

**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)	CAA Appeal No. 18-01 & 18-02
Co., Ltd.)	
)	
Dkt. No. CAA-HQ-2015-8065)	
)	

MOTION FOR LEAVE TO FILE REPLY BRIEF

Taotao USA, Inc. (“Taotao USA”), Taotao Group Co., Ltd. (“Taotao Group”) and Jinyun County Xiangyun Industry Co., Ltd. (“JCXI”) (collectively “Appellants”) move for leave to file a reply to the briefs submitted in the above-captioned matter. Appellants filed their Notice of Appeal on September 6, 2018, and September 20, 2018. Appellee (hereinafter sometimes the “Agency”) filed its response on October 24, 2018. Appellee’s response, which spans over 76 pages (excluding the table of contents, table of authorities, certificates and signatures), misstates Appellants’ position, raises new arguments, and represents that the ALJ made her decision based on certain facts and conclusions that are not reflected in the Initial Decision.

Appellants seeks to file a reply brief for the limited purpose of addressing certain issues raised in Appellee’s response for the first time in these proceedings, and which therefore could not have been addressed earlier in Appellants’ appeal briefs. Furthermore, Appellants’ seek to draw attention to statements and proceedings before the Administrative Law Judge that are contrary to the arguments advanced by Appellee in opposition to this appeal.

Appellants initially conferred with the Agency regarding the filing of a reply brief prior to submitting their Motion to Extend the Deadline for filing this reply, at which time Agency indicated that it was opposed to such a reply brief. Appellants again attempted to confer with the Agency regarding this Motion for Leave and grounds stated herein, but at the time of submission did not hear back from the Agency.

Therefore, Appellants move for leave to file the reply brief, on the following grounds, and in support of that motion provide:

I.

The ALJ found liability, and based her penalty determinations, on an express understanding that Appellants' emission data vehicles' conformity to the subject vehicles was not in controversy. Acc. Dec. at 30-31. Therefore, Appellants' appeal briefs challenge the ALJ's determination of harm from lack of useful life emissions, in light of the stipulated fact that EDVs conformed with the subject vehicles, and those EDVs had been tested for useful life emissions.

With this latest filing, however, the Agency has moved substantively beyond its original position, stated in motions and related responses for partial accelerated decision on liability. More specifically, at the liability stage, the Agency took the position that liability should be found if the catalytic converters on the subject vehicles do not conform to the catalytic converters described in the written COC application. In taking the foregoing prior position, the Agency stipulated that the catalytic converters on the test vehicles from which the test data was derived, and submitted with the application, did in fact conform to the catalytic converters on the subject vehicles. Moreover, the Agency unambiguously removed the matter (i.e. any challenges or disputes with Appellants' factual allegation that the catalytic converter on each test vehicles, and the test data thereof, was representative of the catalytic converter on each subject vehicle) from controversy. Because the

factual matter was removed from controversy, Appellants no longer needed to submit evidence to prove said fact.

In its response, the Agency, inconsistent with its prior position and clear stipulation, now claims that the test vehicle's conformity with the subject vehicles was not stipulated, and even if it was stipulated, the ALJ did not make such a finding, and that Appellants challenged the stipulation. The Agency does not merely retract from its prior stipulation, but further basis most of the its arguments on the lack of evidence in the record to demonstrate whether the EDVs matched the subject vehicles. By doing so, the Agency basically argues that Appellants had the burden to prove a stipulated fact, that Appellee, itself, expressly removed from controversy. Because most of Appellee's arguments are based on the denial of the stipulation, a reply brief is necessary to address said denial, and the alleged lack of evidence.

II.

Appellants' appeals raised issues based on the ALJ's determination that although the DOJ's waiver of the jurisdictional limitations of section 205(c) restricted penalty assessment to violations that harm the regulatory scheme, harm to the regulatory scheme inherently includes harm to the environment from potential emissions. However, in their response, the Agency does not limit its arguments in support of the ALJ's decision, but goes further and challenges the ALJ's analysis of the DOJ waiver itself. Additionally, the Agency argues that the DOJ's waiver did not have any conditions to penalty assessment in these proceedings, and that the penalty determinations in this case were not limited to violations that merely harm the regulatory scheme.

The Agency therefore puts the DOJ clearly conditional waiver of the statutory cap at issue, and seems to challenge the ALJ's findings in a response, as opposed to an appeal brief. Because Appellants' arguments in their appeal brief were made to solely challenge the ALJ's penalty

determinations in spite of the ALJ's finding of the waiver's conditional language, the reply brief now addresses the issues raised by the Agency in its response. Although the issue is not briefed in the reply brief, it is addressed here to bring it to the Board's attention.

III.

The Agency also argues for the first time that the Clean Air Act's exception to administrative penalty assessment only pertains to the maximum administrative penalty sought against each party, not whether an administrative penalty can be sought at all. Appellee therefore concludes that a lack of a joint waiver, as required by section 205(c) for penalties that exceed the statutory cap, does not preclude this action on jurisdictional grounds. Appellee's reasons for such a conclusion is that section 205(c) is not a time-based bar, but rather an amount-based bar, and therefore cannot be a jurisdictional limit. Such a reasoning, raised for the first time by Appellee, defies logic given that most jurisdictional limitations are based on the amounts sought in proceedings, while time-based bars are more akin to the affirmative defense of the statute of limitations in most cases. Although the issue is not briefed in the reply brief, it is addressed here to bring it to the Board's attention.

IV.

Throughout the proceedings and in their post-hearing briefs, Appellee's argued that Taotao Group and JCXI are manufacturers based on the statutory definition of a "manufacturer." Based on that definition alone, Appellee argued that Taotao USA and JCXI were liable for the violation alleged in this action, which Appellee later claimed harmed the regulatory scheme.

Because the Initial Decision found that the harm to the regulatory scheme was a result of submitting inaccurate information about catalytic converters in the COC applications, Appellee now argues that Taotao Group and JCXI are liable, not simply because they are for the definition

of “manufacturer” but because the regulations require original manufacturer’s to satisfy certain conditions of submitting an approvable COC application. However, as the reply brief will show, those conditions have nothing to do with providing, or ensuring, accurate catalytic converter descriptions. The Agency’s previously stated argument regarding the waiver of the statutory cap on penalties in administrative proceedings also suggests that the ALJ’s decision was based on a finding that the three Appellants are part of a joint enterprise, and form a “parent-subsidiary relationship,” an argument that is neither reflected in the Initial Decision, nor supported by the facts in this case. Although the issue is not briefed in the reply brief, it is addressed here to bring it to the Board’s attention.

V.

In its response brief, the Agency fails to adequately address the arguments and issues raised by Appellants in this appeal. Instead the Agency’s response dismisses Appellants’ arguments, which rest on the clear language of the applicable regulations, by merely deeming such arguments “nonsensical,” “illogical,” or “ludicrous.” The Agency undermines Appellants’ arguments that are based on the plain meaning of the regulatory text, by claiming that such a textual interpretation makes the regulations, when taken as a whole, unreasonable or unfair. However, not only does the Agency’s position shift blame for its own lack of clearly stating regulatory requirements onto Appellants, it ignores regulations that clearly support Appellants’ position. The reply brief therefore directs the Board to the missing or misstated regulations to avoid confusion caused by the Agency’s response.

Respectfully Submitted,

/s/William Chu

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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