UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, REQUEST FOR INTERLOCUTARY APPEAL

COME NOW Respondents Taotao USA, Inc. (Taotao USA), Taotao Group Co., Ltd. (Taotao Group), and Jinyun County Xiangyuan Industry Co. Ltd. ("JCXI") and file this reply in support of their Motion for Reconsideration, or in the Alternative, an Interlocutory Appeal, of the Order on Partial Accelerated Decision and Related Motions (Respondents' Motion).

Complainant's Response and Respondents' Reply

Complainant has filed a response to Respondents' Motion (Agency's Response") making the same following arguments multiple times:

Agency's Argument # 1: Respondents have not identified substantial grounds for a difference of opinion about the question of law put forth in their Motion because a party requesting interlocutory review typically must come forward with citations to authority demonstrating that there are substantial grounds for difference of opinion. *See* Complainant's Response at 4.

Reply: Respondents have identified multiple grounds for difference of opinion, the most significant of which is that there is no unambiguous regulation that requires catalytic converter compositions to match the compositions described in a COC application. The only regulations that stand for the preposition that a COC does not cover a vehicle that is not specifically described in

the vehicles COC application are those that clearly state that for a vehicle to be covered by a COC, it must conform to the "specifications" described in a COC application or it must conform to the test vehicle for the engine family. Because the Agency has deliberately excluded catalytic converter composition from the definition of "specifications" by failing to require that such information be included in the vehicle's ECI label, by failing to set composition standards, and by failing to mention catalytic converters anywhere in the applicable regulations except for requiring that catalytic converters in an engine family be identical to each other.

Additionally, Complainant has cited certain decisions, such as *In re Isochem N. Am, LLC*, 2008 EPA ALJ LEXIS 4, to support the preposition that a party requesting interlocutory review typically must come forward with citations to authority demonstrating that there are ·'substantial grounds for difference of opinion. Ignoring for a moment the citations Respondents did come forward with,[1] the cases cited by Complainant to support its argument are clearly distinguishable from the present matter, for example, *In re Isochem N. Am, LLC* was a case where respondent's argument for reconsideration/interlocutory appeal relied on a statutory exception and without citations to controlling authority, the general principle was applied, i.e. it is a violator's burden to plead and prove statutory exceptions. Here Respondents are not relying on a statutory exception, instead Complainant's have relied on their own interpretation of multiple regulations to come up

[1] *See* Respondents' Motion at 3: a Court affords an agency "no deference, if the language of the regulation is unambiguous, for doing so would 'permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation. *Summit Petroleum Corp. v. Env'l Protection Agency*, 690 F.3d 733, 740 (6th Cir. 2012) (*quoting Christensen v. Harris Cnty*., 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000))."). It is not the court's task in reviewing a motion to dismiss to decide between two plausible inferences that may be drawn from the factual allegations in a complaint. *Anderson News, L.L.C. v. Am. Media, Inc*., 680 F.3d 162, 185 (2d Cir. 2012), cert. denied, 133 S. Ct. 846 (2013).

with a violation, it is Complainant's burden to plead and prove a violation of some regulation that is punishable under the Clean Air Act.

Agency's Argument # 2: Respondents' argument that catalytic converter composition is not a "specification" as defined by the applicable regulation is based on a revised version of 40 C.F.R. § 1068.103(a) that took effect on December 27, 2016, five months after the Amended Complaint was filed and therefore does not apply to the vehicles described in the Amended Complaint. Agency's Response at 10-11. The definition of "specification" that applies to the vehicles described in the Amended Complaint is the pre-amendment version of 40 C.F.R. § 1068.103, which did not include a reference to the ECI label. *Id.*

Reply: The United State Supreme Court has held that "a court is to apply the law in effect at the time it renders its decision," *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974); *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 264 (1994). Because amended version of 40 C.F.R. § 1068.103(a) took effect in December 2016, well before the Presiding Officer rendered her decision, Complainant's position that the pre-amended regulation applies to the Amended Complaint is clearly incorrect.

Agency's Argument # 2: Webster's dictionary defines "specification" broadly and that therefore that definition, i.e. the plain meaning of the word, should apply rather than the Agency's own definition of the term. Agency's Response at 12.

Reply: Complainant suggests that that the plain meaning of the word "specifications" should apply, instead of Agency's own definition of the word. Agency's Response at 12. Complainant's position clearly contradicts the plain language of 40 C.F.R. § 1068.103(a), which provides that ***"[f]or the purposes of this paragraph (a),*** (emphasis added) "specifications" includes the emission control information label and any conditions or limitations identified by the manufacturer or EPA.

40 C.F.R. § 1068.103(a). Paragraph (a) of section 1068.103 states that "engines/equipment covered by a certificate of conformity are limited to those that are produced during the period specified in the certificate and conform to the ***specifications*** (emphasis added) described in the certificate and the associated application for certification." *Id.* The only regulations or language on the COC, that Complainant has referred to in the present proceedings to infer that Respondents have violated the Clean Air Act by importing uncertified vehicles, are those which, like paragraph (a) of section 1068.103, provide that a vehicle is not covered by a COC which does not conform in all material respects to the ***specifications*** described in the application for certification. *See* Agency's AD Motion at 6-7; *see also* 40 C.F.R. §§ 86.437-78(a)(2)(iii) ("a certificate will cover all vehicles represented by the test vehicle"); 1068.103(a) (certificates cover only nonroad engines or equipment that "conform to the specifications described in the certificate and the associated application for certification"); 40 C.F.R. §§ 85.2305(b)(1) (vehicles produced before a certificate is issued may be covered only if they "conform in all material respects to the vehicles . . . described in the application"). Clearly, by including the language "for the purposes of paragraph (a)" the regulation expressly defines the "specifications" which a vehicle must conform to in order for it to be covered by a COC, making the plain meaning of the word irrelevant. Had the regulations intended to make vehicles uncertified if they did not conform to any specifications, i.e. the plain meaning of the word, there would be no need to specifically define "specifications" for purposes of the certificate invalidating regulations. Complainant's definition of the word "specification" conflicts with the clear language of section 1068.103(a).

Additionally, in line with its argument that the "plain meaning of the word specifications controls, instead of the Agency's own definition, Complainant appears to argue that because section 1051.205(a)-(b) requires that an application for certification of a recreational vehicle

engine family must "[d]escribe the engine family's specifications and other basic parameters of the vehicle's design and emission controls," the word "specifications" includes "all system components for controlling exhaust emissions" and "the part number of each component" described. *Id.* Complainant's interpretation is contrary to the plain language of the regulation, which itself distinguishes between "specifications" and "other basic parameters of the vehicle's design and emission controls. 40 C.F.R. § 1051.205(a)-(b). If Complainant was correct and the word "specifications" included catalytic converter descriptions then why would the section 1051.205 place the word "and" in between "specification" and "other basic parameters?" Likewise why would the regulation use the word "other" to describe parameters of a vehicle's design and emission controls which are not engine family specifications. The only plausible reason for doing so is that the regulations recognize that not all vehicle design parameters and emission controls are "specifications," and only those design parameters and emission controls that are included in the ECI label…are in fact "specifications." *Id.* §§ 1051.205, 1068.103(a).

Finally, Complainant argues that the plain language of section 1068.103(a) includes catalytic converter composition because "as the Presiding Officer observed, [40 C.F.R. § 1051-230(b)(5) states that] recreational vehicles belonging to a single engine family must have the same "number, location, volume, and composition of catalytic converters." *See* Agency's Response at 12-13; Order at 25; 40 C.F.R. § 1051.230(b)(5). Again, the argument, and observation is incorrect, because section 1051-230(b)(5) only requires that vehicles belonging to a single engine family must be identical in catalytic converter composition *to each other*. Section 1051-230(b)(5) nowhere states that each vehicle must have the same composition of catalytic converters as the composition described in the COC application. 40 C.F.R. § 1051.230(b) ("For exhaust emissions, group vehicles in the same engine family if they are the same in all the following aspects…(5) The

number, location, volume, and composition of catalytic converters."). Clearly, the regulation only requires that vehicles belonging have the same catalytic converter composition as each other, and therefore Complainant's argument that section 1051.230(b) somehow stands for the preposition that the definition of "specifications" includes catalytic converter composition, and requires that catalytic converter composition be the same as the composition described in the COC application is clearly unsupported by the clear language of said regulation.

Agency's Argument # 3: Under Respondents' construction of the term "specification" a COC would cover vehicles so long as they did not exceed Clean Air Act emissions standards and conformed to the maintenance conditions described in the relevant application to the EPA. Agency's Response at 13, n. 3. Manufacturers would have wide latitude to deviate from their certified designs without testing to ensure that the new configuration would continue to satisfy emissions standards. *Id.*

Reply: Complainant clearly misstates Respondents reading of the 40 C.F.R. § 1068.103(a). As stated in Respondents' Motion, "specifications" by EPA's own definition include the emission control information label and any conditions or limitations identified by the manufacturer or the EPA. *See* Respondents' Motion at 9-10; *see also* 40 C.F.R. §§ 86.1807-01, 1068.103(a). Therefore, Respondents' construction of the word specifications, which is in fact EPA's own construction of the word, a COC would cover vehicles so long as they conform with the information included in the ECI label and any conditions or limitations identified by the manufacturer and the EPA, which includes emission standards, but is not limited to said standards. If, however, the EPA would like to include catalytic converter composition within its own definition of "specifications," it can do so by requiring an ECI label to include catalytic converter composition, set conditions or limitations pertaining to catalytic converter compositions, and/or amend section 1051.205 to

eliminate the distinction between "specifications" and "other" emission control parameters. Doing so, however, would require that the changes go through the mandatory rulemaking process. Notably, EPA has not taken any action, not even in the 2016 amendments where the definition of "specifications" was specifically dealt with, to include catalytic converter composition within the definition of "specifications." *See* 81 F.R. 73478 (Oct. 2016).

Agency's Argument # 4: Because 40 C.F.R. § 1068.103(a) provides an example for when a COC will not cover vehicles, and the example includes differences in engine configurations, "specifications" go beyond conditions and limitations to include aspects of design, construction, calibration, and emission control strategies control strategies included in an application for certification. Agency's Response at 14.

Reply: The foregoing argument fails because (1) the example Complainant refers to was included in the pre-amendment version of section 1068.103 as well as the current version, therefore it is an example of conditions and limitations set by the manufacturer or EPA. These engine configurations are included in a vehicle's ECI label. The example does not go beyond the conditions and limitations to include design, calibration, etc., but rather reiterates that "specifications" are limited to conditions and limitations set by a manufacturer or EPA, which are for the most part, included in the ECI label.

Agency's Argument # 5: A COC issued by the Agency does not cover vehicles with catalytic converters that are different in location, volume, or composition from what was described in the manufacturer's COC application because 40 C.F.R. § 1051.230(b)(5) requires that a single engine family must have the same "number, location, volume, and composition of catalytic converters." Agency's Response at 9, 12.

Reply: Complainant has misstated Section 1051-230(b)(5). *See* supra Reply to Agency's Argument # 2. 40 C.F.R. 1051.230(b) only requires that vehicles belonging to a single engine family have the same catalytic converter composition. To state differently, section 1051.230 requires that all vehicles in an engine family conform to *each other*. Contrary to Complainant's foregoing argument, section 1051.230 does not say, nor infer, that a COC issued by the Agency does not cover vehicles with catalytic converters that are different in location, volume, or composition from what was described in the manufacturer's COC application. *See* 40 C.F.R. § 1051.230(b).

Agency's Argument # 6: Respondents' fair notice argument fails because (1) because the statute, regulations, and COC applications clearly required Respondents to manufacture their highway motorcycles and nonroad recreational vehicles with the catalytic converters they described in each application for certification; and (2) the record shows Respondents had actual pre-enforcement notice of what Complainant believed the law required. Agency's Response at 22.

Reply: Respondents have already demonstrated that no statute or regulation required Respondents to manufacture their vehicles with the same catalytic converter composition described in each COC application. As far as Complainant's argument that Respondents had pre-enforcement notice of what Complainant believed the law required, it is important to note that the pre-enforcement notice Complainant appears to be referring to was a notice of violation dated December 24, 2013, after which the Agency ordered Respondents to conduct emission and catalytic converter testing of three vehicles from eight engine families. *See* Order at 11-12. By the time, the notice was sent, Respondents had no way to amend the COC applications or otherwise ensure catalytic converter conformity on vehicles belonging to model years 2012 and 2013. Likewise, by the time the catalytic converter test results came back, it was too late to amend the applications or catalytic

converter compositions on vehicles belonging to model year 2014. Therefore, "notifying" Respondents of what Complainant believed the law is not fair notice when the notification came after a majority of the alleged violations had already occurred and could no longer be corrected.

Agency's Argument # 7: There is no meaningful distinction between *Chrysler* and this case. Agency's Response at 29.

Reply: Respondents have continually shown a clear distinction between the facts of Chrysler and the present matter: (1) Chrysler involved nonconforming parts which clearly fit within the Agency's definition of "specifications"; (2) the decision in Chrysler relied on a regulation that has since been deleted; and the EDV tested for emissions in Chrysler had different components than the production vehicles later introduced into commerce. Complainant keeps relying on Chrysler in spite of these clear distinctions, perhaps because Chrysler is the only case that allowed the Agency to collect penalties for non-emission related violations. Agency's Response at 31..

Agency's Argument # 8: On the specific issue of the number of violations, the Presiding Officer enumerated the evidentiary material cited by Complainant in support of the contention that all vehicles in each engine family are implicated, and found it sufficiently established that none of the vehicles identified in the Amended Complaint conformed to the design specifications in their COC applications, and the Presiding Officer noted that Respondents had "put forward no evidence to contradict this conclusion nor have they offered any legal authority to suggest it is improper.

Reply: The Presiding Officer relied on expert declarations that were not included in the prehearing exchange until the time the Presiding Officer granted Complainant's motion to supplement the prehearing exchange and simultaneously granted Agency's AD Motion holding Respondents liable for 109,964 violations. *See* Respondents' Motion for Continuance at 2-7.

CONCLUSION

For the following reasons, Respondents respectfully request the Presiding Officer grant their Motion for Reconsideration, or alternatively, forward the Order to the Environmental Appeals Board for review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on June 9, 2017, the foregoing Reply 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 a copy of the foregoing instrument was sent on June 9, 2017 via certified mail for service on Complainant's counsel as follow:

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