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.	)	

RESPONSE TO RESPONDENTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

On August 2, 2017, respondents in this matter, Taotao USA, Inc. ("Taotao USA"), Taotao Group Co., Ltd. ("Taotao Group"), and Jinyun County Xiangyuan Industry Co., Ltd. ("Jinyun") (collectively "Respondents") filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion"). The Director of the Air Enforcement Division of the United States. Environmental Protection Agency's Office of Civil Enforcement ("Complainant") now files this response opposing Respondents' Motion. Respondents' Motion misstates the law and is not supported in fact, and should therefore be denied.

I. Background

Section 205(c)(1) of the Clean Air Act (the "Act") authorizes the Administrator to assess a civil penalty for violations of sections 203(a) and 213(d) of the Act in lieu of commencing a civil action. 42 U.S.C. § 7524(c)(1). The maximum administrative penalty sought against each violator in an assessment proceeding is limited to $362,141,[1] "unless the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate

[1] The statutory maximum civil penalty level has been adjusted over time as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, Pub. L. No. 101-410, 104 Stat. 890 (1990), the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461 note, Pub. L. No. 104-134, 110 Stat. 1321-373 (1996), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461 note, Pub. L. No. 114-74, § 701, 129 Stat. 599 (2015) (the "Improvement Act of 2015"). The EPA has implemented these inflation adjustments by periodically updating maximum penalty levels as codified at 40 C.F.R. § 19.4. On January 12, 2017, EPA issued a final rule adjusting statutory maximum civil penalties according to formulas prescribed under the Improvement Act of 2015. *See* Civil Monetary Inflation Adjustment Rule, 82 Fed. Reg. 3633 (Jan. 12, 2017). For violations occurring after November 2, 2015, the penalty limit increased to $362,141. *Id.* at 3636.

for administrative penalty assessment. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review." *Id.*

Within the EPA, the Administrator has delegated waiver authority under the Act to the Assistant Administrator ("AA") for the EPA's Office of Enforcement and Compliance Assurance ("OECA") in "multi-Regional cases, cases of national significance or nationally managed programs." Attach. A (EPA Delegation 7-6-A). The EPA's program for enforcing the mobile source provisions under Title II of the Act, 42 U.S.C. §§ 7521 through 7590, is and has always been a nationally managed program. *See* Attach. F at 6, 9 (Memorandum from Assistant Administrator Steve A. Herman, "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases" (July 11, 1994)). The AA for OECA has redelegated the waiver authority to the Director for the Office of Civil Enforcement ("OCE"), who has redelegated the authority to the Director of the Air Enforcement Division. Attach. B (Office of Enforcement and Compliance Assurance Redelegation 7-6-A (Mar. 2013)); Attach. C (Office of Enforcement and Compliance Assurance Redelegation 7-6-A (Sept. 2015)); Attach. D (Office of Civil Enforcement Redelegation 7-6-A (Mar. 2013)); Attach. E (Office of Civil Enforcement Redelegation 7-6-A (Sept. 2015)). Complainant is the Director of the Air Enforcement Division. *See* Compl. ¶ 2 (identifying Complainant's title and delegations of authority); Amd. Compl. ¶ 2 (same).

Within the United States Department of Justice ("DOJ"), the Attorney General has delegated waiver authority under the Act to the Assistant Attorney General ("AAG") in charge of the DOJ's Environment and Natural Resources Division ("ENRD") by regulation, 28 C.F.R. § 0.65(a). *See In re Strong Steel Products, LLC*, Docket No. CAA-5-2003-00090, 2004 EPA ALJ LEXIS 144, at *31 (Order on Respondent's Motion to Dismiss and Complainant's Cross Motion for Accelerated Decision) (ALJ, Nov. 22, 2004) (holding that 28 C.F.R. § 0.65(a) properly delegates waiver authority under the Act from the Attorney General to the AAG for ENRD). The AAG has redelegated waiver authority to the supervising Deputy Assistant Attorney General ("DAAG"), Chief, Deputy Chiefs, and Assistant Chiefs of ENRD's Environmental Enforcement Section ("EES"). Attach. G at 1, 7 (Environment and Natural Resources Division Directive No. 2014-01, "Delegation of Authority to Initiate, Litigate and Compromise EDS and EES Cases").

On January 30, 2015, Complainant sent a letter to the AAG for ENRD requesting that DOJ waive the limitation on the EPA's authority to assess an administrative penalty against Respondents for violations of sections 203(a) and 213(d) of the Act, 42 U.S.C. §§ 7522(a)(1) and 7547(d).[2] Attach. H. On March 17, 2015, Karen Dworkin, Assistant Section Chief of EES, wrote a letter concurring with Complainant's request to waive the administrative penalty limit pursuant

[2] Additional information about the violations, including Complainant's legal analysis and proposed litigation strategy, were set forth in an enforcement sensitive memorandum. The memorandum's content consists of privileged, deliberative communication between the Office of Enforcement and Compliance Assurance's ("OECA") and DOJ concerning the exercise of their enforcement discretion, and is therefore not appropriate for review. Consequently, the memorandum has been redacted in its entirety.

to section 205(c)(1) of the Act, allowing Complainant to pursue an administrative enforcement action against Respondents. CX026.[3] On November 12, 2015, Complainant filed the first Complaint alleging that certificates of conformity did not cover vehicles purportedly belonging to the eight different engine families identified in Counts 1 through 8, and the vehicles were therefore imported or sold in violation of sections 203(a)(1) and 213(d) of the Act. *See* Compl. at ¶¶ 18, 36–99 (asserting that the penalty limit had been waived pursuant to 205(c)(1) of the Act, and identifying engine families in violation).

After the Complaint was filed, inspections revealed additional engine families were being imported and sold in violation of the Act. On February 1, 2016, Complainant wrote a second letter to the AAG to inform him of newly-discovered violations, and to request concurrence with Complainant's determination that the violations should be resolved administratively with a waiver of the administrative penalty cap.[4] Attach. I. Ms. Dworkin wrote a reply letter dated March 24, 2016, concurring in Complainant's waiver determination. Attach. J.

On May 6, 2016, Complainant wrote a third letter to the AAG to inform him of yet more violations and to request concurrence with Complainant's determination that an administrative proceeding with a waiver against Respondents remained an appropriate enforcement response both for the violations identified to date, and for substantially similar violations that might be discovered in the future.[5] Attach. K. In response to Complainant's May 6th letter, Ms. Dworkin wrote a reply letter concurring in Complainant's waiver determination, and requesting additional consultation regarding substantially similar future violations if certain thresholds were met. CX028.[6] Specifically, Ms. Dworkin requested additional consultation if newly-discovered violations caused harm other than to the regulatory scheme, including violations that caused excess emissions; violations other than those involving certification or labeling; violations that were willful, knowing, or otherwise potentially criminal; or if the aggregate number of vehicles in violation increased to over 125,000. *Id.*

On June 14, 2016, Complainant filed the Amended Complaint, increasing the number of vehicles identified as purportedly belonging to the engine families identified in Counts 1 through 3 and 5 through 8, and adding Counts 9 and 10 identifying two new engine families with violations substantially similar to those described in Counts 1 through 8.

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[3] A copy of CX026 is submitted with this Response.

[4] The February 1, 2016 letter contains enforcement sensitive deliberative communications, subject to the attorney-client and attorney work product privileges, between OECA and DOJ concerning the exercise of enforcement discretion and information pertaining to Complainant's legal analysis and proposed litigation strategy, which have been redacted.

[5] The May 6, 2016 letter contains enforcement sensitive deliberative communications, subject to the attorney-client and attorney work product privileges, between OECA and DOJ concerning the exercise of enforcement discretion and information pertaining to Complainant's legal analysis and proposed litigation strategy, which have been redacted.

[6] A copy of CX028 is submitted with this Response.

On August 25, 2016, Complainant filed the March 17, 2015, and June 2, 2016, letters from Karen Dworkin as exhibits CX026 and CX028, respectively, to its Initial Prehearing Exchange. Those letters, in combination with the signed Complaint and Amended Complaint, show that the EPA and DOJ agreed to waive the section 205(c)(1) limit on an administrative penalty assessed against Respondents in this proceeding. *See* Order on Partial Accelerated Decision and Related Motions, at 18 n.25 (May 3, 2017) (citing Am. Compl. ¶ 21; CX026; CX028) ("In this case, the Attorney General agreed the Agency could seek a penalty of more than $320,000."). On June 23, 2017, Complainant filed a Motion Requesting Official Notice pursuant to 40 C.F.R. § 22.22(f), requesting that the Presiding Officer take official notice of the agreement between the Agency and the Attorney General to waive the statutory penalty limit in this administrative proceeding. Respondents did not file a timely opposition to the Motion Requesting Official Notice. On August 2, 2017, Respondents filed the pending Motion challenging the validity of the waiver determination.[7]

II. Legal Standard

The Consolidated Rules of Practice that govern this proceeding provide that the Presiding Officer may dismiss a proceeding "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). In actions for the assessment of any administrative civil penalty under sections 113(d) or 205(c) of the Act,[8] the administrative courts have identified failure to obtain a valid determination to waive the limits on the Administrator's administrative penalty authority as "other grounds" that may warrant dismissal.[9] *In re Strong Steel Products, LLC*, 2004 EPA ALJ LEXIS 144, at **16–19.

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[7] Respondents did not contact Complainant prior to filing this Motion to determine whether Complainant opposed the relief requested therein, in contravention of the Prehearing Order's consultation requirement. Prehearing Order, at 6 (May 11, 2016).

[8] Prior decisions addressing the waiver provisions of the Act have arisen under section 113(d) of the Act, which applies to violations of Title I, rather than 205(c), which applies to violations of Title II. Both section 113(d) and section 205(c) limit the Administrator's authority to assess administrative penalties to matters where the total penalty sought does not exceed $200,000, adjusted for inflation, unless the limit is waived. *Compare* 42 U.S.C. 7413(d)(1) *with* 42 U.S.C. § 7524(c)(1). Section 113(d) differs from section 205(c) in that section 113(d) further limits the Administrator's authority to actions where the first date of violation occurred no more than twelve months prior to the initiation of the administrative action, unless the Administrator and Attorney General agree that a longer period of violation is appropriate for administrative resolution. *Id.* Section 205(c) does not impose a time limitation.

[9] In this action, if the Administrator and the Attorney General had not jointly determined to waive the limitation on the Administrator's penalty authority, this Tribunal could still have subject matter jurisdiction over the claims alleged in the Amended Complaint under section 205(c)(1) of the Act and 40 C.F.R. § 22.1(a)(2), but Complainant would be barred from seeking a penalty against each Respondent in excess of the statutory limit. Complainant may therefore be entitled to *some* relief even if the waiver determination is found to be invalid, making dismissal inappropriate under 40 C.F.R. § 22.20(a).

A waiver determination is valid if the statutory conditions for the determination have been met. *In re Lyon County Landfill*, 8 E.A.D. 559, 567 (EAB 1999). While the question of whether a waiver is appropriate in a given case is a policy matter "appropriately reserved to enforcement personnel," a presiding officer may properly "determine whether the statutory preconditions that enable EPA and DOJ to exercise their discretionary authority to issue a waiver [have] been satisfied." *Id.* at 567–68.

Respondents have challenged the factual bases for Complainant's claim that "[t]he Administrator and the Attorney General jointly determined that this matter, although it involves a penalty amount greater than $320,000, is appropriate for administrative penalty assessment." Amd. Compl. ¶ 21. On challenge, "Complainant must prove, by a preponderance of the evidence, that the officials with delegated authority from the Attorney General and the EPA Administrator made the necessary waiver determination." *In re Strong Steel Products, LLC*, 2004 EPA ALJ LEXIS 144, at *19; *see In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 518 n.40 (EAB 2004) (noting that the "obligation to put forward evidence to prove jurisdiction arises once [the] assertion of jurisdiction has been challenged").

III. The determination to waive the section 205(c)(1) limit on penalty amount was made by officials with delegated authority

There can be no genuine dispute that officials with delegated authority from the Attorney General and the EPA Administrator determined to waive the statutory limit on the Administrator's authority to assess a penalty against Respondents in this action pursuant to section 205(c)(1) of the Act. The Environmental Appeals Board ("EAB") has previously observed that "a valid determination by EPA, in combination with the concurring determination by the Department of Justice, would support" a finding that a valid joint determination had been made. *Id.* at 508. Complainant has provided this documentation for the present action.

The EAB has found that "the presence of a delegation in the EPA Delegations Manual . . . provides a sufficient evidentiary basis . . . to conclude that a delegation of authority has in fact occurred." *In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. at 519. The Delegations Manual contains a clear delegation of the section 205(c) waiver determination authority for cases that are part of a nationally managed program from the Administrator, through the AA of OECA and the Director of OCE, to Complainant.[10] Attach. A at ¶¶ 1(b)–3(a); Attach. B at ¶¶ 1(b)–3(a);

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[10] Respondents' assertion that "it is well-established that the Director of the Air Enforcement Division . . . does not have the authority to make a waiver determination" based on the EAB's opinion in *Julie's Limousine* is mistaken. *See* Mot. at 5 (citing *In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. at 522). In *Julie's Limousine*, the question was whether the AED Director had authority to make a waiver determination for a case initiated by EPA Region IV. *In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. at 510. Because that case was not a multi-Regional case, a case of national significance, or part of a nationally managed program, the AED Director did not have waiver authority for that case under the text of EPA Delegation 7-6-A. *Id.* The present matter is initiated out of EPA headquarters and is part of a nationally managed

Attach. C at ¶¶ 1(b)–3(a); Attach. D at ¶¶ 1(b)–3(a); Attach. E at ¶¶ 1(b)–3(a). This action arises under sections 203(a)(1), 213(d), and 205(c)(1) in Title II of the Act, and was initiated out of EPA headquarters as part of the EPA's nationally-managed mobile source enforcement program with a Complaint signed by Complainant, the Director of the EPA's Air Enforcement Division. Compl. ¶¶ 2, 16, 20; Amd. Compl. ¶¶ 2, 19, 23; Attach. F at 6 (identifying mobile source enforcement as a nationally managed program).

Complainant determined that it would be appropriate to assess an administrative penalty against Respondents in excess of the statutory threshold, and documented that determination in three separate letters to DOJ requesting concurrence in the waiver determination. Attach. H; Attach. I; Attach. K. Complainant further documented and ratified the determination by signing the Complaint and Amended Complaint, each of which state that the waiver determination had been made. Compl. ¶ 18; Amd. Compl. ¶ 21; *see In re Strong Steel Products, LLC*, 2004 EPA ALJ LEXIS 144, at **41–42 (signature on complaint is *prima facie* evidence that signatory reviewed and agrees with the content of the complaint). There can be no genuine dispute that Complainant is an official with delegated authority from the Administrator, and Complainant made the necessary waiver determination.

The Attorney General has delegated waiver authority under section 205(c)(1) of the Act to the AAG for ENRD, who has redelegated the authority to the Assistant Section Chiefs of EES. 28 C.F.R. § 0.65(a); Attach. G at 1, 7; *see In re Strong Steel Products, LLC*, 2004 EPA ALJ LEXIS 144, at *31 (holding that 28 C.F.R. § 0.65(a) properly delegates waiver authority to the AAG for ENRD). Ms. Dworkin, an Assistant Section Chief of EES, concurred with Complainant's determination that it would be appropriate to waive the penalty cap and assess an administrative penalty against Respondents in excess of the statutory limit, and documented that concurrence in three separate letters to EPA. Ms. Dworkin is an official with delegated authority from the Attorney General, and she made the waiver determination.

Taken together, the three determination letters from Complainant, three concurring determination letters from Ms. Dworkin, and the signed Complaint and Amended Complaint filed in this matter document that a valid determination was made to waive the limit on the Administrator's authority to assess an administrative penalty against Respondents in this action.

IV. Respondents' challenge to the basis and scope of the waiver is meritless

Respondents make four arguments concerning the basis and scope of the waiver. First, Respondents complain that "it is impossible to know what facts Ms. Dworkin's determination relied upon," and the evidence therefore does not show whether a determination to waive the penalty limit in this action was made. Mot. at 5–6. Respondents also attempt to parse language regarding "future" violations in Ms. Dworkin's June 2, 2016 letter to argue that no waiver determination was made with regard to the newly-discovered violations added to Counts 1

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program. Attach. F at 6. The limitation identified in paragraph 3(a) of EPA Delegation 7-6-A does not apply in this instance.

through 3 and 5 through 8 in the Amended Complaint. *Id.* at 6–7. Third, Respondents argue that language in the June 2, 2016 letter prevents Complainant from applying "penalty factors that pertain to vehicles that exceed or potentially exceed emission standards" because penalties pertaining to excess emissions are allegedly beyond the waiver's scope. *Id.* at 7. Finally, Respondents claim that the evidence does not show Ms. Dworkin knew what the proposed penalty would be, and therefore did not make a determination to waive the penalty limit. *Id.*

Respondent's first argument fails because it calls for the Presiding Officer to inquire into the bases and mental processes leading to the waiver determination, and to inappropriately second-guess enforcement personnel's determination that a waiver should be granted in this action. The EAB has cautioned that the review to determine whether a valid waiver determination was made "need not, and indeed should not, interfere with EPA and DOJ's authority to determine, from a policy perspective, when to use the waiver tool." *In re Lyon County Landfill*, 8 E.A.D. at 568. Yet that is precisely what Respondents ask the Presiding Officer to do when they demand to know what facts the decision-making officials relied on, including facts pertaining to the amount of the proposed penalty. That inquiry would necessarily delve into enforcement sensitive and privileged deliberations between OECA and DOJ regarding their exercise of prosecutorial discretion, and invite the Presiding Officer to substitute her judgement regarding the appropriateness of a waiver for that of the enforcement officials authorized to make the determination. The Presiding Officer should not accept Respondents' invitation to make that inquiry. The evidence shows that properly-authorized officials from OECA and DOJ jointly determined it was appropriate to waive the section 205(c)(1) limit on the Administrator's ability to assess a penalty against Respondents in this matter. The inquiry need go no further to establish that the Tribunal has jurisdiction over this matter and authority to assess an administrative penalty in the amount Complainant proposed.

Respondents' attempt to read limitations into the waiver determination letters is similarly misplaced. Their claim that no waiver determination was made with regard to the newly-discovered violations in the engine families identified in Counts 1 through 3 and 5 through 8 in the Amended Complaint because the violations are not specifically referenced in Ms. Dworkin's June 2, 2016 letter rests on speculation that those violations were not covered by that waiver determination or previous waiver determinations. There is no requirement that a waiver determination be made in writing, in whole or in part, so long as the evidence is "adequate to show that the appropriate person made the required determination." *In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. at 520–21. Respondents' line of inquiry would transform the waiver determination process into a formal action subject to record review, something it is decidedly not. *See* 42 U.S.C. § 7524(c)(1) (waiver determination not subject to judicial review). Section 205(c) of the Act provides no criteria to guide the Administrator and Attorney General in determining whether an administrative action is appropriate, and the determination is not a final action subject to judicial review. 42 U.S.C. § 7524(c)(1). In other words, the determination of whether to waive the penalty limitation is entrusted to the officials' discretion. The discretionary nature of the determination is precisely why the jurisdictional inquiry is limited to ascertaining whether the determination was made, and does not go further to investigate the mental processes of the officials who made the determination.

In this matter, as Complainant continued to discover new violations, Complainant requested a waiver to pursue additional violations as well as future violations substantially similar to those already identified and waived in this matter. Ms. Dworkin concurred in the waiver request for future violations of the Act as long as such violations were substantially similar to those covered under the waivers already issued to date, and the total number of waived vehicles in the matter did not exceed 125,000. CX028. Ms. Dworkin also established certain thresholds which, if met, would prompt OECA and DOJ to reconsider whether this matter should be pursued through a civil action in United States district court rather than through an administrative enforcement proceeding. These thresholds were the discovery of future violations that caused excess emissions, violations other than those regarding certification, potentially criminal violations, or violations bringing the aggregate number of vehicles in violation to over 125,000. CX028.

Respondents argue that the violations the Amended Complaint added to Counts 1 through 3 and 5 through 8 are not "future violations" because they occurred in the past. This argument, aside from constituting an improper inquiry into the waiver determination process, elevates form over substance. The discussion of future violations in Complainant's May 6, 2016 letter, and Ms. Dworkin's June 2, 2016 letter, show that the officials contemplated that the number of violations in this administrative matter would grow as new violations were discovered, and that the matter remained appropriate for administrative resolution so long as additional violations were substantially similar to those already discussed and the aggregate number of vehicles in violation did not exceed 125,000. Complainant discovered the violations added to Counts 1 through 3 and 5 through 8 after Complainant sent the May 6, 2016 letter. The time the violations occurred is substantively irrelevant. This matter remains substantively within the contours of what OECA and DOJ determined was appropriate for administrative resolution. Complainant has not alleged that the violations identified in the Amended Complaint caused quantifiable emissions exceedances warranting court-ordered remediation, or that the violations resulted from a deliberate effort to circumvent the Act. The Amended Complaint identifies 109,964 vehicles in violation, and all of the violations pertain to certification. Amd. Compl. ¶ 38.

Respondents' suggestion that the Tribunal does not have jurisdiction to assess a penalty in this action for violations of "major" egregiousness based on language in Ms. Dworkin's June 2, 2016 letter should be rejected. The EPA's Clean Air Act Mobile Source Civil Penalty Policy provides that violations may be characterized as being of "major" egregiousness if there is no information about emissions, if test data shows exceedances, or if excess emissions are otherwise "likely to occur." Penalty Policy at 13. The question of whether a violation may be characterized as "major" for the purpose of calculating a proposed penalty is distinct from the question of whether violations demonstrably cause quantifiable excess emissions such that the appropriate enforcement response is a civil action in district court to restrain future violations and obtain injunctive relief in the form of court-ordered remediation. *See* 42 U.S.C. § 7523(a) ("The district courts of the United States shall have jurisdiction to restrain violations of section 7522(a) of this title."). Nothing in the June 2, 2016 letter suggests that the determination limits the discretion of the Complainant or this Tribunal to characterize the egregiousness of the violations identified in

the Amended Complaint and calculate an appropriate penalty with the guidance of the Penalty Policy.

V. Respondents' claim that this action is unconstitutional is frivolous

Respondents posit that the waiver determination in this matter constitutes an attempt to wrongfully circumvent the limitations in the Act because "it is highly unlikely that congress contemplated that a 'larger penalty amount' of over fifteen times the maximum penalty limit could ever be appropriate" in an administrative enforcement action. Mot. at 7–8. Respondents cite to precedent holding that punitive or "exemplary" damage awards in private litigation may be so large as to constitute a "grossly excessive" punishment in violation of the Due Process Clause of the Fourteenth Amendment to suggest that the penalty proposed in this action is excessive and unconstitutional. Respondents complain that the Consolidated Rules governing this proceeding do not adequately protect their constitutional right to due process and "therefore, this action involving millions of dollars in proposed penalties should be dismissed." *Id.* at 8–9. These arguments are frivolous and should be rejected.

Respondents do not cite any authority to support their argument that the Administrator and Attorney General can only waive the limitation on the Administrator's penalty-assessment authority up to an unspecified dollar amount, nor can they. Their argument is undercut by the plain language of the Act, which states without limitation that the Administrator may assess a penalty in excess of $200,000 if "the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment." 42 U.S.C. § 7524(c)(1). It is self-contradictory to say the Administrator and the Attorney General are circumventing the Act by exercising the authority expressly given them by the Act.

Respondents' complaint about the Consolidated Rules is likewise unsupported. Section 205(c)(1) requires assessment of a civil penalty to be "by an order made on the record after opportunity for a hearing in accordance with sections 554 and 556" of the Administrative Procedure Act, using procedures set forth in the Consolidated Rules codified at 40 C.F.R. Part 22. *Id.*; 40 C.F.R. § 22.1(a)(2). Respondents have not identified any specific basis for their suggestion that Consolidated Rules do not adequately protect their right to procedural due process.

Finally, Respondents' suggestion that the proposed penalty violates the Constitution is both premature and incorrect. It is premature because to date, no penalty has been assessed against them in this matter. The penalty will be determined by the Presiding Officer after consideration of evidence in the record, the Penalty Policy's guidelines, and the penalty criteria set forth in the Act. 40 C.F.R. § 22.27(b). It is incorrect because the cases Respondents cite, to the extent they apply at all to this civil penalty proceeding, suggest the proposed penalty is a modest one.

In *BMW of North America v. Gore*, 517 U.S. 559 (1996), the United States Supreme Court observed that one indicium of whether a punitive damage award is grossly excessive is the difference between the amount of the award and the amount of civil or criminal penalties that could be imposed for comparable misconduct. *BMW*, 517 U.S. at 583. Respondents are liable for 109,964 violations of section 203(a)(1) and 213(d) of the Act. Section 205(a) of the Act allows a civil penalty of up to $37,500 per violation.[11] 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. The proposed penalty of $3,030,320 represents a penalty of approximately $27.55 per violation, less than 0.1% of the maximum amount allowed by law.

Conclusion

For the reasons stated above, Complainant requests that this Tribunal deny Respondents' Motion. In the alternative, if the Presiding Officer deems that additional evidence is required, Complainant requests an opportunity to provide unredacted versions of the waiver request letters and memorandum under seal for in camera, ex parte review.

Respectfully Submitted,

8/17/17
Date

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[11] Violations identified in Counts 9 and 10 of the Amended Complaint may be subject to penalties of up to $45,268 due to inflation. 40 C.F.R. § 19.4.

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CERTIFICATE OF SERVICE

I certify that the foregoing Response to Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction in the *Matter of Taotao USA, Inc., et al.*, Docket No. CAA-HQ-2015-8065, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judge's E-Filing System.

I certify that an electronic copy of this Response was sent this day by e-mail to the following e-mail addresses for service on Respondents' counsel: William Chu at wmchulaw@aol.com, Salina Tariq at stariq.wmchulaw@gmail.com, and David Paulson at dpaulson@gmail.com.

8/17/17
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