UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Freedom Performance, LLC,	)	**Docket No. CAA-HQ-2019-8362**
	)	
Respondent.	)	

INITIAL DECISION AND PENALTY ORDER

I. PROCEDURAL HISTORY

This proceeding was commenced on March 18, 2019 with the filing of a Complaint[1] by the Complainant, the Director of the Air Enforcement Division, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency (EPA), against Respondent, Freedom Performance, LLC. The Complaint charged Respondent in three counts with 13,928 violations of Section 203(a)(3)(B) of the Clean Air Act (CAA), 42 U.S.C. § 7522(a)(3)(B). The violations arise from Respondent's sale of, or offer to sell, between May 1, 2015 and November 1, 2016, parts or components intended to bypass, defeat, or render inoperative devices or design elements installed on or in a motor vehicle in compliance with CAA regulations. As sanction for the violations, the Complaint seeks imposition of an administrative penalty assessed pursuant to CAA Section 205(a), 42 U.S.C. § 7524(a).

On August 15, 2019, Complainant filed a Motion for Default Judgment and Order [on penalty] ("Default Motion").[2] No response to the Default Motion was received. On December 16, 2019, I issued an Order on Complainant's Motion for Default Judgment and Order ("Default Order") which granted, in part, the Default Motion finding that Respondent was in default and liable for the 13,928 violations of CAA Section 203(a)(3)(B) as alleged in the Complaint. However, I denied Complainant's request for entry of a penalty and directed Complainant to file "further explanation or documentation in support of the proposed penalty, including as to the horsepower of the vehicles in which Respondent's violative devices were designed to be installed." Default Order ("Order") at 41. Complainant's Response to the Default Order was timely filed on January 16, 2020 ("Response"). To date, Respondent has not filed a reply to Complainant's Response.

[1] Complainant identified the Complaint as including material claimed to be confidential business information (CBI) pursuant to 40 C.F.R. § 2.203. Therefore, it filed a redacted copy of the Complaint for inclusion in the public record and an unredacted copy, identified as CBI-protected, with the Tribunal.

[2] Complainant identified the Default Motion and the 14 attachments thereto as including CBI (Preface to Default Motion at 1) and so filed a redacted copy of the Default Motion for inclusion in the public record and an unredacted copy, identified as CBI-protected, with the Tribunal.

II. RULES APPLICABLE TO PENALTY IMPOSITION UPON DEFAULT

As to imposition of a civil penalty in the case of default, the Consolidated Rules provide in pertinent part that –

> (b) . . . Where the motion [for a default] requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.
>
> (c) . . . 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(b), (c).

Rule 22.27(b) further provides in pertinent part that –

> (b) . . . If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

Id. § 22.27(b).

III. COMPLAINANT'S PENALTY CALCULATIONS

The Complaint filed in this matter made no specific penalty demand but reserved EPA's right "to seek the maximum civil penalty authorized by the CAA for each violation." Compl. ¶¶ 137, 139. As to that maximum penalty, it counseled that under the CAA, Respondent is subject to a civil penalty of up to $3,750 for each violation that occurred on or before November 2, 2015, and up to $4,735 for each violation that occurred after November 2, 2015, accounting for adjustments made for inflation. Compl. ¶ 138 (citing 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4 tbl.l; Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2056, 2059 (Feb. 6, 2019)). Further, in determining the exact amount of the civil penalty, the CAA specifies certain penalty factors be considered, namely "the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of [Respondent's] business, [Respondent's] history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on [Respondent's] ability to continue in business, and such other matters as justice may require." Compl. ¶ 140 (alterations in original) (citing 42 U.S.C. § 7524(c)(2)).

Citing Rule 22.17(b), the Default Motion specified the penalties Complainant sought from Respondent, offering legal and factual justification for those proposed penalties. Default Motion ("Mot.") at 31-42. In sum, it sought a total civil penalty of $7,058,647 for the 13,928 violations of CAA section 203(a)(3)(B), alleging that such "amount is consistent with the record

of the proceeding and the Act." Mot. at 5, 31, 33, 38, 44 (citing 40 C.F.R. § 22.17(c)).[3] As to the methodology utilized in its penalty calculations, Complainant averred that it relied on EPA's Clean Air Act Mobile Source Civil Penalty Policy - Vehicle and Engine Certification Requirements (2009) ("Penalty Policy"), which "calculates civil penalties based on the number of violative engines or products, their horsepower, the egregiousness of the violations, remedial action, and other legal and equitable factors."[4] Mot. at 32-38; Compl. ¶ 141. The Penalty Policy incorporates the CAA statutory penalty factors, Complainant represented, and is used by the EPA to calculate civil penalties for specific cases of violations such as those committed by Respondent here involving the prohibition against defeat devices. Mot. at 32 (citing Penalty Policy at 1, 2). Complainant explained the Penalty Policy methodology for calculating civil penalties as follows:

> First, the Penalty Policy requires the calculation of the *preliminary deterrence amount*. This is the sum of the *economic benefit* and the *gravity*. Second, the Penalty Policy requires the calculation of the *initial penalty target figure*. This figure is the preliminary deterrence amount, but with the gravity component adjusted to reflect the violator's degree of willfulness or negligence, degree of cooperation or non-cooperation, and history of noncompliance. Finally, the initial penalty target figure can be adjusted to account for unique factors, and such adjustments yield the *adjusted penalty target figure*.

Mot. at 32 (italics in original).

Further detailing the calculations required by the Penalty Policy, Complainant stated:

> In cases involving uncertified vehicles or engines, the economic benefit component reflects the benefit from delayed cost or avoided cost of compliance and is often calculated using a "Rule of Thumb" estimate. Penalty Policy at 2-8. However, in cases involving the sale of emission control defeat devices, a more appropriate calculation of economic benefit, referred to as "beyond BEN benefit" or BBB, reflects the benefits to a violator "from business transactions that would not have occurred but for the illegal conduct . . . ." Penalty Policy at 7. In such cases the economic benefit is based on the net profits made from the improper transactions, i.e., the profits from the sale of illegal devices. *Id.* at 7, 11.
>
> To determine the gravity component, a base gravity figure is calculated according to horsepower, then multiplied to reflect egregiousness (using a factor of 1 for minor violations, 3.25 for moderate violations, or 6.5 for major violations), further increased by 0 – 30% for failure to remediate, scaled down according to the number of vehicles, and adjusted to reflect business size. *Id*. at 11-15.

[3] The final paragraph of the Default Motion contains a typographical error that offers a slightly different figure: $7,058,532. Mot. at 42.

[4] The Penalty Policy is publicly accessible at: https://www.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf.

> . . . [T]he CAA also requires EPA to consider "the effect of the penalty on the violator's ability to continue in business." CAA §205(c)(2); 42 U.S.C. § 7524(c)(2). This statutory factor is often referred to as a violator's "ability to pay." Penalty Policy at 27.

Mot. at 32-33.

As to the factual grounds for the penalty calculations, Complainant stated that it relied upon its November 2, 2016 inspection of Respondent's business facility and the receipt of sales records from Respondent's sales database for the allegations made in the Complaint. Mot. at 33. Those allegations were that Respondent sold and/or offered to sell at least 13,928 Aftermarket Defeat Devices that disable, defeat, or render inoperative devices or elements of design installed on or in heavy-duty diesel trucks in compliance with Title II of the CAA. Mot. at 33. It further noted that as default has occurred, all the facts alleged in the Complaint are deemed to be admitted by the Respondent. Mot. at 33 (citing 40 C.F.R. § 22.17(a)).

A. Economic Benefit

The Default Motion narratively describes the Complainant's calculations made consistent with the Penalty Policy, starting with economic benefit:

> The economic benefit in this matter is based on [Respondent's] estimated profit from the sale of the Defeat Devices the [sic] comprise the alleged violations. Use of profit to estimate economic benefit is merited because sale of violative products would not have occurred but for the illegal conduct. Penalty Policy at 7. Using the sales data obtained during the inspection of Respondent, ERG [Eastern Research Group, Inc.][5] tabulated the total sales revenue for 13,955 Defeat Devices Respondent sold between May 1, 2015 and November 1, 2016. Mot. Att. 1 at CMD00012. Respondent's total revenue from the sale of these Defeat Devices was [redacted], with an average revenue of [redacted] per Defeat Device. *Id*. As actual cost of goods sold and profit data was not included in the sales records obtained from Respondent, Complainant estimated gross profit by reviewing the total revenue and gross profit reported in Respondent's tax returns for 2015 and 2016, which totaled [redacted] and [redacted], respectively. Mot. Att. 7A at Freedom-EPA 0014; 0038. These values indicate that Respondent received an average [redacted] profit margin for sales during those two years. Applying this profit margin to the total revenue recorded in sales records ([redacted]) for 13,955 Aftermarket Defeat Devices yields an estimated profit of $1,526,444.52, or an average profit of $109.38 per Aftermarket Defeat Device. Multiplying $109.38 to the number of Aftermarket Defeat Devices alleged as violations in the Complaint, 13,928, and rounded to the nearest dollar, yields a value of $1,523,445, which Complainant proposes this Tribunal adopt as the economic benefit penalty for the violations alleged in the Complaint.

[5] Complainant identified ERG as its "contractor." Mot. at 17. *See also* Mot. Attach. 1 at 1 (ERG Memorandum dated November 2, 2016) (noting ERG was hired under a contract to conduct an inspection at Respondent facility with EPA).

Mot. at 33-34.

Complainant argued in its Default Motion that the estimate generated of Respondent's profits "is a reasonable and conservative representation of the economic benefit from the illegal sale of these Defeat Devices." Mot. at 34 (citing *Spartan Diesel Technologies, LLC*, EPA Docket No. CAA-HQ-2017-8362, 2018 WL 5887550, at *8, *13 (ALJ, Oct. 30, 2018) (Initial Decision and Order on Default)). Complainant contended that in *Spartan Diesel*, the "ALJ assessed [the] economic benefit penalty calculation similarly [to the method employed here] based on [the] estimate of illegal profits from the sale of Aftermarket Defeat Devices derived from revenue and profit margin data." Mot. at 34.

B. Gravity

According to the Default Motion, upon applying the Penalty Policy, Complainant calculated a gravity-based penalty of $5,091,768 for the 13,928 violations. Mot. at 34-37. When adjusted for inflation, the total gravity penalty Complainant sought was $5,535,202. Mot. at 37-38. As explanation therefor, it stated as follows:

> The Penalty Policy's gravity component reflects the actual or potential harm from the violations and focuses on "whether the activity of the violator actually resulted in, or was likely to result in, the emission of a pollutant in violation of the standards specified for the particular vehicles or engines at issue." Penalty Policy at 11. This amount is generally based on the vehicle or engine's horsepower. In the case of violations of the defeat device prohibition, the gravity is calculated based on the vehicles or engines on which the defeat devices are installed or intended to be installed. Penalty Policy at 22. As alleged in the Complaint, Respondent's Aftermarket Defeat Devices were designed and marketed for use for several models of HDDE trucks manufactured by Ford, Dodge, and GMC/Chevy. Complaint ¶¶ 111, 121, and 130 and Appendix A. Complainant used an estimate of 350 horsepower rating for these motor vehicles, consistent with the horsepower rating used by the EPA to assess a section 203(a)(3)(B) penalty in *Spartan Diesel*. *See Spartan Diesel*, 2018 WL 5887550 at *10.
>
> The first step in calculating the gravity portion of the civil penalty is to calculate the base per-vehicle penalty using Table 1 of the Penalty Policy. Here, using 350 horsepower results in a base per-vehicle penalty of $3,850, as indicated below:

HP	**$/HP**	**Total**
First 10 HP	$80	$800
Second 90 HP	$20	$1,800
Next 250 HP	$5	$1,250
	Base Per-Vehicle Penalty	**$3,850**

> The base per-vehicle penalty is then adjusted to reflect the egregiousness of the violations. Under the Penalty Policy, the egregiousness is considered "Major," which is the most egregiousness category of violations. Penalty Policy at 13. It

applies to violations where excess emissions are likely to occur. *Id*. Most emission control devices, if missing or defective, are expected to result in increased emissions. *Id*. According to the Penalty Policy, violations are classified as "Major" if there is no information about the emissions from these vehicles or engines. *Id*. Thus, a 6.5-fold increase to the base per-vehicle amount for "major" violations is appropriate given the massive potential excess emissions that has occurred from the removal or deactivation of major emission controls for diesel trucks through Respondent's thousands of Aftermarket Defeat Devices. This results in a base per-vehicle amount adjusted for gravity of $3,850 x 6.5 = $25,025.

The adjusted base per-vehicle gravity is then scaled to reflect the total number of affected vehicles using Table 3 of the Penalty Policy in order to obtain the multiple vehicle/engine gravity amount. Penalty Policy at 17.

Number of Vehicles	**Scaling Factor**	**Adjusted Per Vehicle Gravity**	**Total**
10	1	$25,025	$250,250
90	0.2	$25,025	$450,450
900	0.04	$25,025	$900,900
9,000	0.008	$25,025	$1,801,800
3,928	0.0016	$25,025	$157,277
		Total	**$3,560,677**

The multiple vehicle/engine gravity amount is then increased to reflect the lack of any remediation of the violations. Penalty Policy at 20. Here [Respondent's] failure to recall products and mitigate excess emissions in any way justifies a 30% increase resulting in an adjusted gravity amount of 1.30 x $3,560,677 = $4,628,880.

Next, the Penalty Policy calls for an upward adjustment to the gravity penalty component to reflect a company's size. Penalty Policy at 20. Company size is typically calculated based on a company's net worth or net assets. *Id*. Complainant did not make any upward adjustments for business size.

Based on the foregoing, the total preliminary deterrence amount here (i.e., the sum of the economic benefit and the fully adjusted gravity component described above) is $1,523,445 + $4,628,880= $6,152,325.

Under the Penalty Policy, the preliminary deterrence amount is further adjusted to account for willfulness and/or negligence, degree of cooperation/non-cooperation, and history of noncompliance to yield the "initial penalty target figure." Penalty Policy at 23-26. In this case, we increased the gravity portion of the penalty (i.e. $4,628,880) by 10% to reflect [Respondent's] lack of cooperation in responding to the EPA's inquiries whether [Respondent] had ceased sales of Aftermarket Defeat Devices and come into compliance with section 203(a)(3)(B) of the CAA after being notified of violations by the EPA in January 2017 (as discussed in the "Factual Background Regarding Respondent" section of this Motion), and [Respondent's] failure to answer the Complaint. This 10% upward

adjustment results in an initial penalty target figure for gravity of $4,628,880 + $462,888 = $5,091,768. Complainant made no further adjustments for willfulness/negligence or history of noncompliance. The sum of the initial penalty target figure for gravity and economic benefit combined is $6,153,731.[6]

Pursuant to the Federal Civil Penalty Inflation Adjustment Act, 40 C.F.R Part 19, and EPA policy memoranda regarding penalty inflation adjustment, the gravity component of the penalty must be further adjusted to account for inflation. The December 6, 2013, EPA memorandum, "Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013),[7] at page 6, provides that, for penalties calculated under the Penalty Policy, gravity penalties for violations that occur after December 6, 2013 must be multiplied by the inflation factor of 1.0487. The July 27, 2016 EPA memorandum "Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective August 1, 2016),[8] at page 9, provides that, for penalties calculated under the Penalty Policy, gravity penalties for violations that occur after November 5, 2015 must be multiplied by the inflation factor of 1.10020, and, at page 2, the memorandum indicates that for violations that occur on or before November 2, 2015 the inflation factor under the 2013 policy (1.0487) is to be applied.

In this matter, the number of violations alleged in the Complaint that occurred in 2015 is 3,546, and the number of violations alleged that occurred in 2016 is 10,382. To readily calculate a gravity penalty including inflation, Complainant made the following calculations:

$5,091,768 x 3,546/13,928 x 1.0487 = $1,359,470.76
$5,091,768 x 10,382/13,928 x 1.1002 = $4,175,731.24
$1,359,470.76 + $4,175,731.24 =
$5,535,202 total gravity penalty including inflation
$5,532,202 (gravity) + $1,523,445 (economic benefit) =
$7,058,647 total penalty.

Mot. at 34-38 (bolding in original).

C. Consideration of Ability to Continue in Business

As noted above, under the CAA, determining the penalty requires "tak[ing] into account the . . . effect of the penalty on the violator's ability to continue in business." CAA § 205(c)(2); 42 U.S.C. § 7524(c)(2). Complainant asserted in its Motion that "[a]s [Respondent] apparently

[6] This number appears to be a miscalculation. It should be $6,615,213.

[7] This memorandum can be found at https://www.epa.gov/sites/production/files/2014-01/documents/guidancetoamendepapenaltypolicyforinflation.pdf. Mot. at 37.

[8] This memorandum can be found at https://www.epa.gov/sites/production/files/2017-01/documents/finalpenaltyinflationguidance.pdf. Mot. at 38.

has ceased business given its Chapter 7 bankruptcy petition, the penalty assessed in this case will not affect its ability to continue in business" and that "given Respondent's bankruptcy petition, the bankruptcy court is the appropriate forum to decide whether and how much Respondent can pay a claim arising from this Tribunal's penalty decision in this matter."[9] Mot. at 38 (citing *Munce's Superior Petroleum Products, Inc.*, 15 E.A.D. 746, 754 (EAB 2012) ("Determining the amount of the administrative penalties for [the respondent's] violations in this administrative proceeding will not interfere in any way with the bankruptcy case pending . . . . To the contrary, establishing the amount of the EPA's penalty claim in this proceeding, in accordance with applicable law, should assist and advance the Bankruptcy Court's ability to discharge its duties efficiently.")).

Further, Complainant advised that consideration of "the ability to continue in business" in this case does not warrant any reduction of the proposed penalty as the Environmental Appeals Board (EAB) has consistently held a respondent's ability to pay may be presumed until it is put at issue by a respondent, which has not occurred here. Mot. at 39 (citing *JHNY, Inc. A/K/A Quin-T Technical Papers and Boards*, 12 E.A.D. 372, 397 (EAB 2005); *Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 321 (EAB 2000); *New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (EAB 1994)). As Respondent has abandoned filing an answer and specifically making an issue of ability to pay in this Proceeding, Complainant urged this Tribunal to conclude that any objection Respondent may have to the penalty based upon ability to pay has been waived and no reduction of the proposed penalty based on this factor is warranted. Mot. at 39.

Nevertheless, in light of Respondent's bankruptcy, Complainant went on in its Default Motion to state that "[e]ven if this Tribunal considered Respondent to have put ability to pay at issue in this Proceeding, Complainant has appropriately considered Respondent's ability to pay in light of the totality of all the relevant statutory factors." Mot. at 40. It notes that the EAB has held that, if a respondent puts ability to pay at issue in a penalty proceeding, the Agency "is required to present some evidence to show that it *considered* the respondent's ability to pay a penalty as part of [the Agency's] prima facie case that a proposed penalty is appropriate taking all penalty criteria into consideration." Mot. at 40 (quoting *JHNY,* 12 E.A.D. at 398). "That is, there is no specific burden of proof with respect to an ability to pay factor; so long as the respondent's ability to pay is considered and 'touched upon[,] and the penalty is supported by the analysis[,] a prima facie case can be made.'" Mot. at 40 (quoting *CDT Landfill Corp.*, 11 E.A.D. 88, 121 (EAB 2003)). "The Agency 'need not present any *specific* evidence to show that the respondent can pay or obtain funds to pay the assessed penalty but can simply rely on some general financial information regarding the respondent's financial status which can support the inference that the penalty assessment need not be reduced.'" Mot. at 40 (quoting *JHNY*, 12 E.A.D. at 398) (italics in original). Thus, in its prima facie case, Complainant asserts it need not establish that Respondent can pay the proposed penalty, only that it "considered the ability-to-pay penalty factor in conjunction with all the other penalty factors under the CAA, and that, in

[9] A Suggestion of Bankruptcy on behalf of Respondent was submitted in this proceeding on June 12, 2019. That document advised that on June 4, 2019, Respondent had filed a petition for relief under Title 11, Chapter 7, of the United States Code, in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, case number 8:19-bk-05338-RCT. The Suggestion of Bankruptcy further stated that "[t]he automatic stay imposed by operation of 11 U.S.C. Section 362 of the Bankruptcy Code is applicable until a ruling herein." The Default Order found that the automatic stay provided for by the Bankruptcy Code was inapplicable to this proceeding. Order at 2-5.

light of all of the penalty factors, the penalty proposed is appropriate." Mot. at 40 (citing *United Global Trading, Inc.*, EPA Docket No. FIFRA-04-2011-3020, 2014 WL 983752, at *19 (ALJ, Feb. 28, 2014) ("Furthermore, bankruptcy by itself is not specific evidence that a respondent cannot pay any penalty."); *New Waterbury*, 5 E.A.D. at 539-540 ("There is simply no basis for suggesting that 'ability to pay' is a special factor which if not established (as opposed to not considered) precludes imposition of any penalty. Theoretically, a penalty that forces a respondent into bankruptcy is not precluded . . . where the penalty is justified under the totality of the relevant statutory considerations.").

Complainant asserted that in this case it undertook "extraordinary effort to consider Respondent's ability to pay a penalty" by making "multiple efforts to request financial and other information needed to obtain a complete picture of Respondent's financial and business activity to appropriately assess Respondent's ability to pay claim [sic]." Mot. at 41. It alleged that Respondent's Responses to Complainant's requests were "incomplete, fragmented, and for several specific questions, Respondent failed to answer at all." Mot. at 41. Specifically, it stated that:

> Respondent failed to fully account for its substantial increase in sales revenue in 2018 and substantial expenditures on advertising; provide an explanation why Respondent suddenly reported wages as a large portion of its expenditures in 2018 when no wages were reported in between 2015 through 2017; confirm whether Respondent's submitted financial documentation reflected all sales from a second website operated by Respondent devoted to gasoline-fueled vehicles; confirm whether any assets were transferred to [Respondent's] members or other business entities owned or operated by the members; and confirm whether or not there exists other business entities owned or operated by [Respondent's] members.

Mot. at 41.

Complainant concluded the penalty portion of its Default Motion stating:

> Thus, Complainant has been unable to adequately assess Respondent's ability-to-pay claim, and is left in a quandary as to how Respondent could claim to the EPA its inability to pay a substantial penalty yet substantially expand its sales revenue and advertising expenditures after the EPA's first inquiry about Respondent's ability-to-pay claim in 2017. This conduct frankly put the validity of Respondent's claim in serious doubt. Moreover, after Complainant's further inquiries as to Respondent's finances and business activity after the Complaint was filed, Respondent suddenly removed its websites from the internet, leading Complainant to become concerned that Respondent's members may have shifted profits or assets from Respondent to avoid having to pay a penalty at all in this proceeding. Respondent only enhanced such concern by discharging its counsel in this Proceeding and failing to answer Complainant's requests concerning whether any asset transfers or financial transactions with other entities owned by Respondent's members have occurred. As these open issues with Respondent's ability-to-pay claims have not been addressed by Respondent, leaving Complainant without means to determine whether Respondent's submitted information has

> provided complete and accurate picture [sic] of Respondent's business finances and access to funds, it is Complainant's assessment that a reduction in penalty based on ability to pay is not warranted nor appropriate.

Mot. at 41-42.

D. Complainant's Explanation of its Horsepower Calculation in its Response

As noted in the Default Order, after reviewing the Complainant's penalty analysis as set forth in its Default Motion, I found the proposed civil penalty amount of $7,058,647 to not be adequately supported by the existing record such that it would be appropriate for me to then order the requested relief. 42 U.S.C. § 7524(c)(2); 40 C.F.R. § 22.17(c). In particular, I observed that Complainant had used an "estimate of 350 horsepower rating for the motor vehicle parts at issue" on the basis that doing so was "consistent with the horsepower rating used by the EPA to assess a section 203(a)(3)(B) penalty in *Spartan Diesel*." Order at 40 (citing Mot. at 34; *Spartan Diesel*, 2018 WL 5887550, at *10). However, I noted that in *Spartan Diesel*, the evidentiary record indicated that the emissions-related components at issue were designed to be installed only in Ford diesel truck models F250, F350, F450, and F550 for model years 2008 through 2012. Order at 40 (citing *Spartan Diesel,* 2018 WL 5887550, at *1). Further, based upon the record developed in that prior case, the Tribunal there was able to make a factual finding that the engines in those particular Ford trucks had a horsepower of 350–400. Order at 40-41; *Spartan Diesel*, 2018 WL 5887550, at *5 (Finding of Fact 17). However, I stated in my Default Order that the record as presently before me in this case does not contain any allegation of fact as to the specific horsepower of any of the Ford, Dodge, and Chevy/GMC vehicles in which the Respondent's components were designed to be installed. Order at 41. Accordingly, I found it was inappropriate at that point to issue an order assessing a penalty, and directed Complainant to supply additional explanations and supporting documentation for its penalty calculation before I ruled on the issue. Order at 41.

Subsequently, Complainant submitted its Response to the Default Order, supported by the Declaration of Victor Aguilar dated January 16, 2020 (Resp. Attach. 1 ("Declaration")), a "HP [Horsepower] Analysis Spreadsheet" dated January 16, 2020 prepared by Mr. Aguilar (Resp. Attach. 2), and 114 source documents relied upon by Mr. Aguilar to determine horsepower ratings for the various categories of affected motor vehicles and motor vehicle engines as reflected in his HP Analysis Spreadsheet (Resp. Attachs. 3-116).[10] Based upon Mr. Aguilar's Declaration and calculations, Complainant's Response asserts that its use of "an estimate of 350 horsepower rating" for the motor vehicles/engines affected by the violations in its penalty calculations as to gravity is supported by the factual record. Resp. at 2-4.

In his Declaration, Mr. Aguilar advises that he is employed as an Environmental Engineer with the EPA's Vehicle and Engine Enforcement Branch (VEEB), is a credentialed CAA vehicle and engine inspector, and has provided support activities for the EPA's enforcement investigations of automotive aftermarket companies concerning the manufacturing of potential defeat devices. Decl. ¶¶ 2, 5, 7. Initially, he reviewed Respondent's sales

[10] Complainant identified two of the attachments (nos. 99 and 100) as including material claimed to be confidential business information (CBI) pursuant to 40 C.F.R. § 2.203. Therefore, it filed a redacted copy of the Response without those attachments for inclusion in the public record.

information on the violative defeat devices identified in the Complaint to determine the model year ranges and model types of motor vehicles into which Respondent's defeat devices were designed to be installed. Decl. ¶ 9. These data were assembled into a table which was attached to the Complaint as Appendix A. Decl. ¶ 9.

Subsequently Mr. Aguilar researched and reviewed various additional records including those from EPA, the California Air Resources Board, the original equipment manufacturers (OEM), etc., corresponding to each vehicle model year and type into which Respondent's defeat devices could be installed, in order to derive the horsepower ratings for each vehicle category. Decl. ¶¶ 11-12. Complainant listed the source material he used to determine the ratings in its Response (Resp. ¶ 14) and submitted copies of the material as attachments 3-116 to the Response. Decl. ¶ 12. He then aggregated and compiled this data into an Excel spreadsheet. Decl. ¶ 12. Where model types for model years had various horsepower ratings, Mr. Aguilar stated he conservatively chose the lowest horsepower rating per model type. Decl. ¶¶ 14, 23, 24, 26. Next he identified the total number of violative defeat devices sold for each category of model type/years, multiplied it by the corresponding horsepower rating, summed the results together, and then divided them by the total number of products sold to get a "weighted average" of 359 horsepower per vehicle into which the violative aftermarket products could be installed. Decl. ¶ 25. Mr. Aguilar declared that he determined the weighted average rather than a simple average of the horsepower per vehicle because he believed it was "a more accurate representation of the average horsepower rating of the vehicles that [Respondent's] defeat devices could be installed on, because use of a weighted average accounts for the uneven distribution of violative defeat devices that pertain to each individual vehicle category." Decl. ¶ 26.

In his Declaration, Mr. Aguilar states that in calculating the weighted horsepower average he did not include those violative defeat devices sold by Respondent for use in several different model year ranges and model types which he labeled on the spreadsheet as "Multiple." Decl. ¶ 27. He excluded these devices "because there was no way to determine an average horsepower for that category." Decl. ¶ 27. However, based upon his knowledge and experience, Mr. Aguilar opined that those devices are "typically used" for motor vehicles in the other category types for which he was able to calculate a weighted average. Decl. ¶ 27. His "best estimate" for the devices in the "Multiple" category would be the weighted average of all the other vehicle categories which is 359 hp. Decl. ¶ 27.

Lastly, Mr. Aguilar stated that he reviewed the advertisements recited in the Complaint for defeat devices sold by Respondent. Decl. ¶ 29. He noted that those advertisements indicate that the defeat devices are specifically designed to increase the horsepower of the affected vehicles. Decl. ¶ 29. Based upon this, Mr. Aguilar indicated in the Declaration that in his opinion Complainant's use of 350 horsepower for the penalty calculation is even more conservative, as it is the weighted average horsepower of the affected vehicles *prior to* installation of defeat devices on those affected vehicles, and one would expect the horsepower to typically increase as a result of installation of defeat devices. Decl. ¶ 29.

In sum, Mr. Aguilar's declaration, analysis, and the source material relied thereon supported the Complainant's argument that utilizing a horsepower rating of 350 hp in the penalty calculation for all violations alleged in the Complaint is appropriate.

IV. DISCUSSION

As noted above, the CAA specifies certain factors be considered in determining the penalty for its violation. Those statutory factors are "the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of [Respondent's] business, [Respondent's] history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on [Respondent's] ability to continue in business, and such other matters as justice may require." 42 U.S.C. § 7524(c)(2). While the Rules require this Tribunal to consider relevant penalty policies, such policies are not binding and I have wide discretion to adopt, reject, or deviate from the rationale of an applicable penalty policy where appropriate. 40 C.F.R. § 22.27(b); *DIC Americas, Inc.*, 6 E.A.D. 184, 1995 WL 646512, at *4 (EAB 1995).

Upon review, I find the Complainant's detailed penalty calculation in accordance with the Penalty Policy to be consistent with the record of this proceeding and the CAA statutory factors. As to the gravity of the violation, it is noted that in calculating the gravity component of a penalty, EPA's Penalty Policy does not provide for the use of horsepower averages, weighted or otherwise. Rather, the Penalty Policy appears to assume the Agency will do a "per-vehicle" or "per-engine" horsepower analysis. Penalty Policy at 16. Nevertheless, under the circumstances of this particular case, where the defeat devices were advertised as capable of being installed on a variety of vehicle/engine types in order to boost horsepower, the use of the figure of 350 hp representing a rounding of the weighted average of 359 hp seems reasonable and a conservative estimate of the gravity of the violation. As noted in the Penalty Policy, the engine size is a way of reasonably estimating excess emissions where precise quantification of such emissions "may not be known with certainty." Penalty Policy at 12.

As to economic benefit, a close inspection of the sales data gathered and analyzed by ERG reveals a significantly higher average profit margin per Aftermarket Defeat Device sold by Respondent than that used by Complainant ($109.38) in its calculations. *See* Mot. Attach. 1 at CMD00012.[11] As such, the total economic benefit figure for the 13,928 violations of $1,523,445 used by Complainant in its penalty calculations appears more than fair based upon the evidence of record.

In terms of size of business, the financial documentation gathered by Complainant and the sales revenue reported by Respondent for the years 2015 and 2016 evidence a company of substantial size at the time of the violations. *See* Mot. Attach. 7B at Freedom-EPA 0012, 0014, 0035, 0038.[12]

There is no evidence that Respondent has a prior history of violations. Nor is there any evidence of efforts Respondent undertook to remedy the violations. As to the effect of the penalty on Respondent's ability to continue in business, as Complainant noted, Respondent has already filed for bankruptcy. Mot. Attach. 12. Moreover, despite Complainant's request, the

[11] Complainant has identified the exact numerical figures that went into this calculation as CBI and as such they are not restated herein. Preface to Mot. at 1.

[12] Complainant has identified these records as CBI and as such financial information found within them is not restated herein. Preface to Mot. at 1.

record indicates that Respondent did not submit evidence in support of an inability to pay a claim although it bears the burden of proof on that issue. Mot. Attach. 10. Finally, the record suggests no other penalty factors to be considered under the circumstances of this particular case.

As indicated above, under the CAA Respondent is subject to a civil penalty of up to $3,750 for each violation that occurred on or before November 2, 2015, and up to $4,735 for each violation that occurred after November 2, 2015, accounting for adjustments made for inflation. Compl. ¶ 138 (citing 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4 tbl.l; Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2056, 2059 (Feb. 6, 2019)).

In light of all the statutory penalty factors, particularly that Respondent committed 13,928 violations of the CAA by selling, or offering to sell, parts or components which were specifically intended to bypass, defeat, or render inoperative devices or design elements installed on or in a motor vehicle in compliance with the CAA, profited in excess of $1.5 million dollars in less than two years as a result, and likely caused significant excess air emissions and endangered public health and welfare, I find the proposed civil penalty amount of $7,058,647 (i.e., approximately $507 per violation) to be consistent with the record of the proceeding and the Act.[13] 40 C.F.R. § 22.17(c). *See* 42 U.S.C. § 7401(b)(1) (noting a purpose of the CAA is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of the population"); 42 U.S.C. § 7521(a)(1) (noting EPA regulations shall apply to motor vehicles which "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare").

[13] As indicated in the Default Order, the Respondent's pending bankruptcy proceeding does not prevent the entry of an order determining the amount of and assessing a penalty against Respondent, nor does it interfere with the authority and duties of the bankruptcy court. Order at 2-5; *Munce's Superior Petroleum Products, Inc*., 15 E.A.D. 746 (EAB 2012) (holding that establishing the amount of the EPA's penalty claim in an administrative proceeding assists and advances the Bankruptcy Court's ability to discharge its duties efficiently).

ORDER

Based upon the foregoing, as sanction for its commission of 13,928 violations of the CAA as found in the previously issued Default Order, Respondent Freedom Performance, LLC is assessed and ordered to pay a civil penalty in the amount of $7,058,647 in the manner directed below:

1. This Order constitutes an Initial Decision as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order 30 days after its service upon the Complainant and Respondent unless a party appeals or moves to set aside this Initial Decision, or unless the Environmental Appeals Board elects to review this Initial Decision on its own initiative;

2. Within 30 days after this Order becomes final, Respondent shall pay the above-stated civil penalty as follows: use any method, or combination of methods, provided on the website http://www2.epa.gov/financial/makepayment; identify each and every payment with "Docket No. CAA-HQ-2019-8362;" and, 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 or 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-2019-8362") to both the EPA Office of Administrative Law Judges and the Complainant, as follows:

    a. The EPA Office of Administrative Law Judges: If by USPS (except Express Mail), send to:

        U.S. Environmental Protection Agency
        Office of Administrative Law Judges
        Mail Code 1900R
        1200 Pennsylvania Ave., N.W.
        Washington, DC 20460

        If by any other carrier or hand-delivery, deliver to:

        U.S. Environmental Protection Agency
        Office of Administrative Law Judges
        Ronald Reagan Building, Rm. M1200
        1300 Pennsylvania Ave., N.W.
        Washington, DC 20460

b. Complainant: If by USPS (except Express Mail), send to:

Mark J. Palermo
U.S. EPA, Air Enforcement Division
1200 Pennsylvania Ave., N.W.
Mail Code 2242A
Washington, DC 20460

If by any other carrier or hand-delivery, deliver to:

Mark J. Palermo
U.S. EPA, Air Enforcement Division
1200 Pennsylvania Ave., N.W.
William J. Clinton Federal Building South, Room 2117C
Washington, DC 20004

3. If Respondent fails to timely pay any portion of the penalty ordered, the EPA may:

a. request the Attorney General to bring a civil action in an appropriate district court to recover: the amount assessed; interest at rates established pursuant to 26 U.S.C. § 6621(a)(2); the United States' enforcement expenses; and a 10 percent quarterly nonpayment penalty, 42 U.S.C. § 7413(d)(5);

b. refer the debt to a credit reporting agency or a collection agency, 42 U.S.C. § 7413(d)(5), 40 C.F.R. §§ 13.13, 13.14, and 13.33;

c. collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. Part 13, Subparts C and H; and

d. suspend or revoke Respondent's licenses or other privileges, or suspend or disqualify Respondent from doing business with the EPA or engaging in programs the EPA sponsors or funds, 40 C.F.R. § 13.17.

It is so ordered.

Susan L. Biro
Chief Administrative Law Judge

Dated: February 24, 2020
Washington, D.C.

In the Matter of *Freedom Performance, LLC,* Respondent.
Docket No. CAA-HQ-2019-8362

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Initial Decision and Penalty Order**, dated February 24, 2020, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

Michael B. Wright
Senior Attorney-Advisor

Original and One Copy by Personal Delivery to:

Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copy by Electronic Mail to:

Mark J. Palermo
Jessica B. Goldstein
Air Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Mail Code 2242A
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Email: palermo.mark@epa.gov
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Bcc:
Clerk of the Board

Assistant Administrator
Office of Enforcement and Compliance Assurance

Copy by Certified Mail to:

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Date: February 24, 2020