

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 POWERTRAIN, INC.,)
 WOOD SALES, INC.,)
 and)
 TOOL MART, INC.,)
)
 Defendants.)
_____)

Civil Action No. 1:09-cv-00993-RBW

CONSENT DECREE

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WHEREAS, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), has filed a Complaint in this action against defendants Powertrain, Inc., (“Powertrain”), Wood Sales, Inc., (“Wood Sales”), and Tool Mart, Inc., (“Tool Mart”) (collectively referred to herein as “Defendants”), corporations incorporated under the laws of the State of Mississippi, pursuant to Sections 203, 204, 205, 207, 208 and 213 of the Clean Air Act (“the Act”), 42 U.S.C. §§ 7522, 7523, 7524, 7541, and 7547, and the regulations promulgated thereunder at 40 C.F.R. Part 90, pertaining to emissions certification, labeling, warranty, and recordkeeping requirements for small non-road spark-ignited engines.

WHEREAS, the Complaint alleges that Defendants imported, or caused the importation of, and sold or otherwise introduced into commerce, engines that were not validly covered by certificates of conformity, emitted emissions exceeding the applicable emissions standards, lacked legally sufficient emissions-control labels, and lacked sufficient emissions-related warranties, and that Defendants failed to maintain required records and fully respond to an EPA Information Request, in violation of Sections 203, 207, 208 and 213 of the Act, 42 U.S.C. §§ 7522, 7541, 7542 and 7547, and the regulations promulgated at 40 C.F.R. Part 90. All of the engines were manufactured by companies located in the People’s Republic of China and imported into the United States by Defendants.

WHEREAS, the United States reviewed Financial Information submitted by Defendants and determined that Defendants have a limited ability to pay a civil penalty in this matter.

WHEREAS, Defendants do not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint.

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation among the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law, except as provided in Section I, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and Sections 203, 204, 205, 207 and 213 of the Act, 42 U.S.C. §§ 7522, 7523, 7524, 7541, and 7547, and the regulations promulgated under Section 213 of the Act, and over the Parties. Venue in this District is proper pursuant to Sections 204 and 205 of the Act, 42 U.S.C. §§ 7523 and 7524, 40 C.F.R. §§ 90.1005 and 90.1006, because, pursuant to § 205(b), 42 U.S.C. § 7524(b), this District is the location of the “Administrator’s principal place of business.” For purposes of this Decree, or any action to enforce this Decree, Defendants consent to this Court’s jurisdiction and agree that venue is proper.

2. For purposes of this Consent Decree, the Defendants agree that the Complaint states claims upon which relief may be granted pursuant to Sections 203, 204, 205 and 213 of the Act, 42 U.S.C. §§ 7522, 7523, 7524, and 7547, and the regulations promulgated thereunder.

II. APPLICABILITY

3. The obligations of this Consent Decree apply to and are binding upon the United States, and upon Defendants and any successors, assigns, or other entities or persons otherwise bound by law.

4. The obligations of Defendants under this Consent Decree to make payments and to implement injunctive relief are joint and several obligations of each Defendant.

5. Each Defendant shall provide a copy of this Consent Decree to each of its respective officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor(s) retained to perform work required under this Consent Decree. Each Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

6. In any action to enforce this Consent Decree, Defendants shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

7. Unless specifically defined in this Section or elsewhere in this Consent Decree, terms used in this Consent Decree shall have the meanings currently set forth in Sections 202, 216 and 302 of the Act, 42 U.S.C. §§ 7521, 7550, and 7602, and the regulations promulgated under Title II of the Act, 42 U.S.C. §§ 7521–7590.

- a. “Act” means the Clean Air Act, as amended, 42 U.S.C. §§ 7401 *et seq.*
- b. “Certificate of Conformity” means a certificate issued by EPA pursuant to Section 206 of the Act, 42 U.S.C. § 7525 and 40 C.F.R. § 90.108.
- c. “Complaint” means the complaint filed by the United States in this action;

- d. “Consent Decree” or “Decree” means this Decree, including all appendices attached hereto;
- e. “Day” or “day” means a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day;
- f. “Defendants” means Powertrain, Inc., Wood Sales, Inc., and Tool Mart, Inc.;
- g. “Effective Date” has the definition provided in Section XVI.
- h. “Engine Family” means a group of engines, as specified in 40 C.F.R. § 90.116.
- i. “EPA” means the United States Environmental Protection Agency and any of its successor departments or agencies;
- j. “Facility” means any store, warehouse, distribution center, detention center, or other inventory storage location, owned, leased or operated by any Defendant.
- k. “Financial Information” means tax returns, balance sheets, financial statements, and information regarding business practices submitted by Defendants to the United States prior to the Effective Date of this Consent Decree;
- l. “Interest” means interest at the rate allowed on money judgments pursuant to 28 U.S.C. § 1961. For the purposes of calculating interest under Paragraph 8 of this Consent Decree, interest shall begin to accrue on the date this Consent Decree is lodged with the Court, and such date shall be viewed as the “date of the entry of judgment” under 28 U.S.C. § 1961(a). For the purposes of calculating interest owed under Paragraphs 34 and 36 of this Consent Decree, interest shall begin to accrue on the date that EPA sends a demand for payment of stipulated penalties

under Paragraph 32 of the Consent Decree and such date shall be viewed as the “date of entry of judgment” under 28 U.S.C. § 1961(a).

- m. “Model Year” means model year as defined in 40 C.F.R. § 90.3.
- n. “Paragraph” means a portion of this Decree identified by an Arabic numeral;
- o. “Parties” means the United States and Defendants;
- p. “Permanently Destroy” (or “Permanent Destruction”) means to destroy a vehicle

or engine using one the following methods:

(1) (a) Remove (and dispose of appropriately) the engine oil from the crankcase, replace the oil with a 40 percent solution of sodium silicate ($\text{SiO}_2/\text{Na}_2\text{O}$ with a weight ratio of 3.0 or greater).

(b) Run the engine at a low speed (approximately 2000 rpm) until the engine stops.

(c) After allowing the engine to cool for an hour, try to start the engine. If the vehicle or engine contains a battery and that battery is charged and the engine will not operate at idle, the procedure is complete.

(d) If the engine starts, run the engine at a low speed (approximately 2000 rpm) until the engine stops and then try to start the engine again after allowing the engine to cool for an hour. Repeat step (d) in this process until the engine will not operate.

(e) Remove and dispose of any remaining fuel in accordance with applicable law.

(2) Remove (and dispose of appropriately) all oil and gasoline from the device.

Using a drill bit of no less than 3/8 inch,

- (a) drill a hole through the lower crankcase of the engine so that it no longer retains oil;
 - (b) drill a hole through the cylinder head into the combustion chamber;
 - (c) drill a hole through the cylinder or cylinder block through the cylinder liner; and
 - (d) drill a hole through the bore of the carburetor, rendering all parts useless.
- (3) Compact or crush the engine and all of its parts or components to render them useless.

- q. "Section" means a portion of this Decree identified by a roman numeral;
- r. "United States" means the United States of America, acting on behalf of EPA.

IV. CIVIL PENALTY

8. Defendants shall pay a civil penalty of \$2 million, plus interest, to be paid in installments, as follows: within 30 days after the Effective Date of this Consent Decree, Defendants shall pay \$250,000 plus applicable interest; by no later than seven months after the Effective Date, \$250,000 plus applicable interest; by no later than thirteen months after the Effective Date, \$300,000 plus applicable interest; by no later than nineteen months after the Effective Date, \$300,000 plus applicable interest; by no later than twenty-five months after the effective date, \$300,000 plus applicable interest; by no later than thirty-one months after the effective date, \$300,000 plus applicable interest; and by no later than thirty-six months after the effective date, \$300,000 plus applicable interest. Interest on the installments shall be at the rate specified in Paragraph 7.1 of this Consent Decree, and shall be calculated on the entire declining balance starting from the date specified in Paragraph 7.1 of this Consent Decree.

9. Defendants shall pay the civil penalties by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice in accordance with written instructions to be provided to Defendants, following lodging of the Consent Decree, by the Financial Litigation Unit of the U.S. Attorney’s Office for the District of the District of Columbia. At the time of payment, each Defendant shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in United States v. Powertrain, Inc., et al., and shall reference the civil action number, 1:09-cv-00993-RBW, and DOJ case number, 90-5-2-1-09332, to the United States in accordance with Section XV of this Decree (Notices); by email to acctsreceivable.CINWD@epa.gov; and by mail to:

EPA Cincinnati Finance Office
26 Martin Luther King Drive
Cincinnati, Ohio 45268

10. Defendants shall not deduct any penalties paid under this Decree pursuant to this Section or Section IX (Stipulated Penalties) in calculating their federal income tax or other state, local, or federal tax.

11. The United States shall be deemed a judgment creditor for purposes of collection of the payments required by Paragraph 8.

V. EXPORT/DESTRUCTION OF SPECIFIED EQUIPMENT

12. By no later than 12 months after the date of entry of this Decree, Defendants shall export or Permanently Destroy each of the engines specified in Appendix A (hereinafter referred to as “Appendix A Equipment”) to a country outside the United States, Canada, and Mexico, in accordance with the requirements of this Section.

13. Defendants shall maintain custody and control of the Appendix A Equipment in the condition it was in upon receipt by Defendants until it is shipped for export or Permanently Destroyed.

14. Each Defendant shall retain all customary transactional documents relating to its export or Permanent Destruction of Appendix A Equipment, including but not limited to customer name, address, quantity, identification of the port from which the engines were exported, and the name of the carrier used to export the engines. Such documents shall be made available to EPA upon request.

15. Each Defendant shall inform each entity that purchases or receives Appendix A Equipment from that Defendant (or from an entity acting as an agent of, or on behalf of, that Defendant), in writing, that the equipment does not meet U.S. EPA regulatory requirements and may not be sold in the United States, Mexico or Canada. Each Defendant shall prominently label all shipping pallets and individual boxes that hold the Appendix A Equipment: "For Export outside the United States, Mexico, or Canada. Not Lawful for Sale in the United States, Canada, or Mexico."

16. For those engines listed in Appendix A that are currently installed in generators, water pumps, or other devices, Defendants may reuse or recycle the non-engine parts of those devices, provided that the parts are not installed or used on any device that was manufactured prior to the date of lodging of this Decree.

17. In the first Semi-Annual Progress Report submitted pursuant to Section VIII (Reporting) after completion of the requirements of this Section and Appendix A, Defendants shall submit to EPA a Completion Report, certifying completion of the requirements of this

Section and Appendix A. In this Completion Report, Defendants shall include, and certify to the truth and accuracy of, each of the following:

- a. A list of all engines exported or Permanently Destroyed, including the model names and numbers and the Engine Family numbers, the date of export or destruction, and whether the engine was exported or Permanently Destroyed;
- b. If Defendants reuse or recycle any non-engine parts pursuant to Paragraph 16, a list of the model names and numbers of the devices into which such parts are installed;
- c. The name and contact information for any freight forwarding company or exporter used to facilitate the exportation of any engines, and for the entity used to facilitate the Permanent Destruction of any engines; and
- d. The name and contact information for the customer or recipient of the exported engines, or the location where the engines were Permanently Destroyed.

VI. CORPORATE COMPLIANCE PLAN

18. Within 30 days of the Effective Date of this Consent Decree, Defendants shall implement the Corporate Compliance Plan set forth in Appendix B.

VII. REQUIRED EMISSIONS OFFSET

A. Project Requirements

19. Within 18 months of the Effective Date of this Consent Decree, Defendants shall submit plans to implement the Emissions Offset Projects, as set forth in Appendix D (collectively referred to as "Emissions Offset Projects").

20. Defendants shall, through the implementation of the Emissions Offset Projects, offset the number of tons of HC+NO_x and of CO set forth in Table 1, by the deadlines specified in Table 1:

Table 1: Required Emission Offset (Tons)		
<u>Deadline</u>	<u>Cumulative Tons HC+NO_x Offset</u>	<u>Cumulative Tons CO Offset</u>
Three years from the Effective Date of this Consent Decree	51	1511
Four years from the Effective Date of this Consent Decree	102	3022
Five years from the Effective Date of this Consent Decree	152	4533

B. Reporting Requirements

21. In the first Semi-Annual Progress Report due, pursuant to Section VIII (Reporting Requirements) after each of the deadlines set forth in Paragraph 20, Defendants shall include:

- a. A detailed description of the Selected Emissions Offset Projects;
- b. A statement of the results of the Selected Emissions Offset Projects, including the number of tons of pollutants offset as a result of the Selected Emissions Offset Projects, including all supporting documentation and calculations; and
- c. A description of any problems encountered in completing the Selected Emissions Offset Projects and the solutions thereto.

22. In the first Semi-Annual Progress Report submitted pursuant to Section VIII (Reporting Requirements), Defendants will certify to the truth and accuracy of each of the following:

a. that Defendants are not required to perform any of the Selected Emissions Offset Projects by any federal, state, or local law or regulation or by any agreement, grant, or as injunctive relief awarded in any other action in any forum;

b. that the Selected Emissions Offset Projects are not projects that Defendants were planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;

c. that Defendants have not received and will not receive credit for the Selected Emissions Offset Projects in any other enforcement action; and

d. that Defendants will not receive any reimbursement for any portion of the Wood Stove Emissions Offset Project from any person, other than another Defendant.

C. General Requirements

23. Any public statement, oral or written, in print, film, on a website, or in other media, made by any Defendant making reference to any of the Selected Emissions Offset Projects under this Decree, shall include the following language: “This project is being undertaken in connection with the settlement of an enforcement action, United States v. Powertrain, Inc., et al., taken on behalf of the U.S. Environmental Protection Agency under the Clean Air Act.”

VIII. REPORTING REQUIREMENTS

24. Beginning 30 days after the end of the second full calendar quarter following the entry of this Consent Decree, and continuing on a semi-annual basis until termination of this Decree, and in addition to any other express reporting requirement in this Consent Decree, Defendants shall submit a Progress Report to EPA. The Progress Report shall contain all

information necessary to determine compliance with this Consent Decree, including but not limited to:

- a. the information required to be reported in the Semi-Annual Progress Report in accordance with the Paragraphs 17, 21 and 22 and Appendices B and C;
- b. a description of any non-compliance with the requirements of this Consent Decree and an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. Nothing in this Paragraph relieves Defendants of their obligation to provide the notice required by Section X of this Consent Decree (Force Majeure).

25. Each report submitted by Defendants under this Section shall be signed by an official of each signing Defendant, and shall contain the following certification:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowingly and willfully submitting a materially false statement.

26. All reports shall be submitted to the persons designated in Section XV of this Consent Decree (Notices).

27. The reporting requirements of this Consent Decree do not relieve any Defendant of any reporting obligations required by the Clean Air Act or its implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

28. Any information submitted pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

IX. STIPULATED PENALTIES

29. Defendants shall be liable for stipulated penalties to the United States for each failure to comply with the terms of this Consent Decree. A violation includes failing to perform any obligation required by the terms of this Decree according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

30. The following stipulated penalties shall apply as provided below:

- a. For failure to make a payment required by Paragraph 8 when due: \$1,500 per day for each day that the payment is late during the first fifteen days, and \$5,000 per day thereafter;
- b. For failure to submit the following written deliverables or notifications as required by this Consent Decree: \$1,200 per deliverable per day for the first 30 days; \$1,500 per deliverable per day for the next 30 days; and \$2,500 per deliverable per day for all days thereafter:
 - (i) Inspection Reports (Appendix B, ¶¶ 7(b)(5), 10);
 - (ii) Emissions Test Results (Appendix B, ¶¶ 7(b)(2), 12);
 - (iii) Notifications of noncompliance (Appendix B, ¶¶ 11 and 13);
 - (vi) Semi-Annual Progress Reports (Paragraph 24).

- c. For failure to timely Permanently Destroy or export the engines in accordance with the requirements in Section V and Appendix A of this Decree: \$5,000 per day.
- d. For importing engines without the documents specified in Paragraph 7(b) of Appendix B, in violation of Paragraph 8 of Appendix B: \$500/engine.
- e. For failure to secure the Required Emissions Offset, in accordance with Section VII and Appendix D, by any of the dates specified in Paragraph 20: \$2,500 per day.
- f. For failure to cure, to conform to this Consent Decree, any deficiency identified in a Semi-Annual Progress Report, within thirty days of the notification by EPA of such deficiency: \$750 per day for the first thirty days, \$1,250 per day every day thereafter.
- g. For the sale of any engine following the date Defendants ceased, or should have ceased, sale and distribution of any Engine Model as provided in Appendix B, Paragraph 13(b): \$1,500 per engine.
- h. For any violation of this Consent Decree not specified above: \$1,500 per violation per day.

31. Stipulated penalties that apply per day shall automatically begin to accrue on the first day Defendants fail to satisfy any obligation or requirement of this Consent Decree and shall continue to accrue until the violation or deficiency is corrected. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

32. Defendants shall pay any stipulated penalty within 30 days of receiving the United States' written demand.

33. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

34. Stipulated penalties shall continue to accrue as provided in Paragraph 30 during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendants shall pay accrued penalties determined by EPA to be owed, together with Interest, to the United States within 30 days of the effective date of the agreement or the receipt of EPA's decision or order.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendants shall pay all accrued penalties determined by the Court to be owed, together with Interest, within 30 days of receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the District Court's decision, Defendants shall pay all accrued penalties determined by EPA to be owed, together with Interest, within 30 days of receiving the final appellate court decision.

35. Defendants shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraph 9, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

36. If Defendants fail to pay stipulated penalties according to the terms of this Consent Decree, Defendants shall be liable for Interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date the United States sends a demand for payment of stipulated penalties under Paragraph 32 of the Consent Decree. Nothing in this Paragraph shall

be construed to limit the United States from seeking any remedy otherwise provided by law for Defendants' failure to pay any stipulated penalties.

37. Subject to the provisions of Section XIII of this Consent Decree (Effect of Settlement), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Defendants' violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of the Clean Air Act or its implementing regulations, Defendants shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

38. Defendants shall not deduct stipulated penalties paid under this Section in calculating their federal income tax, or any other state, local, or federal tax.

X. FORCE MAJEURE

39. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendants, of any entity controlled by Defendants, or of Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation. The requirement that Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include Defendants' financial inability to perform any obligation under this Consent Decree.

40. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event,

Defendants shall provide notice verbally or by electronic or facsimile transmission to the United States within 72 hours of when Defendants first knew that the event might cause a delay. Within five business days thereafter, Defendants shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendants' rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendants shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendants shall be deemed to know of any circumstance of which Defendants, any entity controlled by any Defendant, or Defendants' contractors knew or should have known when such entities or contractors were performing the obligations of Defendants under this Decree.

41. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

42. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Defendants in writing of its decision.

43. If Defendants elect to invoke the dispute resolution procedures set forth in Section XI (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendants complied with the requirements of Paragraphs 39 and 40, above. If Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

XI. DISPUTE RESOLUTION

44. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendants' failure to seek resolution of a dispute under this Section shall preclude Defendants from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendants arising under this Decree.

45. Informal Dispute Resolution. Disputes submitted to Dispute Resolution under this Consent Decree shall, in the first instance, be the subject of informal negotiations between the Parties. The dispute shall be considered to have arisen when Defendants send the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute and shall include supporting documentation. The period of informal negotiations shall not exceed 30 days from the date the dispute arises, unless that period is modified by written

agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, Defendants invoke formal dispute resolution procedures as set forth below.

46. Formal Dispute Resolution. Defendants shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph of this Consent Decree, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

47. The United States shall serve its Statement of Position within 45 days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendants, unless Defendants file a motion for judicial review of the dispute in accordance with the following Paragraph.

48. Defendants may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XV of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 10 days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendants' position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the

relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

49. The United States shall respond to Defendants' motion within the time period allowed by the Local Rules of this Court. Defendants may file a reply memorandum, to the extent permitted by the Local Rules.

50. Standard of Review.

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute subject to judicial review under Paragraph 48 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Defendants shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute subject to judicial review under Paragraph 48, Defendants shall bear the burden of demonstrating that their position complies with this Consent Decree, that their proposal will achieve compliance with the terms and conditions of this Consent Decree and the Act in an expeditious manner, and that implementation of their proposal will result in equivalent or greater environmental protection than would implementation of the United States' position. The final position of the United States shall be upheld by the Court if supported by substantial evidence in the record of the dispute as identified and agreed to by all Parties.

51. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendants under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 34. If Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section IX (Stipulated Penalties).

XII. INFORMATION COLLECTION AND RETENTION

52. The United States and its authorized representatives, including attorneys, contractors, and consultants, shall have the right to enter into any Facility pertaining to this Consent Decree, at all reasonable times, upon presentation of credentials, to

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. inspect engines or equipment imported, manufactured, or purchased by or on behalf of Defendants;
- d. require emissions testing;
- e. obtain documentary evidence, including photographs and similar data; and
- f. assess Defendants' compliance with this Consent Decree.

53. Until five years after the termination of this Consent Decree, Defendants shall retain, and shall instruct their respective contractors and agents to retain all non-identical copies of all documents, records, data or other information (including documents, records, data or other information in electronic form) that relate to Defendants' performance of their obligations under

this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, Defendants shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

54. Defendants may assert that certain documents, records, or other information requested by EPA pursuant to Paragraph 52 is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendants assert such a privilege, they shall provide the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendants. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of being legally privileged.

55. Defendants may also assert that information required to be provided under this Section is protected as confidential business information (“CBI”) under 40 C.F.R. Part 2. As to any information that Defendants seek to protect as CBI, the asserting Defendant shall follow the procedures set forth in 40 C.F.R. Part 2.

56. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal, state, or local laws, regulations, or permits, nor does it limit or affect any duty or obligation of the Defendants to maintain documents, records, or other information imposed by applicable federal, state, or local laws, regulations, or permits.

XIII. EFFECT OF SETTLEMENT

57. This Consent Decree resolves the United States' civil claims for penalties and injunctive relief under Sections 203, 204, 205, 207, and 213 of the Act, 42 U.S.C. §§ 7522, 7523, 7524, 7541, and 7547 for the violations alleged in the Complaint filed in this action through the date of lodging. The United States' commitment under this Paragraph is expressly conditioned upon the satisfactory performance by Defendants of their obligations under this Consent Decree.

58. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 57. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified in Paragraph 57. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, presented by, or posed by Defendants or their products, whether related to the violations addressed in this Consent Decree or otherwise.

59. In any subsequent administrative or judicial proceeding initiated by the United States against any Defendant for injunctive relief, civil penalties, other appropriate relief, Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 57 of this Section.

60. This Consent Decree shall not limit any authority of EPA under the Act or any applicable statute, including the authority to seek information from the Defendants or to seek

access to the property of the Defendants. The United States reserves all remedies available to it for violations of the Act by the Defendants that are not alleged in the Complaint as well as for violations of the Act by the Defendants that occur after the date of lodging of this Consent Decree.

61. Notwithstanding any other provision of this Agreement, EPA reserves, and this Agreement is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Agreement, if the Financial Information provided by Defendants, or the financial certification made by Defendants in Paragraph 82, is false or, in any material respect, inaccurate.

62. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Defendants are responsible for achieving and maintaining compliance with all applicable federal, state, and local laws, regulations, and permits; and Defendants' compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendants' compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act, or with any other provisions of federal, state, or local laws, regulations, or permits. This Consent Decree does not resolve criminal liability, if any, that any person or entity might have for violations of the Act or any other law.

63. This Consent Decree does not limit or affect the rights of the Defendants against each other or against any third parties not a party to this Consent Decree, nor does it limit the rights of third parties not party to this Consent Decree, against the Defendants, except as otherwise provided by law. Defendants reserve all rights against each other.

64. This Consent Decree does not limit or affect the rights of the United States against any third parties not a party to this Consent Decree.

65. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not a party to this Consent Decree.

XIV. COSTS

66. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to enforce this Consent Decree, including any action to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendants.

XV. NOTICES

67. Unless otherwise provided herein, reports, submissions, notifications to, or communications with the United States or the Defendants shall be deemed submitted on the date they are sent by overnight receipt mail service or by certified or registered mail, return receipt requested. Except as otherwise specifically provided herein, when written notification to or communication with the United States, EPA or the Defendants is required by the terms of this Consent Decree, it shall be addressed as follows:

To the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
Re: DOJ No. 90-5-2-1-09332
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, D.C. 20044-7611

Director, Air Enforcement Division
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W. (2242A)
Washington, D.C. 20460

Marcia Ginley
U.S. EPA Region 8
1595 Wynkoop Street
Mail Code 8MSU
Denver, CO 80202-1129

Marcia Ginley
U.S. EPA Region 8
1595 Wynkoop Street
Mail Code 8MSU
Denver, CO 80202-1129

To Defendants:

Powertrain, Inc.
212 Fulton Road
Golden, MS 38847

Wood Sales Co., Inc.
137 Second Street
Golden, MS 38847

Tool Mart, Inc.
154 Second Street
Golden, MS 38847

68. All Parties to the Consent Decree may change the address for providing notices to them by serving all other addressees identified above with a written notice setting forth the new address.

69. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XVI. EFFECTIVE DATE

70. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket; provided, however, that Defendants

hereby agree that each shall be bound to perform duties scheduled to occur prior to the Effective Date. In the event the United States withdraws or withholds consent to this Consent Decree before entry, or the Court declines to enter the Consent Decree, then the preceding requirement to perform duties scheduled to occur before the Effective Date shall terminate.

XVII. RETENTION OF JURISDICTION

71. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections XI (Dispute Resolution) and XVIII (Modification), or effectuating or enforcing compliance with the terms of this Decree.

XVIII. MODIFICATION

72. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

73. Any disputes concerning modification of this Decree shall be resolved pursuant to Section XI of this Decree (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 50, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XIX. TERMINATION

74. Defendants may, at any time after five years from the Effective Date of this Consent Decree, serve upon the United States, together with all necessary supporting

documentation, a Request for Termination of this Consent Decree, stating that the Defendants have:

- a. made the payments required by Section IV (Civil Penalty) and any accrued Interest imposed by this Consent Decree;
- b. paid in full any stipulated penalties imposed by this Consent Decree; and
- c. completed all other applicable requirements of this Consent Decree.

75. Following receipt by the United States of Defendants' Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendants have satisfactorily complied with the requirements for termination of this Consent Decree. The period of time for informal discussion of termination shall not exceed 60 days, unless agreed by the Parties. If the United States agrees that the Decree may be terminated, it shall submit, for the Court's approval, a motion to terminate the Decree.

76. If the United States does not agree that the Decree may be terminated, Defendants may invoke Dispute Resolution under Section XI (Dispute Resolution) of this Decree. However, Defendants shall not invoke Dispute Resolution regarding any dispute regarding termination under Section XI (Dispute Resolution) until 90 days after service of its Request for Termination.

XX. PUBLIC PARTICIPATION

77. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate.

78. Defendants consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Defendants in writing that it no longer supports entry of the Decree.

XXI. SIGNATORIES/SERVICE

79. Each undersigned representative of Defendants, the United States Environmental Protection Agency, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

80. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendants agree to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXII. INTEGRATION

81. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XXIII. FINANCIAL CERTIFICATION

82. Defendants hereby certify, to the best of their knowledge and belief, after thorough inquiry, (a) that they have submitted to EPA and DOJ Financial Information that fairly, accurately, and materially sets forth their financial circumstances; (b) that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and DOJ and the time they execute this Agreement; and (c) that they have fully disclosed the existence of any insurance policies that may cover any payment of a civil penalty relating to this matter.

XXIV. APPENDICES

83. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is “Engines Subject to Export.”

“Appendix B” is the “Corporate Compliance Plan.”

“Appendix C” is the “Emissions Testing Guidelines.”

“Appendix D” is the “Emissions Offset Projects.”

“Appendix E” is the “Compliance Evaluation Checklist.”

XXV. FINAL JUDGMENT

84. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendants.

SO ORDERED AND APPROVED in accordance with the foregoing this ___ day of ___, ___.

THE HONORABLE REGGIE B. WALTON
UNITED STATES DISTRICT JUDGE
U.S. District Court for the District of Columbia

FOR PLAINTIFF, UNITED STATES OF AMERICA:

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044-7415
(202) 514-2718

Date:

2/25/11

A. NATHANIEL CHAKERES
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
(202) 616-6537
(202) 514-8395 (fax)

Date:

2/9/11

Signature Page to Consent Decree in:

U.S. v. Powertrain, Inc., et al.

Through their undersigned representatives, the Parties agree and consent to the entry of this Consent Decree subject to the public notice and comment provisions of 28 C.F.R. § 50.7:

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

_____ Date: 2/25/11
CYNTHIA GILES
Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

_____ Date: 2/22/11
ADAM M. KUSHNER
Director
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

_____ Date: 2/22/11
PHILLIP A. BROOKS
Director, Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

_____ Date: 2/9/2011
MARCIA GINLEY
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Signature Page to Consent Decree in:
U.S. v. Powertrain, Inc., et al., No. 1:09-cv-00993-RBW (D.C. Dist. Ct.)

Through their undersigned representatives, the Parties agree and consent to the entry of this Consent Decree subject to the public notice and comment provisions of 28 C.F.R. § 50.7:

FOR DEFENDANT POWERTRAIN. INC.:

Date: FEB 4, 2011

Signature Page to Consent Decree in:
U.S. v. Powertrain, Inc., et al., No. 1:09-cv-00993-RBW (D.C. Dist. Ct.)

Through their undersigned representatives, the Parties agree and consent to the entry of this Consent Decree subject to the public notice and comment provisions of 28 C.F.R. § 50.7:

FOR DEFENDANT WOOD SALES, INC.:

Date: *FEB 4, 2011*

Signature Page to Consent Decree in:
U.S. v. Powertrain, Inc., et al., No. 1:09-cv-00993-RBW (D.C. Dist. Ct.)

Through their undersigned representatives, the Parties agree and consent to the entry of this Consent Decree subject to the public notice and comment provisions of 28 C.F.R. § 50.7:

FOR DEFENDANT TOOL MART, INC.:

Date: Feb 4, 2011

**Appendix A to Consent Decree in:
U.S. v. Powertrain, Inc., et al., No. 1:09-cv-00993-RBW (D.C. Dist. Ct.)**

Engines Subject to Export/Destruction

<u>Quantity</u>	<u>Model Name</u>	<u>HP</u>	<u>Displacement</u>
160	PT400	4	118
229	WP200	4	118
502	PT550	5.5	163
198	PTG2500XCS	5.5	163
180	PTWP300	5.5	163
198	PTCP200	5.5	163
1663	PT650E	6.5	196
325	PTG3500EXCS	6.5	196
236	PTTP300	6.5	196
525	PT900	9	270
109	PT900E	9	270
827	PTG4500XCS	9	270
91	PTWP400	9	270

**Appendix B to Consent Decree in:
U.S. v. Powertrain, Inc., et al., No. 1:09-cv-00993-RBW (D.C. Dist. Ct.)**

Corporate Compliance Plan

I. Definitions

1. “Subject Engines” means all EPA-regulated small spark-ignition engines (whether contained in generators or other equipment), imported, manufactured, or purchased by or on behalf of any Defendant from an Engine Supplier after the effective date of the Consent Decree.

2. “Engine Supplier” or “Supplier” means any person or entity that supplies or provides Subject Engines to Defendants.

3. “Engine Model” means any set of Subject Engines that is certified in the same EPA Engine Family, built by the same manufacturer in the same Model Year (as designated by the manufacturer), and with the same displacement and power (i.e., HP or kW).

4. “Sample” means one representative and randomly selected engine from an Engine Model.

5. “Certificate of Conformity” means a certificate issued by EPA under the Clean Air Act that confirms an Engine Family meets all requirements of the Clean Air Act and implementing regulations for a specific Model Year.

6. “Checklist” means the checklist set forth in Appendix E of this Consent Decree.

II. Pre-Importation Compliance Verification Program and Contract Requirements

7. Contracts. All contracts for the purchase or importation of Subject Engines by any Defendant must require the Engine Supplier:

(a) to conduct emission testing on at least one Sample of each Engine Model of the Subject Engines prior to the delivery or shipment of a new Engine Model to any Defendant in the United States. The tests must be performed in accordance with EPA regulations and by a United States-based testing laboratory, pre-approved by EPA under this Consent Decree.

(b) to provide Defendants with:

Appendix B to Consent Decree in *U.S. v. Powertrain, et al.*

(1) written notification, certified in accordance with Paragraph 25 of the Consent Decree, that the Supplier physically inspected at least one Sample and confirmed that it:

(i) is covered by an EPA-issued Certificate of Conformity that displays the Engine Family name and an effective date prior to the date the Engine Model entered or will enter the United States;

(ii) is labeled in accordance with all applicable regulations. See 40 C.F.R. §§ 90.114 and 1054.135;

(iii) is built, in all material respects, in conformity with the design specifications (e.g., Emission-Related Parts, adjustable parameters, and any other component that may reasonably be expected to affect emissions) in the corresponding application for the EPA-issued Certificate of Conformity; and

(iv) is accompanied by an owner's manual containing an emissions warranty that complies with all applicable regulations.

(2) a copy of the results of any emission or catalyst testing performed by, on behalf of, or at the request of the Supplier.

(3) a copy of the owner's manual containing an emissions warranty that complies with all applicable regulations.

(4) a copy of all EPA-issued Certificates of Conformity and their corresponding application(s), including any applications for any amendment to a Certificate of Conformity submitted to and approved by EPA for an Engine Family after issuance of the original Certificate of Conformity for that Engine Family.

(5) a completed Engine (and Equipment) Inspection Checklist, as applicable, as set forth in Appendix E to this Consent Decree (hereinafter "Checklist"), documenting the results of the inspections conducted under Paragraph 7(b)(1) of this Appendix B, above, certified in accordance with Paragraph 25 of this Consent Decree.

8. Compliance Assurance. No Defendant may import any Engine Model until it has obtained the completed Checklist and the documents described in Paragraph 7(b) of this Appendix B, above.

Appendix B to Consent Decree in *U.S. v. Powertrain, et al.*

III. Post-Importation Compliance Verification Program

9. Beginning 30 days after the end of the second full calendar quarter following entry of this Consent Decree and continuing on a semi-annual basis thereafter, Defendants must inspect at least one Sample of each Engine Model using the Checklist, and confirm that the Sample is built, in all material respects, in conformity with the design specifications (e.g., Emission-Related Parts, adjustable parameters, and any other component that may reasonably be expected to affect emissions) in the corresponding application for the EPA-issued Certificate of Conformity.

10. Defendants must document all inspections of Subject Engines and provide these documents, including completed Checklists, to EPA as part of the Semi-Annual Progress Report required by Section VIII of the Consent Decree.

11. If any Defendant identifies any nonconformance in an inspection conducted under Paragraph 9 of this Appendix B, or otherwise obtains any other information indicating that a Subject Engine may not conform to the requirements of the Clean Air Act or its implementing regulations, Defendants must, within ten days, notify the Supplier and EPA of the deficiency, report the total inventory quantity of all affected Subject Engines to EPA, and cease all sale and distribution of the Engine Model at issue until the deficiency has been remediated to EPA's satisfaction. Such remediation may include exportation or destruction of the Engine Model, as specified in Paragraph 13 (b) of this Appendix.

(a) Following the identification of a nonconformance, Defendants may petition EPA for permission to resume sale of the Engine Model (or a subset thereof) by demonstrating that the nonconformity is limited to a subset of engines within the Model. Any such petition shall include the results of any emission tests performed or required to be performed under this Appendix B. If EPA determines, on the basis of such petition, that a subset of the Engine Model is legally compliant, it shall grant Defendants permission to sell the identified subset of compliant vehicles or engines. EPA shall provide its response to any petition submitted under this subparagraph within 90 days of receipt.

(b) If Defendants elect to export the Engine Model of which the inspected engine is a member, Defendants must export such engines in compliance with the provisions of Section V of this Consent Decree no later than 60 days after notifying EPA of a nonconformity.

12. Defendants must complete the following emission testing as part of the Post-Importation Compliance Verification Program:

(a) if an inspection or other information indicates the Subject Engine may not have been built in conformity with the design specifications in the application for the Certificate of Conformity, Defendants must conduct emission testing on a Sample of the affected Engine or export the Engine Model in compliance with the provisions of Section V of this Consent

Appendix B to Consent Decree in *U.S. v. Powertrain, et al.*

Decree. Defendants must provide the results of any emission tests performed to EPA no later than 60 days after notifying EPA of a nonconformity;

(b) if Defendants purchase 2000 or more of an Engine Model that is a spark-ignition engine at or below 19 kW, whether loose or contained in a generator, Defendants must conduct emission testing on one Sample of such Engine Model each calendar year and provide emission test results to EPA no later than 60 days after completing a test; and

(c) In addition to any testing required under Paragraph 12(a)-(b) of this Appendix B, EPA may request that Defendants conduct emission testing on one Sample of any Engine Model, up to a maximum of seven emission tests in a calendar year. Defendants must provide the emission test results to EPA no later than 60 days after EPA's request. Upon a documented showing that no approved testing laboratory can provide test results within 60 days, EPA will consider a request by Defendants for an additional 30 days. The tests must be performed in accordance with Appendix C of this Consent Decree and EPA regulations, and by a U.S.-based testing laboratory, pre-approved by EPA under this Consent Decree.

13. If the emission test results for any Subject Engine indicate emissions above the applicable standard, or otherwise indicate that the tested Sample may not have been manufactured in accordance with the specifications in the application for Certificate of Conformity, Defendants:

(a) must notify the Supplier and EPA within 10 business days of receipt of the test results and provide the Supplier and EPA with the total inventory quantity of all affected Engine Models;

(b) must immediately cease sale and distribution of the affected Engine Model until the deficiency has been remediated to EPA's satisfaction. Such remediation may include exportation of the Engine Model, in compliance with the provisions of Section V of this Consent Decree and no later than 60 days after providing EPA with the test results; and

(c) may perform additional tests to confirm or rebut test results in accordance with 40 C.F.R. Part 90 Subpart F; and

(d) may petition EPA for permission to resume sale of the Engine Model (or a subset thereof) by demonstrating that the nonconformity is limited to a subset of vehicles or engines within the Model. Any such petition shall include the results of any emission tests performed or required to be performed under this Appendix B. If EPA determines, on the basis of such petition, that a subset of the Engine Model is legally compliant, it shall grant Defendants permission to sell the identified subset of compliant engines. EPA shall provide its response to any petition submitted under this subparagraph within 90 days of receipt.

Appendix B to Consent Decree in *U.S. v. Powertrain, et al.*

IV. Semi-Annual Reports

14. Beginning 30 days after the end of the second full calendar quarter following entry of this Consent Decree and continuing on a semi-annual basis thereafter, Defendants must submit Semi-Annual Progress Reports to EPA regarding the implementation of the Compliance Plan in accordance with Section VIII of this Consent Decree. Each Semi-Annual Progress Report must include:

(a) the total number of Subject Engines (organized by Engine Model and including Supplier information) that have been imported, purchased, or sold by Defendants during the reporting period;

(b) the results of all emission tests performed by either the Supplier or by Defendants under this Compliance Plan and the test plan used for the testing;

(d) as to those engines for which any Defendant provides the warranty, the total number of warranty claims submitted for Subject Engines (organized by Engine Model), and how the warranty claims were resolved; and

(e) all information necessary to determine Defendants' compliance with this Compliance Plan.

15. Defendants must provide emission test data and inspection documents to EPA upon request.

V. Implementation of Compliance Plan Requirements

16. Except as otherwise provided in this Paragraph, it will not be a violation of this Compliance Plan for a party other than Defendants to implement any of its terms on behalf of Defendants. Notwithstanding the foregoing, however, Defendants are jointly and severally responsible for the implementation of the Compliance Plan and for paying any stipulated penalties. Defendants must submit the reports and notifications to EPA required by this Compliance Plan and any required Certifications must be made by an officer of each of the Defendants.

17. All emission testing required by this Appendix B shall be low-hour, post-certification testing and conducted according to the guidelines set forth in Appendix C.

**Appendix C to Consent Decree in:
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Emissions Testing Guidelines

Any emission testing performed under this Consent Decree must be performed at a U.S.-based emissions testing laboratory approved in advance by EPA. The testing shall be conducted in accordance with a detailed written test plan that includes the following criteria:

1. Specifies that each test engine shall be subject to emissions testing in conformity with the applicable specifications set forth in 40 C.F.R. Parts 90 and 1054 to determine the levels of regulated exhaust emissions. For generator engines, this means that the engines must be removed from the generators during testing, unless the engine was certified with a special test procedure that allows testing of the engine while it is in the generator.
2. Include, at a minimum, a detailed description of:
 - a. the equipment that will be used to conduct the emissions test and collect emissions test data;
 - b. the procedures that will be used to prepare engines for testing, including the procedure to determine when emissions are stabilized;
 - c. the procedures that will be used to record and report the conduct of the emissions testing and the emissions test results, and engine power and speed, in each test mode;
 - d. the procedures that will be used if the air-fuel ratio of a subject test engine can be adjusted. Specifically, emissions tests shall be conducted: one test with the mixture setting unadjusted, i.e., as received by the testing laboratory, in addition to tests at maximum lean and rich conditions (to include air screw and other adjustments, as applicable). Unless the testing laboratory determines that an engine's air-fuel ratio is not adjustable and obtains EPA's concurrence on this determination, the testing laboratory will test at the lean and rich limits as defined at 40 C.F.R. §§ 90.2 and 1054.115(b), as applicable.
3. Specifies the nature of any maintenance, modification or adjustment performed on the test engines after they were received by Defendants or the testing laboratory.
4. Specifies that the laboratory will create and maintain records regarding the identity of each vehicle or engine that is the subject of testing, and the generator in which the engine is installed. This information shall include, at a minimum, any identifying numbers on the generator and/or engine, photographs of the generator showing the model name and

Appendix C to Consent Decree in *U.S. v. Powertrain, et al.*

number, photographs of the engine, and photographs of any emission control label present on the engine.

5. Specifies that the useful life emissions for the test engine will be calculated based on the low-hour emission levels of the test engine. The deterioration factors for the engine family will be calculated based on the certification test data adjusted according to the estimated vehicle/engine age or vehicle miles traveled.
6. Specifies that the test engines and generators shall be retained by Defendants or the independent laboratory for 120 days after testing.

Appendix D to Consent Decree in *U.S. v. Powertrain, et al.*

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Mitigation of Excess Emissions – Emissions Offset Projects

In compliance with, and in addition to, the requirements in Section VII of this Consent Decree (Emissions Offset Projects), Defendants shall comply with the requirements of this Appendix to ensure that emissions from PowerTrain engines in excess of amounts permitted by applicable EPA regulations are offset by projects to achieve emissions reductions of the same pollutants in other appliances and devices.

I. Overall Mitigation Projects Schedule and Budget

- A. Within eighteen months from the entry of this Consent Decree, as further described below, Defendants shall submit plans to EPA for review and approval for the offset of excess pollutants emitted by engines placed into commerce by Defendants. EPA shall determine, prior to approval, that all Projects are consistent with federal law.
- B. Defendants may, at their election, consolidate the plans required by this Appendix into a single plan.
- C. Upon EPA's approval of the plans required by this Appendix, Defendants shall complete the Mitigation Projects according to the approved plans. Nothing in the Consent Decree or this Appendix shall be interpreted to prohibit Defendants from completing the Projects before the deadlines specified in the schedule of an approved plan.
- D. Beginning thirty days from the date of commencement of each Project, and continuing as part of the Semi-Annual Reporting Requirement found in Paragraph 24 of the Consent Decree, Defendants shall provide EPA with written reports detailing the progress of each Project, including an accounting of Project Dollars spent to date.
- E. Within sixty days following the completion of each Project required under this Consent Decree (including any applicable periods of demonstration or testing), Defendants shall submit to the United States a report that documents the date that the Project was completed, Defendants' results of implementing the Project, including the emissions reductions achieved, all required documentation, and the Project Dollars expended by Defendants in implementing the Project.

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- F. Defendants shall not use or rely on the emission reductions generated as part of any project undertaken pursuant to this Consent Decree in any federal or state emission averaging, banking, trading or other emission compliance program, unless such credits are generated after Defendants' compliance with the entire Required Emissions Offset, as set forth in Paragraph 20 of this Consent Decree.
- G. Any final reports submitted to EPA pursuant to 40 C.F.R. § 1054.730 must state that the credits generated will be retired per the Consent Decree and permanently removed from any account affiliated with Defendants.

II. Wood-Burning Appliance Changeout and Retrofit Project

- A. Within eighteen months from the entry of this Consent Decree, Defendants shall submit to EPA for review and approval pursuant to Section VIII of this Consent Decree a plan to sponsor Wood-burning Appliance Changeout and Retrofit Project(s) ("Project(s)") that a state, local, or tribal air pollution control agency ("air pollution control agency") or third-party non-profit will agree to implement by replacing or upgrading inefficient, higher polluting wood-burning appliances (e.g., non-EPA certified wood stoves, fireplaces, old technology outdoor wood-fired hydronic heaters) with EPA-certified wood-stoves and/or cleaner burning, more energy-efficient wood-burning appliances (e.g., wood pellet, gas, or propane stoves) or Phase II EPA qualified hydronic heaters or fireplace retrofit devices (e.g., gas stove, catalyst). Defendants shall complete the Project(s) no later than five years after the effective date of this Consent Decree.
- B. The Project(s) that Defendants sponsor shall provide incentives through rebates, discounts, and in some instances, actual replacement of the old technology wood-burning appliances for residential homeowners, to encourage residential homeowners to replace their old, higher polluting and less energy efficient wood-burning appliances with cleaner burning, more energy efficient heating appliances like wood pellet stoves, EPA-certified wood stoves, gas stoves, propane stoves, or Phase II EPA-qualified hydronic heaters or fireplace retrofit devices.
- C. Defendants shall sponsor the implementation of the Project(s) in areas that promise significant environmental benefit from the Project(s). In determining the specific areas to implement this Project, Defendants shall give priority to areas with high amounts of air pollution, areas located within a geography and topography that makes it susceptible to high levels of air pollution, areas that have a significant number of old and/or, higher polluting wood-burning appliances, or areas with a high concentration of minority and/or low-income populations that

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could realize health benefits from a changeout campaign. The Project(s) must also take place in areas where EPA expects the average wood-stove user to burn at least three cords of wood per year.

- D. The air pollution control agency(ies) and/or non-profit(s) that Defendants select as specified in paragraph II.A of this Appendix shall consult with EPA's wood smoke team and implement the Project(s) consistent with the materials available on EPA's website at <http://www.epa.gov/burnwise>.
- E. The plan shall also satisfy the following criteria:
1. Identify the air pollution control agency(ies) and/or non-profit(s) selected to implement the Project(s).
 2. Briefly describe the schedule and budgetary increments in which Defendants shall provide the necessary funding to the air pollution control agency(ies) and/or non-profits(s) to implement the old and/or, higher polluting wood-burning appliances. Defendants shall be obligated to provide funding beginning no later than two years after the entry of this Consent Decree, and such schedule and budgetary plan shall reflect this obligation.
 3. Ensure that the air pollution control agency(ies) and/or non-profit(s) will implement the Project(s) in accordance with the requirements of this Appendix, and that the Project Dollars will be used to support the actual replacement, upgrade or retrofit of appliances currently used as the primary or secondary source of residential heat with a cleaner, more energy efficient appliance (e.g., wood pellet stove, EPA-certified wood stove, gas stove, or EPA Phase II qualified hydronic-heater). Defendants shall limit the use of Project Dollars for administrative and project support costs associated with implementation of the program to no greater than 10% of the Project Dollars Defendants provide to a specific air pollution control agency and/or non-profit. Up to 7% can be used for personnel costs incurred by the air pollution control agency and/or nonprofit, and the remaining 3 % for other (e.g., outreach materials, training, studies/surveys, travel) project support costs.
 4. Briefly describe all of the elements of the Project(s) that the air pollution control agency(ies) and/or non-profit(s) will implement. Defendants shall describe the number and type of energy efficient appliances it intends to subsidize or make available, the cost per unit, the value of the rebate or incentive per unit, and the criteria the air pollution control agency(ies)

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and/or nonprofit(s) will use to determine which residential homeowners should be eligible for actual stove replacement.

5. Identify any organizations with which the air pollution control agency(ies) and/or non-profit(s) will partner to implement the Project, including such organizations as: the Hearth, Patio, and Barbecue Association of America, the Chimney Safety Institute of America, a local chapter of the American Lung Association, weatherization offices, individual stove retailers, facilities that will dispose of old stoves so that they cannot be resold or reused, local fire departments, and local health organizations.
 6. Describe how the air pollution control agency(ies) and/or non-profit(s) will ensure that the wood-burning appliances being replaced were in use at the time of replacement and were not EPA-certified. Defendants shall also describe how the air pollution control agency(ies) and/or non-profit(s) will ensure that the wood-burning appliances being replaced will be properly recycled or disposed to ensure they will be permanently incapable of creating emissions.
- F. Upon EPA's approval of the plan, Defendants shall complete the Project according to the approved plan and schedule.

III. Optional Catalyst Emissions Offset Project

- A. In addition to the Wood-Burning Stove Replacement Project(s) described in Part II of this Appendix, Defendants may, within one year from the entry of this Consent Decree, propose a plan for the achievement of emissions offsets through the certification and sale of newly redesigned engine(s) equipped with a catalyst to control CO and HC+NO_x to levels lower than the applicable EPA emissions standards for those pollutants.
- B. The Catalyst Project plan shall include: (a) specifications for the proposed engine(s) and its catalyst(s) (i.e., dimensions, cell density, active material loading and ratio); (b) a certification, in accordance with Paragraph 25 of this Decree, indicating that the project engine was not previously built with a catalyst; and (c) information about the previous Model Year Engine Family, if any, under which the project engine was certified.
- C. EPA shall provide a response to Defendants on the Catalyst Project plan within 90 days. If EPA disapproves the proposed plan, EPA's response will include the steps necessary for Defendants to obtain EPA's approval.
- D. Regarding the redesigned engine(s) with catalysts, Defendants shall:

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1. Enroll in EPA's Averaging, Banking, and Trading ("AB&T") program, pursuant to 40 C.F.R. Part 90, Subpart C, and 40 C.F.R. Part 1054, Subpart H, by certifying the redesigned model(s) to comply with a Family Emissions Limit lower than the applicable EPA emissions standards for CO and HC+NO_x.
2. Permanently retire all credits generated by Defendants' participation in the AB&T program to the extent that such credits are needed to satisfy the Required Emissions Offset set forth in Paragraph 20 of this Decree.
3. Conduct production line testing, as well as satisfy all other applicable requirements, as set forth in 40 C.F.R. Part 1054, Subpart D.
4. Not claim, for any purpose, that the small volume manufacturer exemption applies to these engines.

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**Appendix E to Consent Decree in:
U.S. v. Powertrain, Inc., et al., No. 1:09-cv-00993-RBW (D.C. Dist. Ct.)**

Engine (and Equipment) Inspection Checklist
For loose engines or engines contained in equipment.

Exam Date and Time:

Facility Name and Location:

Inspector Name and Company:

For post-importation inspections only, complete the following:

Purchase Order No. (if available):

SKU:

Please insert N/A for items that are not applicable to the engine/equipment undergoing inspection.

For engines contained in equipment only:

Equipment Type (e.g., generators, pumps, etc.)

Equipment Model – Note source of information:

Equipment Manufacturer – Note source of information:

Equipment Date of Manufacture (or Model Year) – Note source of information:

Equipment Dry Weight – Note source of information:

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Engine Serial No.:

From owner's manual, note the following. If information is not available, respond with "N/A".

Engine Power (HP):

Engine Displacement (cc):

Engine Stroke: 2 / 4 (circle one)

Fuel Type:

Emissions Warranty Information -- (include source of information in response)

Length --

Does it cover all engine components?

Are all terms accurately set forth in owner's manual?

Engine Model -- Based on decals/ badges on equipment/engine:

From EPA label, note:

Engine Family --

Engine Model Year --

Engine Manufacturer --

Engine Date of Manufacture --

Evaporative Family --

Fuel Type --

Emission Control System Abbreviations --

Emission Controls -- Note presence and part number (if applicable) for each of the following. TWC, OC, O2S, HO2S, AIR, PAIR, EM, DFI, CFI, MFI, TBI, EGR

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From carburetor on engine, note:

Manufacturer –

Part Number –

Air-Fuel Ratio:

Identify any of the following if present on the engine/equipment: air-fuel mixture screw or jet needle clip (circle those that apply)

Does COC application indicate that these components are adjustable?

Air-fuel mixture screw: Yes or No (circle one)

Jet Needle Clip: Yes or No (circle one)

If yes to all items, move to the next question, “Fuel Tank”.

If no to any item, note whether these components are permanently sealed or not normally accessible using ordinary tools (check air-fuel mixture screw and jet needle clip accessibility and adjustability within one half hour using ordinary tools).

Air-Fuel Mixture Screw: Yes or No (circle one)

Jet Needle Clip: Yes or No (circle one)

Tools used:

Describe any other design element that can be adjusted and that, if adjusted, may affect the vehicle’s air-fuel ratio.

Fuel Tank: metal or plastic (circle one)

Fuel Line Markings:

Does the EPA Label Peel Off Without Being Destroyed or Defaced? Yes or No (circle one)

Does Crankcase Vent Directly to Open Air? Yes or No (circle one)

Was the engine/equipment or-any portion thereof kept for further inspection? If so, list (e.g., carburetor, exhaust system, etc.) Maintain chain of custody.

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As part of the inspection, take clear photos to document the following:

- Equipment
- Any model name/number or decal on the equipment
- Serial number
- EPA label
- Any of the following emission controls: TWC, OC, O2S, HO2S, AIR, PAIR, EM, EFI, MFI, TBI, EGR
- Fuel Tank
- Crankcase
- Carburetor (from as many sides as possible)
- Carburetor components (if applicable)
- Box (if applicable)

Attach a copy of the owner's manual.