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

In re:	)	
Taotao USA, Inc. Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd.	)	CAA Appeal No. 18-01 & 18-02
Dkt. No. CAA-HQ-2015-8065	)	

REPLY BRIEF

BACKGROUND

It is important to provide a brief overview of the facts and procedural events that are central to this appeal, but overlooked, or simply ignored, by Appellee ("EPA" or the "Agency") in its response, and by the ALJ in her Initial Decision.

A. Catalytic Converters

Catalytic converters were developed to meet tightened emission standards by "scrub[bing] exhaust fumes of their harmful components as they make their way through the exhaust system. Order on Partial Accelerated Decision and Related Motions (May, 3, 2017) (hereinafter "Acc. Dec.") at 9 (quoting CX176, Declaration of Ronald M. Heck, the Agency's expert witness on catalytic converters.). Platinum (Pt), Palladium (Pd), and Rhodium (Rh) are three precious metals that have historically been the key active components used in vehicle catalytic converters. *See* Agency's Exhibit CX176 - Declaration of Ronald M. Heck (hereinafter "Heck's Decl.") ¶ 11;[1] *see also* Acc. Dec. at 9.

Although a catalytic converter's design and composition (i.e. combinations of precious metals and other materials) determine its performance and longevity in a given application, studies to date have not provided a reliable method or model for determining what emission rate a given catalytic converter with a specified precious metals ratio will achieve in a given application. Heck's Decl. ¶¶ 16-17, 20; Acc. Dec. at 9. Reliable results can only be obtained by testing a catalytic converter's performance in a particular application. Heck's Decl. ¶ 20; Acc. Dec. at 9.

[1] The Agency presented the declaration of Dr. Heck, its expert on catalytic converters, in support of the Agency's Motion for Partial Accelerated Decision on liability. The ALJ relied on Dr. Heck's declaration in her liability determinations, and her findings of fact on catalytic converters are directly based on said declaration. *See* Acc. Dec. at 8-9, n. 8.

Because the only reliable method or model from which the Agency can determine a catalytic converter's performance is by analyzing the emission test data derived from the testing of the vehicle or engine equipped with a manufacturer's catalytic converter, the Agency lets manufacturers determine their own catalytic converter designs. While the Agency does not set design standards or specifications for catalytic converters, it does set certain minimum standards and specifications for other emission-related components where current technology so permits. *See e.g.* 40 C.F.R. 1051.245. The Agency also approves COC applications for vehicles and engines that pass emission standards even if they do not contain catalytic converters. Tr. at 227-8.

The regulations do not require catalytic converter testing, nor do the applicable regulations explicitly state that certified vehicles' catalytic converter must be identical to their stated design specifications; in reference to catalytic converters, the applicable regulations only state that catalytic converters in an engine family must be identical [to each other]. *See* 40 C.F.R. § 86.420-78(b)(7); *see also* Acc. Dec. at 18. Here there is undisputed that all subject vehicles belonging to their respective engine families were in fact identical. *See* Acc. Dec. at 12.

B. Subject Catalytic Converters

This case involves 109,964 subject vehicles belonging to ten engine families,[2] and therefore imported under ten separate COCs. *See* Amended Complaint (Am. Compl.) at 26. Except

[2] Although the subject vehicles belonged to ten engine families because of the different model years, the applications (including the stated designs) for some of these engine families were exactly the same and were resubmitted solely based on the model years for which certification was sought, as follow: (1) DTAOC.049MC2 (count 3) and ETAOC.049MC2 (counts 1) were exactly the same except the former was submitted for model year 2013, and the latter was simply resubmitted to renew the certification for model year 2014; (2) DTAOX012A1T (count 8) was submitted in 2013 to recertify a previously certified engine family, and then again resubmitted for recertification for 2014 as ETAOX012AIT (count 5); and (3) DTAOX0.15G2T (count 6) was submitted for 2013 recertification of a previously certified engine family, then resubmitted as FTAOX0.15G2T (count 9) for 2015, and again as GTAOX0.15G2T (count 10) for 2016. *See* CX005 at EPA000151, EPA-000177; CX008 at EPA-000252, EPA-000278); CX00l at EPA-000001, EPA-000025;CX003 at EPA-000080, EPA-000104; CX006 at EPA-000187,, EPA-000213; CX009 at EPA-00028, EPA-000314; CX010 at EPA-000321, EPA-000347; *see also* Appellees' Response Brief ("Res. Br.") at 11, n. 4).

for the COC application for engine family DTAOC.049MC2, all remaining nine engine families are carry-over applications, meaning that no significant changes have been made to those engine families in succeeding years and therefore the test data from the prior model years is used to represent the new model years. *See* 40 C.F.R. §§ 86.421-78(d), 1051.235(d)(1); Tr. at 122-123, 297. The earliest vehicles, in terms of certification and production, identified in the Complaint belong to engine family CTAOC.049MC2 (count 4), model year 2012. Am. Compl. at 26; CX004 at 000116.

In each of the ten subject COC applications, Taotao USA disclosed that the catalytic converters were manufactured by one of two unrelated Chinese manufacturing companies, manufactured by Nanjing Enserver Technology Co. Ltd ("Nanjing Enserver") or Beijing ENTE Century Environmental Technology Co., Ltd ("Beijing ENTE").[3] In total, there are five separate catalytic converter "designs" stated in each of the ten COC applications.[4]

In 2010 and 2011, Taotao USA had various catalytic converters purchased by both Nanjing Enserver and Beijing ENTE tested to ensure that the design specifications provided by these catalytic converter manufacturers were accurate. *See* Complainant's Exhibit 215 at 548-577. These catalytic converter test reports were submitted to the Agency. *See* CX073 at EPA000883; Tr. at 616.[5] The tested catalytic converters belonged to engine families belonging to prior model years,

[3] *See* CX001 at EPA-000011; CX002 at EPA-000047; CX003 at EPA-000090; CX004 at EPA-000126; CX005 at EPA-000162; CX006 at EPA-000198; CX007 at EPA-000231; CX008 at EPA-000263; CX009 at EPA-000299, and CX010 at EPA000332.

[4] *Id.* (COC applications for their respective engine families state the following precious metal ratios: counts 1 and 3, the ratio is stated at 1:7:0; for count 2, it is stated as 7:10:0; count 4 is stated as 2:10:1; for counts 5, 7 and 8, the precious metal ratio is stated as 5:5:1 (0.0027g:0.027g:0.0054); and for counts 6, 9 and 10, the ratio is stated as 5:5:1 (0.06g:0.06g:0.012g)).

[5] Of the twelve separate catalytic converter test reports submitted to the Agency, the Agency's witness Amelie Isin testified that she had no issues with 4 of them. *See* Tr. at 619, 621. Where concerns were expressed at the hearing, they were as follows: Ms. Isin testified that in eight of the catalytic converter reports, the engine family identified belonged to model year 2011, whereas the 2012 model year "vehicle" is tested. Tr. at 619-62. Ms. Isin's concerns are irrelevant here because first, the test reports show the testing of a catalytic converter, not a vehicle, so regardless of whether the vehicle was a model year 2012, it is the catalytic converter that matters. Additionally, it does not matter if a 2011 catalytic converter was placed in a 2012 model vehicle, or if a 2012 model catalytic converter was

later recertified as ETAOXO.12A1T (count 5), DTAOX.15G2T (count 6), DTAOX.124AAA (count 7), DTAOXO.12A1T (count 8), FTAOX.15G2T (count 9) and GTAOX.15G2T (count 10).[6] Furthermore, the evidence shows that the same catalytic converter tested for its composition for earlier models of engine family DTAOX0.12A1T was used in, and its design stated in the COC application for, DTAOX.124AAA (count 7).[7]

In 2012, a professional vehicle and engine consultant, retained by Taotao USA and suggested by the Agency, as part of a compliance plan provided by the Agency, sent three catalytic converters for testing at a laboratory in Canada. CX076 at 000891-894. The Canadian laboratory, SGS Canada Inc. ("SGS"), and the test methods employed by SGS were approved by the Agency. *Id.* One of the catalytic converters tested for volume and composition belonged to engine family CTAOC.049MC1, while a second one belonged to engine family CTAOXO.12AIT, a prior model year of vehicles belonging to DTAOXO.12A1T (count 8) and ETAOXO.12A1T (count 5). CX077 AT EPA-000913-937. Taotao USA submitted these test results to the Agency in 2012. CX076 at 000891-894. The tests showed that all three catalytic converters had the precious metal concentrations, i.e. designs, provided by Beijing ENTE. The same catalytic converter designs were reported in the relevant COC applications as follows: i.e. CTAOC.049MC1 (count 4), DTAOXO.12A1T (count 8) and ETAOXO.12A1T (count 5).

SUMMARY OF THE ARGUMENT

This case does not involve any clear violations of any specific federal statute of regulation, instead the Complaint, as well as the ALJ's decision, rests upon an interpretation that various

tested because as long as the catalytic converter (or vehicle) was part of carry-over engine family, it is presumed to be the same as the one produced before it. *See* 40 C.F.R. §§ 86.421-78(d), 1051.235(d)(1); *see also* Tr. 122-123, 297.

[6] *See supra* note 3.

[7] *See* id.

regulations, when combined, implicitly prohibit the import of the subject vehicles, even though the clear language of those regulations state otherwise. Basically, the ALJ found that even though each subject vehicle was imported under an EPA-issued certificate of conformity ("COC"), the subject vehicles were not covered by their EPA-issued COCs because the catalytic converter design specifications stated in the COC applications did not conform with the design specifications of the imported catalytic converters, regardless of the fact that the imported catalytic converters conformed with the catalytic converters on the test vehicles, and therefore the test data which was likewise submitted with those COC applications. The ALJ reached this conclusion even though:

(1) unlike other emission-related components, the Agency does not have any design standards for catalytic converters, nor are such standards possible under current technology;

(2) the only way to determine the performance of a catalytic converter is through useful life emission testing; and

(3) the performance of the subject catalytic converters was in fact tested for useful life emissions and results submitted with each COC application.

Stated simply, in its COC applications, Taotao USA listed certain catalytic converter design descriptions, and submitted test data showing the performance of catalytic converters with different metal concentrations. The COC applications were approved based on the performance of the catalytic converters, i.e. the test data, not the stated designs. Although the catalytic converters on the subject imported vehicles did not match the design described in the COC applications, they did match the design of the tested vehicles and therefore conformed with the performance data. However, knowing that the only way to determine the performance of any given catalytic converter design is through testing, a fact that the Agency proved through expert witness testimony during the liability stage of the proceedings, the Agency later argued that the stated catalytic converter

designs are vital to the COC application process because the Agency approves COCs based on those descriptions. How could the Agency possibly make its COC decisions based on the stated design of a catalytic converter when the Agency itself admits that the only way to analyze the performance of a catalytic converter design is through useful life testing?

The Agency's argument is analogous to an argument that although we know the only way to test a person's eyesight is through an eye exam, in addition to the exam results, we still require you to provide us with measurements of your retina, pupil and iris (however difficult to take, or unreliable, such measurements might be), and unless you accurately listed your eye measurements, regardless of whether you pass your eye exam, regardless of whether your eyes are the same eyes as those examined, we have no way of knowing how well you see.

As absurd as the foregoing example may seem, the Agency's argument that Appellants' purported violations harmed the regulatory scheme is equally, if not exceedingly, absurd. Whereas a person's eye sight may change, a catalytic converter's composition cannot.

ARGUMENT

Because the Agency has introduced new arguments in its response brief, Appellants present the following arguments to show that the Agency's arguments are unsupported by the facts of this case, as well as the applicable law.

A. Contrary to the Agency's position, Appellants' interpretation of the clear and unambiguous regulations governing on-highway motorcycles is correct.

In their appeal briefs, Appellants Taotao USA and Taotao Group argued that all subject highway motorcycles were covered by their COCs pursuant to the applicable regulations. More specifically, Appellants presented to the Board that the regulations cited in the Amended Complaint, pursuant to which the Agency brought this action, do not that highway motorcycles

produced/assembled by large manufacturers like Appellants conform to the design specifications described in the vehicles' COC application(s). In making their argument, Appellants showed that 40 C.F.R. 86.437 unambiguously states that new motorcycles are covered by their certificate of conformity so long as they are represented by their test vehicle. Therefore, the ALJ's liability determination was erroneous because it was based on the ALJ's conclusion that "liability does not turn on whether an engine meets emissions standards, the performance of the emissions-data vehicles is not relevant to whether an engine family conforms to the description the manufacturer provided the Agency."

In its response, the Agency makes the bold assertion that Appellants' perspective of the vehicle governing regulations is "fundamentally flawed." However, in support of its foregoing bold assertion, the Agency fails to point to the clear language of any governing regulations, and instead dedicates pages of the response brief to the language of outdated regulations that were deleted decades before this action ensued, and the administrative reasons for their deletion. The only argument the Agency posits in support of its claim of Appellants' "fundamentally flawed" interpretation of the governing regulations is as follows:

> Respondents contrast the regulations governing the import and sale of its (sic) vehicles' special provisions governing small-volume manufacturers (less than I0,000 units in a model year) which state that the COC will cover all vehicles described by the manufacturer. Taotao USA . . . Respondents contend that the difference in wording between the regulations it (sic) is governed under and the regulations that apply to small manufacturers means that conformity between the production vehicles and the design specification description in the COC application is not required where import and sales exceed l 0,000 units. This is a thin reed (sic) of reasoning that cannot withstand the weight of the plain language of the statute, the case law, the Part 86 regulations, the language of the COCs, and the testimony of Mr. Jackson as to the critical importance of having accurate and complete information for the proper functioning of the regulatory program. Moreover, Respondents reading of the regulations this way would mean that small-volume manufacturers (by not being exempt from building vehicles in conformity with their COC applications) would be subject to more stringent requirements than large-volume manufacturers (who would be exempt), which makes no sense.

See Resp. Br. At 46-47. Instead of standing by their own regulations, the Agency's above-quoted opposition implies that the Agency admits that a plain reading of its regulations do not provide the requirements it claims Appellants have violated. Regardless of whether or not the Agency's regulations make no sense, an observation that the Agency should perhaps take into consideration while drafting said non-sensical regulations, contrary to the Agency's position, the differing COC requirements for large and small manufacturers are clearly and repeatedly made apparent in the governing regulations.

For example, 40 C.F.R. § 86.437 is not the only regulation that unambiguously provides that in case of large manufacturers, a certificate will cover all vehicles represented by the test vehicle, while in case of a small manufacturer small manufacturers "the certificate will cover all vehicles described by the manufacturer." *See* § 86.437-78(a)(2)(iii); *c.f.* § 86.437-78(b)(4). In fact, although the Agency's claims that a reading of the regulations to mean that small-manufacturers have different standards than large manufacturers "makes no sense," the governing regulations clearly state that "[t]he certification procedure to be followed depends upon the manufacturer's projected sales." 40 C.F.R § 86.406(c). Moreover, the regulations further clearly provides:

> New motorcycles, produced by a manufacturer whose projected U.S. sales of motorcycles is 10,000 or more units (for the model year in which certification is sought) shall demonstrate compliance ***with all general standards and all specific emission requirements*** before they can be sold in the United States . . . The Administrator will select vehicle(s) which will represent the manufacturer's product line. The manufacturer is required to construct these vehicles to be representative of actual production. Service is accumulated and emission tests performed with data submitted to the Administrator . . . The Administrator will review the data and either grant or deny certification. If the manufacturer wishes to make changes to a certified vehicle, or to produce a new vehicle, the Administrator must be notified. The Administrator may require testing to demonstrate continued compliance with emission standards. Each vehicle must be labeled with tune up specifications and the purchaser must be supplied with maintenance instructions. Also, information on production vehicles must be supplied to the Administrator.

See id. § 86.406-78(c)(1). In contrast (c)(2) states that small manufacturers:

> "shall meet both the general standards and specific emission requirements described in §§86.401 through 86.417, §86.425, §86.437, and §§86.440 through 86.444 of this subpart before they can be sold in the United States. The manufacturer is required to submit an application containing a statement that his vehicles conform to the applicable emission standards. The manufacturer is required to retain in his records, ***but not submit with the application, valid emission test data which support his statement.*** The Administrator will review the application and either grant or deny certification. Each vehicle must be labeled with tune up specifications and the purchaser must be supplied with maintenance instructions. Also, information on production vehicles must be supplied to the Administrator.

Id. (emphasis added). Therefore, it is apparent that the regulations do in fact set different standards for large manufacturers and small manufacturers, and the ALJ erroneously held Appellants to standards applicable to small manufacturers. Other regulations likewise create certification distinctions based on a manufacturers' projected sales. *See e.g.* 40 C.F.R. § 86.431-78(a) (requiring that only manufacturers with total projected sales in excess of 10,000 vehicles shall include data from all tests conducted in their application); *see also* § 86.416-80 (a), (b).

The Agency's own lack of understanding of the regulations, and implication that said regulations are non-sensical, undermines their liability and allegations of egregiousness. Like Appellants stated in their briefs, the requirement that a vehicle must conform to the design specifications, is not a certification requirement for large manufacturers, which the Agency's brief clearly and repeatedly claims Appellants to be.

While the Agency's argument in support of the ALJ's liability determinations is largely centered on a United States district court's decision in a 1977 case, which is addressed more fully below, amid the irrelevant and confusing argument presented by the Agency regarding their unlimited authority under the Clean Air Act, the Agency's only points to two regulations, which are also discussed below.

First, the Agency claims that because a COC may be issued based "upon such terms as the Administrator may deem necessary to assure that any new vehicle covered by the certificate will meet the requirements of the [A]ct [and of 40 C.F.R. § Part 86, Subpart E]," Resp. Br. at 42 (citing 40 C.F.R. § 86.437-78(a)(2)(ii)), here the COCs state on their face that they cover "only those vehicles which conform, in all material respects, to the design specifications . . . described in the documentation required" for certification. Resp. Br. at 42. Basically the Agency argues that it has unrestricted regulatory authority to set whatever terms and conditions it may unilaterally deem necessary to ensure compliance with the Act. The Agency's interpretation of the above-quoted language of the regulation, if correct, would however undermine the whole rule making process, i.e. the notice and comment period, specifically prescribed by Congress. The Agency cannot give itself more authority than what has been delegated to it. Furthermore, given that the very regulation quoted by the Agency unambiguously states that a COC issued on the basis of test data will cover all vehicles represented by the test vehicle, a fact admitted by the Agency, the Agency, and the ALJ, cannot undermine the clear language of the regulation by asking the Board to interpret the regulation in a manner that makes the clearly stated regulation seem reasonable. *See Summit Petroleum Corp. v. Env'l Protection Agency*, 690 F.3d 733, 740 (6th Cir. 2012) (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)). (A Court affords an agency "no deference, if the language of the regulation is unambiguous, for doing so would 'permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation."). Here the Agency, and the ALJ has done exactly what the Supreme Court has prohibited. Admitting that 40 C.F.R. § 86.437(a)(2)(iii) does state that a COC issued on the basis of test data will cover all vehicles represented by the test vehicle, the Agency pointed to other

regulations from which the ALJ could derive a different interpretation. *See* Agency's AD Resp. at 16-17.

Secondly, the only other argument based on a current regulation, the Agency makes is that under 40 C.F.R. § 86.441-78(d), EPA officers have the right of entry to manufacturing facilities to determine whether or not production motorcycles conform in all material respects to the design specifications which applied to those vehicles described in the application for certification of which a COC has been issues. The following regulation, however was not cited by the ALJ in her liability decision, nor in her decision on the motion for reconsideration, even though it was cited by the Agency in its response to Appellants' dispositive motions. Therefore, the ALJ correctly failed to find liability based on said regulation, given that the Agency's right of entry is more aligned with its power to revoke or suspend certificates, which is stated as a purpose of the right of entry in the regulation that immediately follows section 86.441-78. *See* 40 C.F.R. § 86.441-78; *see also* Acc. Dec. at 30 (the ALJ states that 86.441-78 pertains to the revocation or suspension of a COC, and is not relevant to liability). Moreover, 40 C.F.R. § 86.441-78 is a regulation that applies to small manufacturers, *see* §86.406-78(c)(2), and given that small manufacturers are not required to submit test data, but instead make records available to the Agency to show compliance with their COC application, the regulation makes sense when applied to said small manufacturers.

B. The Agency's reliance on *United States v. Chrysler Corp. is misguided.*

The Agency has placed all its eggs in the Chrysler basket. From the onset of this action, the Agency has premised its liability arguments on the holding of a single district court decision made nearly fifty years ago.[8] *See United States v. Chrysler Corp*., 437 F. Supp. 94 (D.D.C. 1977). The Agency again argues that Chrysler Corp. sets the applicable law in this case. *See* Rep. Br. at

[8] *See* Complainant's Motion for Partial Accelerated Decision at 30; Acc. Dec. at 26-28; Resp. Br. at 39-41.

39. Basically, the agency quotes portions of the Chrysler Corp. decision, which formed the basis of the D.C. Circuit's acknowledgment that EPA regulations provide that a COC only "covers those new motor vehicles that conform in all material respects to the design specifications that applied to those vehicles described in the application for certification." *See United States v. Chrysler Corp.*, 591 F.2d 958, 960 (D.C. Circuit 1979) (quoting 40 C.F.R. § 85.074-30(a)(2) (1976)). In its response, the Agency admits that the regulation quoted by the D.C. Circuit in Chrysler Corp. has since been deleted. *See* Resp. Br. at 40. The Agency further admits that it was said regulation, now deleted, that required each COC to have language stating that it covered "only those new motor vehicles which conform, in all material respects, to the design specifications . . . described in the application for certification . . ." Resp. Br. at 40. However, the Agency argues that because the language on the face of each COC continued to contain language substantively identical to the language required by the deleted regulation, the D.C's Circuit's decision continues to be authoritative. *Id.* Such an argument clearly fails in light of the clear language of governing regulations. *See* 40 C.F.R. §§ 86.437-78(a)(2)(iii), 86.406-78(c)(1). Under the Agency's interpretation, manufacturers would not only be required to comply with governing regulations, but also deleted regulations. Further, manufacturers would be required to not only comply with the current and outdated regulations, but look into the reasons for the creation, or subsequent deletion, of EPA regulations to understand whether an outdated regulation continues to apply. *See* Acc. Dec. 27-28. Such a requirement is unprecedented and therefore clearly erroneous.

Regardless of the reasons behind the Agency's decision to delete the regulation, and then delete similar language in a subsequent regulation, one thing remains clear, the regulations applicable to the Chrysler Corp. decision, which mandated certain language on the face of a COC,

are no longer in effect. *See* 1981 40 C.F.R. 86.437; *c.f.* 1982 40 C.F.R. 86.437 (1982); *see also* 46 FR 50464 October 13, 1981.

Current regulations do not provide for COCs issued to large manufacturers to be restricted to those vehicles that conform with the design specifications stated in their COC applications. Therefore, the Board need not go any further than the clear language of the regulations, and any interpretations that undermine said clear applicable current regulations, whether based on the EPA's reasons for deleting the former regulations, or the finding the COC language is mandated by the Agency's ability to set whatever limits it may deem necessary, undoubtedly results in the de facto creation of new regulations. *See Summit Petroleum Corp. v. Env'l Protection Agency*, 690 F.3d at 740 (6th Cir. 2012) (quoting *Christensen v. Harris Cnty.*, 529 U.S. at 588).

Even ignoring the fact that Chrysler Corp. was based on regulations, which have since been deleted, the facts of Chrysler Corp. are also clearly distinguishable from the present matter. In *United States v. Chrysler Corp.*, EPA alleged that Chrysler Corp. had manufactured and introduced into commerce vehicles equipped with distributors, carburetors, exhaust gas circulation values, and/or orifice spark advance controls different from those described in its COC application for the vehicles. *Chrysler Corp*. 437 F. Supp. at 95-96. Unlike the present case, Chrysler manufactured both "California" vehicles and "non-California" vehicles to comply with California standards. *See United States v. Chrysler Corp.*, 591 F.2d at 960 n. 3. "According to Chrysler, the error in assembly that precipitated this case occurred when 'California' parts were installed in [thirty-seven] 'non-California' vehicles, or vice versa; or when parts for use in automatic transmission vehicles were installed in manual transmission vehicles, or vice versa." *Id.* The mistaken parts included distributors, carburetors, exhaust gas recirculation valves and orifice spark advance controls. *Id.* at 960 n. 4. Chrysler argued that the mis-built vehicles likewise passed emission standards. The court however reasoned that clear Congressional intent mandates that vehicles pass emission tests before they are sold to the public. *Id.*

Therefore the argument that the mis-built vehicles later also passed emissions frustrated the Congressional intent.

In the present case, only one set of catalytic converters were tested for emissions, those that were ultimately built onto the subject vehicles. Therefore, unlike Chrysler, the emission test results of the EDVs does not undermine the Congressional intent because those tests were conducted on the allegedly "uncertified" catalytic converter before certification. It is also important to note, that the court in Chrysler Corp. held that, in spite of EPA's emphasis on "design specifications," it does not contend that every misbuilt vehicle constitutes a violation of section 203(a)(1). *United States v. Chrysler Corp.*, 591 F.2d at 960. The district court adopted the government's position that an automobile was "materially" different if the difference in parts reasonably may be expected to affect emission controls. *Id.* Although in this case the Agency argues, and the ALJ held, that a catalytic converter is a emission-control part and therefore expected to affect emission controls, the court in Chrysler expressly stated that the "test for materiality properly places maximum emphasis on congressionally mandated prototype testing." Therefore, given that the ALJ found liability in spite of the EDVs conformity to the subject vehicles, meaning that the prototype tested for emissions was the same as the subject vehicles it certified, the ALJ's finding of "materiality" conflicts with the Chrysler decision.

C. No deference should be given to the testimony of Cleophas Jackson

Because the Agency has not been able to identify a specific current regulation which Appellants' purportedly violated, the Agency relies on the testimony of Cleophas Jackson to establish liability. Resp. Br. at 43-44. It is important to note that Clephas Jackson did not testify during summary proceedings, therefore his testimony at the hearing cannot be considered in justifying the ALJ's liability decision.

The Agency claims that Mr. Jackson's testimony shows that the information provided in the application, here the catalytic converter design, is used to assess whether or not the Agency believes that engines described would actually be compliant over the useful life of the product. Resp. Br. at 44 (citing Tr. at 116-17. While Mr. Jackson did so testify, his flawed testimony does nothing more than undermine

his credibility as a witness. This is because the Agency's expert witness, whose declaration the ALJ relied upon in her liability determinations, clearly declared that the only reliable method or manner in which a catalytic converter's emission rate may be assessed is by testing the catalytic converter for emissions. CX176 ¶¶ 19-20; Acc. Dec. at 9. Because the ALJ made a finding, based on the Agency's own expert witness' declaration that the only way to assess a given catalytic converter's performance is through emissions testing, the Mr. Jackson's testimony that the design specifications in the application is used to "assess whether or not …a catalyst as described would be compliant" conflicts with established facts. Therefore, Mr. Jackson's testimony, which conflicts with the ALJ's finding of fact, and the Agency's prior inconsistent testimony cannot be considered to find liability or harm to the regulatory scheme.

D. The Agency is estopped from taking inconsistent positions at different stages of the proceedings.

C. Summary Proceedings

1. *EDVs and test data*

During the liability stage of these proceedings, Appellants filed a 12(b)(6) Motion to Dismiss ("Motion to Dismiss"), as well as a Motion for Accelerated Decision on liability ("AD Motion") (collectively "Appellants' Motions"). In Appellants' Motions, Appellants argued that that current regulation 40 C.F.R. § 86.437(a)(2)(iii) provides that a COC "will cover all vehicles represented by the test vehicle" (the prototype EDV) used to gather emissions data for certification, and asserted that the Agency had not alleged that the catalytic converters used in each engine family's respective EDVs was materially different from those found on the vehicles inspected. Motion to Dismiss at 7–8; AD Motion at 6. Appellants thereafter asserted that the emissions data vehicles (EDVs or test vehicles) used to certify each engine family contained catalytic converters which conformed to the catalytic converters equipped on the relevant subject vehicles identified in the Amended Complaint. *See* Motion to Dismiss at 9. Stated differently, Appellants claimed that each test vehicle, and therefore the test data for useful life emissions, used for the certification

of each engine family was representative of the subject vehicles belonging to that engine family. In their AD Motion, Appellants argued that the Agency has failed to meet their burden of proving that the catalytic converters in all 109,964 vehicles were uncertified based on the analyses of 33 such catalytic converters.

The Agency, in a combined response to both the Motion to Dismiss and the AD Motion requested that the ALJ treat Appellant's statements in their Motion to Dismiss that all EDVs that passed useful life emissions tests used to certify each engine family contained catalytic converters which conformed to the catalytic converters equipped on the imported vehicles as a judicial admission and remove the factual matter from controversy. Complainant's Second Motion to Supplement the Prehearing Exchange and Combined Response Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision ("Agency's AD Resp.") at 14-15 (Jan. 3, 2017). The Agency took the foregoing position to show that by treating Appellants' statements as admissions and removing the matter from controversy, the undisputed fact that all EDVs had catalytic converters that matched the subject vehicles, established that all 109,964 vehicles were uncertified. *Id.*

The ALJ in her decision regarding the evidence of 109,964 violations states as follows:

> "Regarding the number of violations for which they are culpable, [Appellants] argue that the Agency's post-certification testing does not implicate all 109,964 of the vehicles belonging to different engine families often produce different results and tests on different vehicles belonging to the same engine family can also vary,' [Appellants] contend . . . Because of this variance, 'there is no evidence to support [the Agency's] allegation that [Appellants] jointly manufactured, or imported, 109,964 uncertified vehicles.' The Agency disagrees, and cites the following evidence: In their Motion to Dismiss, Respondents state that they purchased their catalytic converters from a common third-party manufacturer and that '***the EDV that passed the emissions standards contained a catalytic converter which conformed to the catalytic converter on imported vehicles.***'"

Acc. Dec. at 30-31 (emphasis added). The ALJ thereafter clearly cited as the Agency's evidence in support of a finding of 109,964 vehicles. *Id.*

2. *Penalty*

Although the Agency claimed that Appellants were liable for all 109,964 violations based on the uncontroverted fact that the EDVs (prototype vehicles) matched the subject vehicles, it later claimed that Appellants' violated the regulatory scheme by importing 109,964 vehicles untested for useful life emissions. Complainant's Post-Hearing Brief ("Compl. Br.") at 8. In their response brief, the Agency argues that the ALJ correctly found that the useful life tests conducted on EDVs were unreliable because they were tested on vehicles produced in prior years. However, as stated previously, the regulations specifically permit manufacturers to rely on test results obtained in prior model years so long as the production vehicles significantly conform to the test vehicles. *See e.g.* 40 C.F.R. §§ 86.1839-01, 86.435-78, 86.432-78. Here, if the EDVs matched the subject vehicles, the prior test results reliability is a non-issue. Furthermore, any claims by the Agency, and findings by the ALJ, that the deterioration factors generated from the EDVs were unreliable are likewise undermined by the clear language of the regulations which state that deterioration factors generated from an EDVs useful life tests may be used to demonstrate compliance in subsequent tests. *See* Resp. Br. at 46; Initial Decision at 33.

Finally, the Agency's claim that there was no evidence to demonstrate that the EDVs were the same as the subject vehicles is flawed because once the Agency stipulated to the EDVs conformity with the subject vehicles, and removed the matter from factual controversy, Appellants had no duty to submit evidence to prove said uncontroverted fact. *See Allapattah Servs., Inc. v. EXXON Corp.*, 372 F.Supp. 2d 1344, 1367 (S.D. Fla. 2005) (citing *New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)) (the doctrine of judicial estoppel is used

to prevent "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.").

Given the complicated nature of the allegations, the ALJ's lengthy decisions, and the Agency's confusing and long response brief, the following tables are included to shed light on the following inconsistencies so that they are not lost in the largely irrelevant details.

Liability Stage – Whether Appellants are liable for all 109,964 violations alleged in the complaint.

Agency's Position	ALJ's Determination
Because Appellants admit that the EDVs used to certify each engine family contained catalytic converters which conformed to the catalytic converters equipped on imported vehicles, the Agency requests that the Tribunal treat it as a judicial admission removing the factual matter from controversy. Therefore, because the EDVs all had the same catalytic converter as those on the imported vehicles, and the evidence further shows that all production vehicles were manufactured the same way as the EDV, then all imported vehicles contained catalytic converters that were different from their designs stated in their respective COC applications.	Noting that the Agency cites the following evidence in support of their claim of 109,964 violations, which includes statements Appellants made in their Motion to Dismiss that they purchased their catalytic converters from a common third-party manufacturer and that '*the EDV that passed the emissions standards contained a catalytic converter which conformed to the catalytic converter on imported vehicles;* in their COC applications, Appellants represent that all vehicles produced are identical to the EDV, the ALJ determined that none of the 109,964 vehicles conformed to the stated design specifications.

Penalty Determinations – Whether Appellants harmed the regulatory scheme by causing potential harm from emissions

Agency's Position	ALJ's Determination
Appellants' violated the regulatory scheme by importing 109,964 vehicles with untested useful life emissions. The EDVs tested for useful life emissions	Noting that Appellants' EDVs were tested for useful life emissions, and that those EDV's were the same as the subject vehilces, the ALJ

had different catalytic converters than those equipped on the imported vehicles. The harm was therefore from potential emissions.	argued that the EDVs tested were manufactured in a different year and therefore the test results were unreliable.

Respectfully Submitted,

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Date: November 19, 2018

Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing instrument was sent this day via electronic mail to the following e-mail addresses for service on Complainant's counsel: Edward Kulschinsky at Kulschinsky.Edward@epa.gov, Robert Klepp at Klepp.Robert@epa.gov, and Mark Palermo at Palermo.Mark@epa.gov.

Date:11/19/2018

/s/William Chu
William Chu