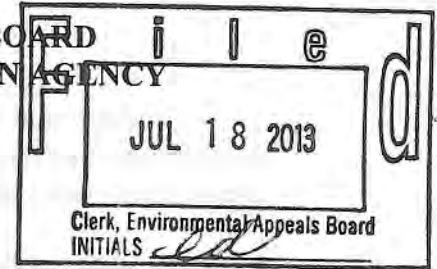


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
))
American Performance)
Technologies, Inc.)
_____))

Docket No. CAA-HQ-2013-7991

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18(b)-(c) of EPA's Consolidated Rules of Practice, the attached Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondent is ORDERED to comply with all terms of the Consent Agreement, effective immediately.

So ordered.¹

Date: *July 18, 2013*

Leslye M. Fraser
Judge, Environmental Appeals Board

¹ The three-member panel ratifying this matter is composed of Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I certify that the foregoing "Consent Agreement" and "Final Order," in the matter of American Performance Technologies, Inc., Docket No. CAA-HQ-2013-7991, were filed and copies of the same were mailed to the parties as indicated below:

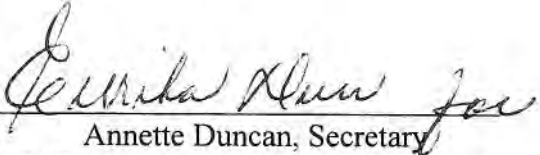
Via Interoffice Mail:

Robert G. Klepp, Acting Chief
Mobile Source Enforcement Branch
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (Mail Code 2242A)
Washington, DC 20460

Via U.S. Certified Mail:

Troy Covey
American Performance Technologies, Inc.
8844 Hillcrest Road
Kansas City, MO 64138-3759

Granta Nakayama
Kirkand & Ellis
655 Fifteenth Street, NW
Washington, DC 20005-5793


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

Dated: July 18, 2013

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

In the Matter of:

AMERICAN PERFORMANCE
TECHNOLOGIES, INC.,

Respondent.

Docket No.
CAA-HQ-2013-7991

CONSENT AGREEMENT

Preliminary Statement

1. This is a civil administrative penalty assessment proceeding instituted under section 205(c)(1) of the Clean Air Act (Act), 42 U.S.C. § 7524(c)(1). The issuance of this Consent Agreement and attached Final Order simultaneously commences and concludes this proceeding. 40 C.F.R. § 22.13(b).
2. Complainant in this matter is the United States Environmental Protection Agency (EPA). On the EPA's behalf, Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized by lawful delegation to institute and settle civil administrative penalty assessment proceedings under section 205(c)(1) of the Act, 42 U.S.C. § 7524(c)(1); EPA Delegations 7-6-A, 7-6-B (August 4, 1994); EPA Redelegations 7-6-A, 7-6-B (March 5, 2013).
3. Respondent in this matter is American Performance Technologies, Inc. (Respondent). Respondent is a corporation organized under the laws of the State of California with an office at 8844 Hillcrest Road, Kansas City, MO 64138.

4. Respondent is an importer of off-road motorcycles, scooters, and other recreational vehicles manufactured in China.
5. The EPA and Respondent, having agreed to settle this action, consent to the entry of this Consent Agreement and the attached Final Order before taking testimony and without adjudication of any issues of law or fact herein, and agree to comply with the terms of this Consent Agreement and the Attached Final Order.

Jurisdiction

6. This Consent Agreement is entered into under section 205(c)(1) of the Act, 42 U.S.C. § 7524(c)(1), and the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits,” 40 C.F.R. Part 22 (“Consolidated Rules”).
7. Under the Act, the EPA may administratively assess a civil penalty if the penalty sought is less than \$295,000. 42 U.S.C. § 7524(c)(1), 40 C.F.R. § 19.4 (adjusting the penalty cap for inflation); 40 C.F.R. §§ 90.1006(c)(1), 1068.125(b).
8. The Environmental Appeals Board is authorized to issue consent orders memorializing settlements between the EPA and Respondent resulting from administrative enforcement actions under the Act, and to issue final orders assessing penalties under the Act. 40 C.F.R. § 22.4(a)(1); EPA Delegation 7-41-C.
9. The Consolidated Rules provide that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously

commenced and concluded by the issuance of a Consent Agreement and Final Order.
40 C.F.R. §§ 22.13(b), 22.18(b).

Governing Law

10. This proceeding arises under Part A of Title II of the Act, 42 U.S.C. §§ 7521–7554, and the regulations promulgated thereunder. These laws aim to reduce emissions from mobile sources of air pollution, including hydrocarbons, oxides of nitrogen, and carbon monoxide. The Alleged Violations of Law, see section below, regard off-highway motorcycles. The applicable statutes and regulations are below.

11. General definitions:

(a) “Person” includes individuals, corporations, partnerships, associations, states, municipalities, and political subdivisions of a state. 42 U.S.C. § 7602(e).

(b) “Manufacturer” means any [P]erson engaged in the manufacturing or assembling of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines, or importing such vehicles or engines for resale, or who acts for and is under the control of any such [P]erson in connection with the distribution of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines, but shall not include any dealer with respect to new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines received by him in commerce. 42 U.S.C. § 7550(1); 40 C.F.R. § 1068.30.

12. Recreational vehicles:

(a) The term “Recreational Vehicle” includes, inter alia, Off-Highway Motorcycles.
40 C.F.R. § 1051.801.

- (b) The term “Off-Highway Motorcycle” is defined as a two-wheeled vehicle with a nonroad engine and a seat. 40 C.F.R. § 1051.801.
- (c) Each vehicle identified herein as an “Off-Highway Motorcycle” meets the definition of such vehicle and is subject to the emission standards and other requirements set forth in 40 C.F.R. Parts 1051 and 1068.
- (d) Model year 2006 and later new Recreational Vehicles and engines with displacement less than or equal to 1000 cc, maximum engine power less than or equal to 30 kW, and maximum vehicle speed higher than 25 miles per hour must satisfy air pollutant emission standards in 40 C.F.R. §§ 1051.101–1051.115. 40 C.F.R. § 1051.1. These emission standards impose limits on emissions of oxides of nitrogen, carbon monoxide, hydrocarbon, and exhaust opacity.
- (e) To demonstrate that an imported Recreational Vehicle satisfies emission standards, it must be covered by an EPA-issued certificate of conformity (COC). 40 C.F.R. § 1068.301(b); *see* 40 C.F.R. Part 1051 Subpart C (outlining COCs and the application requirements).
- (f) Each COC states that it covers “only those vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the documentation required by 40 CFR Part 1051.”
- (g) A Manufacturer may not sell, offer for sale, introduce into commerce, or deliver for introduction into commerce into the United States a model year 2006 or later recreational vehicle—or cause any of the foregoing—unless that recreational vehicle is covered by a COC. 42 U.S.C. §§ 7522(a)(1), 7547(d); 40 C.F.R. § 1068.101(a)(1).

(h) A Manufacturer who imports, sells, offers for sale, introduces, or delivers for introduction into commerce uncertified engines (or causes any of the foregoing) in violation of 42 U.S.C. § 7522(a) and the applicable regulations after January 12, 2009 is subject to a civil penalty of not more than \$37,500 for each such engine. 42 U.S.C. §§ 7524, 7547(d), 40 C.F.R. § 19.4 (civil penalty adjustment table, accounting for inflation).

Stipulated Facts

13. The 8,232 vehicles (Subject Vehicles) introduced into commerce by Respondent were Off-Highway Motorcycles, as defined above, subject to the emission standards and compliance provisions of the Act and its regulations. 42 U.S.C. §§ 7522, 7547(d). The Subject Vehicles are described in Appendix A, attached hereto.
14. Respondent is a “Person” as defined above.
15. Respondent is a “Manufacturer” as defined above.
16. Respondent imported the Subject Vehicles.
17. On or about October 26, 2011, authorized inspectors from the EPA and the United States Department of Homeland Security’s Bureau of Customs and Border Protection (“CBP”) inspected representative Off-Highway Motorcycles from entry 004-61460396 at the Los Angeles/Long Beach Seaport warehouse.
18. Respondent claimed that the Subject Vehicles were covered by the COC for engine family BZHWS.0434SP.

19. In November 2011, the EPA, in coordination with CBP, determined that 8,232 vehicles, the Subject Vehicles, were not covered by the COC for engine family BZHWS.0434SP, as Respondent claimed.
20. The EPA's determination is based on the fact that the vehicles were packaged with a seat.
21. Therefore, they were not covered by the COC for engine family BZHWS.0434SP, which covers only small spark-ignition engines, not Off-Road Motorcycles. Accordingly, the EPA alleges that Respondent imported these uncertified off-highway motorcycles in violation of section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1).

Alleged Violations of Law

22. The EPA alleges that Respondent introduced the Subject Vehicles into commerce in violation of section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1). The EPA alleges that Respondent imported the Subject Vehicles under the COC for engine family BZHWS.0434SP, which did not cover the off-road motorcycles, and so they were uncertified.

Terms of Agreement

23. For the purpose of this Proceeding, Respondent:
- (a) admits that the EPA has jurisdiction over this matter as stated above;
 - (b) admits to the stipulated facts stated above;
 - (c) neither admits nor denies the alleged violations of law stated above;
 - (d) consents to the assessment of a civil penalty as stated below;
 - (e) consents to the conditions specified in this Consent Agreement;
 - (f) waives any right to contest the Alleged Violations of Law; and

(g) waives their rights to appeal the Final Order accompanying this Consent Agreement.

24. Respondent must pay to the United States a civil penalty of \$100,000 (the Civil Penalty).

25. Respondent agrees to pay the Civil Penalty to the United States pursuant to the following schedule:

(a) \$25,000 (25% of the Civil Penalty) due 30 days after the date of issuance of the Final Order;

(b) \$25,000 (25% of the Civil Penalty) due 60 days after the date of issuance of the Final Order;

(c) \$25,000 (25% of the Civil Penalty) due 90 days after the date of issuance of the Final Order;

(d) \$25,000 (25% of the Civil Penalty) due September 30, 2013.

26. Respondent agrees to pay the Civil Penalty in the manner specified in Subparagraph (a) or (b) below:

(a) Mail by United States Postal Service a certified check, company check, or cashier's check payable to the United States of America, to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-7292
ATTN: CAA-HQ-2013-8034

This check must be identified with case number CAA-HQ-2013-7991 and state that it is remitted by Respondent. Simultaneously, scan and email a copy of the check to Robert G. Klepp at klepp.robert@epa.gov.

(b) Pay online through the Department of the Treasury using www.pay.gov. In the “Search Public Form” field, enter “SFO 1.1”, click “EPA Miscellaneous Payments – Cincinnati Finance Center, and complete the SFO Form Number 1.1. The payment must be identified with case number CAA-HQ-2013-7991. Within 24 hours of payment, scan and email a copy of the receipt to Robert G. Klepp at klepp.robert@epa.gov.

27. Failure to pay the full amount of the Civil Penalty assessed under this Consent

Agreement may subject Respondent to a civil action to collect any unpaid portion of the Civil Penalty together with interest accruing as of the date the unpaid portion became due, as described in Paragraphs 29–30, below. In order to avoid the assessment of interest, administrative costs, and late payment penalty in connection with such Civil Penalty, as described in Paragraphs 29–30 of this Consent Agreement, Respondent must timely pay the Civil Penalty.

28. The EPA is required to assess interest and penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim.

Respondent agrees to pay these amounts under this Consent Agreement and attached Final Order. Interest, at the statutory judgment rate provided for in 31 U.S.C. § 3717, will therefore begin to accrue on the Civil Penalty agreed to herein on the date a copy of this Consent Agreement and attached Final Order is mailed to Respondent. However, the EPA will not seek to recover interest on any portion of the Civil Penalty that is timely paid.

29. Pursuant to 31 U.S.C. § 3717, Respondent must pay interest on any amount overdue. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary

of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will be assessed at the rate of the United States Treasury tax and loan account rate in accordance with 40 C.F.R. § 13.11(a).

30. On any portion of a civil penalty more than 90 calendar days delinquent, Respondent must pay a late payment penalty of 6% per annum, which will accrue from the date the penalty became delinquent. This late payment penalty is in addition to charges which accrue or may accrue under Paragraph 29 above.
31. Under 28 U.S.C. § 162(f), penalties paid pursuant to this Consent Agreement are not deductible for federal tax purposes.

Effect of Consent Agreement and Attached Final Order

32. Completion of the terms of this Consent Agreement in Paragraphs 23–31 and attached Final Order with the United States will resolve Respondent’s liability for federal civil penalties for the Stipulated Facts and Alleged Violations of Law as detailed above.
33. This Consent Agreement and attached Final Order apply to and are binding upon the Complainant and Respondent. Successors and assigns of Respondent are also bound if they are owned, in whole or in part, directly or indirectly, or otherwise controlled by Respondent. Nothing in the previous sentence adversely affects any right of the EPA under applicable law to assert successor or assignee liability against Respondent’s successor or assignee.
34. This Consent Agreement constitutes the entire agreement and understanding of the parties and supersedes any prior agreements or understandings, whether written or oral, among the parties with respect to the subject matter hereof.

35. Complainant and Respondent certify that at least one of its undersigned representatives is fully authorized by the party whom he or she represents to enter into the terms and conditions of the Consent Agreement, to execute it on behalf of that party, and to legally bind that party on whose behalf he or she signs this Consent Agreement.
36. By signing this Consent Agreement, Respondent acknowledges that this Consent Agreement and attached Final Order will be available to the public and agree that it does not contain any confidential business information.
37. Nothing in this Consent Agreement shall relieve Respondent of the duty to comply with all applicable provisions of the Act or other federal, state, or local laws or statutes, nor shall it restrict the EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.
38. By signing this Consent Agreement, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response, and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and imprisonment for knowing submission of such information, under 18 U.S.C. § 1001.
39. The EPA reserves the right to revoke this Consent Agreement and accompanying settlement penalty if and to the extent the EPA finds, after signing this Consent Agreement, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to the EPA, and the EPA reserves the right to assess and collect any and all civil penalties for any violation described

herein. The EPA shall give Respondent oral notice of its intent to revoke, which shall not be effective until received by Respondent in writing.

40. By signing this Consent Agreement, Complainant and Respondent agree to bear their own costs and attorneys' fees in the action resolved by this Consent Agreement and attached Final Order.
41. If Respondent fails to comply with any provision contained in this Consent Agreement and Final Order, Respondent waives any rights they may possess at law or in equity to challenge the authority of the EPA to bring a civil action in the appropriate United States District Court to compel compliance with the Consent Agreement and attached Final Order or to seek an additional penalty for such noncompliance.
42. The Parties agree to submit this Consent Agreement to the Environmental Appeals Board with a request that it be incorporated into a Final Order.
43. Respondent and Complainant agree to issuance of the attached Final Order. Upon filing, the EPA will transmit a copy of the filed Consent Agreement to Respondent. This Consent Agreement and attached Final Order shall become effective after execution of the Final Order by the Environmental Appeals Board and filing with the Hearing Clerk.

APPENDIX A

Subject Vehicles Imported by American Performance Technologies, Inc.

Manufacturer	Importer	Model	Qty.	Alleged Engine Family	Vehicle Type	Model Year
Surpass Tools Manufacture Co, Ltd.	American Performance Technologies, Inc.	MVS10	8,232	BZHWS.0434SP	Off-road motorcycle	2011

The foregoing Consent Agreement In the Matter of American Performance Technologies, Inc., Docket No. CAA-HQ-2013-7991, is Hereby Stipulated, Agreed, and Approved for Entry.

For Respondent:




Troy Covey
American Performance Technologies, Inc.
8844 Hillcrest Road
Kansas City, MO 64138-3759

Date



4/15/13

For Complainant:



Phillip A. Brooks, Director
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460-0001

Date



6/9/2013

