significantly different catalyst than was described in the application for engine family CSHKCO.15NFG makes these two engines materially different from the certified configuration. Consequently, because these two highway motorcycles did not materially conform to their (purported) certified configuration, the COC for engine family CSHKCO.15NFG did not cover them. No other COC covered these vehicles. *Id.* ¶ 27(f).

Conclusions of Law: Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – two uncertified highway motorcycles in violation of section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. part 86, subpart E.

C. *Recreational Vehicle Certification Violations (Counts 7 through 9)*

In counts 7 through 9 of the Complaint, EPA alleges that Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – a total of 386 recreational vehicles in violation of

40 C.F.R. § 1068.101(a)(1). Compl. ¶ 28 & tbl. B. Specifically, EPA alleges that these vehicles did not materially conform to their certified configurations.

As noted above, recreational vehicles are regulated under a different set of regulations than are highway motorcycles. Section 1068.101 of EPA's regulations, rather than section 203 of the Act, specifies the acts that are prohibited, although the two sections are quite similar. Section 1068.101 provides that "manufacturers" of new engines or equipment containing these new engines, such as recreational vehicles, "may not sell, offer for sale, or introduce or deliver into commerce in the United States or import into the United States any new engine/equipment after emission standards take effect for the engine/equipment, unless it is covered by a valid certificate of conformity for its model year."[18] 40 C.F.R. § 1068.101(a).

Under EPA's recreational vehicle emission regulations, to obtain a COC, a manufacturer must submit an application to EPA for each model year and each engine family that it intends to manufacture and sell in the United States. *See id.* § 1051.201(a). A COC covers only those recreational vehicles that "conform to the specifications" in the COC and associated application. *Id.* § 1068.103(a). The term "specifications" includes "any conditions or limitations identified by the manufacturer or EPA." *Id.* Thus, if the COC application specifies certain engine configurations, the COC issued for those configurations does not cover any other unstated configurations. *Id.*; *accord id.* § 1068.101(a)(1)(i).

[18] In addition, if anyone "cause[s] someone to commit a prohibited act [including the act quoted above in the text], that person is in violation of that prohibition" as well. 40 C.F.R. § 1068.101(c).

1. *Count 7*

In count 7, EPA alleges that 84 specified recreational vehicles, which were purportedly covered by the COC for engine family 9SHKX.150AAA, did not materially conform to their certified configuration and thus were not covered by that COC. Compl. ¶ 28(a) & tbl. B.

Under the Clean Air Act and relevant regulations, in order for Respondents to have lawfully sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported – or caused the foregoing with respect to – any new recreational vehicles, such vehicle must have been covered by a COC.

Findings of Fact: Each of the 84 recreational vehicles in question contained a catalyst that had significantly less cell density than the certified catalyst design for engine family 9SHKX.150AAA. As explained in our discussion of count 5, a catalyst with less density has less of the surface area needed to chemically react with vehicle exhaust and reduce levels of regulated pollutants leaving the vehicle's tailpipe, and thus a difference in cell density would affect emissions. *Id.* ¶ 27(e).

The regulations require that the COC application "[d]escribe the engine family's specifications and other basic parameters of the vehicle's design and emission controls." 40 C.F.R. § 1051.205(a). Catalysts are part of the engine or engine emissions system; thus, a COC applicant must include a description of the catalyst. Recreational vehicles "are considered not covered by a certificate unless they are in a configuration described in the application for certification." *Id.* § 1068.101(a)(1)(i); *accord id.* § 1068.103(a). The presence of a significantly different catalyst than was described in the application for engine family 9SHKX.150AAA

makes these 84 engines materially different from the certified configuration. For this reason, these 84 engines are not covered by the COC for engine family 9SHKX.150AAA.

In addition, each of the 84 recreational vehicles in question contained a carburetor that had "a replaceable main jet, pilot jet, and jet needle *with five clip position grooves to adjust the engine's air-fuel ratio*." Compl. ¶ 28(a) (emphasis added). The COC application for engine family 9SHKX.150AAA, however, did not describe any adjustable parameters or other adjustments. *Id.* ¶ 28(a). As already noted, adjustments to an engine's air-to-fuel ratio affect emissions.

The regulations specifically require recreational vehicle COC applications to describe "all adjustable operating parameters," 40 C.F.R. § 1051.205(q), and where a recreational vehicle has adjustable parameters, the applicant must demonstrate that the vehicle meets emission standards throughout the adjustable range, *id.* § 1051.115(c), (d). "Adjustable parameter" means "any device, system or element of design that someone can adjust (including those which are difficult to access) and that, if adjusted, may affect emissions or engine performance during emission testing or normal in-use operation." *Id.* § 1051.801. The presence of the above-described adjustable parameter in the carburetors of these 84 recreational vehicles – an adjustable parameter which was not described in the application for engine family 9SHKX.150AAA and for which Respondents failed to demonstrate that the vehicles would meet emission standards throughout the adjustable range – makes these recreational vehicles materially different from the certified configurations. For this second reason as well, these 84 recreational vehicles are not covered by the COC for engine family 9SHKX.150AAA. *See id.* §§ 1068.101(a)(1)(i), 1068.103(a).

In sum, these 84 recreational vehicles did not materially conform to their (purported) certified configuration for two, independent reasons. Thus, the COC for engine family 9SHKX.150AAA did not cover them, and no other COC covered these vehicles. Compl. ¶ 28(a).

Conclusions of Law: Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported 84 uncertified recreational vehicles in violation of 40 C.F.R. § 1068.101(a)(1).

2. *Count 8*

In count 8, EPA alleges that 140 specified recreational vehicles, which were purportedly covered by the COC for engine family ASHKX.250AML, did not materially conform to their certified configuration and thus were not covered by that COC. Compl. ¶ 28(b) & tbl. B. Under the Clean Air Act and relevant regulations, in order for Respondents to have lawfully sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported – or caused the foregoing with respect to – any new recreational vehicles, such vehicle must have been covered by a COC.

Findings of Fact: Each of the 140 recreational vehicles in question contained a catalyst that had significantly less cell density than the certified catalyst design for engine family ASHKX.250AML. For the same reasons provided in the discussion of count 7, the presence of a significantly different catalyst than was described in the application for engine family ASHKX.250AML makes these 140 recreational vehicles materially different from the certified configuration. For this reason, these 140 recreational vehicles are not covered by the COC for engine family ASHKX.250AML. *See* 40 C.F.R. §§ 1068.101(a)(1)(i), 1068.103(a).

In addition, each of the 140 recreational vehicles in question contained a carburetor that had "a replaceable main jet, pilot jet, and idle mixture screw that could be adjusted in a reasonable time using common hand tools." Compl. ¶ 28(b). The COC application for engine family ASHKX.250AML, however, described carburetors with no adjustable parameters or other adjustments. *Id.*

As already noted, the regulations specifically require COC applications for recreational vehicles to describe "all adjustable operating parameters," 40 C.F.R. § 1051.205(q), and where a recreational vehicle has adjustable parameters (or certain "other adjustments"), the applicant must demonstrate that the vehicle meets emission standards throughout the adjustable range, *id.* § 1051.115(c), (d). The regulations define "other adjustments" to include changes to a recreational vehicle's air-fuel ratio that can be made by an experienced mechanic "in less than one hour with a few parts whose total cost is under $50 (in 2001 dollars)." *Id.* § 1051.115(d).

The presence of this adjustable parameter or "other adjustment" in the carburetors of these 140 recreational vehicles, which was not described in the application for engine family ASHKX.250AML, makes these engines materially different from the certified configurations. For this reason as well, these 140 engines are not covered by the COC for engine family ASHKX.250AML. *See id.* C.F.R. §§ 1068.101(a)(1)(i), 1068.103(a).

Because these 140 recreational vehicles did not materially conform to their (purported) certified configuration for two independent reasons, the COC for engine family ASHKX.250AML did not cover them. No other COC covered these vehicles. Compl. ¶ 28(b).

Conclusions of Law: Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported 140 uncertified recreational vehicles in violation of 40 C.F.R. § 1068.101(a)(1).

3. *Count 9*

In count 9, EPA alleges that 162 recreational vehicles, which were purportedly covered by the COC for engine family CSHKX.150ATA, did not materially conform to their certified configuration and thus were not covered by that COC. Compl. ¶ 28(c).

Findings of Fact: The 162 recreational vehicles at issue in this count contained catalysts with significantly less cell density than the certified catalyst design for engine family CSHKX.150ATA. Compl. ¶ 28(c). For the same reasons articulated in count 8 related to nonconforming catalyst design, the presence of a significantly different catalyst than was described in the application for engine family CSHKX.150ATA makes these 162 recreational vehicles materially different from the certified configuration. *See* 40 C.F.R. §§ 1068.101(a)(1)(i), 1068.103(a). Because these 162 recreational vehicles did not materially conform to their (purported) certified configuration, they were not covered by the COC for engine family CSHKX.150ATA.

Conclusions of Law: Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported 162 uncertified recreational vehicles in violation of 40 C.F.R. § 1068.101(a)(1).

D. *Labeling Violations (Count 10)*

In count 10, EPA alleges that Respondents violated 40 C.F.R. § 1068.101(a)(1) by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing – or causing the foregoing with respect to – two recreational vehicles within engine family ASHKX.150AAA "without compliant emission control information labels." Compl. ¶ 29(a).

The regulatory provision upon which EPA relies for this claim prohibits a "manufacturer" of new recreational vehicles from selling, offering for sale, or introducing or delivering into commerce or importing into the United States any new recreational vehicle "unless it * * * has the required label or tag." 40 C.F.R. § 1068.101(a)(1). Section 1051.135 contains the labeling requirements for recreational vehicles, specifying that each recreational vehicle must have three labels, one of which is a "permanent and legible emission control information label" that must contain thirteen items, including specified emission, emission control system, fuel, and manufacturer information. *Id.* § 1051.135(b), (c)(1)-(13).

Findings of Fact: The two recreational vehicles at issue in this count did not have compliant emission control information labels. Compl. ¶ 29(a).

Conclusions of Law: Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce or imported two recreational vehicles within engine family ASHKX.150AAA without a compliant label in violation of 40 C.F.R. § 1068.101(a)(1).

E. *Warranty Violations (Count 11)*

In count 11, EPA alleges that Respondents violated 40 C.F.R. § 1068.101(b)(6) and (c) by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing – or causing the foregoing with respect to – 226 recreational vehicles whose owner manuals did not contain emissions warranties as required by 40 C.F.R. part 1051.

Part 1068 requires recreational vehicle manufacturers to "meet [their] obligation to honor [their] emission-related warranty under § 1068.115." 40 C.F.R. § 1068.101(b)(6). The referenced section 1068.115 "obligation" requires, among other things, that certifying manufacturers "warrant to purchasers that their engines/equipment [including recreational vehicles] are designed, built, and equipped to conform at the time of sale to the applicable [CAA] regulations for their full useful life." *Id.* § 1068.115. A related regulation requires manufacturers to state "the emission-related warranty provisions * * * that apply to the engine" in each vehicle's owner's manual. *Id.* § 1051.120(e). "Failure to meet [the § 1068.115] obligations is prohibited." *Id.* § 1068.101(b)(6). Thus, when read together, these regulations require manufacturers to provide the emissions-related warranty in each vehicle's owner's manual and subject noncompliers to a civil penalty.

Findings of Fact: The owners' manuals for the 226 recreational vehicles in question did not contain emission warranties. Compl. ¶ 30(b).

Conclusions of Law: By selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing – or causing the foregoing with respect to – 226 recreational vehicles whose owners' manuals did not contain emissions warranties as

required by 40 C.F.R. part 1051.120(e), Respondents violated 40 C.F.R. § 1068.101(b)(6) and (c).

F. *Recordkeeping Violations (Counts 12 through 14)*

1. *Count 12*

In count 12, EPA alleges that Jonway USA and Shenke USA violated Clean Air Act section 203(a)(2)(A), 42 U.S.C. § 7522(a)(2)(A), and 40 C.F.R. § 1068.101(a)(2) by failing or refusing to provide information as required by section 208 of the Clean Air Act, 42 U.S.C. § 7542, and 40 C.F.R. §§ 86.414-78(a) and 1051.250(b).

Section 203(a)(2)(A) of the Clean Air Act prohibits "any person * * * to fail to make reports or provide information required" under section 208, 42 U.S.C. § 7542. 42 U.S.C. § 7522(a)(2)(A); *see also* 40 C.F.R. § 1068.101(a)(2) (containing a similar prohibition, requiring "manufacturers" (which includes importers and other persons who introduce vehicles into commerce) to provide "complete and accurate reports and information" to EPA "without delay"). Section 208 requires manufacturers of new motor vehicles and "other persons" subject to the requirement of title II, part A to "make reports and provide information [EPA] may reasonably require to determine whether the manufacturer or other person has acted or is acting in compliance with this part [of the statute]." 42 U.S.C. § 7542(a).

The regulations contain more particularized recordkeeping requirements. Part 86 requires the manufacturer of any motorcycle covered by a certificate of conformity, upon request by EPA, to, "within 30 days, identify by vehicle identification number, the vehicle(s) covered by the certificate of conformity." 40 C.F.R. § 86.414-78(a). Part 1051 requires manufacturers of

recreational vehicles and persons who introduce a new recreational vehicle or engine into commerce in the United States (e.g., importers) to maintain, among other things, records on "[p]roduction figures for each engine family divided by assembly plant" and "a list of engine identification numbers for all the engines [they] produce under each certificate of conformity." 40 C.F.R. § 1051.250(b)(4)-(5); *see also id.* §§ 1051.250(d) (noting that these records must be readily available in case EPA asks for them), 1051.801 (definition of "manufacturer").

Findings of Fact: Respondents Jonway USA and Shenke USA failed to provide to EPA "importation records and information" about total quantities of vehicles covered by their COCs that entered United States commerce for seven engine families. Compl. ¶ 31(a).

Conclusions of Law: The requested information clearly falls within the types of "reports or information" that Clean Air Act section 208, 42 U.S.C. § 7542(a), and 40 C.F.R. §§ 86.414-78(a) and 1051.250(b)(4)-(5) require manufacturers and importers to provide to EPA. Although these two regulatory sections explicitly require production of the vehicle identification numbers of all vehicles covered by the COC, producing such a list would necessarily provide the total quantities of vehicles. By failing or refusing to provide the requested information (the importation records and information about total quantities of vehicles covered by their COCs that entered United States commerce) to EPA for engine families 9SHKX.150AAA, 9SHKX.250AML, BJNYC.234MMA, BSHKX0.11ATA, CSHKC0.05NFG, CSHKC0.15NFG, and CSHKC0.25NFG, Jonway USA and Shenke USA violated 42 U.S.C. § 7522(a)(2)(A) and 40 C.F.R. § 1068.101(a)(2).

2. *Count 13*

In count 13, EPA alleges that Jonway USA and Shenke USA violated Clean Air Act section 203(a)(2)(A), 42 U.S.C. § 7522(a)(2)(A), and 40 C.F.R. § 1068.101(a)(2) by failing or refusing to keep or provide to EPA certification and testing records specified in 40 C.F.R. §§ 86.440-78 and 1051.250.

Section 86.440-78 requires highway motorcycle manufacturers to "establish, maintain and retain" certain "adequately organized and indexed records." 40 C.F.R. § 86.440-78(a). These records include identification and description of all certification vehicles for which testing is required, a complete record of all emission tests performed (including test results) for the certification vehicle, and various other records concerning each motorcycle used for certification testing. *Id.* § 86.440-78(a)(1)-(2). These records must be retained for six years after the issuance of all certificates of conformity to which they relate, except for routine emission test records, which must be kept for one year. *Id.* § 86.440-78(a)(3).

Section 1051.250 requires manufacturers of recreational vehicles and persons who introduce a new recreational vehicle or engine into commerce in the United States (e.g., importers) to keep certain records. *See generally* 40 C.F.R. § 1051.250(a)-(d). These records include a copy of all COC applications and accompanying summary information, a detailed history of each emission-data vehicle (i.e., test vehicle), all performed emissions tests, and various other testing-related data. *Id.* § 1051.250(b)(1)-(5). These records must be retained for eight years after the issuance of all certificates of conformity to which they relate, except for routine emission test records, which must be kept for one year. *Id.* § 1051.250(c).

Findings of Fact: Jonway USA and Shenke USA failed or refused to keep or provide to EPA "certification and testing records" specified in 40 C.F.R. §§ 86.440-78 and 1051.250 for sixteen engine families. Compl. ¶ 31(b).

Conclusions of Law: By failing or refusing to provide to EPA the requested information for engine families 9JNYC.050SA1, 9JNYC0.05NFG, 9JNYC0.15NFG, 9JNYC0.25NFG, AJNYC.050SA1, AJNYC0.05NFG, AJNYC0.15NFG, AJNYC0.25NFG, BJNYC.050SA1, BJNYC.234MMA, BJNYC0.05NFG, BJNYC0.15NFG, BJNYC0.25NFG, CSHKC0.05NFG, CSHKC0.15NFG, and CSHKC0.25NFG, Jonway USA and Shenke USA violated 42 U.S.C. § 7522(a)(2)(A) and 40 C.F.R. § 1068.101(a)(2).

3. *Count 14*

In count 14, EPA alleges that Jonway USA and Shenke USA violated Clean Air Act section 203(a)(2)(A), 42 U.S.C. § 7522(a)(2)(A), by failing to timely respond to the EPA's Request for Information under Clean Air Act section 208, 42 U.S.C. § 7542. As noted above, section 203(a)(2)(A) of the Clean Air Act prohibits persons from failing to make reports or provide information required under section 208, and section 208 requires "manufacturers" and "other persons" to "make reports and provide information [EPA] may reasonably require to determine whether the manufacturer or other person has acted or is acting in compliance" with the Act. 42 U.S.C. §§ 7522(a)(2)(A), 7542(a).

Findings of Fact: EPA issued a Request for Information on October 18, 2010, in which EPA required a complete response by November 17, 2010. Compl. ¶ 31(c). Jonway USA and Shenke USA failed to provide any response until January 25, 2011, which was more than two

months after the deadline. *Id.* Moreover, these two Respondents did not provide a "purportedly complete response" until June 14, 2011, which was nearly seven months after the deadline. *Id.* Respondents' responses to the Request for Information that EPA sent pursuant to Clean Air Act section 208, 42 U.S.C. § 7542, were therefore untimely.

Conclusions of Law: By failing to timely respond to the EPA's Request for Information under Clean Air Act section 208, 42 U.S.C. § 7542, Jonway USA and Shenke USA violated Clean Air Act section 203(a)(2)(A), 42 U.S.C. § 7522(a)(2)(A).

IV. *PENALTY*

In a case where the Board finds respondents in default, the Board will impose the relief proposed by complainant "unless the requested relief is clearly inconsistent with the record of the proceeding or the Act [authorizing the proceeding at issue]." 40 C.F.R. § 22.17(c). Here, EPA seeks a civil penalty of $908,962 against all Respondents, jointly and severally, and an additional civil penalty of $349,620 against Jonway USA and Shenke USA, jointly and severally (*i.e.*, a total civil penalty of $1,258,582 against the two domestic corporations).[19] Motion at 26, 36 (¶¶ 64, 69). The Board has reviewed the record supporting EPA's proposed penalty amounts and finds that they are consistent with the factors specified in the Clean Air Act and applicable EPA penalty policy, as explained below.

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[19] Under section 205 of the Clean Air Act, EPA may administratively assess a civil penalty if the amount sought is less than $295,000 unless the EPA and the Department of Justice "jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment." CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1); *accord* 40 C.F.R. § 1068.125(b); *see also* 40 C.F.R. § 19.4 (adjusting the statutory amount for inflation). EPA and DOJ jointly determined that this matter was appropriate for administrative penalty assessment even though the penalty EPA is seeking is greater than $295,000. Compl. ¶ 13; Motion at 3 & App. 1.

The Clean Air Act authorizes EPA to impose administrative penalties of up to $32,500[20] per vehicle (or engine) against any person who, between March 15, 2004, and January 12, 2009, sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported into the United States, a highway motorcycle or recreational vehicle that was not covered by a COC, was improperly labeled, or violated warranty requirements. CAA § 205(a), 42 U.S.C. § 7524(a) (highway motorcycles); 40 C.F.R. § 1068.101(a)(1) (recreational vehicles). The Act also authorizes EPA to assess a penalty of up to $32,500 per day against any person who, between March 15, 2004, and January 12, 2009, failed to make reports or provide information EPA reasonably required to assess compliance with the Clean Air Act. CAA § 205(a), 42 U.S.C. § 7524(a) (highway motorcycles); 40 C.F.R. § 1068.101(a)(2) (recreational vehicles); *see also* CAA §§ 203(a)(2)(A), 208(a), 42 U.S.C. §§ 7522(a)(2)(A), 7542(a); 40 C.F.R. § 19.4 (inflation adjustments). The maximum penalty for violations that occur after January 12, 2009, is $37,500. 40 C.F.R. § 19.4.

To determine the amount of the penalty in a given case, EPA must "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,

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[20] Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires EPA to adjust the statutory maximum to reflect inflation. *See* 31 U.S.C. § 3701 note; 28 U.S.C. § 2461 note; 40 C.F.R. § 19.4 (containing updated statutory maximums based on inflation).

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* ("Title II Penalty Policy") (Jan. 2009).

EPA applied the Title II Penalty Policy to calculate its proposed penalty in this case for the certification, labeling, and warranty violations. In the first step, it calculated the economic benefit that Respondents received as a result of these violations to be $148,950. Motion at 28. Consistent with the policy, this economic benefit calculation was based only on the 9,930 vehicles that were not remediated by Respondents or denied entry into U.S. markets by U.S. Customs and Border Protection. *See id.* at 28-29. EPA used the policy's "rule of thumb" to calculate the amount of the economic benefit: $15 per violative vehicle for vehicles less than 15 horsepower.

EPA then calculated a gravity-based component of $584,625 for the 10,995 certification violations. *Id.* at 29. This calculation was based on the vehicles' power rating, the egregiousness of the violations ("major" for the non-conforming catalyst and carburetor violations, and "moderate" for the manufacture of vehicles after the COC expired), and Respondents' failure to remediate 9,930 of the violations. *Id.* at 29-30. In performing these calculations, EPA used the scaling factors for engine horsepower and total number of vehicles from the policy. *Id.* For those vehicles for which EPA alleged multiple violations in the Complaint, EPA sought a penalty only for the most egregious of the alleged violations. *Id.* at 29. Thus, EPA did not seek penalties for any of the warranty violations as they all overlapped with certification and labeling violations. *See* Complaint at 15 tbl. B.

EPA then increased the gravity component of the proposed penalty by 20% to reflect Respondents' degree of willfulness or negligence. EPA believed this increase was warranted because Respondents had complete control over the design, certification, manufacture, and sale of their vehicles but, despite numerous seizures of the vehicles by U.S. Customs and Border Protection, they *continued* to introduce large volumes of noncompliant vehicles into U.S. commerce. Motion at 31. EPA also increased the penalty's gravity component by 10% to reflect Respondents' degree of non-cooperation based on Respondents' failure to properly respond to EPA's information request and their failure to discuss the case, negotiate, or answer the Complaint. *Id.* EPA found no unique factors in this case that would justify a reduction of the penalty. *Id.* at 32. The proposed penalty for these violations and the adjustments are consistent with the Title II Penalty Policy and the statutory factors.

For the recordkeeping violations, EPA calculated a proposed additional penalty of $349,620 against Respondents Jonway USA and Shenke USA based solely on an application of the statutory factors because the Title II Penalty Policy does not provide a method for calculating penalties for these types of violations. For each record Respondents Jonway USA and Shenke USA were required to keep (or category of records, as appropriate), EPA calculated a $5,000 to $25,000 gravity-based penalty. *Id.* at 33. For failure to provide EPA importation records and information about total quantities of vehicles covered by their COCs for seven engine families, EPA calculated a $25,000 penalty per engine family, for a total of $175,000. *Id.* These records are essential for EPA to determine compliance, especially the size and volume of a company's business. For failure to provide EPA certification and emission testing records for sixteen engine families, EPA calculated a $5,000 penalty per engine family, for a total of $80,000. *Id.* at 34.

These records are essential for EPA to determine emission consequences of vehicles in use in the United States. For failure to timely respond to EPA's Request for Information, EPA calculated a one-time penalty of $5,000 plus a $150 penalty for each of the 209 days the response was late, resulting in a total penalty of $36,350. *Id.*

EPA then increased the gravity component of the proposed penalty amounts for the recordkeeping violations by 20% to reflect Respondents' degree of willfulness or negligence. EPA believed this increase was warranted because although Jonway USA and Shenke USA certified that all vehicles under their COCs would comply with the CAA and its regulations, they failed to keep track of the quantities of vehicles introduced into United States commerce. *Id.* at 34-35. In addition, these two respondents had explicitly stated that they would make emission test records available to EPA but, upon inspection, they did not have the records. *Id.* at 35. EPA also increased the gravity component by 10% to reflect Respondents' degree of non-cooperation based on Respondents' failure to properly respond to EPA's information request and their failure to discuss the case, negotiate, or answer the Complaint. *Id.* EPA did not seek an economic benefit component for the recordkeeping violations. *Id.* at 32.

The Board finds that EPA's proposed penalty for the recordkeeping violations is within the Clean Air Act statutory maximum for these types of violations and takes into account the required statutory factors. The Act clearly allows for a per day assessment for failure to respond to an EPA request for information. *See* CAA § 205(a), 42 U.S.C. § 7524(a) (highway motorcycles); 40 C.F.R. § 1068.101(a)(2) (recreational vehicles).

There is no information in the record warranting a reduction of the penalty proposed by EPA. For example, the record does not indicate that Respondents took any action to remedy the

violations. Nor does the record contain any information suggesting that the proposed penalty would have an adverse effect on Respondents' ability to continue in business.

For all the reason explained above, the Board concludes that EPA's proposed penalty amounts are consistent with the Clean Air Act and the record of this proceeding.

V. *CONCLUSION AND ORDER*

The Board hereby finds all Respondents to be in default and finds that Respondents have violated Title II, Part A of the Clean Air Act as alleged in the Complaint. The Board assesses a total civil penalty of $1,258,582 as follows: (1) $908,962 against all Respondents, jointly and severally, and (2) an additional $349,620 against Jonway USA and Shenke USA, jointly and severally.

Payment of the full amount of these civil penalties shall be made within thirty (30) days of this Default Order and Final Decision, unless the parties file a motion to reconsider this Default Order and Final Decision as described below. Payment shall be made by one of the following methods:

a) Submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

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

b) Submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed by overnight mail to:

U.S. Bank

Government Lockbox 979077
U.S. EPA Fines & Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

c) Wire transfer to the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA= 021030004
Account= 68010727
SWIFT Address= FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

* Note: Foreign banks must use a United States Bank to send a wire transfer to the US EPA.

d) Through Automated Clearinghouse (ACH) using Vendor Express:

U.S. Treasury REX I Cashlink Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - checking

e) Debit card or credit card online payment:

https://www.pay.gov/paygov
Enter SFO 1.1 in the search field
Open form and complete required fields

If paying by check, a transmittal letter identifying the subject case and the EPA docket number, as well as the Respondent's name and address, must accompany the check. All payments should be identified with "Docket No. CAA-HQ-2014-8032."

If Respondent fails to pay the penalty within the prescribed statutory period after entry of this decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

The parties shall have thirty (30) days to file a motion to reconsider this default order, the same length of time Respondents would have had to appeal this decision had the Board not been the Presiding Officer. 40 C.F.R. § 22.30(a). In this matter, the parties' administrative remedies before EPA shall not be exhausted until such motion is filed and the Board has ruled on such motion, or the time for filing such motion has passed without a motion being filed.[21]

So ordered.[22]

Dated:
November 14, 2014

ENVIRONMENTAL APPEALS BOARD

By: _____
Catherine R. McCabe
Environmental Appeals Judge

[21] The Board is exercising its discretionary authority to require a motion to reconsider as a prerequisite to judicial review as an additional safeguard fostering a fair determination. *See* 40 C.F.R. § 22.4(a)(2).

[22] The three-member panel deciding this matter is composed of Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Catherine R. McCabe. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Default Order and Final Decision, in the matter of Jonway Motorcycle (USA) Co., Ltd., Shenke USA, Inc., Jonway Group Co., Ltd., Shanghai Shenke Motorcycle Co., Ltd., Zhejiang JMStar Shenke Motorcycle Co., Ltd., and Zhejiang Jonway Motorcycle Manufacturing Co., Ltd., CAA Appeal No. 14-(03), were sent to the following persons in the manner indicated:

Certified Mail,
Return Receipt Requested:

Jonway Motorcycle (USA) Co., Ltd.
Shenke USA, Inc.
Attention: Xiaotong Qi
1503 Kelly Boulevard
Carrolton, TX 75006

Jonway Motorcycle (USA) Co., Ltd.
Shenke USA, Inc.
Attention: Xiaotong Qi
1501 Kelly Boulevard
Carrolton, TX 75006

Jonway Motorcycle (USA) Co., Ltd.
Shenke USA, Inc.
Attention: Xiaotong Qi
c/o Nitro PowerSports, LLC
1942 I-35 E. North
Carrolton, TX 75006

Shenke USA, Inc.
Attention: Huai Yi Wang or Wei Guo
1503 Kelly Boulevard
Carrolton, TX 75006

By Interoffice Mail:

Sybil Anderson (1900R)
Headquarters Hearing Clerk
Office of Administrative Law Judges

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

By International Mail:

Guo Wei
Zhe Jiang Jonway Motorcycle Manufacturing Co., Ltd
Chang pu
HouRuan Village
Lu Qiao
Tai Zhou City
Zhe Jiang Province
China 318050

Dated: 11/14/2014

Annette Duncan
Secretary