IN RE PEACE INDUSTRY GROUP

CAA Appeal No. 16-01

FINAL DECISION

Decided December 22, 2016

Syllabus

This case arises from an enforcement action that EPA's Air Enforcement Division ("Enforcement Division") brought against two Chinese corporations for Clean Act violations involving mobile sources. CAA §§ 202-19, 42 U.S.C. §§ 7521-54.

Following the corporations' failure to file prehearing exchanges of information, Administrative Law Judge M. Lisa Buschmann ("ALJ") issued a Default Order and Initial Decision against them. Although the ALJ found that the Enforcement Division failed to properly serve the complaint, she held that any defect in service was waived because the Chinese corporations had each filed answers to the complaint. The ALJ adopted without change the penalty the Enforcement Division proposed – using the applicable mobile source penalty policy – and assessed a total penalty of $1,574,203 – $525,988 against both corporations jointly and severally, and $1,048,215 against one of the corporations individually.

Upon examination of the Default Order and the administrative record, the Board elected to exercise its *sua sponte* review authority under 40 C.F.R. §§ 22.27(c), .30(b), because the ALJ failed to ensure that this substantial penalty was consistent with the "record of the proceeding or the Act," 40 C.F.R. § 22.17(c), and therefore "appropriate." *Id*. § 22.24(a). Although the Enforcement Division advised the ALJ that it was proposing a penalty following the applicable mobile source penalty policy, the Board's review of the record indicated that the Division had failed to provide, and the ALJ had failed to request, certain information critical to determining the proposed penalty under the policy. The Board also elected to exercise *sua sponte* review because of significant concerns that the ALJ may have applied an incorrect standard for determining whether the Enforcement Division had properly served the two Chinese corporations with the complaint. Although the Enforcement Division served the complaint by certified mail, return receipt requested, on the corporations' agent at the address of record, the ALJ concluded that service was not effective because the return receipt was signed by someone other than the agent.

As a result of the Board's exercise of its *sua sponte* review authority, the Enforcement Division submitted a brief which provided the Board with the missing

information needed to determine the penalty under the mobile source penalty policy. And in doing so, the Enforcement Division found it had erred – by approximately $88,000 – in its earlier calculation and proposed to reduce the penalty accordingly. On the issue of service, the Enforcement Division argued that it properly served the corporations with the complaint. The Chinese corporations did not file a reply.

Held: (1) With the additional explanation and information provided by the Enforcement Division as a result of the Board's exercise of *sua sponte* review, the Board is now able to determine that the penalty, as modified to account for the Division's error, is consistent with the record of the proceeding, the Act, and the mobile source penalty policy, and is therefore appropriate. Accordingly, the Board is now assessing a penalty on both corporations jointly and severally of $525,988, and an additional penalty of $959,594 against one of the corporations individually. In future matters, the Board expects that the Enforcement Division will provide the ALJ and the public with the information necessary to demonstrate that a proposed penalty is appropriate for the alleged violations. The Board further expects that the ALJ will not simply accept the Agency's proposed penalty but will ensure that the Agency's explanation is sufficient and, where information is lacking, require the Agency to supplement the record.

(2) The ALJ erred in determining that the Enforcement Division had not properly served the complaint. Contrary to the decision below, the Board finds that the Division properly served the two Chinese corporations with the complaint by addressing and mailing the complaint by certified mail, return receipt requested, to the designated agent at the address of record. The fact that someone else at the address of record signed the return receipt is immaterial. To the extent that any ALJ or Regional Judicial Officer decisions conflict with the Board's determination on this issue, the Board's decision is controlling.

(3) Because the Board finds that the Division properly served the complaint on the Chinese corporations, the Board does not address the ALJ's determination that the corporations waived any defect in service by filing answers to the complaint. In all other respects, the Board affirms the Default Order and Initial Decision.

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

Opinion of the Board by Judge Ward:

I. *STATEMENT OF THE CASE*

This matter concerns an enforcement action that EPA's Air Enforcement Division ("Enforcement Division") brought against two Chinese corporations for Clean Air Act violations involving mobile sources. Following the corporations' failure to file prehearing exchanges of information, Administrative Law Judge M. Lisa Buschmann ("ALJ") issued a Default Order and Initial Decision against them. Although the ALJ found that the Enforcement Division failed to properly serve the

complaint, she held that any defect in service was waived because the Chinese corporations had each filed answers to the complaint. The ALJ assessed a penalty of $525,988 against both corporations jointly and severally, and an additional penalty of $1,048,215 against one of the corporations individually for those violations.

The Environmental Appeals Board ("Board") elected to exercise *sua sponte* review of the Initial Decision because the ALJ failed to ensure that this substantial penalty was consistent with the "record of the proceeding or the Act," 40 C.F.R. § 22.17(c), and therefore "appropriate." *Id*. § 22.24(a). Although the Enforcement Division advised the ALJ that it was proposing a penalty using the applicable mobile source penalty policy, the Board's review of the record indicated that the Division failed to provide, and the ALJ failed to request, certain information critical to determining the proposed penalty under the policy. The Board also elected to exercise *sua sponte* review because of significant concerns that the ALJ may have applied an incorrect standard for determining whether the Enforcement Division had properly served the two Chinese corporations with the complaint. Although the Enforcement Division served the complaint on the corporations' agent at the address of record, the ALJ concluded that service was not effective because the return receipt was signed by someone other than the agent.

As a result of the Board's exercise of its *sua sponte* review authority, the Enforcement Division provided the Board with the missing information needed to determine the penalty under the mobile source penalty policy. And in doing so, the Enforcement Division found it had erred – by approximately $88,000 – in its earlier calculation and proposed to reduce the penalty accordingly. With the additional information provided, the Board is now able to determine that the penalty, as modified to account for the Division's $88,000 error, is consistent with the record of the proceeding, the Act, and the mobile source penalty policy, and is therefore appropriate. Accordingly, the Board is now assessing a penalty on both corporations jointly and severally of $525,988, and an additional penalty of $959,594 against one of those corporations individually. In future matters, the Board expects that the Enforcement Division will provide the ALJ and the public with the information necessary to demonstrate that a proposed penalty is appropriate for the alleged violations. The Board further expects that the ALJ will not simply accept the Agency's proposed penalty but will ensure that the Agency's explanation is sufficient and, where information is lacking, require the Agency to supplement the record.

And on the issue of service, the Board concludes that the ALJ erred in determining that the Enforcement Division had not properly served the complaint.

Contrary to the decision below, the Board finds that the Division properly served the two Chinese corporations with the complaint by addressing and mailing the complaint by certified mail, return receipt requested, to the designated agent at the address of record. The fact that someone else at the address of record signed the return receipt is immaterial. And because the Board finds that the Division properly served the complaint on the Chinese corporations, the Board does not address the ALJ's determination that the corporations waived any defect in service by filing answers to the complaint. In all other respects, the Board affirms the Default Order and Initial Decision.

II. *STATUTORY AND FACTUAL BACKGROUND*

A. *The Clean Air Act's Mobile Source Program*

Under the Clean Air Act's Mobile Source program, the Environmental Protection Agency ("EPA" or "Agency") may impose administrative penalties against any person who imports or sells a highway motorcycle or recreational vehicle not in compliance with an EPA-issued certificate of conformity demonstrating that the vehicle meets U.S. air emission standards. The Agency may further impose penalties against any person who fails to include in the owner's manual for recreational vehicles certain emissions-related warranty information.[1]

When assessing penalties, the Clean Air Act requires that 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 * * *, 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 violations of its Mobile Source program, which provides guidelines for calculation of an appropriate penalty amount applying the statutory penalty factors, including the economic benefit and gravity-based components of a penalty. *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"). The Policy is available

[1] Clean Air Act ("CAA") § 205(c)(1), 42 U.S.C. § 7524(c)(1) (administrative penalty authority); *see also* CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1) (certificate of conformity requirements-highway motorcycles); CAA § 213, 42 U.S.C. § 7547, and 40 C.F.R. § 1068.101(a)(1) (certificate requirements-recreational vehicles); 40 C.F.R. §§ 1051.120(e) (warranty requirements-recreational vehicles), 1068.101(b)(6) (owner's manual warranty requirement for recreational vehicles).

using the following link: https://www.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf.

In an enforcement action, the Agency has "the burdens of presentation and persuasion that the violations occurred * * * and that the relief sought is appropriate." 40 C.F.R. § 22.24(a). And, when issuing a default order, such as the one at issue here, the ALJ shall order the relief proposed in the complaint or in the motion for default "unless the relief requested is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c); *see In re Mountain Village Parks, Inc.*, 15 E.A.D. 790, 797 (EAB 2013) (explaining that under 40 C.F.R. § 22.17(c), the ALJ has a responsibility "to evaluate carefully complaints to determine both whether the facts as alleged establish liability, and whether the relief sought is appropriate").

B. *Proceedings Below*

In June 2014, the Enforcement Division filed an administrative complaint 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 the Clean Air Act's Mobile Source program. CAA §§ 202-19, 42 U.S.C. §§ 7521-54.

In Counts 1 and 2 of the complaint, the Enforcement Division alleged that Zhejiang Peace and Bashan sold or imported over 10,000 highway motorcycles not in compliance with an EPA-issued certificate of conformity. Complaint, *In re Peace Ind. Group (USA), Inc., Zhejiang Peace Ind. and Trade Co., Ltd., Chongqing Astronautic Bashan Motorcycle Mnfg. Co., Ltd., and Blue Eagle Motor, Inc.*, Docket No. CAA-HQ-2014-8119 ("Complaint"), at 12-14 (June 27, 2014).

In Counts 3, 4 and 5, the Enforcement Division alleged that Zhejiang Peace sold or imported over 12,000 recreational vehicles not in compliance with an EPA-issued certificate of conformity. Complaint at 14-15.

Lastly, in Count 6, the Enforcement Division alleged that Zhejiang Peace failed to meet its warranty obligations with regard to the same recreational vehicles at issue in Count 3 by failing to include the emissions-related warranty information in the owner's manual. Complaint at 15-16.

Respondents answered the complaint, and all parties participated in alternative dispute resolution in an unsuccessful attempt to settle the matter. But after that, Respondents stopped participating in the proceedings, and failed to file their pre-hearing exchanges of information. In response, the Enforcement Division

moved for, and the ALJ issued, a Default Order and Initial Decision against Respondents ("Default Order").[2] *See* Default Order at 2-3, 19-21.

In her Default Order, the ALJ concluded that the Enforcement Division had not properly served the complaint on Respondents because someone other than the corporations' agent had signed the return receipt. The ALJ found, however, that the Respondents' filing of an answer waived any defect in service. *Id*. at 5-7. Citing the Enforcement Division's Rebuttal Prehearing Exchange ("Rebuttal Exchange"),[3] the ALJ further concluded that the record supported an assessment of penalties against Zhejiang Peace and Bashan jointly and severally for Counts 1 and 2, and an assessment of penalties against Zhejiang Peace for Counts 3 through 6. *Id.* at 15. The ALJ adopted without change the penalty that the Enforcement Division proposed (which purported to follow the Mobile Source Penalty Policy) and assessed a total penalty of $1,574,203 – $525,988 against Zhejiang Peace and Bashan jointly and severally for Counts 1 and 2, and $1,048,215 against Zhejiang Peace individually for Counts 3 through 6. *Id.* at 15-18 (repeating the penalty narrative summary from the Division's Rebuttal Exchange), 19-21.

Following a preliminary examination of the Default Order and the Division's Rebuttal Exchange, the Board elected to exercise *sua sponte* review of the Default Order because the Enforcement Division had failed to provide, and the ALJ had failed to request, certain information critical to determining the penalty under the Mobile Source Penalty Policy. Rather, the Division's Rebuttal Exchange relied on by the ALJ contained only a narrative summary of how the penalty was determined. But that narrative failed to identify which vehicles in each of the six Counts were remediated, which is needed to determine the economic benefit and the gravity-based components of the penalty under the Penalty Policy. The narrative further failed to provide sufficient information on application of the Penalty Policy's multiple steps in calculating the gravity-based component for the six Counts.

[2] The full title of the Default Order is: Default Order and Initial Decision as to Zhejiang Peace Industry and Trade Co., Ltd., and Chongqing Astronautic Bashan Motorcycle Manufacturing Co., Ltd. (Mar. 29, 2016).

[3] The full title of the Rebuttal Exchange is: Complainant's Rebuttal Prehearing Exchange, *In re Peace Ind. Group (USA), Inc., Zhejiang Peace Ind. and Trade Co., Ltd., Chongqing Astronautic Bashan Motorcycle Mfg. Co., Ltd., and Blue Eagle Motor, Inc.*, Docket No. CAA-HQ-2014-8119 (Apr. 10, 2015).

The Board also elected to review the Default Order because of significant concerns over whether the ALJ applied the incorrect standard in concluding that the Enforcement Division had not properly served the two Chinese corporations with the complaint because someone other than the addressee or designated agent signed the return receipt.

The Enforcement Division timely filed its opening brief responding to the Board's *sua sponte* order. In its brief before the Board, the Division provided the missing information, a step-by-step explanation of its penalty calculations, as well as a proposed reduction in the penalty for Counts 3 through 6 (an approximately $88,000 reduction) because the Division had erred in its original calculations. The Division also argued that it had properly served Respondents with the complaint. Respondents did not file a response brief.

III. *ANALYSIS*

A. *The Enforcement Division's Revised Penalty Calculation is Consistent with the Clean Air Act and the Mobile Source Penalty Policy*

As the Board has made clear, an ALJ's role "is not to accept without question the [Agency's] view of the case, but rather to determine an appropriate penalty as required by 40 C.F.R. § 22.27. As part of [the ALJ's] evaluation, the [ALJ] must ensure that in the pending case the [Agency] has applied the law and the Agency's policies consistently and fairly." *In re Mountain Village Parks, Inc.*, 15 E.A.D. 790, 797 (EAB 2013) (quoting *In re John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 782 (EAB 2013)). In default cases, respondents have waived the right to contest factual allegations. But "[d]efault * * * does not constitute a waiver of a respondent's right to have [an ALJ] evaluate whether the facts as alleged establish liability or whether the relief sought is appropriate in light of the record." *Id*. at 798.

Based on the additional information and explanation that the Enforcement Division provided regarding the penalty after the Board exercised *sua sponte* review – including an approximately $88,000 penalty reduction because of the Division's error – the Board is now able to determine that the penalty is consistent with the record of these proceedings, the Clean Air Act, and the Mobile Source Penalty Policy, and that the penalty is appropriate. As reduced, the Board is assessing a penalty on Zhejiang Peace and Bashan jointly and severally of $525,988, and an additional penalty of $959,594 against Zhejiang Peace individually.

1. *The Mobile Source Penalty Policy*

The Mobile Source Penalty Policy is a complex 29-page document setting forth EPA's approach to assessing penalties for violations of the Clean Air Act's Mobile Source program. As noted above, the Enforcement Division advised the ALJ that it was proposing a penalty using the Penalty Policy, but the Division failed to provide certain information critical to doing so. In order to demonstrate why that missing information was critical to determining a penalty under the Penalty Policy, we first describe key aspects of the Policy below. We then turn to the Policy's application in this case.

a. *Overview of Penalty Policy*

In assessing penalties under the Penalty Policy for noncompliance, the Agency first computes a "preliminary deterrence amount" consisting of an economic benefit component and a gravity component. The Policy then authorizes the Agency to apply adjustment factors to the preliminary deterrence amount to arrive at an initial penalty target. *See* Penalty Policy at 3-4.

Certain information is necessary to calculate the economic benefit and gravity components of the preliminary deterrence amount, including: (1) the number of vehicles imported or sold in violation of the Clean Air Act; and (2) the horsepower of the engines in those vehicles. Also needed – but not provided by the Enforcement Division – are two additional pieces of information: (1) whether the company "remediated" the violations, and if so, for which vehicles and (2) when multiple categories of vehicles are involved, whether the Agency exercised its discretion to address them together for purposes of assessing a penalty using certain "scaling factors." *Id*. at 3-26 (Sections II & III).

b. *The Economic Benefit Component and Remediated Vehicles*

In calculating economic benefit, the Penalty Policy multiplies the number of vehicles imported or sold in violation of the Clean Air Act by a dollar figure per vehicle that approximates the economic benefit of noncompliance. For vehicles with smaller engines (i.e., under 15 horsepower), the cost of emission controls is generally more than $1 per horsepower. In that circumstance, the Penalty Policy uses $15 per vehicle as a "rule of thumb" estimate for vehicles with engines under 15 horsepower (such as those at issue in this case). *Id*. at 8-9.

But, to provide incentives for companies to remedy violations involving vehicles that lack a certificate of conformity, the Penalty Policy reduces or eliminates the economic benefit for "remediated" vehicles. So, if a company exports some or all of those vehicles out of the United States or the vehicles are

otherwise prevented from being imported into the United States (i.e., they are deemed "remediated"), the economic benefit is equal to the "rule of thumb" estimate times the number of vehicles that remain in the United States (i.e., those vehicles deemed not "remediated"). *Id.* at 9-10.

c. *The Gravity Component and Use of "Scaling Factors"*

In calculating the gravity component, the Penalty Policy first calculates what it terms an "adjusted base per-vehicle/engine" gravity amount by multiplying a dollar per horsepower figure by the vehicle engine's horsepower, and then by an adjustment factor to reflect the egregiousness of the violation: a factor of 1 for minor violations, 3.25 for moderate and 6.5 for major. *Id.* at 17.

With that "adjusted base per-vehicle/engine" gravity amount, the Policy then calculates a "multiple vehicle/engine" gravity amount, using Table 3 at page 18 of the Policy. To start, the "multiple vehicle/engine" gravity amount is the number of vehicles/engines times the "adjusted base per-vehicle/engine" amount. But Table 3 then applies scaling factors to reduce the "adjusted base per-vehicle/engine" gravity amount as the number of vehicles increases. *Id.* at 18 (Table 3). The scaling factor is "1" for the first 10 vehicles, meaning that the "adjusted base per-vehicle/engine" gravity amount is unchanged for those first 10 vehicles. The scaling factor for next 90 vehicles is "0.2," resulting in an "adjusted base per-vehicle/engine" gravity amount that is 20% of the original.

The Penalty Policy notes, however, that enforcement personnel have discretion as to how they apply scaling factors where a case involves "vehicles or engines with multiple violations." *Id*. at 18. The Policy explains that enforcement personnel may either apply the scaling factors across the board to the "sum total of all violations" or break the violations into separate "groups" and "re-start the scaling factor in Table 3 for each group." *Id*.[4]

In a separate section (on pages 18-20), the Policy provides guidance in assigning scaling factors when enforcement personnel decide to address together "multiple categories of violations representing more than one size vehicle/engine and/or more than one egregiousness category." *Id*. In these circumstances, the Policy states that the categories of violations should be assigned scaling factors starting with the violation category with "the largest adjusted base per-

[4] The Policy provides several examples of factors that may warrant separate grouping of violations such as different transactions, vehicle models, engine types, or periods of time. Penalty Policy at 18.

vehicle/engine gravity [amount] first, and ending with the violation category with the smallest adjusted base per-vehicle/engine gravity [amount]." *Id*. at 18-19.

The decision on whether to address categories together for scaling purposes or separate them into groups can significantly affect the penalty amount. For example, if two different categories of vehicles (Categories A and B) are grouped separately in applying Table 3 at page 18 of the Penalty Policy, all ten of the vehicles in Category A would have a scaling factor of one and ten of the vehicles in Category B would also have a scaling factor of one with the remainder of the Category B vehicles receiving a scaling factor of 0.2. But by addressing Categories A and B together and following the ordering principle explained at pages 18-20 of the Penalty Policy, the scaling factors and multiple vehicle/engine gravity amount would differ. The ten Category A vehicles would be scaled first, because they have a higher adjusted base penalty, and therefore would retain a scaling factor of one. However, the 90 Category B vehicles would now all fall under the second tier scaling factor of 0.2. This results in a lower "multiple vehicle/engine" gravity amount for the 100 vehicles and a lower "average per-vehicle" gravity amount for the 90 Category B vehicles.

With this background, we turn to the penalty calculations in this case.

2. *The Penalty Calculation for Counts 1-2*

The ALJ – relying on the penalty the Enforcement Division proposed in its Rebuttal Exchange – assessed a total penalty of $525,988 against Zhejiang Peace and Bashan jointly and severally for Counts 1 and 2. *See* Default Order at 15-17 (citing Rebuttal Exchange at 4-6). Because the ALJ adopted without change the proposed penalty, this decision will focus on the Enforcement Division's penalty as proposed in its Rebuttal Exchange.

The Enforcement Division alleged in the complaint that Counts 1 and 2 involved 10,707 highway motorcycles: 7,895 in Count 1 and 2,812 in Count 2. Complaint at 12-13. In its Rebuttal Exchange, the Division further explained that the Count 1 motorcycle engines had a horsepower of 3.2 and the Count 2 engines had a horsepower of 2.8; and that 10,145 of the total 10,707 motorcycles were not remediated.[5] Rebuttal Exchange at 4. For purposes of determining the

[5] 562 of the 10,707 motorcycles were deemed "remediated" because they were detained by the United States Department of Homeland Security's Bureau of Customs and Border Protection at the point of importation and generated no economic benefit. Rebuttal Exchange at 4.

"preliminary deterrence amount," the Division calculated the economic benefit for Counts 1 and 2 as $152,175 and the gravity component as $287,548. *Id.*

Determining how the Enforcement Division calculated the economic benefit for Counts 1 and 2 is relatively simple. Because the engine horsepower of the motorcycles in both Counts is less than 15, the $15 "rule of thumb" estimate of economic benefit per vehicle applies to both Counts. Multiplying 10,145 motorcycles not remediated by $15 per motorcycle yields a combined economic benefit for both Counts of $152,175.

Determining how the Enforcement Division calculated the gravity component, however, is not as simple. In its Rebuttal Exchange, the Enforcement Division explained that it based the "multiple vehicle/engine" gravity amount for Counts 1 and 2 on the violations being "major" warranting an adjustment factor of 6.5. The Division further explained that it increased the "multiple vehicle/engine" gravity amount by 30% for those motorcycles not remediated (calculated by multiplying the "average-per-vehicle" gravity amount by both the number of vehicles not remediated and 30%). Rebuttal Exchange at 4.

With the information the Enforcement Division provided in its Rebuttal Exchange, one can calculate the "adjusted base per-vehicle/engine" gravity amount for the motorcycles in Count 1 as $1,664, and Count 2 as $1,456.[6] But beyond that, one cannot determine how the Enforcement Division calculated the gravity component figure of $287,548 based on the Division's Rebuttal Exchange.

First, that gravity component figure depends on whether the Enforcement Division addressed the violations in Counts 1 and 2 together for purposes of applying the scaling factors in calculating the "multiple vehicle/engine" gravity amount. That decision affects both the combined "multiple vehicle/engine" gravity amount and the "average per-vehicle" gravity amounts. Those figures are lower if the Counts are addressed together. The Division's Rebuttal Exchange was silent on whether Counts 1 and 2 were addressed together, and if anything, suggested the contrary, by referring to Table 3 and citing page 18 of the Penalty Policy (where the calculation is done for a single category of vehicles) rather than pages 18-20 of the Policy (where the calculation addresses multiple vehicle categories together). *Compare* Rebuttal Exchange at 4 *with* Penalty Policy at 18-20.

[6] The calculation for Count 1 is as follows: 3.2 horsepower x $80/horsepower x 6.5 [egregiousness factor] = $1,664. The calculation for Count 2 is as follows: 2.8 horsepower x $80/horsepower x 6.5 [egregiousness factor] = $1,456.

Second, the Rebuttal Exchange failed to identify by Count which motorcycles were not remediated. Because the "average per-vehicle" gravity amount differs for Counts 1 and 2 – at a minimum because of differing engine horsepower – one needs to know how many motorcycles in Count 1 versus Count 2 were not remediated in order to calculate the 30% increase to the "multiple vehicle/engine" gravity amount.

In response to the Board's exercise of *sua sponte* review, the Enforcement Division has now provided in its brief on appeal what it should have included in its Rebuttal Exchange – a step-by-step explanation of its penalty calculation with the missing information by Count of motorcycles not remediated. The Enforcement Division also made clear that it addressed Counts 1 and 2 together for purposes of calculating the "multiple vehicle/engine" gravity amount using the approach found at pages 18-20 of the Policy.

Accordingly, with this additional explanation and information, the Agency has demonstrated that the gravity component of the Agency's penalty assessment for Counts 1 and 2 supports the overall penalty assessment for these counts of $525,988.

3. *Penalty Calculation for Counts 3-6*

For Counts 3 through 6, the ALJ again relied on the Enforcement Division's proposed penalty calculation in its Rebuttal Exchange and assessed a total penalty of $1,048,215 against Zhejiang Peace individually. *See* Default Order at 17-18 (citing Rebuttal Exchange at 6-8).

In its complaint, the Enforcement Division alleged that Counts 3 through 5 involved 12,252 recreational vehicles: 5,908 in Count 3 and 6,122 in Count 4, and 222 in Count 5. Complaint at 14-15. Count 6 involved the same 5,908 recreational vehicles at issue in Count 3, but for a different violation – the failure to include warranty information in the owner's manual. *Id.* at 15-16. In the Rebuttal Exchange, the Division explained that the Count 3 and Count 4 engines had a horsepower of 6.3, that the Count 5 engines had a horsepower of 7.0, and that 11,718 vehicles were not remediated.[7] Rebuttal Exchange at 6. The Division

[7] 534 of the 12,252 recreational vehicles were deemed "remediated" because they were detained by the United States Department of Homeland Security's Bureau of Customs and Border Protection at the point of importation and generated no economic benefit. Rebuttal Exchange at 6.

calculated the economic benefit for Counts 3 through 6 as $264,390 and the gravity component as $602,942. *Id.*

In calculating economic benefit, the Enforcement Division explained that it again used the $15 "rule of thumb" estimate for economic benefit per vehicle because the engine horsepower is less than 15 for all vehicles in Counts 3 through 6, and that it applied that $15 economic benefit to the 11,718 vehicles not remediated. *Id.* But multiplying $15 times 11,718 vehicles yields $175,770, a figure far less than $264,390, and the Division provided no explanation in its Rebuttal Exchange for the discrepancy.

As to the gravity component, the Enforcement Division explained in its Rebuttal Exchange that it based the "multiple vehicle/engine" gravity amount on: (1) the violations under Counts 3 through 5 as "major" warranting an adjustment factor of 6.5, and (2) the Count 6 violations as "moderate" for an adjustment factor of 3.25. The Division further explained that it increased the "multiple vehicle/engine" gravity amount by 30% for those vehicles not remediated. *Id.*

With the information the Division did provide in the Rebuttal Exchange, one can calculate the "adjusted base per-engine/vehicle" gravity component for the vehicles in Counts 3 and 4 as $3,276, Count 5 as $3,640, and Count 6 as $1,638.[8] But beyond that, one cannot determine how the Enforcement Division calculated the gravity component figure of $602,942 based on the information in the Rebuttal Exchange.

As with Counts 1 and 2, that gravity component figure depends on whether the Enforcement Division addressed the violations in Counts 3 through 6 together for purposes of applying the scaling factors in calculating the "multiple vehicle/engine" gravity amount. Yet again, the Division's Rebuttal Exchange was silent on this point and, if anything, suggested the contrary by referring to Table 3 and citing the Penalty Policy at page 18 (where the calculation is done for a single category of vehicles). *See* Rebuttal Exchange at 6.

The Rebuttal Exchange similarly failed to identify by Count how many vehicles were not remediated. Because the "average per-vehicle" gravity amount differs for Counts 3 through 6 – at a minimum because of differing engine horsepower – one needs to know how many vehicles in Count 3 through 6 were not

[8] The calculation for Counts 3 and 4 is as follows: 6.3 horsepower x $80 per horsepower times 6.5 = $3,276. The calculation for Count 5 is as follows: 7.0 x $80 x 6.5 = $3,640. And the calculation for Count 6 is as follows: 6.3 x $80 x 3.25 = $1,638.

remediated, in order to calculate the 30% increase to the "multiple vehicle/engine" gravity amount.

As with Counts 1 and 2, the Enforcement Division has now provided in its brief on appeal what it should have included in its Rebuttal Exchange – a step-by-step explanation of its penalty calculation for Counts 3 through 6, with the missing information by Count of the vehicles not remediated. And in doing so, the Division identified a significant error of $88,620 in its original economic benefit calculation for Count 6 because under the Penalty Policy, it is inappropriate to use the "rule of thumb" estimate for the warranty violations at issue in Count 6. *See* Penalty Policy at 11. Lastly, the Division made clear that it addressed Counts 3 through 6 together for purposes of calculating the "multiple vehicle/engine" gravity amount using the approach found at pages 18-20 of the Policy.

Accordingly, with this additional explanation and information – including the deduction of the $88,620 error from the proposed penalty – the Agency has demonstrated that the economic benefit and gravity components of the Agency's penalty assessment for Counts 3 through 6 support an overall penalty assessment for these counts of $959,594.

4. *The Board Affirms the Penalty as Corrected by the Agency Following the Board's Exercise of Sua Sponte Review*

Unlike the penalty narrative provided to the ALJ in the Rebuttal Exchange, the Enforcement Division's brief on appeal provides a step-by-step explanation of its penalty calculations, including all necessary information and assumptions. Where the Agency moves for a default judgment in a penalty case, it is critical that the Agency provide, and for the ALJ to require, the necessary information and explanation to support the proposed penalty. This is so, not only so the Board can properly exercise its responsibilities in reviewing a default order, but also so that the public can understand, and have confidence in the appropriateness of, the penalty assessed and the Agency's exercise of its enforcement authority.

In future matters, the Board expects that the Enforcement Division will provide the ALJ and the public with the explanation and information necessary to understand the proposed penalty and to demonstrate that the proposed penalty is appropriate under the applicable statute and the penalty policy. *See* 40 C.F.R. § 22.24; *In re New Waterbury, Ltd*, 5 E.A.D. 529, 536-39 (EAB 1994) (discussing the Agency's burden of proof in establishing that a proposed penalty is appropriate).

The Board similarly expects that the ALJ will ensure that the Agency has met its burden of establishing that the penalty is appropriate, particularly in a

default situation, and where the Agency has failed to do so, that the ALJ will seek any necessary additional explanation and information. And it bears repeating: an ALJ's role "is not to accept without question the [Agency's] view of the case, but rather to determine an appropriate penalty as required by 40 C.F.R. § 22.27. As part of [the ALJ's] evaluation, the [ALJ] must ensure that in the pending case the [Agency] has applied the law and the Agency's policies consistently and fairly." *In re Mountain Village Parks, Inc.*, 15 E.A.D. 790, 797 (EAB 2013) (quoting *In re John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 782 (EAB 2013)).

Having now been provided with the necessary explanation and information, the Board concludes that the Enforcement Division's proposed penalty, as reduced by approximately $88,000 by the Division, following the Board's exercise of *sua sponte* review, is consistent with the record of the proceedings, the Clean Air Act, and the Penalty Policy, and is therefore appropriate. The Board therefore assesses a total civil penalty of $1,485,582 as follows: (1) $525,988 against Zhejiang Peace and Bashan jointly and severally for the violations in Counts 1 and 2, and (2) an additional $959,594 against Zhejiang Peace for the violations in Counts 3 through 6.

B. *The Enforcement Division Properly Served Respondents with the Complaint*

Turning to the service issue, we describe below the standards governing service of a complaint on a corporation and then analyze whether the Enforcement Division properly served Respondents in this case. Based on that analysis, we conclude that the Division properly served Respondents with the complaint and that the ALJ applied overly restrictive standards for service on a corporation in concluding otherwise.

1. *Regulations Governing Service*

Under 40 C.F.R. part 22, the Agency shall serve the complaint "on respondent, or a representative authorized to receive process on respondent's behalf." 40 C.F.R. § 22.5(b)(1)(i). The regulations further provide that in the case of a domestic or foreign corporation, the Agency shall serve the complaint 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." *Id.* § 22.5(b)(1)(ii)(A). Part 22 defines "person" to include any "individual, partnership, association [or] corporation," and so contemplates that a corporation

may designate under Federal or state law either an individual or an entity such as a corporation as its agent for service of process. *See id.* § 22.3(a).[9]

Part 22 further provides that the complainant may serve the complaint "by certified mail with return receipt requested." *Id.* § 22.5(b)(1)(i). "Service of the complaint is complete when the return receipt is signed." *Id.* § 22.7(c).

Reading these provisions together then, the Agency may serve a corporation by sending the complaint by certified mail, return receipt requested, to the respondent's agent for service of process, typically by mailing it to the address of record designated for that purpose. *In re Jonway Motorcycle (USA) Co., Ltd.*, CAA Appeal No. 14-03, at 8 n.13 (Nov. 14, 2014) (Default Order and Final Decision). And in serving a corporation, Part 22 contemplates that the Agency will address the certified mail to a named individual – "an officer, partner, a managing or general agent [of the respondent]" – or to a named individual or entity (such as a corporation) "authorized * * * to receive service of process." 40 C.F.R. § 22.5(b)(1)(ii)(A).[10]

But under a plain reading of Part 22, proper service on a corporation by certified mail does not require that the named addressee be the person who signs the return receipt. Part 22 is instead silent as to who must sign the return receipt, requiring only that the return receipt be "properly executed." *Id.* § 22.5(b)(1)(iii). Notably, part 22 does 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." *In re Jonway*, at 8 n.14 (emphasis added) (citing U.S. Postal Service, *A Customer's Guide to Mailing* 9, 21 (Sept. 2014)); *see also* http://pe.usps.com/text/dmm100/extra-services.htm (link to *A Customer's Guide to Mailing* (Jan. 2016) (see section titled: "Adding Extra Services")). And in the past, when part 22 has required actual delivery to a specific individual, it has expressly so stated, using specific language to that effect. *See* 40 C.F.R. § 22.05(b)(1)(iv)(A) (1998) (under prior version of part 22, requiring service on state or local government "by delivering a copy of the complaint to the chief executive officer

[9] For example, in Georgia, where Respondents in this matter were doing business, a registered agent may be a corporation. *See* Ga. Code Ann. § 14-2-501 (2016).

[10] *In re Medzam. Ltd.*, 4 E.A.D. 87 (EAB 1992) is not to the contrary. In *Medzam*, the Board held that service was defective because the complaint was addressed only to the respondent corporation and not to a named individual or entity authorized to receive service on behalf of the corporation as required by 40 C.F.R. § 22.5(b)(1)(ii)(A).

thereof"); *see also In re Medzam, Ltd.*, 4 E.A.D. 87, 93 (EAB 1992) (noting difference between service by delivery to a specific person and service by mailing).

This plain reading is further well-supported by long-standing Board precedent. In 1986, the Board's predecessor ruled that where the Agency serves a complaint by certified mail addressed to the corporation's agent for service of process, the Agency has properly served the complaint, even though the return receipt was signed by a secretary and not the agent as the addressee. *In re Katzson Bros., Inc.*, 2 E.A.D. 134, 135 (CJO 1986). On appeal, the Tenth Circuit upheld this determination, holding that where service on a corporation is by certified mail, return receipt requested, the mailing "need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual." *Katzson Bros., Inc. v. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988) (reversing *In re Katzson Bros., Inc.*, 2 E.A.D. 134, on other grounds).

On several occasions since, the Board has reiterated this point regarding service on a corporation by certified mail and signing of the return receipt. In *Medzam*, the Board stated that the "proper focus" under part 22 is "whether the Complaint was properly addressed and mailed * * * rather than on the authority of the employee who signed the receipt on behalf of the [addressee]." *Id.* at 93. In *Jonway*, the Board held that an agent's "signature on the return receipt * * * was not a necessary prerequisite to a finding of valid service on a corporation." *Id.* at 8. And the Board recently found again that a return receipt signed by an individual other than the addressee "is no impediment to proper service at [the addressee's] address of record." *In re Polo Development, Inc.*, CWA Appeal No 16-01, slip op. at 4 n. 2 (EAB, Mar. 17, 2016) (concluding that respondent's counsel was properly served with an order when the order was sent by certified mail, return receipt requested, and an individual at counsel's address of record signed the receipt).[11]

In short, in serving a corporation, if EPA properly addresses and mails the complaint by certified mail, and an individual at that address signs the return receipt, service is complete. While EPA "has control over how the mail is

[11] The Board recognizes that *Katzson* and *Medzam* were decided under a pre-1999 version of the part 22 rules where service was considered effective if a certified mailing was "directed to" the proper person. *See* 64 Fed. Reg. 40,138 (July 23, 1999) (amending the language in part 22). However, because the 1999 amendments were not intended to substantially revise the service rules or result in any procedural or substantive changes, the pre-1999 decisions are relevant in the present case. *See id.* (stating that the 1999 rule change will "remove inconsistencies, fill in gaps in [part 22] by codifying accepted procedures, and make [part 22] more clear and easily understood").

addressed," EPA has no control "whatsoever over who receives and signs for it," *Medzam*, 4 E.A.D. at 93, or "any duty * * * to look behind the corporation's doors to ensure that its chosen methods for mail distribution guarantee receipt by the individual addressee," *In re Katzson Bros.*, 2 E.A.D. at 136 (internal quotations and citations omitted). Instead, it is the duty of the corporation and its agent for service of process "to ensure that properly addressed certified mail is correctly processed." *Id*. Indeed, any other interpretation of the part 22 regulations "would severely hinder service of process on corporations by certified mail, since the postal service employee would have to wait * * * until the officer, partner, or agent could sign the return receipt." [12] *Katzson Bros.,* 839 F.2d at 1399.

With these standards governing service of a complaint on corporations in mind, the Board now turns to whether EPA properly served Respondents with the complaint in this case.

2. *The Agency Properly Served Respondents' Agent*

As described above, under the Clean Air Act's Mobile Source program, the EPA may impose administrative penalties against any person who imports or sells a highway motorcycle or recreational vehicle not in compliance with an EPA-issued certificate of conformity. *See infra* Section II.A. And when applying for a certificate of conformity, applicants must designate an agent in the United States for service of process. 40 C.F.R. §§ 86.416-80(a)(2)(ix) (applicable to highway motorcycles), 1051.205(w) (applicable to recreational vehicles). Service on that agent "constitutes service on [the certificate holder] or any of [its] officers or employees for any action by EPA or otherwise by the United States related to the [mobile source] requirements." 40 C.F.R. §§ 86.416-80(a)(2)(ix), 1051.205(w).

In their applications for certificates of conformity, both Respondents designated Peace Industry Group (USA) Inc., as their agent for service of process in the United States. Respondents further identified the agent's President, Qiuping Wang, as the primary contact and President. *See* Application for EPA Certificate

[12] In its brief, the Enforcement Division states that part 22 requires both a proper addressee and signature by a proper recipient. Br. at 20-21. The Board disagrees to the extent that the Enforcement Division is suggesting that the person signing the return receipt must be an agent of the respondent corporation, or otherwise authorized by Federal or state law to sign for certified mail. While part 22 requires "service" on either respondent or a "representative authorized to receive service on respondent's behalf," the focus is on whom the Agency must serve, not who must sign for the certified mail. To read the regulation otherwise would in effect require the Agency to use a form of restricted delivery, which is not required. Nor is it practical to do so for the reasons stated above.

of Conformity for Engine Family 9PCGC.050SAA [Motor Cycles] at 8-9, and Application for EPA Certificate of Conformity for Engine Family 9PCGX.250AMA [Recreational Vehicles] at 8-9 (Exhibits 2 and 98 to Complainant's Prehearing Exchange).

The Enforcement Division served the complaint by certified mail, return receipt requested, to Respondents' agent, Peace Industry Group (USA), "Attention: Qiuping Wang" at the agent's address of record for service. *See* Default Order at 5-6.[13] Although the U.S. Postal Service delivered the complaint to the agent's address of record, the return receipts were not signed by Qiuping Wang for Peace Industry Group (USA) as the addressee. Rather they were signed by an individual present at the time of delivery, Ms. Amy Tang. *Id.* at 5.

The ALJ concluded that the Enforcement Division had not properly served Respondents with the complaint. Without citing or discussing any Board

[13] The Enforcement Division mailed the complaint to the Respondents' agent at the following address: 2649 Mountain Industrial Blvd., Tucker, GA 30084. While this address differs from the agent's address of record as of the 2008 applications, the agent's address had been updated at least as early as 2013 to the address used by the Enforcement Division to mail the complaint, as reflected in Peace Industries' annual registration filings with the Georgia Secretary of State. These filings can be accessed at the State of Georgia's Corp. Div. Business Search link: https://ecorp.sos.ga.gov/BusinessSearch (last visited Dec. 22, 2016). Although this information is not in the record on appeal, the Board takes official notice of it pursuant to 40 C.F.R. § 22.22(f), which provides that official notice may be taken of any matter that can be judicially noticed in the federal courts. The Board notes that under the Federal Rules of Evidence, a court may take judicial notice of "a fact that is not subject to reasonable dispute because * * * it can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed R. Evid. 201(b)(2). The Board finds that the above-referenced website maintained by the Georgia Secretary of State reflecting information contained in annual registration filings is sufficiently reliable to allow for official notice of the information contained therein. *See In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 36 (EAB 2010) (stating that the Board may take official notice of "public documents such as * * * public records."), *aff'd sub. nom Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012); *In re City of Denison*, 4 E.A.D. 414, 419 n.8 (EAB 1992) (taking official notice of an EPA delegation of authority as an official government record).

The Board also notes that the change of address was not highlighted, let alone explained, by either the Enforcement Division in any of its filings or the ALJ in the Default Order. In future matters where the Agency moves for default against a respondent, the Board expects the Agency to demonstrate and the ALJ to confirm that any mailing was sent to an appropriate address.

precedent, the ALJ concluded that the return receipts "do not indicate whether [Ms. Tang] is an 'agent' or 'addressee,' and do not establish that she is 'an officer, partner, a managing or general agent, or any other person authorized by appointment * * * to receive service of process' for Zhejiang Peace and Bashan and therefore do not establish that they were properly served." *Id.* The Board disagrees.

As described above, the part 22 regulations make clear that service of a complaint on a corporation may be accomplished by certified mail, return receipt requested, to the agent for service of process. The regulations further make clear that service on the corporation is complete when the return receipt is signed. *See* 40 C.F.R. §§ 22.5(b)(1)(i); 22.7(c). The Enforcement Division correctly addressed the mailing of the complaint to the agent Respondents designated to receive service of process, Peace Industry Group (USA), Inc., through its primary contact, as well as its President, Qiuping Wang, at the agent's address of record. And the complaint was sent certified mail and successfully delivered, as demonstrated by the signed return receipt. Although Ms. Tang was not the addressee, she was present at the agent's address of record, accepted delivery and signed the return receipt. By necessity, corporations conduct business on a day-to-day basis through the use of assistants and subordinates who are commonly responsible for tasks such as accepting mail, signing return receipts and ensuring that mail is properly delivered to the addressee. Where, as here, (i) the complaint is sent to the corporation's agent at the agent's address of record by certified mail, return receipt requested, and (ii) an individual present at the agent's address of record accepts and signs the return receipt, the Agency has met its burden of proof to demonstrate that service of the complaint on the corporation was proper.[14] *See Katzson Bros.,* 2 E.A.D. at 136.

[14] In *Jonway,* the Board held that EPA had properly served a corporation where EPA served the complaint on the agent for service of process, even though it was sent certified mail to a known business address of the agent other than the address of record and signed for by someone whose title or position was not identified in the record. *In re Jonway Motorcycle (USA) Co., Ltd.,* CAA Appeal No. 14-03, at 7-8 (Nov. 14, 2014) (Default Order and Final Decision). As the Board noted, it "generally expects EPA to serve complaints * * * at the official address of record designated for service," but "[w]here respondents fail to accept service at their officially designated addresses [as in the *Jonway* case], * * * there is nothing in the rules that prevents EPA from serving their designated agent at an address where he can be found." *Id.* at 8 n.13. Otherwise, parties could avoid service by refusing to accept service at their designated address or by listing a sham address for service. *Id.* The Board also found relevant the fact that respondents had acknowledged actual receipt of the complaint. The Board does not reach the question of whether the result in *Jonway* would have been different absent respondents' acknowledgement of actual receipt.

While a respondent may seek to rebut this demonstration, it will carry a heavy burden to do so. Simply arguing that the signature on the return receipt is illegible will likely not suffice, and in this digital age, may become more common than not. It bears repeating that EPA has no control "whatsoever over who receives and signs for [the certified mail]," *Medzam*, 4 E.A.D. at 93, including how legible that signature is, and it is the duty of the corporation and its agent for service of process "to ensure that properly addressed certified mail is correctly processed." *Katzson Bros.*, 2 E.A.D. at 136; *see* Bill Ervolino, *Illegible Signatures are a New Sign of the Times*, NorthJersey.com (June 28, 2015, 12:15 pm), http://www.northjersey.com/news/business/illegible-scribblings-are-a-new-sign-of-the-times-1.1364665?page=all (last visited Dec. 22, 2016).

But the Board notes without deciding that other facts may call into question whether the U.S. Postal Service properly delivered the mail – for example, if the person who purportedly signed the return receipt was not in the office that day; or if the return receipt is dated as being signed on a day that the office was closed. *Cf. Crabill v. Charlotte Mecklenburg Bd. of Educ.*, 423 Fed. Appx. 314, 321-22 (4th Cir. 2011) (respondent successfully rebutted the presumption of actual receipt of a right-to-sue notice by presenting evidence that lack of receipt was the result of circumstances beyond her control).

In this case, however, Respondents did not raise an issue concerning service, nor is there any evidence in the record that Ms. Tang was not in a position to receive and sign for the certified mail delivered to the agent's address of record. Instead, the record shows that Ms. Tang was an in-house bookkeeper and accountant for Peace Industry Group (USA) and was "familiar with the books and records and book keeping policy and procedures." *See* Peace Industry Group (USA)'s Initial Prehearing Exchange at 1 (Mar. 25, 2015). For all these reasons, the Board concludes that the Enforcement Division properly served Respondents with the complaint.[15]

However, the Board strongly encourages the Agency to serve respondents in the first instance at the agent's address of record.

[15] A prior ALJ decision suggested that service of a complaint is not perfected where the return receipt is signed by someone other than the addressee or where the complainant does not establish that the person signing the return receipt is an "officer, partner, a managing or general agent, or any other person authorized" to receive service of process. *See Geason Enterprises, LLC*, 2014 EPA ALJ LEXIS 6 (EPA Feb. 6, 2014) (holding that a return receipt failed to provide evidence of proper service where the person signing was not identified as an "agent" for the addressee). To the extent that this or any other ALJ or

As stated above, the ALJ concluded that even if service of the complaint on the Chinese corporations was not perfected, the corporations waived any objections to service by filing answers to the complaint without objecting to service. *See* Default Order at 6. Because the Board concludes that the Enforcement Division properly served the complaint on the Chinese corporations in this matter, the Board does not reach the issue of waiver. The Board notes, however, that the only case the ALJ cited in support of her determination on waiver is a federal case interpreting the Federal Rules of Civil Procedure. The ALJ did not cite any Board precedent addressing waiver of defenses if not included in an answer under 40 C.F.R. § 22.15(b),[16] and the ALJ did not acknowledge that the Board is not bound by the Federal Rules.[17] Going forward, ALJs should cite and address relevant Board precedent in future penalty matters.

Regional Judicial Officer decisions conflict with the Board's determination on this issue, the Board's decision is controlling.

In addition, the Board notes that it is not overruling or modifying its decision in *In re Las Delicias Community*, 14 E.A.D. 382 (EAB 2009). *Las Delicias* involved an unincorporated community association, where a community member other than the addressee and official representative of the association signed the certified mail receipt. In that case, the Board closely examined whether the member who signed the receipt was also "an officer, partner, a managing or general agent, or any other person authorized * * * by Federal of State law to receive service of process," such that the receipt of service is valid. *Las Delicias*, 14 E.A.D. at 391; 40 C.F.R. § 22.5(b)(1)(ii)(A). While the regulations governing service under part 22 do not distinguish between unincorporated associations and corporations, several factors distinguish *Las Delicias* from this matter. In particular, the Board noted that in *Las Delicias*, the structure of unincorporated associations can be more fluid than a corporate entity. *Las Delicias*, 14 E.A.D. at 395. Further, it does not appear as if the association had a fixed place of business. Rather, the community consisted of forty-eight individuals residing in twelve separate households. *Id.* at 384. Under these unique circumstances (not present in this case), the Board closely examined the issue of whether the person signing the return receipt was an authorized agent.

[16] *See, e.g., In re: J. Phillip Adams*, 13 E.A.D. 310, 325-26 (June 29, 2007) (authority to treat defenses as waived flows from 40 C.F.R. § 22.5(b) but delayed assertion is not necessarily fatal where the Agency is not prejudiced by the delay); *In re Zaclon, Inc.*, 7 E.A.D. 482, 490 (EAB 1998) (although 40 C.F.R. § 22.5(b) requires that all defenses be raised in an answer, waiver is not always strictly enforced); *In re Lazarus. Inc.* 7.E.A.D. 318, 335 (EAB 1997) (excusing delay in raising Paper Work Reduction Act public protection defense where the Agency was not prejudiced by the delay).

[17] *See, e.g., In re Chempace Corp.*, 9 E.A.D. 119, 135 n.22 (EAB 2000). However, the Board may look to federal court decisions on similar procedural rules to inform the

IV. *CONCLUSION*

For the reasons stated above, the Board concludes that the Enforcement Division's proposed penalty, as reduced by approximately $88,000 in light of the Division's error, is consistent with the record of the proceeding, the Clean Air Act, and the Mobile Source Penalty Policy, 40 C.F.R. § 22.17(c), and therefore "appropriate." *Id*. § 22.24(a). The Board therefore assesses a total civil penalty of $1,485,582 as follows: (1) $525,988 against Zhejiang Peace and Bashan jointly and severally for the violations in Counts 1 and 2, and (2) an additional $959,594 against Zhejiang Peace for the violations in Counts 3 through 6. Payments shall be made by any method or combination of methods specified on EPA's payment website https://www.epa.gov/financial/makepayment. Payments must be identified with "Docket No. CAA-HQ-2014-8119." If Respondents fail 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 Board further holds that the Enforcement Division properly served the two Chinese corporations with the complaint. Under these circumstances, the Board does not address the ALJ's determination that the corporations waived any defect in service by filing answers to the complaint. In all other respects, the Board affirms the Default Order and Initial Decision.

So ordered.

Board's interpretation of its administrative rules. *See In re Bayer CropScience LP and Nichino America, Inc.*, 17 E.A.D. 228, 276 n.32 (EAB 2016); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 (EAB 1997).