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.	)
Dkt. No. CAA-HQ-2015-8065	)

APPEAL BRIEF

INTRODUCTION

This is an appeal of the Initial Decision of the Administrative Law Judge ("ALJ") assessing a civil penalty of $247,982.55 against Taotao Group Co. Ltd. ("T-Group) for 67,527 alleged violations of sections 203 of the Clean Air Act (CAA), and $1,353,167.40 against Jinyun County Xiangyuan Industry Co., Ltd. ("JCXI"), for 42,437 alleged violations of section 213 (to the extent section 213 permits EPA to enforce emission standards for nonroad vehicles in the same manner as the motor vehicles regulated under section 203 of the CAA).

This is a case involving no foul on the part of the actual OEM manufacturers/assemblers, and no harm to the clean air in the United States. This is also a case about penalties that do not fit the violation, especially since there was no bad act committed by these Appellants. The case further involves the violation the due process rights of foreign manufacturers.

For the reasons stated in this brief, the ALJ erred both her liability determination, and her penalty assessment.

ISSUES PRESENTED FOR REVIEW

1. Did the ALJ's err in concluding that Complainant had adequately served Taotao Group and JCXI in accordance with the service requirements of Hague Convention?

2. Did the ALJ erroneously conclude that all 109,964 on-road and nonroad vehicles were not covered by their respective EPA-issued COCs because they did not conform, in all material respects, to the design specifications in their COC applications, regardless of whether they were identical to their respective engine family's emission data vehicles, which passed end of useful life emission tests?

3. Given that Taotao Group and JCXI neither manufactured the non-conforming catalytic converters, nor submitted any data about the third-party catalytic converters, and the COC

applications were not ***theirs***, did the ALJ therefore err in assessing the penalty based on a finding that Appellants (collectively) harmed the regulatory scheme by submitting false data about ***their*** catalytic converters in ***their*** COC applications?

4. In spite of the DOJ's express condition on the jurisdictional waiver stating that the waiver does not extend to violations do not go beyond mere harm to the regulatory scheme and those that cause excess emissions, did the ALJ erroneously conclude that because harm to the regulatory scheme ultimately leads to potential harm to the environment, the administrative court had jurisdiction over this complaint even though Complainant clearly sought a penalty for harm from actual or potential emissions?

5. Although liability was determined solely based on (i) a finding that the catalytic converters in the imported vehicles did not match the catalytic converters described in their respective COC applications, and (ii) a finding that all 109,964 subject vehicles were uncertified because they contained the same catalytic converters as the emission data vehicles tested for each respective engine families and were therefore all the same, did the ALJ then erroneously conclude at the penalty stage that the imported vehicles had a potential for excess emission because all useful life emission tests were conducted on emission data vehicles that were ***not the same*** as the imported vehicles?

5. Did the ALJ erroneously make a penalty determination based on the Complainant's upward biased penalty calculation without regard to the statutory factors and the DOJ's conditional waiver, and without considering each Appellant's distinct benefit, culpability and history of noncompliance?

ARGUMENT AND AUTHORITIES

I. The ALJ erroneously denied Appellants Motion to Quash insufficient service of process.

Appellants T-Group and JCXI are both corporations organized under the laws of the People's Republic of China. *See* Amended Complaint ("Am. Comp.") ¶¶ 5, 6. On November 16, 2015, the Agency served the Complaint on T-Group and JCXI by personally delivering copies to Matao Cao, President of Taotao USA, Inc. *See* Order on Motion to Quash and Dismiss (June 21, 2016) ("Order") at 1. Following said service, T-Group and JCXI specially appeared for the purpose of filing a Motion to Quash and Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(5) and Brief in Support thereof ("Motion to Quash"). Order at 1. In their Motion to Quash, Appellants argued that the Agency's service of process was insufficient because it did not comply with the Hague Convention. Motion to Quash at 4-5. Appellants argued that because China is a signatory of the Hague Convention, all service requests from other signatory nations, such as the United States, to Chinese defendants must be effectuated in China by sending the request to China's central authority. *Id.* Appellants further argued that the Agency, through regulation requiring designation of agents for Certificates of Conformity has attempted to circumvent the Hague Convention. *Id.* at 6.

The ALJ denied Appellants Motion to Quash, stating that pursuant to the Supreme Court's holding in Volkswagenwerk Aktiengesellschaft *v. Schlunk,* 486 U.S. 694, 696 (1988), the applicable law of the forum in this case was section 22.5 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, which provides that "where respondent is a . . . .foreign corporation, . . .

complainant shall serve an officer, partner, a managing or general agent, *or any, other person authorized by appointment or by Federal or State law to receive service of process*." Order at 2 (citing 40 C.F.R. § 22.5(b)(1)(ii)(A)). In regards to Appellants claim that EPA's regulation requiring the designation of a U.S. agent for service of process, the ALJ reasoned that *Schlunk* suggests that forums are free to adopt laws that provide for service upon foreign entities in lieu of that required under the Convention, as long as such service does not violate due process requirements of notice. Order at 3. As for the due process requirement, the ALJ held that because "even service by publication has been upheld as consistent with due process, there is nothing to suggest that the service on an agent specifically appointed for such purposes by the [Appellants] themselves, as allowed by Rule 22.5 would violate due process." Order at 3 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Finally, the ALJ stated that as a general rule challenges to rulemaking are rarely entertained in an administrative enforcement proceeding, and review of a regulation will not be granted absent the most compelling reasons.

A. Section 22.5 of the Consolidated Rules of Practice is not the applicable forum law in this case.

Contrary to the ALJ's conclusion, the service requirements under the Consolidated Rules of Practice is not applicable law of the forum state. *See* Order at 2[1] Pursuant to Rule 4(h) of the Federal Rules of Civil Procedure, service can be made pursuant to the law of the state where the district court is located, or in which service is effected. Fed. R. Civ. P. 4(h). Here, Appellee did not bring this action in a district court, therefore the governing law in this case is the law of the state where service was effected, in this case, Texas. *See* Confirmations of Process Serving attached to Proof of Service; Am. Compl. ¶ 13. In *Volkswagenwerk Aktiengesellschaft v. Schlunk,*

[1] The ALJ does not say that Rule 4 of the Federal Rules of Civil Procedure govern this proceeding, but rather section 22.5 of the Consolidated Rules.

the Supreme Court held that if a foreign defendant can be served under state law without transmitting documents abroad, the Hague Convention is inapplicable. 486 U.S. at 707.

In Texas, service of process may be effected upon a party in a foreign country if service of the citation and petition is made: in the manner provided by Rule 106; or . . . pursuant to the terms of any applicable treaty or convention; . . . or . . . by any other means directed by the court that is not prohibited by the law of the country where service is to be made. Tex. R. Civ. P. 108a(1); *Wuxi Taihu Tractor Co. v. York Grp., Inc.*, No. 01-13-00016-CV, 2014 Tex. App. LEXIS 12888, at *13-14 (App. Dec. 2, 2014). Requests for service on a defendant within the borders of China must be sent directly to China's designated Central Authority. *See* 20 U.S.T. 361, arts. 2, 3; *Schlunk*, 486 U.S. at 698-99. Because Texas law, the applicable state law in this case, requires transmitting documents abroad by sending the Complaint to China's designated Central authority, the Hague Convention applies.

However, even if the Federal Rules, or the Consolidated Rules of Practice apply, service of process on an appointed agent would be proper only if the appointment was voluntary, and complied with due process. *Id.* at 707; *Vazquez v. Sund Emba AB*, 152 A.D.2d 389, 398 (App. Div. 1989).

B. The Agency's service of process on Appellants' appointed domestic agent violates the due process clause, and therefore the Hague Convention applies.

Compliance with the forum law of a state is not enough to effectuate service of process and avoid the provisions of the Hague Convention, service of process on a foreign defendant must also comport with the due process clause. *Schlunk*, at 707 ("Where service on a domestic agent is valid and complete under both state law ***and the Due Process Clause***, our inquiry ends and the Convention has no further implications") (emphasis added).

In *Schlunk,* the Supreme Court held that Due Process Clause requires every method of service to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. However, the service of process on T-Group and JCXI in this case violated the due process clause because: (1) appointment of an agent solely to comply with regulation, does not equate voluntary consent necessary for due process; and (2) due process requires informative notice, necessitating that notice, or here the Complaint, be translated into the official language of the intended recipient.

1. Appellants' appointment of the U.S. agent for service of process was involuntary

The ALJ could not exercise jurisdiction over T-Group and JCXI simply because they appointed a U.S. agent for service of process. *See Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316-17 (1945) (Due process requires that a nonresident have enough contact with the state to generate a reasonable expectation that the state may constitutionally wield its judicial power over him.); *Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437, 444-48 (1952) (Service on a designated agent alone does not establish minimum contact).

Unlike the Sclunk case, where the domestic company was an involuntary agent of process because it was a subsidiary of the foreign corporation, here T-Group and JCXI do not conduct business in the United States, they do not have a parent-subsidiary relationship with Taotao USA, and do not have common owners/directors.[2] *See e.g. Gateway Overseas, Inc. v. Nishat (Chunian) Ltd.*, No. 05 CV 4260 (GBD), 2006 U.S. Dist. LEXIS 49272, at *13 (S.D.N.Y. July 13, 2006). By registering to do business, or in this case by appointing an agent as required by EPA so that a buyer/importer could apply for a COC, a foreign corporation only *potentially subjects* itself to jurisdiction; it does not subject itself to potential jurisdiction. *Leonard v. USA Petroleum Corp.*,

[2]

829 F. Supp. 882, 888-89 (S.D. Tex. 1993). The designation of an agent simply gives the company more efficient notice than service through the secretary of state, when service is otherwise proper. *Id.* In complying with the Texas statute, foreign defendants consent to personal jurisdiction in Texas only if the jurisdiction were constitutional. *Id.* If a corporation does not do business in Texas, it derives no benefit from Texas laws. Without a received benefit, there is no bargain, and without a bargain, there is no due process. *Id.* A corporation cannot consent unless it is first afforded due process. *Id.*

In *Leonard*, the foreign defendant corporation, USA Petroleum, applied for a certificate of authority to do business in Texas and appointed an agent for service of process, as required by state law.[3] *Id.* at 1886. After 1988, USA Petroleum did not conduct business in Texas, but kept its registration to conduct business in Texas current. *Id.* The court held that:

> "Due-process is the cornerstone of personal jurisdiction. Courts cannot be permitted to haul non-resident corporations across state lines on the fiction that they somehow consented to jurisdiction. USA Petroleum did not consent to jurisdiction in Texas and waive its rights to due process when it appointed an agent for service of process. ***Consent requires more than legislatively mandated compliance with state laws. Routine paperwork to avoid problems with a state's procedures is not a wholesale submission to its power."***

Leonard, 829 F. Supp. at 891 (emphasis added).

Just like the foreign defendant in *Leonard*, appointed an agent for service of process because state law required it, T-Group and JCXI similarly appointed Taotao USA, Inc., as their designated agent for service of process because EPA regulations required it. *See* 40 C.F.R. §§ 86.416-80(a)(2)(ix), 1051.205(w). Appellants did not conduct business in the United States,[4] nor

[3] (In Texas, foreign corporations must receive a certificate of authority to do business from the secretary of state to act properly as a corporation in *intrastate* business, Tex. Bus. Corp. Act Ann. art. 8.01(A), and once registered, a foreign corporation must appoint a registered agent who can be served with process, Tex. Bus. Corp. Act Ann. arts 8.08, 8.10(A).

[4] All COC applications were submitted by Taotao USA, Inc. Tr. at 105-06. Taotao USA, Inc. submitted these applications as a U.S. importer and prospective COC holder, T-Group and JCXI were merely listed as OEM manufacturers. *Id.*; Am. Comp. ¶ 31.

did they import vehicles to be sold here. Tr. 105-06. In fact, T-Group and JCXI, being foreign companies, are not even permitted to apply for, or hold COCs. *See* CX014 at EPA-000399; Tr. at 69-70, 219. Whether or not the CAA makes Appellants liable for causing vehicles to be imported and sold in the United States, Appellants must be amenable to service of process in the Country. *See Int'l Shoe Co.,* 326 U.S. at 316-17; *Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437, 444-48. It was Appellees burden to prove that service of process on T-Group's and JCXI's involuntary agent for service of process did not violate due process. CX191 at EPA-002522. They do not have an office, a parent company, or a subsidiary operating in the U.S., they merely appointed a U.S. agent for service of process because EPA regulations required them to do so.[5] Due process is central to consent; it is not waived lightly. *Leonard*, 829 F. Supp. at 891. A waiver through consent must be willful, thoughtful, and fair. *Id.* "Extorted actual consent and equally unwilling implied consent are not the stuff of due process." *Id.* (citing Cound, et al., Civil Procedure, Ch. 2, p. 71 (3d Ed. 1981).

2. <u>Due process requires that the Complaint be translated</u>.

Assuming the appropriateness of service, due process also requires informative notice, i.e., the document or a summary of its contents should be translated into an official language of the recipient. *Vazquez*, 152 A.D.2d at 398; *see also* 1981 ITC GCM LEXIS 34 (Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, Service of process abroad in administrative proceedings;§ 337; Wang No. 2754B). Failure to provide a translation may, in some instances, constitute a denial of due process. *Vazquez*, 152 A.D.2d at 398 (citing *e.g. Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972) (noting that the Court may consider evidence that the foreign corporation has representatives that have demonstrated the ability to

[5] Mr. Cao, in his deposition (which was admitted into evidence at trial) testified that Taotao USA, Inc., purchases vehicles from T-Group and JCXI and then imports the vehicles to the U.S. CX216 at 27-28.

understand English.). China requires that all documents served be translated into the language of the country, *see e.g.* Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004).

C. EPA regulations requiring foreign manufacturer's to appoint U.S. agents for service of process have no purpose other than to circumvent the Hague Convention.

EPA's regulations requiring foreign manufacturers appoint U.S. agents for service of process, do precisely what the Hague Convention sought to prevent. *See Schlunk*, at 707. In Schlunk, the foreign corporation brought to the attention of the Supreme Court certain forum country laws that could circumvent the Hague Convention, however the Court declined to consider those instances because the facts of Schlunk did not require it to do so. *Id.* The Supreme Court noted that

> "[W]e do not think that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad. *Id*. at 705. For example, there has been no question in this country of excepting foreign nationals from the protection of our Due Process Clause. Under that Clause, foreign nationals are assured of either personal service, which typically will require service abroad and trigger the Convention, or substituted service that provides 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"

Id. (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. at 314.

Yet, the EPA's regulations requiring U.S. agents has done just that. These regulations require that an authorized representative of foreign manufacturer "name an agent for service of process located in the United States." 40 C.F.R. §§ 86.416-80(a)(2)(ix), 1051.205(W). "Service on this agent constitutes service on you or any of your officers or employees for any action by EPA or otherwise by the United States related to the requirements of this part." *Id.* By requiring that foreign manufacturer's name a U.S. agent for certification purposes, while simultaneously prohibiting foreign manufacturers from holding such certificates, the regulations serve no purpose other than to circumvent the Hague Convention, as well as its notice and translation requirements.

A violation of due process, and the supreme law of the land (U.S. treaty),[6] are clearly compelling reasons, if ever there were any, for an administrative court to grant review of a regulation. *See In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994); *see also* Order at 3.

Because the appointment of Taotao USA, Inc. as their U.S. agent was not voluntary, and/or the service of process on said U.S. agent did not comply with the foreign Appellants' due process right, the Hague Convention applied, and compliance was mandatory. *See Schlunk*, 486 U.S. at 705. ("compliance with the Convention is mandatory in all cases to which it applies.").

II. T-Group and JCXI are not "manufacturers" for the purpose of the CAA in this case.

The Complaint alleges that Taotao USA holds EPA-granted COCs for every engine family identified in the Complaint, and that Taotao USA imported for ***resale*** those highway motorcycles and recreational vehicles so identified. Am. Comp. ¶¶ 30, 31 (emphasis added). The Complaint further alleges that the CAA was violated because the catalytic converters on the imported vehicles do not conform to the design specifications described in the relevant applications for COCs. *Id.* ¶ 37. The Complaint does not allege that T-Group and JCXI applied for or hold COCs, that they provided inaccurate information on the applications for COCs, or that they imported into, or sold the subject vehicles in, the United States. *See generally* Am. Comp. In fact, the use of the word "resale" in the Complaint implies that T-Group and JCXI sold the vehicles to Taotao USA prior to them being imported for resale in this country. The Complaint only alleges that T-Group and JCXI manufactured or assembled the subject vehicles, and therefore they manufactured, offered

[6] The Hague Convention has been held to have the status of a treaty, E.g., Dr. Ing. H.C.F. Prosche A.G. v. Superior Court, 123 Cal. App. 3d 755, 757-58, 177 Cal. Rptr. 155, 156 n.1 (1981), and as such is put on an equal footing with the federal laws of the United States. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster v. Neilson*, 27 U.S. 108, 121 (1829).

for sale, or introduced or delivered for introduction into commerce uncertified highway motorcycles or recreational vehicles. *Id.* ¶ 38(b)-(c).

But foreign manufacturers Given that T-Group and JCXI sold the respective vehicles to Taotao USA after Taotao USA held EPA-granted COCs for each of the engine families identified in the Complaint, the Agency seeks to hold T-Group and JCXI liable based on nothing more than an overly broad and irrational interpretation of the applicable statute and related definition of manufacturer, even though such an interpretation has been refuted by the Agency's own understanding of the regulations. *See* RX038 at 256-57. In this case, the ALJ found T-Group and JCXI liable, even though T-Group and JCXI did not, and could not (based on the Appellee's own certification guideline),[7] apply for COCs on their own behalf; they did not manufacture the allegedly "non-conforming" catalytic converters;[8] and the COCs actually issued to Taotao USA, Inc. did not describe the "certified" precious metal concentrations of the catalytic converters. *See* CX043-CX052. The actual COCs issued to Taotao USA merely state that the vehicles covered by the COC will contain one (1) catalytic converter. *Id.*

In spite of the foregoing, the ALJ held that T-Group and JCXI were liable for violating CAA § 203 because they were "manufacturers" pursuant to the statutory definition of the term. Liability Order at 21-22. The CAA defines manufacturer as follows:

> 'manufacturer' . . . means any person engaged in the manufacturing or assembling of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines, ***or*** importing such vehicles or engines for resale, ***or*** who acts for and is under the control of any such person in connection with the distribution of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines. (emphasis added)

[7] *See* CX014 at EPA-000399(only a U.S. manufacturer or importer can apply for a COC); Tr. at 69-70.
[8] Each COC application, which was submitted to Appellee and approved for COCs, stated that the catalytic converter is manufactured by one of the two following companies, neither of which are made parties to this suit: Biejing ENTE Century Environmental Technology Co. Ltd. and Nanjing Enserver Technology Co. Ltd. *See e.g.* CX001 at EPA-000011, CX005 at EPA000162.

42 U.S.C. § 7550(1); Liability Order at 22. By this definition a manufacturer is anyone who manufactures or assembles new vehicles, anywhere in the world, whether or not it produces vehicles to be sold in the United States or solely in its own foreign country.

While T-Group and JCXI could be considered manufacturers under the foregoing definition because they engage in the manufacturing or assembling of the new motor vehicles or nonroad vehicles, they cannot be held liable under CAA § 203 because pursuant to Agency practice, COC's can only be issued to U.S. manufacturers and U.S. importers. CX014 at EPA-000399. Given that the CAA only requires that vehicles produced for sale in the U.S. be covered by EPA-issued COCs, and the EPA doesn't issue COCs to foreign manufacturers, foreign manufacturers cannot be liable. After all, if foreign manufacturers, such as T-Group and JCXI, are not permitted to hold COCs, how can they then be held liable for not having COCs, or for violating regulations applicable to acquiring COCs? In fact, the Agency's own witness, Amelie Isin, from EPA's Mobile Source Enforcement Branch herself, along with the former Director of EPA's Air Enforcement Division, have stated:

> ". . . some of EPA's challenges in enforcing the Clean Air Act with regard to consumer products originate from the fact that ***EPA's regulations limit liability to the importer of the illegal goods, not the foreign manufacturer of the product*** or the retailer selling the illegal product."

See RX038 at 256-57, Exh. 2.[9]

Therefore, a "manufacturer" for purposes of the CAA, or this case, can only be a U.S. manufacturer or importer, not T-Group or JCXI.

[9] Exh.2 is an article authored by Ms. Isin, Anne Wick (the vehicles and engines team leader at the Air Enforcement Division, Office of Enforcement and Compliance Assurance) and **Adam M. Kushner,** the former Director of EPA's Air Enforcement Division. was attached to RX038, and admitted into evidence by the ALJ. *See* Tr. at 696.

The ALJ erroneously held Appellants liable for violating the CAA by failing to comply with EPA's certification regulations, even though said certification is only available, and limit liability, to U.S. importers/manufacturers.

III. The EPA did not meet its burden to prove that T-Group or JCXI violated the CAA, or any of the implementing regulations stated in the Complaint.

The CAA prohibits manufacturers from selling or offering for sale, introducing or delivering for introduction into commerce, or (in the case of any person, ***except as provided by regulation of the Administrator***), importing into the United States a vehicle and/or vehicle engine unless it is covered by a certificate of conformity (COC) issued under applicable regulations. 42 U.S.C.§ 7522(a)(1). Here, as stated above, the EPA has ***excepted*** foreign companies (persons) from holding COCs. Regardless, because Taotao USA holds EPA-granted COCs for every engine family identified in [the Complaint],[10] in order to establish liability the Agency had the burden to prove that the highway motorcycles and recreational vehicles manufactured or assembled by Appellants were not covered by those EPA-granted COCs for every engine family and class of vehicles. *See* 40 C.F.R. § 22.24.

To show that the 67,527 highway motorcycles, and the 42,437 recreational vehicles were not covered under their corresponding EPA-granted COCs, the Complaint alleges that "[b]ecause the catalytic converters do not conform to the ***design specifications*** described in the relevant applications for COCs, the vehicles do not conform in all material respects to the specifications in the COC applications and are therefore not covered by those COCs. Am. Compl. ¶ 37 (emphasis added). In making the foregoing allegation, the Agency relies on the following regulations: 40

[10] Am. Compl. ¶ 31.

C.F.R. §§ 85.2305(b)(l) and 86.437-78(a)(2)(iii), (b)(4) (highway motorcycles), and 40 C.F.R. §§ 1068.101(a)(1)(i) and 1068.103(a) (recreational vehicles).

A. All subject highway motorcycles were covered by their EPA-issued COCs.

In regards to the highway motorcycles, for which, according to the Complaint, 40 C.F.R. Part 86 sets emission standards and section 203 or the CAA, 42 U.S.C. *§* 7522, sets compliance provisions,[11] the Agency alleges that subject highway vehicles are not covered by their COCs pursuant to the following regulations: 40 C.F.R. §§ 85.2305(b)(l) and 86.437-78(a)(2)(iii), (b)(4). Am. Compl. ¶¶ 48, 58, 68, 78. However, as shown below, none of the foregoing regulations, as stated in the Complaint, require that highway motorcycles produced/assembled by large manufacturers like Appellants conform to the design specifications described in the vehicles' COC application(s).

Because 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, and here the parties stipulated that each subject vehicle was represented by their test vehicle,[12] T-Group's vehicles were clearly covered by their applicable COCs. *See* 40 C.F.R. 86.437 (a)(2)(iii) ("New motorcycles produced by a manufacturer whose projected sales in the United States is 10,000 or more units (for the model year . . .)[13] are covered by the following . . . (2). . . (iii) The certificate will cover all vehicles represented ***by the test vehicle*** and will certify compliance with no more than one set of applicable standards.") (emphasis added).

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[11] Am. Comp. ¶ 23(a)

[12] *See* 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 ("Compl. AD Resp.") at 14-15 (Jan. 3, 2017) (requesting the Presiding Officer treat Appellant's statements on page 9 of their Motion to Dismiss that the test vehicles Appellants "used to certify each engine family contained catalytic converters which conformed to the catalytic converters equipped on [their] imported vehicles[12]. . . as a judicial admission and remove the factual matter from controversy."); *see also* Liability Order at 30-31.

[13] T-Group's projected sales in each model year were greater than 10,000 units pursuant to Appellee's own Complaint. *See* Am. Compl. ¶¶ 38-39, Table 1; *see also* Initial Decision at 10.

Regardless of the clear and unequivocal language of the above-quoted regulation, the ALJ held as follows:

> "[Appellants] might prefer that material conformity with each engine family's emissions-data vehicle [i.e. test vehicle] be the point of comparison rather than the data submitted in the COC application. . . . But clearly the question is whether catalyst levels in [Appellants'] vehicles matched what was claimed on their COC applications, not whether they matched the catalyst levels of their emissions-data vehicles."

Liability Decision at 29. In making the foregoing conclusion, the ALJ not only ignores the regulation, upon which the Complaint rests, she undermines the clear language of the regulation and attempts to unilaterally create new law. *Id.*

> "([40 C.F.R. § 86.437(a)(2)(iii)] states that a COC 'will cover all vehicles represented by the test vehicle,' but it does ***not suggest*** the vehicles represented by that test vehicle ***must not*** conform to the description in their COC application . Additionally, because 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.")

According to the ALJ therefore, even though T-Group clearly complied with the regulation that clearly states a certificate will cover all vehicles represented by the test vehicle, Appellant must also comply with whatever is ***not*** stated in the regulation. Not only is the implication of such a duty clearly unfair, the ALJ's decision is undermined by the remaining subpart of the very same regulation. *See* 40 C.F.R. § 86.437-78(b)(4). Although subpart (b)(4) does not apply to T-Group because as stated above, the Complaint itself states that T-Group manufactured more than 10,000 units for sale in each relevant model year, the subpart states that in case of such small manufacturers, "[t]he certificate will cover all vehicles described by the manufacturer." *Id.* § 86.437-78(b)(4).

An analysis of subpart (b)(4) is important because it sheds light on why vehicles by large manufacturers need only match their test vehicle, while those by small manufacturers match their COC application. The following comparison also undermines the ALJ's conclusion that Appellant

is liable because the regulation does not say that the test vehicles must not conform to their COC applications. Clearly by requiring that some vehicles match their test vehicles to be covered by their COCs, while other match their COC applications, the drafters have drawn a distinction between these two sets of standards. *See* id. To further clarify this distinction, the drafters of the regulation included the following emphasized statement in reference to vehicles produced by large manufacturers: "The certificate will cover all vehicles represented by the test vehicle and will certify compliance with ***no more than one set of applicable standards***. *See* id. ¶ 86.437-78(a)(2)(iii); *see also* table below.

§ 86.437-78(a) Manufacturers with projected sales of 10,000 or more units	§ 86.437-78 (b) Manufacturers with projected sales of less than 10,000 units
The manufacturer shall submit to the Administrator ***a statement*** that *the test vehicles with respect to which data are* ***submitted*** have been tested in accordance with the applicable test procedures, that they meet the requirements of such tests, and that, on the basis of such tests, they conform to the requirements of the regulations in this part.. . .	The manufacturer shall submit to the Administrator ***an application*** for certification containing the following: (i) A brief ***description of the vehicles*** to be covered by the certificate (the manufacturer's sales data book or advertising including specifications will satisfy this requirement for most manufacturers). (ii) A statement signed by the authorized representative of the manufacturer stating: "The vehicles described herein have been tested in accordance with the provisions of subpart E, part 86, title 40, of the Code of Federal Regulations, and on the basis of these tests are in conformance with that subpart. All of the data and records required by that subpart ***are on file*** and are available for inspection by the Administrator. Total sales of vehicles subject to this subpart will be limited to less than 10,000 units.". . .
If, after a review of the test reports and data submitted by the manufacturer, data derived from any inspection carried out under § 86.441 and any other pertinent data or	If, after a review of the statement the Administrator determines that the requirements of this subpart have been met, he

information, the Administrator determines that ***a test vehicle(s)*** meets the requirements of the Act and of this subpart, he will issue a certificate of conformity with respect ***to such vehicle(s) . . .***	will issue a certificate of conformity with respect to the ***described*** vehicles . . .
The certificate will cover all vehicles ***represented by the test vehicle*** and will certify compliance with ***no more than one*** set of applicable standards.	The certificate will cover all vehicles ***described by the manufacturer.***

The table above shows the differences between vehicles produced by large companies, like those of Appellants, and other small companies. In case of large manufacturers, the COC applicant need only provide a statement that the test data being submitted was conducted in accordance with applicable test procedures on a test vehicle. Each of Taotao USA's COC applications for highway motorcycles included the required statement. *See* CX001 at EPA-000005 (statement of conformity), CX002 at EPA-000041, CX003 at EPA-000084, and CX004 at EPA-000120. The Administrator (here EPA) then makes a determination based on the test reports and data submitted (or other inspections which were not conducted here) to determine if the test vehicle conforms with the Act (here the emission standards),[14] and issues a COC. Here the data submitted for certification of each highway motorcycle showed that the test vehicle passed emission standards throughout its useful life. *See e.g.* CX001 at EPA-000025-36; CX004 at EPA-000136-50. Because test data was submitted for the certification of each vehicle, T-Group, or here Taotao USA, was not required to submit a COC application with a description of the vehicles, and the COC was not granted based on any such description. *See* 40 C.F.R. § 86.437-78.

Clearly the drafters understood that when a COC is approved based on a test vehicle's performance data, all vehicle's must conform to that test vehicle; whereas in cases where a COC

[14] The Agency, and the CAA, does not have any catalytic converter standards.

is approved based solely on what is described in the manufacturer's COC application, and there is no performance data,[15] the vehicle must conform to the COC application.

The ALJ further states that for "for highway motorcycles, COCs are issued for distinct engine families based on written applications describing the vehicles in the family." Initial Decision at 25. To support her statement she generally points to 40 C.F.R. §§ 86.416-80 and 86.420-78. *Id.* The statement is incorrect, and irrelevant. Whereas section 86.416-80 does say that new motorcycles are covered by the following, which includes a list of items to be included in a COC application, nowhere does it say that those vehicles are covered by their COC only if they match their COC applications. In fact, in comparing this language to the language of 86.437-78, it is clear that the word "covered" as used in the first sentence of both regulations, refers to the provisions that apply to new motor vehicles produced by large manufacturers. Therefore, whether or not the COC application itself requires certain descriptions, as stated above, a COC covers only those vehicles that are represented by the test vehicle, not the COC description. As for section 86.420-78, it only says that all vehicles in an engine family must match each other, and as previously mentioned, there is Appellee has stipulated that all vehicles in each engine family matched their test vehicle, and therefore each other.

The Complaint also cites to 40 C.F.R. § 85.2305(b)(1) to support a claim of liability under the CAA, but because the ALJ found liability for highway motorcycles based on the CAA implementing regulations codified in 40 C.F.R., Part 86, Subpart E (not Part 85), *see* Initial Decision at 2; and did not refer to section 85.2305 in her order on liability, *see generally* Liability Decision; the section is clearly inapplicable.

[15] Only large manufacturers are required to submit test data. ("Data from all tests (including voided tests) performed by a manufacturer with total projected sales in excess of 10,000 vehicles shall be included in the application.").

Finally, the ALJ's liability decision was based largely on the language stated on the face of the COC, even though it clearly conflicts with 40 C.F.R. § 86.437-78. *See* Initial Decision at 25. The ALJ states that because each COC application on its face says that "This Certificate covers *only* those vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the documentation required by the relevant regulations . . . [t]here is no material conformity when the vehicles actually manufactured contain catalytic converters with precious metal contents that are different in volume and composition from the catalytic converters described in the COC application." However, as mentioned above, the language of the COC directly conflicts with the language of the relevant regulation, which states that a vehicle is covered by a COC if it is represented by the test vehicle, and certifies compliance with only one set of standards. Furthermore, the regulation that required the language quoted on the face of each COC was based on a previous version of section 86.437-78. This previous version, instead of saying only that a COC covers only those vehicles that are represented by the test vehicle, said as follows:

> "Each such certificate shall contain the following: This certificate covers only those new motorcycles which conform, in all material respects, to the design specifications that applied to those vehicles described in the application for certification and which are produced during the model year production period of the said manufacturer . . ."

Compare 1981 40 C.F .R. 86.437 to 1982 40 C.F .R. 86.437 (1982). In 1982, the above-quoted language was entirely deleted and the only language regarding which vehicles are covered by a COC that remained was "[t]he certificate will cover all vehicles ***represented by the test vehicle***" (emphasis added).

Clearly, the language of the regulation, having been replaced by a current standard, suggests that the language on the face of each COC issued to a large manufacturer is unauthorized and contrary to the current regulation. Although the ALJ states that the language, deleted over thirty years ago, still applies, said language was not only deleted from the above-mentioned

regulation but the entire regulation that previously applied to certification of motor vehicles, which contained similar language, was likewise deleted in 1977. *See* 40 C.F.R. § 85.074-30(a)(2) (1976). The liability order therefore runs contrary to the Agency's own deliberate choice. The decision is not based on any current law, or interpretation of the law, but instead makes new law by circumventing necessary rule-making procedures.

Furthermore, nowhere does 40 C.F.R. Part 86 require that the manufacturer describe the precise precious metal concentrations of its catalytic converters. Even if such a regulation existed, which it does not, the term "design specifications" does not include catalytic converter concentrations. *See infra* at 23-24.

Because the Agency stipulated, and the ALJ determined liability for all 109,964 vehicles on the finding, that all imported vehicles conformed, in all material respects, to their respective emission data vehicles, there is no dispute that all highway motorcycles (and recreational vehicles) identified in the Complaint conformed to their relevant test vehicles, i.e. EDVs. *See* 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 ("Compl. AD Resp.") at 14-15 (Jan. 3, 2017) (requesting the Presiding Officer treat Appellant's statements on page 9 of their Motion to Dismiss that "the EDVs[16] [Appellants] used to certify each engine family contained catalytic converters which conformed to the catalytic converters equipped on [their] imported vehicles[17]. . . as a judicial admission and remove the factual matter from controversy."); *see also* Liability Order at 30-31 (agreeing with Complainant's position and

[16] The EDVs referenced are the prototype test vehicles for each engine family used to gather emissions data for certification; the data is submitted with each COC application. *See* Compl. AD Resp. at 13; Respondents' Motion to Dismiss for Failure to State a Claim ("Motion to Dismiss") at 9.

[17] Appellee agreed that the "imported vehicles" Appellant refers to include the 109,964 vehicles identified in the Amended Complaint. Compl. AD Resp. at 14.

holding that because Respondents state that "the EDV that passed the emissions standards contained a catalytic converter which conformed to the catalytic converter on imported vehicles… I find there is sufficient evidence to conclude that none of the 109,964 imported vehicles conform to the design specifications of their COC applications."). Because all 67,547 highway motorcycles imported by Appellant had catalytic converters that conformed to the catalytic converters on their respective test vehicles, and test reports and test data for said representative test vehicles were submitted to the Agency prior to the production of these subject vehicles, they are covered by their EPA-granted COCs.

B. All subject recreational vehicles were covered by their EPA-issued COCs.

In case of recreational vehicles, for which, according to the Complaint, 40 C.F.R. Part 1051 sets emission standards and 40 C.F.R. Part 1068 sets compliance provisions,[18] the Agency alleges that subject highway vehicles are not covered by their COCs pursuant to the following regulations: 40 C.F.R. §§ 1068.101(a)(1)(i) and 1068.103(a). Am. Compl. ¶¶ 87, 97, 107, 117, 125, 133.

The Complaint is premised on the allegation, and regulation, that " Engines/equipment covered by a certificate of conformity are limited to those that . . . conform to the specifications described in the certificate and the associated application for certification." 40 C.F.R. 1068.103(a). Yet, the Agency ignores the very next sentence that precedes the above-quoted language, which defines the term "specifications." *Id.* ("For the purposes of this paragraph (a), 'specifications' includes the emission control information label and any conditions or limitations identified by the manufacturer or EPA.).[19] Nowhere in all the emission control information ("ECI") specified on each ECI label attached to all the vehicles identified in the Complaint, is there any mention of

[18] Id. ¶ 23(b)

[19] The ALJ took the position that the applicable regulation is not the one that is current now, or was current at the time of her liability decision, but rather one that existed prior to December 2016, which did not include "the emission control information label" but was otherwise the same.

the precious metal concentrations, nor is such "mention" required. See e.g. CX006 at EPA-000196. Furthermore, none of the conditions or limitations identified by the manufacturer make any mention the catalytic converter's precious metal concentrations. See e.g. id at EPA-000205. Finally, that EPA does not have any catalytic converter design standards or specifications. Initial Decision at 8.

Therefore, unlike cases where certain design specifications are required, i.e. EPA standards such as those required in order to demonstrate compliance with evaporative emission standards,[10] and information that must be included; or cases where the parts equipped onto the EDV were different from the parts on the production vehicles, *see e.g. United States v. Chrysler Corp.,* 591 F.2d at 960, n.3., the present matter involves no such facts. Because the recreational vehicles involved materially conformed to all "specifications" described in the COC application, as the term is defined in the relevant regulation, and it is undisputed that the recreational vehicles conformed to their respective test vehicles, *see* Compl. AD Resp. at 14-15, all recreational vehicles imported by Appellant into the U.S. were covered by a valid COC.

IV. The ALJ's penalty decision exceeds the express limits of the CAA.

The Clean Air Act unambiguously limits the amount of penalty that may be sought against a violator in a penalty assessment proceeding. CAA § 205(c)(1). The language of the Act makes clear that the limitation is not only on the amount recovered, but the amount "sought" in an administrative proceeding. *Id.* Here, Appellee initially sought a proposed penalty of $3,295,556.32 ($1,698,432.42 from Taotao USA and T-Group, and $1,597,123.89 from Taotao USA and JCXI). *See* Complainant's Initial Prehearing Exchange at 8. Complainant later reduced the proposed penalty to $1,601,149.95 shortly before the hearing. *See* Motion for Leave to Reduce the Proposed Penalty (Oct. 9, 2017); *see also* CX213 at EPA-002808–11. P

Prior to this reduction in the penalty sought, Appellants filed a Motion for Lack of Subject Matter Jurisdiction ("SMJ Motion"). *See generally* SMJ Motion (Aug. 2, 2017). In their Motion, Appellants argued, among other things, that this administrative action exceeded the statutory limitations set by the CAA, and although an Administrator's and the Attorney General's joint determination that a matter involving a larger penalty amount is appropriate for administrative penalty assessment waives said statutory limit, *see* CAA § 205(c)(1), in this case the joint determination has its own limitations. *See* SMJ Motion at 6-7; *see also* CX028 at CX028 at EPA-000546-47.

Here the Agency had submitted two letters from the DOJ's representative, Karen S. Dworkin, as part of its Prehearing Exchange. *See* CX026, CX028. The first letter, dated March 17, 2015, merely said that "in response to your letter dated January 30, 2015, requesting a waiver to pursue administrative action against Taotao USA, Inc., and ***related entities***[20]. . . 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) . . ." CX026 at EPA-000539. Eight months after this letter, Appellee filed the Original Complaint against Appellants, alleging 64,377 violations of the CAA. Appellee claims that on January 26, the Agency discovered additional recreational vehicles that violated the CAA. Motion for Leave to Amend the Complaint and to Extend Prehearing Deadlines (Jun. 14, 2016) ("Motion to Amend") at 2. On February 1, 2016, Appellee again requested a waiver for additional vehicles from the DOJ, and on March 24, 2016, the DOJ again concurred, however statements immediately before the concurrence have been withheld by Appellee. *See* Response to Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Aug. 25, 2017) ("SMJ Response"), Attachment ("Att.") I-J.

[20] Because there is was no information or evidence in the prehearing exchange showing that the companies were "related entities" and the only finding of such relation

Although these letters by itself could have potentially sufficed the waiver requirement, the issue arose when the Agency added an additional 45,587 violations, which it claimed to have discovered nearly fourteen months after the DOJ's foregoing letter, and presented an additional letter, in which the DOJ made clear its conditions on each waiver. *See* Motion for Leave to Amend the Complaint and to Extend Prehearing Deadlines (Jun. 14, 2016) ("Motion to Amend") at 3; *see also* CX028. The Motion to Amend claimed that the Agency discovered the additional recreational vehicle violations on or after April 8, 2016, and the remaining 43,906 additional violations on or after May 9, 2016. Motion to Amend at 2-3.

On May 6, 2016, Appellee again sought a waiver from the DOJ for the additional recreational vehicles (purportedly discovered on or after April 8, 2016), and any other "future violations." Appellee submitted another letter from Ms. Dworkin, dated June 2, 2016. *See* CX028. Ms. Dworkin's letter clearly states that it is in response to the Appellee's May 6, 2016 letter, i.e. before the additional 43,906 violations were discovered, titled "Second Addendum to the EPA's January 30, 2015 Request . . ." CX028 at EPA-000546. Ms. Dworkin states that Appellee's May 6th letter "sought a waiver to pursue administrative penalty assessment action against Taotao USA, Inc., ***and related entities***,[21] for additional recreational vehicles (now totaling 1681) . . ." *Id.* (emphasis added). Ms. Dworkin further states that Appellee's May 6th letter additionally "sought a waiver for certain potential additional violations that may occur in the future." *Id.* This time, however, Ms. Dworkin did not merely concur to the requests but made clear that the waiver for said future violations covered only those violations that "are *substantially similar* ***to those covered***

[21] Notably, there was no evidence in the prehearing exchange at the time showing that the entities were related, and the only relation the ALJ ultimately found was that the entities were related because the Chinese companies were owned by Yuejin Cao, who was the president of T-Group and JCXI, and the father of Matao Cao, who owned Taotao USA, and former president and registered agent for Taotao USA. However, this information came from the testimony of the Agency's witness, Cleophas Jackson, who claims to have learned of the relations in May 2017, i.e. well after the dates of each waiver.

under the waivers already issued to date." Therefore, Ms. Dworkin not only set limits on what violations were covered under this second waiver, but also made clear that all waivers previously issued were limited to the same category of violations. *See* id. ("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 assessment action."). Ms. Dworkin made clear that the waiver sought, and the waiver granted, covered those 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." *Id.*

Ms. Dworkin could have ended her letter there, leaving it up to the Agency to determine whether or not harm to the regulatory scheme includes harm caused by excess emission, but she did not. Perhaps knowing that the Agency could deliberately interpret the waiver to include anything that could potentially be included in harm to the regulatory scheme, Ms. Dworkin went further to explain what was not covered by the waivers (requesting that the EPA consult to discuss with the DOJ "the path forward for any violations that are not *substantially similar*."). By asking that the EPA further discuss the inclusion of violations that the DOJ deemed not "substantially similar," Ms. Dworkin's letter clearly indicates that the following violations are not subject to a *joint* determination to waive the statutory limits, as required by the CAA:

> "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 criminal; or --that increase the aggregate number of waived vehicles in the matter to over 125,000 total.

Id. at EPA000546-7 (emphasis added). Notably, the list includes an "or" after each item, except the first two, meaning that the DOJ limited the violations not only to those that harm the regulatory scheme, but further exempted from the Agency's generally interpretation of regulatory scheme

anything that goes beyond ***mere*** harm to the regulatory scheme, such as harm to the regulatory scheme from excess emissions and harm from to the regulatory scheme from any violations other than those expressly stated in her waiver. *See* id.

To satisfy its burden of showing that the jointly determined waivers covered all violations, including the "future violations," which occurred prior to the last waiver, but were purportedly discovered shortly after Appellee's third request for a waiver, Appellee submitted the fully (or mostly) redacted documents presented by the Agency.[22] *See Southway v. Central Bank of Nigeria*, 328 F.3d 1267, 1274 (10th Cir. 2003) (plaintiff must present affidavits or other evidence sufficient to establish the court's subject matter jurisdiction by a preponderance of the evidence); *McNutt v. General Motors Acceptance Corp*. 298 U.S. 178, 189 (1936); see also *In re Lyon County Landfill*, 8 E.A.D. 559, 568 (EAB 1999) (An administrative tribunal may make the legal and/or factual findings necessary to assure itself that it has subject matter jurisdiction over the case before it.).

These documents consisted of Appellee's letters to the DOJ, all of which were almost completely redacted; and letters from Ms. Dworkin to Appellee, one of which was also partially redacted. *See* SMJ Response, Exh. H-K. To justify its failure to present evidence of the matters jointly determined, Appellee insisted that inquiry into the redacted portions would "necessarily delve into enforcement sensitive and privileged deliberations between OECA and DOJ regarding their exercise of prosecutorial discretion, and invite the Presiding Officer to substitute her judgement regarding the appropriateness of a waiver for that of the enforcement officials authorized to make the determination." SMJ Response at 8. However, said inquiry would do no such thing, nor did Appellants ask the ALJ to substitute the judgment regarding the appropriateness of the waiver.

[22] *See* SMJ Response at 2-3, Att. H-K; *see also* Order on Denying Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction ("SMJ Order") at 17.

First, the ALJ, being part of the Agency, could have viewed the allegedly "sensitive and privileged deliberations" to determine whether the violations, the DOJ deemed "substantially similar" mentioned the violations' actual or potential harm to the environment for which Appellee sought a penalty. *See In re Lyon County Landfill*, 8 E.A.D. at 566-7. Next, a review of the redacted portions was fully justified in light of the DOJ's express conditions on the violations that were "covered" by each waiver, because an ALJ has the authority to determine whether statutory preconditions that enable EPA and DOJ to exercise their discretionary authority to issue a waiver in this particular case had been satisfied. *See* CX028 at EPA000546-7; *see also See In re Lyon County Landfill*, 8 E.A.D at 568.

Here Appellee deliberately withheld crucial information from Appellants and the ALJ. *See e.g.* SMJ Response, Att. K at 3 (Appellee has completely redacted the paragraphs following Appellee's statement: "We seek your concurrence to pursue a higher penalty in this matter based on the violations described herein"). How could a description of the violations, i.e. the matter for which the joint determination is sought, be considered "sensitive and privileged deliberations?" Clearly, no statute or regulation states that even the "matter" which the EPA-DOJ determine appropriate for a waiver is protected or privileged, instead of merely the determinations of appropriateness. Without knowing what "violations" the waivers cover, in light of the DOJ's own deliberate choice to limit the waiver to certain types of violations, the ALJ could not conclude if all the violations in this Complaint were covered by a EPA-DOJ joint waiver. *See* SMJ Order at 19.

Nevertheless, the ALJ, in her SMJ Order did note that with regard to the penalty that the Agency may obtain in light of the language of CX028, no definitive ruling is made. *See* SMJ Order at 19, n. 21. The ALJ further noted that "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." *Id.* Yet, in her Initial Decision, the ALJ ruled that the Agency's penalty calculations, which clearly included upward adjustments for harm from excess emissions, were justifiable "because the risk of excess emissions created by the failure to have valid COCs harmed the regulatory scheme as the scheme was designed to prevent such risks." Initial Decision at 31-32.

The ALJ's decision that Appellee could significantly increase the penalty for vehicles that could violate the emission standards, and which were not retested for emissions, clearly interprets the term regulatory scheme to include what the DOJ expressly excluded from the jurisdictional waiver. *See supra* page 27; *see also* CX028 at EPA-000546-47. Additionally, although initially noting that CX028 did suggest that the penalty cannot be based upon the violations being undertaken willfully, knowingly, or intentionally, she later found, on the contrary, that it was clear from the DOJ authorization (CX028) that the willful or knowing prohibition only applied to enforcement actions arising in the criminal context. *See* Initial Decision at 38; *but c.f.* SMJ Order at 19, n.21. How could the same DOJ letter, on its face, first suggest that the Agency's penalty in this case cannot be based on Appellants' willful, knowing or intentional conduct, and later "clearly" state that the penalty in this case could be based on Appellants' willful or knowing conduct?

Because the evidence presented to the ALJ shows that the EPA-DOJ joint waiver determination was limited in scope to "mere regulatory harm," excluding harm to the regulatory scheme from excess emissions , the ALJ's penalty determination violates the CAA § 205(c). *See* Tr. at 841 (Ms. Isin, the person who testified to the calculations, admitting that the Agency's penalty assessment is not solely based on harm to the regulatory scheme, but also includes amounts

attributable to actual or potential harm from excess emissions.). Furthermore, because the ALJ's penalty was also based on Appellant's willful and knowing conduct, the penalty violated the DOJ's express limitations, thereby exceeding her authority to assess penalties under the CAA. *See* Tr. 601 (the Agency admitting that the penalty includes amounts attributable to willfulness and negligence); *see also* Tr. at 706 (Ms. Isin admitting that her "willfulness or negligence" upward adjustment was based on something that could have been prevented…something the ***Respondent*** knew or should have known to prevent."[23] *See* Tr. at 706.

V. The ALJ's penalty assessment ignores an Appellant-specific application of the statutory factors.

When assessing penalties, the Clean Air Act requires that EPA "take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require." CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2).

The Board has made clear that an ALJ's role "is not to accept without question the Agency's view of the case, but rather to determine an appropriate penalty as required by 40 C.F.R. § 22.27. *In re Peace Indus. Group (USA) Inc*., 17 E.A.D. 348, 354 (EAB 2006). As part of the ALJ's evaluation, the ALJ must ensure that in the pending case the Agency has applied the law and the Agency's policies consistently and fairly." *In re Mountain Village Parks, Inc.*, 15 E.A.D. 790, 797 (EAB 2013) (quoting *In re John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 782 (EAB 2013)).

[23] Ms. Isin does not specify the Respondent she is referring to, such a disregard for individualized determination is evident in the Agency's entire penalty assessment.

A. *The Penalty Policy did not provide an appropriate framework in the unique circumstances of this case.*

In this case, Appellee sought, and the ALJ granted, a penalty calculated pursuant to the Mobile Source Penalty Policy ("Penalty Policy"), or rather Appellee's biased interpretation of the Penalty Policy. The Board generally disfavors the use of settlement guidelines outside the settlement context. *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 394 & n.37 (EAB 2004) (citing *In re Britton Constr. Co*., 8 E.A.D. 261, 287 n.16 (EAB 1999)). Regardless, even when a penalty policy does provide a framework for statutorily prescribed framework for a specific violation, but in cases, such as this case, where the unique facts and circumstances demand a departure from the framework of the relevant EPA policy, the ALJ is free to, and should, disregard it. *See In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002); *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 759 (EAB 1997) (freedom to depart from the framework of a penalty policy preserves an ALJ's discretion to handle individual cases fairly where circumstances indicate that the penalty suggested by a penalty policy is not appropriate).

This case presents such unique circumstances because, a mentioned above, here the DOJ waived jurisdictional limits solely based on what the department deemed "mere harm to the regulatory scheme." *See* CX028. Because the Penalty Policy relies heavily on harm from actual or potential emissions, and, save from a few examples on violations that harm the regulatory scheme without causing harm from excess emissions, the policy is largely silent on penalty calculations for violations that merely harm the regulatory scheme. *See* CX022 at EPA-000466 ("…the gravity component under this Penalty Policy for violations involving uncertified vehicles is calculated to be proportional to the vehicle's engine size because the amount of emissions and potential for excess emissions id proportional to the engine size.").

While the Penalty Policy does acknowledge circumstances where violations do not cause harm in the form of excess emissions, in which case, the seriousness of the violation depends on its effect on the regulatory program, the Penalty Policy does not provide a framework for calculating such a penalty. *See* CX022 at EPA-000469, EPA- 000476. The only examples provided by the Penalty Policy on violations that harm the regulatory program but do not cause excess emissions, involve emission label violations (*see* CX022 at EPA- 000465 n.12, EPA-000468-9), and the Penalty Policy, itself, states that "[t]he method of calculating the gravity penalty component described in this Penalty Policy is ***not to apply to cases*** that involve violations other than uncertified vehicles or engines, or violations of the tampering or defeat device prohibitions", thereby implicitly excluding certification violations that do not exceed emissions. *See* CX022 at EPA-000476 (emphasis added). For such cases, the Penalty Policy by largely deferring to the Agency's own calculation methods, fails to provide a uniform framework for the assessment of penalties. *See* id. Nevertheless, the ALJ did not disregard the inapplicable penalty policy and do her own statutory analysis, thereby assessing an improperly high penalty against Appellant.

Furthermore, the ALJ, like Appellee, failed to accurately assess a penalty with adhered to the Penalty Policy, and instead made calculations based on inaccurate and biased assumptions on what the Penalty Policy states (even where the policy is entirely silent on an issue). These calculations wholly lacked any individualized Appellant by Appellant analysis, and improperly grouped all Respondents together based on an EPA witnesses, Cleophas Jackson's hearsay statement, which conflicted with documentary evidence, that on a trip to China in 2017, he was told by Yuejin Cao, the owner of T-Group and JCXI, that all companies (or operations) were related. *See* Initial Decision at 15. It was unclear in his testimony if Mr. Jackson knew what companies Yuejin Cao was referring to, and Mr. Jackson himself admitted that the U.S. company

Mr. Cao referred to was Tao Motor, Inc. (a company that was created in 2016, well after the occurrence of the allegations in this Complaint).[24] *See* in any case, the testimony on related companies was for the purpose of proving an ability to pay, and therefore the term "related entities" was based on the definition stated in In re New Waterbury. *See* Tr. at 146; *see also In re New Waterbury, Ltd.*, 5 E.A.D. 529, 543 (EAB 1994) (finding that to determine ability to pay, the Agency could consider Respondent's ability to secure funds from related-companies, including those companies that has merely loaned money to Respondent in the past).

B. *The ALJ's penalty assessment is erroneous and exceeds the limits of the Penalty Policy itself.*

In assessing the penalty, the ALJ was required to consider certain statutorily mandated factors. *See* CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2). However, the ALJ's penalty determinations were not based on the particular facts of this case, but rather on the Agency's upward biased application of the penalty Policy, and its biased views towards the Appellants. For example, in calculating the base-per-vehicle gravity, the ALJ looked to the portions of the Penalty Policy which provides a gravity calculation for violations that cause actual or potential harm from emissions, instead of the portion which provides a method for calculating gravity based on violations that harm the regulatory program but do not cause excess emissions. *See* CX022 at EPA-000466;[25] *but cf.* CX022 at EPA-000469;[26] *see also* Initial Decision at 23. As previously discussed, the ALJ reasoned that harm to the regulatory scheme, included harm from risk of excess emissions (or

[24] Tr. 221-223; *see also* RX039 at 92 ("I don't know the corporate relationships")

[25] Gravity calculations based on actual or potential emissions rely on the horsepower of the vehicle or engine as a measure of the engine's size and therefore states that the potential for excess emissions is proportional to the engine size. CX022 at EPA-000466.

[26] The Penalty Policy states that in case of violations that harm the regulatory program, but do not cause excess emissions, the importance of the requirement to the regulatory scheme should be considered in determining egregiousness, and because egregiousness is the second time in gravity calculations, the Penalty Policy appears to eliminate the first step entirely. *See* id. at EPA-000469.

potential emissions). However, even ignoring that the DOJ expressly excluded such interpretations of the regulatory scheme from the joint waiver, there was no potential for excess emissions in this case. *See* Appellants' Reply Post-Hearing Brief (Jan. 19, 2018) at 9-13.

In support of its claim that Appellants violated the regulatory scheme, and created a risk of potential emissions, Appellee argued that even though low-hour emissions tests were conducted on vehicles identified in Counts 1 through 8, said low-hour tests results do not mean there is no potential for harm. *See* Complainant's Initial Post-Hearing Brief (Dec. 21, 2017) ("Agency's Br.") at 9. Appellee argued that there was a potential for harm from emissions because (1) the deterioration factors used in these low-hour tests were taken from useful life tests conducted on different vehicles (with different catalytic converters), and (2) the Agency had concerns regarding the durability of the actual "palladium-only" catalytic converters which could only be tested through higher mileage and service hours. *Id.* at 9-10. Basically, Appellee submitted a single basis for its position that the violations harmed the regulatory scheme, which caused a risk of excess emissions. As such, Appellee's entire harm to the regulatory scheme relied on its assertion that Appellants caused 109,964 vehicles with untested useful life emissions to operate in the United States. *Id.*

However, as previously mentioned, *see supra* at 22-23, at the liability stage of the proceedings, Appellee stipulated that all emission data vehicles (test vehicles) that Taotao USA tested for end of useful life emissions for the certification of each engine family had the same catalytic converters as the respective imported vehicles. Appellee took the foregoing fact out of controversy early in the proceedings, and because the Agency has the burdens of presentation and persuasion that the violation occurred ***as set forth in the Complaint*** and that the relief sought is appropriate, 40 C.F.R. § 22.24 (emphasis added), and the ALJ can only make factual

determinations on matters of controversy, the ALJ could not base the penalty contrary to an uncontroverted fact, i.e. all useful life emissions data submitted to the Agency for certification were conducted on vehicles that were identical to those alleged in the Complaint.[27] *See* 40 C.F.R. § 22.24 (Each ***matter of controversy*** shall be decided by the Presiding Officer upon a preponderance of the evidence) (emphasis added).

Because the deterioration factors for the low hour tests were taken from useful life tests conducted on test vehicles that were equipped with the same catalytic converters as those on their respective imported vehicles, and because full useful life emission tests were conducted on what the Appellee deems palladium-only catalytic converters, Appellants neither harmed the regulatory scheme, nor created a risk for excess emissions.

Regardless, the ALJ, ignoring Appellee's own basis for regulatory harm and potential emissions, which the parties had the opportunity to brief, substituted her own reasons for said harm. *See* Initial Decision at 32. The ALJ reasoned that although Appellants had provided full useful life emissions data demonstrating long-term viability of the actual imported catalytic converters to the Agency for certification purposes, those tests were conducted on previous model years, and therefore their performance characteristics cannot be presumed. Not only is the ALJ's foregoing conclusion entirely unfounded in fact or law, she points to the Agency's Reply Brief to where the Agency purportedly made the argument, where in fact the Agency's brief says no such thing. *See* Complainant's Reply Post-Hearing Brief ("Agency's R. Br.") at 6-7. The ALJ misconstrues the Agency's argument regarding the differences in model years. The Agency does

[27] *See* 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 ("Compl. AD Resp.") at 14-15 (Jan. 3, 2017) (requesting the Presiding Officer treat Appellant's statements on page 9 of their Motion to Dismiss that "the EDVs [Appellants] used to certify each engine family contained catalytic converters which conformed to the catalytic converters equipped on [their] imported vehicles[27]. . . as a judicial admission and remove the factual matter from controversy.").

not say that the performance characteristics of the test vehicles cannot be presumed because the test vehicles were produced in different model years, nor can the Agency make such an argument in light of its own regulations, the Agency instead argues that because the model years of the test vehicles were different from the model years the actual imported vehicles were produced, it cannot be assumed that the test vehicles contained catalytic converters that conformed to the catalytic converters imported. *See* id. ("[because the EVDs were not manufactured at the same time as the production vehicles . . . [t]he record does not support an inference that the certification EVDs had the same non-conforming catalytic converters as the vehicles identified in the Amended Complaint.") Therefore, contrary to the ALJ's basis for finding a risk for potential emissions, the Agency never argued that simply because test vehicles are produced in years prior to the production of certified vehicles, the test vehicles' emission results are unreliable. In fact the Agency cannot make such an argument because such a finding runs contrary to the entire certification process, which requires that manufacturers conduct tests on emission data vehicles, produced prior to the model year the relevant COC is issued. *See* 40 C.F.R. §§ 86.423-78, 86.431-78, 86.437-78. Instead the Agency, in its reply brief, merely argued that the EDVs tested for useful life emissions were not the same as the imported vehicles, an allegation that runs contrary to the Agency's prior stipulation at the liability stage. The Agency was estopped from taking an inconsistent position, for the first time during its briefs, after establishing liability on the ground that "because all test vehicles were the same as the vehicles identified in the Complaint, all identified vehicles did not conform," simply because the Agency's objective had changed at the penalty stage. *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.").

Finally, the ALJ upheld (1) the Agency's 20% increase for a history of non-compliance based on an ASA signed only by Taotao USA for vehicles produced by neither T-Group nor JCXI; the Agency's decision to use a 6.5 egregiousness multiplier for lack of emissions data, even though the Agency had those vehicle's full useful life emissions data; and the Agency's decision to group counts 9 and 10 separately because those violations occurred after the Notice of Violation was issued. Again the Notice of Violation was issued to Taotao USA, Inc. only, not T-Group and JCXI, so Appellants can't imputed with a notice, they were never given.

CERTIFICATE OF COMPLIANCE

This Brief complies with the Board's word limit, because including all portions the brief contains 12051 words.

Respectfully Submitted,

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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:09/20/2018

/s/William Chu
William Chu