UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Peace Power Sports, Inc.	)	Docket No. CAA-HQ-2014-8063
doing business as **LUXE USA,**	)	
	)	
	)	Dated: August 3, 2015
Respondent.	)	
	)	

DEFAULT ORDER AND INITIAL DECISION

I. Procedural History

The Complaint in this matter was issued on May 16, 2014 by Complainant, the United States Environmental Protection Agency, under Section 205(c)(1) of the Clean Air Act ("CAA"), 42 U.S.C. §7524(c)(1). The Complaint alleges three counts of violation, alleging that Respondent sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported, or caused the foregoing, with respect to approximately 444 highway motorcycles and 23 recreational vehicles which were not covered by a certificate of conformity with regulatory emission requirements, and thereby violated Sections 203(a)(1) of the CAA, 42 U.S.C. §§ 7522, and 40 C.F.R. § 1068.101(a)(1). Respondent submitted an Answer to the Complaint on June 23, 2014, denying allegations in the Complaint, and thereafter the parties engaged in Alternative Dispute Resolution in an attempt to settle this matter. A settlement not having been reached, the undersigned was designated to preside in this matter.

On December 5, 2014, Complainant moved to amend the Complaint, seeking to include additional separate and independent grounds for the claims in the Complaint that the subject motorcycles are not covered by certificates of conformity. Respondent did not file any response to the Motion. On January 13, 2015, Complainant's Motion to Amend Complaint was granted and a Prehearing Order was issued, directing Complainant to file a prehearing exchange on February 20, 2015, and Respondent to file a prehearing exchange on March 20, 2015. On January 14, Complainant filed the First Amended Complaint ("Amended Complaint") and mailed it to Respondent.

After filing its Prehearing Exchange, on February 26, 2015 Complainant filed a Motion for a Default Order ("Motion"), on the basis that Respondent failed to file an Answer to Complainant's Amended Complaint within the time allowed under the applicable procedural rules. The Motion requests either an order finding that Respondent has defaulted on all claims alleged in this proceeding and assessing a civil penalty of $169,613, or an order deeming admitted the facts alleged in the Amended Complaint that were not present in the initial Complaint.

Thereafter, Respondent submitted an Answer to Complainant's Motion for Default ("Response") and an Initial Prehearing Exchange, with a certificate of service for both documents dated March 26, 2015, filed with this Tribunal on April 2. On April 3, Complainant submitted a Rebuttal Prehearing Exchange, in which Complainant reaffirms its Motion on the basis of the untimeliness and insufficiency of the Response and Initial Prehearing Exchange. To date, nothing further has been received from Respondent.

II. Positions of the Parties

In its Motion, Complainant shows its proof of service of the Amended Complaint on Respondent's counsel's office on January 20, 2015, and points out that Respondent failed to file an answer to the Amended Complaint, which was due on February 9 according to the 20-day period allowed by the applicable procedural rules. Complainant asserts that its counsel telephoned Respondent's counsel informing him of the February 9 deadline and of Complainant's intention to move for default on or after February 17. Attached to the Motion are the following documents: (1) a letter from G. Michael Smith of the firm Smith Collins, LLC—apparently now practicing as Smith, Collins & Fletcher P.A. -- indicating that Mr. Smith, who also signed Respondent's Answer to the first Complaint, is authorized to represent Respondent in this matter; (2) Certified Mail receipts indicating that the Amended Complaint was served on Respondent's counsel on January 20, 2015, and the proof of service was served on Respondent February 9, 2015; and (3) a signed affidavit from Evan Belser, counsel for Complainant, declaring that he spoke with Respondent's counsel by phone on February 12, 2015, during which conversation he notified Mr. Smith that an Answer was past due.

In its Response, Respondent asserts that in conversation through counsel, it had advised Complainant's attorney that it had no objection to the additional claims in the Amended Complaint. Respondent argues that the added claims "are essentially repetitive in nature and have in essence been responded to by the Respondent in its original answer and do not require additional response." Response at 1. Nevertheless, in response to the Amended Complaint, Respondent "hereby denies any new facts which are materially different from the original facts alleged and reaffirms that they are in fact denied as they always were." Response at 2.

Complainant believes this is not a clear denial because it conflicts with the immediately preceding sentence in the Response, "Respondent agrees with counsel for the EPA that the added

facts may be admitted to the extent that they materially and specifically differ from the allegations which have been denied in the original answer to the EPA's complaint." Complainant's Rebuttal Prehearing Exchange at 2.

Complainant in its Rebuttal Prehearing Exchange points out that the Response, even if construed as an answer to the Amended Complaint or response to the Motion, was filed 52 days after the deadline for filing an answer to the Amended Complaint and 16 days after the time allowed for responding to a motion, and the Initial Prehearing Exchange was filed on April 2, which is 13 days after the deadline set in the Prehearing Order. Complainant argues that Respondent's failure to comply with prehearing exchange requirements as ordered provides additional and independently sufficient grounds for a default order.

III. Standards for Default

The procedural rules governing this proceeding are codified at 40 C.F.R. Part 22 ("Rules"). Section 17, governing default, provides in relevant part as follows:

> (a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint [or] upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . . 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. * * * *
>
> (b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. * * * *
>
> (c) *Default order.* When the Presiding Officer finds that default has occurred, [she] shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17. The word "may" in the introductory clause of 40 C.F.R. §22.17(a) indicates that a finding of default is a matter of discretion.

The Rules set out requirements and standards as to the prehearing exchange and discovery, and for failures and omissions thereof, provide the following:

(g) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in [her] discretion:
(1) Infer that the information would be adverse to the party failing to provide it;
(2) Exclude the information from evidence; or
(3) Issue a default order under § 22.17(c).

Default is a harsh and disfavored sanction, to be reserved for only the most egregious behavior. A "[d]efault judgment is appropriate where the party against whom the judgment is sought has engaged in willful violations of court rules, contumacious conduct, or intentional delays." *Forsythe v. Hales*, 255 F. 3d 487, 490 (8th Cir. 2001) (quoting *Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856 (8th Cir. 1996). Default "is not an appropriate sanction for a marginal failure to comply with the time requirements," *Id.* (internal quotations omitted), and is "not favored by the Federal Rules." *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274 (5th Cir. 1989). Moreover, parties are "not entitled to a default judgment as a matter of right, even where the defendant is technically in default." *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996).

The Environmental Appeals Board has also "endorsed the general principle of law disfavoring default as a means of concluding cases." *JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005). It has noted that "doubts are generally resolved in favor of the defaulting party." *Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 131 (EAB 1992). "[W]here a respondent fails to adhere to a procedural requirement, the Board has traditionally applied a 'totality of the circumstances' test to determine whether a default order should be or has properly been entered," considering "whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there is a valid excuse or justification for not complying with the procedural requirement." *JHNY*, 12 E.A.D. at 384. Mere lack of willful intent to delay proceedings does not excuse noncompliance with the Rules. *Jiffy Builders, Inc.*, 8 E.A.D. 315, 321 (EAB 1999).

In regard to the importance of the prehearing exchange requirements and default for failure to comply with them, the Board has explained:

> [B]ecause federal administrative litigation developed as a truncated alternative to Article III courts that intends expedition . . . , the prehearing exchange plays a pivotal function - ensuring identification and exchange of all evidence to be used at hearing. . . [, it] clarifies the issues to be addressed at hearing and allows the parties and the court an opportunity for informed preparation for hearing . . . [and thus] it is not surprising that the regulations recognize that failure to comply with an ALJ's order requiring exchange is one of the primary justifications for entry of default.

JHNY, Inc., 12 E.A.D. at 382.

Default may be appropriate where a prehearing exchange is both untimely and substantially incomplete. For example, the Board upheld default judgment against a respondent who filed a prehearing exchange which described proposed testimony and identified specific financial documents previously provided to opposing counsel, but which was not filed until after an Order to Show Cause was issued, and did not include any proposed exhibits or any explanation of why the penalty should be reduced. *JHNY,* 12 E.A.D. at 385-390. The Board also upheld default judgment against a respondent who elected to proceed without counsel, for an untimely and insufficient one-page prehearing exchange. *Rybond*, 6.E.A.D. 614.

In examining the totality of circumstances, the Board has taken into consideration the respondent's likelihood of success on the merits, stating that it is permissible to find good cause not to enter a default order where the respondent shows a strong probability that litigating the defense will produce a favorable outcome. *Pyramid Chemical Company* 11 E.A.D. 657, 662, 669 (EAB 2004)(upon consideration of motion for default and respondent's response to order to show cause, default judgment granted for respondent's failure to file answer to complaint); *Jiffy Builders,* 8 E.A.D. at 322; *Rybond,* 6 E.A.D. at 628.

IV. Relevant Provisions of the CAA and Regulations

Respondent is alleged to have violated 203(a)(1) of the CAA, 42 U.S.C. §§ 7522, and 40 C.F.R. § 1068.101(a)(1). Section 203(a)(1) of the CAA prohibits 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 . . . the importation into the United States, of any new motor vehicle or new motor vehicle engine . . . unless such vehicle is covered by a certificate of conformity issued (and in effect) under regulations prescribed under this part . . . ."

Section 1068.101 of the regulations promulgated under the CAA provides in pertinent part:

> (a) The following prohibitions and requirements apply to manufacturers of new engines and manufacturers of equipment containing these engines . . .
> (1) Introduction into commerce. You may not sell, offer for sale, or introduce or deliver into commerce in the United States any new engine or equipment . . unless it has a valid certificate of conformity for its model year and the required label or tag. You also may not take any of the actions listed in the previous sentence with respect to any equipment containing an engine subject to this part's provisions, unless the engine has a valid and appropriate certificate of conformity . . . . We may assess a civil penalty up to $31,500 for each engine in violation.

V. Discussion and Conclusions as to Default

The first question to address is whether to consider the Response where it was not filed timely. The Rules provide 15 days after service of a motion to file a response, plus five days where it was served by mail. 40 C.F.R. §§ 22.7(c), 22.16(b). A party who fails to respond within that time period "waives any objection to the granting of the motion." 40 C.F.R. 22.16(b). The due date for a response to the Motion was March 18, 2015, and Response was filed about two weeks later. Given that waiving objection to the motion at issue here may result in a default order, and that default is a disfavored sanction, the fact that the Response was not filed within the allotted time period will not preclude it from being considered.

The next question is whether the failure to file a timely answer to the Amended Complaint warrants a finding of default. The Rules at 40 C.F.R. § 22.14(c) provide that a respondent "shall have 20 additional days from the date of service of the amended complaint to file its answer" thereto. As a preliminary note, when an answer to a complaint has been filed, and subsequently an amended complaint is served but no answer to the amended complaint is filed within the 20-day time limitation, a finding of default does not necessarily follow. If the judge did not order the respondent to file an answer, the Rules do not provide that a failure to file an answer to an *amended* complaint is a basis for a default order. Where the new or revised allegations in the amended complaint do not add any factual information that is beyond the scope of what the previously filed answer responded to, then no answer to the amended complaint is required.

In this case, the Amended Complaint did add significant factual information. The Complaint alleged that the subject vehicles were not covered by certificates of conformity ("COC") because they do not conform with certain specifications in the COC application. Specifically, the Complaint alleged in Counts 1 that 394 motorcycles had carburetors with different manufacturer and part number than stated in the COC application, and in Count 2 that 50 motorcycles had an adjustable air-fuel mixture screw where the COC application stated that there are no adjustable parameters. The Amended Complaint added specifications in the COC application with which the subject motorcycles did not conform, namely for Count 1, that the 394 motorcycles' catalytic converters contained none or almost none of the platinum described in the COC, and that their engine displacement was 62 cubic centimeters (cc) whereas the COC application specified 49 cc, and for Count 2, that the other 50 motorcycles also had carburetors with different manufacturer and part number than stated in the COC application. The amendments did not result in any additional counts of violation, vehicles at issue, or separate paragraphs in the Complaint. Nevertheless, they are additional grounds for finding violations, and are alleged facts for which an answer is required. Respondent's Answer to the original Complaint simply denied paragraphs of the Complaint and asserted that it complied with the CAA, which does not serve to deny the additional allegations of fact in the Amended Complaint. Under the Rules, an answer is required to "clearly and directly admit, deny or explain each of the factual allegations in the complaint" and state the facts which the respondent disputes. 40 C.F.R. § 22.15(b).

In the Response, Respondent's denial of "any new facts which are materially different," despite the rather confusing sentence preceding this denial, may be deemed an answer to the Amended Complaint. As such, it was untimely, being filed several weeks after the February 9 due date. However, that fact does not alone warrant a finding of default in the circumstances of this case.

The untimeliness of the Response must be considered along with the untimely Prehearing Exchange. Not only was it filed more than a week after the due date, and after it had received the Motion for Default Order, but it is also incomplete and fails to inform Complainant of any specific issues of fact as to liability. It fails to adequately respond to Complainant's Prehearing Exchange, which includes 76 documentary exhibits in support of the allegations in the Amended Complaint. The Prehearing Order specifically required Respondent to include in its Prehearing Exchange "[a] statement identifying which of the particular allegations of fact in Paragraphs 16(a), 16(b) and 17(a) of the First Amended Complaint that Respondent denies and which of the particular allegations of fact therein than Respondent admits." Respondent's Prehearing Exchange does not include any such statement. The Prehearing Order also required "[a] narrative statement explaining in detail the legal and/or factual bases for any . . . assertions in the Answer defending against factual allegation(s) in the First Amended Complaint, and/or a copy of any documents in support of such assertion(s)." Respondent failed to include any statement or document in support of its assertion that it was in compliance with the CAA and implementing regulations.

Furthermore, the witness list provides no information as to any issues regarding the alleged violations or a penalty. Respondent's Prehearing Exchange lists three witnesses, two of which are Respondent's general manager and accountant, and simply adopts the description of their testimony in Complainant's Prehearing Exchange, namely, Respondent's business operations and finances. The testimony of the third witness, an EPA inspector, is described as "his directions and purpose in taking discovery pictures at the Respondent's warehouse," which is not relevant to allegations of violation at issue in this proceeding. Respondent's Initial Prehearing Exchange at 1. Respondent suggests it may present expert testimony, but does not provide any subject of testimony or field of expertise, merely stating it "will supplement this portion of the response upon securing expert witnesses competent to testify on such technical matters deemed necessary to prove its case." *Id.* No such supplement has been received to date.

Respondent includes in its Prehearing Exchange some arguments, but they appear only to relate to issues regarding penalty assessment. It argues that a significant number of the vehicles were remediated by U.S. Customs at the border, and the other vehicles were not tested for emissions, which should "allow for diminishment and/or obviation" of the penalties. *Id.* Respondent also states as evidence of its cooperation that it fired MotorScience "prior to any court action" once it realized it was not performing required tests under CAA standards. In addition, Respondent argues that it "has no control over the Respondent factories in China" and that over the past few years they have realized the necessity for strict compliance. *Id.* at 2.

Respondent does not suggest which, if any, witnesses would testify in support of these arguments.

In its request for locating the hearing in Dallas, Respondent states that it intends to have live demonstrations of dismantling of a subject vehicle, preferably at its facility in Dallas. Respondent provides no explanation as to what it intends to show with such live demonstration, or what defense it relates to. It does not relate to any of the arguments set forth in the Prehearing Exchange.

Respondent has not submitted any proposed exhibits and provides no indication that it intends to offer any exhibits in support of its arguments, except for the following:

> Copies of all documents which have been previously produced by the Respondent as part of the record exchange to demonstrate its limited ability to pay pursuant to 42 U.S.C. § 7524 9 (sic). The Respondent requests that these documents already in the possession of Complainant be admitted for evidentiary purposes and any additional documents which are later discovered which address similar questions posed by the Complainant be admitted in hearings before the Administrative Hearing Judge.

Respondent's Initial Prehearing Exchange at 1. This statement relates to ability to pay a penalty, which is relevant only to penalty assessment and not to Respondent's liability for the violations.

All of these deficiencies lead to the conclusion that Respondent's Prehearing Exchange is substantially incomplete and that Respondent is in default. In addition, the Respondent's Prehearing Exchange evidences a lack of defenses against the violations alleged in this proceeding. The Response confirms Respondent's lack of defenses, or at least a disinterest in defending, against a finding of liability for the violations alleged in this proceeding. It states, "The Respondent shows since the beginning the Parties understood that costs associated with challenging the base allegations being made by EPA were prohibitively expensive to address as to be totally financially destructive of the Respondent's business." Response at 1. Considering the totality of circumstances, including Respondent's likelihood of success on the merits as to liability, issuance of a default order is appropriate in the circumstances of this case. As provided by the Rules, the default constitutes "an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a).

Furthermore, it is concluded that the exhibits included with Complainant's Prehearing Exchange support Complainant's prima facie case for the violations alleged in the First Amended Complaint.

VI. Discussion and Conclusions as to Penalty Assessment

Complainant requests issuance of a default order either with assessment of a penalty of $169,613 as to all claims in this case, or a default order only as to the additional claims in the Amended Complaint, allowing Complainant to seek the statutory maximum until it resolves all outstanding issues and claims and demands a penalty. The latter option does not fit the circumstances, where Respondent has failed to defend against any claims of violation. The remaining question is whether the default order should include assessment of the penalty proposed by Complainant.

The Rules provide that when a default has occurred, the default order shall be issued "as to any or all parts of the proceeding" and that if it "resolves all outstanding issues and claims in the proceeding," the relief proposed by the complainant "shall be ordered" unless it is "clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c)

In the Motion, Complainant explains its calculation of the proposed penalty under the Clean Air Act Mobile Source Civil Penalty Policy – Vehicle and Engine Certification Requirements (Jan. 16, 2009) ("Penalty Policy") and under the statutory penalty assessment factors set forth in Section 205(c)(2) of the CAA and reiterated in 40 C.F.R. § 1068.125: "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 noncompliance 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."

Complainant explains that it first calculated a preliminary deterrence amount, which is the sum of the economic benefit and the gravity of the violation. The economic benefit was not applied to the 444 motorcycles referenced in the Complaint, which were remediated by the U.S. Bureau of Customs and border Protection denying their entry to the United States at the point of importation. Motion at 13. A "rule of thumb" was used to calculate the per-vehicle economic benefit of $1 per unit of horsepower but at least $15 per vehicle and engine, for the 23 recreational vehicles at issue in Count 3 of the Complaint, resulting in an economic benefit of $432, or $18.77 for each of the 23 vehicles.

The gravity of the violations was calculated as $153,801 based on the horsepower and number of engines, "major" level of egregiousness of the violation, and a 30% increase for failure to remediate the 23 recreational vehicles. According to Table 1 of the Penalty Policy (p. 16), vehicles are assessed a base per-engine penalty of $80 times the horsepower for the first 10 horsepower, plus $20 times the horsepower over 11 but under 100 horsepower. Complainant asserts that the vehicles in Counts 1 are 3.22 horsepower, in Count 2 are 2.82 horsepower, and in Count 3 are 18.77 horsepower. Thus, for Count 1 the base per-engine penalty is $80 times 3.22, or $257.6 per vehicle, and for Count 2, $225.60 per vehicle. For Count 3, the per-engine base penalty is $800 ($80 times 10) plus 8.77 times $20, or $975.40.

In the next step under the Penalty Policy, Complainant adjusted the penalties by a "major" level of egregiousness, for which the Penalty Policy provides that the per-engine penalties are multiplied by 6.5. The Penalty Policy states that the "major" level is appropriate where vehicles are uncertified and there is no information about the their emissions, and that if the violator is able to demonstrate that emissions do not exceed certification emissions levels under the COC, then "moderate" level is appropriate. Penalty Policy at 13. There is no information as to emissions levels in the case file, and Respondent has not offered any proposed evidence as to emissions.

The next step is the multiple vehicle gravity adjustment under Table 3 of the Penalty Policy (p. 18). The first ten vehicles are assigned a multiplier of 1, that is, the penalty does not change. The next 90 vehicles are assigned a multiplier of 0.2, and additional vehicles (up to 1,000) are assigned a multiplier of 0.04. The Penalty Policy provides (at p. 18) that with multiple categories of violation with more than one size engine or vehicle, the largest adjusted per-vehicle gravity figure should be calculated first.

Complainant increased the penalty for the 23 recreational vehicles in Count 3 by 30% for Respondent's failure to remediate them. This percentage figure is the maximum percentage adjustment for this factor provided in the Penalty Policy (p. 20), and reflects a violator's failure to stop the vehicles from being sold in commerce in the United States. The total gravity based penalty plus the economic benefit figure yields a preliminary deterrence figure of $154,233.

Next, Complainant increased the gravity component ($153,801) by 10%, yielding a final total penalty of $169,613, to reflect Respondent's degree of non-cooperation, based on the refusal of Mr. Zeliang Lu, Respondent's sole shareholder and principal of its primary vehicle vendor, to speak with Complainant and answer questions regarding Respondent's business operations and finance.

The Penalty Policy provides that a penalty is increased for the factor "size of business" where the company's net worth exceeds $50,000. Complainant did not increase the penalty for this factor because it was unable to ascertain the size of the business and it believes the proposed penalty has a sufficient deterrent effect without an increase for this factor. Complainant's Rebuttal Prehearing Exchange at 3-4. The Penalty Policy (p. 25) provides for an increase in the penalty if the respondent had prior CAA violations. Complainant did not increase the penalty for this factor. Complainant's Rebuttal Prehearing Exchange at 4.

As to the factor of ability to continue in business, or ability to pay the proposed penalty, Complainant asserts that since February 2014, it has requested that Respondent provide financial information to enable Complainant to assess this factor. In support, Complainant encloses letters it sent to Respondent reflecting financial information it requested that Respondent submitted and failed to submit, from February 28, 2014, September 10, 2014, and February 2, 2015. Complainant's Rebuttal Prehearing Exchange Exhibits ("CX") 77, 78, 79. They reflect that Respondent failed to respond to questions first posed in March 2014, including questions about

affiliations and financial relationships between Respondent and certain other companies, including foreign vehicle manufacturers, and loans to Respondent. The letter dated February 2, 2015 includes a request for Respondent to provide documents responsive to a list of 14 items, including credit card statements, inventory and financial information for 2014, and shipping documents, and to certify that the information provided is true and complete. CX 79. Complainant asserts in the Rebuttal Prehearing Exchange that as of April 3, 2015, Respondent has not provided the requested certification, documents and information. To date, there is no indication in the case file that Respondent has provided these items and information. Complainant presents a report of an EPA inspector's investigation on March 27, 2015, showing that Respondent remains in business with hundreds of vehicles in its inventory. CX 80. Complainant states that its expert forensic accountant, Cindy T. Vu, has reviewed all information provided by Respondent, and shared her findings with Complainant, upon which Complainant has determined that the proposed penalty need not be reduced based on the effect of the penalty on the ability to continue in business. Complainant asserts that Respondent pays its primary vehicle vendor for vehicles as cash flow allows, and has carried a very large account payable with no terms for repayment, and thus the proposed penalty would have little or no effect on its ability to continue in business. Complainant's Rebuttal Prehearing Exchange at 5. Complainant did not adjust the penalty for any other factors.

Complainant has shown that it calculated a penalty in accordance with the applicable statutory penalty assessment factors and with the Penalty Policy, and has provided a logical and reasonable analysis of its calculation. *New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994)("so long as each factor is touched upon and the penalty is supported by the analysis a prima facie case can be made."). It has also carried its burden to show in calculating the penalty that it adequately considered Respondent's ability to pay or continue in business.

Respondent does not contest Complainant's calculation of penalty under the Penalty Policy. In addition, Respondent has not presented any documents in support of a claim of inability to pay or to continue in business, despite being directed in the Prehearing Order to provide a copy of documents in support of such a claim. Respondent's request in its Prehearing Exchange that "documents already in the possession of Complainant be admitted for evidentiary purposes" does not identify any particular documents, and such documents may not be offered in evidence by Complainant. The request does not allow an informed preparation for hearing, and does not serve the purpose of the prehearing exchange. As the Board has stated, where a respondent "fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the . . . presiding officer may conclude that any objection to the penalty based upon inability to pay has been waived under the Agency's procedural rules and thus this factor does not warrant a reduction of the proposed penalty." *New Waterbury, Ltd.*, 5 E.A.D. at 542.

As to the other arguments in Respondent's Prehearing Exchange, the fact that the motorcycles were remediated at border was adequately taken into account by Complainant in assessing the penalty. Motion at 13, ¶ 47(a)(ii). The arguments that it fired MotorScience and

that it "has no control over that Respondent factories in China" are unsupported by any documentation and do not demonstrate that the proposed penalty is clearly inconsistent with the record of the proceeding or the CAA.

Accordingly, it is concluded that in the circumstances of this case, assessment of the proposed penalty is appropriate upon Respondent's default.

VII. Findings of Fact and Conclusions of Law

The following Findings of Fact and Conclusions of Law are based upon the Complaint, Answer, and Prehearing Exchanges filed in this case.

1. Respondent, a corporation organized under the laws of the State of Texas, is a "person" and a "manufacturer" within the meaning of Sections 216(1) and 302(e) of the CAA.

2. Respondent sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – approximately 444 uncertified highway motorcycles ("subject motorcycles") in violation of section 203(a)(1) of the CAA and 40 C.F.R. § 1068.101(a)(1).

3. The subject motorcycles were new "motorcycles" within the meaning of 216(3) of the CAA and 40 C.F.R. § 86.402-98 and subject to regulation under the CAA.

4. Of the subject motorcycles, 394 were not covered by a COC for engine family 9PCG.050SAA because they do not conform in all material respects to the specifications provided in the application for the COC that purportedly covers them. Specifically:

(a) They were equipped with carburetors whose manufacturer and part number do not match the manufacturer and part number provided in the COC application.

(b) They were equipped with catalytic converters which contained none or almost none of the platinum that is described in the COC application for this engine family.

(c) Their engine displacement was 62 cubic centimeters whereas the COC application stated that the engine displacement is 49 cubic centimeters.

5. No other COC covers the 394 subject motorcycles.

6. Of the subject motorcycles, 50 were not covered by a COC for engine family ABLEC.049PCE because they do not conform in all material respects to the specifications provided in the application for the COC that purportedly covers them. Specifically:

(a) They were equipped with adjustable parameters, namely an adjustable air-fuel mixture screw, whereas the COC application states, "There are no adjustable parameters on this engine family. There is no idle mixture adjustment."

(b) They were equipped with carburetors whose manufacturer and part number do not match the manufacturer and part number provided in the COC application.

7. No other COC covers the 50 subject motorcycles.

8. The non-conformances with the COC application, with regard to the 444 subject motorcycles, are material to the CAA certification requirements.

9. Respondent sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported – or caused the foregoing with respect to – approximately 23 uncertified recreational vehicles ("subject recreational vehicles") in violation of sections 203(a)(1) of the CAA and 40 C.F.R. § 1068.101(a)(1).

10. The subject recreational vehicles were new "recreational vehicles" within the meaning of 216(3) of the CAA and 40 C.F.R. § 1051.801 and subject to regulation under the CAA.

11. The 23 subject recreational vehicles were not covered by a COC for engine family CJPSX0.28A1B because they do not conform in all material respects to the specifications provided in the application for the COC that purportedly covers them. Specifically, they were equipped with catalytic converters which contained less platinum than is described in the COC application for the engine family.

12. This non-conformance with the COC application, with regard to the subject recreational vehicles, is material to the CAA certification requirements.

13. I find persuasive the rationale for the calculation of the proposed penalty set forth in the Motion for Default and Complainant's Rebuttal Prehearing Exchange, and such rationale is hereby incorporated by reference into this Order.

14. For Respondent's violations of Section 203(a)(1) of the CAA, and 40 C.F.R. § 1068.101(a)(1) as alleged in the First Amended Complaint, a penalty of $169,613 is the appropriate civil penalty to be assessed against Respondent.

ORDER

1. Complainant's Motion for a Default Order is **GRANTED.** Respondent is hereby found in **DEFAULT.**

2. Respondent Peace Power Sports, Inc. is ordered to pay a civil penalty in the amount of **$169,613** in the manner directed below.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made as follows:

(a) by any method, or combination of methods, provided on the website http://www2.epa.gov/financial/makepayment;

(b) identify each and every payment with "Docket No. CAA-HQ-2014-8063"; and,

(c) within 24 hours of payment, send proof of payment ("proof of payment" means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire of automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to the EPA requirements, in the amount due, and identified with Docket No. CAA-HQ-2014-8063) to both the EPA Office of Administrative Law Judges and Complainant, as follows:

1) The EPA Office of Administrative Law Judges:

By USPS (except Express Mail):
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900R
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

By any other carrier:
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building Room M1200
1300 Pennsylvania Ave., NW
Washington, D.C. 20004

2) Complainant:

By USPS (except Express Mail):
Morgan E. Rog
U.S. EPA, Office of Civil Enforcement
Mail Code 2249A
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

By any other carrier:
Morgan E. Rog
U.S. EPA, Office of Civil Enforcement
WJC Federal Building Room 4146A
1200 Pennsylvania Ave., NW
Washington, D.C. 20004

5. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11. Further, if Respondent fails to pay any portion of the penalty assessed, EPA may request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed, plus interest, enforcement expenses and a 10 percent quarterly nonpayment penalty, refer the debt to a credit reporting agency or a collection agency, or collect the debt by administrative offset. 42 U.S.C. § 7413(d)(5), 40 C.F.R. Part 13.

6. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

Lisa Busch

M. Lisa Buschmann
Administrative Law Judge

In the Matter of Peace Power Sports, Inc., d/b/a Luxe USA, Respondent
Docket No. CAA-HQ-2014-8063

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Default Order and Initial Decision**, dated August 3, 2015, was sent this day in following manner to the addresses listed below:

Sybil Anderson
Office of Administrative Law Judges
U.S. Environmental Protection Agency
(202)564-6261

Dated: **August 3, 2015**

One Copy by Electronic and Regular Mail to:

Evan M. Belser, Esquire
Air Enforcement Division
Office of Enforcement & Compliance Assurance
U.S. EPA
1200 Pennsylvania, Ave., N.W.
Room 4146A, Mail Code 2249A
Washington, DC 20460
belser.evan@epa.gov

Morgan E. Rog, Attorney Adviser
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. EPA
1200 Pennsylvania, Ave., N.W.
Room 4146A, Mail Code 2249A
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rog.morgan@epa.gov

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