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

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

BUSINESS CONFIDENTIALITY ASSERTED
REDACTED VERSION OF RESPONSE BRIEF

Complainant's Response Brief contains material claimed to be confidential business information ("CBI") pursuant to 40 C.F.R. § 2.203(b). The material claimed as CBI includes financial information submitted to Complainant by Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd. (collectively, "Respondents"), as well as financial information about Respondents obtained through the United States Customs and Border Protection's Automated Commercial Environment database. A complete version of the Response Brief has been filed with the Environmental Appeals Board, together with the attached version in which the CBI has been redacted. If you have any questions, please contact Mark Palermo at (202) 564-8894, or at palermo.mark@epa.gov

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RESPONSE BRIEF

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I. Introduction

Taotao USA, Inc. (hereinafter "Taotao USA"), Taotao Group Co., Ltd. (hereinafter "Taotao Group"), and Jinyun County Xiangyuan Industry Co., Ltd. (hereinafter "JCXI")—collectively "Respondents"—appeal from an Initial Decision of Chief Administrative Law Judge Susan L. Biro assessing a total civil penalty of $1,601,149.95 for violations of sections 203(a)(1) and 213(d) of the Clean Air Act ("the Act" or "CAA"), 42 U.S.C §§ 7522(a)(1), 7547(d), and regulations promulgated thereunder. Judge Biro found that Respondents had violated sections 203(a)(1) and 213(d) of the Act on 109,964 occasions, by selling, offering for sale, introducing or delivering for introduction into commerce, or importing, highway scooters and motorcycles (hereinafter "highway motorcycles") as well as non-road motorcycles and all-terrain vehicles ("ATVs") (hereinafter "nonroad vehicles," or "recreational vehicles") not covered by certificates of conformity ("COCs") issued by the United States Environmental Protection Agency ("EPA").

For the reasons stated below, the Administrative Law Judge ("ALJ") did not err in her liability determination or penalty assessment. Judge Biro correctly determined the existence of liability for the violations of CAA sections 203(a)(1) and 213(d), 42 U.S C. §§ 7522(a)(1), 7547(d), and correctly addressed the relevant factors when assessing the penalty. Therefore, the Director of the EPA's Air Enforcement Division ("Complainant") requests that the Environmental Appeals Board ("EAB") uphold the decisions of the ALJ, and dismiss this consolidated appeal

II. Issues Presented for Review

Respondents collectively present six issues for appeal that can be summarized into six questions, all of which should be answered in the affirmative:

a. Was the Complaint's service of process proper pursuant to the Consolidated Rules as well as due process?

b. As a matter of law, does the Act prohibit import or sale of a highway motorcycle or recreational vehicle built with a catalytic converter materially different from the catalytic converter described in the application for the COC?

c. Are Taotao Group and JCXI manufacturers of the vehicles in violation and are they liable for penalties for such violations under the CAA?

d. Did the ALJ have legal authority to assess a penalty in excess of the waivable ceiling established by section 205(c)(1) of the Act, 42 U.S.C. § 7524(c)(1)?

e. Was it appropriate for the ALJ to decide that EDV emissions data was not relevant to her assessment of the gravity component of the penalty?

f. Did the ALJ's penalty determination correctly and reasonably apply the statutory factors as well as the Penalty Policy when assessing the penalty in this matter?

III. Background

A. Regulatory Background

Title II of the CAA requires the EPA to promulgate emissions standards for any pollutant from new vehicles and engines that causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. §§ 7521(a)(1), 7547(a). Different classes of vehicles and engines are subject to different standards. The vehicles in this Proceeding are subject to emissions requirements under 40 C.F.R. Part 86, subpart E, Parts 1051 and 1068. Vehicles and engines must meet applicable standards for their entire designated useful life. 42 U.S.C. §§ 7521(a)(1), 7547(d).

To ensure compliance with emissions standards, the Act directs the EPA to oversee a mandatory pre-importation, pre-sale certification program. 42 U.S.C. §§ 7522(a)(1), 7525(a), 7547(d). Section 203(a)(1) of the Act prohibits any manufacturer or importer from selling, offering for sale, introducing or delivering for introduction into commerce, or importing into the United States any new vehicle or

engine unless it is covered by an EPA-issued COC. 42 U.S.C. § 7522(a)(1); *see* 42 U.S.C. § 7550(1) (defining "manufacturer" to include importers). [1]

To comply with the Act, manufacturers divide their products into engine families, which are groups of engines within a single model year[2] expected to have similar emission characteristics throughout their useful life. 40 C.F.R. §§ 86.420-78(a), 1051.230(a). Vehicles or engines within an engine family must be "identical" or "the same" in a number of respects, including "the number . . . location, volume, and composition" of catalytic converters they employ.[3] 40 C.F.R. §§ 86.420-78(b)(7), 1051.230(b)(5). For each engine family the manufacturer intends to introduce into commerce, it must submit to the EPA's Office of Transportation and Air Quality ("OTAQ") an application with specific

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[1] The Agency's regulations applicable to this Proceeding incorporate this statutory mandate. "Every new motorcycle manufactured for sale, sold, offered for sale, introduced or delivered for introduction into commerce, or imported into the United States … is required to be covered by a certificate of conformity…." 40 C.F.R. § 86.407-78(a). Manufacturers of nonroad and recreational vehicles "may not sell, offer for sale, or introduce or deliver into commerce in the United States or import into the United States any new engine/equipment … unless it is covered by a valid certificate of conformity for its model year and has the required label or tag." 40 C.F.R. § 1068.101(a)(1).

[2] Each model year is named for a calendar year, but a model year may begin as early as January 2nd of the calendar year preceding the calendar year for which it is named. 40 C.F.R. §§ 85.2303, 1068.103(b)(2). However, a model year can never extend beyond December 31st of the calendar year for which it is named. 40 C.F.R. §§ 85.2304(a), 1068.103(b)(1).

[3] In the context of this case, a catalytic converter is an emissions control device that promotes chemical reactions to convert pollutants to non-pollutants. CX175 at EPA-002350, EPA-0002362, EPA-002371, EPA-002393–94 (background information about catalytic converters is from material excerpted from a treatise on catalytic converter technology, *Catalytic Air Pollution Control: Commercial Technology*, by Ronald M. Heck, Robert J. Farruto, and Suresh T. Gulati). The chemical reaction for pollution abatement is the simultaneous oxidation of carbon monoxide ("CO") and hydrocarbons ("HC") to form carbon dioxide ("CO_2") and water ("H_2O"), and reduce nitrogen oxides ("NOx") to nitrogen. *Id.* at EPA-002394. Precious metals are the catalytic components most commonly used for exhaust emission control, and the elements platinum (Pt), palladium (Pd), and rhodium (Rh) are the three precious metals most frequently used for this purpose. *Id.* at EPA-002353, EPA-002359. As the name implies, precious metals are rare and expensive, and thus are recycled, purified, and reused when a catalytic converter reaches the end of its useful life. *Id.* at EPA-002367.

information about the engine family and the manufacturer(s). *See* 40 C.F.R. § 86.416-80(a)(2)(i) (description of the vehicles' emission control system, name of agent for service of process in the U.S. included among information to be provided in the COC application), 40 C.F.R. § 86.431-78(a) (data from all tests performed by manufacturer must be included in the COC application), 40 C.F.R. § 1051.205(b), (o), and (w) (detailed description of emission control system, description of vehicles or engines selected for testing, emissions data to show emissions standards are met, and name of agent for service of process in the U.S. included among information to be provided in the COC application). An application for a COC must be in the English language and shall be updated and corrected by amendment. 40 C.F.R. § 86.416-80; *see also* 40 C.F.R. §§ 1051.30 and 1051.205(d) (records must be provided in English upon EPA request), 40 C.F.R. § 1051.225(a) (must amend COC application before adding or changing a vehicle configuration in any way that may affect emissions or change components described in the application). A test vehicle (an emissions data vehicle or "EDV") is selected to represent the vehicles within an engine family that are described by the manufacturer in the COC application. 40 C.F.R. §§ 86.421-78(a); 1051.235(b). Where more than one engine configuration is included in the COC application, the EDV selected for emissions testing must have a configuration that will have the greatest probability of exceeding the emissions standard. 40 C.F.R. §§ 86.421-78(a); 1051.235(b). A manufacturer may use "carryover" emission data from tests performed on an EDV for a previous model year for which certification was obtained if the EDV continues to represent the engine family.[4] 40 C.F.R. §§ 86.421-78(d), 1051.235(d).

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[4] Several of the engine families identified in the Amended Complaint are related by their use of carryover data from a common EDV. These are: DTAOX0.12A1T & ETAOX0.12A1T (CX005 at EPA-000151, EPA-000177; CX008 at EPA-000252, EPA-000278); DTAOC.049MC2 & ETAOC.049MC2 (CX001 at EPA-000001, EPA-000025; CX003 at EPA-000080, EPA-000104); and DTAOX0.15G2T, FTAOX0.15G2T, & GTAOX0.15G2T (CX006, EPA-000187, EPA-000213; CX009 at EPA-000288, EPA-000314; CX010 at EPA-000321, EPA-000347).

Pursuant to the regulations for certifying highway motorcycles, if, "after a review of the test reports and data submitted by the manufacturer . . . and any other pertinent data or information, the Administrator determines that a test vehicle(s) meets the requirements of the Act and of [40 C.F.R. Part 86, subpart E], he will issue a certificate of conformity with respect to such vehicle(s)...." 40 C.F.R. § 86.437-78(a)(2); *see also* 40 C.F.R § 86.417(a). The regulations for certifying nonroad vehicles are substantially the same. *See* 40 C.F.R. § 1051.255(a) (COC is issued where the Administrator determines the application is complete and "shows that the engine family meets all the requirements of [40 C.F.R. Part 1051] and the Act."). A COC for a highway motorcycle or a nonroad engine family may be issued subject to conditions. 40 C.F.R. § 86.437-78(a)(2)(ii) (COC may be issued "upon such terms as . . . necessary to assure that any new motorcycle covered by the certificate will meet the requirements of the Act and of [40 C.F.R. Part 86, subpart E]"); 40 C.F.R. § 1051.255(a) (EPA may make "approval subject to additional conditions"). For a highway motorcycle engine family, "the certificate will cover all vehicles represented by the test vehicle and will certify compliance with no more than one set of applicable standards." 40 C.F.R. § 86-437-78(a)(2)(iii). The nonroad regulations state that engines/equipment covered by a COC 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). A manufacturer must obtain new COCs each model year, even if the vehicles or engines in an engine family are identical from year to year. 42 U.S.C. § 7525(a)(1); 40 C.F.R. §§ 86.437-78(a)(2)(ii), 1051.201(a), 1051.230(a), 1068.103(a).

B. Penalty Policy Background

The civil penalty in this Proceeding is to be determined based upon evidence in the record and in accordance with statutory authority. *See* 40 C.F.R. § 22.27(b); *In re John A. Biewer Co. of Toledo, Inc.*,

15 E.A.D. 772, 780 (EAB, 2013); Initial Decision ("Init. Dec") at 16. The CAA authorizes the EPA to assess an administrative penalty of up to $46,192 per vehicle or engine, against any person who sells or imports into the United States highway motorcycles or recreational vehicles not covered by a COC. Sections 203(a)(1) and 205(a) and (c), 42 U.S.C. §§ 7522(a)(1) 7524(a) and (c); 40 C.F.R. § 19.4.[5] The Act requires EPA to consider "the gravity of the violation, the economic benefit or savings resulting from the violation, the size of the violator's business, the violator's history of compliance . . . 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." 42 U.S.C. § 7524(c)(2).

The EPA has published civil penalty guidance under the CAA in the form of the Clean Air Act Mobile Source Penalty Policy (January 2009) ("Penalty Policy"). CX 22; Init. Dec. at 16. The EPA's penalty guidelines or policies "create a framework whereby the decisionmaker can apply [her] discretion to the statutorily-prescribed penalty factors, thus facilitating the uniform application of these factors." *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002) (quoting *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994)). The Consolidated Rules of Practice Regarding the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") require the ALJ to consider "any civil penalty guidelines issued under the Act" in assessing a civil penalty. 40 C.F.R. § 22.27(b); *Biewer*, 15 E.A.D. at 780; Init. Dec. at 16.

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[5] The statutory maximum civil penalty level has been adjusted over time to reflect inflation. Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act, of 2015 (the "Improvement Act of 2015"). The EPA has adjusted the statutory maximum for violations of the CAA to reflect inflation by periodically updating maximum penalty levels as codified at 40 C.F.R. § 19.4. *See* Civil Monetary Inflation Adjustment Rule, 83 Fed. Reg. 1190 (Jan. 10, 2017). The rule increased civil monetary adjustments for violations under 42 U.S.C. § 7524(a) occurring after November 2, 2015 to $46,192. *Id.* at 1193. The proposed penalty in this matter was increased in accordance with the EPA's inflation policies. Tr. at 600-01; CX 212-213 (revised penalty calculation). Complainant applied the civil penalty inflation rules and policies in effect at the time of its penalty calculation. CX 212 at EPA-002802 and CX 213.

The EPA utilized the Penalty Policy as a framework for calculating the penalty it proposed in this case. Init. Dec. at 16; Tr. 553–54. In determining the appropriate penalty, the Penalty Policy first calls for calculation of a "preliminary deterrence amount" by adding together an "economic benefit penalty component" and a "gravity penalty component." CX 22 at EPA-000457; Init. Dec. at 16; *see also In re Peace Industry Group (USA), Inc.*, 17 E.A.D. 348, 355 (EAB 2016). The economic benefit component "recovers the economic benefit of noncompliance," while the gravity component "reflects the seriousness of the violation." CX 22 at EPA-000457-000458; Init. Dec. at 16. The Penalty Policy then authorizes the Agency to apply several factors to adjust the preliminary deterrence amount up or down. *See* CX 22 at EPA-000457; *Peace Industry Group*, 17 E.A.D. at 355; Init. Dec. at 16. In proposing a penalty in this Proceeding, Complainant applied the Penalty Policy by considering: (i) Respondents' economic benefit from their violations; (ii) the gravity of their violations; (iii) adjustments that are appropriate to the facts of this case; and (iv) Respondents' ability to pay. CX 212 and 213. In turn, the ALJ considered both the statutorily enumerated penalty factors and the Penalty Policy in her penalty assessment.

C. Factual Background

Respondents are part of a family-controlled, global corporate enterprise, which includes the manufacturing of highway motorcycles and recreational vehicles in China, and the distribution of the vehicles in the United States. *See* Init. Dec. at 18. Taotao Group and JCXI are corporations organized under the laws of the People's Republic of China, and are located in Jinyun County, Zhejiang, China. Amended Complaint ("Am. Compl.") ¶¶ 5–6; Amended Answers ("Am. Answers") ¶¶ 5–6. JCXI is a

subsidiary of Taotao Group. CX 168 at EPA-002296; CX 191 at EPA-002522; CX 216[6] at 105. JCXI's vehicles that are the subject of this Amended Complaint bear the "Taotao" name and logo. *e.g.*, CX 5 at EPA-000160.

Taotao Group has several subsidiary companies worldwide and produces a variety of products including ATVs, motorcycles, electric vehicles and bicycles, wooden and steel doors, lawn and garden equipment, and fitness equipment. *See* CX 35 at EPA000607 ("Taotao Group has 9 wholly owned companies in the United States [and worldwide]"); *see also* CX 42, EPA-000638 ("The U.S. accounts for 70 percent of Taotao's export volume."). Taotao Group manufactured the highway motorcycles identified in Counts 1 through 4 of the Complaint. CX 1-CX 4; Tr. at 308. JCXI manufactured the recreational vehicles identified in Counts 5 through 10 of the Complaint. CX 5-CX 10; Tr. at 308.

Taotao USA is a corporation organized under the laws of Texas, with an office at 2201 Luna Road, Carrollton, Texas. Am. Compl. ¶ 4; Am. Answers ¶ 4; CX 30–CX 31. Taotao USA imports highway motorcycles manufactured by Taotao Group and off-road motorcycles and ATVs manufactured by JCXI into the United States. Am. Compl. ¶ 10; Am. Answers ¶ 10; CX 95 at EPA-001213. Taotao USA is the exclusive U.S. importer of vehicles manufactured by Taotao Group and JCXI, and it sells those vehicles to dealers throughout the United States. CX 95 at EPA-001212-13; CX 216 at 10-11, 25-30, 44, 46; CX 1 at EPA000018; CX 5 at EPA-000171; Tr. at 308. Taotao USA does not purchase vehicles from any suppliers other than Taotao Group and JCXI. CX 216 at 45-46. Taotao USA imported all 109,964 vehicles in the Amended Complaint. Am. Compl. ¶¶ 45, 55, 65, 74, 84, 94, 104, 114, 122, 130; Am. Answers, ¶¶ 45, 55, 65, 74, 84, 94, 104, 114, 122, 130.

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[6] CX 216 is the transcript of the pre-hearing deposition of Matao Cao, which was admitted at the hearing. The transcript has its own internal pagination, different than "EPA___," as for other EPA exhibits.

The three Respondents are among a number of related companies owned and controlled by Yuejin Cao and Matao "Terry" Cao, who are father and son, respectively. Specifically, Yuejin Cao is the owner of Taotao Group and the President of both Taotao Group and JCXI. Am. Compl., ¶¶ 14-15; Resp'ts Am. Answers, ¶¶ 14-15; Tr. at 100, 155; CX 216 at 105. Matao "Terry" Cao is the owner of Taotao USA and has been the President and registered agent for that company at all times relevant to the violations in this Proceeding. Am. Compl., ¶¶ 12-13; Am. Answers, ¶¶ 12-13; Tr. at 100, 155; CX 73 at EPA-000869, 000885; CX 171 at EPA-002294; CX 191 at EPA-002522; CX 216 at 21-22, 89; *see also* CX073 at EPA-000885 (email from Taotao USA employee to EPA referring to "Matao Cao" as "Terry"). The Respondents operate in concert as part of a global corporate enterprise; Yuejin Cao has responsibility for the overall enterprise, and Matao Cao has specific responsibility for the U.S. entities, including Taotao USA. *See* Init. Dec. at 48 (citing CX 191 at EPA-002522-002523; Tr. at 100, 155-58, 213-15, 367). Additionally, Taotao Group and JCXI both manufacture their vehicles from a factory owned by a Chinese company, Zhejiang Taotao Vehicles Co., Ltd., that is in turn owned by Matao Cao and Yuejin Cao. *Id.* (citing CX 191 at EPA-002523; CX 216 at 93-95, 97, 105-06).

Respondents are a top producer of on-highway and recreational vehicles imported into the United States. They were the [redacted] manufacturer from a production perspective in Class I-A highway motorcycles in 2017, they were [redacted] in Class I-B highway motorcycles in 2016, and they are currently in the [redacted] producers of ATVs and utility-terrain vehicles ("UTVs"). Init. Dec. at 34; Tr. at 96-97; *see also* 40 C.F.R. § 86.419-2006(b)(1) (providing for the division of motorcycles into classes based on engine displacement). Between 2009 and 2016, Taotao USA was "consistently ranked between [redacted] of the top importers of recreational vehicles and motorcycles made in China into the United States." Init. Dec. at 49 (citing CX 189; CX 190A; Tr. at 565-66; 571; 635-38, 844). The total

declared value of Taotao USA's imports during those years was more than [redacted].[7] *Id.* Considering only the vehicles at issue in this case, Respondents together manufactured and introduced into United States commerce an inventory valued at [redacted] at the time it was imported into the United States. *See* Init. Dec. at 47 (citing CX 61; CX 64; CX 140; CX 148; CX 183-CX 189; Tr. at 565-68).

Each of the engine families in Counts 1 through 10 in this matter went through a similar COC application process. Taotao USA, as U.S. importer, and a manufacturer, either Taotao Group for highway motorcycles, or JCXI for recreational vehicles, submitted COC applications to OTAQ using consultant Stanley Marketing & Consulting, LLC. CX 1 at EPA000001-03; CX 2 at EPA000037-39; CX 3 at EPA000080-83; CX 4 at EPA000116-18; CX 5 at EPA000151-53; CX 6 at EPA000187-189; CX 7 at EPA000220-22; CX 8 at EPA000252-54; CX 9 at EPA000288-90; CX 10 at EPA000321-23. Each COC application submitted to the EPA indicates that it was "submitted *on behalf of* [Taotao Group or JCXI] and Taotao USA." CX 1 at EPA000004; CX 2 at EPA000041; CX 3 at EPA000085; CX 4 at EPA000122; CX 5 at EPA000153; CX 6 at EPA000189; CX 7 at EPA000222; CX 8 at EPA000254; CX 9 at EPA000290; and CX 10 at EPA000323; (emphasis added). Each COC application is signed by Yuejin Cao, as President of Taotao Group and JCXI, respectively. CX 1 at EPA000006; CX 2 at EPA 000042; CX 3 at EPA000085; CX 4 at EPA000121; CX 5 at EPA000156; CX 6 at EPA000192; CX 7 at EPA000225; CX 8 at EPA000257; CX 9 at EPA000293; and CX 10 at EPA000326. Each COC application includes a contractual agreement between Taotao USA and either Taotao Group or JCXI, and executed by Matao Cao and Yuejin Cao, naming Taotao USA as the exclusive importer of the

[7] As the ALJ further noted, Taotao Group boasted an annual sales volume of more than $80 million. CX 168 at EPA-002296. The company also represents that it has 2,000 employees and owns multiple subsidiary companies, including JCXI. *See, e.g.*, CX 35 at EPA-000607; CX 168 at EPA-002296; CX 191 at EPA-002520.

manufacturers' vehicles for distribution in the U.S. CX 1 at EPA0000018-20; CX 2 at EPA 000056-58; CX 3 at EPA000097-99; CX 4 at EPA000133-35; CX 5 at EPA000171-73; CX 6 at EPA000207-09; CX 7 at EPA000239-41; CX 8 at EPA0002272-74; CX 9 at EPA000308-10; CX 10 at EPA000341-43. The agreements set out the respective obligations of the parties to implement the sale and the distribution of the vehicles in the United States, including: obtaining COCs; addressing warranty claims and providing warranty service through Taotao USA's "dealer network;" providing immediate notification by Taotao USA to Taotao Group or JCXI "of any recall or other action of which it is notified" by the EPA "under the provisions of 40 CFR regulations;" managing and fulfilling the terms of such EPA notice; supplying spare parts and technical support to the dealers. *See, e.g.*, CX 1 at EPA000019. The agreement states that information from U.S. dealers to Taotao Group and JCXI and from Taotao Group and JCXI to U.S. dealers will be "channeled through the office located at the headquarters of TAOTAO USA Inc. should be considered the main contact point for all EPA related issues." [sic] *Id.* Importantly, for this appeal, the contracts provide that Taotao Group and JCXI appoint Taotao USA as their agent for service of process from the EPA, and provide that "the designation is in legal form required to make it binding on the manufacturer under the laws, corporate by laws, or other requirements governing the making of the designation by the manufacturer at the place and time where it was made . . . The designation of Importer as an agent solely for service of process shall remain in effect until it is withdrawn or replaced by the manufacturer." CX 1 at EPA0000019; CX 2 at EPA 000057; CX 3 at EPA000098; CX 4 at EPA000134; CX 5 at EPA000172; CX 6 at EPA000208; CX 7 at EPA000240; CX 8 at EPA0002273; CX 9 at EPA000309; CX 10 at EPA000342. Lastly, each COC application also contains a letter signed by Taotao Group and JCXI President Yuejin Cao designating, Taotao USA, and its president, Matao Cao, and its consultant, Stanley Marketing and Consulting LLC "as the authorized representatives for all matters relating to *our* applications for certification. . . . These individuals are authorized to deal for

[Taotao Group or JCXI] with the [EPA] . . . on all matters." (emphasis added). CX 1 at EPA00006; CX 2 at EPA000044; CX 3 at EPA000088; CX 4 at EPA000125; CX 5 at EPA000156; CX 6 at EPA000192; CX 7 at EPA000225; CX 8 at EPA000257; CX 9 at EPA000293; and CX 10 at EPA000324.

In each of the COC applications, Respondents describe:

> ...the respective engine family's emission control system and auxiliary emission control devices....Each application contained certified design specifications that require their associated engines and vehicles to be equipped with catalytic converters, and they identify the catalytic converter as an emission-related part....The applications describe the manufacturer, part number, configuration, location, physical dimensions, honeycomb cell density, precious metal loading, and precious metal ratios of the catalytic converters to be used in each engine family.

Order on Partial Accelerated Decision and Related Motions ("Acc. Dec. Order") at 8 (citing CX 1 – CX 10). The applications further provide the emission test results from the EDVs alleged to represent the engine family. CX 1 – CX 10. The applications also provide that the vehicles in each engine family will be identical in all material respects to the vehicles described in the COC application. Acc. Dec. Order at 8 (citing CX 1 – CX 10). The COC applications further include a "Statement of Conformity" explicitly confirming that all the vehicles of the engine family to be covered by the COC are manufactured and assembled by either Taotao Group or JCXI (depending upon the engine family), that all production vehicles will comply with EPA regulations, that no modification following initial assembly is ever performed, and 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 applicable regulations. *See, e.g.*, CX 6 at EPA-000191. The COCs subsequently issued by the EPA when it certified each engine family state that the corresponding COC "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 40 CFR Part 86, Part 1051, Part 1065, and Part 1068, accordingly]." See CX 43 – CX 52.

Prior to the violations here, in 2010, the EPA entered into an Administrative Settlement Agreement ("ASA") with Taotao USA regarding the company's having committed 3,768 violations of CAA section 203(a)(1) and 213(d), 42 U.S.C. §§ 7522(a), 7547(d). CX 67 at EPA-000808-46; Tr. at 598-99; Init. Dec. at 11. Consistent with statements made in the COC application with respect to how Taotao Group and JCXI authorized Taotao USA to deal on their behalf with the EPA, Yuejin Cao was informed by Matao Cao as to the ASA and weighed in on the decision to settle the violations under the ASA with the EPA. CX216, 129-30. The subject vehicles in the ASA were recreational vehicles, *i.e.*, ATVs, manufactured using emission-control related parts, *i.e.*, carburetors, that allowed adjustments of the vehicle's air-fuel ratio which may affect the engine's emissions or engine performance during testing or normal in-use operation. Init. Dec. at 11; Acc. Dec. Order at 9 n. 9; CX 67 at EPA-000810-12; Tr. at 600. The respective COC applications stated there are no adjustable parameters on the engine families for these ATVs engines. *Id.* Consequently, the ASA required, in addition to payment of a civil penalty in the amount of $260,000, a compliance plan for all new vehicles Taotao USA imported thereafter that provided for pre-importation inspection of all emissions related parts used on the vehicles, including catalytic converters, testing of catalytic converters, and periodic reporting to the EPA, to ensure the vehicles were built according to the design specifications described in the COC applications. Tr. at 601, 603-04; CX 67 at EPA-000815, 000824-000846; Init. Dec. at 11. The purpose of the plan was to provide detailed instructions "to get Taotao USA on track to compliance." Init. Dec. at 11 (citing Tr. at 603-04).

Despite entering into the ASA and continuing discussions with the EPA thereafter, Taotao USA was unable to satisfy the compliance plan, which included the catalytic converter testing and reporting requirements. *See* Init. Dec. at 11 (citing CX 69-CX 74; CX 76-CX81; CX 215; Tr. at 605-617, 622-24,

627-29, 743-44, 746-48, 750-51, 751). For such failure, Taotao USA was required to pay stipulated penalties for violating the ASA in 2012. *Id.* (citing CX 74; Tr. at 622, 745).

Starting in March 2012, the EPA and U.S. Customs and Border Protection began warehouse and port inspections of vehicles that Taotao USA was importing. During these inspections, EPA removed catalytic converters from selected vehicles for analysis. Init. Dec. at 12 (citing, *e.g.,* CX 61; CX 64; CX 81; Tr. at 631, 717-721).

In December 2013, the EPA issued a Notice of Violation (NOV) to Taotao Group, JCXI and Taotao USA. *See* Section III.C., Procedural Background section. In sum, the NOV notified Respondents that 64,377 vehicles in eight engine families were imported and sold in violation of CAA because the catalytic converters in these vehicles did not conform with the description in the corresponding COC applications. In February 2014, the EPA ordered the Respondents to test vehicles from the eight violating engine families. Init. Dec. at 12 (citing CX 94; Tr. at 591-92). After back-and-forth negotiation, the EPA agreed to accept low-hour emission testing on 24 vehicles from those eight engine families. *Id.*, citing CX 98; Tr. at 592-93. Testing was conducted between May 2014 and October 2014, and all but one of the 24 vehicles were found to be compliant with emissions standards at the low-hour mark. Init. Dec. at 12; CX 99-122; Tr. at 593, 831.

The February 2014 Order also required Respondents to test the catalytic converters of the vehicles that were selected for emissions testing, in order to reveal their precious metal composition. CX94. The analysis was conducted at SGS Canada Inc. ("SGS"). Acc. Dec. Order at 13; CX 125-133. The results showed all 23 vehicles sent to SGS[8] contained precious metal ratios of platinum ("Pt"),

[8] Twenty-four vehicles were tested for emissions, however, only 23 of the catalytic converters from the emissions tested vehicles were tested for precious metal composition. Respondents diverted one of the vehicles in response to a Highway Motorcycle Exhaust Confirmatory Test Order issued July 24, 2014,

palladium ("Pd"), and rhodium ("Rh") that were different than were described in their associated COC applications. *Id.* at 12-13. The SGS results showed that 20 of the vehicles had catalytic converters that did not have detectable concentrations of Pt, and 16 of the catalytic converters did not have detectable concentrations of Rh. *Id.* at 13. A catalytic converter with all three precious metals could perform differently at higher mileage than the catalytic converter that is Pd-only, as testified by Mr. Cleophas Jackson. Tr. at 136 ("[W]e would have concerns about [a Palladium-only catalyst's] durability [,] about its full useful life. A Palladium-only catalyst could potentially have very similar results as a palladium/platinum/rhodium catalyst at a low–hour test points. However, a palladium-only catalyst may be subject to poisoning at higher useful life, at higher engine hours, engine mileage.") Tr. at 136.[9] *See also* Init. Dec. at 13; *infra* at Sections III.D. and IV.B. (describing Mr. Jackson's position at the EPA and testimony relevant to this matter)

Between June 12, 2013, and March 4, 2016, 35 randomly-selected catalytic converters from 10 different engine families representing five different model years of Respondents' highway motorcycles and recreational vehicles were tested by EPA or by SGS. CX 63; CX 66; CX 86; CX 89; CX 125–CX 133; CX 147; CX 152. None of the catalytic converters tested matched the catalytic converters described in the COC applications for the relevant engine families. Acc. Dec. Order at 13-15 (table summarizing the engine families, vehicle identification numbers of tested vehicles, tested concentrations of precious metals in catalytic converters, and citations to the record). *See also* Acc. Dec. Order at 26 (ALJ

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by the EPA's Office of Transportation and Compliance, and the vehicle was not sent to SGS. Init. Dec. at 13, n 15; *see also* CX 134.

[9] See CX 175. Catalytic converters deteriorate and become less effective over time due to poisoning and other effects. *Id.* at EPA-002372, EPA-002387–90. Poisoning occurs when a contaminant such as sulphur chemically reacts with a catalytic component to render it inactive. *Id.* at EPA-002381–82, EPA-002404–05.

concluding as a matter of law that the COCs issued to Respondents did not cover the vehicles that were manufactured and imported because the catalytic converters in those vehicles were not the same volume and composition authorized by the Agency; the vehicles that were manufactured and imported did not "conform, in all material respects, to the design specifications that applied to those vehicles described" in their COC applications).

D. Procedural Background[10]

On December 24, 2013, the EPA issued an NOV to Matao Cao, President, Taotao USA, Yuejin Cao, President, Taotao Group, and Yuejin Cao, President, JCXI. CX 92, EPA-0001112-16. The NOV provided notice of 64,377 vehicles in eight engine families that were imported and sold in violation of CAA section 203(a)(1) and 213(d) of the Act. 42 U.S.C. §§ 7522(a)(1), 7547(d), and implementing regulations because the catalytic converters in these vehicles did not contain the ratios and concentrations of precious metals described in the corresponding COC applications. CX 92, EPA-001114 and 001116; Tr. at 589). On February 14, 2014, the EPA issued an information request pursuant to CAA section 208(a), 42 U.S.C. § 7542(a) (CX 94 at EPA001120-31), which required documentary information, testing of vehicle emissions, and catalytic converter testing and analysis.

On March 17, 2015, the U.S. Department of Justice ("DOJ"), pursuant to CAA section 205(c), 42 U.S.C.§ 7524(c), concurred with EPA's determination that a penalty larger than the administrative penalty cap is appropriate in an administrative action against Respondents in this matter. CX026 at EPA-000539. In November 2015, the EPA filed a Complaint alleging CAA violations based on SGS testing

[10] The description of the procedural history provided here is complete for those portions relevant to the issues on appeal. As the ALJ notes in the Initial Decision, this case was intensely litigated over the course of almost three years and included filing of nearly 180 pleadings, motions, briefs, and a multitude of orders addressing those filings. Init. Dec. at 2.

of catalytic converters from eight engine families in Counts 1-8. The EPA served the Complaint on each of the Respondent companies by personally delivering copies thereof and of the Consolidated Rules, 40 C.F.R. Part 22, to Matao "Terry" Cao, President of Taotao USA on November 16, 2015.

Subsequently, after filing the Complaint, EPA conducted two additional inspections of Respondents' imported vehicles in December 2015 and February 2016. Acc. Dec. Order at 13-14; CX 140; CX 148. Those shipments included vehicles from the engine families that are covered by Counts 9-10 of the Amended Complaint, and further testing showed that the vehicles did not contain precious metal quantities and concentrations that matched the vehicles corresponding COC applications. Acc. Dec. Order at 13-14.

In May 2016, Complainant obtained Respondents production reports that Respondents had submitted to OTAQ, which indicated that Respondents produced many more vehicles than were represented to Complainant in response to requests for information. *See* Order on Motion for Leave to Amend the Complaint and to Extend Prehearing Deadlines (July 5, 2016). Consequently, Complainant sought leave to amend the Complaint by adding Counts 9 and 10 and adding the newly-discovered violations to Counts 1-3 and 5-8. *Id.*

On December 15, 2015, Taotao Group and JCXI filed a Motion to Quash and Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(5) and Brief in Support thereof ("Motion to Quash"). The Motion to Quash alleged an insufficiency of service of process as to the Complaint filed by EPA, claiming that Respondents are corporations organized under the laws of the People's Republic of China, a signatory to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, i.e., The Hague Convention, and compliance with The Hague Convention is mandatory. Motion to Quash at 3-4 (Motion to Quash pages are not numbered). The motion was denied by the ALJ. Order on Motion to Quash and Dismiss ("Quash Order") at 4. Respondent Taotao USA filed

an answer to the Complaint on January 19, 2016. Taotao Group and JCXI separately filed answers on February 9, 2016.

On February 19, 2016, the ALJ ordered Alternative Dispute Resolution ("ADR") at the request of the parties. Order Initiating ADR Resolution Process and Appointing Neutral. The ADR process was terminated without resolution of the Proceeding. Report Recommending Termination of ADR Process and Assignment of a Judge for Litigation. Approved by the ALJ on May 4, 2016.

In June 2016, the DOJ again provided a letter concurring with the EPA's determination that a penalty larger than the administrative penalty cap was appropriate, pursuant to CAA section 205(c). 42 U.S.C. § 7524(c). CX 28 at EPA-000546-47. The ALJ granted the EPA's Motion for Leave to Amend the Complaint on July 5, 2017. Am. Compl. ¶38; *See also* Init. Dec. at 2. On June 14, 2016, the EPA filed an Amended Complaint against Respondents Taotao USA, Taotao Group, and JCXI alleging additional wrongdoing that added two counts and increased to 109,964 the number of vehicles in violation of CAA section 203(a)(1) and 213(d), 42 U.S.C. §§ 7522(a)(1), 7547(d), and implementing regulations. Amended Complaint, *passim*. The EPA served the Amended Complaint on Respondents by certified mail on August 4, 2016. Taotao USA, Taotao Group, and JCXI, filed answers to the Amended Complaint on August 17, 2016.

The EPA and Respondents submitted initial prehearing exchange materials and the EPA submitted rebuttal prehearing exchange materials.[11] On November 28, 2016, the EPA filed a Motion for

[11] As pointed out by the ALJ, the EPA supplemented its prehearing exchange materials on several occasions, including June 16, 2017, July 31, 2017, and September 15, 2017. Init. Dec. at 3. There was extensive discovery in this case. *See, e.g.*, Order Granting Complainant's Motion for Additional Discovery Through Requests for Admission, August 17, 2017 (granted the EPA's request to issue RFAs to Respondents); Order on Agency's Motion for Additional Discovery, August 25, 2017 (granted the EPA's request for discovery through production of documents and interrogatories), Order on Respondents' Motion to Take Depositions, July 7, 2017 (granted Respondents' request to depose three EPA witnesses); and Order Granting Complainant's Motion to Take Depositions, August 17, 2017

Partial Accelerated Decision, seeking a determination on the issue of liability. The same day, Respondents filed a Motion to Dismiss for Failure to State a Claim and a Motion for Accelerated Decision. On May 3, 2017, following submission of responses and reply briefs by the EPA and Respondents, the ALJ granted accelerated decision to the EPA as to liability on all ten counts in the Amended Complaint (109,964 violations) and denied Respondents' dispositive motions. Acc. Dec. Order at 31. On May 15, 2017, Respondents moved for reconsideration of the Acc. Dec. Order or a recommendation for interlocutory review by the EAB, which the EPA opposed. The ALJ denied the Motion for Reconsideration and the request to recommend that the EAB review the order on interlocutory appeal. Order on Respondents' Motion of Reconsideration of Interlocutory Appeal, June 15, 2017, 11-13. Respondents did not ask the EAB to review the refusal to recommend interlocutory review. Init. Dec. at 3.

On August 2, 2017, Respondents filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. They asserted that the ALJ lacks jurisdiction over this action because the EPA had failed to establish the existence of a valid joint determination, made by the EPA Administrator and the Attorney General, to waive the monetary penalty limitation on administrative actions. The motion was denied. Order Denying Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction ("SMJ Order").

Liability having been determined, the hearing held on October 17-19, 2017 in Washington, DC, focused solely on the penalty for the violations. At hearing, 121 exhibits offered in evidence by the EPA were admitted (documents identified with the prefix CX followed by sequential Arabic numerals); five exhibits Respondents offered in evidence were admitted (documents identified with the prefix RX and

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(granted the EPA request to depose three of Respondents' witnesses). The EPA's witnesses who testified at the hearing, i.e., Cleophas Cawthorn Jackson, Amelie Cara Isin, and James J. Carroll, were deposed by Respondents' counsel prior to the hearing. The EPA deposed three of Respondents' witnesses, *i.e.*, Matao "Terry Cao, David Garibyan and Jonathan S. Shefftz, prior to the hearing. Mr. Shefftz was the one witness Respondents called to testify at the hearing.

numbered by sequential Arabic numerals). Three witnesses for the EPA testified: (1) Cleophas Cawthorn Jackson, Director of the EPA Gasoline Engine Compliance Center ("GECC") since 2012, who was qualified as an expert witness in the EPA's vehicle and engine certification and compliance program; (2) James J. Carroll, CPA and Professor of Business Administration at the Georgian Court University, Lakewood, NJ, who was qualified as an expert witness in accounting and corporate finance; and (3) Amelie Cara Isin, EPA environmental engineer in the Vehicle and Engine Enforcement Branch, who testified regarding her role in leading the investigation in this case and the calculation of the EPA-proposed penalty. One witness testified for Respondents, Mr. Jonathan S. Shefftz, who qualified as an expert economist and an expert on the economic benefit and ability to pay components of the Penalty Policy. The EPA filed its Initial Post-Hearing Brief on December 21, 2017. Respondents filed their Initial Post-Hearing Brief on December 26, 2017. The EPA and Respondents filed post-hearing reply briefs on January 19, 2018.

On August 7, 2018, the ALJ issued the Initial Decision and Order, which assessed a civil penalty against Taotao USA in the amount of $1,601,149.95. Init. Dec. at 50. Of the total penalty amount, Taotao Group is jointly and severally liable for $247,982.55, and JCXI is jointly and severally liable for $1,353,167.40. *Id.*

On September 6, 2018, Taotao USA filed an appeal from the Initial Decision with the EAB. CAA Appeal No. 18-02. That same day, by motion filed with the EAB, Taotao Group and JCXI, requested a two-week extension of time, until September 20, 2018, to file their appeal brief. CAA Appeal No. 18-01. The EAB granted the motion and the deadline for Respondents' appeal brief in CAA Appeal was extended to September 20, 2018. The deadline for the EPA's responses to both appeals is October 24, 2018. Order Consolidating Appeals, Allowing a Consolidated Response, Extending the Response Deadline and Authorizing Service by Email, September 27, 2018.

IV. Argument

A. The Complainant's service of process was proper pursuant to the Consolidated Rules as well as due process

Taotao Group and JCXI challenge the conclusion of the ALJ that service of process was sufficient and compatible with due process. Ignoring the standards for service of process applicable to this Proceeding under the Consolidated Rules, they put forth a hodgepodge of arguments to invalidate this conclusion: that Complainant was not supposed to serve the Respondents' duly-appointed agent for service of process in the United States but rather should have served Respondents in China via the Hague Convention for service on foreign defendants; that the Federal Rules of Civil Procedure provide that service in the Proceeding is subject to Texas law (which in turn requires service in China via the Hague Convention); and that the service of process that occurred violated due process because they do not do business or have subsidiaries in the United States, were involuntarily compelled to appoint an agent for service under EPA regulations, and were not served a complaint in Chinese. *See* Taotao Group Br. at 3-10. For the reasons discussed below, Respondents are wrong on all accounts.

1. Taotao Group and JCXI are Wrong Regarding Applicability of the Hague Convention to this Proceeding – Service Pursuant to the Hague Convention is Not Required

The Hague Convention governs service of process on a foreign defendant "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." 20 U.S.T. 361. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988), the Supreme Court established that the Hague Convention applies "[i]f the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad[.]" *See Volkswagenwerk*, 486 U.S. at 700. "Where service on a domestic agent is valid and complete under

both state law and the Due Process Clause," as it was in this matter, "the Convention has no further implications." *Id.* at 707; *cited in In the Matter of Health Care Prods.*, 1996 EPA ALJ LEXIS 142, *18 (E.P.A. June 13, 1996) (finding service valid and complete on foreign corporation's domestic agents pursuant to the Consolidated Rules).

The forum for this Proceeding is the federal administrative enforcement proceeding initiated by the EPA pursuant to CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1), which authorizes the EPA Administrator to assess administrative penalties against "[a]ny person who violates [section 203(a)(1)] . . . ." *See* 42 U.S.C. §§ 7524(a), (c)(1); *see also Health Care Prods.*, 1996 EPA ALJ LEXIS 142, at **10–11 (describing administrative forum under the Federal Insecticide, Fungicide, and Rodenticide Act). This forum is analogous to the state court forum in *Volkswagenwerk.*

The law that defines the standards for service of process in this administrative Proceeding is that contained in section 22.5 of the Consolidated Rules. 40 C.F.R. § 22.5. That section permits substituted service on an appointed domestic agent of a foreign defendant in lieu of transmitting documents for service abroad: "Where respondent is a domestic or 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." 40 C.F.R. § 22.5(b)(1)(ii)(A) (*emphasis added*). Accordingly, the Hague Convention does not govern service on a foreign corporation when, as here, service is perfected pursuant to the Consolidated Rules, the law of the forum for this Proceeding.

Substituted service (service on an appointed agent for service of process), as provided for under the Consolidated Rules, is consistent with the due process requirements for notice. In her Quash Order, the ALJ noted that "*Volkswagenwerk*" 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 for notice. Quash Order at 3 (citing *Volkswagenwerk*, 486 U.S. at

706). In *Volkswagenwerk*, the Supreme Court upheld service of process on a foreign corporation by delivery to a domestic registered agent for receipt of process. *Volkswagenwerk*, 486 U.S. at 696-708. The Supreme Court has held that "[t]he 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." *Volkswagenwerk* 486 U.S. at 707 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Under this broad standard, the ALJ stated, "[a]s 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 Respondents themselves, as allowed by the Rule 22.5, would violate due process." Quash Order at 3 (citing *Mullane,* 339 U.S. 306 (due process requirement of notice may be satisfied by service by publication as notification supplemental to other action which in itself may reasonably be expected to convey a warning)).

As in *Volkswagenwerk*, products manufactured by Taotao Group and JCXI are distributed in the United States exclusively by Taotao USA. *See Volkswagenwerk,* 498 U.S. at 697; *see e.g.,* CX 01 at EPA-000019 (contract between T-Group and Taotao USA "for the exclusive distribution in the U.S.A."), CX 5 at EPA-000176 (contract between JCXI and Taotao USA "for the exclusive distribution in the U.S.A."). However, while the domestic agent in *Volkswagenwerk* was not formally appointed by the foreign defendant, Taotao Group and JCXI appointed Taotao USA as their U.S. agent by formal agreement and represented as much to the EPA.

2. *Service of Process Pursuant to the Consolidated Rules was Proper*

Service in this Proceeding was perfected pursuant to the Consolidated Rules. As discussed above, Taotao Group and JCXI each appointed Taotao USA as their domestic agent for service of

process from the EPA. *See* Section III.C., *supra*. Copies of the Complaint and the Consolidated Rules were served on Taotao USA, as the agent for service of process for Taotao Group and JCXI, through personal service on Matao Cao, president of Taotao USA. CX 9 at 297–98; CX 11 at 303–04.

3. *Service of Process was Consistent with Due Process Requirements*

Taotao Group and JCXI also contend that service in this matter was subject to Texas law because Rule 4(h) of the Federal Rules of Civil Procedure so requires. *See* Taotao Group Br. at 4 (citing Fed. R. Civ. P. 4(h)). However, while the Federal Rules of Civil Procedure may provide guidance in this Proceeding, they do not control. *In re B&L Plating, Inc.*, 11 E.A.D. 183, 188 n.10 (EAB 2003). "[A]gencies are free to fashion their own rules of procedure, so long as these rules satisfy the fundamental requirements of fairness and notice. The EPA has availed itself of this opportunity by establishing its Consolidated Rules of Practice." *Katzson Bros., Inc. v. United States Environmental Protection Agency*, 839 F.2d 1396, 1399 (10th Cir. 1988) (cited by *B&L Plating, Inc.*, 11 E.A.D at 188 n.10). Thus, even if Rule 4(h) mandates service pursuant to Texas law — which it does not (*see* Fed. R. Civ. P. 4(h)(1)(B) (permitting service on appointed agent of a foreign corporation)) — the law of the forum requires only that service of process is consistent with section 22.5 of the Consolidated Rules, which it was here. *See* 40 C.F.R. § 22.5(b)(1)(ii)(A). Accordingly, service on Taotao Group and JCXI through their appointed agent for service of process, Taotao USA, was properly effectuated under the Consolidated Rules and would have been proper under the Federal Rules as well if they applied. *See* 40 C.F.R. § 22.5(b)(1)(ii)(A); Fed. R. Civ. P. 4(h)(2)(B).

Taotao Group and JCXI further claim that EPA regulations requiring applicants for COCs to name an agent for service of process located in the United States unconstitutionally circumvent the Hague Convention and violate due process. Taotao Group Br. at 9-10 ("The regulations serve no

purpose other than to circumvent the Hague Convention . . . ."); *see also* 40 C.F.R.§ 86.416-80(a)(2)(ix); 40 C.F.R. § 1051.205(w). As support, Taotao Group and JCXI claim that "they 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." Taotao Group Brief at 6. They further say that the only reason they appointed Taotao USA as agent for service of process was because they were forced to by the EPA's certification regulations. *Id.* They assert that because their only contact with the United States is through involuntary appointment of an agent of service of process to comply with regulations, there is no personal jurisdiction here, and therefore Complainant's service violated due process. *Id.* 6-8 (citing *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882 (S.D. Tex. 1993)).

As an initial matter, Respondents' reference to lack of personal jurisdiction in their brief arguing that personal service was invalid is completely misplaced. Personal jurisdiction is a matter relevant to Article III and state courts, and is not referred to in any provision under the Consolidated Rules. That being said, Taotao Group and JCXI's claims that they do not do business in the United States or do not have any subsidiaries here are completely belied by, among other things, Taotao Group and JCXI: introducing into United States commerce for sale at least 109,964 vehicles that are the subject of this Proceeding, submitting COC applications to the EPA to be able to sell these vehicles in the United States, entering into contracts with Taotao USA (owned by company president's son) for the distribution of these vehicles through a nation-wide dealer network and the provision of warranty, technical assistance, and other services covering such vehicles. *See* Section III.C, *supra.* These activities alone comprise ample "minimum contacts" with the United States and the EPA to satisfy due process for invoking personal jurisdiction. *Cf.*, *Health Care Prods.*, 1996 EPA ALJ LEXIS 142, *9-10 (foreign corporation's registration of a pesticide, distribution of such pesticide in at least 19 states, and continuous maintenance of an authorized agent in the United States amply establish ALJ's personal

jurisdiction over penalty proceeding) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Moreover, the authority Respondents rely upon specifically cites *International Shoe* in confirming that a foreign entity's general business presence in the state is sufficient to establish the minimum contacts necessary to establish personal jurisdiction. *See Leonard*, 829 F. Supp. at 889. To make *Leonard* work for them, Taotao Group and JCXI attempt to stand behind the fig leaf assertion that that they do not do business in the United States, which is utter nonsense. See Section III. B., Factual Background, above, describing extensive commerce of Taotao Group and JCXI in the United States.

Also absurd is the assertion that Taotao Group and JCXI appointed Taotao USA as their agent for service of process involuntarily. As discussed above, as a condition of obtaining a COC from the EPA, COC applications must designate an agent for service of process located in the United States, and service on the agent constitutes service on the applicant. *See* 40 C.F.R.§ 86.416-80(a)(2)(ix); 40 C.F.R. § 1051.205(w) . By voluntarily submitting multiple COC applications in which it appointed Taotao USA as their U.S. agent for service, Taotao Group and JCXI willingly complied with these regulations and consented to be subject to EPA jurisdiction over enforcement of the certification regulations. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 170 (1939) (holding that defendant corporation consented to be sued in Pennsylvania by complying with Pennsylvania law that required appointing an agent for service of process in the state); *Nat'l Bank of N. Am. v. Assocs. of Obstetrics & Female Surgery, Inc.*, 425 U.S. 460, 462 (1976) (Rehnquist, J., concurring)(Justice Rehnquist concurred with the holding of the majority of the Court, but on different grounds, i.e., that a national bank could consent to jurisdiction in state court based on it having provided an agent for service of process in that state). Taotao Group and JCXI appointed Taotao USA as their domestic agent for service of process to avail themselves of the ability to legally introduce into U.S. commerce their vehicles pursuant to United States emissions certification law. To conduct business in the United States, they voluntarily submitted

themselves to the jurisdiction of United States law, including EPA's certification regulations requiring designation of an agent for service of process. *See Health Care Prods.*, 1996 EPA ALJ LEXIS 142, *15 (EPA pesticide registration regulations' requirement to establish agent for service of process analogous to "the general rule that a corporation is deemed to acquiesce to the service rules of the jurisdiction in which it is doing business"). Not only did they appoint Taotao USA as agent for service of process, but they specifically told EPA in their COC applications that Taotao USA, and its President, Matao Cao, "are authorized to deal for [Taotao Group or JCXI] with the [EPA] . . . on all matters." See *e.g.*, CX 1 at EPA00006; CX 6 at EPA000192. This clearly evidences an understanding by Taotao Group and JCXI that they would be subject to U.S. law by introducing into commerce their vehicles. By seeking certification from the EPA to introduce their vehicles into United States commerce, Taotao Group and JCXI willingly subjected themselves to the authority of EPA if they violated the conditions of that certification. How they can now claim unfairness when they have benefitted from importation and sales of their vehicles in the United States makes no sense.

4. *Challenge to the Regulations Requiring Designation of an Agent for Service of Process is Improper, Untimely and Without Merit*

To the extent that Taotao Group and JCXI challenge the validity of the regulations governing appointment of an agent for service of process as a condition of obtaining a COC for their vehicles, such challenge is improperly before the Board. The Board has instructed that "under established Agency precedent, challenges to rulemaking are rarely entertained in an administrative enforcement proceeding. . . and review of a regulation will not be granted absent the most compelling

circumstances."[12] *In re Woodkiln Inc.*, 7 E.A.D. 254, 270 n.16 (EAB 1997) (quoting *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994)); *see also In re Matter of City of Irving*, 10 E.A.D. 111, 123–24 (EAB 2001) (discussing the presumption of non-reviewability). This is particularly so where "Congress, as in the Clean Air Act section 307(b), has set precise limits on the availability of a judicial forum for challenging particular kinds of regulations." *Id.* at 269 (citing *Echevarria*, 5 E.A.D. at 634–35))

Moreover, Taotao Group and JCXI have not presented a compelling argument to explain why the EPA's regulations are invalid. The presence of a domestic agent facilitates effective administration and enforcement of the CAA against foreign manufacturers who avail themselves of the United States market, in part by assuring the proximity of a person who may speak for and to the manufacturer. *See Health Care Prods.*, 1996 EPA ALJ LEXIS 142, *17-18 (citing General Counsel Opinion, "Must EPA Require a Foreign Registrant to Designate a Domestic Agency" (June 23, 1972) (EPA may require foreign pesticide registrants to name a domestic agent who may receive service of process to effectuate enforcement and thus ensure the environmental safeguards established through Congressional statutes are met)). The Board has previously upheld the validity of service on foreign corporations through their domestic authorized representatives. *In re Jonway Motorcycle (USA) Co. Ltd.*, CAA Appeal No. 14-03, slip. op.at 5–7, 7 n.10 (EAB Nov. 14, 2014) (Default Order and Final Action); *In re Peace Indus. Group (USA)*, 17 E.A.D. 348, 365 (EAB Dec. 22, 2016) (finding valid service on foreign manufacturer's agent for service of process established pursuant to 40 C.F.R. §§ 86.416-80(a)(2)(ix) and 1051.205(w)).

Taotao Group and JCXI's challenge also is untimely. The regulations requiring applicants to provide the name of an agent for service of process in the United States were promulgated in 2006 for

[12] As an example of a compelling circumstance, the Board described a situation where a regulation had been held invalid by a federal court, but not yet repealed. *In re Echevarria*, 5 E.A.D. 626, 635 n.13 (EAB 1994). No similar circumstance is present here. In *Echevarria,* the Board refused to entertain a challenge to a regulation based on alleged unconstitutional vagueness. *Id.* at 634.

Part 86 (Amendments to Regulations for Heavy-Duty Diesel Engines, 71 Fed. Reg. 51481, 51487 (Direct Final Rule, Aug. 30, 2006)), and in 2005 for Part 1051 (Test Procedures for Testing Highway and Nonroad Engines and Omnibus Technical Amendments, 70 Fed. Reg. 40420, 40494 (Final Rule, July 13, 2005)). The time for filing a judicial challenge to these regulatory provisions has long passed. *See* 42 U.S.C. § 7607 (sixty days to challenge rulemaking); *see also* 28 U.S.C. § 2401 (general six-year statute of limitations for claims against the United States).

Thus, the Board should reject the regulatory challenge because Taotao Group and JCXI have not shown that this case presents compelling circumstances warranting Board review, the challenge is untimely, and the regulations do not circumvent the Hague Convention.

5. *The Complaint and Amended Complaint Served in English was Permissible*

Finally, Taotao Group and JCXI seek to invalidate service because the documents were served in English. Taotao Group Br. at 9 (citing *Vazquez v. Sund Emba AB*, 152 A.D.2d 389, 398, 548 N.Y.S.2d 728, 733 (App. Div. 1989). *Vazquez*, however, was a case involving service of a complaint written in English in a non-English speaking country through the Hague Convention; this Proceeding involves service on a company's authorized United States representative pursuant to the Consolidated Rules. Moreover, *Vazquez* acknowledges that service in English is permissible on a foreign corporate defendant "whose representatives have demonstrated an ability to deal in English, and the defendant is attempting to invalidate service on the grounds that the documents served should have been translated into the language of the country where served." *Vazquez*, 152 A.D.2d at 733 (citing *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 4, 9 (S.D.N.Y. 1975); *Shoei Kako Co. v Superior Ct.*, 33 Cal. App. 3d 808, 109 (1973)). The documents submitted by Respondents as part of their COC applications are more than sufficient to demonstrate the Respondents' proficiency in English. *See also* 40 C.F.R. § 86.416-80 (an application for

a certificate of conformity must be in the English language and shall be updated and corrected by amendment); 40 C.F.R. §§ 1051.30 and 1051.205(d) (records must be provided in English upon EPA request).

The foregoing demonstrates conclusively that, contrary to Taotao Group and JCXI's claims, service of process in this administrative proceeding was not required to be made in China via The Hague Convention, but was wholly consistent with the requirements of the Consolidated Rules and due process.

B. As a matter of law, the Act prohibits import and sale of a motorcycle or recreational vehicle built with a catalytic converter that is materially different from the catalytic converter description in the application for the COC

As a defense against liability for vehicles in Counts 1 through 4, the on-highway motorcycles, Respondents cite 40 C.F.R. § 86.437-78(a)(2)(iii), which states that a COC "will cover all vehicles represented by the test vehicle and will certify compliance with no more than one set of applicable standards." Taotao USA Br. 9; Taotao Group Br. at 14-15. Essentially, Respondents do not dispute that the catalytic converters on their imported motorcycles had different precious metal ratios that made them materially different from the descriptions in the COC applications. Rather, they assert that the catalytic converters on these motorcycles were the same as those used in the test EDVs for respective engine families to which they purportedly belonged. Taotao USA Br. 10-11; Taotao Group Br. 14.[13] Respondents argue that the COCs thus cover the imported motorcycles, pursuant to 40 C.F.R. 86.437-78(a)(iii). Taotao USA Br. 10-11; Taotao Group Br. 14. Respondents further argue that the ALJ was

[13] The record in the Proceeding below is consistent with Respondents' position on appeal. The ALJ found material facts Complainant set forth with the Motion for Accelerated Decision not in genuine dispute, including that each of the vehicles purported to be in engine families represented in ten Counts in the Amended Complaint, inclusive of Counts 1 through 4 covering Respondents' motorcycles, contained catalytic converters that were materially different in composition from the description in the related COC application. Acc. Dec. Order at 31; *see also*, Acc. Dec. Mot., Attachment A.

mistaken in deciding liability based on the conditional language on the face of each COC, which limits COC coverage to "vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the documentation required by 40 CFR Part 86," because here the Respondents submitted test vehicle emissions data, and only in instances where the COC is issued without such test data must the imported vehicles comply with the COC application. Taotao USA Br. at 11; Taotao Group Br. at 17-18. Respondents also assert that the conditional language of the COCs is "unauthorized" because of changes to the governing regulations, and regulations do not explicitly require manufacturers to describe precious metal concentrations of a catalytic converter in their applications. Taotao USA Br. at 11-12; Taotao Group Br.at 19-20.

As a defense against liability for vehicles in Counts 5 through 10, Respondents argue that the recreational vehicles at issue were covered under their respective COCs because, based on their reading of the Part 1068 regulations, precious metal concentrations are not a basis for determining whether production vehicles comply with the COC and associated application for certification. Taotao USA Br. 12-13; Taotao Group Br. 21-22; *see also* 40 C.F.R. § 1068.103(a).

As discussed below, Respondents' interpretations of the governing regulations are wrong – the regulations clearly provide that Respondents were prohibited from introducing into United States commerce vehicles that have catalytic converters that are materially different than those described in their COC applications.

1. Respondents' Interpretation of the Regulations Governing On-Highway Motorcycles is Wrong.

Respondents' argument against liability for Counts 1 through 4 rests on a fundamentally flawed perspective of the vehicle certification program and the governing regulations. The CAA prohibits the importation and sale of uncertified vehicles and directs that the EPA oversee a mandatory pre-

importation, pre-sale certification program to ensure compliance with emission standards. *See* Section III, A (Regulatory Background), *supra.* A vehicle may conform to the applicable emission standards and still not be covered by a COC if it is materially different from the specifications described in the COC application. *United States v. Chrysler Corp.*, 437 F. Supp. 94, 97 (D.D.C. 1977), *aff'd* 591 F.2d 598 (D.C. Cir. 1979). In *Chrysler.*, the EPA brought an action against Chrysler because Chrysler had manufactured and introduced into commerce vehicles equipped with distributors, carburetors, exhaust gas recirculation values, and/or orifice spark advance controls different from those described in Chrysler's COC application for the vehicles. 437 F. Supp. at 95–96. Emissions testing demonstrated that the vehicles met emissions standards. *Id.* at 97. The COC issued for the vehicle's engine family stated that it covered "only those new motor vehicles or new motor vehicle engines which conform in all material respects to the design specifications described in the application for this certificate." *Id.* at 95 (quoting COC). On this basis, the District Court concluded:

> [A]s a matter of law, … where one or more parts erroneously installed in a vehicle are of a nature intimately related to and which may reasonably be expected to affect emission controls, such vehicle is not covered by the certificate of conformity for the vehicle, even though it may in fact meet emission standards.

Id. at 97. On appeal, the D.C. Circuit acknowledged the language in the COC, and also noted that EPA regulations provided that a COC "covers only those new motor vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the application for certification." *United States v. Chrysler Corp.*, 591 F.2d at 960 (quoting 40 C.F.R. § 85.074-30(a)(2) (1976)). The Circuit Court affirmed, finding that the "clear language of the statutes, the regulations, and the policies favoring presale certification" together supported the District Court's decision. *Id.* at 960–61.

The relevant statutory language has not changed, nor have the regulations changed in any way that is substantive. All governing regulations steadfastly require compliance with a pre-importation, pre-sale certification program to ensure compliance with emission standards. 42 U.S.C. §§ 7522(a)(1), 7525(a)(1). The regulation cited in *Chrysler*, 40 C.F.R. § 85.074-30(a)(2) (1976), 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 . . ." 39 Fed. Reg. 7545, 7552 (Feb. 27, 1974) (provided in the record as CX 177). The COCs issued to Respondents have language that is substantively identical to the language required by 40 C.F.R. § 85.074-30(a)(2) (1976) and included on the COC issued to Chrysler, *i.e.*, that the COC only covers vehicles that conform in all material respects to the design specifications described in the COC application.[14] *Compare Chrysler*, 437 F. Supp. at 95 (covers "only those new motor vehicles or new motor vehicle engines which conform in all material respects to the design specifications described in the application for this certificate") *with* CX 43–CX 52 ("covers only those vehicles which conform, in all material respects, to the design specifications as described in the documentation required"). The D.C. Circuit's interpretation of that language, and of the certification program writ large, continues to be authoritative.

The Respondents' argue that the regulations have substantially changed in a manner that moves the vehicle certification program for motorcycles away from requiring material conformity of vehicles with design specifications specified in the COC application. Taotao USA Br. at 12 ("regulation that required that [sic] specific language on the face of each COC has since been deleted"); Taotao Group Br. at 19 ("language quoted on the face of each COC was based on a previous version of section 86.437-78" that was changed to delete the requirement, leaving only the regulatory language that "the certificate will cover all vehicles represented by the test vehicle). This argument relies on a distortion of the governing

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regulatory framework and is obviously wrong. In 1981, the regulatory provision referred to in the D.C. Circuit *Chrysler* decision, *i.e.*, 40 C.F.R. § 85.074-30(a)(2) (1976), was deleted, and that section no longer exists. At noted in *Chrysler* at the time, the regulation mandated that each COC contain language that specified that it covered "only those new motor vehicles which conform, in all material respects, to the design specifications. . . described in the application for certification . . . ." 39 Fed. Reg. 7545, 7552 (Feb. 27, 1974); Acc. Dec at 27 (CX 177)[15]. In 1981, the EPA promulgated an interim final rule that was "designed to reduce the administrative burdens of emission certification" while the EPA developed a new motor vehicle compliance program. *See* Control of Vehicle Emission Certification Procedures, 46 Fed. Reg. 50464, 50464 (Oct. 13, 1981); *see also* CX 178; Acc. Dec. at 27. Part of the rulemaking covered a number of technical amendments. *Id.* at 50471. Among the technical amendments were revisions made to regulations pertaining to the COC language, those at 40 C.F.R. §§ 86.082-30, 86.084-30, and 86.437-78. These regulations formerly required specific language be contained in the COC. *Id.* This language would vary for different classes of vehicles, different types of engines and for other factors. *Id.* Instead of requiring specific language on the certificate, the regulatory amendment was made to simply require a statement. *Id.* The EPA states "This change will have no effect on the motor vehicle industry which is familiar with these requirements.... It will permit EPA to reduce the cost of preparing and printing certificates, since uniform language will apply to all vehicles and engines. *These changes are administrative in nature and do not affect the substantive requirements of the regulations.*" 46 Fed. Reg. at 50471 (emphasis added). In her decision, the ALJ correctly determined that "this amendment did not revoke the substantive requirement that vehicles conform to the design specifications they relied on

[15] 40 C.F.R. § 85.074.30(a)(2) required each COC to state: "This certificate covers only those new motor vehicles 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 model year production period of the said manufacturer, as defined in 40 C.F.R. § 85.002(a)(3) ."

in their application for certification. Rather, the purpose of these 'technical amendments' was to 'simply require' that COCs contain a general statement rather than specific language that until then had varied within the regulations based on vehicle and engine type." Acc. Dec. at 27.

As demonstrated above, the COC may be issued subject to conditions. 42 U.S.C. § 7525(a)(1) (EPA issues COCs "upon such terms . . . as [it] may prescribe."); *see also* 40 C.F.R. §§ 86.437-78(a)(2)(ii), 1051.255(a); 1068.103(a). Each COC issued to Respondents for the vehicles at issue in this Proceeding stated: "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 applicable regulations. CX 43–CX 52. When interpreting similar language, the D.C. Circuit held that a difference is "material" if it "may reasonably be expected to affect emission controls." *Chrysler*, 591 F.2d at 960.

Although Respondents try to evade liability by their contention that the catalytic converters on their imported motorcycles match the catalytic converters on the corresponding EDVs, their attempt fails. Governing law directs that whether a vehicle is covered by a COC is determined by whether the vehicle conforms to both the specifications in the application for that COC as well as the EDV that is representative of the engine family for which certification is sought. 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]." 40 C.F.R. § 86.437-78(a)(2)(ii). The COCs for each of the engine families identified in the Amended Complaint 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. *See* CX 43–CX 52. The Board therefore does not need to look beyond the plain language of COCs themselves in order to find that Respondents' vehicles are not covered.

As further support for this interpretation, the Board should look to the testimony of Cleophas Jackson, the Director of GECC. The ALJ qualified Mr. Jackson as an expert in the area of regulatory certification and compliance with the EPA vehicle and engine program. Tr. at 43. Mr. Jackson's testimony described how the regulatory program ensures manufacturers of vehicles and engines meet emission standards and limitations under the Act. *Id.* at 74. He testified that manufacturers are free to design their products using the technology they deem appropriate and cost effective for the market. *Id.* The EPA evaluates the decisions the manufacturers have made to determine if it believes the technology that is utilized will meet the performance requirement the Act has set. *Id.*, *see also* Tr. at 116-17 (describing a multi-tiered approach to EPA's application review). The design specifications are not regulatorily prescribed. *Id.* Rather, the regulations set performance standards. *Id.* at 75. The EPA reviews the design specifications to ensure that if the EPA believes those design standards will meet the Act's standards over their useful life the EPA can issue a COC. *Id.*

The Respondents attempt to argue that regulations do not explicitly require manufacturers to describe precious metal concentrations of a catalytic converter in their applications. Taotao USA Br. at 11-12; Taotao Group Br. at 19-20. Per Mr. Jackson's testimony, this argument is meritless. Per Mr. Jackson, the fact that design standards are not regulatorily prescribed does not detract from their "critical" importance as to how the compliance program functions. Tr. at 75. Mr. Jackson testified that it is important for the EPA "to know that the design specifications provided by the manufacturer are in fact consistent with the production specifications." *Id.* Mr. Jackson referred to the confirmatory testing compliance tool as an example of an area of the program that is affected where the design information in the COC application was wrong or incomplete. *Id.*[16] The EPA assessment would be "inaccurate if in fact

[16] The Administrator may require the manufacturer to comply with additional testing of vehicles during the pre-certification review process. 40 C.F.R. §§ 86-422-78, 86.427-78(f) and (g), 86.434-78.

the design information did not match the production information." *Id.* The EPA would be "testing and making assessments based on a different product," and "would have no way of knowing how that particular product would perform throughout its useful life." *Id.* Further, wrong or misleading information on a COC application causes "irreparable harm, and the only way, if [EPA] were to determine that their production vehicle somehow was different from the certification vehicle, it would require the Agency to test almost every production vehicle to ensure that it was compliant at multiple points throughout its useful life." Tr. at 77. Moreover, Part 86 states that EPA enforcement officers have a right of entry to manufacturing facilities to allow the EPA "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 for which a [COC] has been issued,* and to standards prescribed under [the Act]." 40 C.F.R. § 86.441-78(d) (emphasis added). Where there is wrong information provided in the COC application, the EPA would not be able to determine full useful life performance in compliance with standards under the Act. Tr. at 76-77.

Integral to EPA certification process is EPA's ability to trust "that the manufacturer is being honest with us about their design, about their testing, about the compliance of their test facilities, and about the fact that their production will match what they've told us in the in the application." Tr. at 116-17. With respect to description of catalytic converters in particular, Mr. Jackson testified that the information provided in the application is used to "assess whether or not we believe the engine as designed with the catalysts as described would actually be compliant over the full useful life of the product." Tr. 114-15. Thus, given the critical importance to the regulatory program that the production vehicles match the description of the vehicles in the COC application, it would be consistent with the purpose and goals of the statute and regulations to read the COC conditions as requiring manufacturers to ensure their vehicles' catalysts match the description given in their COC applications'

Moreover, Respondents' defense to the highway motorcycle violations narrowly focuses on 40 C.F.R. § 86.437(a)(2)(iii) (a COC "will cover all vehicles represented by the test vehicle and will certify compliance with no more than one set of applicable standards") alone without reading this provision in context and in concert with the regulation as a whole, which distorts the provision's meaning. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (interpretation of statutory language depends on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). As the ALJ correctly states in her Order on Partial Accelerated Decision and Related Motions,

> For highway motorcycles, COCs are issued for distinct engine families based on written applications describing the vehicles in the family. *See* 40 C.F.R. §§ 86.416-80, 86.420-78. Members of an engine family "must be identical" in terms of "number of catalytic converters, location, volume, and composition." 40 C.F.R. § 86.420-78(b)(7). The test vehicle from which the manufacturer collects emissions and other data when preparing its COC application is a member of and represents the engine family for which certification is sought. *See* 40 C.F.R. §§ 86.421-78, 86.422-78, 86.423-78, 86.431-78, 86.436-78. A COC certifies compliance "with no more than one set of applicable standards." 40 C.F.R. § 86.437-78(a)(2)(ii)-(iii) (emphasis added).

Acc. Dec. at 25. The plain meaning of these regulations read in context and in concert with one another is that the only motorcycles that are covered by a COC are the members of the engine family that is described in the COC application. The ALJ correctly applied the law in determining that a COC issued by the EPA cannot cover highway motorcycles with catalytic converters that are different in location, volume, or composition from what was described in the manufacturers' COC application. By regulatory definition, vehicles whose catalytic converters are not identical in number, location, volume and composition are not part of the same engine family. Acc. Dec. Order at 25. *See also* Tr. at 121-134.

This interpretation of the regulations is supported by Mr. Jackson's testimony. Mr. Jackson's testified that a production vehicle must have the same control strategy, i.e., same exhaust system, same

catalyst, and same precious metal loading, in order for it to be included in the same engine family as the vehicles described in the COC application. Tr. at 133. If the production vehicle was not the same as the design specifications in the COC application in this regard, then applying the deterioration factor[17] from the EDV that was submitted to the EPA with the COC application would not provide an accurate and reliable deterioration factor for purposes of low-hour test conducted on the production vehicle and an estimate of the useful life emissions of the production vehicle. *Id.*

Respondents contrast the regulations governing the import and sale of its vehicles' special provisions governing small-volume manufacturers (less than 10,000 units in a model year) which state that the COC will cover all vehicles described by the manufacturer. Taotao USA Br. at 9-10; Taotao Group Br. at 16-18. Respondents contend that the difference in wording between the regulations it 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 10,000 units. This is a thin reed 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

[17] *See* 40 C.F.R. § 86.432-78 (describing method to determine whether a vehicle's end of useful life emissions would meet standards under the Act from a low-hour or short test distance emissions test and use of a deterioration factor). Respondents argue that one can derive a "deterioration factor" from EDV full useful-life testing submitted as part of the COC applications, and then apply that deterioration factor to the low-hour testing result to estimate full useful-life emissions. However, as discussed in the Initial Decision, Respondents' derived deterioration factors are not a reliable indicator whether the vehicles would remain compliant with emissions standards throughout their useful life. Init. Dec. at 12-13. Because a deterioration factor is derived from a tested EDV, such a deterioration factor would not be applicable to a vehicle or engine with a different emissions control strategy, exhaust system, catalytic converter, precious metal loading, etc., from that of the EDV. *Id.* at 13 (citing Tr. at 122, 130, 133-134). As discussed in Section IV.E., below, there is no reliable information in the record to establish that EDVs associated with their COC applications have the same catalytic converters as the production vehicles.

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.

Similarly, Respondents also dispute the Agency's citation to 40 C.F.R. § 85.2305(b). Taotao USA Br. at 8-9; Taotao Group Br. at 18. This regulation states that vehicles produced prior to the effective date of a certificate of conformity may be covered by the COC if certain conditions are met, including that they "conform in all material respects to the vehicles or engines described" in the COC application. 40 C.F.R. § 85.2305(b)(1).[18] The ALJ pointed out the weakness of the argument here, stating "But, as *Chrysler* observes, it is the statute, regulations in Parts 86 and 1051, and terms of the COCs that in concert impose … [the] requirement [of conformity of the production vehicles with the COC application design specifications]. The specific authority of § 85.2305(b)(1) is not necessary for enforcement in this case. That is, Respondents' vehicles are required to conform in all material respects to their corresponding COC documentation, with or without the application of § 85.2305(b)(1)." Acc. Dec at 30.

2. *Respondents' Interpretation of the Regulations Governing Recreational Vehicles is Wrong.*

Nonroad recreational vehicles such as those identified in Counts 5 through 10 of the Amended Complaint are governed by regulations codified in 40 C.F.R. parts 1051 and 1068. Respondents appear

[18] Respondents appear to also challenge to the adequacy of the Complaint and Amended Complaint. Taotao USA 8-9; Taotao Group at 18. Such challenges raised for the first time after Answers have been filed are untimely and should be dismissed on that basis. *See e.g.*, Fed. R. Civ. P. 12(g) and (h) (defense of failure to state a claim upon which relief can be granted is waived if not raised in the answer, a motion for judgment on the pleadings or at trial). In addition, the Complaint and Amended Complaint clearly are sufficient under 40 C.F.R. § 22.14. *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (complaint must contain sufficient factual matter to state a claim that is plausible on its face).

to base their argument that the nonroad vehicles were covered under the relevant COCs on 40 C.F.R. § 1068.103(a), which in its current form states:

> Engines/equipment covered by a certificate of conformity are limited to those that are produced during the period specified in the certificate and conform to the specifications described in the certificate and the associated application for certification. *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.* For example, if the application for certification specifies certain engine configurations, the certificate does not cover any configurations that are not specified.

40 C.F.R. § 1068.103(a) (emphasis added). Respondents assert that the only "specifications" that manufacturers must meet under this regulation is "the emission control label and any conditions or limitations identified by the manufacturer or EPA." Taotao Group Br. at 21-22. According to Respondents, catalytic converter precious metal specifications are not identified in their vehicles' ECI label and have not been identified as conditions or limitations by the manufacturer, and the EPA has not promulgated or published any conditions or limitations concerning catalytic converter precious metal specifications.

As the ALJ correctly determined, Respondents' arguments on this subject are untenable. Reconsideration Order at 3. Respondents cite an inapplicable version of the regulation which was amended in October 2016 and became effective on December 27, 2016,[19] nearly 18 months after the most recent COC was issued in this case and well after the filing of the Amended Complaint. *Id.* The prior version of the regulation that applies to vehicles in this Proceeding makes no mention of the emissions control information "ECI" label, and reads as follows:

> Engines/equipment covered by a certificate of conformity are limited to those that are produced during the period specified in the certificate and

[19] *See* Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles–Phase 2 rulemaking. 81 Fed. Reg. 73478, 74224 (Oct. 25, 2016).

> conform to the specifications described in the certificate and the associated application for certification. For the purposes of this paragraph (a), "specifications" includes any conditions or limitations identified by the manufacturer or EPA. For example, if the application for certification specifies certain engine configurations, the certificate does not cover any configurations that are not specified.

40 C.F.R. § 1068.103(a) (2015). The applicable version of 40 C.F.R. § 1068.103(a) does not contain a reference to ECI labels, and Respondents' arguments that refer to labeling requirements are therefore unfounded. Complainant will refer to the pre-amendment version of 40 C.F.R. § 1068.103 for the remainder of this response because it is the version that properly applied to the vehicles at issue in this matter.

With or without reference to ECI labels, the meaning of the regulation or the word "specifications," is the same. Both versions of the regulation use the term "specifications" inclusively, and are thus plainly incompatible with the restrictive interpretation advanced by Respondents. As the ALJ correctly states, a plain reading to the current regulation in full reveals that to be covered by a COC, as engine must conform with all of the following: the specifications described by the EPA in the COC; the specifications described by the manufacturer in the COC application; any additional conditions or limitations identified by the manufacturer; and any additional conditions or limitations identified by the EPA. *See* Reconsideration Order at 4. The plain meaning of the word "specification" is broad, and includes "the act or process of specifying," or "a detailed precise presentation of something or of a plan or proposal for something – usually used in the plural." *Specifications | Definition of Specifications from Merriam-Webster*, Merriam-Webster, https://www.merriam-webster.com/dictionary/specifications (last accessed on October 21, 2018). Moreover, as the ALJ correctly determined, the regulatory text makes clear that EPA intended . . . the term to be construed broadly for purposes of this regulation. Reconsideration Order at .4. *See* Tr. at 74-75 (design specifications the manufacturer provides in the

COC application are critical to how the regulatory program functions). Both the pre-2016 and current version of the regulation use the term "specifications" inclusively, and are thus "plainly incompatible with the restrictive interpretation advanced by Respondents." *Id.*

The Board has already reviewed 40 C.F.R. § 1068.103 and explained that a description of a vehicle's catalytic converter is among the "specifications" to which the regulation refers. *Id.* (citing *In re Jonway Motorcycle*). In *Jonway Motorcycle*, the Board determined that "[c]atalysts are part of the engine or engine emissions system; thus, a COC applicant must include a description of the catalyst. Recreational vehicles "are considered not covered by a certificate unless they are in a configuration described in the application for certification. [citing 40 C.F.R. §§ 1051.205(a) and 1068.103(a)]" *In re Jonway Motorcycle,* slip. op. at 23. In all, three counts in *Jonway Motorcycle* rely on this interpretation of the regulation. *In re Jonway Motorcycle*, slip. op. at 23, 25, 26.

C. Taotao Group and JCXI are manufacturers of the vehicles in violation and are liable for penalties for such violations under the CAA

As a defense against liability for vehicles in Counts 1 through 10, Taotao Group and JCXI argue that foreign manufacturers are not "manufacturers" within the meaning of the Act and cannot be held liable under § 203(a) and 213(d). Taotao Group Br. 10-13. Their argument asserts that a "manufacturer" under the Act can only be a domestic manufacturer or importer because it is the EPA's practice to only issue COCs to domestic manufacturers or importers. Taotao Group Br. 11-12. They also state that they did not manufacture the catalytic convertors of the vehicles. *Id.* at 11. They further state that the COCs as issued did not describe the certified precious metal concentrations of the catalytic converters that must be met, but only stated that the vehicles covered by the COC will contain one catalytic converter. *Id.* Further, Respondents argue that the Complaint fails to allege that Taotao Group and JCXI applied for a COC, provided inaccurate information in the applications for COCs, or imported or sold the subject

vehicles in the United States, and that these are elements that are necessary limits on the CAA definition of manufacturer, 42 U.S.C. § 7550(1). Taotao Group Br. at 10-12. Finally, Taotao Group and JCXI claim they should not be subject to penalties in this Proceeding, since the COC wasn't issued to them and thus they are not responsible for harming the regulatory scheme.

1. *Taotao Group and JCXI are Clearly Manufacturers of Vehicles Governed Under the Act and Regulations*

The ALJ found that there can be no material dispute that Taotao Group and JCXI are each a manufacturer under the CAA, and as a matter of law, "manufacturers" under the CAA subject to the statute's prohibitions. Acc. Dec. at 22-23. Under the CAA a

> '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.

42 U.S.C. § 7550(1). Given that Taotao Group and JCXI have admitted they are the original manufacturers of the vehicles at issue in this case, they are manufacturers subject to CAA section 203(a)(1) and 213(d) Acc. Dec. at 22. The ALJ further found that nothing in the CAA's definition of manufacturer in any way suggest that its meaning is limited only to those persons that apply for COCs, or that "manufacturer" is limited to a person who builds the parts or components of a vehicle. *Id.* at 22-23.

Taotao Group and JCXI cite no statutory, regulatory, or judicial authority in their attempt to renew their defense that failed at the accelerated decision stage of this Proceeding. Instead, Taotao Group and JCXI base their assertion that they are not subject to the Act upon their reading of an EPA

guidance document and an article by EPA employees. However, their "support" fails to contravene the plain language of the statute.

Taotao Group and JCXI reference an EPA guidance document entitled "On-Highway Motorcycle Certificate Review Sheet – March 7, 2005." CX 14. On the top of the document it indicates that the certificate holder must be a U.S. manufacturer or U.S importer/distributor. *Id.* at EPA-000399. However, the document further specifies a series of requirements for foreign motorcycle manufacturers as conditions of submitting an approvable COC application. The COC application must include an agreement between the U.S. importer and the foreign motorcycle manufacturer authorizing the applicant to import and distribute motorcycles in the U.S., and that the agreement shall include: a complete identification of the manufacturer, identities of all entities authorized to import the manufacturer's motorcycles/engines into the U.S., identification of importer/certificate holder's obligations to the manufacturer, identification of the manufacturer's obligations to the import to the importer/certificate holder, identification of the models which the importer is authorized to import, assure that service of process of the manufacturer in the United States, including identification of a representative of the manufacturer who EPA can contact for emission compliance, warranty, and other issues. *Id.* at EPA-000401. Contrary to Respondents' interpretation, clearly this document recognizes that foreign manufactures are subject to the certification regulations and COCs issued by EPA covering their vehicles.

Nothing in the CAA or relevant regulations limits liability to COC holders, or to domestic corporations. In explicitly contemplating there will be foreign manufacturers, these EPA regulations also require manufacturers to appoint a domestic agent for service of process in the COC application. 40 C.F.R. § 86.416-80(a)(2)(ix); 40 C.F.R. § 1051.205(w). Foreign manufacturers are also subject to selective enforcement audits by EPA. 40 C.F.R. § 86-441-78 (right of entry regulations apply to both

domestic and foreign manufacturers and facilities located in China); Tr. at 143 (the EPA conducted a selective enforcement audit at the production facility of Taotao Group and JCXI). EPA guidance contemplates that foreign manufacturers are identified and other information on the manufacturer is provided in applications for COCs. CX012 at EPA000379-80; CX013 at 000389; CX 14 atEPA000399-401; CX 17 at EPA000436.

As for the article written by EPA personnel, regardless of what an the authors of that article said or meant, the article does not have authority of law, and does not constitute an official agency interpretation of regulations. Further, EPA has pursued foreign corporations and held them liable for violations of 203(a) and 213(d), for which penalties have been upheld by the Board. *See, e.g., Jonway Motorcycle*, slip. op. at 13 (CAA Title II requirements apply to foreign manufacturers and also persons who import vehicles for distribution for commerce in the U.S.); *Peace Indus. Group* (USA), 17 E.A.D. 348. Moreover, many Agency official statements have explicitly warned that foreign manufacturers are subject to certification prohibitions the Act. *See* CX 19 at EPA-000439 (nonroad enforcement alert addressing importer and manufacturer responsibility); CX 20 at EPA-000444 (enforcement alert addressing importer and manufacturer obligations); CX 21 at EPA-000447-48 (enforcement alert addressing obligations of importers and manufacturers, including foreign manufacturers).

2. *The ALJ Properly Assessed Penalties Against Taotao Group and JCXI for the Vehicles in Violation*

Regarding whether Taotao Group and JCXI harmed the regulatory scheme by their violations, the ALJ found harm to the regulatory scheme clearly occurred by Respondents providing inaccurate information in their applications. Init. Dec at 33 (citing Tr. at 75 (testimony of Mr. Jackson that a manufacturer's stated design specifications "are critical to how our compliance program functions. It's

important for us to know that the design specifications provided by the manufacturer are in fact consistent with the production specifications."). By manufacturing and introducing into United States commerce vehicles that did not match the descriptions of their COC applications, Taotao Group and JCXI harmed the regulatory program's ability to ensure that vehicles sold in this country comply with emission standards throughout their useful life.

As numerous vehicles sold in the United States are manufactured outside of the United States, adoption of Respondents' interpretation of the CAA that would exclude them from liability and penalties under section 203(a)(1) and 213(d) of the CAA would completely upend the EPA's certification program and eviscerate the CAA's goal to protect public health and environment from pollutants from mobile sources. Therefore, Respondents' appeal on this basis should be rejected.

D. The ALJ had legal authority to assess a penalty in excess of the waivable ceiling established by section 205(c)(1) of the Act, 42 U.S.C. § 7524(c)(1)

Respondents reference the provision of section 205(c)(1) of the CAA, which governs the assessment of administrative civil penalties. This provision authorizes the Administrator to assess a civil penalty for violations of sections 203(a) and 213(d) of the Act in lieu of commencing a civil action. 42 U.S.C. § 7524(c)(1). The maximum administrative penalty sought against each violator in an assessment proceeding is limited to $369,532,[20] "unless the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review." *Id.*

[20] Pursuant to the Civil Monetary Inflation Adjustment Rule, 83 Fed. Reg. 1190, 1193 (Jan. 10, 2018), for violations occurring after November 2, 2015, the penalty limitation under Section 205(c) of the CAA increased to $369,532.

Respondents argue that one of the letters issued by the Department of Justice (DOJ) to provide its concurrence on EPA's determination pursuant to section 205(c)(1) that exceeding the administrative penalty cap against Respondents in this matter is appropriate ("waiver letter"), dated June 2, 2016 (CX 28), contained conditions limiting DOJ's concurrence to certain violations, namely, violations that cause no more than "mere harm to the regulatory scheme," "do not cause excess emissions," and are not "willful, knowing, or otherwise potentially criminal." Taotao USA Br. at 16-19; Taotao Group Br. at 22-29. Respondents then assert that because the penalty in this Proceeding was calculated using the Penalty Policy's factors associated with "actual or potential harm to the environment" and "willfulness and negligence," the violations in the Amended Complaint fall within the exclusion set forth in DOJ's waiver concurrence letter, and therefore the violations are not waived from the section 205(c)(1) administrative penalty limitation. *Id.* Taotao Group and JCXI further read the conditions set forth in the June 2, 2016 waiver letter to retroactively apply to all previous waivers made by DOJ concerning the violations at issue in this Proceeding. Taotao Group Br. at 25.

1. Respondents' Interpretation of CAA Section 205(c)(1) as a Jurisdictional Condition is Wrong

At the outset, Respondents' characterization in their Issue for Appeal of the section 205(c)(1) waiver as "jurisdictional" is inapposite. Section 205(c)(1) of the CAA and 40 C.F.R. § 22.1(a)(2) clearly provide the ALJ with subject matter jurisdiction over this action. The exception to administrative penalty in section 205(c)(1) of the CAA requiring a DOJ wavier pertains only to the maximum administrative penalty sought against each party, not whether an administrative penalty can be sought at

all. Thus, the lack of a DOJ waiver would not preclude, on jurisdictional grounds, the EPA from imposing an administrative penalty against each Respondent up to the cap[21].

Moreover, the section 205(c)(1) waiver determination explicitly is not subject to judicial review. 42 U.S.C. § 7524(c)(1). As such, the ALJ's authority is limited to determining that the requisite waiver occurred, and ALJ is not to second-guess or judge the criteria that the agencies relied upon in making their joint determination. *See* Init. Dec. at 17 (citing *In re Lyon County Landfill*, 8 E.A.D. 559, 568 (EAB, 1999) ("[T]he narrow scope of the Presiding Officer's decision to review the section 113(d)(1) waiver determination is … solely to determine whether the statutory preconditions that enable EPA and DOJ to exercise their discretionary authority to issue a waiver had been satisfied. Such review need not, and indeed should not, interfere with EPA and DOJ's authority to determine, from a policy perspective, when to use the waiver tool."). It is through this lens that the Respondents' waiver challenge should be viewed.

2. *The Administrative Penalty Limitation was Properly Waived by the EPA and DOJ*

The ALJ determined that DOJ waived the section 205(c)(1) administrative penalty limitation on the Agency's authority to assess administrative penalties of Respondents' certification violations set forth in Counts 1 and 8 based upon DOJ's waiver letter of March 17, 2015. Init. Dec. at 30; Acc. Dec. Order at 18 n.25 (citing CX 26); *see also* SMJ Order at 2. The March 17, 2015 letter specifies that the

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[21] Previous Board decisions on CAA "waivers" addressed CAA section 113(d)(1) limits the penalty amount with respect to both matters where the total penalty amount exceeds the administrative penalty cap, and violations occurring more than 12 months prior to the initiation of the administrative action. 42 U.S.C. § 7413(d)(1). *In re Lyon County Landfill*, 8 E.A.D. 559. The plain language of section 205(c) limitation, however, makes it clear that it is a bar that limits the amount the EPA may seek, as opposed to a jurisdictional bar to a claim or action, given that section 205(c) contains no time-based limitation, other than the applicable five-year statute of limitations, and limits the EPA only as to the penalty amount able to be sought. 42 U.S.C. § 7524(c).

administrative action for which the waiver is sought is "against Taotao USA, Inc. and related entities, in connection with the manufacture and sale of highway motorcycles and recreational [vehicles] in violation of the certification requirements of the Act and implementing regulations." CX 26. The ALJ further determined that the ALJ extended the waiver for the additional recreational vehicles in Counts 9 and 10 that had been subsequently found to violate CAA certification requirements based upon DOJ's waiver letter of June 2, 2016. Init. Dec. at 30; Acc. Dec Order at 18 n.25 (citing CX 28); *see also* SMJ Order at 2. The June 2, 2016 letter[22] indicated that it was in response to EPA seeking "a waiver to pursue an administrative penalty action against Taotao USA, Inc., and related entities[23] for additional recreational vehicles (now totaling 1,681[24]) that have been found to violate the certification requirements," stating "I concur with your request for waiver [under 42. U.S.C. § 7524(c)] in order to

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[22] The June 2, 2016 letter refers to a previous "supplemental" waiver letter issued March 24, 2016. This letter was included as Attachment J to the Response to SMJ Motion. *See* Response to SMJ Motion, Attach. J. This waiver letter was not put forth by Complainant as evidence of waiver in its prehearing exchange as the June 2, 2016 letter was sufficient to demonstration a joint waiver determination for the additional violations included in the Amended Complaint.

[23] Taotao Group and JCXI state in a footnote in their brief that it has not been demonstrated that Taotao Group and JCXI are among the "related entities" contemplated by the use of this term in the June 2, 2016 waiver letter. *See* Taotao Group Br. at 24 n. 21. The SMJ Order references a letter, dated January 30, 2015, that Complainant filed in this Proceeding as an attachment to its Response to the Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Response to SMJ Motion"). *See* SMJ Order at 14, citing Compl. Response to SMJ Motion (Aug. 17, 2017), Attach. H ("Response Attach. H"). Response Attach. H is the initial request from EPA to DOJ for the waiver, and the title of the letter is "Request, Pursuant to Section 205(c) of the Clean Air Act, 42 U.S.C. § 7524(c), for a waiver of the Civil Penalty Limitation on EPA's Authority to Initiate an Administrative Case Against Taotao USA, Inc., Jinyun County Xiangyuan Industry Co., Ltd., and Taotao Group Co., Ltd." Response Attach. H. In the letter, EPA explicitly requested that DOJ "waive the limitation on the EPA's authority to assess an administrative penalty for violations" of the CAA, 42 U.S.C. §§ 7522(a) and 7547(d), and the applicable regulations under 40 C.F.R. Parts 86, 1051, and 1068. Id. Also, the May,16, 2016 waiver request letter from EPA that DOJ was responding to in its June 2, 2016 waiver letter explicitly referenced Taotao Group and JCXI. *See* Response to SMJ Motion, Attach. K. Clearly, in responding to EPA's waiver requests, DOJ clearly contemplated that Taotao Group and JCXI would be included as Respondents in the administrative penalty matter covered by the waiver.

[24] 1,681 is the total number of violations included in Counts 9 and 10 of the Amended Complaint.

pursue an administrative penalty in this matter for these additional vehicles." CX 28. In addition, the June 2, 2016 waiver letter addressed EPA's request for a waiver for "certain potential additional violations that may occur in the future." In response, the DOJ letter stated:

> I concur with your waiver request for future violations of section 203(a) of the CAA, 42 U.S.C. § 7522(a), as long as such violations are substantially similar to those covered under the waivers already issued to date, and do not cause the total number of waived vehicles in the matter to exceed 125,000. (This includes both any vehicles that are included in your administrative complaint and vehicles that are not pled in the complaint but that EPA seeks to resolve in its administrative penalty action).
>
> By substantially similar to those covered under waivers concurred upon to date, I mean future violations:
>
> --that harm the regulatory scheme, but that do not cause emissions; and
> --of provisions on certification, labeling, incorrect information in manuals, or warranty information violations.
>
> I ask EPA to consult with us to discuss the path forward for any violations that are not substantially similar, including, but not limited to any future violations:
>
> --that go beyond mere harm to the regulatory scheme;
> --that cause excess emissions;
> --that are other than violations of provisions on certification, labeling, incorrect information in manuals, or warranty information violations; or
> --that are willful, knowing, or otherwise potentially criminal; or
> --that increase the aggregate number of waived vehicles in the mater to over 125,000 total.

The focus of the Respondents' challenge is towards the language in the June 2, 2016 waiver letter concerning future violations that are not "substantially similar" to the certification violations covered by DOJ's waivers. Taotao USA says the language in the letter limits the scope of the waiver to violations that harm the regulatory scheme but do not cause excess emissions, and violations that are not "willful, knowing, or otherwise potentially criminal." Taotao USA Br. at 16–18. Taotao Group and JCXI take it further, reading into the letter an intent to retroactively apply the language to all violations in the case covered by previously-issued waivers. Taotao Group Br. at 25. According to Respondents,

because the ALJ's penalty assessment applies the Penalty Policy's factors regarding the violations' actual or potential harm (which focuses on whether, or to what extent, excess emissions may result from the violations), and willfulness and/or negligence, the violations are not covered by DOJ's waivers.

The March 17, 2015 and June 2, 2016 waiver letters sufficiently demonstrated, and the ALJ correctly decided, that EPA and DOJ jointly determined that seeking an administrative penalty against Respondents above the statutory penalty amount for violations of Section 203(a) and 213(d) of the CAA was appropriate. The March 2015 DOJ waiver letter was in response to EPA's January 30, 2015, waiver request letter, which specifically identified all three Respondents and requested concurrence in Complainant's determination that it was appropriate to pursue an administrative action for a penalty above the cap against Respondents for, specifically, violations of sections 203(a) and 213(d) of the CAA and the regulations governing highway motorcycles and recreational vehicles. Response Attach. H. The March 2015 DOJ waiver letter specifically states that the waiver applies to "the manufacture and sale of highway motorcycles and recreational [vehicles] in violation of the certification requirements of the Act and implementing regulations." CX 26. The June 2016 Waiver letter provides a waiver to an additional 1,681 certification violations regarding recreation vehicles (Counts 9 and 10 of the Amended Complaint) and any future section 203(a) violations that are "substantially similar" to the violations already concurred upon by DOJ's waiver. CX 28. Given such demonstration, EPA has satisfied the statutory preconditions under Section 205(c)(1) of the CAA to assess an administrative penalty above the statutory cap against Respondents. *See Lyon County Landfill*, 8 E.A.D. at 567 (a waiver determination is valid if the statutory conditions for the determination have been met).

Respondents' assertion that the language in the June 2016 waiver concerning the appropriateness of administrative enforcement of certain potential future violations really was meant to be a claw-back of violations in Amended Complaint from being covered by DOJ's waiver completely defies logic,

given how the letter is written. The discussion Respondents rely upon concerns violations that DOJ specifically refers to as "not substantially similar" to the violations already covered by waiver. It is not rational for DOJ to say that future violations that are "substantially similar" to waived violations are now waived *but* waived violations that are not "substantially similar" to waived violations are no longer waived. Rather, the reasonable interpretation is that when the DOJ waiver letter discusses violations that are not "substantially similar" to past waived violations, such violations are of a different category altogether from the substantially similar certification violations that are included in the Amended Complaint. Such reasonable interpretation is consistent with the plain language of both DOJ waiver letters, as both letters clearly state that certification violations are covered within the scope of DOJ's waiver.

Even if one were to read the language concerning future violations in the June 2016 waiver letter as conditions imposed on already-waived violations, the violations in the Amended Complaint clearly fall within such conditions. In the Initial Decision, the ALJ addressed head-on whether the June 2016 waiver letter's descriptions concerning violations not "substantially similar" in any way cabins the scope of the waiver regarding the Amended Complaint's violations, and found that the waiver letter was referring to violations that were not at all like the violations at issue in this case. With respect to the June 2016 waiver letter's reference to violations "that cause excess emissions," the ALJ held that the violations are based upon regulations relating to certification and are not seeking a penalty based upon proof that Respondents' vehicles in fact "caused excess emissions. Init. Dec.at 30 (citing Amended Complaint; Complainant's Initial Post-Hearing at 11, n 1; Complainant's Post-hearing Reply brief at 3) In this Proceeding, Complainant has made it very clear that it is not alleging that Respondents' certification violations actually resulted in excess emissions. For example, Complainant's initial post-hearing brief states that the EPA "does not allege that evidence in this matter shows the violations

caused excess emissions, and does not seek any increase of penalty on that basis." Init. Post Hearing Br. at 11, n. 1. The brief goes on to say that "[a]s to Counts 1 through 8, the gravity component that the EPA seeks under the Penalty Policy is based upon "Moderate" egregiousness level because evidence suggests the vehicles in those Counts may not exceed emissions standards." *Id.* As to Counts 9 and 10, the brief states that the gravity component of the penalty is based upon "Major" egregiousness "because there is no information regarding those vehicles' emissions." *Id.*. Complainant's proposed penalty is based in part on the likelihood that Respondents' violations would potentially lead to excess emissions, which is appropriate, given the Penalty Policy calls for consideration of a violation's actual or potential harm to environment. *Id.* at 27 (citing Tr. at 841). The ALJ's view that Respondents' violations clearly fall within the waiver is bolstered by the fact that nowhere does the June 2016 waiver letter say or even imply that DOJ is concerned about waiving violations would increase the likelihood of potential harm to the environment in a manner that would make such violations not substantially similar to violation covered by the waiver.

Concerning the phrase "mere harm to the regulatory scheme" in the June 2016 waiver letter, the ALJ found that that "the risk of excess emissions created by the failure to have valid COCs also harmed the regulatory scheme as the scheme was designed to prevent such risks." Init. Dec. at 31. The ALJ held that inherent to EPA's regulatory scheme for the certification of engines is the potential for harm to the environment if a violator circumvents the certification requirements, and stated:

> Respondents attempt to have this Tribunal categorize the risk of excess emissions as something more than "mere harm to the regulatory scheme," as so to ignore that risk as beyond a harm for which the Agency was allowed to seek a penalty. However, as the Agency notes, harm to the regulatory scheme ultimately leads to potential harm to the environment, so it would be absurd to adopt Respondents' interpretation of the DOJ waiver because their reasoning would exclude the Agency from penalizing violations that harm the regulatory scheme despite the waiver's express authorization to do so.

Init. Dec. at 32. This is all common sense – of course EPA regulatory programs are designed to limit potential harm to the environment. If violations harm the regulatory program, the violations are going to raise the risk of an adverse impact on the program's ability to limit environmental harm, thus increasing the potential for environmental harm. As the ALJ indicated, one of the declared purposes of the CAA is pollution prevention. Init. Dec. at 31 (citing section 101(c) of the Act, "Pollution Prevention," 42 U.S.C. § 7401(c)). Pollution prevention is the central purpose of the vehicle pre-import, pre-sale certification program. As such, "the Agency's regulatory scheme implementing the Act does not merely provide for injunctions and remediation for excess emissions which have occurred, but also includes a complex compliance scheme, involving permits and COCs, etc., all directed at reducing risk of polluting emissions occurring." *Id.* Thus, for Respondents to say that DOJ wanted in its waiver to exclude all violations that have the potential to harm the environment, frankly, is ludicrous.

With respect to the June 2016 waiver's reference to future violations that are willful, knowing, or otherwise potentially criminal, there is no question that the violations described in the Amended Complaint are for civil penalties with respect to the CAA certification provisions. *See* Amd. Compl. ¶¶ 25–26, 38. Complainant does not allege that "potentially criminal" violations involving efforts to knowingly make a material false statement, representation or certification, or omit or conceal information, occurred in this matter. *See* 42 U.S.C. § 7413(c)(2) (CAA criminal provision). Nor does Complainant allege a willful and knowing effort to deceive EPA occurred in this matter. *See* 18 U.S.C. § 1001 (making it a criminal offense to "knowingly and willfully" make false statements "in any matter within the jurisdiction of the executive, legislative, or judicial branch"). On this, the ALJ stated:

> It is clear from the context of the DOJ authorization and use of the phrase "or otherwise potentially criminal" that the "willful" or "knowing" prohibition applies to enforcement actions arising in a criminal context, or to violations requiring a scienter element. *See* CX 28 at EPA-000547. That is the waiver withholds authorization for a criminal proceeding against the Respondents which DOJ could initiate in a federal district court based

> upon their mental culpability. Again, the only allegations described in this *administrative* proceeding are certification violations under the Clean Air Act, a strict liability statute with no scienter element. To the extent willfulness and negligence were considered, it was only for purposes of calculating an appropriate administrative penalty, not for assessing criminal, civil, or administrative liability. The DOJ waiver contains no stipulation as to Respondents' state of mind within an administrative enforcement proceeding, and the Agency has not alleged any potentially criminal violations. Consequently, Respondents have presented no viable argument based on the DOJ waiver and 42 U.S.C. § 7524(c).

Init. Dec. at 38.

Finally, in an attempt to sow confusion, Taotao Group and JCXI in their brief make the accusation that Complainant "deliberately withheld crucial information" from the Respondents and the ALJ when it redacted portions of the DOJ and EPA waiver letters included as attachments to the Response to SMJ Motion. Taotao Br. at 27. Complainant had redacted privileged legal analysis and proposed litigation strategy from the letters. Response to SMJ Motion at 2-3. However, the ALJ found that such redactions simply reflect the rationale discussed between the EPA and DOJ for concurring on the waiver, and has no bearing on determining the sufficiency of the concurrence itself. SMJ Order at 17. As such she found the redacted, privileged communications have "no effect on this Tribunal's determination as to whether a valid joint determination occurred, as the CAA explicitly provides that '[a]ny such determination by the Administrator and the Attorney General shall not be subject to judicial review'," which means it not the role of the Tribunal to second-guess whether the basis for the joint determination was valid. *Id.* (citing 42 U.S.C. § 7524(c)(1); *Lyon County Landfill*, 8 E.A.D. at 568).

The ALJ correctly found that EPA met the legal prerequisite under section 205(c) of the CAA to assess an administrative penalty above the administrative penalty cap in this Proceeding, and the Respondents have put forth no coherent, supported reason why anything stated in the June 2016 Waiver document should limit or bar assessment of a penalty above the statutory cap for the certification

violations alleged in the Amended Complaint. On this basis, the ALJ's decision with respect to the DOJ waivers and their impact upon the ALJ's penalty decision should stand.

E. It was Appropriate for the ALJ to Decide that EDV Emissions Data was not Relevant to Her Assessment of the Gravity Component of the Penalty

Respondents assert that Complainant stipulated that the production vehicles identified in the Amended Complaint had catalytic converters that conformed to the catalytic converters used on the relevant EDVs tested for certification, and that this stipulation was accepted by the ALJ in her Acc. Dec. Order. Taotao USA Br. at 5, 13–14 (citing Complainant's Combined Response at 14-15 (Jan. 3, 2017); Respondents' Mot. Dismiss for Failure to State a Claim at 9 (Nov. 28, 2016); Acc. Dec. at 30–31); Taotao Group Br. at 20-21. Respondents then argue that Complainant and the ALJ subsequently contradicted themselves by arguing, and ruling, that the EDVs were not necessarily identical to the production vehicles, and testing performed on EDVs was not representative of the production vehicles' emissions over the course of their useful lives. Taotao USA Br. at 6 (citing Complainant's Post-Hearing Br. at 8–9; Init. Dec. at 12–13); Taotao Group Br. at 33-36. Per Respondents, the Complainant was estopped from taking a position contrary to previous stipulation. Taotao Group Br. at 35. Similarly, Respondents contend, the ALJ could not base the penalty on facts that contradict previous findings. Taotao Group Br. at 33–34. Respondents further argue that full-useful life tests conducted on EDVs are representative of the full-useful life emissions of the production vehicles identified in the Amended Complaint. Taotao Group Br. at 34. Because the testing performed on the EDVs shows the vehicles will conform to emissions standards throughout their useful lives, according to Respondents, there is no potential that the production vehicles will harm the environment. Taotao Group Br. at 34. Similarly,

Respondents aver there was no risk for harm to the program because the applications for certification accurately described the useful-life emissions from the production vehicles. Taotao Group Br. at 33–34.

Therefore, Respondents say, the ALJ erred by finding that the violations harmed the program, and created a risk for potential harm. Taotao Group Br. at 34–35. Respondents further argue that because the emissions testing performed on the EDVs show the vehicles identified in the Amended Complaint meet emissions standards in relevant regulations under the Act, the ALJ erred by upholding the EPA's proposal to assess the violations in Counts 9 and 10 as "Major" egregiousness violations, because supposedly data from the EDVs showed the production vehicles met emissions standards at the end of useful life. Taotao Group Br. at 36; Taotao USA Br. at 19-20. [25]

1. Complainant's Proposed Gravity Component of the Penalty was Consistent with the Penalty Policy

A major thrust of Respondents' challenge to the penalty relies on their assertion that the EDV emission tests submitted as part of their COC applications demonstrate that there have been no actual or potential excess emissions from their vehicles.

The Penalty Policy evaluates gravity of the violation in part by characterizing the "egregiousness of the violation as either "Major," "Moderate," or "Minor" based upon "the likelihood that the emissions from the vehicles or engines in violation may exceed certified levels or applicable standards. Init. Dec.

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[25] Respondents appear to argue that because the Amended Complaint does not allege that its subject vehicles were different from the EDVs, the ALJ cannot consider whether or not these vehicles were similar to the EDVs when determining the appropriate penalty. Taotao USA Br. at 14–15; Taotao Group and JCXI's brief at 33–34. The Respondents argue that the ALJ can only make factual findings on matters of controversy as set forth in the Amended Complaint, and there was no controversy over whether productions vehicles matched EDVs, so the ALJ cannot make a contradictory finding. The Complaint and Amended Complaint clearly are sufficient under 40 C.F.R. § 22.14 and provide an adequate basis for notice to Respondents and for the ALJ to make her finding. *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (complaint must contain sufficient factual matter to state a claim that is plausible on its face).

at 23 (citing CX 22 at EPA-000467). A "Major" violation is one "where excess emissions are likely to occur," such as in engines with defective catalytic converters. *Id.* A "Moderate" violation involves "uncertified vehicles or engines where the emissions . . . are likely to be similar to emissions from certified vehicles or engines." *Id.* "Minor" violations are those involving defective emissions control labels. *Id.* Complainant calculated the proposed penalty by assigning Moderate egregiousness for Counts 1 through 8, given the low-hour testing done pursuant to EPA's test order did not reveal excess emissions, and major egregiousness for Counts 9 through 10, where emission testing was not done. Init. Dec. 25-26. The ALJ found that Complainant appropriately assigned the egregiousness factors based upon the facts of this case. Init. Dec. 32-34. In making this finding, the ALJ rejected Respondents' claim that the emission tests conducted on the EDVs prior to certification demonstrative the long-term viability of the production vehicles' catalysts, given that all of the relevant engine families in this case relied on an EDV from a previous model year for certification, meaning the EDVs were not manufactured at the same time as the production vehicles. *Id.* at 32. "Thus," the ALJ noted, "performance characteristics of the EDVs cannot be presumed to apply to vehicles in this case based on a shared production process" and "[l]ikewise the reverse comparison between emissions of the tested vehicles and Respondents' EDV are invalid. *Id.*

2. *Respondents Assertion that the EPA Stipulated to the EDVs Representing the Production Vehicles is Wrong*

As an initial matter, beyond their so-called "stipulation," Respondents have put forth no evidence for support that the EDV test data has relevance for assessing actual or potential emissions from the production vehicles. Given that the catalyst information in the COC applications have been proven to be false, one cannot help but suspect the reliability of any submitted test data with those applications. See

Init. Dec. at 33. Further, as demonstrated below, there was no stipulation between Complainant and Respondents that production vehicles identified in the Amended Complaint were representative of the EDVs that provided certification emission data for each engine family identified in the Amended Complaint. In the absence of evidence of emissions as to vehicles in Counts 9 and 10, the ALJ reasonably ruled on the gravity assessment of the penalty calculation for all Counts in the Amended Complaint, Counts 9 and 10 inclusive.

Respondents' assertion that Complainant stipulated that the EDVs were representative of the production vehicles, and was thus estopped from questioning the reliability of the EDV test results as applied to the production vehicles, is a distortion of the record in this matter. Rather, during the liability phase, Complainant asked the ALJ to construe statements made in Respondents' briefs as a stipulation or admission that none of the vehicles identified in the Amended Complaint conformed to the descriptions in their corresponding COC applications. Respondents subsequently denied making the admission, and the ALJ declined to construe the statement as a stipulation that would remove an issue from controversy. The following timeline explains what occurred in more detail.

On November 28, 2016, Complainant filed its Motion for Partial Accelerated Decision with an attachment enumerating 107 assertions of fact, with citations to the record, that Complainant argued were uncontroverted and entitled it to judgment as a matter of law. The enumerated facts as they pertained to liability referred to catalytic converters for each of the vehicles in the engine families in Counts 1 through 10 as materially different from the specifications in the respective COC applications. None of the material facts the ALJ found not in genuine controversy had anything to do with the EDVs or the test results from EDV testing that was used for certification. On that same date, Respondents collectively filed a Motion to Dismiss for Failure to State a Claim and a Motion for Accelerated Decision. On page 9 of the Motion to Dismiss, Respondents argued, as they do on appeal (*see* section

III. B., above), that COCs cover all vehicles represented by the certification EDV, and that EPA had failed to state a claim by not alleging that the production vehicles did not match the certification EDVs. In doing so, Respondents asserted without evidence that "the EDV that passed the emissions standards contained a catalytic converter which conformed to the catalytic converter on imported vehicles." Mot. Dismiss for Failure to State a Claim at 9. In response, Complainant argued that Respondents' statements constituted a stipulation or admission that the vehicles inspected by EPA were representative of all the vehicles identified in the Amended Complaint, and requested the ALJ treat it as a judicial admission to remove the fact from controversy.[26] Combined Response at 14–15 (Jan. 3, 2017). Respondents' counsel subsequently denied making any such stipulation or admission. Respondents' Reply to Complainant's Combined Response at 13 (Jan. 13, 2017).

3. The Emissions Tests Respondents Submitted with COC Applications had no Relevance to the ALJ's Penalty Assessment

The ALJ did not accept Complainant's request to treat Respondents' statement as a dispositive admission. Instead, in the Acc. Dec. Order, Judge Biro identified several facts that contributed to her liability ruling that none of the 109,964 vehicles in this matter would conform to design specifications of their COC applications, including "the uniformity of the manufacturing process" and "the common source of the catalytic converters," that no post-production alterations are made to the vehicles, that inspected vehicles from all ten engine families represented in Counts 1 through 10 failed to match their COC application descriptions, and the EPA's expert opinion that it was highly likely that none of the

[26] Respondents do not allege, and the record does not show, that Complainant ever offered to stipulate to identicality between the EDVs and production vehicles, nor the accuracy or reliability of the certification tests performed on the EDVs.

vehicles in the ten engine families would yield compliant results, as well as the absence of any contradictory evidence from Respondents. Acc. Dec. at 31. The Order on liability further found that the 107 material facts set forth by the EPA with its Motion for Accelerated Decision are not in genuine dispute and exist without substantial controversy. *Id.* At no point did Judge Biro find that the catalytic converters equipped on the EDVs were identical to the catalytic converters equipped on the vehicles identified in the Amended Complaint.

Following the ALJ's ruling on liability, the only evidence concerning the catalytic converters on the certification EDVs were the descriptions in the applications for certificates of conformity (CX 1- CX 10), data from analytical tests conducted on vehicles manufactured years after the certification EDVs, and the contradictory statements by Respondents' counsel. *Compare* Respondents' Mot. Dismiss for Failure to State a Claim at 9 *with* Respondents' Reply to Complainant's Combined Response at 13. As Complainant argued in its responsive Post-Hearing Brief, "[f]rom the available evidence, neither Complainant nor Respondents know whether the EDVs accurately represent the production vehicles identified in the Amended Complaint . . . The uncertainty about Respondents' EDVs is emblematic of the harm Respondents caused to the program." Complainant's Reply Post-Hearing Br. at 9 (Jan. 19, 2018).[27]

As noted above, the ALJ observed that the "performance characteristics of the EDVs cannot be presumed to apply to vehicles in this case based on a shared production process" because the EDVs were not manufactured at the same time as the vehicles identified in the Amended Complaint. Init. Dec.

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[27] Respondents are required to preserve the certification EDVs, and thus were in a position to produce evidence demonstrating conclusively whether the EDVs were representative of the production vehicles. Alternatively, Respondents could have re-run full certification testing on vehicles from the engine families identified in the Amended Complaint to demonstrate that their full-useful life emissions would be comparable to those of certified vehicles.

at 32. The certification applications for the engine families identified in Counts 9 and 10 show a model year 2010 EDV was used to certify model year 2015 and 2016 engine families, respectively. *Id.* Because the information Respondents submitted to the EPA in the COC applications had been proven unreliable, the ALJ rejected Respondents' argument that the applications demonstrated that the vehicles identified in Counts 9 and 10 would have emissions comparable to those from certified vehicles. *Id.* at 33. The ALJ found that evidence in the record suggested the vehicles in Counts 9 and 10 were equipped with inadequate catalytic converters, and that no countervailing evidence had been produced to indicate the vehicles in Counts 9 and 10 would remain emission compliant throughout their useful life. *Id.* at 32–33. The ALJ therefore determined that under the Penalty Policy it was appropriate to characterize the violations in Counts 9 and 10 as being of "Major" egregiousness.[28]

The ALJ's decision to assess Counts 9 and 10 as "Major" egregiousness was consistent with her findings in the Liability Order, and was reasonable based on the evidence in the record. Respondents' argument that the ALJ and Complainant were inconsistent is meritless.

F. The ALJ's penalty determination correctly and reasonably applied the statutory factors as well as the Penalty Policy when assessing the penalty in this matter

Taotao USA argues that the Complainant erred in seeking an economic benefit of $219,299 because the amount included both the cost of purchasing and installing the correct catalytic converters, and the cost of additional staffing necessary to have prevented the violations from occurring. Taotao USA Br. at 21-22. Taotao USA further argues that the Respondents could have avoided the violations through the cost of either installing the correct catalytic converters, or through additional staffing, one or the other,

[28] Reducing Counts 9 and 10 to "Moderate" egregiousness would cut the penalty for vehicles in Counts 9 and 10 in half, reducing the penalty assessed against Taotao USA and JCXI by $266,207.53.

but not both.[29] As to the gravity component of the penalty, Respondents argue that the June 2016 waiver concurrence from DOJ precludes any consideration of excess emissions or the potential for excess emissions. The briefs contain two variations on the theme of preclusion by way of the June 2016 DOJ waiver concurrence. Taotao USA argues that the Penalty Policy's first step in calculating the gravity component of the penalty should be ignored because it is based on an engine's horsepower as a proxy for its potential to generate emissions. Taotao USA Br. at 19, 22-24. As an alternative, Taotao USA argues the gravity should have been limited to $500 per violation because this is the amount the Penalty Policy allows for labelling violations that merely harm the program. Taotao USA Br. at 19. Taotao Group and JCXI argue that the June 2016 DOJ letter results in disregarding the Penalty Policy because the Policy is largely silent on penalty calculations for violations that merely harm the regulatory scheme. Taotao Group Br. at 30, 36.

Taotao USA argues that all violations should have been assessed based on "Moderate" egregiousness under the Penalty Policy because the Complainant supposedly stipulated that the EDVs for certification were representative of the production vehicles. *Id.* at 20. Taotao Group and JCXI argue that the supposed stipulation by the Complainant that there were no excess emissions based on the EDVs representing the production vehicles precludes any consideration of the first step of the gravity component calculation because that portion of the gravity calculation is based on an engine's horsepower as a measure to the engine's potential for emissions. Taotao Group Br. at 32-25. Respondents make the argument that all of the vehicles in the Amended Complaint should have been scaled together in the gravity calculation. Taotao USA Br. at 20; Taotao Group Br. at 36. Taotao Group and JCXI argue that it was wrong for the EPA to restart the scaling for Counts 9 and 10, which

[29] Taotao USA intends to argue, presumably, that the ALJ erred as well, although this is not stated in Taotao USA's brief.

Complainant based on the rationale that the violations occurred after the NOV was issued because the NOV was issued to Taotao USA only, and Taotao Group and JCXI were never given notice. Taotao USA argues that the DOJ waiver concurrence letter in June 2016 precludes consideration Taotao USA's willfulness and negligence, and Complainant's gravity adjustment to reflect Taotao USA' willfulness or negligence was prohibited. Taotao USA Br. at 20. Taotao Group and JCXI argue that the Complainant and ALJ erred by increasing the penalty against all Respondents due to a history of noncompliance because the previous violation on which the penalty increase was based was resolved through a settlement agreement signed only by Taotao USA. Taotao Group Br. at 35; see CX067.

1. The ALJ Did Not Err in Considering and Calculating Economic Benefit

In her assessment of economic benefit, the ALJ primarily considered the evidence of Respondents' economic benefit provided by Respondents' expert witness, Jonathan S. Shefftz. Init. Dec. at 18. Mr. Shefftz, who was qualified as an expert economist and expert in the economic benefit component of the Penalty Policy, was the only witness Respondents called at the hearing. Init. Dec. at 5 and 18; Tr. at 861, 863. Mr. Shefftz calculated four different economic benefit scenarios that he thought might apply to this case. Init. Dec. at 18; Tr. at 692, 864; RX 1.

Mr. Shefftz's first scenario was based upon an assumption that Respondents could have avoided the violations in this case if they had simply taken the administrative step of ensuring the catalytic convertor precious metal content identified in the COC applications matched the precious metal content of the catalytic convertors that actually were installed in Respondents' vehicles. Init. Dec. at 18.

In scenarios two and three, Mr. Shefftz estimated what would have been the cost of Respondents paying more to their catalytic converter supplier for higher precious metals contents so as to match the COC specification. Init. Dec. at 19; RX 1 at 15; *see also* Tr. at 869-70.

In scenario four, Mr. Shefftz considered the net costs that would have been incurred by Respondents had they simply bought catalytic converters with metals compositions that matched the COC applications. Init. Dec. at 19; Tr. at 871; RX 1 at 18. To make these calculations, Mr. Shefftz used cost information supplied by Respondents that they indicated represented the cost for the actual catalytic converters used in the vehicles at issue in this case, and the cost of catalytic converters that met the COC metals content specifications. Init. Dec. at 19; Tr. 872. Mr. Shefftz also included in Scenario 4, as well as Scenarios 2 and 3, the costs estimated for Scenario 1, as he reasoned that increased staffing costs would be incurred to ensure the changes to the vehicles were compliant. *Id.* at 18-19 (citing Tr. at 896-98). Mr. Shefftz's total calculated economic benefit from the violations for each scenario is as follows: Scenario 1 ($104,961); Scenario 2 ($129,843); Scenario 3 ($220,731); and Scenario 4 ($219,299). Init. Dec. at 18-19; RX 1 at 21.

Based upon the evidence before her, the ALJ determined that the fourth scenario, which includes the net cost of purchasing compliant catalytic converters using the figures provided by Respondents, plus the cost of having the necessary staffing, consultants, and engineers to ensure that the catalytic converters installed accurately matched the specifications in Respondents' COC applications was the best measure to calculate economic benefit for the violation in this case. Init. Dec. at 21. Moreover, this scenario best fit the guidance provided by the Penalty Policy regarding assessing economic benefit for missing or defective emission control devices. In a situation where an imported engine costs less to produce because it was manufactured with a non-compliant catalyst, the Penalty Policy indicates that "the cost of purchasing and installing [a compliant] catalytic converter may be used to approximate the violator's economic benefit from the introduction into commerce or importation of the uncertified engine." CX 22 at EPA-000462; Init. Dec. at 18. Respondent Taotao USA argues that the ALJ's acceptance of Respondent expert's Scenario 4 as the appropriate measure of the economic benefit is

inappropriate because it includes the added staffing costs calculated from Scenario 1. In support of this argument Respondent says that had it "used catalytic converters with the certified specifications, there would be no avoided costs, and the economic benefit would be $114,338 [Scenario 4 minus Scenario 1]." Taotao USA Appeal Br. at 21. Respondent further notes the Mr. Shefftz testified at the hearing that in adding the additional staffing costs to scenarios 2 through 4, he took a "more aggressive approach or a more upwardly-biased approach...." *Id.*, citing Tr. at 898.

Respondent ignores that its expert at hearing indicated that he added the costs of additional staffing to scenarios 2 through 4, even though it was contrary to the financial interest of his clients, the Respondents, because it was "more comprehensive" and "the most accurate approach that I felt was justified here." Init. Dec. at 19, citing Tr. at 898. Moreover, Mr. Shefftz indicated that the staffing costs for scenarios 2 through 4 could be higher than for scenario 1 because scenarios 2 through 4 would likely involve engine testing. *Id.* Respondent thus wants this Board to ignore the opinion made by its own expert at the hearing on staffing costs (an expert who was qualified with expertise in the economic benefit component of the Penalty Policy).

Moreover, Respondent provides the Board nothing to contradict the ALJ's holding that, beyond incurring costs to obtain COCs for their vehicles, Respondents were "obliged to incur the cost of staffing, etc., to ensure that what they were actually purchasing and installing in their engines matched what was in their approved COC applications." Init. Dec. at 21. The ALJ found:

> ...It is clear from the facts here that, at least as to the catalytic converters, Respondents were not undertaking such quality control, or at least not undertaking it competently, and did not do so over the course of many years. They incurred a financial savings as a result and perhaps a competitive advantage as well. As such, this actual economic benefit may also be recovered by the government...
> ...To know they were complying with the CAA, regardless of what converters they purchased, Respondents would have had to monitor and evaluate that the catalysts they were buying and installing on their engines to confirm the catalysts did in fact meet their claimed specifications.

> Although Mr. Shefftz calculated the cost of hiring an engineer on a part time basis and used this calculation as a broad proxy for compliance costs generally, his methodology and assumptions are acceptable based on the evidence available in this case. Undoubtedly, his staffing calculation is less than the costs Respondents actually avoided given that he did not also include the cost of testing that would be necessary for compliance. *See* Tr. at 896-98.

Id.

Taotao USA alternatively argues that Scenario 1 should be the appropriate measure of economic benefit, saying, "Respondents could have simply listed the correct catalytic converter concentrations on the COC applications, and given that the EDVs with the uncertified catalytic converters passed the useful life emissions and the Agency's decision to approve the design specifications could have only been based on those tests… the only economic benefit would then be the cost of additional staffing alone." Taotao USA Br. at 21. Respondent, however, has put forth no credible evidence in this Proceeding showing that it could have complied with certification requirements simply by changing the metal contents listings specified in its COC applications. All they put forth is the admission by counsel on Respondents' behalf that the catalytic converters installed on the imported vehicles match the catalytic converters installed in their EDVs, which counsel subsequently contradicted. See As explained earlier, whatever emissions testing Respondents conducted on those EDVs was not relied on by the ALJ in her penalty assessment. See Section IV.E. above. Moreover, the ALJ found that "there is insufficient evidence that Respondents' vehicles, utilizing the design specifications as actually built, would meet emission standards throughout their useful life and/or that a COC application that accurately described Respondents' catalysts would have been approved…" Init. Dec. at 22. The ALJ pointed out that Mr. Jackson testified at the hearing that most of the catalytic converters installed in Respondents' vehicles contained only the metal palladium, which would increase their likelihood of poisoning and make them less effective later in their useful lives. *Id.* at 22 (citing Tr. at 136). The ALJ thus held, "[a]s such, it is

pure speculation to assume that Respondents' COC applications would have been approved had they originally submitted accurate descriptions of their catalysts as actually installed, particularly given that an accurate description would raise questions about the long-term durability of said catalysts." *Id.* As Respondent has nothing convincing to offer that it could have complied through a change of its application's descriptions of its catalytic converters alone, Respondent's brief falls silent in response to this part of the Initial Decision.

2. *DOJ's Waiver Did Not Restrict the ALJ from Applying the Penalty Policy to the Gravity Assessment in this Case.*

Additionally, Respondents in their briefs assert that the language of the June 2016 waiver letter restricts the ALJ from considering in its penalty assessment the actual or potential environmental harm from the violations or the Respondents' culpability (willful or negligent conduct) concerning the violations. Taotao Group Br. at 28–29. Taotao Group and JCXI further argue that the limitations effectively preclude application of the Penalty Policy because it bases the Preliminary Deterrence amount in part on the size of a violative vehicle's engine size as a proxy for the potential harm that could result from a violation, and calls for consideration of whether a violation results from willful or negligent behavior. Taotao Group Br. at 30, 33.

The letter does not restrict what facts the ALJ may consider in determining an appropriate penalty. The letter documents the DOJ's concurrence in EPA's determination that it is appropriate for Complainant to seek, and the EPA to assess, an administrative penalty more than the statutory cap for the violations identified in the Complaint and Amended Complaint. Once the joint determination is made, the ALJ should consider all the evidence in the record and apply the statutory and regulatory penalty factors. *See* 42 U.S.C. § 7524(c)(2) (identifying factors the Administrator "shall take into account" when determining amount of civil penalty); 40 C.F.R. § 22.27(b) ("the Presiding Officer [ALJ]

shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act," and "shall consider any civil penalty guidelines issued under the Act"); *John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 782–83 ("the ALJ must have the authority and discretion to examine and weigh the evidence").

The Penalty Policy encompasses both "actual or potential harm" to the environment and harm "to the regulatory scheme" in a single penalty calculation method. CX022 at EPA-000470–76. Indeed, the method demonstrates that potential environmental harm and harm to the regulatory scheme are both considered when calculating a penalty for *all* types of violations. Base per-vehicle gravity is always initially calculated by reference to a vehicle or engine's horsepower,[30] without regard to whether the penalty is for a certification violation under CAA section 203(a)(1), 42 U.S.C. § 7522(a)(1), or a labeling violation under CAA section 203(a)(4), 42 U.S.C. § 7522(a)(4).[31] *Id.* at EPA-000470. Certification violations are then deemed to be of "Major" egregiousness if excess emissions are present or if there is no information about potential emission consequences, or "Moderate" egregiousness if emissions from the uncertified vehicles are likely to be similar or identical to emissions from certified vehicles. *Id.* at EPA-000467. Labeling violations are "Moderate" if labels are missing or certification status cannot be determined, or "Minor" if the deficient label nonetheless shows the vehicle's certification status. *Id.* at EPA-000467–68. The calculation method set forth in the Penalty Policy thus applies to all violations within its scope, regardless of the type and degree of harm they cause. *See id.* at

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[30] Respondents correctly note that Complainant's witness, Ms. Amelie Isin, misspoke when testifying about how the proposed penalty was calculated in this matter. Rs' Br. at 11. Table 1 of the Penalty Policy calculates the base gravity by multiplying $80 times the first ten horsepower of an engine, not $15 as stated by Ms. Isin. CX022 at EPA-000470; Tr. 558–59. The EPA proposed penalty and the ALJ's assessed penalty both use the correct $80 per horsepower amount for the first ten horsepower.

[31] The base per-vehicle or engine penalty amount is for violations of emissions label requirements is determined first by reference to engine size, but is capped at $500.

EPA-000455–56 (scope).

To avoid a plain, straightforward application of the Penalty Policy, Respondents contort logic by arguing that no gravity penalty should be assessed in this matter (Taotao USA Br. at 3), that the Penalty Policy provides no method for calculating a penalty (Taotao USA Br. at 9–10), and that the violations should be Minor (Taotao USA Br. at 12). Respondents' arguments thwart the objective of the Act, are contradicted by the plain language of the letter and the Penalty Policy, and should be rejected.

Respondents' interpretation also leads to absurd results. Though the concepts of harm to the "regulatory scheme" and harm in the form of actual or potential excess emissions are described separately in the Penalty Policy, *see* CX022 at EPA-000465 and 469, in actuality harm to the regulatory program leads to potential harm to the environment. The Penalty Policy explains that one factor in assessing the gravity component of a penalty is the violated requirement's "importance to the regulatory scheme," meaning "the importance of the requirement to achieving the goals of the [Act] and its implementing regulations." *Id.* The goals of the Act and its implementing regulations are to protect human health and the environment by preventing air pollution and protecting air quality. 42 U.S.C. § 7401; Tr. 44. The Act accomplishes these goals in part by establishing pollutant emission standards for vehicles and engines, and enforcing those standards through the preventative pre-importation, pre-sale certification program implemented by EPA. 42 U.S.C. §§ 7521(a)(1), 7525(a)(1); Tr. 44–46. When the regulatory scheme is harmed, there is an inherent risk that harm to human health and the environment will follow in the form of excess emissions. *See Carroll Oil Co.*, 10 E.A.D. 635, 658–59 (EAB 2002) (failure to comply with regulatory scheme over time increases risk of potential environmental harm and impairs broader objective of preventing contamination); *Everwood Treatment Co., Inc.*, 6 E.A.D. 589, 602–03 (EAB 1996) (adverse effect on program created potential for environmental harm resulting in major violation). "[I]t is the potential in each situation that is important, not solely whether harm has

actually occurred." *Euclid of Virginia, Inc.*, 13 E.A.D. 616, 694 (EAB 2008) (deviation from regulatory requirements creates potential for harm to the environment). This is consistent with the plain language and context of the letter. The letter documents DOJ's concurrence that this matter is appropriate for administrative resolution, meaning resolution through an adjudicatory process in which injunctive relief, additional discovery, and criminal sanctions are not available. The limiting language in the letter identifies types of violations that may not be appropriate for administrative resolution, i.e., violations that demonstrably "cause excess emissions" and therefore require injunctive relief to remedy; violations that are or might be criminal; or violations of a number or nature requiring additional discovery and process only available in district court. *See* CX028 at EPA-000546–47. As stated above, the letter itself makes no reference to violations that may carry the potential for excess emissions. *Id.* There is nothing in the letter to suggest arbitrary limits have been imposed on the ALJ's power to assess a penalty for the violations in this waived matter. Indeed, any such attempt would be contrary to the purpose of waiving the penalty cap in the first instance.

3. The ALJ Appropriately Applied "Major" Egregiousness to Counts 9 and 10.

The Penalty Policy provides that "Major" egregiousness applies to violations where excess emissions are likely to occur, including situations where emission control devices are missing or defective. CX028 at 13. Also, the Penalty Policy states that "violations should be classified as "Major" if vehicles or engines are uncertified and there is no information about the emissions from these vehicles or engines, or test data of the uncertified engines show the engines exceed emission standards. *Id.*

The ALJ applied "Major" Egregiousness to Counts 9 and 10, given "there was no evidence produced to indicate that they will remain emissions-compliant throughout their useful lives" and the evidence "points only to the fact that their catalytic converters contain inadequate quantities and

proportions of precious metals, and that they therefore cannot be expected to produce emissions similar to emissions from certified vehicles or engines." *Id.* (citing Acc. Dec. Order at 13-14; Tr. at 594).

In their briefs, Respondents argue Counts 9 and 10 should not have been characterized as being of "Major" egregiousness because Respondents claim that Complainant stipulated that the certification EDVs were representative of the vehicles in those Counts, and thus the record showed full useful life emissions data for those vehicles. Taotao USA Br. at 20; Taotao Group Br. at 36. Elsewhere in this Response, Complainant already addressed the relevance of the certification testing performed on the EDVs, that there was no stipulation that the EDVs represented the production vehicles identified in the Amended Complaint, and that the certification test results are not reliable. *See* sections IV. E. and IV. B. 1., above. . Moreover, the ALJ specifically considered the EDV test data for purposes of considering egregiousness with respect to Counts 9 and 10 and held that "Respondents' argument that useful emissions information can be gleaned from the COC applications for vehicles in Counts 9 and 10 falls flat because the information in those applications has already been proven to be unreliable." Init. Dec. at 33.

4. The ALJ Appropriately Applied the Penalty Policy's Scaling Factor for Multiple Violations.

The Penalty Policy provides for the use of scaling factors to adjust the overall gravity penalty calculation downward when dealing with very large numbers of violation to avoid an unreasonably high overall penalty. CX 22 at EPA-000469. The Penalty Policy indicates that the litigation team has the discretion, when using scaling, to "group" violations, and restart the scaling factor for each group, depending upon the facts of the case or other relevant criteria or bases on which to group the violations. *Id.* at EPA-000472; see also ***Peace Industry Group***, 17 E.A.D. at 356 (EAB approved assessed penalty against vehicle manufactures based upon group scaling, since the Penalty Policy grants enforcement

personnel discretion "as to how they apply scaling factors" where a case involves vehicles/engines with multiple violations). The ALJ applied the scaling factor to Counts 1 and 8 as a group, and then applied a separate scaling factor to Counts 9 and 10 as a group. Init. Dec. at 34. The ALJ indicated it was appropriate to scale Counts 9 and 10 separately given the violations were discovered after the original Complaint was filed, Respondents were on notice of the violations outlined in Counts 1 through 8 at least as early as December 24, 2013, and they did not submit COC applications for vehicles in Counts 9 and 10 until June 2014 and June 2015. Init. Dec. at 34 (citing CX 9 and CX 10). Therefore, it was reasonable to rescale for Counts 9 and 10, as the "Respondents knew about problems with their catalytic converters, could have made changes to their manufacturing/quality control/importation process before importing the vehicles in Counts 9 and 10, but chose not to." *Id.*

Further, **Taotao Group and JCXI complain that** Complainant and the ALJ restarted scaling for Counts 9 and 10 because those violations occurred after the Notice of Violation, and doing so vis-à-vis Taotao Group and JCXI was erroneous because the Notice of Violation was only issued to Taotao USA, and JCXI therefore did not have notice. Taotao Group Br. at 36. Respondents are mistaken - the NOV is clearly addressed to all three Respondents. CX092 at EPA-001112.

5. The ALJ Appropriately Applied the History of Noncompliance Factor to Taotao Group and JCXI.

Taotao Group and JCXI argue that Complainant and the ALJ erred by increasing the penalty against all Respondents due to a history of non-compliance because the previous violation on which the increase was based was resolved through a settlement agreement signed only by Taotao USA. Taotao Group Br. at 36; *see* CX067.

The Penalty Policy indicates that it is appropriate to impute a prior violation between parent or subsidiary corporations, with the assumption that the parent controls the subsidiary corporate organization, unless the violator can demonstrate an absence of corporate control or oversight linkage between the organizations. CX 22, EPA-000475, 000480. The situation at bar involving extensive familial, financial and business operational ties among Taotao Group, JCXI and Taotao USA owners and officers is one that is analogous to where a corporate parent is imputed with the violations that occurred because the whole operation was controlled by Yuejin Cao, owner and President of Taotao and its subsidiary JCXI. .

The 2010 ASA was executed to resolve 3,768 CAA violations for Taotao USA's importation of uncertified vehicles manufactured with undisclosed adjustable parameters and emissions-related parts different from those described in the COC applications. Init. Dec. at 39 (citing CX 67; Tr. at 140-42, 598-600). See Section III.C., Factual Background. As such, the ALJ found that the ASA violations are clearly similar to the violations in the Amended Complaint. *Id.* The ALJ found it was appropriate to apply a 20% penalty increase based on the History of Noncompliance factor to all three Respondents given that the evidence presented "joins all three Respondents in serving the same business enterprise under the ownership and control of the Cao family." *Id.* Moreover, the ALJ noted that, "the Chinese catalyst testing conducted...in response to the 2010 ASA was ordered by [Taotao Group], and Matao Cao in his deposition reported discussing the impact of the 2010 ASA violations with his father." *Id.* (citing CX 216 at 129-30, 135).

The ASA required Taotao USA to implement a compliance plan for all new vehicles Taotao USA imported thereafter, including pre-importation and post-importation inspections and testing of catalytic converters to ensure compliance with the governing regulations. CX067, EPA000828-846. The plan required periodic reporting whereby Taotao USA was required to submit information to the

EPA. Id. at EPA-000832. The record in this matter includes documentation of an extensive back and forth of communications between the EPA and employees of Taotao USA regarding the subject of compliance with the requirements of the ASA. *See* CX69, EPA-000850-862; CX 72, EPA-000865; CX74, EPA-000868-873; CX76, EPA-000891-907. Ms. Isin repeatedly inquired as to missing or deficient information concerning catalytic converter testing results required under the ASA for imported vehicles, the EPA received only a small fraction documents that were required to be submitted to the EPA, and these communications reflect the breadth and depth of involvement of the employees in China for the Taotao manufacturing operations, and the control the employees in China had with respect to information that was required under the compliance plan.. The EPA determined that Respondents lacked serious commitment to the requirements of the ASA compliance plan. CX071, EPA-00863-864. As a result, the EPA assessed stipulated penalties for failure to comply with the ASA. CX 73, EPA-000866-867; CX 74, EPA-000999-889. The ALJ thus correctly determined, "[i]n the absence of evidence to the contrary, this is sufficient to implicate [Taotao Group and JCXI] in the prior violations that were the subject of the 2010 ASA. *Id.*

VI. Conclusion

For the foregoing reasons, the Complainant requests that the EAB uphold the decisions of the ALJ, and dismiss this consolidated appeal.

This Brief complies with the EAB's word limitation of 28,000 words.

Respectfully Submitted,

10/24/18
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CERTIFICATE OF SERVICE

I certify that the Complainant's Response Brief in *In re* Taotao USA, Inc., et al., Docket No. CAA-HQ-2015-8065, CAA Appeal Nos. 18-01 & 18-02, was filed and served on the Environmental Appeals Board by hand delivery.

I certify that a copy of the unredacted Brief and a copy of the Brief as redacted to remove Confidential Business Information were sent this day by UPS mail, for service on Respondents' counsel at the address listed below:

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