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 RESPONDENTS' MOTION FOR RECONSIDERATION OR INTERLOCUTORY APPEAL

In May, this Tribunal granted the Agency's Motion for Partial Accelerated Decision on the question of liability and denied the Respondents' Motion to Dismiss and Motion for Accelerated Decision. *See* Order on Partial Accelerated Decision and Related Motions (May 3, 2017) ("Order"). Specifically, I found that the undisputed facts sufficiently proved Respondents' liability for 109,964 violations of sections 203 and 213 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7522, 7547, and the CAA's implementing regulations codified at 40 C.F.R. Parts 86, 1051, and 1068 as alleged in the Amended Complaint. The violations occurred when Respondents imported motorcycles and recreational vehicles whose engines were not covered by Certificates of Conformity ("COCs") because their catalytic converters did not contain the quantities and ratios of precious metals that Respondents claimed in their COC applications.

Now, Respondents have moved for reconsideration of this ruling or, alternatively, to forward it to the Environmental Appeals Board ("EAB") for interlocutory review. *See* Motion for Reconsideration, or in the Alternative, Request for Interlocutory Appeal (May 15, 2017) ("Motion"). The Agency opposes Respondents' requests. *See* Complainant's Response to Respondents' Motion for Reconsideration, or in the Alternative, Request for Interlocutory Appeal (May 30, 2017) ("Response"). Respondents filed a reply brief ("Reply") on June 9, 2017.

A. Motion for Reconsideration

The Rules of Practice governing this proceeding do not specifically provide for reconsideration of interlocutory orders by an Administrative Law Judge. *Firestone Pacific Foods, Inc.*, Docket No. EPCRA-10-2007-0204, 2009 EPA ALJ LEXIS 5, at *71-72 (ALJ, Mar. 24, 2009); *see also* 40 C.F.R. Part 22. However, when such motions are considered, this Tribunal applies the same standard of review as the EAB when it adjudicates motions to reconsider its final orders. *Id.* at 72 (citing cases). In particular, reconsideration is typically appropriate only in cases where the EAB or this Tribunal is shown to have made a demonstrable

error, such as a clearly erroneous mistake of law or fact. *See, e.g.*, *Hawaii Elec. Light Co., Inc.*, PSD Appeal Nos. 01-24 through 01-29, 2002 EPA App. LEXIS 44, at *4 (EAB, Jan. 29, 2002).[1] Thus, "motions for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." *Pyramid Chem. Co.*, Docket No. RCRA-HQ-2003-0001, 2004 EPA App. LEXIS 50, at *2 (EAB, Nov. 8, 2004). "[T]he filing of a motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of the [Tribunal] clearly erroneous factual or legal conclusions." *Id.* A party cannot present new evidence that could have been presented earlier or argue a new legal theory for the first time. *Id.* at 3. In short, "[a] party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *Id.*

Respondents' Motion opens with nine points on which the Order is purportedly erroneous. These points mostly parrot the same arguments that Respondents made in their prior motions and responses, and that were considered and rejected in the Order. To that extent, Respondents fail to demonstrate that this Tribunal made a manifest error of law or fact. Rather, their restatement of previously-made arguments shows that they merely disagree with the conclusions reached. This is insufficient to meet the standard governing a motion for reconsideration.

Even so, when considering Respondents' arguments and alleged points of error, I note that most rest on the same unsupported assertion that the precious metal ratios of catalytic converters are not "'specifications' under the Agency's definition of the term" and therefore not a basis for determining whether a production vehicle conforms with the COC and associated application for certification covering the vehicle's engine family. Mot. at 2. The only authority Respondents cite for this claim is 40 C.F.R. § 1068.103 (2016), which addresses the duration and applicability of COCs generally. Mot. at 1. That regulation states, in relevant part:

> (a) Engines/equipment covered by a certificate of conformity are limited to those that are produced during the period specified in the certificate and conform to the specifications described in the certificate and the associated application for certification. For the purposes of this paragraph (a), "specifications" includes the emission control information label and any conditions or limitations identified by the manufacturer or EPA. For example, if the application for certification specifies certain engine configurations,

[1] This standard is similar to that used by Federal trial courts under Federal Rule of Civil Procedure 60(b), which allows courts to grant relief from judgment on grounds such as "'obvious errors of law, apparent on the record.'" *Martex Farms, S.E.*, Docket No. FIFRA-02-2005-5301, 2005 EPA ALJ LEXIS 67, at *13 (ALJ, Oct. 21, 2005) (quoting *Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991), *cert. denied*, 506 U.S. 828 (1992)). Motions for reconsideration are not appropriate for purposes of presenting the same issues ruled upon by the court, either expressly or by reasonable implication. *Id.* (citing *United States v. Midwest Suspension & Brake*, 803 F. Supp. 1267, 1269 (E.D. Mich. 1992), *aff'd*, 49 F.3d 1197 (6th Cir. 1995)).

> the certificate does not cover any configurations that are not specified.

40 C.F.R. § 1068.103(a)(2016). From this regulation, Respondents argue that the term "specifications" is a narrowly defined term of art essentially meaning *only* those items required to appear on an emission control information ("ECI") label[2] and those items for which EPA has established a regulatory standard. *See, e.g.*, Mot. at 1 ("Precious metal concentration is not included on a vehicle's ECI label"); *see also* Mot. at 3-6, 9; Reply at 1-2, 7. Given that the composition of a vehicle's catalytic converter is not information required to be included on the ECI label, Respondents maintain, it is not a "specification" to which production vehicles must conform in order to be covered by the COC. *See, e.g.*, Mot. at 9-10. Respondents similarly conclude that because the regulations do not "prescribe[ ] specific standards for the content of catalytic converters," a vehicle cannot on that basis lose COC coverage. Mot. at 2; *see also* Mot. at 4-5, 9, 12.

Respondents' arguments on this subject are untenable. First, Respondents are citing an inapplicable version of the regulation, which was amended in October 2016 and became effective on December 27, 2016, nearly 18 months after the most recent COC was issued in this case and well after the filing of the Amended Complaint. Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2, 81 Fed. Reg. 73478, 74224 (Oct. 25, 2016); *see also* CX 52. The prior version of the regulation that applies to Respondents' vehicles and the engines at issue in this case makes no mention of the ECI label:

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

40 C.F.R. § 1068.103(a) (2015).[3] Consequently, Respondents' ECI label argument is entirely inappropriate and may be rejected on these grounds.

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[2] An emission control information label is permanently affixed to an engine or vehicle at the time of manufacture. The label includes emissions-related information such as engine displacement, operating fuel, date of manufacture, exhaust emission standards, identification of the exhaust and emission control system, specifications and adjustments for engine tune-ups, fuel types, useful life, and evaporative emission controls. 40 C.F.R. §§ 86.413-2006, 1051.135(b).

[3] Respondents claim the notion "that the pre-amended regulation applies to the Amended Complaint is clearly incorrect" because the change was made "well before the Presiding Officer rendered her decision," and the Tribunal must "apply the law in effect at the time it renders its decision." Reply at 3. But the cases Respondents cite for this claim do not apply here. Moreover, it is a general rule that regulations issued pursuant to agency rulemaking operate

Second, even if the current version of the regulation applied, Respondents' proposed interpretation is in error because it focuses only on a portion of the regulatory text and ignores the rest. A plain reading of the current regulation in full reveals that to be covered by a COC, an engine must conform with *all* of the following: the specifications described in the COC; the specifications described in the COC application; the specifications listed on the vehicle's emission control information label; any additional conditions or limitations identified by the manufacturer; and any additional conditions or limitations identified by the Agency. By its plain meaning, "specifications" is a broad term, and the regulatory text makes clear that EPA intended it to be construed as such for purposes of this regulation. As the Agency observes, "[b]oth versions of the regulation use the term 'specifications' inclusively, and are thus plainly incompatible with the restrictive interpretation advanced by Respondents." Response at 11. The plain meaning of the term includes "the act or process of specifying" or "a detailed precise presentation of something or of a plan or proposal for something – usually used in plural." *See* http://www.merriam-webster.com/dictionary/specification (last accessed June 12, 2012). The composition of a catalytic converter as described in a COC application is unambiguously a "specification" because it is part of the "detailed precise presentation" or the "plan or proposal" for the engine/equipment for which certification is sought.[4]

Third, the EAB has already read 40 C.F.R. § 1068.103 and explained that a description of a vehicle's catalytic converter is among the "specifications" to which the regulation refers. In *Jonway Motorcycle (USA) Co., Ltd.*, the EAB issued a Default Order and Final Decision finding that the respondents violated the Clean Air Act in part because they manufactured vehicles with catalytic converters that did not "conform to the specifications" of the COC and associated application. CAA Appeal No. 14-03, 2014 EPA App. LEXIS 45 (EAB, Nov. 14, 2014). In that decision, the EAB states that "[t]he term 'specifications' includes 'any conditions or limitations

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prospectively and not retroactively. *Gary Dev. Co.*, Docket No. RCRA-V-W-86-R-45, 1996 EPA ALJ LEXIS 46, at *16-17 (ALJ, Apr. 8, 1996) (citing cases). *See also Rogers Corp.*, Docket No. TSCA-I-94-1079, 1997 EPA ALJ LEXIS 51, at *45 (ALJ, Nov. 13, 1997) ("[E]ven if the Proposed Rule were to become final at some future date, it would not be available for possible application . . . unless the final regulation provides a retroactive effective date before the violation date").

[4] Respondents' argument that "the plain meaning of the word [is] irrelevant" because "the regulation expressly defines the 'specifications' which a vehicle must conform to" falls flat. *See* Reply at 3-4. Section 1068.103(a) explicitly states that "specifications" *includes* certain things for the purposes of that paragraph and then provides an example, but it does not say that the term *means* only those things, nor does it state that its meaning is in any way limited to only those things. Thus, it is clear that the regulatory text illustrates some items considered by the Agency to be "specifications," but that the list is hardly exclusive. *See Am. Sur. Co. v. Marotta*, 287 U.S. 513, 517 (1933) (the term "include" is a word of extension or enlargement rather than as one of limitation or enumeration); *In the Interest of B.R.C.M.*, 182 So. 3d 749, 752 (Fla. Dist. Ct. App. 2015) (noting definition containing term "includes" is "by its terms . . . not exclusive"). *See also Black's Law Dictionary* (10th ed. 2014) ("include" means "[t]o contain as a part of something . . . The participle including typically indicates a partial list"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012) ([T]he word include does not ordinarily introduce an exhaustive list).

identified by the manufacturer or EPA.' Thus, if the COC application specifies certain engine configurations, the COC issued for those configurations does not cover any other unstated configurations." *Id.* at *35-36. More specifically, the EAB continued, "[c]atalysts are part of the engine or engine emissions system; thus, a COC applicant must include a description of the catalyst [in its application for certification]." *Id.* at *37. Because engines are "'considered not covered by a certificate unless they are in a configuration described in the application for certification' . . . [t]he presence of a significantly different catalyst than was described in the application . . . makes these . . . engines materially different from the certified configuration." *Id.* at 37. In this case, Respondents manufactured vehicles with catalytic converters that did not have the quantity and ratio of precious metals that Respondents had claimed. As a result, Respondents produced vehicles with catalysts that were significantly different from what they described in their COC applications. Consequently, Respondents' vehicles were materially different from the certified configurations and not covered by any COC. Respondents' argument that a catalyst's precious metal content cannot be a "specification" upon which a COC depends is contrary to the EAB's holding and demonstrates that they fundamentally misunderstand how the CAA and its implementing regulations work.

Recognizing these basic truths, Respondents' nine "Grounds for Appeal" mostly fall away:

Point 1. Respondents contend that precious metal concentration is not a "specification" because it is neither listed on a vehicle's ECI label nor the subject of any regulatory standards. *See* Mot. at 1-2. As discussed above, this argument is directly rebutted by both the plain language of 40 C.F.R. Part 1068 as well as the EAB's conclusions in *Jonway Motorcycle*.

Point 2. Respondents attempt to distinguish the facts of this case and the facts of *United States v. Chrysler*, 591 F.2d 958 (D.C. Cir. 1979), which is controlling here and which the Order discusses in depth. *See* Order at 26-29. The distinction, Respondents state, is that the engine parts at issue in Chrysler "clearly fell within the Agency's definition of 'specifications' whereas catalytic converter ratios do not." Mot. at 2; *see also* Mot. at 12; Reply at 9. But as discussed above, this distinction does not exist. The ratio of precious metals in catalytic converters *is* a specification described in the COC applications at issue in this case. Either way, *Chrysler* is on point. Respondents have presented no new bases for disregarding it.

Point 3. Respondents contend that the Order "not only determines whether or not the Agency's interpretation that differences in catalytic converter ratios violate the Clean Air Act is a plausible argument, but instead rules that catalytic converter ratio differences does[sic] in fact violate the Clean Air Act." Mot. at 3. Respondents then cite *Anderson News, L.L.C. v. Am. Media, Inc*., 680 F.3d 162, 185 (2d Cir. 2012), for the proposition that "[i]t 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." *Id.* But Respondents' argument reflects their misunderstanding of *Anderson News* and civil procedure. The proposition Respondents cite in *Anderson News* refers to a scenario where a motion to dismiss was erroneously *granted* because the court chose one plausible inference over another rather than allowing the claims to proceed to a jury to make the decision. Here, as the nonmoving party, the Agency's claims were accepted as true and allowed to go forward, and Respondents' motion to dismiss was *denied*. This Tribunal did not choose between plausible factual inferences in disposing of that motion. The

legal determination that Respondents violated the Clean Air Act was decided when ruling on the Agency's Motion for Partial Accelerated Decision.

Point 4. Respondents argue that the Order "permits the Agency to escape the rulemaking requirement by deferring to the Agency's interpretation of an unambiguous regulation, which clearly does not include catalytic converter ratios as a material 'specification.'" Mot. at 3. They cite *Summit Petroleum Corp. v. U.S. EPA*, 690 F.3d 733, 740-41 (6th Cir. 2012), for the proposition that courts give no deference to an agency's interpretation of its own regulation "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." Mot. at 3. But Respondents misapprehend *Summit* and the concept of deference. First, the deference to which *Summit* refers entails an Article III court's review of agency decision making; meanwhile, this Tribunal functions as part of that decision making to which an Article III court decides whether deference is given. *See, e.g.*, *U.S. Army, Fort Wainwright Central Heating & Power Plant*, Docket No. CAA-10-99-0121, 2002 EPA ALJ LEXIS 24, at **19-23 (ALJ, Apr. 30, 2002) ("The ALJ 'is part of the decision-making unit of the Agency, whereas a court is not,' and 'the statutory and constitutional restrictions which apply to a court and which prevent it from substituting its judgment for that of the Agency do not apply to the [ALJ].'") (quoting *Louisville Gas & Elec. Co., Trimble Cty. Power Plant*, 1 E.A.D. 687, 690-91 (JO 1981), *aff'd in part*, *rev'd on other grounds by U.S. Army*, 11 E.A.D. 126 (EAB 2003). Applying *Summit* in this forum makes no sense. Second, the Order never defers – and never signals that it is deferring – to Complainant's statutory and regulatory interpretation. This Tribunal conducted its own analysis and reached conclusions of its own accord. Finally, as discussed above, the plain language of 40 C.F.R. Part 1068 and the EAB's conclusions in *Jonway Motorcycle* clearly support the finding that precious metal concentration is a "specification" to which a production vehicle must conform and negate any argument that it must be specifically identified by regulation. The regulatory requirements are unambiguous, but not in the way Respondents argue. Thus, the Order does not enable the Agency to escape any rulemaking requirement.

Point 5. Respondents complain that they are being "held strictly liable for any inaccuracies" in the composition of their catalytic converters, "an impossible standard" given that they purchased the catalytic converters from a third-party supplier. Mot. at 3-4. Respondents also point to "the Agency's own evidence show[ing] that testing of a catalytic converter precious metal content and concentrations is not always accurate." Mot. at 3. "Clearly, it is not rational to now hold a person liable for catalytic converter ratios manufactured by a different person and which cannot be tested to ensure 100% accuracy," Respondents contend. Mot. at 4. Respondents are correct that they are being held strictly liable for their noncompliance with the CAA. "Without question, Congress intended to impose a strict, regulatory scheme in order to ensure compliance with the strictures of the Clean Air Act." *United States v. J&D Enters. of Duluth*, 955 F. Supp. 1153, 1159 (D. Minn. 1997); *see also Liston Brick of Corona*, Docket No. CAA-9-2005-0018, 2007 EPA ALJ LEXIS 36, at *32 (ALJ, Dec. 18, 2007) ("The Clean Air Act is a strict liability statute.") (citing *Friedman & Schmitt Constr. Co.*, 11 E.A.D. 302, 354 (EAB 2004), *aff'd*, Docket No. 2:04-CV-00517-WBS-DAD (C.D. Cal., Feb. 25, 2005) (unpublished)). Moreover, as previously explained in the Order, "[t]he 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." Order at 28. Respondents are free to seek indemnification from their supplier if they believe they were misled or provided faulty parts. But they have a statutory obligation to comply with the CAA regardless of where or how they obtain parts for their vehicles. Furthermore, Respondents are not absolved of this obligation because of any variability in the test results potentially complicating their ability to verify that the catalytic converters provided by their supplier conformed with the related information provided in their applications. As I have previously held, "[f]or violations of the Clean Air Act, impossibility of compliance is no defense to liability." *U.S. Army, Fort Wainwright Central Heating & Power Plant*, Docket No. CAA-10-99-0121, 2001 EPA ALJ LEXIS 30, at *22-23 (ALJ, July 3, 2001) (citing cases). So contrary to their claim, Respondents *can* be held liable for their wrongly-described catalytic converters even if they are "manufactured by a different person and . . . cannot be tested to ensure 100% accuracy."

Point 6. Respondents believe that the Order erred in relying on an Agency expert's opinion "regarding the value of different precious metals and their concentrations, which is completely irrelevant given that the Agency does not have any precious metal content or concentration standards."[5] Mot. at 5. However, as observed above, whether the Agency has expressly identified precious metal content and concentration standards is not at issue; Respondents set their own catalytic converter standards by including the composition of their catalytic converters in their applications for certification, and they then produced vehicles that failed to live up to those standards. These deviations serve as the bases for the violations found in this proceeding. The Agency expert's opinion on precious metals and their role in catalytic converter activity was relevant to identifying such discrepancies and their significance.

Point 7. Respondents contend that the Agency cannot hold them liable for catalytic converter ratio differences in the absence of a formal rulemaking process to provide notification "that catalytic converters are included in the definition of 'specifications.'" Mot. at 5-6. According to Respondents, "[b]ecause the regulations did not include catalytic converter ratios as information required on ECI labels or otherwise include the ratios to fall within the term 'specifications,' there was no notice to the public that catalytic converter ratios are 'specifications.'" Mot. at 5-6. Respondents' argument is without merit. At issue is Respondents' certification in their COC application that their catalytic converters were of one design and composition when in fact they were another. As discussed above and previously in the Order, there is no question that existing regulations required Respondents' engines to conform to the configuration described in their respective COC applications, and this requirement unquestionably covered the configuration of the catalytic converters. While the regulations may not have explicitly identified a vehicle's catalytic converters as an item with which the vehicle was required to conform, as discussed above, both the plain language of the regulations and the EAB's holding in *Jonway Motorcycle* make clear that the requirement

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[5] Respondents go on to claim that in not setting catalyst standards, the Agency "is penalizing manufacturers who do install catalytic converters regardless of whether their vehicles would pass emissions with or without said converters," and is "therefore hindering attempts to further reduce emissions by forcing manufacturers to manufacture vehicles without catalytic converters and meet only the minimum emission standards." Mot. at 5. This argument is irrelevant for purposes of this proceeding. Respondents in this case face a penalty because they provided false information to the Agency about their engines when applying for COCs.

applies to such elements of a vehicle's design as the configuration of its catalytic converters. Thus, to the extent that Respondents are claiming that there was not fair notice of what the law required of them, their argument is not credible. *See, e.g.*, Reply at 8-9. "If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty' the standards with the which the agency expects the parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *V-1 Oil Co.*, 8 E.A.D. 729, 752 (EAB 2000) (quoting *General Elect. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)). In this case, the statute and regulations unambiguously required Respondents to manufacture engines that comported with what they described in their COC applications – including their catalyst description – and the EAB's ruling in *Jonway Motorcycle* confirms it. A regulated party acting in good faith would be able identify this requirement. If Respondents are contending that the Order engages in de facto rulemaking by engaging in an exercise of statutory and regulatory interpretation, they are simply incorrect, as the Order did not change clear law and overrule prior decisions relied on by the parties. *See Henrico Co. Sch.*, Docket No. TSCA Appeal No. 86-3, 2 E.A.D. 435, at *436 (EAB, Sept. 28, 1987). Finally, to the extent that Respondents object to the regulation itself, the time for challenging the rulemaking process that produced it passed long ago, and they are addressing the wrong forum. *See* 42 U.S.C. § 7607(b)(1) (requiring petitions for review of administrative regulations promulgated under the CAA to be filed within 60 days from the date of notice of such promulgation in the appropriate U.S. Court of Appeals); *see also Echevarria*, 5 E.A.D. 626, 634 (EAB 1994) ("As a 'general rule . . . challenges to rulemaking are rarely entertained in an administrative enforcement proceeding.'") (quoting *Am. Ecological Recycle Research Corp.*, 2 E.A.D. 62 (CJO 1985)).

Point 8. Respondents assert that the Order "erroneously concludes that it is Respondents' burden to prove that the facts and allegations do not amount to violations, and that Respondents have not met the burden." Mot. at 6. That is false. As the Order states, "[t]he 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." Order at 30. The Agency's evidence on its own established Respondents' liability. Respondents had the opportunity to put forward evidence to establish that a material fact was in dispute – or that the Agency's evidence did not establish the absence of a genuine dispute – and they failed to do so. *See* Fed. R. Civ. P. 56. Moreover, Respondents wrongly claim that "neither the language of the Clean Air Act, nor any regulation prohibits Respondents [sic] actions." Mot. at 6. As the Order clearly laid out, Respondents' actions violated the CAA.

Point 9. Respondents claim that the Order "erroneously concludes that because Taotao [China] and [Jinyun] manufactured the vehicles, they are manufacturers of the catalytic converters." Mot. at 6. Again, Respondents are simply wrong. The Order concluded that Respondents are manufacturers of vehicles and engines; it quite clearly recognized that a third party manufactured the catalytic converters. *See, e.g.*, Order at 23, 28. Respondents again complain that they are being unfairly punished "for purchasing catalytic converters in different quantities than those listed in the application, i.e. provided by catalytic converter manufacturers, even though catalytic converter testing may not always accurately reveal precise concentrations." Mot. at 7. And again, Respondents demonstrate their fundamental misunderstanding of the structure of the Clean Air Act. They want the Agency to excuse their conduct because they relied on parts that – allegedly – were not what they believed them to be. But when it comes to

COC requirements, the Act places the burden of compliance on manufacturers of engines and vehicles, not on manufacturers of their component parts. *See* 42 U.S.C. § 7522(a)(1) (prohibiting manufacturers from selling vehicles not covered by COCs); 42 U.S.C. § 7550(1) (defining a manufacturer as 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, or who acts for and is under the control of any such person"); *see also* 40 C.F.R. §§ 1051.801, 1068.30 (defining "manufacturer" in reference to 42 U.S.C. § 7550(1)). Even if the Agency could penalize the third-party catalyst manufacturer, Respondents would not be excused from liability for their own transgressions. Either way, if Respondents believe they were wronged by their supplier, they are free to pursue any remedy to which the law entitles them. But that has no bearing on this penalty proceeding. Moreover, none of the regulatory definitions of "equipment manufacturers," "engine manufacturers," and "secondary engine manufacturers" that Respondents cite have any bearing on the plain language of the statutory prohibition that forbids "manufacturers" from selling engines not covered by COCs. *See* Mot. at 7; 40 C.F.R. §§ 1051.801, 1068.30.

After reciting their nine points, Respondents then continue to restate many of their arguments in narrative form under a section titled "Argument." Mot. at 8.

First, they contend that their Motion to Dismiss "was erroneously denied because it only considered one of Respondents' arguments, i.e. failure to exceed emissions, for dismissal and ignored everything else." Mot. at 8. That is a patently false statement. Many of Respondents' arguments were considered alongside the parties' motions for accelerated decision. Indeed, the Order specifically indicates this. *See* Order at 5 & n.6. Any of Respondents' arguments that were not expressly referenced in the Order were still considered by this Tribunal – they were simply not mentioned because they lacked merit.

Next, Respondents state that the Order "relies on a material mistake of fact and law" in determining that the Agency sufficiently alleged liability to survive a motion to dismiss. Mot. at 8. The supposed mistake of fact "is that all highway motorcycles and nonroad vehicles complained of in the Amended Complaint were in fact covered by EPA-issued COCs." Mot. at 8. Of course, notwithstanding Respondents' conclusory statement to the contrary, the Order makes clear that this is not true, as do the paragraphs above and below. The supposed mistake of law

> is that the Order denies the Motion to Dismiss on the ground that if the factual allegations plead in the Amended Complaint were true then Respondents' delivered into commerce or imported highway motorcycles and recreational vehicles with catalytic converters that were not in the same volume and composition as described in the COC application. Because there is no statute or regulation that renders a vehicle uncertified because of differences in a catalytic converters [sic] volume and composition, Respondents' [sic] have not violated any law and cannot be held liable for something the laws does not prohibit.

Mot. at 9. Here too, Respondents rest on the faulty premise that the statute and regulations do not prohibit their conduct because they do not specify catalytic converter ratios. *See* Mot. at 9-

10. The reasons their premise is faulty has been spelled out in detail above, below, and in the Order.

After that, Respondents dispute the Order's conclusion that because members of the same engine family must have catalytic converters that are the same in number, location, volume, and composition, an engine with different catalyst characteristics is not part of that same family. Mot. at 11. They object that this "ignores that the regulations . . . only require that all vehicles belonging to an engine family be identical to each other, not 'identical' to the catalytic converters described in the COC application." Mot. at 11. Yet again, Respondents misread the law and the manner in which engines are certified for compliance. Because a COC is issued for a particular engine family, an engine that is not part of the family for which the COC is issued is, by definition, not covered by that COC. In other words, when a COC is issued for an engine family that uses catalysts of a certain description, that COC cannot extend to engines with different catalysts because those engines are, by definition, not part of the covered engine family.

Respondents then go on to assert that the Order erred in referring to the express terms of the COCs issued in this matter. Mot. at 11. Those terms are stated, at least in part, on the face of the certificates. They generally state that "[t]his 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. *See* Order at 25-26. According to Respondents, "[b]ecause the regulations only require conformance with material 'specifications' and the vehicles passed emissions, and because the only mention of a 'design specifications' is on the face of a COC, and an outdated regulation, the Agency cannot hold Respondents liable for something that is not prohibited." Mot. at 12. But again, Respondents' insistence that they are governed by some definition of "specifications" that does not allow for the consideration of catalytic converters is wrong for the reasons already discussed. They also cannot escape the terms outlined on the face of the COC, as regulations make clear that the certificates are issued "upon such terms as [the Agency] may deem necessary . . . ." *See, e.g.*, 40 C.F.R. § 86.437-78(a)(2)(ii). Clearly, the Agency has deemed necessary any terms it places on the faces of the COCs it issues.

Respondents additionally refer back to 40 C.F.R. § 85.2305, which states in part that vehicles or engines produced before a COC is issued may be covered by the COC if they "conform in all material respects to the vehicles or engines described in the application for the certificate of conformity." Mot. at 13. This contrasts, they say, with § 86.437-78(a)(2)(iii), which states in part that a COC is issued to "cover all vehicles represented by the test vehicle and will certify compliance with no more than one set of applicable standards." Mot. at 14. Respondents suggest this sets up two different standards for compliance. It does not. The regulations clearly require vehicles to conform with the standards that a manufacturer claims in its application; it is presumed the test vehicle also conforms with the claims a manufacturer makes in its application because the test vehicle represents the rest of the engine family for which certification is being sought. If the test vehicle represented some other standard, a manufacturer could, as the Agency points out, "undermine the certification program by . . . provid[ing] inaccurate, incomplete, or misleading information in their applications for certification." Response at 8.

Respondents also wrongly assert that expert statements that "the presence and concentrations of platinum, palladium, and rhodium in a catalytic converter affect a vehicles'

emissions" are irrelevant "given that the Agency does not require that a catalytic converter include all three of those precious metals, nor does it require a certain concentration of said metals." Mot. at 14. As previously stated, the issue is not whether the law requires a catalytic converter to contain a specific concentration of precious metals; the issue is that Respondents claimed in their applications for certification that their catalytic converters possessed a specific concentration of precious metals, the Agency relied upon those claims in issuing COCs for Respondents' vehicles, and then Respondents' claims turned out to be inaccurate. Similarly, Respondents' complaint that "the Agency is holding manufacturers to an impossible standard, i.e. strict compliance with the precious metal concentrations specified on the application when complete accuracy of the contents and concentrations cannot be revealed by any testing," is a nonstarter. Mot. at 14. Respondents are the ones charged with determining standards for the composition of their catalytic converters when they apply for certification. The burden is on them to know what they are and are not capable of manufacturing and to accurately describe that in their COC applications. In this case, Respondents set the standard and then failed to meet it.

Finally, Respondents contend that the Agency has not proven that all 109,964 imported vehicles are in violation of the Clean Air Act based only on the 35 tested vehicles. Mot. at 15; Reply at 9. But the Order adequately sets forth the Agency's evidence from which it may reasonably be concluded that all of the imported vehicles are in violation. Respondents have provided no evidence or legal authority to dispute this conclusion or to suggest that the Agency's evidence is insufficient. They also protest the Order's partial reliance on the Declaration of John Warren, which the Agency submitted January 3, 2017, as supplemental prehearing exchange information. *See* Reply at 9; CX 179. However, Respondents never objected to the Agency's motion to supplement the record with Mr. Warren's declaration, and by failing to do so they "waive[d] any objection to the granting of the motion." 40 C.F.R. § 22.16(b).

Ultimately, it is clear that Respondents are primarily using their Motion for Reconsideration to relitigate arguments that this Tribunal has already considered and rejected in its Order, and any new legal theories that they raise now could have been raised previously. On those grounds alone, Respondents' Motion for Reconsideration should be denied. Even so, this Tribunal has again considered the merits of Respondents' arguments and still finds them lacking.

Consequently, for the reasons outlined above, Respondents' Motion for Reconsideration is **DENIED**.

B. Request for Interlocutory Appeal

As an alternative to reconsideration of the Order, Respondents ask this Tribunal to refer it to the EAB for interlocutory review. This Tribunal may recommend that the EAB review an order on interlocutory appeal when:

> (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

40 C.F.R. § 22.29(b).

Here, Respondents argue that the important question of law concerning which there is a difference of opinion is that "catalytic converter precious metal concentrations are 'specifications' and any differences between precious metal concentrations found in an imported vehicle and those listed in the vehicle's application for COC, whether for highway motorcycle or recreational vehicle, violates the Clean Air Act." Mot. at 15. According to Respondents,

> [b]ecause no unambiguous regulation stands for the foregoing preposition[sic] and an unambiguous regulation clearly excludes catalytic converter ratios from the Agency's definition of 'specifications,' the case cannot proceed until there is a determination on whether the Agency and the Presiding Officer is able to defer to the Agency's interpretation of an unambiguous regulation or the Agency's irrational interpretation of an ambiguous regulation.

Mot. at 15-16.

Despite Respondents' protests to the contrary, none of the questions of law that this Tribunal has ruled on present "substantial grounds for difference of opinion." As stated above and in the Order, Respondents flat out misread and misstate the law when they argue "specifications" is a term of art that limits the ability of deviations in their catalytic converters to render their engines non-compliant with their respective COCs. Moreover, Respondents are imprecise in recounting the legal issue addressed in the Order. The Order did not find that the law establishes specific levels of specific catalysts and that Respondents did not meet them. Rather, this Tribunal ruled that Respondents' vehicles were not covered by COCs because the location, volume, or composition of their catalytic converters *did not match what they claimed in their corresponding COC applications*. In that sense, it was the *existence* of nonconformity, and less the specific *manner* of nonconformity, that violated the Clean Air Act. The statute, its implementing regulations, the terms of the COCs themselves, and prior case law all unambiguously require that engines must materially conform to the specifications of their corresponding COC applications. Further, Respondents have not cited any authority for alternative grounds that support a different opinion. *See Isochem North America, LLC*, Docket No. TSCA-02-2006-9143, 2008 EPA ALJ LEXIS 4, at *11 (ALJ, Feb. 7, 2008) (concluding that without providing authority for its position, the respondent could not show a differing opinion as to any question of law or policy).[6] As such, there are no substantial grounds for disagreement and therefore no basis for interlocutory review.

Because Respondents fail to meet the first criterion for interlocutory appeal under 40 C.F.R. § 22.29(b), there is no need to address the second criterion, that "[e]ither an immediate

[6] Respondents contend they *did* cite supporting authority. But they did not. The cases they refer to in their Reply do not relate to the "important question of law" they have attempted to articulate. Respondents also try to distinguish *Isochem* but fail to do so persuasively. *See* Reply at 2 & n.1.

appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective." In any event, granting interlocutory review would only further delay this proceeding, which has been pending for more than 18 months. If, as expected, the Agency prevailed before the EAB on interlocutory appeal – however long that review might take – it would take several more months to reschedule the penalty hearing after remand, and the intervening time would lead to the potential loss of witnesses, relevant documents, and the inevitable fading of witnesses' memories. *See Isochem North America, LLC*, 2008 EPA ALJ LEXIS at *11.

Consequently, Respondents' request that I recommend that the EAB review the Order on interlocutory appeal is **DENIED**.

Conclusion

For the reasons stated above, Respondents' Motion for Reconsideration is **DENIED**, and their Request for Interlocutory Appeal is also **DENIED**.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: June 15, 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 Respondents' Motion for Reconsideration or Interlocutory Appeal,** dated June 15, 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: June 15, 2017
Washington, D.C.