UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER ON PARTIAL ACCELERATED DECISION AND RELATED MOTIONS

On November 12, 2015, Complainant, the United States Environmental Protection Agency ("EPA" or "the Agency"), filed a Complaint against Respondents Taotao USA, Inc. ("Taotao USA"), Taotao Group Co., Ltd. ("Taotao China"), and Jinyun County Xiangyuan Industry Co., Ltd. ("Jinyun") alleging, in eight counts, 64,377 violations of sections 203 and 213 of the Clean Air Act (CAA), 42 U.S.C. §§ 7522, 7547, and implementing regulations codified at 40 C.F.R. Part 86, Subpart E and 40 C.F.R. §§ 1051, 1068. The action arises out of the Respondents' manufacture and import into the United States of motorcycles and recreational vehicles with catalytic converters not designed or built in accordance with their Certificates of Conformity ("COC").

Respondents filed answers to the Complaint on January 19, 2016, and February 9, 2016, respectively. On July 5, 2016, I granted the Agency leave to amend its Complaint.[1] In doing so, the Agency added two more counts and allegations of additional wrongdoing under sections 203 and 213 of the CAA, 42 U.S.C. §§ 7522, 7547, raising the total number of violations to 109,964. Am. Compl., ¶ 38. Respondents filed amended Answers to the amended Complaint on August 17, 2016.[2] On August 25, 2016, the Agency filed its prehearing exchange materials, followed by rebuttal prehearing exchange material on October 13, 2016. Respondents submitted their joint prehearing exchange on September 23, 2016.[3]

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[1] The Amended Complaint was filed on June 14, 2016, the same date the Agency requested leave to amend. After leave to amend was granted, the Agency served the Amended Complaint on Respondents by certified mail. Proof of Service (Aug. 4, 2016).

[2] Although Respondents separately filed their Amended Answers, when appropriate, this Order refers to the three collectively as "Respondents' Amended Answers."

[3] Respondents' prehearing exchange filed in this office differed from the prehearing exchange it provided the Agency. Respondents submitted additional filings on October 28, 2016, and November 3, 2016, intended to correct the September filing discrepancies.

On November 28, 2016, the Agency filed its First Motion to Supplement the Prehearing Exchange ("First Motion") and a Motion for Partial Accelerated Decision ("Agency AD Motion"). The same day, Respondents filed a Motion to Dismiss for Failure to State a Claim ("Motion to Dismiss") and a Motion for Accelerated Decision ("Respondents' AD Motion"). Thereafter, on January 3, 2017, the Agency filed a Second Motion to Supplement the Prehearing Exchange ("Second Motion"). Within that document, the Agency also responded ("Agency Response") to the Respondents' AD Motion and the Motion to Dismiss. Also, that same day, Respondents filed their "Response to Complainant's Motion for Partial Accelerated Decision" ("Respondents' Response"). On January 13, 2017, both parties submitted reply briefs. Complainant's Reply in Support of Complainant's Motion for Partial Accelerated Decision ("Agency Reply"); Respondents' Reply to Complainant's Combined Response to Respondent's Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision ("Respondents' Reply").

I. Motions to Supplement the Prehearing Exchange

In its First Motion to Supplement the Prehearing Exchange, the Agency asks to add nine exhibits, numbered CX 170 through CX 178, to its prehearing exchange. First Motion at 2. The exhibits include documents responsive to a request for information related to Respondents' claimed inability to pay, a letter requesting information regarding the economic benefit Respondents obtained through noncompliance, and documents discussing catalytic converters and rules concerning motor vehicle certification. First Motion at 2-4. The Agency notes that many of these exhibits are documents that Respondents themselves provided, that have already been shared with Respondents, or that are publicly available. Thus, Respondents will not be surprised, the Agency contends, nor will they be subject to undue prejudice because no hearing date has been set in this case. First Motion at 4.

In its Second Motion to Supplement the Prehearing Exchange, the Agency seeks to add two exhibits, numbered CX 179 and CX 180, to its prehearing exchange. Second Motion at 2. Both are declarations from two proposed Agency witnesses, and the Agency argues their supplementation does not prejudice Respondents because both proposed witnesses are identified in its initial prehearing exchange. The declarations were prepared in response to Respondents' dispositive motions and pertain to matters that would be the subject of their testimony at hearing. Second Motion at 2.

Respondents counter, with regard to the First Motion, that

> this matter has been active for at least two years; and after an exhaustive exchange of discovery, any further orders that require Respondents to produce, respond to, or analyze discovery items at this point will unduly burden Respondents prior to trial since they lack sufficient opportunity to review the exhibits and conduct further investigation where necessary.

Respondent's[sic] Motion[sic] to Complainant's First Motion to Supplement the Prehearing Exchange ("Response") at 1. Respondents further claim that allowing the supplement "will prejudice Respondent this close to trial since Respondent lacks an opportunity to effectively incorporate, or respond to, or challenge the new Exhibits and discovery for purposes of disputing

the EPA's claims." Response at 1. Regarding CX 170 to CX 173, Respondents admit they are documents previously provided to the Agency by Respondents but confusingly argue the supplementation is "unnecessary, burdensome, and untimely[.]" Response at 3. Respondents contend CX 174 "should be prohibited from the record since it does not evidence a valid attempt" to obtain from them additional documents. Response at 4. As for CX 175 to CX 178, Respondents claim an "undue burden" in having to analyze an expert witnesses' background, experience, education, and associated legal theories. Response at 4. Respondents have offered no specific Response to the Agency's Second Motion.

According to the rules governing this proceeding, a party who has previously made an information exchange under 40 C.F.R. § 22.19(a) "shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section." 40 C.F.R. § 22.19(f).[4]

In this instance, the Agency has provided such additional information, just as it was compelled to by the rules. Respondents' claim of prejudice is unwarranted because no hearing has yet been scheduled in this case. There is plenty of opportunity for them to review the additional documents, proposed witnesses, and related legal theories. Notably, Respondents have not made any request in all of this time to test through additional discovery the expert witnesses they complain about. Moreover, as Respondents admit, many of the supplementary documents are already in their possession and are not new to them. Finally, permitting a supplement of the prehearing exchange does not equate to admission into evidence; Respondents will still have the ability at or prior to hearing to object to specific exhibits on admissibility grounds. And to the extent the supplementary exhibits are relied on to grant the Agency accelerated decision, it is notable that Respondents had an equal opportunity to submit their own supplementary evidence to place the Agency's submission in dispute, if such evidence exists.

Consequently, the Agency's First Motion to Supplement the Prehearing Exchange and its Second Motion to Supplement the Prehearing Exchange are both **GRANTED**.

II. Dispositive Motions

Respondents have filed a motion to dismiss. Additionally, both parties have filed motions for accelerated decision. This Order addresses all three motions and their related responses below.

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[4] Respondents also argue that 40 C.F.R. § 22.19(e), rather than (f), more appropriately applies in this case. Response at 3. But Respondents are mistaken. Section (e) refers to "[o]ther discovery" instruments, i.e., interrogatories, depositions, admissions, that a party might turn to when seeking information beyond what is provided in the prehearing exchange. Conversely, section (f) mandates that a party exchange additional evidence on which it intends to rely at hearing if it did not previously do so. In this instance, section (e) clearly does not apply. The Agency is merely offering further evidence in support of its case; it is not, as Respondents contend, seeking additional discovery or placing any burden on Respondents to provide additional discovery. Response at 3-5.

a. Respondents' Motion to Dismiss

In their Motion to Dismiss, Respondents contend the Agency has failed to state a claim and ask this Tribunal to dismiss the enforcement action "in its entirety as null and void." Mot. to Dismiss at 1. According to Respondents, the Clean Air Act provisions the Agency relies on do not support the allegations in the Amended Complaint, because there are no allegations that any emissions standards were exceeded. Mot. to Dismiss at 4.

Under the Rules of Practice that govern these proceedings, Administrative Law Judges are authorized to, "upon motion of the respondent, . . . dismiss a proceeding without further hearing or upon such limited additional evidence as [s]he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20(a). A motion to dismiss in this case is "analogous to motions for dismissal under Rule 12(b)(6)[5] of the Federal Rules of Civil Procedure." *Mercury Vapor Processing Technologies, Inc.*, EPA Docket No. RCRA-05-2010-0015, 2011 EPA ALJ LEXIS 15, at *6 (ALJ, July 14, 2011) (citing *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993)). Such motions "test the legal sufficiency of a claim." *Id.* (quoting *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011)). As the U.S. Supreme Court has stated:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Thus, in considering a motion for dismissal, [this Tribunal] should assume the veracity of all 'well-pleaded factual allegations' in the complaint and 'then determine whether they plausibly give rise to an entitlement to relief.'" *Id.* at *7.

In this case, the Agency has established a prima facie case that entitles it to relief. The Clean Air Act (CAA) and its enforcing regulations are broad and comprehensive, establishing myriad legal requirements beyond mere emission limitations. *See* 42 U.S.C. § 7401 *et seq.* As discussed below with respect to the motions for accelerated decision, the facts alleged in the Amended Complaint, which are almost entirely undisputed and for purposes of the motion to dismiss presumed to be true, demonstrate that Respondents violated the CAA by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing into the United States highway motorcycles and nonroad vehicles that were not covered by COCs, or that Respondents caused the foregoing. That is, a plausible claim for relief has been stated by allegations that Respondents' COCs did not cover the vehicles actually manufactured and imported because the catalytic converters in those vehicles were not the same in volume and

[5] A complaint filed in federal court may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

composition as described in their COC applications. Moreover, as discussed below, Respondents have provided no plausible legal argument that the facts and conduct alleged do not amount to violations.[6] As further explained below, for the purposes of finding Respondent liable for committing the violations alleged in the Complaint, it does not matter if there are no allegations or evidence that Respondents' vehicles exceeded CAA emissions standards. Accordingly, Respondents' Motion to Dismiss is **DENIED**.

b. Motions for Accelerated Decision

The Agency contends "there are no genuine issues of material fact in dispute with regard to Respondents' liability for any of the violations . . . alleged in the Amended Complaint," and asks this Tribunal to find Respondents liable for those violations as a matter of law and narrow the issues for hearing accordingly. Agency AD Mot. at 1-2. Respondents also "contend that there are no genuine issues of material fact in dispute in regards to Respondents liability," but they ask this Tribunal to reach the opposite conclusion and find they are *not* liable as a matter of law. Respondents' AD Mot. at 1.

i. Accelerated Decision Standard

Under the Rules of Practice that govern these proceedings, Administrative Law Judges are authorized to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). This standard is analogous to the summary judgment standard prescribed by Rule 56 of the Federal Rules of Civil Procedure. Although the Federal Rules do not directly apply here, the Environmental Appeals Board ("EAB") has consistently looked to Rule 56 and its jurisprudence when adjudicating motions for accelerated decision under Part 22. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999). Federal courts have endorsed this approach, describing Rule 56 as "the prototype for administrative summary judgment procedures" and its associated jurisprudence as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

[6] To the extent that Respondents raise legal arguments in their Motion to Dismiss that merit discussion in this Order, those arguments are addressed below along with the parties' motions for accelerated decision.

Under the Federal Rules, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The party moving for summary judgment bears the burden of showing an absence of genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This includes an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). A party must support its assertion that a material fact cannot be or is genuinely disputed by "citing to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute exists by similarly "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

Evidentiary material and reasonable inferences drawn therefrom must be construed in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion permit denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

In applying these principles to motions for accelerated decision under Section 22.20(a) of the Rules of Practice, the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no

reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.* As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. The evidentiary standard that applies here is proof by a preponderance of the evidence. 40 C.F.R. § 22.24(b). The complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a).

ii. The Respondent Parties

Taotao China is a corporation organized under the laws of the People's Republic of China and is located at No. 6 Xinmin Road, Jinyun County, Lishui City, Zhejiang, China. Am. Compl., ¶ 6; Resp'ts Am. Answers, ¶¶ 6. The company, founded in 1985, has 2,000 employees, 200 staff members, and owns multiple subsidiary companies. Its main products include ATVs, motorcycles, electric vehicles, electric bicycles, wooden doors, steel doors, running machines, fitness equipment, and garden tools. *See, e.g.*, CX 35 at EPA-000607.

Jinyun is a corporation also organized under the laws of the People's Republic of China and is located at Xinbi Industrial Zone, Xinbi Town, Jinyun County, Zhejiang, China. Am. Compl., ¶ 5; Resp'ts Am. Answers, ¶ 5. Jinyun manufacturers nonroad (off-road) recreational vehicles. Am. Compl., ¶ 10; Resp'ts Am. Answers, ¶ 10.

Taotao USA is a corporation organized under the laws of Texas with an office in Carrollton, Texas. Am. Compl., ¶ 4; Resp'ts Am. Answers, ¶ 4. Taotao USA imports into the United States highway motorcycles manufactured by Taotao China and nonroad recreational vehicles manufactured by Jinyun.[7] Am. Compl., ¶ 10; Resp'ts Am. Answers, ¶ 10.

[7] Matao "Terry" Cao is the president of and a registered agent for Taotao USA. Yuejin Cao is the president of both Taotao China and Jinyun. Am. Compl., ¶¶ 12-15; Resp'ts Am. Answers, ¶¶ 12-15. *See, e.g.*, CX 73 at EPA-000869, 000885.

iii. Factual Background

Over nearly three years, beginning in 2013, EPA tested 35 catalytic converters taken from vehicles Respondents built and imported into the United States. The catalytic converters came from ten different engine families used in Respondents' motorcycles and nonroad vehicles. Testing determined the catalytic converters did not possess certain significant characteristics that were described in Respondents' COC applications for each engine family. Specifically, the devices' precious metal content did not exist in the same quantities and ratios that Respondents claimed when they applied to have their engines certified. The ten counts in the Agency's amended Complaint are based on the failure of these ten engine families – which encompass 109,964 vehicles imported into the United States – to comply with their respective COCs.

1. COCs and Catalytic Converters

At various times over the past several years, Respondents submitted applications to EPA for COCs from ten different engine families so that they could lawfully sell vehicles with the engines in the United States. All of these applications described the respective engine family's emission control system and auxiliary emission control devices. *See* CX 1-CX 10. 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. *See* CX 1-CX 10. 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. *See* 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. *See* CX 1-CX 10. The COCs the Agency subsequently issued 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" COC application. *See* CX 43-CX 52.

Catalytic converters[8] were developed to reduce the harmful emissions from vehicle exhaust that form during gasoline combustion. CX 176, ¶¶ 8-9. The hydrocarbons, carbon monoxide, and oxides of nitrogen formed during fuel combustion are major contributors to smog. They also harm human health by reducing the ability of blood to transport oxygen,

[8] Background information about catalytic converters is drawn from the declaration of one of the Agency's experts, Ronald M. Heck, Ph.D., and a book he co-authored, "Catalytic Air Pollution Control: Commercial Technology." CX 175; CX 176. Dr. Heck is a private consultant "in the areas of chemical engineering; combustion engineering; catalysis; chemical catalysis; environmental catalysis for automotive, diesel, and stationary source applications; reaction engineering; and air pollution control." CX 176, ¶ 5. He holds a doctorate degree in chemical engineering and worked more than 30 years for the Engelhard Corp. "in various technical and managerial positions pertaining to the research and development of catalytic air pollution control." CX 176, ¶ 4. Among his responsibilities was developing automotive catalysts that enabled the production of low emission vehicles. CX 176, ¶ 4. He has authored, published, and presented more than 80 articles in scientific journals on catalysis, catalytic converter technology, and air pollution control strategies using catalytic converters. CX 176, ¶ 6.

irritating airways in the respiratory system, and aggravating respiratory diseases such as asthma. CX 176, ¶ 8. Catalytic converters were developed to meet tightened emission standards by "scrub[bing] exhaust fumes of their harmful components as they make their way through the exhaust system." CX 176, ¶¶ 9-10. The basic operation of the catalytic converter is to oxidize the carbon monoxide and hydrocarbons to form carbon dioxide and water and to reduce the oxides of nitrogen to nitrogen. CX 175 at EPA-002393-94.

The key active components that enable the necessary chemical reactions to take place are most commonly expensive precious metals such as platinum (Pt), palladium (Pd), and rhodium (Rh). CX 175 at EPA-002367; CX 176, ¶¶ 11, 13. Because of the costs of these precious metals, "catalytic converters that use only Pd have been studied because the price of Pd was less expensive relative to Pt and Rh." CX 176, ¶ 14. Studies have shown "Rh to be an excellent NOx reduction catalyst. Pt is more stable in sulfur containing exhaust gases and was the mainstay of automotive catalysis for many decades. Pd, which is more sensitive to sulfur, is more suitable at high exhaust temperatures over long periods of exposure and is less subject to sintering and agglomeration." CX 176, ¶ 15.

When a catalytic converter is constructed, the precious metals are incorporated into a washcoat that covers a metal substrate, i.e., a honeycomb-matrix monolith, that is placed in steel housing. CX 175 at EPA-002362-66, 2371, 2396-99; CX 176, ¶¶ 12-13. Different combinations of precious metals and other materials that may be used in the construction of a catalytic converter produce different chemical reactions and different rates of reaction, and the catalytic converter's design and composition determine its performance and longevity. CX 175 at EPA-002354-56, 2368-70; CX 176, ¶¶ 16-17. Thus, changing a catalytic converter's design or composition, such as the quantity or ratio of precious metals, will change the way the device performs over time. CX 176, ¶ 18. Temperature, sulfur, and oil contaminants all affect a catalytic converter's ability to enhance reaction rates over time. CX 176, ¶ 19. However, the only reliable way to determine the emission rate of a given catalytic converter is through useful-life testing of its performance in a given situation. CX 176, ¶¶ 19-20.

2. Course of Events

On June 3, 2011, Taotao China and Taotao USA submitted a COC application for engine family CTAOC.049MC1 [Count 4] for a 2012 model year highway motorcycle. CX 4. The Agency issued the COC just over a month later. CX 46. On March 27, 2012, at the Los Angeles/Long Beach Seaport, the Agency inspected a recently-arrived shipment of motorcycles built by Taotao China and imported by Taotao USA that included the CTAOC.049MC1 [Count 4] engine family.[9] CX 61 at EPA-000663-64, 000667-74, 000685-87; CX 180, ¶¶ 13-14.

[9] Respondents had already drawn the Agency's scrutiny several years prior. In 2009 and 2010, Taotao USA imported nearly 4,000 nonroad motor vehicles, i.e., all-terrain vehicles, in violation of Section 203(a)(1) of the Clean Air Act, 42 U.S.C. § 7522(a)(1). CX 67 at EPA-000811-12. In those cases, Agency inspectors discovered the carburetors on these vehicles contained uncertified adjustable parameters and did not match the carburetors described in the corresponding COC application. CX 67 at EPA-000811-12. As a result, Taotao USA entered into an Administrative Settlement Agreement with the Agency. CX 67. Taotao USA agreed to pay a $260,000 civil penalty and committed to certain remedial actions and a compliance plan.

Inspectors selected one of those motorcycles – marked with the Vehicle Identification Number ("VIN") L9NTEACB01019276 – and removed its catalytic converter for further testing.[10] CX 61 at EPA-000663-64, 000694-95; CX 62 at EPA-000720; CX 180, ¶¶ 13-14. They then shipped the catalytic converter to Eastern Research Group ("ERG"), an Agency contractor in Chantilly, Virginia, for analysis. CX 62 at EPA-000720-22.

During this time, Respondents continued to seek COCs for other engine families. On July 5, 2012, Taotao China and Taotao USA submitted a COC application for engine family DTAOC.150MC2 [Count 2]. CX 2. The same date, Jinyun and Taotao USA submitted COC applications for engine families DTAOX0.15G2T [Count 6] and DTAOX.124AAA [Count 7]. CX 6-CX 7. On September 5, 2012, Taotao China and Taotao USA submitted a COC application for engine family DTAOC.049MC2 [Count 3]. CX 3. Later that month, on September 25, 2012, Jinyun and Taotao USA submitted a COC application for engine family DTAOX0.12A1T [Count 8]. CX 8. The next year, on May 11, 2013, Taotao China and Taotao USA submitted a COC application for engine family ETAOC.049MC2 [Count 1], and Jinyun and Taotao USA submitted a COC application for engine family ETAOX0.12A1T [Count 5]. CX 1; CX 5.

On June 12, 2013, ERG conducted an analysis of the catalytic converter seized from engine family CTAOC.049MC1 [Count 4] during the March 2012 inspection. ERG discovered its platinum content was below the detectable limit, and the concentration ratio of palladium to rhodium was 77.4:1, or 5,653:73 parts per million ("ppm"). CX 63 at EPA-000723-24. These "measured ratios were significantly different than the certified ratios," which Taotao USA in its COC application on behalf of Taotao China had claimed was [redacted]. CX 4 at EPA-000116, 000126; CX 63 at EPA-000723-24. By the date of the analysis, Taotao China had built, and Taotao USA had imported, 21,275 new vehicles belonging to engine family CTAOC.049MC1 [Count 4]. CX 4 at EPA-000119-20; CX 77 at EPA-000910-11; CX 83 at EPA-000996-97.

CX 67 at EPA-000812-15. The company also agreed to pay a stipulated penalty for non-compliance and to provide the Agency, upon request, "all documents and information . . . relating to implementation of and compliance with" the agreement. CX 67 at EPA-000819. Subsequently, Taotao USA failed to provide the Agency the results of various emissions tests and catalytic converter analyses as required by the plan. For its noncompliance, the company paid an additional $160,000 penalty in 2012. CX 74 at EPA-000888-CX 75 at EPA-000890. In this proceeding, Respondents' have objected to the Agency's reference to the settlement agreement. Respondents' Response at 15-16. Their objection is noted but unnecessary; these prior actions are mentioned here only for context and are not relied on as evidence of liability.

[10] The U.S. Department of Homeland Security's Bureau of Customs and Border Protection brings entries selected for detention to its warehouses for inspection. Warehouse employees unload and stack boxes of imported vehicles from the shipping containers, and EPA employees ensure the number of boxes and model names on the boxes match the entry paperwork. EPA inspectors then randomly select one box per unique vehicle model and model year for unpacking and inspection. CX 180, ¶¶ 15-16.

On June 18, 2013, the Agency inspected a recently arrived shipment of ATVs at the Los Angeles/Long Beach Seaport. The ATVs were built by Jinyun and imported by Taotao USA. CX 64 at EPA-000725-35. Inspectors selected one of the ATVs – marked with VIN L5NAAFTD3D1004570 and a member of the DTAOX0.12A1T [Count 8] engine family – and removed its catalytic converter for further testing. CX 64 at EPA-000725-35, 000747, 000767, 000771, 000793; CX 180, ¶¶ 13-14. EPA then shipped the catalytic converter to ERG. CX 65. ERG analyzed the catalytic converter on July 9, 2013. CX 66 at EPA-000806. ERG determined the metal ratio in the catalytic converter was about 1.3:30.9:1 Pt:Pd:Rh, or 87:2,038:66 ppm. CX 66 at EPA-000806. As ERG noted in its report, "[t]he certified ratio [claimed by Taotao USA in its COC application] of Pt and Pd to Rh [redacted] CX 6 at EPA-000187, 000198; CX 66 at EPA-000806. However, [redacted] CX 66 at EPA-000806.

In a letter to Taotao USA dated August 1, 2013, the Agency indicated its suspicion that catalytic converters in members of the DTAOX0.12A1T [Count 8] engine family had "significantly less active material loading compared to the certified design." CX 81 at EPA-000991. The Agency asked the company to send two more exhaust systems from the inspected shipment to ERG for further testing. CX 81 at EPA-000991; CX 180, ¶ 17. ERG received the two exhaust systems on August 22, 2013.[11] CX 84.

Two-and-a-half months later, on November 6, 2013, EPA Inspector Amelie Isin[12] inspected Taotao USA's warehouse in Carrollton, Texas. CX 87; CX 180. Armed with a list of available inventory she had obtained from Taotao USA the week prior, Inspector Isin, took exhaust systems and catalytic converters from ten different vehicles representing six different engine families and sent them to ERG for analysis. CX 87; CX 88; CX 155; CX 180, ¶¶ 18-19. The vehicles were selected at random from engine families ETAOC.049MC2 [Count 1], DTAOC.150MC2 [Count 2], DTAOC.049MC2 [Count 3], ETAOX0.12A1T [Count 5], DTAOX0.15G2T [Count 6], and DTAOX.124AAA [Count 7]. CX 87; CX 88; CX 180, ¶¶ 18-19. ERG analyzed one catalytic converter from each engine family on November 12 and 13, 2013. CX 89. In each of the six tests, the measured metals ratios and loading were significantly different from values that Taotao USA had certified in the COC applications it submitted for each engine family on behalf of Taotao China and Jinyun. CX 1-3; CX 5-7; CX 89.

On November 20, 2013, ERG also analyzed the precious metal concentrations of the two additional exhaust systems from engine family DTAOX0.12A1T [Count 8] that Taotao USA had sent at the Agency's request in August. CX 84-86. ERG concluded that "[t]he measured metals

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[11] The exhaust systems were taken from vehicles with either VIN L5NAAFTD5D1004845 or VIN L5NAAFTD5D1004848, but Taotao USA did not mark which VIN belonged to which exhaust system. CX 85; CX 180, ¶ 17.

[12] Ms. Isin is a licensed professional engineer. During her involvement in this case, she worked as an environmental engineer in the Agency's Office of Enforcement and Compliance Assurance. CX 180, ¶ 3. She has been a credentialed vehicle and engine inspector since 2008 and received general and specific inspection-related training. Many of the 150 inspections she has conducted included catalytic converter sampling. CX 180, ¶¶ 5-6.

ratios are [redacted] The measured metals loadings are [redacted] CX 86 at EPA-001003. ERG made this determination after measuring a metal ratio of 2.3:51.1:1 Pt:Pd:Rh, or 140:3,063:60 ppm – a significant departure from what Taotao USA reported in its COC application. CX 6 at EPA-000187, 000198; CX 86 at EPA-001003.

On December 24, 2013, the Agency sent a Notice of Violation to Taotao USA, Taotao China, and Jinyun. CX 92. The Notice declared that based on the inspections and importation information Taotao USA had previously provided, "64,377 vehicles do not conform in all material respects to the specifications in the COC application and are uncertified because the required catalyst active material is either missing or not present in the quantity or concentration described in the relevant COC application." CX 92 at EPA-001114. EPA determined the vehicle quantity based on the number of each offending engine family that had been imported. "[B]ecause the vehicles . . . are presumed to have been manufactured in the same way because they are claimed to be in the same engine family, EPA concludes that all of them are uncertified," EPA observed. CX 92 at EPA-001114.

The Agency in a February 6, 2014, Request for Information under the CAA ordered Respondents to conduct emissions and catalytic converter testing of three randomly-selected vehicles from each of the eight engine families then at issue and identified in the December 24 Notice of Violation: ETAOC.049MC2 [Count 1], DTAOC.150MC2 [Count 2], DTAOC.049MC2 [Count 3], CTAOC.049MC1 [Count 4], ETAOX0.12A1T [Count 5], DTAOX0.15G2T [Count 6], DTAOX.124AAA [Count 7], and DTAOX0.12A1T [Count 8]. CX 94 at EPA-001120-22, 001126-27; CX 180, ¶¶ 20-21.[13]

After a few months of negotiations between the Agency and Respondents, who were chiefly represented by Taotao USA, the parties agreed in May 2014 to a testing plan that would be conducted by California Environmental Engineering ("CEE"), "an EPA . . . recognized emission testing facility located in Santa Ana, California." CX 98 at EPA-001230-38. The plan called for the selected motorcycles to be run for a "2500km service accumulation" prior to emissions testing, and for the selected nonroad vehicles to run for "12 hours of service accumulation" before testing, a fraction of the engines' useful lives. CX 98 at EPA-001231. *See also* 40 C.F.R. §§ 86.402-98, 86.419-2006(b), 1051.105(c), 1051.107(c) (setting forth "useful life" time and mileage accumulations for various engine classes). The vehicles' catalytic converters would then be sent to SGS Canada Inc. for analysis. CX 98 at EPA-001234-36. The

[13] By February 13, 2014, Taotao China had built, and Taotao USA had imported, 21,275 new vehicles belonging to engine family DTAOC.150MC2 [Count 2] and 26,357 new vehicles belonging to engine family DTAOC.049MC2 [Count 3]. CX 2 at EPA-000040-41; CX 3 at EPA-000083-84; CX 55-CX 56. Also by that date, Jinyun had built, and Taotao USA had imported, 1,520 new vehicles belonging to engine family DTAOX0.15G2T [Count 6], 864 new vehicles belonging to engine family DTAOX.124AAA [Count 7], and 16,825 new vehicles belonging to engine family DTAOX0.12A1T [Count 8]. CX 6 at EPA-000190-91; CX 7 at EPA-000223-24; CX 8 at EPA-000255-56; CX 55-CX 56.

vehicles selected for analysis were randomly chosen[14] by Inspector Isin from electronic files of VIN photos organized by engine family and provided by Taotao USA. CX 180, ¶¶ 22-27.

CEE conducted emissions testing of the 24 selected vehicles between May 29, 2014, and October 17, 2014. CX 99-CX 122. SGS analyzed 23 of those vehicles' catalytic converters.[15] CX 125-133. Also during this time, on June 19, 2014, Jinyun and Taotao USA submitted a COC application for engine family FTAOX0.15G2T [Count 9]. CX 9.

The results of the analysis, released on various dates between August 13, 2014, and December 12, 2014, revealed that all of the catalytic converters contained platinum, palladium, and rhodium in ratios different than described in their associated COC applications. Additionally, 20 of the catalytic converters did not have detectable concentrations of platinum and 16 catalytic converters did not have detectable concentrations of rhodium. CX 1-CX 8; CX 125 at EPA-001751-52; CX 126; CX 127 at EPA-001769-70; CX 128; CX 129 at EPA-001786-87; CX 130; CX 131 at EPA-001802-03; CX 132 at EPA-001817-18; CX 133 at EPA-001831-32. Of the engine families that were tested, only in the case of DTAOX0.15G2T [Count 6] did all three catalytic converters tested contain detectable amounts of platinum and rhodium.

By February 24, 2015, Taotao China had built, and Taotao USA had imported, 17,665 new vehicles belonging to engine family ETAOC.049MC2 [Count 1]. CX 1 at EPA-000004-05; CX 57-CX 58. As of that same date, Jinyun had built, and Taotao USA had imported, 21,547 new vehicles belonging to engine family ETAOX0.12A1T [Count 5]. CX 5 at EPA-000154-55; CX 57-CX 58.

On June 15, 2015, Jinyun and Taotao USA submitted a COC application for the final engine family at issue here, GTAOX0.15G2T [Count 10]. CX 10. A few months later, on November 12, 2015, the Agency filed the original Complaint in this proceeding that sought to penalize Respondents for violations related to engine families in counts one through eight.

Not long thereafter, on January 4, 2016, ERG inspectors acting on the Agency's behalf inspected a recently-arrived shipment of ATVs at the Los Angeles/Long Beach Seaport. CX 140; CX 141. The shipment included 28 members of the GTAOX0.15G2T [Count 10] engine family that were built by Jinyun and imported by Taotao USA. CX 140 at EPA-001909-001914; CX 141 at EPA-001918. The Agency removed the exhaust system from an engine with VIN L5NAELTN4G1003749 and had its catalytic converter tested February 11, 2016, at the Agency's Region 9 Laboratory. CX 143; CX 144; CX 180, ¶¶ 13-14. The lab found no detectable amount of platinum, palladium, or rhodium in the catalytic converter – that is, less than 150 mg/Kg platinum, and less than 40 mg/Kg palladium and rhodium, a 0:0:0 ratio. CX 144 at EPA-001931-33. This does not comply with the ratios reported in Jinyun and Taotao

[14] There were only three vehicles from engine family DTAOX0.15G2T [Count 6] available in Taotao USA's inventory so those were by default the ones selected for analysis. CX 180, ¶ 25.

[15] One of the vehicles was "diverted" in response to a Highway Motorcycle Exhaust Confirmatory Test Order issued July 24, 2014, by the Agency's Office of Transportation and Compliance. Mot. at 18; CX 134; CX 135. Notwithstanding references in the test order to engine family FTAOC.049MCT, the diverted vehicle appears to have come from engine family ETAOC.049MC2 based on the VIN identified in the record. *See* CX 134; CX 135; CX 136.

USA's COC application materials for engine family GTAOX0.15G2T [Count 10]. CX 10 at EPA-000332.

On February 25, 2016, the Agency collected an exhaust system from a different engine family – FTAOX0.15G2T [Count 9] – that was part of the same shipment first inspected in January. CX 145. That system, marked with VIN L5NAELTN3F1001036, was sent to ERG for analysis of its catalytic converter. CX 146; CX 147; CX 180, ¶¶ 13-14. In its first analysis, ERG reported on March 4, 2016, that the catalytic converter contained no detectable amount of rhodium and quantities of platinum and palladium at concentrations of 120 ppm and 61 ppm. CX 147 at EPA-001944. A second analysis revealed concentrations of platinum and palladium at 123 ppm and 80 ppm, and again found no detectable amount of rhodium. CX 147 at EPA-001946. The ratios of these precious metals – about 2:1:0 Pt:Pd:Rh and 1.5:1:0 Pt:Pd:Rh – are not the proportions certified in Jinyun and Taotao USA's COC application materials for engine family FTAOX0.15G2T [Count 9]. CX 9 at EPA-000299.

Also on February 25, 2016, the Agency inspected another recently-arrived shipment of ATVs that were built by Jinyun and imported by Taotao USA. CX 148; CX 149. From this shipment they examined a vehicle belonging to engine family GTAOX0.15G2T [Count 10] and marked with VIN L5NAELTNIG1003420. CX 149. The inspectors removed the vehicle's catalytic converter and took it to ERG for analysis. CX 149; CX 150; CX 151. On March 4, 2016, ERG reported that it found no detectable amounts of rhodium or platinum in the catalytic converter and concentrations of palladium at 18 ppm. CX 152 at EPA-002004-05. This does not comply with the ratios reported in Jinyun and Taotao USA's COC application materials for engine family GTAOX0.15G2T [Count 10]. CX 10 at EPA-000332.

By May 3, 2016, Jinyun had built, and Taotao USA had imported, 1,290 new vehicles belonging to engine family FTAOX0.15G2T [Count 9]. CX 9 at EPA-000291-92; CX 59-CX 60. As of May 5, 2016, Jinyun had built, and Taotao USA had imported, 391 new vehicles belonging to engine family GTAOX0.15G2T [Count 10]. CX 10 at EPA-000324-25; CX 154 at EPA-002024-27.

In the course of bringing this penalty action, the Agency retained Dr. Heck to provide expert opinion "regarding design specifications, durability, and performance characteristics of catalytic converters that were add-on emissions controls" on the vehicles manufactured and imported by Respondents. CX 176, ¶ 22; n.8, *supra*. Dr. Heck reviewed the Amended Complaint and Respondents' COC applications for the ten engine families at issue, which he notes "specify the manufacturer, configuration, location, precious metal loading, and precious metal ratios of the catalytic converters to be used on each vehicle in each engine family." CX 176, ¶ 25. Dr. Heck also reviewed the test results for the catalytic converters tested at SGS, ERG, and EPA Region 9, concluding that each result "shows a difference between the ratios of precious metals described in the applications for certificates of conformity and the ratios of precious metals present in the catalytic converters being tested." CX 176, ¶¶ 26-27. Thus, he declares, "[t]he results of tests performed on the catalytic converters show that the catalytic converters are not the catalytic converters described in the approved certification applications, and in fact are completely different, as they are essentially Pd catalytic converters." CX 176, ¶¶ 28. More broadly, a discrepancy like this is problematic for the Agency's certification program because "[n]o data from the approved certification applications can be used to predict how vehicles with the Pd catalytic converters will perform." CX 176, ¶¶ 28.

The table below summarizes the allegations against Respondents and the evidence on which those allegations are based:

Engine Family COC Application Ratio	**VIN**	**Tested Concentration (Pt:Pd:Rh) (ppm or mg/kg)[16]**	**Record Citations**
Count 1 ETAOC.049MC2 [redacted] CX 1 at EPA-000011	L9NTEACVDE1050041	18:5,062:47	CX 89 at EPA-001097
	L9NTEACT2E1003902	<10:3,941:<10	CX 106 at EPA-001395 CX 129 at EPA-001786
	L9NTEACT9E1000849	<10:4,399:<10	CX 116 at EPA-001601 CX 132 at EPA-001818
Count 2 DTAOC.150MC2 [redacted] CX 2 at EPA-000047	L9NTELKB9D1050248	890:8,923:110	CX 89 at EPA-001099
	L9NTELKE3D1250004[17]	<10:4,486:<10	CX 100 at EPA-001262 CX 129 at EPA-001786
	L9NTELKXD1250050[18]	<10:3,074:<10	CX 104 at EPA-001352 CX 129 at EPA-001786
	L9NTELKA1D1050106	<10:4,596:<10	CX 108 at EPA-001436 CX 131 at EPA-001803
Count 3 DTAOC.049MC2 [redacted] CX 3 at EPA-000090	L9NTEACB6D1044975	35:6,420:114	CX 89 at EPA-001091
	L9NTEACX9D1150770	<10:4,215:<10	CX 118 at EPA-001640 CX 133 at EPA-001832
	L9NTACX6D1101302	<10:3,615:<10	CX 120 at EPA-001676 CX 133 at EPA-001832
	L9NTACX1D1101627	<10:5,842:<10	CX 102 at EPA-001308 CX 131 at EPA-001803
Count 4 CTAOC.049MC1 [redacted] CX 4 at EPA-000126	L9NTEACB0C1019276	<10:5,653:73	CX 63 at EPA-000724
	L9NTEACW5C1000001	<10:4,639:<10	CX 110 at EPA-001478 CX 131 at EPA-001803
	L9NTEACW4C1000104	<10:4,526:<10	CX 114 at EPA-001560 CX 132 at EPA-001818
	L9NTEACW6C1000122	<10:4,066:<10	CX 122 at EPA-001715 CX 132 at EPA-001818

[16] Ppm is equivalent to mg/kg.

[17] The SGS report identifying this vehicle refers to VIN "L9NTELKED12500045," a typographical error. AD Mot. at 20 n.14; CX 129 at EPA-001786.

[18] The SGS report identifying this vehicle refers to VIN "L9NTELKEND1250005050," a typographical error. AD Mot. at 20 n.14; CX 129 at EPA-001786.

Count 5 ETAOX0.12A1T [redacted] CX 5 at EPA-000162	L5NAAHTJXE1029940 L5NAAFBXE1041955 L5NAAHTJ8E1037762 L5NAAHTJ3E1037815	105:1,844:192 <10:1,123:35 <10:987:<10 <10:1,472:30	CX 89 at EPA-001089 CX 101 at EPA-001284 CX 125 at EPA-001752 CX 103 at EPA-001327 CX 125 at EPA-001752 CX 109 at EPA-001455 CX 125 at EPA-001752
Count 6 DTAOX0.15G2T [redacted] CX 6 at EPA-000198	L5NAAJTP5D1003627 L5NAELTNOD1000133 L5NAELTNXD1000107 L5NAELTN5D1000113	32:646:40 44:3,625:54 47:3,024:53 48:3,201:54	CX 89 at EPA-001095 CX 111 at EPA-001497 CX 127 at EPA-001769 CX 113 at EPA-001538 CX 127 at EPA-001769 CX 115 at EPA-001579 CX 127 at EPA-001769
Count 7 DTAOX.124AAA [redacted] CX 7 at EPA-000231	L5NAAJT16D1000991 L5NAAJT19D1000936 L5NAAJT16D1000912 L5NAAJT11D1000851[19]	ND:1,665:84 <10:981:<10 <10:1,023:<10 <10:1,005:<10	CX 89 at EPA-001093 CX 117 at EPA-001618 CX 127 at EPA-001769 CX 119 at EPA-001657 CX 127 at EPA-001769 CX 121 at EPA-001693 CX 129 at EPA-001786
Count 8 DTAOX0.12A1T [redacted] CX 8 at EPA-000263	L5NAAFTD3D1004570 L5NAAFTD5D1004845 (or L5NAAFTD5D1004848) L5NAAHTJ4D1019516 L5NAAHTJ3D1019751 L5NAAHTJXD1024218	87:2,038:66 140:3,063:60 <10:2,445:81 <10:2,146:39 <10:897:<10	CX 66 at EPA-000806 CX 86 at EPA-001003 CX 99 at EPA-001240 CX 125 at EPA-001752 CX 107 at EPA-001414 CX 125 at EPA-001752 CX 105 at EPA-001371 CX 125 at EPA-001752
Count 9 FTAOX0.15G2T [redacted] CX 9 at EPA-000299	L5NAELTN3F1001036	120:61:0 / 1:.5:0	CX 147 at EPA-001944
Count 10 GTAOX0.15G2T [redacted] CX 10 at EPA-000332	L5NAELTN4G1003749 L5NAELTNIG1003420	<150:<40:<40 0:18:0	CX 144 at EPA-001931 CX 152 at EPA-002004

[19] The SGS report identifying this vehicle refers to VIN "L5NAAJT19D1000726." This is the VIN that was identified in Respondents' testing plan. CX 98 at EPA-001231. However, the actual vehicle that Respondents sent to CEE was from the same engine family but was marked with VIN L5NAAJT11D1000851. CX 121 at EPA-001694. Although this is the vehicle whose catalytic converter was tested, the SGS report erroneously labeled it with the originally proposed vehicle's VIN. AD Mot. at 20 n.14; CX 129 at EPA-001786.

iv. Legal Background

The Clean Air Act authorizes EPA to prescribe emissions standards for new vehicles and engines that cause or contribute to air pollution and endanger public health. 42 U.S.C. §§ 7521(a)(1), 7547(a)(3). The Act particularly targets emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen for the "useful life" of an engine. 42 U.S.C. § 7521(b). "Motor vehicles" and "nonroad vehicles" are two of the several categories of vehicles and engines regulated under the Act.[20] 42 U.S.C. §§ 7521, 7547. "The term 'motor vehicle' means any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. § 7550(2). A "nonroad vehicle" is "a vehicle that is powered by a nonroad engine[21] and that is not a motor vehicle . . . ." 42 U.S.C. § 7550(11). Although compliance testing and certification sections of the Act expressly apply to motor vehicles and engines, emissions standards for nonroad vehicles and engines, which were authorized by later amendments to the Act, are also subject to the same prescriptions and are "enforced in the same manner." 42 U.S.C. §§ 7522-7542, 7547(d).

To help ensure compliance with emissions standards, the Act prohibits "manufacturers"[22] from selling or offering for sale, introducing or delivering for introduction into "commerce,"[23] or importing into the United States "any new motor vehicle or new motor vehicle engine . . . unless such vehicle is covered by a certificate of conformity" issued under applicable regulations. 42 U.S.C. § 7522(a)(1). Manufacturers are also prohibited from causing any of the foregoing acts. *Id.* Any person,[24] manufacturer, or dealer who violates this prohibition is subject to a civil

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[20] Within these two categories, the Clean Air Act further authorizes the Agency to divide vehicles into classes based on such factors as gross vehicle weight, horsepower, or type of fuel used. 42 U.S.C. §§ 7521(a)(3)(A)(ii), 7547(a).

[21] A "nonroad engine" is "an internal combustion engine (including the fuel system) that is not used in a motor vehicle . . . ." 42 U.S.C. § 7550(10).

[22] "The term '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, but shall not include any dealer with respect to new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines received by him in commerce." 42 U.S.C. § 7550(1).

[23] "The term 'commerce' means (A) commerce between any place in any State and any place outside thereof; and (B) commerce wholly within the District of Columbia." 42 U.S.C. § 7550(6).

[24] "The term 'person' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e).

penalty of up to $37,500 per vehicle or engine in violation.[25] 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. The Agency issues COCs for up to a one-year period after the subject engines are tested to determine whether they comply with the emissions regulations set forth under 42 U.S.C. § 7521. 42 U.S.C. §§ 7525(a)(1). The Agency may also test engines previously issued a COC to determine if they still "conform with the regulations with respect to which the certificate of conformity was issued" and may suspend or revoke the certificate for non-conforming engines. 42 U.S.C. § 7525(b)(2). Additionally, for purposes of testing and COC compliance, the Agency is "authorized (1) to enter, at reasonable times, any plant or other establishment of [a] manufacturer, for the purpose of conducting tests of vehicles or engines in the hands of the manufacturer, or (2) to inspect at reasonable times, records, files, papers, processes, controls, and facilities used by such manufacturer[.]" 42 U.S.C. § 7525(c).

Agency regulations establish the precise methods and procedures for compliance testing and issuing COCs under the Clean Air Act. *See* 42 U.S.C. § 7525(d). Emission regulations and testing procedures for motorcycles, which are generally treated as motor vehicles, can be found at 40 C.F.R. Part 86, subparts E and F. A "motorcycle" is "any motor vehicle with a headlight, taillight, and stoplight and having: Two wheels, or Three wheels and a curb mass less than or equal to 793 kilograms (1749 pounds)." 40 C.F.R. § 86.402-98. Emission standards for motorcycles are set forth at 40 C.F.R. § 86.410-2006. Emission regulations for all-terrain vehicles and off-road motorcycles, which are generally treated as nonroad vehicles, can be found at 40 C.F.R. Parts 1051 and 1068. An "all-terrain vehicle" is "a land-based or amphibious nonroad vehicle" that has certain characteristics such as four low pressure tires, a seat to be straddled by a single operator and handlebars for steering controls, or, alternatively, a vehicle with three or more wheels and one or more seats that is designed for transportation over rough terrain at more than 25 miles per hour. 40 C.F.R. § 1051.801. Off-highway motorcycles and all-terrain vehicles must meet emissions standards that are outlined at 40 C.F.R. §§ 1051.105 and 1051.107.

"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). To meet this requirement, a manufacturer must first divide its product line into engine families. An engine family is "the basic classification unit of a manufacturer's product line used for the purpose of test fleet selection and determined in accordance with §86.420." 40 C.F.R. § 86.402-78. Each engine family is composed of vehicles whose engines are expected to have similar emission characteristics throughout their useful life and are the same in numerous technical aspects. 40 C.F.R. § 86.420-78(a). Among the characteristics that must be shared by members of the same engine family are "[t]he number of catalytic converters, location, volume, and composition." 40 C.F.R. § 86.420-78(b)(7). The manufacturer then selects one vehicle to serve as a test vehicle to represent the family for which it is seeking certification. From that test vehicle, the

[25] In an administrative penalty proceeding such as this one, the penalty shall not exceed $320,000 unless the Agency and the Attorney General jointly determine a larger penalty is appropriate. 42 U.S.C. § 7524(c)(1); 40 C.F.R. §§ 19.4 Table 1, 1068.125(b). In this case, the Attorney General agreed the Agency could seek a penalty of more than $320,000. Am. Compl., ¶ 21; CX 26; CX 28.

manufacturer collects emissions data and other information. 40 C.F.R. §§ 86.421-78, 86.422-78, 86.423-78, 86.431-78, 86.436-78. The test vehicle chosen will be the one that "has the greatest probability of exceeding the [emission] standards . . . ."[26] 40 C.F.R. § 86.421-78(a).

After collecting data from the test vehicle, manufacturers must then apply in writing for a COC to cover the corresponding engine family it intends to sell. 40 C.F.R. § 86.416-80. An application includes, among other things, the test vehicle data, a description of the vehicles covered, and a description of their engine, emission control system, fuel system components, auxiliary emission control devices, transmission gear ratios, overall drive ratios, and vehicle mass. 40 C.F.R. § 86.416-80(a)(2)(i). "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 this subpart, he will issue a certificate of conformity with respect to such vehicle(s)[.]" 40 C.F.R. §§ 86.417-78, 86.437-78(a)(2)(i). A COC covers all vehicles represented by the test vehicle, lasts no more than one model year, certifies compliance with no more than one set of applicable standards, and is issued "upon such terms as [the Agency] may deem necessary to assure that any new motorcycle covered by the certificate will meet the requirements of the act and of this subpart." 40 C.F.R. § 86.437-78(a)(2)(ii)-(iii). A manufacturer may amend a COC application to reflect "any proposed changes to vehicles in production or additional vehicles to be produced," but "no changes may be instituted until approved by the [Agency]." 40 C.F.R. § 86.438-78(a). Alternatively, a manufacturer may notify the Agency concurrently with making the modification, but only if after the modification the vehicles will still meet applicable emission standards. This notification must "include a full description of the addition or change and any supporting documentation the manufacturer may include to support the manufacturer's determination that the addition or change does not cause noncompliance." 40 C.F.R. § 86.439-78(a)(1)-(a)(2).

As with highway motorcycles, manufacturers of all-terrain vehicles and off-road motorcycles "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); *see also* 40 C.F.R. §§ 1068.1(a)(9). For certification purposes, they too must first divide their product line into engine families. 40 C.F.R. § 1051.230(a). Members of the same engine family must be the same in several aspects, including model year and "[t]he number, location, volume, and composition of catalytic converters." 40 C.F.R. § 1051.230(a), (b)(5). The manufacturer must then select an "emission-data vehicle" to serve as a test vehicle to represent the family for which it is seeking certification. 40 C.F.R. § 1051.235. The selected test vehicle should be the engine family member "most likely to exceed the emission standards."[27] 40 C.F.R. § 1051.235(b). After collecting emission data from the respective test

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[26] However, in lieu of testing a test vehicle, manufacturers are permitted to submit exhaust emission data on a similar vehicle for which certifications have previously been obtained or applicable data submitted. 40 C.F.R. § 86.421-78(d). In this case, the Agency notes that Respondents used "carryover data from a common prototype" for several of the engine families at issue. Motion for Partial Accelerated Decision at 6, n.6.

[27] As with highway motorcycles, manufacturers of all-terrain vehicles and off-road motorcycles in certain cases "may use previously generated emission data . . . from a previous model year instead of doing new tests." 40 C.F.R. § 1051.235(d).

vehicles, the manufacturer must submit a separate written application for a COC for each engine family it seeks to certify. 40 C.F.R. § 1051.201. The application must identify the covered engine family and describe the vehicles, their engine, their emission control system, and test results from a test vehicle showing that it satisfies exhaust emissions standards set forth in 40 C.F.R. §§ 1051.105 and 1051.107. 40 C.F.R. §§ 1051.205, 1051.235, 1051.240, 1051.245.

The Agency will then issue a COC if it determines the "application is complete and shows that the engine family meets all the requirements of [Part 1051 and the Clean Air Act]." 40 C.F.R. § 1051.255(a). A valid COC applies for the same model year as the model year of the equipment, covers the appropriate engine category, and conforms to all specified equipment standards. 40 C.F.R. § 1068.101(a)(1)(i). "Engines/equipment are considered not covered by a certificate unless they are in a configuration described in the application for certification," and the engines/equipment that are covered "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." 40 C.F.R. §§ 1068.101(a)(1)(i), 1068.103(a).[28] Manufacturers may amend their applications for certification by submitting appropriate data and information describing the modifications being made. 40 C.F.R. § 1051.225.

v. Discussion

In this case, Respondents Taotao USA and Taotao China are jointly accused of 67,527 violations of the Clean Air Act for "selling, offering for sale, introducing into commerce, delivering for introduction into commerce, importing into the United States (or causing any of the foregoing with respect to)" 67,527 highway motorcycles that were not covered by COCs because they were equipped with catalytic converters different from those described in their COC applications. *See* 42 U.S.C. § 7522(a)(1). Likewise, Respondents Taotao USA and Jinyun are jointly accused of 42,437 violations of the Clean Air Act for "selling, offering for sale, introducing into commerce, delivering for introduction into commerce, importing into the United States (or causing any of the foregoing with respect to)" 42,437 all-terrain vehicles and off-road motorcycles that were not covered by COCs because they were equipped with catalytic converters different from those described in their COC applications. *See* 42 U.S.C. § 7522(a)(1). Counts 1 through 4 involve highway motorcycles. Counts 5 through 10 involve nonroad recreational vehicles.

1. Agency Argument

The Agency argues there are no material facts in dispute, and the evidence in the record demonstrates, as a matter of law, that the Respondents violated the Clean Air Act as alleged in the Complaint. The Agency's general argument is as follows:

Each of the Respondents are both "persons" and "manufacturers" within the meaning of the Clean Air Act. Agency AD Mot. at 25. They manufactured vehicles that were "materially

[28] In this instance, "'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).

different" from vehicles described in their COC applications, because the vehicles at issue in this case were built with catalytic converters that contained precious metals in different concentrations and ratios than described in their COC applications. Agency AD Mot. at 26-27. Given this material difference, the vehicles Respondents built did not belong to the certified engine families and were not covered by the COC issued for those families. Agency AD Mot. at 33-34. Consequently, Respondents imported, sold, offered for sale, or delivered for introduction into United States commerce 109,954 vehicles that were not covered by COCs, in violation of the Clean Air Act, 42 U.S.C. §§ 7522(a), 7547(d). Agency AD Mot. at 34.

2. Respondents' Argument

Like the Agency, Respondents also argue no material facts are in dispute, but they contend the facts lead to the conclusion they are not liable for the alleged violations. Their general argument is as follows:

The Clean Air Act does not require that "all vehicles belonging to the engine family that is covered by the [certificate of conformity] . . . be exactly similar to the active material contents and concentrations specified" in the engine family's corresponding COC application. Respondents' AD Mot. at 5-6. Moreover, it is the parts and components of the test vehicle representing each engine family prior to certification that must conform with each certified vehicle, "not the design specifications of the parts and components described in the application for certification," and the Agency has provided no evidence that the pre-certification test vehicle did not contain the same catalyst materials found in post-certification inspection of Respondents' sample vehicles. Respondents' AD Mot. at 6. Nor is there evidence that all of the 109,964 vehicles cited in the Complaint had non-conforming catalyst materials. Respondents' AD Mot. at 6-7. Likewise, there is no evidence that Respondents received any economic benefit by importing vehicles with non-conforming catalytic converters. Respondents' AD Mot. at 7-8.

3. Analysis

a. Respondents are "persons" and "manufacturers" subject to the Clean Air Act

Based on the plain language of the Clean Air Act, there can be no material dispute that each of the Respondents is a "person" as defined by the Clean Air Act. Under the Act, a "'person' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e). Respondents admit the allegation that Taotao China is a corporation organized under the laws of the People's Republic of China and is located at No. 6 Xinmin Road, Jinyun County, Lishui City, Zhejiang, China. Am. Compl., ¶ 6; Resp'ts Am. Answers, ¶ 6. Respondents further admit that Jinyun is a corporation also organized under the laws of the People's Republic of China and is located at Xinbi Industrial Zone, Xinbi Town, Jinyun County, Zhejiang, China. Finally, Respondents admit that Taotao USA is a corporation organized under the laws of the state of Texas with an office in Carrollton, Texas. Am. Compl., ¶¶ 4-5; Resp'ts Am. Answers, ¶¶ 4-5. Accordingly, each Respondent is a "corporation" and therefore a "person" under the Clean Air Act.

Likewise, based on the plain language of the statute, there can be no material dispute that each Respondent is a "manufacturer" as defined by the Clean Air Act. Under the Act, 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). In this case, each of the Respondents is a 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." Specifically, in each of their corresponding applications for COCs, Taotao China is described as the "original manufacturer" of highway motorcycles in engine families ETAOC.049MC2 [Count 1], DTAOC.150MC2 [Count 2], DTAOC.049MC2 [Count 3], and CTAOC.049MC1 [Count 4]. CX 1 at EPA-000004–05; CX 2 at EPA-000040–41; CX 3 at EPA-000083–84; CX 4 at EPA-000119–20. *See also* Motion to Dismiss at 10 ("All Taotao Group and [Jinyun] did was manufacture the original vehicles"). Similarly, Jinyun is described as the "original manufacturer" of the nonroad vehicles in engine families ETAOX0.12A1T [Count 5], DTAOX0.15G2T [Count 6], DTAOX.124AAA [Count 7], DTAOX0.12A1T [Count 8], FTAOX0.15G2T [Count 9], and GTAOX0.15G2T [Count 10]. CX 5 at EPA-000154–55; CX 6 at EPA-000190–91; CX 7 at EPA-000223–24; CX 8 at EPA-000255–56; CX 9 at EPA-000291–92; CX 10 at EPA-000324–25. *See also* Motion to Dismiss at 10 ("All Taotao Group and [Jinyun] did was manufacture the original vehicles"). Because they are the "original manufacturers" of all of the vehicles at issue in this case, Taotao China and Jinyun are "manufacturers" under the Clean Air Act. Meanwhile, Taotao USA admits that it imported into the United States all of the highway motorcycles manufactured by Taotao China and all of the nonroad vehicles manufactured by Jinyun. Am. Compl., ¶ 10; Resp'ts Am. Answers, ¶¶ 10. *See also* Motion to Dismiss at 10 ("Taotao USA . . . was the . . . importer). Additionally, Taotao USA "acts for" Taotao China and Jinyun "in connection with the distribution of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines." Because it is "engaged in . . . importing such vehicles" for sale in the United States and acts on behalf of its co-Respondents in connection with distributing these vehicles, Taotao USA is also a "manufacturer" under the Clean Air Act.

Notwithstanding these undisputed facts, Respondents put forth a legal argument that qualifying as "manufacturers" under 42 U.S.C. § 7550(1) still does not subject them to Clean Air Act enforcement provisions. Respondents appear to suggest that only applicants for COCs can be held liable as "manufacturers" for "failing to provide accurate design specifications" in their applications. Respondents' Response at 9; *see also* Motion to Dismiss at 4, 10-11. Thus, according to Respondents, "it is clear that 'manufacturer' as defined in the applicable statute only includes manufacturers who manufacture vehicles that fail emission standards and are not liable for ensuring that all design specifications in a COC application are exact." Respondents' Response at 10. But Respondents offer no authority for this claim, nor do they provide any plausible reason for ignoring the plain language of the statute. Nothing in the Clean Air Act's

definition of "manufacturer" in any way suggests its meaning is limited to *only* those persons who apply for COCs.

Similarly, Respondents' make the entirely unsubstantiated assertion that a "manufacturer," at least for the purposes of this proceeding, "would be one of the two catalytic converter manufacturers listed in each of the ten engine family's COC applications," not one of the Respondents. Respondents' Response at 10. Elsewhere, they suggest only Taotao USA could be a "manufacturer" because it holds the relevant COCs. Motion to Dismiss at 4. But again, these arguments flat out ignore the statutory language.[29] Nothing in the Act's definition in any way suggests that a "manufacturer" is limited to a person who builds the *parts* or *components* of a vehicle. Nor does it indicate a manufacturer is limited to the COC applicant. Rather, quite clearly, the definition states that a manufacturer is engaged in the building *or assembly* of "new motor *vehicles*, new motor vehicle *engines*, new nonroad *vehicles* or new nonroad *engines*," i.e., the *whole* product, not the pieces thereof. This Tribunal will not read non-existent language into the congressionally-crafted definition of "manufacturer."

To that end, Respondents are, as a matter of law, "manufacturers" under the Clean Air Act subject to the statute's prohibitions, including the ones at issue in this proceeding.

b. Respondents' vehicles are not covered by a certificate of conformity and their sale violates the Clean Air Act

The catalytic converters taken from vehicles inspected in this case contained active catalyst material in quantities and concentrations that were different from what Respondents represented in their applications for COCs. Respondents have not pointed to any evidence to place this fact in dispute.[30] Respondents instead suggest that the Agency's catalytic converter testing is unreliable. Respondents' Response at 7, 17-18. Significantly, this is a speculation-

[29] Straying even further afield, Respondents in their Motion to Dismiss raise a legal argument based on *Michigan v. EPA*, 135 S. Ct. 2699 (2015). Motion to Dismiss at 11-14. That case evaluated the Agency's decision in a rulemaking setting to not consider costs when determining it would regulate emissions from electric utility steam generating units. *Michigan*, 135 S. Ct. at 2704-06. *Michigan* has no relation to this case or this administrative enforcement context, and Respondents' reliance on it is misplaced.

[30] Notably, in their many briefs, Respondents cite little evidence in the record to either support their motion for accelerated decision or to rebut the Agency's motion for accelerated decision, particularly in regard to the evidence of their vehicles' nonconformity. This failure on its own merits a finding that the facts as stated by the Agency are not genuinely disputed. *See* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact cannot be or is genuinely disputed *must* support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.") (emphasis added).

based argument that the differences in precious metal concentrations "could be caused by any number of reasons," such as "the use of different testing procedures, the testing of vehicle during different stages of the its[sic] useful life, and the act of removing the catalytic converter from a vehicle's muffler." Respondents' Response at 17. But Respondents do not point to *any evidence* that there is a genuine dispute as to the reliability of these tests. Rather, they posit that the testing did not recognize that the precious metal concentrations Respondents provided in their COC applications "were based on new catalytic converters, with 0 mileage" and ignored the fact "that the catalytic converters subsequently tested were the same catalytic converters represented by the prototype, i.e. EDV[.]" Respondents' Response at 7. Additionally, Respondents contend, "some variance may be reasonably expected," as evidenced by the fact that the tests by ERG yielded different results than the tests by SGS. Respondents' Response at 7. Their catalytic converters would never yield consistent precious metal concentrations, they suggest. Respondents' Response at 7.

But again, Respondents have presented only argument and speculation. The Agency, meanwhile, offers the expert opinion of Dr. Heck that the test results are valid and not affected by the factors Respondents suggest. *See* Second Declaration of Ronald M. Heck (Jan. 13, 2017). Indeed, precious metal ratios in a catalytic converter "are not affected by time, contamination, handling, operation, or environmental conditions," and the devices themselves "are designed to operate on vehicles for the vehicles' full useful life, and . . . to withstand a wide range of temperatures and other environmental factors." Heck Second Decl., ¶¶ 2-3. Standard operating temperatures would not affect a catalytic converter's precious metal concentration. Heck Second Decl., ¶ 7. The metals would dissipate only through extreme temperature conditions that would not normally occur and that would severely damage or destroy the catalytic converter. Heck Second Decl., ¶¶ 4-6. Even standard deterioration through sintering, contamination, occlusion, or washcoat loss would not change the precious metal content. Heck Second Decl., ¶ 8. And, in this case specifically, CEE's low-mileage emissions tests[31] "would not affect the precious metal content of a catalytic converter's washcoat." Heck Second Decl., ¶ 9. As to Respondents' contention that variability in the test results undermines the testing itself, the Agency rightly responds that such variance is irrelevant; although the results of the catalytic converter analysis may differ, none reflect the precious metal ratios and concentrations claimed in Respondents' COC applications. Agency Reply at 5-6. Consequently, Respondents' complaints about the test results in this case are without foundation, and the Agency has presented sufficient support for accepting their validity.

With no facts truly in genuine dispute, the Agency contends that as a matter of law, the altered catalyst composition means Respondents manufactured vehicles that were "materially different" from what the Agency authorized, such that the vehicles were not covered by COCs and therefore not authorized for sale in the United States. Respondents make various arguments that this difference is immaterial because, regardless of the actual characteristics of their catalytic converters, their vehicles did not violate emissions standards. *See, e.g.*, Motion to Dismiss at 6-

[31] CEE subjected the selected motorcycles to a "2500km service accumulation" prior to emissions testing and the selected nonroad vehicles to "12 hours of service accumulation." This was a fraction of the engines' useful lives. *See* CX 98 at EPA-001231; *see also* 40 C.F.R. §§ 86.402-98, 86.419-2006(b), 1051.105(c), 1051.107(c) (setting forth "useful life" time and mileage accumulations for various engine classes).

7. But none of Respondents' arguments hold water, and there is ultimately no need to proceed further than the text of the Clean Air Act: "[T]he sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or . . . the importation into the United States, of any new motor vehicle or new motor vehicle engine" is prohibited "*unless such vehicle is covered by a certificate of conformity*." 42 U.S.C. § 7522(a)(1) (emphasis added). The plain language of this prohibition, which makes no mention of emissions standards, is in itself sufficient reason to reject the notion that a violation requires excessive emissions.

But even when looking beyond the statute, it is also clear, based on the implementing regulations and the terms of the COCs themselves, that certifications issued for vehicles with catalysts of one type would not cover vehicles with catalysts of another type. 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 "[t]he 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). Thus, by the plain language of the regulations, the only highway motorcycle engines and vehicles that are covered by a COC are the members of the engine family that is described in the application for the COC. A COC issued by the Agency cannot cover highway motorcycles with catalytic converters that are different in location, volume, or composition from what was described in the manufacturer's COC application. By definition, vehicles whose catalytic converters are not identical in number, location, volume, and composition are not part of the same engine family.

Likewise, for nonroad vehicles, COCs are issued for distinct engine families based on information provided in their corresponding written applications. *See* 40 C.F.R. §§ 1051.201, 1051.205. Vehicles are grouped in the same engine family only "if they are the same" in several technical aspects, including "[t]he number, location, volume, and composition of catalytic converters." 40 C.F.R. § 1051.230(a), (b)(5). The emission-data vehicle used to prepare the COC application is selected from the specific engine family it represents. *See* 40 C.F.R. §§ 1051.235. Importantly, the engines and equipment that are 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) (emphasis added). Thus, as with highway motorcycles, the plain language of the regulations pertaining to nonroad vehicles clearly indicates that the only nonroad engines and vehicles covered by a COC are ones that are described in the application for that COC. A COC issued by the Agency does not cover nonroad vehicles with catalytic converters that are different in location, volume, or composition from what was described in the manufacturer's COC application. As with highway motorcycles, nonroad vehicles whose catalytic converters are not identical in number, location, volume, and composition are not part of the same engine family.

Finally, the regulations are not the only basis for concluding the vehicles at issue in this case were not covered by a COC. The COCs themselves expressly state, on their face, that they do not apply to *any* vehicles other than those described in the relevant applications: "This Certificate covers *only* those vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the documentation required by" the

relevant regulations. CX 43-CX 52 (emphasis added). There is no material conformity when the vehicles actually manufactured contain catalytic converters with precious metal contents that are different in volume and composition from the catalytic converters described in the COC application.

Consequently, following only the plain language of the statute, implementing regulations, and COC terms, I conclude as a matter of law that the COCs issued to Respondents did not cover the vehicles that were actually manufactured and imported, because the catalytic converters in those vehicles were not the same volume and composition authorized by the Agency.[32] Thus, the vehicles that were actually manufactured and imported did not "conform, in all material respects, to the design specifications that applied to those vehicles described" in their COC applications.

Additionally, as the Agency also observes, case law supports the conclusion that vehicles materially different from the description in their COC applications are not covered by COCs issued based on that description. In *United States v. Chrysler Corp.*, Chrysler applied for and was granted a COC for its RG engine family for use in the company's Plymouth Valiant and Dodge Dart motor vehicles. 437 F. Supp. 94, 95 (D.D.C. 1977). The COC 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 95-96. Later, 37 vehicles in the engine family were discovered to have "distributors, carburetors, exhaust gas recirculation values, and/or orifice spark advance controls with part numbers other than those which were designated by Chrysler on its application for certification for use of these vehicles." *Id.* at 96. These incorrectly installed parts each "intimately relate[d] to and [was] reasonably expected to affect emission controls" of the vehicles in question, but there was no evidence that the vehicles did not conform to federal emission standards. *Id.* at 97. Even so, the district court concluded as a matter of law "that 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 (emphasis added).

The United States Court of Appeals for the D.C. Circuit affirmed the district court's decision. *United States v. Chrysler Corp.*, 591 F.2d 958 (D.C. Cir. 1979). In addition to the language found on the face of the COC, the Court of Appeals noted that the Agency had determined 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.'" 591 F.2d at 960 (quoting 40 C.F.R. § 85.074-30(a)(2) (1976)). The Court held this language "explicitly commands that each vehicle conform to design specifications," and that "[n]othing indicates that compliance with emission control standards is to be the

[32] Respondents try to argue that "volume" and "composition" of the catalytic converters do not encompass the amounts and concentrations of the catalyst active material. Respondents' Reply at 4-6. They base this argument on the claim that "nowhere" on the COC applications "do they mention precious metal concentrations." Respondents' Reply at 5. Like many of Respondents' arguments, this claim is confusing because it is completely unfounded. The COC applications contain multiple data points related to the catalytic converters at issue, including their precious metal volume, ratios, and loading. *See, e.g.*, CX 1 at EPA-000011.

controlling standard." *Id.* Further, the Court of Appeals adopted the district court's acceptance of the Agency's "position that an automobile was 'materially' different if the difference in parts reasonably may be expected to affect emission controls," because that test "properly places maximum emphasis on congressionally mandated prototype testing." *Id.* In requiring COCs under the Clean Air Act, Congress's "clear . . . intent" was "that vehicles pass emission tests *[b]efore* they may be sold to public," and to adopt an approach that made compliance with emission control standards the primary consideration "would have favored use of a test that conceivably could subject every automobile to emission tests *after* manufacture and sale." *Id.* at 961 (emphasis added). Thus, "[i]n view of the clear language of the statutes, the regulations, and the policies favoring presale certification, . . . where one or more parts erroneously installed in a vehicle are intimately related to and reasonably may be expected to affect emission controls," the vehicle is not covered by a COC. *Id.* To that end, *Chrysler* produced a clear test that applies to this case.

Not surprisingly, Respondents attempt to argue that *Chrysler* is no longer good law. Respondents' Response at 10-14. According to Respondents, *Chrysler*

> was based on the language of a regulation, which has since been deleted and the language of the successor regulation specifically eliminates the requirement that a Certificate of Compliance[sic] contain the language that the COC 'covers only those new motor vehicles which conform, in all material respects, to the design specification that applied to those vehicles described in the application for certification.'

Respondents' Response at 11. Because of this deletion, and because the Clean Air Act itself "say[s] nothing about nonconformity by vehicles that pass emission standards, the holding clearly does not apply to all future cases, especially those with different facts." Respondents' Response at 11. *See also* Motion to Dismiss at 3-4, 7-8. The language Respondents refer to is the D.C. Circuit's citation to 40 C.F.R. § 85.074-30(a)(2) (1976), which no longer exists. At the time, that regulation mandated that each issued COC contain language stating that the 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[.]" Control of Air Pollution from New Motor Vehicles and New Motor Vehicle Engines, 39 Fed. Reg. 7545, 7552 (Feb. 27, 1974); *see also* CX 177.

In 1981, the regulatory requirement that COCs contain such specific language was amended by an interim final rule "designed to reduce the administrative burdens of emission certification" while the Agency developed a new motor vehicle compliance program. Control of Pollution from New Motor Vehicles and New Motor Vehicle Engines; Revisions to Motor Vehicle Emission Certification Procedures, 46 Fed. Reg. 50464, 50464 (Oct. 13, 1981); *see also* CX 178. But this amendment did not revoke the substantive requirement that vehicles conform to the design specifications they relied on in their applications 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. 46 Fed. Reg. at 50471. "This change will have no effect on the motor vehicle industry which is familiar with these requirements," the Agency noted in its comments on the rule change. *Id.* "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*." *Id.* (emphasis added). Thus, 40 C.F.R. § 86.437-78 was amended to make clear that COCs are issued "*upon such terms as [the Agency] may deem necessary* to assure that any new motorcycle covered by the certificate will meet the requirements of the act and of this subpart." *Id.*; 40 C.F.R. § 86.437-78(a)(2)(ii).

To that extent, the amendment simply gave the Agency greater flexibility in how it worded the terms of an issued COC. In this case, those terms were expressly stated on the face of the certificates: "This Certificate covers *only* those vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the documentation required by" the relevant regulations. CX 43-CX 52 (emphasis added). It does not matter, as Respondents contend, that the language on the face of the COC "in and of itself is not a regulation." Respondents' Response at 13; *see also* Respondents' Reply at 8. The language still outlines the terms under which the COC is issued and remains valid, and these are terms that have been authorized by regulation and deemed necessary by the Agency. Additionally, *Chrysler* rested on Congress's clear intent that vehicles be certified *before* they go to market. The regulatory amendment could not and did not change this statutory mandate. So it cannot be reasonably argued that the Court in *Chrysler* would alter its decision based purely on an administrative change to the regulations. To accept Respondents' argument that their vehicles conformed with their COCs because no emissions limits were exceeded would be to accept a "test that conceivably could subject every automobile to emission tests *after* manufacture and sale." *See Chrysler*, 591 F.2d at 961 (emphasis added).

Respondents also attempt to draw a factual distinction between this case and *Chrysler*. Chrysler manufactured cars for sale both inside and outside the state of California, where emissions standards were more stringent. The company erroneously installed distributors, carburetors, exhaust gas recirculation valves, and orifice spark advance controls when it installed California-compliant parts in non-California vehicles, and vice versa. *Chrysler*, 591 F.2d at 959-60 n.3-4. In this case, according to Respondents, one of two Chinese companies manufactured the catalytic converters for Respondents' vehicles and provided the specifications that Respondents included in their COC applications. Respondents' Response at 14; *see also* Respondents' Reply at 6-7. Respondents then installed these catalytic converters in their test vehicles and all of the other vehicles belonging to the same engine family. Respondents' Response at 14. Unlike *Chrysler*, "[h]ere there is only one catalytic converter specification, the one that was installed on the test vehicle that was tested for emissions," Respondents claim. And, according to Respondents, if the only way to determine a catalytic converter's emission rate is to test the converter's performance, then the Agency's position is "that each catalytic converter must be tested for active material concentrations prior to submitting an application for certification," which "will do exactly what the Chrysler Corp. decision was aiming to avoid, it would make the statutory policies behind the enactment more difficult to fulfill." Respondents' Response at 14. The problem with this argument is that it does not make sense. The Clean Air Act and its implementing regulations place the burden on Respondents, not their suppliers, to provide accurate emissions information in their COC applications. Respondents must decide the extent to which they will rely on their suppliers' statements about their catalytic converters and whether to test or verify those statements. But it is incorrect to say that requiring a manufacturer to provide truthful information to the Agency in a COC application somehow thwarts the statutory policy "that vehicles pass emission tests *[b]efore* they may be sold to public." *See*

Chrysler, 591 F.2d at 961 (emphasis added). In fact, this requirement fulfills that policy goal. There is simply no meaningful distinction between *Chrysler* and this case.

Consequently, the rulings in *Chrysler* remain intact; nothing substantive changed when the Agency decided it did not need a regulation mandating precise verbiage for inclusion in issued COCs. It is therefore entirely wrong to say that *Chrysler's* holding was superseded by subsequent rule changes. When applying *Chrysler* to this case, it is clear that the vehicles at issue are not covered by their respective COCs: Their catalytic converters "are of a nature intimately related to and . . . may reasonably be expected to affect emission controls," and they were "erroneously installed" because they are not the catalytic converters that Respondents claimed on their COC applications. It does not matter whether the vehicles meet emissions standards. Respondents' Response at 6, 8; Respondents' Reply at 12. Many of Respondents' other arguments also fall flat in the face of this conclusion. To find liability in this case, it is irrelevant that the regulations do not specify certain catalyst concentration levels;[33] that Respondents did not benefit economically from their actions; that the Agency would have issued COCs anyway for the catalyst levels found following the warehouse inspections; or that Respondents' believe that the term "'specifications' described in the COC and . . . associated application" has not been defined to include precious metal concentrations. Respondents' AD Mot. at 5-6; Respondents' Reply at 3-4, 8-10, 12-13.

Nor do Respondents avoid liability because the Agency has not provided catalyst levels of the test vehicles Respondents used when applying for COCs. Respondents might prefer that material conformity with each engine family's emissions-data vehicle be the point of comparison rather than the data submitted in the COC application. *See, e.g.*, Respondents' Reply at 10, 12-13; Motion to Dismiss at 9. But clearly the question is whether catalyst levels in Respondents' vehicles matched what was claimed on their COC applications, not whether they matched the catalyst levels of their emissions-data vehicles. *See* Respondents' AD Mot. at 6; Respondents' Response at 5. Even Respondents' reliance on 40 C.F.R. § 86.437(a)(2)(iii), which in any case applies only to highway motorcycles, is misplaced. *See* Respondents' AD Mot. at 6. That regulation states that a COC "will cover all vehicles represented by the test vehicle," but it does not suggest the vehicles represented by that test vehicle must not conform to the description in their COC application. Additionally, because liability does not turn on whether an engine meets emissions standards, the performance of the emissions-data vehicles is not relevant to whether an engine family conforms to the description the manufacturer provided the Agency.

Respondents also dispute the Agency's citation to 40 C.F.R. § 85.2305(b). *See, e.g.*, Agency AD Mot. at 7. 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). Respondents contend that because this regulation

[33] As the Agency correctly observes, it was not necessary to establish catalyst concentration levels by regulation because "Respondents committed themselves to standards for catalytic converters when they submitted applications to the EPA stating that they would manufacture their vehicles using catalytic converters with specific physical and chemical characteristics." Agency Response at 13. Respondents failed to meet their own standards.

applies to pre-COC vehicles, it does not apply to post-COC vehicles, and therefore no conformity requirement exists for vehicles produced after the COC becomes effective. Respondents' Response at 5; Respondents' Reply at 11-12. But, as *Chrysler* observes, it is the statute, regulations in Parts 86 and 1051, and terms of the COCs that in concert impose this requirement. 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).

Respondents additionally raise the point that revocation or suspension of a COC shall "[e]xtend no further than to forbid the introduction into commerce of vehicles previously covered by the certification which are still in the hands of the manufacturer, except in cases of such fraud or other misconduct as makes the certification invalid ab initio." 40 C.F.R. § 86.442-78(e)(2); *see also* 40 C.F.R. § 1051.255; Respondents' Response at 12; CX 177 at EPA-002417; 39 Fed. Reg. at 7551. From this, Respondents conclude that because there is no allegation of fraud or misconduct that makes the certificate invalid ab initio, the Agency can only suspend certification of Respondents' vehicles that have not "been sold to ultimate purchasers." Respondents' Response at 12-13. However, this appears to be a nonissue, as this provision is not relevant to liability. Moreover, the Agency disclaims any effort through this enforcement action to suspend, revoke, or void Respondents' COCs. Agency Reply at 8 n.7 ("Proceedings to suspend, revoke, or void a COC are pursued by [a different office within EPA] rather than Complainant, and are distinct from enforcement proceedings to assess and recover civil penalties for violations of the Act.").

Given the discussion above, I find there are no material facts in dispute as to Respondents' liability for the allegations in the Amended Complaint. The Agency has met its burden to show that, as a matter of law, Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported into the United States highway motorcycles and nonroad vehicles that were not covered by COCs, or that Respondents caused the foregoing. More specifically, I find that the COCs issued to Respondents did not cover the vehicles that were actually manufactured and imported, because the catalytic converters in those vehicles were not the same volume and composition as those described in the COC applications and authorized by the Agency. Thus, the vehicles and engines that were actually manufactured and imported did not "conform, in all material respects, to the design specifications that applied to those vehicles described" in their COC applications.

Regarding the number of violations for which they are culpable, Respondents argue that the Agency's post-certification testing does not implicate all 109,964 of the vehicles that were imported. Of the nearly three-dozen catalyst inspections, "multiple tests on vehicles belonging to different engine families often produce different results and tests on different vehicles belonging to the same engine family can also vary," Respondents contend. Respondents' AD Mot. at 7. Because of this variance, "there is no evidence to support Complainant's allegation that Respondents jointly manufactured, or imported, 109,964 uncertified vehicles." Respondents' AD Mot. at 7. The Agency disagrees, and cites the following evidence:

- ❖ In their Motion to Dismiss, Respondents state that they purchased their catalytic converters from a common third-party manufacturer and that "the EDV that passed the emissions standards contained a catalytic converter which conformed to the catalytic converter on imported vehicles." Mot. to Dismiss at 9.

- ❖ In each COC application for the ten engine families at issue, Respondents describe the family's catalytic converter characteristics, and further state that:

    - The vehicles produced "are identical in all material respects to the [vehicles] described" in the application; and

    - The vehicles are all "assembled at the factory located in China from components made by Taotao Group" and shipped to the United States without further modification once they leave the factory. CX 1-CX 10.

- ❖ After noting that none of the tested vehicles had a catalytic converter that matched the COC application description, Complainant's expert statistician, John Warren, Ph.D., states that "[m]y calculations show that it is very unlikely that a catalytic converter taken from a vehicle labeled as belonging to [one of the ten engine families at issue], if tested, would show success, i.e., show that the catalytic converter contained Pt, Pd, and Rh in the certified ratio. I conclude that it is very unlikely the certified ratio is being achieved in any catalytic converter from a vehicle labeled as belonging to [one of the ten engine families at issue]. CX 179 at EPA-002431-32.

Given the uniformity of the manufacturing process, the common source of the catalytic converters, that no post-production alterations are made to the vehicles, that the inspected vehicles from all ten engine families failed to match their COC application descriptions, and the Agency's expert opinion that it was highly likely that none of the vehicles in the ten engine families would yield compliant results, I find there is sufficient evidence to conclude that none of the 109,964 imported vehicles conform to the design specifications of their COC applications. Further, Respondents have put forward no evidence to contradict this conclusion nor have they offered any legal authority to suggest it is improper.

vi. Conclusion

For the foregoing reasons, I find there are no remaining facts as to Respondents' liability that remain controverted. The only remaining facts in dispute are those relating to penalty. A hearing will be necessary to address those issues. Additionally, I find all 107 of the material facts[34] set forth by the Agency with its Motion for Accelerated Decision are not in genuine dispute and exist without substantial controversy. *See* Agency AD Mot., Attach. A; 40 C.F.R. § 22.20(b)(2). Consequently, the Agency's Motion for Partial Accelerated Decision is **GRANTED**, and Respondents' Motion for Accelerated Decision is **DENIED**.

[34] The Agency's Statement of Material Facts appears to contain a few typographical errors: Presumably, ¶ 47 should reference engine family DTAOC.150MC2 and not ETAOC.049MC2; ¶¶ 56 and 61-63 should reference engine family CTAOC.049MC1 and not CTAOC.049MC2; and the Pd concentration in ¶ 83 should be 1,023 mg/kg and not 1,005 mg/kg.

III. Conclusion

As outlined above, both of the Agency's motions to supplement the prehearing exchange are **GRANTED**. The Agency's Motion for Partial Accelerated Decision is **GRANTED**. Respondents' Motion to Dismiss is **DENIED**. Respondents' Motion for Accelerated Decision is **DENIED**.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: May 3, 2017
Washington, D.C.

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Partial Accelerated Decision and Related Motions,** dated May 3, 2017, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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Dated: May 3, 2017
Washington, D.C.