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.	)	

COMPLAINANT'S RESPONSE TO
RESPONDENTS' MOTION FOR RECONSIDERATION, OR
IN THE ALTERNATIVE, REQUEST FOR INTERLOCUTORY APPEAL

The Director of the Air Enforcement Division of the U.S. Environmental Protection Agency's Office of Civil Enforcement ("Complainant") files this Response opposing respondents' "Motion for Reconsideration, or in the Alternative, Request for Interlocutory Appeal" (the "Motion"). The respondents in this matter are Taotao USA, Inc. ("Taotao USA"), Taotao Group Co., Ltd. ("Taotao Group"), and Jinyun County Xiangyuan Industry Co., Ltd. ("Jinyun") (collectively "Taotao" or "Respondents"). Respondents have not identified substantial grounds for disagreement with the Presiding Officer's Order that would justify interlocutory review, nor have they identified legal or factual errors warranting reconsideration. Complainant respectfully requests the Tribunal deny Respondents' Motion for the following reasons.

I. Abbreviated Procedural History and Summary of Arguments

Complainant initiated this action on November 12, 2015, under section 205(c)(1) of the Clean Air Act (the "CAA" or the "Act"), 42 U.S.C. § 7524(c)(1), by filing its Complaint against Respondents with the EPA's Headquarters Hearing Clerk as required by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the

Revocation/Termination or Suspension of Permits ("Consolidated Rules") at 40 C.F.R. §§ 22.5 and 22.13. *See* 40 C.F.R. § 22.1(a)(2) (applying Consolidated Rules to proceedings brought under CAA § 205(c), 42 U.S.C. § 7524(c)). On July 14, 2016, Complainant filed a Motion for Leave to Amend the Complaint, together with an Amended Complaint. The Amended Complaint revised the number of violations alleged in Counts 1 through 3 and Counts 5 through 8, and included two new Counts 9 and 10. On July 5, 2016, the Tribunal granted the Motion to Amend, and Respondents filed their Amended Answers on August 17, 2016.

On October 13, 2016, the parties completed the prehearing information exchange pursuant to 40 C.F.R. § 22.19(a), as required by the Presiding Officer's May 11, 2016 Prehearing Order and September 12, 2016 Order on Motion to Extend Prehearing Exchange Deadlines. Complainant then filed its Motion for Partial Accelerated Decision on November 28, 2016, requesting that the Presiding Officer find the Respondents liable as a matter of law for the violations alleged in the Amended Complaint, or in the alternative, narrow the issues for hearing by resolving questions of law and determining what material facts remained in controversy. The next day, Respondents filed a Motion for Accelerated Decision (the "Motion for Accelerated Decision") and a separate Motion to Dismiss for Failure to State a Claim (the "Motion to Dismiss").

On May 3, 2017, the Presiding Officer, Chief Administrative Law Judge Susan L. Biro, issued the "Order on Partial Accelerated Decision and Related Motions" (the "Order"), granting Complainant's Motion for Partial Accelerated Decision and denying Respondents' motions. In the Order, the Presiding Officer found that there were no genuine disputes of material fact regarding liability in the record, and that the facts showed the Respondents' highway

motorcycles and nonroad recreational vehicles were manufactured with catalytic converters containing active catalyst materials in quantities and concentrations different than what Respondents had described in their applications for COCs. Order at 22, 23 & n.30, 24, 30–31. The Presiding Officer held that the difference was material because engine families are defined in part by having identical catalytic converters; catalytic converters are intimately related to emission controls; and differences in catalytic converters may reasonably be expected to affect emission controls. *Id.* at 25–26, 29 (citing 40 C.F.R. §§ 86.420-78(b)(7), 1051.230(a)–(b)(5); *United States v. Chrysler Corp.*, 591 F.2d 958 (D.C. Cir. 1979)). Because Respondents' vehicles did not conform in all material respects to the design specifications for the engine families described in the applications, the COCs issued for those engine families did not cover the vehicles. *Id.* at 30. As a consequence, Respondents sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported those vehicles into the United States in violation of sections 203(a)(1) and 213 of the Clean Air Act, 42 U.S.C. §§ 7522(a)(1), 7547. *Id.*

On May 15, 2017, Respondents filed a "Motion for Reconsideration, or in the Alternative, Request for Interlocutory Appeal" (the "Motion"). In the Motion, Respondents identify alleged errors constituting "Grounds for Appeal," and argue that the Presiding Officer erroneously denied their Motion to Dismiss and Motion for Accelerated Decision, and erroneously granted Complainant's Motion for Partial Accelerated Decision. Respondents also request that the Presiding Officer recommend the following legal question to the Environment Appeals Board ("EAB") for interlocutory review:

> [Whether] 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 [a certificate of conformity ("COC")], whether for highway motorcycle or recreational vehicle, violates the Clean Air Act.

Respondents' Mot. at 15. Complainant will address Respondents' request for interlocutory appeal first. Complainant will then address the request for reconsideration and the Presiding Officer's alleged errors.

II. Interlocutory Review

Respondents' request for interlocutory review should be denied because Respondents have not identified substantial grounds for a difference of opinion about the question of law put forth in their Motion.

a. Standard for Interlocutory Appeal

The Consolidated Rules provide that a Presiding Officer may recommend an order or ruling for immediate review by the EAB if:

> (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).

A party requesting interlocutory review typically must come forward with citations to authority demonstrating that there are "substantial grounds for difference of opinion." *See In re Isochem N. Am., LLC*, 2008 EPA ALJ LEXIS 4, at **7–11 (ALJ, Feb. 7, 2008) (holding that respondents had not established the existence of substantial grounds because they failed to cite

authority for their position); *In re Hanson's Window & Construction, Inc.*, 2011 EPA ALJ LEXIS 1, at **10–14 (ALJ, Jan. 26, 2011) (denying request for interlocutory appeal because respondents failed to show substantial grounds for difference of opinion); *In re Elementis Chromium, Inc.*, Docket No. TSCA-HQ-2010-5022, slip op. at 2–3 (ALJ, Apr. 27, 2011) (order denying interlocutory appeal). A party's "mere disagreement" with the Presiding Officer's decision is not a sufficient basis for interlocutory review. *In re Isochem N. Am, LLC*, 2008 EPA ALJ LEXIS 4, at *7 (ALJ, Feb. 7, 2008); *In re Hanson's Window & Construction, Inc.*, 2011 EPA ALJ LEXIS 1, at **13–14 (ALJ, Jan. 26, 2011) (citing *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. Barnum & Baily Circus*, 246 F.R.D. 39, 43 (D.D.C. 2007) ("[M]ere disagreement . . . with a court's ruling does not establish a substantial ground for difference of opinion sufficient to satisfy the statutory requirements for an interlocutory appeal.")).

b. Question of Law or Policy for Interlocutory Review

Respondents identify the following legal issue for interlocutory review: whether "catalytic converter precious metal concentrations are 'specifications' and any differences between precious metal concentrations found in an imported vehicle and those listed in the vehicles application for [a certificate of conformity], whether for highway motorcycle or recreational vehicle, violates the Clean Air Act."[1] Respondents' Mot. at 15. Stated more simply,

[1] Respondents did not raise an argument concerning the so-called definition of the term "specifications" based on 40 C.F.R. § 1068.103(a) in their Motion for Accelerated Decision or Motion to Dismiss, nor did Complainant make any such argument in its "Second Motion to Supplement the Prehearing Exchange and Combined Response Opposing Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision." Respondents appear to have improperly raised their argument about "specifications" based on 40 C.F.R. § 1068.103(a) for the first time in their "Reply to Complainant's Combined Response to

the question is whether a COC issued to cover an engine family described in a written application can cover a highway motorcycle or recreational vehicle manufactured with a number, location, volume, or composition of catalytic converters different from that described in the application. As explained in the Presiding Officer's Order, the clear answer is that a COC cannot cover such a vehicle.

c. Highway Motorcycle Regulations

The regulations that apply to the highway motorcycles identified in Counts 1 through 4 of the Amended Complaint, 40 C.F.R. part 86, subpart E, require vehicles in a single engine family to "be identical" in "[t]he number of catalytic converters, location, volume, and composition." Order at 25 (quoting 40 C.F.R. § 86.420-78(b)(7)). The Presiding Officer observed that "COCs are issued for distinct engine families based on written applications describing the vehicles in the family," and that the test vehicle used to obtain emissions data for the application must be "a member of and represent[] the engine family for which certification is sought." *Id.* (citing 40 C.F.R. §§ 86.416-80, 86.420-78, 86.421-78, 86.422-78, 86.423-78, 86.431-78, 86.436-78). The Presiding Officer concluded that because COCs are issued to cover engine families and can only certify compliance with one set of standards, and because highway motorcycles within an engine family must by definition be identical in the number, location, volume, and composition

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Respondents' Motion to Dismiss for Failure to State a Claim and Motion for Accelerated Decision" ("Respondents' Combined Reply"). *See* Respondents' Combined Reply at 8–10. Under the Consolidated Rules, reply briefs must be limited to issues raised in the response. 40 C.F.R. § 22.16(b). Respondents should not be permitted to continue raising and litigating new legal theories through requests for reconsideration or interlocutory review. *See In re Hawaii Elec. Light Co., Inc.*, 8 E.A.D. 66, PSD Appeal Nos. 97-15 through 97-22, slip op. at 6 (EAB, March 3, 1999) (Order Denying Motion for Reconsideration and Lifting Stay) ("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.")

of catalytic converters, a COC therefore "cannot cover highway motorcycles with catalytic converters that are different in location, volume, or composition from what was described in the manufacturer's COC application." *Id.* (citing 40 C.F.R. § 86.437-78(a)(2)(ii)–(iii)).

Respondents have not identified any authority that would dispute or undermine the Presiding Officer's analysis and conclusion. Instead, Respondents express their disagreement with the ruling by repeating their argument that highway motorcycles in an engine family only need to be identical to each other and the certification test vehicle, and not to the engine family description submitted to EPA in the manufacturer's application for certification. Respondents' Mot. at 11, 13–14; *see* Respondents' Mot. to Dismiss at 8–9; Respondents' Mot. for Accelerated Decision at 6. Respondents compare 40 C.F.R. § 85.2305(b)(1), which states that highway motorcycles produced before a COC is issued may be covered if they "conform in all material request to the vehicles or engines described in the application," with 40 C.F.R. § 86.437-78(a)(2)(iii), which states that a COC "will cover all vehicles represented by the test vehicle," and suggest these provisions show the Agency intentionally created two different standards for coverage because it knew and accepted that test vehicles would not always be identical to the vehicles described in the application. Respondents' Mot. at 13–14.

Respondents' argument is not persuasive because the regulations require manufacturers to accurately describe in their applications for certification the "engine, emission control system and fuel system components," among other things, of the engine family to be certified, and the test vehicle must represent the configuration described in the application. 40 C.F.R. §§ 86.416-80(a)(1), 86.421-78(a); *see* Complainant's Second Mot. to Supplement the Prehearing Exchange & Combined Response Opposing Respondents' Mot. to Dismiss for Failure to State a Claim &

Mot. for Accelerated Decision at 16 (rebutting Respondents' arguments). Respondents' interpretation would undermine the certification program by giving manufacturers free license to provide inaccurate, incomplete, or misleading information in their applications for certification. *See* Order at 28–29 (rejecting Respondents' argument).

The Presiding Officer's decision is consistent with the regulations' plain language, reads the regulations in harmony, and preserves the integrity of the certification program. Respondents have not identified substantial grounds for a difference of opinion on this issue.

d. Nonroad Recreational Vehicle Regulations

Nonroad recreational vehicles such as those identified in Counts 5 through 10 of the Amended Complaint are governed by regulations codified in 40 C.F.R. parts 1051 and 1068. Respondents appear to base their argument on 40 C.F.R. § 1068.103(a), which in its current form states:

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

40 C.F.R. § 1068.103(a) (emphasis added).

The Presiding Officer determined that the plain language of the regulations "clearly indicates that the only nonroad engines and vehicles covered by a COC are ones that are described in the application for that COC," and a COC "does not cover nonroad vehicles with catalytic converters that are different in location, volume or composition from what was

described in the manufacturer's COC application." Order at 25 (citing 40 C.F.R. §§ 1051.201, 1051.205, 1051.230(a)–(b)(5), 1051.235, 1068.103(a)).

i. Respondents' Argument

Respondents argue that the italicized language in 40 C.F.R. § 1068.103(a) narrowly defines the term "specifications" to "unambiguously include only [emission control information ("ECI")] label information and maintenance conditions and limitations . . . ." Respondents' Mot. at 3; *see id.* at 2, 5–6, 9–13, 15–16. Respondents note that the EPA has not promulgated regulations prescribing specific standards or conditions governing the composition of catalytic converters. *Id.* at 1–2, 5. Respondents further note that ECI labels for recreational vehicles are not required to include information about a vehicle's catalytic converter composition.[2] *Id.* at 3, 6, 9–10. Respondents then argue that because "[n]either the ECI label, nor the Agency's 'design standards' include catalytic converter precious metal concentrations as 'specifications' or 'design specifications,'" (*id.* at 3), this means "[t]he Agency has clearly defined the term 'specifications' and deliberately excluded catalytic converter ratios from the ECI label and failed to require certain ratios as conditions." *Id.* at 6.

Respondents claim that because catalytic converter composition is not a "specification" as defined by 40 C.F.R. § 1068.103(a), then a recreational vehicle equipped with a catalytic

[2] On pages 9 and 10 of their Motion, Respondents mistakenly cite to 40 C.F.R. § 86.1807-01, which sets forth the ECI label requirements for certain light-duty vehicles, light-duty trucks, medium-duty passenger vehicles, and heavy-duty vehicles. Section 86.1807-01 does not apply to the highway motorcycles and nonroad recreational vehicles at issue in this matter. *See* 40 C.F.R. § 86.1801-01 (defining classes of vehicles subject to the subpart). The ECI label requirements for highway motorcycles are set forth at 40 C.F.R. § 86.413-78, and for recreational vehicles at 40 C.F.R. § 1051.135. They do not require manufacturers to disclose a vehicle's catalytic converter composition on the public ECI label.

converter different from the one identified in the certification application for that vehicle's purported engine family would nonetheless be covered by the COC issued for that engine family. Respondents' Mot. at 12. Respondents contend that "all the vehicles need to do is comply with emissions [standards] and have one [catalytic converter]." *Id.*

Respondents argue that the plain language of 40 C.F.R. § 1068.103(a) excludes an engine family's catalytic converter composition from the definition of "specification," and the Presiding Officer erred by concluding otherwise. *Id.* at 1, 3, 5–6, 15–16.

ii. Complainant's Response

Respondents' request for interlocutory review should be denied because: Respondents base their argument on a revised version of 40 C.F.R. § 1068.103(a) that did not apply to any vehicles identified in the Amended Complaint; Respondents' argument is a belated attempt to impose a cramped, counterintuitive reading of the regulations that is contrary to their plain meaning and would lead to absurd results; and Respondents have not identified any controlling or persuasive authority to support their interpretation of the regulations and have therefore not met their burden of establishing a substantial basis for disagreement.

1. Respondents' argument relies on language that took effect on December 27, 2016, five months after the Amended Complaint was filed.

Respondents argue that the catalytic converter composition described in an engine family's certified design is not a "specification" to which production vehicles must conform because 40 C.F.R. § 1068.103(a) defines the term "specifications" to include only "the emission control information label and any conditions or limitations identified by the manufacturer or EPA," and the EPA does not require information about catalytic converter composition to be

included on a vehicle's ECI label. Respondents' Mot. at 1, 3, 5–6, 9–10, 12. The reference in 40 C.F.R. § 1068.103(a) to a vehicle's ECI label was added without explanatory comment in 2016 as part of the Agency's "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles–Phase 2" rulemaking. 81 Fed. Reg. 73478, 74224 (Oct. 25, 2016). The final rule was published in the Federal Register on October 25, 2016, and took effect on December 27, 2016. *Id.* at 73478. Thus, the version of 40 C.F.R. § 1068.103(a) that Respondents rely on does not apply to any of the vehicles identified in the Amended Complaint.

At all times relevant to this matter, 40 C.F.R. § 1068.103(a) stated:

> 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). The applicable version of 40 C.F.R. § 1068.103(a) does not contain a reference to ECI labels, and Respondents' arguments that refer to labeling requirements are therefore unfounded. Complainant will refer to the pre-amendment version of 40 C.F.R. § 1068.103 for the remainder of this Response because it is the version that actually applied to the vehicles at issue in this matter. However, Complainant would argue that the 2016 revision does not substantively change the meaning of the regulation or the word "specifications." Both versions of the regulation use the term "specifications" inclusively, and are thus plainly incompatible with the restrictive interpretation advanced by Respondents.

2. Catalytic converter composition is a "specification" as the term is used in 40 C.F.R. § 1068.103(a).

The plain meaning of the word "specification" is broad. Webster's dictionary defines the word "specification" to mean "the act or process of specifying," and "a detailed precise presentation of something or of a plan or proposal for something . . . ." *Webster's Ninth New Collegiate Dict.* 1132 (Frederick C. Mish ed., 1984). To "specify" is then defined as "to name or state explicitly or in detail," or "to include as an item in a specification." *Id.* These are consistent with an older definition of "specification" which identified the word as "a detailed description of the parts of a whole; statement or enumeration of particulars, as to the actual or required size, quality, performance, terms, etc." *Webster's New World Dict. of the Am. Language Second College Ed.* 1367 (David B. Guralnik ed., 1972).

The first line of 40 C.F.R § 1068.103(a) states that "[e]ngines/equipment covered by a certificate of conformity are limited to those that . . . conform to the specifications described in the certificate and the associated application for certification." 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," including all "vehicle configurations and model names," and detailed descriptions of "all system components for controlling exhaust emissions" and "the part number of each component" described. 40 C.F.R. § 1051.205(a)–(b). Further, as the Presiding Officer observed, recreational vehicles belonging to a single engine family must have the same "number, location, volume, and composition of catalytic converters." 40 C.F.R. § 1051.230(b)(5); Order at 25. Applying the plain dictionary definition of the word "specification," it is clear that details in an application for certification

about the number, location, volume, and composition of catalytic converters being used in an engine family would be "specifications described in the . . . application for certification."

The next sentence of 40 C.F.R. § 1068.103(a) states that "[f]or the purposes of this paragraph (a), 'specifications' includes any conditions or limitations identified by the manufacturer or EPA." Respondents argue that this narrows the definition of "specifications" to "maintenance conditions and limitations" (Respondents' Mot. at 3), but there is no support for their position.[3] To the contrary, the EAB has observed that "[c]ourts have repeatedly interpreted the term 'including' as one of enlargement, and not one of limitation." *In re Bil-Dry Corp.*, 9 E.A.D. 575, 598–99 & n.29 (EAB 2001) (citing *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218, 225 (3rd Cir. 1991)); *see Exxon Corp. v. Lujan*, 730 F. Supp. 1535, 1545 (D. Wyo. 1990) ("The use of the word 'includes' rather than 'means' in a definition indicates that what follows is a nonexclusive list which may be enlarged upon."). The plain language of section 1068.103(a) thus provides that "specifications" in a certificate or application to which a vehicle or engine must conform include, but are not limited to, "conditions or limitations identified by the manufacturer or EPA."[4]

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[3] Respondents' construction would also lead to absurd results. Under Respondents' preferred reading, 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. 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. This result is plainly at odds with the spirit and text of the Clean Air Act, which directs the EPA to establish emissions standards and enforce them through a program of mandatory testing and certification. CAA §§ 202(a)(1), 206(a)(1), 42 U.S.C. §§ 7521(a)(1), 7525(a)(1).

[4] Respondents also do not explain why, if their interpretation of 40 C.F.R. § 1068.103(a) was correct, the catalytic converter specifications they set for themselves in their applications would not be "conditions or limitations set by the manufacturer." *See* Order at 29 n.33 ("Respondents failed to meet their own standards.").

The inclusive definition of the term "specifications" is reinforced by the next sentence of 40 C.F.R. § 1068.103(a), all but ignored by Respondents, which states: "For example, if the application for certification specifies certain engine configurations, the certificate does not cover any configurations that are not specified." An "engine configuration" is "a unique combination of engine hardware and calibration within an engine family" that "differ only with respect to normal production variability or factors unrelated to emissions." 40 C.F.R. § 1051.801. Section 1068.103(a) thus shows that "specifications" go beyond conditions or limitations to include aspects of design, construction, calibration, and emissions control strategies included in an application for certification.

3. Respondents have not demonstrated substantial grounds for a difference of opinion on the issue.

After conducting an independent review and analysis, the Presiding Offer correctly held:

> [T]he plain language of the regulations pertaining to nonroad vehicles clearly indicates that the only nonroad engines and vehicles covered by a COC are ones that are described in the application for that COC. A COC issued by the Agency does not cover nonroad vehicles with catalytic converters that are different in location, volume, or composition from what was described in the manufacturer's COC application. As with highway motorcycles, nonroad vehicles whose catalytic converters are not identical in number, location, volume, and composition are not part of the same engine family.

Order at 25.

Respondents have not identified any authority, controlling or otherwise, that would contradict the Presiding Officer's conclusion or call her reasoning into question. Instead, Respondents offer renewed arguments in a belated attempt to bolster a theory that itself was improperly advanced for the first time in a reply brief. Respondents' disagreement with the

Presiding Officer's decision "does not establish 'substantial grounds for difference of opinion' to warrant interlocutory review." *In re Hanson's Window & Construction, Inc.*, 2011 EPA ALJ LEXIS 1, *13 (ALJ, Jan. 26, 2011). Respondents' request to have this matter recommended for interlocutory review should therefore be denied.

e. Certificates of Conformity

Though Respondents do not identify it as an issue for interlocutory appeal, an analysis of the regulations would not be complete without a discussion of the COCs themselves. For both the highway motorcycles and nonroad recreational vehicles, each COC issued to Respondents states on its face: "This Certificate covers only those vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the documentation required by" the applicable certification regulations. Order at 25–26 (quoting CX043–CX052); *see* 40 C.F.R. §§ 86.437-78(a)(2)(ii), 1051.255(a) (COC may contain additional conditions). The Presiding Officer determined that the terms of the COCs themselves make clear "that they do not apply to *any* vehicles other than those described in the relevant applications." Order at 25.

Respondents dispute the Presiding Officer's determination because the text of each COC uses the word "specifications,"[5] and because each COC also states that it is "issued with respect

[5] Respondents observe that the phrase "design specifications" is used on each COC, and also appears in a regulatory provision pertaining to evaporative emission standards, 40 C.F.R. § 1051.245(a)(2). Respondents' Mot. at 11–12. The regulatory provision allows manufacturers to meet evaporative emission standards for fuel systems by showing that their fuel tanks and fuel lines are constructed to certain design specifications set forth in the regulation. 40 C.F.R. § 1051.245(a)(2), (e). Respondents observe that the fuel system "design specifications" in section 1051.245 do not mention catalytic converter ratios.

Respondents appear to imply that the phrase "design specifications" as used on the face of the COCs is a defined term that refers exclusively to the "design specifications" for fuel tanks

to test vehicles . . . more fully described in the manufacturer/importer's application for certification." Respondents' Mot. at 11–12. As discussed *supra* in section (II)(d)(ii), an engine family's catalytic converter design and composition qualify as "specifications" within the plain meaning of the word and within the meaning of 40 C.F.R. § 1068.103(a). With regard to the COCs' text, Respondents do not explain why the text undermines or is inconsistent with the Presiding Officer's analysis. In fact, the additional text Respondents quote appears to buttress the Presiding Officer's conclusion because it shows that the test vehicle for each engine family must match the description in the application for certification, and that the written description carries controlling weight in the event of a discrepancy.

The Presiding Officer correctly concluded that the COCs themselves provide an independent basis for holding that "when the vehicles actually manufactured contain catalytic converters with precious metal contents that are different in volume, and composition from the catalytic converters described in the COC application," the vehicles are not covered by the COC. Order at 26. Respondents have not identified any authority suggesting that the Presiding Offer

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and fuel lines in 1051.245. However, Respondents cite no authority for this, nor do they make a cogent argument for reaching that conclusion.

Respondents also neglect to mention that the phrase appears in other regulatory provisions, such as 40 C.F.R. § 1051.130. Section 1051.130 applies to scenarios in which an engine is certified by EPA separately from the vehicle or equipment it powers, and addresses what instructions an engine manufacturer must provide to a vehicle manufacturer to ensure that the engine will be installed according to its "certified configuration." 40 C.F.R. § 1051.130(a). The instructions must "make sure the installed engine will operate according to design specifications in [the] application for certification," and "may include, for example, instructions for installing aftertreatment devices when installing the engines." 40 C.F.R. § 1051.130(b)(6). This suggests that the phrase "design specification" as used in the Respondents' COCs should be given its plain, broad meaning, rather than the artificially constrained interpretation Respondents appear to advocate.

erred on this point, and their request to have this matter recommended for interlocutory review should be denied.

f. Respondents' request to have this matter recommended for interlocutory review should be denied.

Respondents have not demonstrated that there are substantial grounds for a difference of opinion about an important question of law in this matter. Respondents' request to have this matter recommended for interlocutory review should therefore be denied.

III. Reconsideration

Separate from their request for interlocutory review, Respondents request that the Presiding Officer reconsider her Order and correct several alleged errors. The Presiding Officer should deny Respondents' request because Respondents have not identified any error of law or fact in the Order.

a. Standard for Reconsideration

Though the Consolidated Rules do not provide for reconsideration of interlocutory orders, previous cases have "held that a motion for reconsideration of an Administrative Law Judge's order is subject to the same standard of review as that for orders of the" EAB. *In re Firestone Pacific Foods, Inc.*, 2009 EPA ALJ LEXIS 5, at **71–72 (ALJ, Mar. 24, 2009) (citations omitted); *see* 40 C.F.R. § 22.32 (motion to reconsider a final order). "Reconsideration is generally reserved for cases in which the [Presiding Officer] is shown to have made a demonstrable error, such as a mistake of law or fact." *Id.* at *73 (quoting *In re Hawaii Elec. Light Co., Inc.*, 8 E.A.D. 66, PSD Appeal Nos. 97-15 through 97-22, slip op. at 6 (EAB, March 3, 1999) (Order Denying Motion for Reconsideration and Lifting Stay)). A motion for reconsideration is not "an opportunity to reargue the case in a more convincing fashion. . . . 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.* (quoting *Hawaii Elec. Light Co., Inc.*, 8 E.A.D. 66, slip op. at 6). "Motions for reconsideration 'are not simply an opportunity to reargue facts and theories upon which a court has already ruled.'" *Am. Soc'y for the Prevention of Cruelty to Animals,* 246 F.R.D. at 41 (quoting *Black v. Tomlinson*, 235 F.R.D. 532, 533 (D.D.C. 2006)); *see Firestone Pacific Foods, Inc.*, 2009 EPA ALJ LEXIS 5 at *74 ("Motions for reconsideration are not for presenting the same issues ruled upon by the court, either expressly or by reasonable implication."). "Reconsideration is normally appropriate only when [the Tribunal] has obviously overlooked or misapprehended the law or facts or the position of one of the parties." *Firestone Pacific Foods, Inc.*, 2009 EPA ALJ LEXIS 5 at *74 (quoting *In re City of Detroit*, TSCA Appeal No. 89-5 (CJO Feb. 20, 2001) (unpublished order)).

b. Respondents have failed to show the Presiding Officer made a demonstrable error.

Respondents allege that the Presiding Officer made several points of error in her Order. In truth, however, Respondents' Motion presents "'little more than a rehash of the arguments' previously argued and rejected by the" Tribunal. *Am. Soc'y for the Prevention of Cruelty to Animals*, 246 F.R.D. at 41 (quoting *Black*, 235 F.R.D. at 533).

i. The Presiding Officer correctly held that the plain language of the Clean Air Act, implementing regulations, and COC terms clearly prohibit Respondents' conduct.

Respondents' primary objection, woven throughout their Motion, is the legal issue identified in their request for interlocutory review. As explained *supra* in section II and incorporated here, the Presiding Officer did not commit any error on that point. Respondents raise several additional, closely related objections.

1. The Presiding Officer conducted an independent review and analysis.

Respondents confusingly argue that the Presiding Officer erroneously "deferr[ed] to the Agency's interpretation of an unambiguous regulation." Respondents' Mot. at 3, 10 (citing *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 740 (6th Cir. 2012)). The principles that encourage Article III courts to give deference to agency interpretations of statutory and regulatory provisions, as articulated by *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984) and *Auer v. Robbins*, 519 U.S. 452 (1997), do not apply to administrative proceedings under the Consolidated Rules. *In re U.S. Army, Ft. Wainwright Central Heating & Power Plant*, 2002 EPA ALJ LEXIS 24, at **20–23 (ALJ, Apr. 30, 2002), *aff'd in part, rev'd in part on other grounds by In re U.S. Army*, 11 E.A.D. 126 (EAB 2003) (citing *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 543 n.22 (EAB 1998); *In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997); *In re Mobil Oil Co.*, 5 E.A.D. 490, 509 n.30 (EAB 1994); *In re Louisville Gas & Elec. Co., Trimble County Power Plant*, 1 E.A.D. 687, 690–91 (JO 1981)). The presiding Administrative Law Judge and the EAB perform their "own 'independent review and analysis of the issue'" because they are the Agency's final decision-makers. *Ocean State*, 7 E.A.D. at 543 n.22 (quoting *Mobile Oil*, 5 E.A.D. at 508).

In this matter, nothing in the Presiding Officer's Order suggests that she gave deference to Complainant's arguments. Rather, the Order demonstrates that the Presiding Officer independently reviewed and analyzed the regulations at issue in this proceeding and determined their best reading. *See* Order at 17–31 (analyzing and applying statutory provisions, regulatory provisions, and relevant case law).

2. Respondents wrote their own catalytic converter standards.

Respondents argue that the Presiding Officer erred by holding that "differences in catalytic converter ratios violate the Clean Air Act" even though "the Agency does not require that a catalytic converter include all three of [platinum, palladium, and rhodium], nor does it require a certain concentration of said metals." Respondents' Mot. at 3, 14; *see id.* at 2–3, 5–7, 9–10, 14. Respondents misstate the Presiding Officer's holding, and in so doing misrepresent the basis of this entire case.

Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), prohibits manufacturers from selling, offering to sell, introducing, or delivering for introduction into commerce, or importing into the United States any new vehicle or engine, unless the vehicle or engine is covered by a COC. *See* 42 U.S.C. § 7524(d) (standards for nonroad vehicles shall be enforced in the same manner as standards for motor vehicles). The Presiding Officer did not hold that catalytic converters of a particular composition violate the Act. Instead, the Presiding Officer held that a COC does not cover a highway motorcycle or nonroad vehicle with catalytic converters different in location, volume, or composition from what was described in the manufacturer's COC application. Order at 25–26, 29 (citations omitted). The Presiding Officer then found that there was no genuine dispute that: Respondents' vehicles identified in the Amended Complaint were manufactured with catalytic converters of different volume and composition as those described in the relevant COC applications; the vehicles were therefore not covered by the COCs issued in response to those applications; and Respondents therefore sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported the vehicles into the United

States in violation of sections 203(a)(1) and 213(d) of the Act, 42 U.S.C. §§ 7522(a)(1), 7547(d). Order at 30–31.

As the Presiding Officer observed, Respondents wrote their own catalytic converter standards when they prepared their COC applications and committed to manufacture vehicles identical to those described. Order at 26 n.32, 29 n.33; *see e.g.*, CX001 at EPA-000005 (COC application stating that all vehicles "are identical in all material respects to the motorcycles described in this application for certification"); *id.* at EPA-000011 (listing detailed catalytic converter specifications). Respondents have not rebutted or identified any error in the Presiding Officer's analysis and determination.

3. Respondents had fair notice of what the law required.

A party may not be penalized for conduct unless they had fair notice that it was prohibited. *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995). "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 which the agency expects the parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *In re V-1 Oil Co.*, 8 E.A.D. 729, 752 (EAB 2000) (quoting *General Elec. Co.*, 53 F.3d at 1328–29). The affirmative defense of fair notice is not available to a respondent who received actual notice of an agency's regulatory interpretation. *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 193–96 (EAB 1997).

Respondents appear to raise for the first time a fair notice defense in their Motion. Respondents contend:

> Because 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 not notice to the public that catalytic converter ratios are 'specifications.' Therefore, the Agency cannot, for the first time, hold Respondents liable for catalytic converter ratio differences and interpret the ratios to be included in the term 'specifications' until it goes through the rulemaking process, i.e. notice and comment period.

Respondents Mot. at 5–6.

In addition to being untimely, Respondents' fair notice argument fails 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. *See* Order at 24–27; *supra* section II. Further, the record shows that Respondents had actual pre-enforcement notice of what Complainant believed the law required. *See* Order at 9–11 (detailing history of Complainant's investigation and identifying letter to Respondents alerting them to concerns about catalytic converters).

4. The Presiding Officer has not engaged in *de facto* rulemaking.

Respondents claim that the Presiding Officer's ruling amounts to a *de facto* rulemaking conducted without the procedural requirements mandated by section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d), or section 553 of the Administrative Procedure Act, 5 U.S.C. § 553. Respondents' Mot. at 3, 5–6, 10, 16 (citing *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 740 (6th Cir. 2012) (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000))). Respondents rely on language from *Christensen v. Harris County*, in which the Supreme Court stated that Article III courts should not defer to an agency's regulatory interpretation if the interpretation contradicts the plain and unambiguous meaning of the regulatory language, because doing so would "permit the agency . . . to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588.

Here, the Presiding Officer independently analyzed the applicable statutory and regulatory provisions, and determined that they clearly prohibited Respondents' conduct as alleged in the Amended Complaint. "[T]his is not a situation where the Agency through adjudication is changing clear law, such as overruling prior decisions relied on by the parties." *In re Henrico County Pub. Sch.*, 2 E.A.D. 435, 436 (CJO 1987) (Denial of Motion for Reconsideration). Instead, the Presiding Officer interpreted the regulations and applied them in a manner consistent with their plain meaning. *See id.* at 435 (final decision interpreted "exemption in a manner that [was] consistent with the provision's requirement" and was therefore not *de facto* rulemaking). The Presiding Officer's Order does not constitute a *de facto* rulemaking.

ii. The Presiding Officer correctly held that Respondents are manufacturers subject to liability under section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1).

Respondents Taotao Group and Jinyun renew their argument that they are not "manufacturers" subject to section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), because they did not manufacture the catalytic converters. Respondents contend that it is irrational to penalize them for purchasing catalytic converters different from those described in the relevant certification applications because they cannot control the content of the catalytic converters, and because variation within Complainant's own test results show the difficulty of ascertaining catalytic converters' precise composition. Respondents' Mot. at 3–4, 6–7, 14. Respondents claim they are being held to an impossible standard, and further suggest that the Agency may be estopped from imposing liability because it "approved Respondents' [COC applications] in the absence of catalytic converter test results knowing that the converters were purchased from an unrelated third party manufacturer." *Id.* at 4.

Respondents also argue that "the Agency itself recognizes that there is no *single* definition of manufacturer, citing for support definitions for "*equipment manufacturers*, *engine manufacturers*, and *secondary engine manufacturers*." *Id.* at 7 (citing 40 C.F.R. §§ 1051.801, 1068.30). Respondents point to the delegated assembly regulation for nonroad vehicles, 40 C.F.R. § 1068.261(c), and rhetorically ask: "if catalytic converter manufacturers . . . are required to separately apply for COCs, then how can aftertreatment component manufacturers be held responsible for said catalytic converter manufacturers obligations?"[6]

1. The Presiding Officer Correctly held that each Respondent is a manufacturer as defined by section 216(1) of the Act, 42 U.S.C. § 7550(1).

The Presiding Officer correctly held there is no genuine dispute that each Respondent is a manufacturer within the plain meaning of the Act because Taotao Group and Jinyun are the vehicles' original manufacturers, and Taotao USA imported the vehicles into the United States and acts on behalf of the other Respondents. Order at 22–23. The Presiding Officer considered and rejected Respondents' fundamental argument that the liable "manufacturers" in this case should be the catalytic converter manufacturers rather than themselves, because the Act defines "manufacturer" in reference to vehicles and engines, and "not the pieces thereof." *Id.*

Respondents are also mistaken when they claim there are multiple legal definitions of "manufacturer." The Act itself clearly defines the term "manufacturer" to mean "any person engaged in the manufacturing or assembling of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines, or importing such vehicles or engines for resale

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[6] Complainant assumes Respondents mean "vehicle manufacturers" rather than "aftertreatment component manufacturers."

. . . ." 42 U.S.C. § 7550(1). The regulations governing certification of nonroad recreational vehicles repeat and incorporate this definition. *See* 40 C.F.R. § 1051.801 ("*Manufacturer* has the meaning given in section 216(1) of the Act."); 40 C.F.R. § 1068.30 ("*Manufacturer* has the meaning given in section 216(1) of the Clean Air Act (42 U.S.C. 7550(1))."). The terms "engine manufacturer" and "equipment manufacturer" are not explicitly defined, but are plainly encompassed by the statutory definition of "manufacturer."[7] Similarly, the term "secondary engine manufacturer" is defined as a subtype of manufacturer, specifically as "anyone who produces a new engine by modifying a complete or partially complete engine that was made by a different company." 40 C.F.R. § 1068.30. None of the terms or provisions cited by Respondents suggests the Presiding Officer erred in concluding that they are manufacturers within the meaning of the Act.

Respondents' citation to 40 C.F.R. § 1068.261(c), the delegated assembly regulation for nonroad vehicles, also fails to cast doubt on the propriety of the Presiding Officer's Order. The delegated assembly provision "describes an exemption that allows certificate holders to sell or ship engines that are missing certain emission-related components," an action that would normally constitute a violation of section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1). 40 CF.R. § 1068.261. Subsection (c), cited by Respondents, describes conditions that must be satisfied in order to utilize the exemption. To qualify for the exemption, a manufacturer must, among other things, "[p]rovide installation instructions in enough detail to ensure that the engine will be in its certified configuration;" "[h]ave a contractual agreement with the equipment manufacturer

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[7] The regulations define "equipment" to include "[a]ny vehicle, vessel, or other type of equipment that is subject to the requirements of [Part 1068] or that uses an engine that is subject to the requirements of" Part 1068. 40 C.F.R. § 1068.30.

obligating the equipment manufacturer to complete the final assembly of the engine so it is in its certified configuration when final assembly is complete;" and "[t]ake appropriate additional steps to ensure that all engines will be in a certified configuration when installed by the equipment manufacturer." 40 C.F.R. § 1068.261(c)(2)–(4).

Nothing in section 1068.261 suggests that catalytic converter manufacturers are required to apply for certification, or otherwise relieves manufacturers from the responsibility of making sure their products are built correctly before reaching an ultimate purchaser. Rather than support the Respondents' argument, the provisions of section 1068.261(c) reinforce the Presiding Officer's conclusion that vehicles and engines must be in their certified configuration, i.e., the configuration described in the relevant certification application, in order to be covered by a COC.

2. Respondents have not demonstrated why the Agency should be estopped from holding them to the standards they wrote in their applications for certification.

Respondents complain that it is irrational or unfair to expect them to manufacture their vehicles using the catalytic converters they described in their applications for certification because Respondents purchase the catalytic converters from a parts supplier, and therefore cannot control their composition. Respondents' Mot. at 6–7, 14. Respondents' argument is contrary to law and reason.

The Act is a strict-liability statute. EPA's Clean Air Act Mobile Source Civil Penalty Policy at 23; *see United States v. B&W Inv. Properties*, 38 F.3d 362, 367 (7th Cir. 1994) (discussing strict liability under Title I of the Act). Section 203(a)(1), 42 U.S.C. § 7522(a)(1), clearly puts the onus of legal compliance on vehicle and engine manufacturers. Further, Respondents do not explain why it is impossible for them to ensure, through independent testing

or contractual arrangements, that their component suppliers provide them with the correct catalytic converters. *See* Order at 28 ("Respondents must decide the extent to which they will rely on their suppliers' statements . . . and whether to test or verify those statements"). Alternately, Respondents do not explain why they could not write their applications to accurately describe the catalytic converters available to them.[8]

To the extent Respondents are attempting to now raise an estoppel-type argument, "[a] party seeking to estop the government bears a heavy burden of demonstrating the traditional elements of estoppel and some 'affirmative misconduct' on the part of the government." *In re B.J. Carney Indus.*, 7 E.A.D. 171, 196 (EAB 1997). Respondents do not explain how the Agency's decision to approve their applications for certification constitutes affirmative misconduct, or how they then relied on that misconduct to their detriment. *See id.* (standard for estoppel). To the contrary, the regulations required Respondents to accurately and truthfully describe their vehicles in their applications, which they failed to do. *See* 40 C.F.R. §§ 86.416-80(a)(2)(i), 1051.30, 1051.205(a)–(b); *see also* Order at 28 ("The Clean Air Act and its implementing regulations place the burden on Respondents, not their suppliers, to provide accurate emissions information in their COC applications.").

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[8] To the extent Respondents may be arguing that it would be impossible to build their vehicles with catalytic converters that conform to the catalytic converters described in their applications for certification, Complainant reiterates that the Respondents wrote their own standards when they designed their vehicles. Order at 29 n.33. Further, this Tribunal has held that "[f]or violations of the Clean Air Act, impossibility of compliance is no defense to liability." *In re U.S. Army, Ft. Wainwright Central Heating & Power Plant*, 2001 EPA ALJ LEXIS 30, at **22–25 (ALJ, July 3, 2001) (Order on Complainant's Motion for Accelerated Decision and on Other Motions), *aff'd in part, rev'd in part on other grounds by In re U.S. Army*, 11 E.A.D. 126 (EAB 2003) (citing *United States v. Vanguard Corp.*, 701 F. Supp. 390 (E.D.N.Y. 1988); *United States v. Ford Motor Co.*, 814 F.2d 1099, 1103–04 (6th Cir. 1987); *Union Elec. Co. v. EPA*, 427 U.S. 246, 258–59 (1976)).

The plain language of the Act and the structure of the certification program hold manufacturers ultimately responsible for ensuring the vehicles they produce match the vehicles described in their applications for certification. Respondents have not identified any error in the Presiding Officer's holding.

iii. The Presiding Officer correctly analyzed the D.C. Circuit's holding in *United States v. Chrysler Corp.*, 591 F.2d 958 (D.C. Cir. 1979), and applied it in this matter.

In *United States v. Chrysler Corp.*, 591 F.2d 958 (D.C. Cir. 1979), the D.C. Circuit held that a COC "covers only those new motor vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the application for certification," and that a difference is "material" if "the difference in parts reasonably may be expected to affect emission controls." *Chrysler Corp.*, 591 F.2d at 960. As a consequence, thirty-seven 1974 Plymouth Valiant and Dodge Dart motor vehicles that had been manufactured with the wrong distributors, carburetors, exhaust gas recirculation valves, or orifice spark advance controls were not covered by a COC, even though the vehicles did meet federal emission standards. *Id.*; *see United States v. Chrysler Corp.*, 437 F. Supp. 94, 96 (D.D.C. 1977) (listing differences); Order at 26–29 (analyzing and applying *Chrysler*).

Respondents claim the Presiding Officer erroneously relied on *Chrysler* because the parts at issue in that case "clearly fell within the Agency's definition of 'specifications,'" because they were listed on the ECI label, "whereas catalytic converter ratios do not" fall within the definition of "specifications." Respondents Mot. at 2 & n.2, 12. Respondents are mistaken.

As explained *supra* in section II(d)(ii), catalytic converter composition does fall within the plain dictionary definition of a "specification," and the definition of a "specification" as used

in 40 C.F.R. § 1068.103(a). Further, Respondents' reference to the ECI label is irrelevant and erroneous. It is irrelevant because the COC issued to *Chrysler*, like the COCs issued to Respondents, stated that it covered "only those new motor vehicles . . . which conform, in all material respects, to the design specifications *described in the application* for this certificate . . . ." *Chrysler*, 437 F. Supp. at 95 (quoting the COC) (emphasis added). It is erroneous because ECI labeling regulations, including the regulation applicable to the model year 1974 vehicles in *Chrysler*, display "[e]ngine tuneup specifications and adjustments . . . including idle speed, ignition timing, and the idle air-fuel mixture setting procedure and value." 40 C.F.R. § 85.074-35(a)(4)(iv) (1974). They *do not* require a manufacturer to list *parts* or *part numbers* on a label, but in *Chrysler* it was a difference in parts that caused the vehicles to not be covered by a COC. *Chrysler*, 437 F. Supp. at 97; *Chrysler*, 591 F.2d at 960–61.

The Presiding Officer examined the *Chrysler* decisions and determined: "There is simply no meaningful distinction between *Chrysler* and this case." Order at 29. In reaching her conclusion, the Presiding Officer considered and rejected Respondents' attempt to distinguish the facts in *Chrysler* from the facts presented here, and to otherwise limit *Chrysler*'s significance. *Id.* at 27–29. Respondents have not in their Motion presented any basis to question the Presiding Officer's analysis.

iv. The Presiding Officer did not err in denying Respondents' Motion to Dismiss.

Respondents allege that the Presiding Officer erroneously denied Respondents' Motion to Dismiss because she failed to consider all but one of Respondents' arguments. Respondents' Mot. at 8. However, Respondents do not identify those arguments with specificity. Instead, Respondents simply state their disagreement with the Presiding Officer's decision by repeating

arguments the Presiding Officer has already considered and rejected. *Id.* at 8–13. Respondents also fault the Presiding Officer for ruling on the question of Respondents' liability, but here Respondents appear to be confusing the Presiding Officer's decision on their Motion to Dismiss with her decision on Complainant's Motion for Partial Accelerated Decision. *Id.* at 13. Respondents have not identified any genuine mistake of law or fact in the Presiding Officer's decision to deny their Motion to Dismiss, and their request for reconsideration of that ruling should be denied.

v. The Presiding Officer did not err in granting Complainant's Motion for Partial Accelerated Decision.

Respondents repeat their allegations that the Presiding Officer incorrectly interpreted the Act and its implementing regulations in her decision to grant Complainant's Motion for Partial Accelerated Decision. Respondents' Mot. at 13–15. Those arguments have been rejected by the Presiding Officer, and are addressed elsewhere in this response. Respondents further argue that the Presiding Officer incorrectly placed the burden on Respondents "to prove that the facts and allegations do not amount to violations," and that the Presiding Officer erroneously found that all vehicles belonging to the ten engine families identified in the Amended Complaint were manufactured with catalytic converters different from those described in the relevant applications. *Id.* at 6, 15. Respondents' arguments are without merit.

Accelerated decision is appropriate where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Order at 6 (quoting Fed. R. Civ. P. 56(a); 40 C.F.R. § 22.20(a)). The moving party has "an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving

party." *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting)). The Presiding Officer observed that here Complainant "bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for any affirmative defenses." *Id.* at 7 (citing 40 C.F.R. § 22.24(a)).

The Presiding Officer examined the evidentiary material in the record at length, and found "there are no material facts in dispute as to Respondents' liability for the allegations in the Amended Complaint." *Id.* at 7–16, 21–24, 30–31. Significantly, the Presiding Officer noted that unlike Complainant, "Respondents cite[d] little evidence in the record to either support their motion for accelerated decision or to rebut the Agency's motion for accelerated decision." *Id.* at 23–24 & n.30, 31. The Presiding Officer observed that the failure to cite evidence "on its own merits a finding that the facts as stated by the Agency are not genuinely disputed." *Id.* at 23 n.30 (citing Fed. R. Civ. P. 56(c)(1)).

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. *Id.* at 30–31. Again, 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." *Id.* at 31. Respondents have not in their Motion identified any legal or factual errors with the Presiding Officer's analysis. The Presiding Officer did not err in granting Complainant's

Motion for Partial Accelerated Decision, and Respondents' request to reconsider that decision should be denied.

Conclusion

Respondents have not identified substantial grounds for disagreement with the Presiding Officer's Order that would justify interlocutory review, nor have they identified legal or factual errors warranting reconsideration. Instead, Respondents do little more than repeat arguments previously argued and rejected by the Tribunal. For the foregoing reasons, Complainant respectfully requests the Tribunal deny Respondents' "Motion for Reconsideration, or in the Alternative, Request for Interlocutory Appeal."

Respectfully Submitted,

5/30/17
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CERTIFICATE OF SERVICE

I certify that the foregoing Response to Respondents' Motion for Reconsideration, or in the Alternative, Request for Interlocutory Appeal ("Response") 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, and Salina Tariq at stariq.wmchulaw@gmail.com. I further certify that three copies of the foregoing Motion were sent this day by certified mail, return receipt requested, for service on Respondents' counsel at the address listed below:

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