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 Co., Ltd.,	§	**CAA-HQ-2015-8065**
	§	
	§	
Respondents.	§	

RESPONDENTS' MOTION FOR ACCELERATED DECISION

COME NOW Respondents Taotao USA, Inc. (Taotao USA), Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co. Ltd. ("JCXI") and file this Motion for Accelerated Decision concerning Respondents' liabilty in this matter. Respondents contend that there are no genuine issues of material fact in dispute in regards to Respondents liability and request that the Presiding Officer finds that Respondents are not liable as a matter of law.

BACKGROUND

A. Statutory Background

On December 17, 1963, Congress passed an Act titled "To improve, strengthen, and accelerate programs for the prevention and abatement of air pollution." Pub. L. No. 88-206, § 14, 77 Stat. 392, 401 (1963) ("1963 Act"). On October 20, 1965, Congress passed an act "[t]o amend the [1963 Act] to require standards for controlling emission of pollutants from certain motor vehicles . . . and for other purposes" ("1965 Act"). Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, § 202(b), 79 Stat. 992, 993 (1965). The 1965 Act introduced the Certificate of Conformity. Clean Air Act § 206, 79 Stat. at 994 (Certification). Upon application by a manufacturer, the Secretary was mandated to require the testing of a new motor vehicle or

new motor vehicle engine to determine whether it conformed to regulations. *Id.* at 206(a). For a prototype that was in compliance, the Secretary was required to issue a certificate of conformity valid for at least one year. *Id.* To protect the business expectations of the automobile manufacturer, Congress provided that a new motor vehicle or new motor vehicle engine that was in "all material respects" substantially the same construction as the test vehicle or engine, shall be deemed to be in conformity with the regulations. *Id.* at 206(b). In the 1970 amendments, Congress preserved the certification procedure, even though it removed the provision that new vehicles that are substantially the same in "all material respects" as previously certified vehicles shall be deemed to be in compliance. *Compare* § 206(b), 79 Stat. at 994, *with* Pub. L. No. 91-604, § 8, 84 Stat. 1676, 1694–95 (1970).

B. Regulatory Background

In 1976, EPA promulgated certain regulations dealing with the Certification procedures and the issuance of certificates of conformity. 40 C.F.R. § 85.074-30(a)(2) (1976). The 1976 version of the regulation included the following language: ... "Each such certificate shall contain the following language: This certificate covers the only those new vehicles which conform in all material respects, to the *design specifications* that applied to those vehicles described in the application for certification..." Relying on the aforementioned regulatory language, in 1977, a district court held that when one or more parts erroneously installed in a vehicle are intimately related to and reasonably may be expected to affect emission controls, such vehicle is not covered by the certificate of conformity although the vehicle may, in fact, meet emission standards. *United States v. Chrysler Corp.,* 437 F. Supp. 94 (D.D.C.1977). However, the regulation which formed the basis of the decision in Chrysler Corp. was deleted in 1977, and replaced by 40 C.F.R. 86.437-78.

In 1982, the regulation was amended and the language stating that the COC covers only those vehicles which conform in all material respects to the "design specifications described in the application for certification" was deleted. *Compare* 1981 40 C.F.R. 86.437 to 1982 40 C.F.R. 86.437 (1982); see 46 FR 50464 October 13, 1981. Additionally, in the 1982, the certification regulations now allowed manufacturers to make running changes without prior EPA approval. 46 FR 50464 ("[t]his rule change will allow manufacturers to add vehicles to a certified engine family and to implement running changes without prior EPA approval. The manufacturer will be responsible for determining that all vehicles still comply with emission standards following implementation of any running change. The manufacturer's determination may be based on either an engineering evaluation of the change and/or emission test data...")

C. Factual Background

In its Amended Complaint, Complainant has alleged a single cause of action: Respondents Taotao Group and JCXI (hereinafter sometimes collectively referred to as "Original Manufacturers") allegedly manufactured or assembled highway motorcycles and recreational vehicles belonging to ten different engine families for which Respondent Taotao USA holds EPA-granted Certificates of Compliance (COC). EPA contends that because the catalyst active material in each of the inspected vehicles' catalytic converters does not conform to the design specifications described in the relevant COC applications, those COCs do not cover the vehicles. EPA therefore concludes that Respondents have violated the Clean Air Act.

Complainant makes no claim that the alleged difference between the catalyst precious metals concentrations found in the vehicles inspected and what is listed on each of the relevant COC applications has any effect on the environment, nor does it claim that the active material concentration in the inspected vehicles exceeded the acceptable limits, or that such limits even

exist. In fact, there are currently no active material concentrations required by the EPA, and there is no allegation in the Complaint that had Respondent Taotao USA's COC applications described the active materials in the exact same quantities and concentration as those that EPA allegedly found in their inspections, EPA would not have granted the relevant COCs..

ARGUMENT

The Consolidated Rules of Practice, govern this proceeding and are set out in 40 CFR Part 22 (Rules). Complainant's Amended Complaint states that Respondents have violated the Clean Air Act ("CAA") by manufacturing for sale or introduction into commerce, or by importing into the United States, new motor vehicles that are not covered by an EPA-issued COC.[1] In support of its claim that the vehicles imported were not covered by Respondent Taotao USA's EPA-issued COCs, EPA has put forth the argument that any difference between a catalytic convertor's active material concentration in a vehicle that was tested by the EPA and the concentration described in the 'vehicle's COC application is grounds for holding both the original manufacturer, whether it manufactured the catalytic converter or not, and the importer liable for a violation of CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1). EPA contends that simply because a vehicle does not conform to the exact design specifications described in the COC application covering such vehicle, it is as if the vehicle is not covered by any COC, and therefore, the original manufacturer of the vehicle, not the manufacturer of the nonconforming part, and the importer are subject to a civil penalty of up to $37,500 per vehicle pursuant to CAA § 205(a), 42 U.S.C. § 7524(a).

The Clean Air Act provisions that EPA has relied upon in bringing this action against Respondents do not support the aforementioned allegations. *See* CAA § 206, 42 U.S.C. §7525.

[1] Amended Complaint at 8.

Complainant's contention that a difference in the active material content and concentration in an application for COC and a post-certification catalysts test renders a COC ineffective as to the vehicle is arbitrary and capricious, and coupled with the fact that the differences in the catalytic converter's active material content and concentrations do not affect the environment Complainant's argument is not a reasonable interpretation of the Clean Air Act. Furthermore, the evidence Complainant has provided shows that Respondents have time and again complied with Complainant's requests, however unnecessary and costly, to ensure compliance, but the level of compliance Complainant expects from Respondents, and the restrictions it has placed in achieving said compliance, is impossible to attain.

Finally, there is no evidence that (1) all 109,964 vehicles manufactured or imported in the Complaint were uncertified because a few of the inspected vehicles allegedly contained active materials in nonconforming concentrations; and (2) by manufacturing, or importing, vehicles with catalyst active materials in allegedly nonconforming concentrations, Respondents were benefitted economically.

A. Complainant's contention that differences in a catalytic converter's active material content and concentration in and of itself is a violation of the Clean Air Act subject to penalties fails as a matter of Law.

Respondent Taotao USA had EPA-issued Certificates of Conformity ("COC") for all vehicles belonging to each of the ten counts alleged in the Amended Complaint. Complainant has alleged that that in order to be covered by the EPA-issued COCs, the vehicles must conform in all material respects to the design specifications described in each of the COC applications. What Complainant is essentially arguing is that because Taotao USA has described the active material content and concentrations in the application for COC, all vehicles belonging to the engine family that is covered by the COC must be exactly similar to the active material contents

and concentrations specified. Complainant has made this argument even though the applicable regulations do not require any specific catalyst active material contents or concentrations, and there is no evidence that by describing a certain catalyst active material concentration and then importing a different catalyst active concentration Respondents benefitted in any way. Finally, there is no evidence that had Respondents described the catalyst active materials in the concentrations that were allegedly found in the post-certification inspected vehicles, the COCs would not have been issued for the vehicles.

B. There is no evidence that the catalyst active material found in the post-certification testing did not conform to the catalyst active material in the catalytic converters attached to the EDV.

A certificate of compliance covers "all vehicles represented by the test vehicle and will certify compliance with no more than one set of applicable standards. 40 C.F.R. 86.437-78(a)(2)(iii). In spite of the clear language of the regulation, all the evidence submitted by Complainant in its Initial Prehearing Exchange and Rebuttal Prehearing Exchange relies on the argument that the catalyst active materials tested in post-certification inspections did not match the catalyst active materials described in the COC application.

Complainant has not submitted any evidence that would show that the "test vehicle" used to determine compliance for the purpose of obtaining a COC, did not contain catalyst active materials in the concentrations allegedly found in the post-certification catalyst testing conducted by EPA. Therefore, Complainant's allegations are premised on the incorrect test to determine compliance. It is the parts and components of the tested vehicle ("EDV") that must conform with the post-certification vehicles to determine whether a vehicle is covered by a COC, not the design specifications of the parts and components described in the application for certification.

C. There is no evidence that all 109,964 vehicles manufactured or imported in the Complaint were uncertified.

In its prehearing exhibits, Complainant has produced test results conducted on some inspected vehicles belonging to the same engine family or various engine families. *See* Complainant's proposed exhibits CX063, CX066, CX086, CX0089, CX125-CX133, CX147 and CX152. The exhibits show that the catalyst active materials test results are not uniform, i.e. multiple tests on vehicles belonging to different engine families often produce different results and tests on different vehicles belonging to the same engine family can also vary. Given that the results vary across the tests and only a few of the entire 109,964 vehicles imported were actually tested for catalyst active material, there is no evidence to support Complainant's allegation that Respondents jointly manufactured, or imported, 109,964 uncertified vehicles. According, the pRESIDING officer should find that Complainant's allegation that all 109,964 vehicles imported by Taotao USA contained catalytic converters which did not conform to catalytic convertor specifications described in the relevant COC applications fails as a matter of law.

D. There is no evidence that by importing, vehicles with catalyst active materials in allegedly nonconforming concentrations, Respondents received an economic benefit.

The Clean Air Act mandates that "In determining the amount of any civil penalty assessed under this subsection, the Administrator shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require. CAA § 205, 42 U.S.C. 7524 (c) (2).

Although the Complainant has used the rule of thumb economic benefit in calculating its proposed penalty, Complainant have not provided any evidence to show that Respondent received any economic benefit by importing vehicles with catalytic converters which had a

catalyst active material concentration that did not match the catalyst active material concentration described in the relevant COC applications.

Therefore, Respondents request that the Presiding Officer should find that Respondents did not receive any economic benefit from the alleged noncompliance as a matter of law.

PRAYER

WHEREFORE, Respondents prays that the Presiding Officer grants this Motion for Accelerated Decision and hold that Respondents are not liable for any violations subject to the Clean Air Act penalty provisions as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on November 28, 2016 the foregoing Motion to Dismiss was filed and served on the Presiding Officer electronically through the Office of Administrative Law Judges (OALJ) e-filing system. I certify that a copy of the foregoing Motion was sent by mail on November 28, 2016 to opposing counsel as follows:

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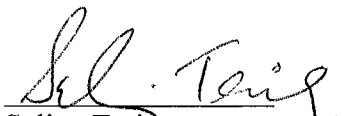

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