UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Taotao USA, Inc.,	)	**Docket No. CAA-HQ-2015-8065**
Taotao Group Co., Ltd., and	)	
Jinyun County Xiangyuan Industry	)	
Co., Ltd.	)	
	)	
Respondents.	)	

ORDER DENYING RESPONDENTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

On August 2, 2017, Respondents filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a) ("Motion"). Complainant filed a Response to the Motion on August 17, 2017 ("Response"), to which Respondents filed a Reply in support of their Motion on August 28, 2017 ("Reply"). After due consideration, as discussed below, the Motion is **DENIED**.

I. Relevant Background[1]

On November 12, 2015, Complainant, the Environmental Protection Agency (EPA or "Agency"), initiated this administrative action against the Respondents, Taotao USA, Inc. ("Taotao USA"), Taotao Group Co., Ltd. ("Taotao Group"), and Jinyun County Xiangyuan Industry Co., Ltd ("Jinyun"). The ten count Complaint, *as amended*, alleges Respondents committed a total of 109,964 violations of sections 203 and 213 of the Clean Air Act (CAA), 42 U.S.C. §§ 7522, 7547, and implementing regulations codified at 40 C.F.R. Part 86, Subpart E and 40 C.F.R. §§ 1051, 1068. The violations arise from Respondents' manufacture and import into the United States of motorcycles and recreational vehicles with catalytic converters not designed or built in accordance with their Certificates of Conformity[2] ("COC"). For the

[1] This section contains only a sliver of the procedural history of this case. Nearly 150 motions, briefs, and orders have been filed in the case to date.

[2] A certificate of conformity is a document EPA issues to a manufacturer certifying that a vehicle or engine class conforms to all of the applicable federal emission requirements. *See* https://www.epa.gov/vehicle-and-engine-certification/overview-certification-and-compliance-vehicles-and-engines. A catalytic converter is an automobile exhaust-system component containing a catalyst that causes conversion of harmful gases (such as carbon monoxide and uncombusted hydrocarbons) into mostly harmless products (such as water and

violations, the Agency proposed a civil penalty totaling more than $3,000,000.[3] *See* Complainant's Fourth Motion to Supplement the Prehearing Exchange (July 31, 2017) at 6.

On May 3, 2017, this Tribunal issued an Order, *inter alia*, granting the Agency's Motion for Partial Accelerated Decision, finding the material facts establishing the Respondents' liability for the violations not to be in dispute.[4] *See*, May 3, 2017 Order on Partial Accelerated Decision and Related Motions ("PAD Order"). A footnote in the PAD Order memorialized a finding to the effect that the EPA had fulfilled the legal prerequisite to obtaining an administrative penalty above the monetary threshold of $320,000 imposed by CAA (42 U.S.C. § 7524(c)(1)) by obtaining the consent of the Department of Justice (DOJ).[5] *See* PAD Order at 18 n.25 (citing Am. Compl. ¶ 21; CX 26; CX 28).

On August 18, 2017, this Tribunal granted the Agency's Motion to Take Official Notice. *See* Order Granting Respondent's Motion for Leave to Respond and Complainant's Motion Requesting Official Notice ("Official Notice Order"). In that Order, official notice was taken of

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carbon dioxide). *See* Motor Vehicle Emissions Control Book Seven, Catalytic Converter Systems, at 7–9 (EPA Pub. 450/3-77-042, 1977), accessible at nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=9101XSS9.TXT.

[3] The Agency has since lowered its penalty calculation to $1.6 million. *See* Complainant's Motion for Leave to Reduce the Proposed Penalty (Oct. 9, 2017).

[4] The PAD Order also denied Respondents' Motions for Accelerated Decision and Motion to Dismiss and granted the Agency's First and Second Motions to Supplement the Prehearing Exchange. On May 15, 2017, Respondents filed a Motion for Reconsideration, or in the Alternative for Interlocutory Appeal of the PAD Order. On June 15, 2017, this Motion was denied primarily on the basis that it raised the same legal argument to the effect that the precious metal ratios of catalytic converters were not "specifications" under the Agency's definition of that term, as Respondents raised in their motion for accelerated decision and in opposition to the Agency's PAD Motion, and failed to show any error in the prior adverse ruling on that issue. *See* Order on Respondents' Motion for Reconsideration or Interlocutory Review (June 15, 2017).

[5] Section 7524 provides that in lieu of commencing a civil action in U.S. district court, the EPA Administrator may commence an administrative action seeking penalties for violations of various sections of the CAA, including § 7522(a)(1) and 7547(d) at issue here, **"**except that the maximum amount of penalty sought against each violator in a[n] [administrative] penalty assessment proceeding shall not exceed $200,000 [now $362,141], unless the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review." 42 U.S.C. § 7524(c)(1); Civil Monetary Penalty Inflation Adjustment Rule, 82 Fed. Reg. 3633, 3636 (Jan. 12, 2017). As the issue of whether the Agency had complied with this prerequisite was not raised as a contested issue by the Respondent in its opposition to the Agency's motion, or in its own dispositive motions, the finding thereon was relegated to a footnote.

the finding made in the PAD Order that the penalty in this matter may exceed $320,000, as well as certain penalty policies.[6]

II. Respondents' Motion

Respondents' Motion asserts that this Tribunal lacks jurisdiction over this action because the Complainant has failed to establish by a preponderance of the evidence the existence of a valid joint determination, made by the EPA Administrator and the U.S. Attorney General ("DOJ"), to waive the monetary penalty limitation on administrative actions prior to initiating this action, as required by 42 U.S.C. § 7524(c)(1). Mot. at 2. In support, Respondents offer three arguments.

First, Respondents argue the evidence fails to show that both the "proper parties," that is the EPA Administrator or the Attorney General, or persons with valid delegated authority from them, waived the limitations provision. Mot. at 5-6. Specifically, they claim that the Agency has failed to present a waiver signed by anyone in the EPA. The only evidence offered by Complainant on the waiver issue they assert are two letters (CX 26 and CX 28) "purportedly signed" by Karen S. Dworkin, Assistant Section Chief of the DOJ's Environmental Enforcement Section within its Environmental and Natural Resources Division (ENRD) dated March 17, 2015, and June 2, 2016. These letters indicate DOJ is concurring with the substance of letters sent to her by Phillip A. Brooks, EPA's Director of Air Enforcement Division (AED) within the Office of Enforcement and Compliance Assurance (OECA), which Respondents observe, EPA has not produced in discovery. Mot. at 2, 5. Respondents further assert that "it is well-established" that the AED Director "does not have the authority to make a waiver determination." Mot. at 5 (citing *In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. at 522 (EAB 2004)).

Similarly, as to the Attorney General/DOJ, Respondents allege that the Agency "has failed to present evidence to show that Ms. Dworkin has the requisite authority to make a waiver determination on behalf of the DOJ in this matter." Mot. at 5 (citing *In the Matter of Strong Steel Prods., LLC,* 2004 EPA ALJ LEXIS at *42). Even if Ms. Dworkin does have such authority, they declare, the concurrence letters produced to date by the Agency are insufficient to show that such a determination was in fact made, since again, the letters to which she is concurring have not been produced. Mot. at 5–6. Moreover, Respondents argue that Ms. Dworkin's second concurrence letter dated June 2, 2016, only "waives the addition of 1681 recreational vehicles and any potential violations that *may occur in the future* 'as long as such violations are [substantially similar] to those covered under the waivers already issued to date . . .

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[6] Respondents failed to submit a timely opposition to the Agency's June 23, 2017, Motion for Official Notice. Official Notice Order at 1. However, on August 10, 2017, before the motion was ruled upon, they filed a request for leave to respond, which was granted and their response was considered in ruling on the Agency's Motion. *Id.* In the response, Respondents vaguely suggested that the Agency was seeking "notice of facts that were subject to reasonable dispute," but again made no arguments directly contesting whether the Agency had complied with 42 U.S.C. § 7524(c)(1). *See* Respondents' Motion for Leave to Respond to Complainant's Motion Requesting Official Notice (Aug. 10, 2017).

.'" Mot. at 6 (citing CX 28) (emphasis added). As all of the 43,906 violations in excess of the 1681 added in reliance on such letter via the Amended Complaint occurred before the date of that letter, they were not "future violations," Respondents assert. In addition, the waiver only included vehicles "'that harm the regulatory scheme, but that do not cause excess emissions.'" Mot. at 7 (quoting CX 28). As such, the waiver does not cover penalties for exceeding emissions, or potentially exceeding emissions, and so "Complainant, therefore, cannot apply penalty factors that pertain to vehicles that exceed or potentially exceed emission standards," Respondent proclaims. Mot. at 7.

Second, Respondents briefly argue that the evidence does not show Ms. Dworkin had knowledge that the matter involved a proposed penalty exceeding three million dollars and so could not participate in a "joint determination to waive limitations as to the amount of penalties, as is required by the Act." Mot. at 7 (citing 42 U.S.C. § 7524(c)).

Third, "[b]ecause the proposed penalty far exceeds the jurisdictional limit, a waiver in this matter is unconstitutional," Respondents declare. Mot. at 7. Noting that EPA is required to obtain a waiver to initiate an administrative action where the proposed penalties exceeds $200,000, "it is highly unlikely that Congress contemplated that a 'larger penalty amount' of over fifteen times the maximum penalty limit could ever be appropriate," they surmise. Mot. at 7. In support, they assert that the relaxed rules of administrative proceedings do not provide the same constitutional protections as the Federal Rules of Civil Procedure applied in district courts. Mot. at 9. As such, "Complainant is attempting to circumvent the statute, congressional purpose, and the constitution by initiating this administrative action," Respondents argue.[7] Mot. at 7–8.

III. The Agency's Response

The Agency asserts in Response that the Administrator and the Attorney General did jointly determine this matter "is appropriate for administrative penalty assessment" above the statutory threshold, as required by 42 U.S.C. § 7524(c)(1). In support, EPA produced with its Response a series of new exhibits identified as Attachments A-K, along with previously produced exhibits CX 26 and CX 28.

Complainant explains that the EPA Administrator has delegated such determination authority under the CAA to the Assistant Administrator ("AA") for the EPA's Office of Enforcement and Compliance Assurance ("OECA") in "multi-Regional cases, cases of national significance or nationally managed programs." Resp. at 2 (citing Attach. A (EPA Delegation 7-6-A)). Further, it advises that the EPA's program for enforcing the mobile source provisions under Title II of the Act, 42 U.S.C. §§ 7521 through 7590, "is and has always been a nationally managed program." Resp. at 2 (citing Attach. F at 6, 9 (Memorandum from Assistant Administrator Steve A. Herman, Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases (July 11, 1994))). Further, the AA for OECA has redelegated the waiver authority to the Director for the Office of Civil Enforcement ("OCE"), who has redelegated the authority to the Director

[7] Respondents further make the point that the United States Supreme Court has ruled exemplary damage awards that are "grossly excessive" violate the Due Process Clause of the Fourteenth Amendment, citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). Mot. at 8.

of the Air Enforcement Division. Resp. at 2 (citing Attach. B (Office of Enforcement and Compliance Assurance Redelegation 7-6-A (Mar. 2013), Attach. C (Office of Enforcement and Compliance Assurance Redelegation 7-6-A (Sept. 2015), Attach. D (Office of Civil Enforcement Redelegation 7-6-A (Mar. 2013), Attach. E (Office of Civil Enforcement Redelegation 7-6-A (Sept. 2015))). Complainant is the Director of the Air Enforcement Division, the Agency observes. Resp. at 2 (citing Compl. ¶ 2 (identifying Complainant's title and delegations of authority); Am. Compl. ¶ 2 (same)).

As to DOJ, the Agency advises, the Attorney General has delegated his/her waiver authority under the CAA to the Assistant Attorney General ("AAG") in charge of the DOJ's Environment and Natural Resources Division ("ENRD") by regulation. Resp. at 2 (citing 28 C.F.R. § 0.65(a); *In re Strong Steel Products, LLC,* Docket No. CAA-5-2003-00090, 2004 EPA ALJ LEXIS 144, at *31). The AAG has, in turn, redelegated waiver authority to the supervising Deputy Assistant Attorney General ("DAAG"), Chief, Deputy Chiefs, and Assistant Chiefs of ENRD's Environmental Enforcement Section ("EES"). Resp. at 2 (citing Attach. G at 1, 7 (Environment and Natural Resources Division Directive No. 2014-01, "Delegation of Authority to Initiate, Litigate and Compromise EDS and EES Cases" (April 8, 2014))).

As to how the joint determination occurred in this case, EPA reports that, pursuant to 42 U.S.C. § 7524(c)(1), on January 30, 2015, the EPA AED Director sent a letter to the AAG for ENRD requesting that DOJ waive the limitation on the EPA's authority to assess an administrative penalty against Respondents for violations of sections 203(a) and 213(d) of the Act, 42 U.S.C. §§ 7522(a)(l) and 7547(d). Resp. at 2 (citing Attach. H).[8] On March 17, 2015, Karen Dworkin, DOJ's Assistant Section Chief of EES, wrote a letter concurring with Complainant's request. *Id*. at 2–3 (citing CX 26). On November 12, 2015, Complainant filed the first Complaint alleging that certificates of conformity did not cover vehicles purportedly belonging to the eight different engine families identified in Counts 1 through 8, and the vehicles were therefore imported or sold in violation of sections 203(a)(l) and 213(d) of the Act. *Id*. at 3 (citing Compl. at ¶¶ 18, 36–99).

Subsequently, EPA learned that additional engine families were being imported and sold by Respondents in violation of the Act. *Id.* Therefore, on February 1, 2016, Complainant sent a second letter to the AAG to inform him of newly-discovered violations, and to again "request concurrence with [EPA's] determination that the violations should be resolved administratively with a waiver of the administrative penalty cap." *Id.* (citing Attach. I). As before, Ms. Dworkin of wrote a reply letter dated March 24, 2016, concurring in Complainant's waiver determination. *Id*. (citing Attach. J). Further, on May 6, 2016, Complainant wrote a third letter to the AAG to inform him of yet more violations by

[8] EPA asserts in its Response that this correspondence (Attach. H), as well as others it sent to DOJ in connection with this matter (Attachs. I and K), include*, inter alia*, its "legal analysis and proposed litigation strategy," and therefore those portions thereof have been redacted from the exhibits produced. Resp. at 2 n.2, at 3 nn.4, 5.

Respondents and requested a third concurrence with Complainant's determination that an administrative proceeding with a waiver against Respondents remained an appropriate enforcement response "both for the violations identified to date, and for substantially similar violations that might be discovered in the future." *Id.* (citing Attach. K). In response to Complainant's May 6 letter, Ms. Dworkin wrote a reply letter concurring in Complainant's waiver determination, and requesting additional consultation regarding substantially similar future violations if certain thresholds were met. *Id*. (citing CX 28). Specifically, Ms. Dworkin requested additional consultation if newly-discovered violations caused harm other than to the regulatory scheme, including violations that caused excess emissions, violations other than those involving certification or labeling, violations that were willful, knowing, or otherwise potentially criminal, or if the aggregate number of vehicles in violation increased to over 125,000. *Id.*

Thereafter, on June 14, 2016, Complainant filed the Amended Complaint, increasing the number of vehicles identified as purportedly belonging to the engine families identified in Counts 1 through 3 and 5 through 8, and adding Counts 9 and 10 identifying two new engine families with violations substantially similar to those described in Counts 1 through 8. Resp. at 3.

Based upon the foregoing, the Agency argues that "[t]here can be no genuine dispute that officials with delegated authority from the Attorney General and the EPA Administrator determined to waive the statutory limit on the Administrator's authority to assess a penalty against Respondents in this action pursuant to section 205(c)(l) of the Act." Resp. at 5-6.

Moreover, EPA asserts that Respondents' criticism that "it is impossible to know what facts Ms. Dworkin's determination relied upon" in determining waiver, due to the absence or redaction of EPA's letters to her, is invalid, because this Tribunal may not "second-guess enforcement personnel's [discretionary] determination" in this regard. *Id*. at 7 (citing *In re Lyon County Landfill,* 8 E.A.D. at 568; *In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. at 520-21; 42 U.S.C. § 7524(c)(l)).

Further, Respondents' argument that the violations added to Counts 1 through 3 and 5 through 8 via the Amended Complaint were unauthorized based upon select portions of the language in the relevant correspondence is erroneous, Complainant asserts. First, because they were not "future violations" because they occurred in the past, "elevates form over substance," and that the "time the violations occurred is substantively irrelevant," EPA asserts. *Id.* at 8. Complainant suggests that the references to future violations in its May 6, 2016 letter, and DOJ's June 2, 2016 letter, "show that the officials contemplated that the number of violations in this administrative matter would grow as new violations were discovered, and that the matter remained appropriate for administrative resolution so long as additional violations were substantially similar to those already discussed and the aggregate number of vehicles in violation did not exceed 125,000." *Id.* Second, EPA explains it has not alleged that the violations identified in the Amended Complaint caused quantifiable emissions exceedances warranting court-ordered remediation, or that the violations resulted from a deliberate effort to circumvent the Act. Rather, all of the violations related to the 109,964 vehicles identified in the Amended Complaint "pertain to certification." *Id.* (citing

Am. Compl. ¶ 38). Third, with regard to the use of the term "major" in Ms. Dworkin's June 2, 2016 letter, EPA declares that

> The question of whether a violation may be characterized as "major" for the purpose of calculating a proposed penalty is distinct from the question of whether violations demonstrably cause quantifiable excess emissions such that the appropriate enforcement response is a civil action in district court to restrain future violations and obtain injunctive relief in the form of court-ordered remediation.

Resp. at 8 (citing 42 U.S.C. § 7523(a)). As such, it argues "[n]othing in the June 2, 2016 letter suggests that the determination limits the discretion of the Complainant or this Tribunal to characterize the egregiousness of the violations identified in the Amended Complaint and calculate an appropriate penalty with the guidance of the Penalty Policy." *Id.* at 8–9.

Lastly, Complainant's Response characterizes Respondents' claim that this action is "unconstitutional" as "frivolous." *Id.* at 9. EPA notes Respondents do not cite any authority for their argument as to there being a lawful monetary cap on waiver and such argument is contradicted by the "plain language" of the statute. *Id*. (citing 42 U.S.C. § 7524(c)(l)). Nor do they cite any basis for finding that the Consolidated Rules do not adequately protect their right to procedural due process, noting that such Rules were promulgated pursuant to sections 554 and 556 of the Administrative Procedure Act providing for due process in the assessment of civil penalties. *Id.* Finally, Respondents' suggestion that the penalty amount is "grossly excessive" and so violates the Constitution is both "premature and incorrect," states the Agency. *Id.* In support, they note that, to date, no penalty has been assessed against them in this matter for the 109,964 violations, and that the proposed penalty of "$3,030,320 represents a penalty of approximately $27.55 per violation, less than 0.1% of the maximum amount allowed by law," which is a maximum of $37,500 per violation alleged in Counts 1–8 and $45,268 per violation alleged in Counts 9 and 10. *Id.* at 10 (citing 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4; *BMW of North America v. Gore,* 517 U.S. 559 (1996)).

IV. Respondents' Reply

Respondents' Reply initially begins by criticizing Complainant's delay in producing the additional evidence in support of waiver and thus jurisdiction. Reply at 2–3. They note that the documents Complainant attached to their Response to the Motion were not submitted with their Initial Preheating Exchange filed on August 25, 2016. *Id.* at 5. As such, they suggest this Tribunal did not have sufficient evidence of waiver and jurisdiction, in light of their denials of the same made in their answers to the original and amended Complaints, when it subsequently found in the PAD Order that the requisite waiver had been issued and entered liability against them. *Id.* at 3–6 (citing PAD Order at 18 n.25). On the same grounds, they suggest the Tribunal's Official Notice Order issued August 18, 2017 was inappropriate. *Id.* at 5.

Second, Respondents assert that the additional evidence is still insufficient to prove that a valid waiver occurred. They note that the first EPA letter to DOJ requesting waiver, signed by AED Director Philip A. Brooks and dated January 30, 2015, was supported by a memorandum which is "wholly redacted." *Id.* at 6–7. Respondents suggest that "the memorandum is essential to determine who made the initial determination, and if Mr. Brooks ever concurred with said EPA's determination." *Id.* at 7. Without the text of such Memorandum, a determination of a valid waiver cannot be made, they suggest. *Id.*

Third, with regard to the second concurrence letter, Respondents assert that reading it to cover "newly discovered" violations, *i.e.* vehicles then in non-compliance, rather than violations occurring in time in the future, is inconsistent with the plain language thereof. *Id.* at 7–8.

Fourth, Respondents assert that the DOJ delegations of authority only authorize waivers made by the "EPA Administrator." Because of that, and the fact that "Complainant is barred" from introducing at this point the letters EPA sent to DOJ, the waivers are invalid, they claim. *Id.* at 9.

Fifth, they argue that the authority delegated to DOJ is monetarily limited and thus because EPA sought the "maximum penalty," the Assistant Section Chief did not have authority to concur or deny in the commencement of this administrative action. Reply at 8 (citing Resp., Attach. G).

Finally, Respondents assert that consistent with the delegations, EPA has failed to show that the Director of the AED made the waiver determination, the OCE concurred in the determination, and the Regional Administrator was notified, as required by the applicable delegations. *Id.* at 10.

V. Discussion

A. Law of the Case

As a preliminary matter, this Tribunal notes that, once again, Respondents are attempting re-litigate a matter upon which this Tribunal has already ruled, in violation of the "law of the case doctrine." *See In re: Service Oil, Inc*. 2011 EPA App. LEXIS 41, *20–21 (EAB, Dec. 7, 2011) ("Under the [law of the case] doctrine, once a court decides an issue of fact or law, either explicitly or by necessary implication, that court's decision on the issue will be treated as binding -- i.e., as the "law of the case"" -- in subsequent proceedings in the same case."). While it is certainly true that a motion challenging jurisdiction may be filed "at any time," as Respondents note, the issue of jurisdiction cannot be endlessly relitigated once ruled upon. As the Supreme Court has indicated, the "law of the case doctrine is never off the table solely because an issue is jurisdictional." *Bishop v. Smith*, 760 F.3d 1070, 1084–85 (10th Cir. 2014) (emphasis in original) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988); *see also* 18B Charles Alan Wright et al., Federal Practice and Procedure § 4478.5, at 798-800 (2d ed. 2002) ("Although a federal court is always responsible for assuring itself that it is acting within the limits of subject-matter jurisdiction statutes and Article III, this duty need not extend to perpetual reconsideration."), *quoted in Bishop v. Smith*, 760 F.3d at 1085–86.

This case began almost two years ago, in November 2015. In their original Answers Respondents raised as an affirmative defense the lack of jurisdiction based upon the Agency allegedly not fulfilling the CAA joint determination requirement.[9] Resp't Taotao USA Inc.'s, Original Ans. and Req. for Hr'g. at 13; Resp't Taotao Group Co., LTD.'s, Original Ans. and Req. for Hr'g. at 14; Resp't Jinyun County Xiangyan Industry Co., LTD.'s, Original Ans. and Req. for Hr'g. at 14. After that, they had an extended opportunity to undertake discovery on the jurisdiction issue and/or raise and litigate the jurisdictional issue in their own Motion to Dismiss and/or Motion for Accelerated Decision filed in November 2016. Alternatively, they could have argued the absence of jurisdiction in opposition to the Complainant's Motion for Partial Accelerated Decision, also filed in November 2016, or in opposition to the Motion for Official Notice. However, Respondents failed to avail themselves of any of these opportunities. Instead, they sat back and waited until after years of litigation, and after the Tribunal had ruled on all the various motions for Accelerated Decision, and until shortly before hearing, to offer their arguments on the jurisdiction point. As such, they potentially wasted not only a great deal of their own time and resources and that of Complainant, but more importantly the limited time and resources of this Tribunal.

Therefore, had the Agency not offered new and/or additional evidence on the question of jurisdiction with its Response, this Tribunal would not be inclined to reconsider the issue. However, since the Agency has offered such new evidence, and to potentially avoid unnecessarily wasting additional resources, the Tribunal will exercise its discretion and reconsider the jurisdictional issue again in light of the new evidence. *In re Rogers Corp.*, 9 E.A.D. 534, 554 (EAB, 2000) (The law of the case doctrine does not limit a court's power to revisit an issue it previously decided but it should be "loathe" to do so absent extraordinary circumstances.) (quoting *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. at 817)).

B. Statutory Requirement

CAA Section 7524(c)(1) provides that -

> In lieu of commencing a civil action [in district court] under subsection (b), the Administrator may assess *any* civil penalty prescribed [statutorily for

[9] Respondent Taotao USA's Fifth and Respondents Taotao Group's and Jinyun's Sixth Affirmative defenses state that

> The EPA has not met its burden of establishing that it has jurisdiction over this matter or that it has the ability to assess a penalty in excess of $320,000.00. The EPA has provided no proof that the Administrator and the Attorney General jointly determined that this matter is appropriate for an administrative penalty assessment proceeding, beyond a mere assertion in Paragraph 18 of the Complaint. Therefore, the EPA has not proven that it has jurisdiction over this matter through an administrative penalty assessment proceeding."

Resp't Taotao USA Inc.'s, Original Ans. and Req. for Hr'g. at 13; Resp't Taotao Group Co., LTD.'s, Original Ans. and Req. for Hr'g. at 14; Resp't Jinyun County Xiangyan Industry Co., LTD.'s, Original Ans. and Req. for Hr'g. at 14.

> CAA violations under 42 U.S.C. § 7522 and 7547], *except that the maximum amount of penalty sought against each violator in [such administrative] penalty assessment proceeding shall not exceed $200,000,*[10] *unless the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment*. Any such determination by the Administrator and the Attorney General *shall not* be subject to judicial review. Assessment of a civil penalty under this subsection shall be by an order made on the record after opportunity for a hearing in accordance with sections 554 and 556 of title 5. The Administrator shall issue reasonable rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person. The Administrator may compromise, or remit, with or without conditions, any administrative penalty which may be imposed under this section.

42 U.S.C. § 7524(c)(1) (emphasis added).

C. EPA Delegation of Authority

As indicated above, CAA Section 7524(c)(1) imposes the obligation upon the "EPA Administrator" to make the joint determination regarding the administrative penalty. 42 U.S.C. § 7524(c)(1). However, Section 7601(a) of the CAA provides that "[t]he Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this Act, except the making of regulations, as he may deem necessary or expedient." 42 U.S.C. § 7601(a). *See also In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. 498, 509–11, 2004 EPA App. LEXIS 23 (EAB, July 23, 2004).

A review of the documents provided by Complainant with its Response evidences that on August 4, 1994, the EPA Administrator delegated the authority "[t]o determine jointly with the Attorney General in accordance with the CAA the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action" to the "Regional Administrators and the Assistant Administrator [AA] for Enforcement and Compliance Assurance [OECA]."[11] EPA

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[10] *See* n.4, *supra*.

[11] The Agency suggests in its Response that the attachments provided evidencing EPA delegations of authority were taken from EPA's official Delegations Manual. Resp. at 5. It further notes that the Environmental Appeals Board (EAB) has held that "the presence of a delegation in the EPA Delegations Manual (including Regional delegations) provides a sufficient evidentiary basis for the Board to conclude that a delegation of authority has in fact occurred," if no evidence has been presented to bring the accuracy of the Delegations Manual into question with regard to the delegation at issue. *Id*. (quoting *In re Julie's Limousine & Coachworks, Inc*.,

Delegation of Authority 7-6A at ¶¶ 1.b, 2 (Aug. 4, 1994), Resp. Attach. A. *See also* EPA Delegation of Authority 7-6A at ¶ 3.d (OECA AA "must concur in any determination regarding the authority delegated under paragraph 1.b."). "Limitations" placed on the delegation are that the AA for OECA "may exercise these authorities in multi-Regional cases, cases of national significance or nationally managed programs," and that the OECA AA "or his/her designee must notify any affected Regional Administrators or their designees when exercising any of the above authorities . . . ." *Id.* at ¶ 3.a. Significantly, the EPA Administrator authorized the OECA AA to redelegate this authority "to the Division Director level." *Id.,* at ¶ 4.a. *See also Julie's Limousine*, 11 E.A.D. 498, 2004 EPA App. LEXIS 23 (EAB, July 23, 2004).

Consistent therewith, on March 5, 2013, and again on September 11, 2015,[12] the OECA AA redelegated the authority "[t]o determine jointly with the Attorney General in accordance with the CAA the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action" to the "Director of the Office of Civil Enforcement (OCE)," among others. OECA Redelegation of Authority Clean Air Act 7-6-A at ¶¶ 1.b, 2 (Mar. 5, 2013), Resp. Attach. B; OECA Redelegation of Authority Clean Air Act 7-6-A at ¶¶ 1.b, 2 (Sep. 11, 2015), Resp. Attach. C. Again, the exercise of such redelegated authority was limited to "multi-Regional cases, cases of national significance or nationally managed programs," and required that "any affected Regional Administrators or their designees" must be notified "when exercising any of the above authorities . . . ." *Id.* at ¶ 3.b. This delegation of authority allowed for further redelegation to the "Division Director level in OCE." *Id.* at ¶ 4.

By delegations dated March 5, 2013 and September 2015, the OCE Director in turn redelegated her authority "[t]o determine jointly with the Attorney General in accordance with the CAA the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action" to the "Director of the Air Enforcement Division (AED)," among others. OCE Redelegation of Authority Clean Air Act, 7-6-A ¶ 1.b., 2 (Mar. 5, 2013), Resp. Attach. D, OCE Redelegation of Authority Clean Air Act, 7-6-A ¶ 1.b., 2 (Sep. 11, 2015), Resp. Attach. E (.[13] The same limitations

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11 E.A.D. 498, 519 & n.41 (EAB, 2004). There are various references to EPA's Delegation Manual on the internet but the whole Manual itself, and more importantly the delegations at issue here, do not appear to be accessible by the general public via the web.

[12] The revised delegation appears to have been issued to allow the redelegation of authority to negotiate and confer with the alleged violator to EPA enforcement attorneys, and not just Division Directors. *Compare* Resp. Attach. B, ¶ 4, *with* Attach. C ¶ 4. Both of the delegations are relevant here as some of the EPA-DOJ correspondence was exchanged when the March 2013 delegation was in effect and the Complaint filed in November 2015, when the September 2015 delegation was in effect.

[13] These delegations explicitly provide that the authority granted therein "may not be redelegated." Resp. Attach. D ¶ 4, Attach. E ¶ 4.a. The Revised delegation appears to have been issued to specifically add a provision indicating that delegation does not divest authority in the delegator to act. *Compare* Resp. Attach. D, ¶ 4, *with* Attach. E ¶ 4.

applied. *Id*. at ¶ 3.a. Thus, in sum, the EPA Administrator's statutory authority to make the requisite CAA penalty determination jointly with the Attorney General was delegated down to the AED Director, in "multi-Regional cases, cases of national significance or nationally managed programs." *Id.*

According to EPA Memorandum dated July 11, 1994, cases "involving a bottom line penalty of $500,000 or more assume a sufficient national profile so as to be presumptively nationally significant." Memorandum from Steve A. Herman, Assistant Administrator, to Assistant Administrators, Regional Administrators, Deputy Assistant Administrators, Regional Counsels, and OECA Office Directors and Division Director, Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases (July 11, 1994), Resp. Attach. F at 3. Further, the Memorandum indicates that "'National Program' cases" are "cases that arise in programs that are not implemented at the Regional level, such as the Mobile Source program"[14] and that "[i]n these cases, Headquarters has the lead role, with little or no regional involvement." *Id*. at 6.

This case involves a penalty of over $500,000, and mobile sources of air emissions, *i.e.* vehicles. It was instituted by EPA Headquarters, rather than any particular EPA region. *See* Compl. and Am. Compl. As such, I find that in this case the EPA's AED Director was lawfully delegated authority to make the CAA penalty determination jointly with the U.S. Attorney General as required by 42 U.S.C. § 7524(c)(1). In so concluding, I find no merit in Respondents' claims that the Complainant is prohibited from producing additional documents evidencing jurisdiction with its Response in that it has failed to show "good cause" for not producing them earlier. Reply at 3, 5. A hearing in this matter has not yet been held and the time for producing evidence prior to hearing set by the Prehearing Orders had not yet expired as of the date that Complainant filed its response to the instant Motion to Dismiss. As Respondents had not actively challenged jurisdiction by offering arguments in support thereof in any dipositive motion, or in opposition to Complainant's dispositive motion, the Agency had no reason to produce this additional evidence previously. Moreover, I find the Respondents' suggestion in their Reply (at pages 3 and 6) that the submission of the additional evidence suggests that this Tribunal's finding of jurisdiction in the PAD Order and Official Notice Order was inappropriate, also unpersuasive. Prior to the issuance of such Orders, the Agency produced two documents (CX 26 and CX 28) showing the concurrence of the DOJ to institution of this administrative action, which in the opinion of this Tribunal, made out a *prima facie* case of jurisdiction. Respondents neither offered any evidence nor arguments to dispute such *prima facie* case until they filed the instant Motion. As such, the preponderance of the evidence available in the record at the time proved the fulfillment of the jurisdictional requirement imposed by 42 U.S.C. § 7524(c)(1). It is simply not the responsibility of this Tribunal to seek out evidence on and/or evaluate the merit of every single defense raised by the Respondents in their Answer regardless of whether they pursue them by motion or in opposition to motions where appropriate. That is the responsibility of Respondents' counsel, and his failure to do so, is the risk they alone assume.

[14] "Mobile" sources of air emissions include motor vehicles and recreational vehicles of the types at issue here. *See* https://www.epa.gov/mobile-source-pollution/how-mobile-source-pollution-affects-your-health

I also find no merit to Respondents' claim that the validity of the exercise of the delegation of authority to the AED Director in this case is contingent upon the Director of the OCE concurring with the determination and the "affected Regional Administrator" being notified. Reply at 9–10. First, the OCE redelegation to the AED does not require that the OCE concur, only that the Director of AED (or other relevant office) concur in the joint determination. Resp. Attach. D at ¶ 3.b.; Resp. Attach. E at ¶ 3.b. Second, this is a headquarters case involving a national program. It is not a regional case and there is no evidence of any "affected Regional Administrator," who should or could be notified. *See* Resp. Attach. F at 6 (noting in national program cases, Headquarters has the lead role and there is "little or no regional involvement.").

D. DOJ Authority

The CAA gives authority to "jointly determine" with EPA whether it is appropriate to institute an administrative penalty action seeking a sum above the statutory limit to the Attorney General. 42 U.S.C. § 7524(c)(1). Like the EPA Administrator, this authority has apparently been delegated down the DOJ hierarchy.

By Regulation, DOJ has provided that:

> The following functions are assigned to and shall be conducted, handled, or supervised by the Assistant Attorney General [AAG] in charge of the Environment and Natural Resources Division [ENRD]:
>
> (d) Civil and criminal suits and matters involving air, water, noise, and other types of pollution . . .

28 C.F.R. § 0.65.[15]

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[15] It is not completely clear that this provision (subsection (d)) covers administrative actions, as subsection (a) of this regulation specifically refers and includes covers civil suit and matters in "administrative tribunals," and this subsection (d) does not. There is another DOJ regulation more specifically referencing EPA which states that

> "[w]ith respect to any matter assigned to the [ENRD] in which the [EPA] is a party, the Assistant Attorney General in charge of the [ENRD], and such members of his staff as he may specifically designate in writing, are authorized to exercise the functions and responsibilities undertaken by the Attorney General in the Memorandum of Understanding between the [DOJ] and the [EPA] (42 FR 48942), except that subpart Y of this part shall continue to govern as authority to compromise and close civil claims in such matters."

28 C.F.R. § 0.65a. However, as the memorandum referred to does not appear to reference the CAA and penalty determinations, and this is not a matter assigned to ENRD, this section does not appear any more relevant here. *See* Memorandum of Understanding Between Department of Justice and Environmental Protection Agency, 42 Fed. Reg. 48942 (Sept. 26, 1977). *See also In the Matter of Strong Steel Prods.,* LLC, 2004 EPA ALJ LEXIS 12, *27 n.11 (ALJ, Apr. 30,

In turn, Directive No. 2014-01, issued by AAG for ENRD in about March 2014, provides that:

> Subject to the limitations imposed by section III of this Directive,[16] and upon application of the [EPA Administrator], under . . . CAA, 42 U.S.C. § . . . 7524(c)(1), the supervising DAAG [Deputy Assistant Attorney General], Chief, Deputy Chiefs, and Assistant Chiefs of EES [Environmental Enforcement Section] are each hereby authorized to concur in or deny the commencement of a proceeding for the assessment of an administrative penalty greater than $200,000 . . .

Resp. Attach. G at 7 (U.S. DOJ ENRD Directive No. 2014-01, Delegation of Authority to Initiate, Litigate and Compromise EDS and EES Cases, at 7 (April 8, 2014)).

As such, within the hierarchy of DOJ, the Directive indicates that the Assistant Chief of EES is authorized to concur in or deny the commencement of an EPA proceeding for the assessment of an administrative penalty greater than $200,000. *Id.* The Respondent in neither its Motion nor its Reply appears to contest this conclusion. Reply at 8.

E. The Joint Determination

Referencing the Respondents here, on January 30, 2015, the EPA's AED Director, Phillip A. Brooks, wrote DOJ's John C. Cruden, AAG, ENRD, explicitly requesting that DOJ "waive the limitation on the EPA's authority to assess an administrative penalty for violations" of the CAA, 42 U.S.C. §§ 7522(a) and 7547(d), and the applicable regulations, citing 42 U.S.C. § 7524(c) and the need for waiver via a joint determination. Resp. Attach. H at 1. The reasons for the waiver were set forth by EPA in a five page "sensitive memorandum," attached to the request, the majority of which is redacted from the exhibit produced by the Agency with its Response. *Id.* at 2–7.

On March 17, 2015, Karen S. Dworkin, DOJ's Assistant Section Chief for EES, responded to EPA's letter and request for "waiver to pursue an administrative action against Taotao USA, Inc., and related entities, in connection with the manufacture and sale of highway motorcycles and recreational [vehicles] in violation of the certification requirements of the Act and implementing regulations," stating "I concur with your request for a waiver pursuant to Section 205(c) of the Clean Air Act (CAA), 42 U.S.C. § 7524(c), of

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2004) (Order on Respondent's Motion to Stay). However, DOJ has apparently concluded for itself that this delegation covers the joint determinations made under 42 U.S.C. § 7524(c)(1) by allowing redelegation of such by the AAG of ENRD, so this Tribunal defers to that Agency's interpretation of its own statutory authority. *See* Resp. Attach. G at 9.

[16] None of the listed limitations appear relevant here. *See* Resp. Attach. G at 8–9.

the limitation on EPA's authority to assess administrative penalties, in order to pursue an administrative action in this matter." CX 26.

Approximately 11 months later, on February 1, 2016, Mr. Brooks again wrote to Mr. Cruden presenting an "Addendum" to EPA's request for waiver of the penalty limitation with regard to the Respondents. The substance of the Addendum is redacted. *See* Resp. Attach. I.

On March 24, 2016, Ms. Dworkin again responded on DOJ's behalf to this request by EPA, stating "I concur with your request for waiver . . . [under 42 U.S.C. § 7524(c)] . . . in order to pursue administrative action in this matter for these additional vehicles." Resp. Attach. J.

Less than two months later, on May 6, 2016, Mr. Brooks again wrote to Mr. Cruden, submitting a "Second Addendum to EPA's January 30, 2015 Request . . . for a Waiver of the Penalty Limitation on the EPA's Administrative Penalty Authority" under the CAA in regard to the Respondents. Resp. Attach. K. The substance of the basis for the second addendum request is also redacted out. *Id.*

On June 2, 2016, Ms. Dworkin, again as the Assistant Section Chief for EES, responded to the May 6 EPA letter, which she described as seeking "a waiver to pursue an administrative penalty action against Taotao USA, Inc., and related entities for additional recreational vehicles (now totaling 1681) that have been found to violate the certification requirements," stating "I concur with your request for waiver [under 42 U.S.C. § 7524(c)] . . . in order to pursue an administrative penalty in this matter for these additional vehicles." CX 28. In addition, the DOJ letter stated as follows:

> In addition, you sought a waiver for certain potential additional violations that may occur in the future. I concur with your waiver request for future violations of Section 203(a) of the CAA, 42 U.S.C. 7522(a), as long as such violations are *substantially similar* to those covered under the waivers already issued to date, and do not cause the total number of waived vehicles in the matter to exceed 125,000. (This includes both any vehicles that are included in your administrative complaint and vehicles that are not pled in the complaint but that EPA seeks to resolve in its administrative penalty action.
>
> By *substantially similar* to those covered under waivers concurred upon to date, I mean future violations:
>
> --that harm the regulatory scheme, but that do not cause excess emissions; and
>
> --of provisions on certification, labeling, incorrect information in manuals, or warranty information violations.

I ask EPA to consult with us to discuss the path forward for any violations that are *not substantially similar*, including, but not limited to any future violations:

> --that go beyond mere harm to the regulatory scheme;
> --that cause excess emissions;
> --that are other than violations of provisions on certification, labeling, incorrect information in manuals, or warranty information violations; or
> --that are willful, knowing, or otherwise potentially criminal; or
> --that increase the aggregate number of waived vehicles in the matter to over 125,000 total.

CX 28.

F. Sufficiency of the Joint Determination

As indicated above, by virtue of various delegations, the EPA Administrator authorized the Agency's AED Director to "jointly determine" if waiver of the penalty limitation is appropriate in cases of national significance or nationally managed programs. Such cases include those with penalties over $500,000 or involving mobile sources. This case involves both, it was issued and instituted by EPA Headquarters. It appears that at all the relevant times, Phillip A. Brooks was the AED Director. Resp. Attachs. H, I, K. As such, I find that Mr. Brooks, EPA's AED Director, was an appropriate authority to jointly determine the appropriateness of a waiver in regard to the violations alleged in this action.[17] Resp. Attach. A–E.

Similarly, DOJ's Directive indicates that the Assistant Chief of EES has been delegated the authority to concur in or deny the commencement of an EPA proceeding for the assessment of an administrative penalty greater than $200,000. Resp. Attach. G at 7. As such, based thereon, I find Karen Dworkin, DOJ's Assistant Section Chief for EES at all relevant times, was authorized upon behalf of the Attorney General to determine the appropriateness of such waiver with regard to the violations alleged in this action.[18] Resp. Attach. G, CX 26, CX 28.

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[17] For the reasons stated in Complainant's Response, there is no merit to Respondent's argument that the AED Director is not authorized to make a waiver determination based upon *In re Julie's Limousine & Coachworks, Inc.,* 11 E.A.D. 498 (EAB July 23, 2004), a regionally initiated case. Resp. at 5 n.10.

[18] Respondents argue in their Reply that because the DOJ Directive states the Assistant Chief of EES can authorize or concur in a waiver "upon application" of the EPA "Administrator," an "application," specifically, submitted by the EPA Administrator him/herself is required. Reply at 8–9. However, they cite no authority for this proposition and I find this argument unpersuasive and illogical. It seems to me that no agency has the right to determine for another who has

Further, it appears by virtue of the series of written correspondence exchanged by Mr. Brooks (EPA) and Ms. Dworkin (DOJ), between January 30, 2015 and June 2, 2016, that the agencies heads, through their delegates, "jointly determined" that seeking an administrative penalty against the Respondents over the statutory threshold then in effect, for violations of the CAA, was appropriate for administrative penalty assessment. EPA's determination is evidenced by both the three letters sent by Mr. Brooks explicitly seeking DOJ's waiver and submitting memoranda in support, as well as his execution and filing of the Complaint and Amended Complaint in this matter.

In making such finding, I am sympathetic to Respondents' objection to the fact that the rationale for the agencies waiving the penalty limitation is withheld from them by virtue of the redactions made by EPA to the correspondence exchanged between it and DOJ. However, whether Respondents are made aware of the rationale, and more significantly whether they agree with it or not, has no effect on this Tribunal's determination as to whether a valid joint determination occurred, as the CAA explicitly provides that "[a]ny such determination by the Administrator and the Attorney General shall not be subject to judicial review." 42 U.S.C. § 7524(c)(1). Such statutory provision clearly indicates that the determination is solely within the discretion of the agencies to make on whatever criteria, if any, they determine is appropriate, and shall not be second-guessed or judged thereafter. Thus, even if the Respondents were told the basis for the waiver, and could convince this Tribunal that, on the basis thereof, the joint determination was erroneously made by the agencies, there would be no available remedy for such an alleged wrong.[19] This Tribunal's authority is limited to determining whether the requisite waiver occurred. *See In re Lyon County Landfill*, 8 E.A.D. 559, 568 (EAB, 1999) ("[T]he narrow scope of the Presiding Officer's decision to review the section 113(d)(1) waiver determination is . . . solely to determine whether the statutory preconditions that enable EPA and DOJ to exercise their discretionary authority to issue a waiver had been satisfied. Such review need not, and indeed should not, interfere with EPA and DOJ's authority to determine, from a policy perspective, when to use the waiver tool.").

I am also not persuaded by Respondents' argument based upon the assertion that DOJ did not have authority to concur or deny in the commencement of this administrative action initially seeking the maximum statutory penalty per violation. Reply at 8 (citing Resp., Attach. G). This argument appears to be based upon the DOJ Directive's limitations provision (section III ¶ B) which states that the delegated authority provided in section II.C, to approve or deny commencement of actions under the CAA, may not be exercised if "the proposed action, as a

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authority to exercise the agency's own statutory obligations. In this case, the EPA Administrator has determined it is appropriate to delegate the statutory authority to make this determination under the CAA to others. DOJ cannot by its own directive restrict or prohibit such delegations and thereby refuse to act except upon an application signed by the Administrator.

[19] Respondents' also argue that they require the memoranda to "determine who made the initial determination, and if Mr. Brooks ever concurred with said EPA determination." Reply at 7. Whether Mr. Brooks was the first or last person at EPA to determine it was appropriate to seek a higher penalty in this matter also seems legally insignificant, and his signatures on the letters to DOJ (and the complaints) adequately document his determination/concurrence in regard thereto.

practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated in the above sections or exceeding the authority to accept offers in compromise delegated to the Assistant Attorney General by 28 C.F.R. § 0.160(a)." Resp. Attach. G at 8. There is no evidence of any "other claims," adversely affected by this action nor does the relevant part of the DOJ Directive, that is section II.C., contain any monetary upper limit on the redelegation authority. Resp. Attach. G at 7. Further, as this is an action brought by EPA, it is unclear that the DOJ AAG would have any authority to accept any offer in compromise in regard to it whatever the amount. In addition, the referenced regulation limits its application to cases brought by the "United States" and settlements over $4 million dollars, neither of which are relevant here. 28 C.F.R. § 0.160(a).

That being said, the issue remains as to whether a valid joint determination was made as to *all of* the violations alleged in this action, including those beyond the 1681 as to which EPA explicitly enumerated and explicitly sought and obtained approval from DOJ for an administrative penalty action to be initiated.[20] Resp. Attach. H–K; CX 26, 28. Based upon their reading of CX 28's language referring to DOJ's approval given in regard to "potential additional violations that may occur in the future," Respondents state that DOJ only approved EPA initiating a penalty action for the 1681 violations referred to therein, and those which occurred after June 2, 2016, the date of such letter, *i.e.* "in the future." Reply at 7–8. EPA would read this language as covering violations which it found appropriate to add to the Complaint after its second addendum request letter, *i.e.* "violations [it discovers] in the future." Resp. Attach. K at 4.

Since EPA has redacted out any potential discussion about its request with regard to "violations in the future" in its second addendum letter no clarification on the meaning of the language can be gleaned therefrom. *Id.* However, the circumstances and language of CX 28, suggests that EPA's interpretation, rather than Respondents, is correct. First, it is important to note that CX 28 was issued in response to EPA's Second Addendum, requesting additional waiver authority from DOJ to cover "additional recreational vehicles that have been found" in violation. CX 28. Thus, it is likely that with regard to "future violations," EPA was seeking additional authority with regard to other violations it (EPA) "found" in the future, rather than violations Respondents *committed in the future,* as doing so would obviate the need for EPA to go back to DOJ with a third or fourth addendum request as additional vehicles belonging to Respondents were found, upon inspection and/or after legal evaluation, to be in violation of the same provision. Supporting this conclusion is also the language in CX 28 with reference to DOJ approving EPA not needing to seek additional waiver authority up to 125,000 "waived vehicles," including "both any vehicles that are included in your administrative complaint and vehicles that are not pled in the complaint *but that EPA seeks to resolve in its administrative penalty action*." CX 28 (emphasis added). Such language suggests that DOJ was already aware that EPA knew of other vehicles/violations that were not yet pled in the Complaint but which EPA intended to resolve by administrative action either by adding to the Complaint or in conjunction with resolution of the Complaint.

[20] These are the violations in the engine families identified in Counts 1 through 3 and 5 through 8 in the Amended Complaint. Respondent does not appear to question the Agency and DOJ waiver as to the first 1681 violations.

On the other hand, other than the phrase "may occur in the future," nothing suggests that DOJ was intending to limit its waiver to violations committed in time by Respondents after the date of the letter. Such date appears to have no particular significance in terms of Respondents or the violations and even the letter does not clarify that "in the future" means from the date of the letter. Establishing such a deadline also seems illogical in that it was clear at that point from the series of correspondence back and forth that EPA was in the process of actively gathering evidence of past violations, recently determined. There's no suggestion in the correspondence that it had finalized the set of violations that had occurred up to that point in time and/or that it was seeking authority to institute an administrative action for violations that had yet to actually occur. Therefore, I find that in CX 28 the EPA Administrator and the Attorney General did "jointly determine" that EPA could initiate an administrative penalty action over the statutory monetary limit for any and all additional violations committed by Respondents which it subsequently found to be "substantially similar" to those covered under the waivers previously issued, and do not cause the total number of waived vehicles in the matter to exceed 125,000.[21]

G. Unconstitutionality

As the Complainant notes, Respondents' claim that it is an unconstitutional violation of due process of law for EPA and DOJ to jointly determine that this matter proceed administratively with such a large proposed penalty is unsupported by citation to any legal authority. Resp. at 9. There is nothing in the CAA itself setting an absolute upper monetary limit on an administratively imposed penalty or on a joint determination that an administrative action is the appropriate venue for enforcement. 42 U.S.C. § 7524(c)(1). To the contrary, the Act explicitly states that the Administrator may assess by administrative action "*any* civil penalty prescribed" in the statute. *Id.* (Emphasis added). Further, while the waiver provision in the Act prescribes a threshold for needing to seek such waiver, initially $200,000 per violator, it provides no monetary upper limit at all on the granting of waivers. *Id.* In fact, the only monetary limitation the statute provides on administrative penalties which may be imposed is the statutory limit of either $37,500 or $45,268, per violation. 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4.

Moreover, the statute clearly authorizes such penalties to be obtained through the administrative process consistent with the procedural due process requirements of notice and an opportunity to be heard, by explicitly providing that –

> Assessment of a civil penalty under this subsection shall be by an order made on the record after opportunity for a hearing in accordance with sections 554 and 556

[21] DOJ defined the meaning of the term "substantially similar" in CX 28. Respondent has not alleged that the violations added to the Amended Complaint above the first 1681 are not "substantially similar." With regard to the penalty, which the Agency may obtain in light of the language of CX 28, no definitive ruling is made herein. However, CX 28 does suggest that such penalty *cannot* be based upon the violations causing "excess emissions," any harm beyond that to the "regulatory scheme," or being undertaken willfully, knowingly, or intentionally. CX 28.

> of title 5 [the Administrative Procedure Act]. The Administrator shall issue reasonable rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person. The Administrator may compromise, or remit, with or without conditions, any administrative penalty which may be imposed under this section.

42 U.S.C. § 7524(c)(1). In addition, the statute allows for judicial review of any administrative penalty imposed. 42 U.S.C. § 7524(c)(5). Respondents offer no specific argument or evidence that its due process rights in this proceeding have been unfairly or illegally restricted or denied. Therefore, their argument in this regard is without merit.[22]

CONCLUSION

Based upon the foregoing, Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby **DENIED**.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: October 10, 2017
Washington, D.C.

[22] It is noted that this action is not unique. The Agency has brought other Administrative actions for similar violations obtaining civil penalties upward of $1 million dollars. *See, e.g., In re Jonway Motorcycle Co.*, 2014 EPA App. LEXIS 45 (EAB, 2014) (EAB imposes upon default a penalty of $1,258,582 for violations of title II, part A, of the Clean Air Act involving approximately 11,000 vehicles). It is observed that, per vehicle, the penalty imposed in that case is far higher than the penalty sought in this case.

In the Matter of *Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd.,* Respondents. Docket No. CAA-HQ-2015-8065

CERTIFICATE OF SERVICE

I certify that true copies of the foregoing **Order Denying Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction**, dated October 10, 2017, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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Dated: October 10, 2017
Washington, D.C.