(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd. Docket No. CAA-HQ-2015-8065	)	CAA Appeal Nos. 18-01 & 18-02

[Decided March 5, 2020]

FINAL DECISION AND ORDER

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

IN RE TAOTAO USA, INC., TAOTAO GROUP CO., LTD., AND JINYUN COUNTY XIANGYUAN INDUSTRY CO., LTD.

CAA Appeal Nos. 18-01 & 18-02

FINAL DECISION AND ORDER

Decided March 5, 2020

Syllabus

Taotao USA, Inc. ("Taotao USA"), Taotao Group Co., Ltd. ("Taotao China"), and Jinyun County Xiangyuan Industry Co., Ltd. ("Jinyun") (collectively referred to as "Appellants") appeal from an Initial Decision that Chief Administrative Law Judge ("ALJ") Susan L. Biro issued holding these companies liable for violations of the Clean Air Act's ("CAA") mobile source program and assessing a civil penalty. The U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance ("EPA") filed a complaint alleging that Appellants manufactured and imported into the United States motorcycles and recreational vehicles with catalytic converters that differed from the catalytic converters described in Appellants' respective applications for certificates of conformity ("COCs"). As a result, EPA alleged the imported vehicles were uncertified, in violation of CAA sections 203(a) and 213(d), 42 U.S.C. §§ 7522(a), 7547(d), and their implementing regulations codified at 40 C.F.R. §§ 86.407-78, 1051.255, 1068.101.

The ALJ found Appellants jointly and severally liable: Taotao USA for importing 109,964 uncertified new vehicles, comprised of 67,527 highway motorcycles and 42,437 recreational vehicles; Taotao China for manufacturing, offering for sale, or introducing or delivering for introduction into commerce the uncertified highway motorcycles; and Jinyun for manufacturing, offering for sale, or introducing or delivering for introduction into commerce the uncertified recreational vehicles. The ALJ held Taotao USA jointly and severally liable for the total penalty amount of $1,601,149.95; Taotao China jointly and severally liable with Taotao USA for $247,982.55 of the total penalty; and Jinyun jointly and severally liable with Taotao USA for $1,353,167.40 of the total penalty.

Taotao USA appealed to the Environmental Appeals Board ("Board") challenging the ALJ's authority to rule on this matter and the ALJ's liability and penalty determinations. Taotao China and Jinyun filed a separate appeal that raised similar challenges and disputed that EPA had adequately served them. Taotao China and Jinyun

claimed that Texas Law and the Hague Service Convention required EPA to serve them abroad, and that service under EPA's Consolidated Rules of Practice did not meet due process requirements.

With respect to liability, Appellants raised several arguments, including: 1) the vehicles were covered by their respective COCs because they were identical to the emission data vehicles used to determine compliance with the CAA; 2) the *United States v. Chrysler Corporation* decision and the regulations it interpreted did not apply to Appellants; and 3) they did not need to conform their vehicles to the design "specifications" described in their COC applications because the term "specifications" should be interpreted narrowly and there are no design specifications for catalytic converters included in the regulations. Finally, Taotao China and Jinyun assert that as foreign manufacturers they cannot be liable under the CAA.

With respect to the penalty, Appellants challenged the ALJ's authority to impose a penalty above the waivable maximum for administrative cases, the applicability of the Mobile Source Penalty Policy to this matter, and the way in which the ALJ considered the penalty policy in this matter.

Held: The Board affirms the Initial Decision, including the liability and penalty determinations, and the ALJ's order on service of process.

Service of Process. The law of the forum that defines service of process for this administrative enforcement matter is the Consolidated Rules of Practice ("CROP"), codified at 40 C.F.R. § 22.5, not Texas law nor the Hague Service Convention. The CROP contains procedures for assessing administrative civil penalties under CAA sections 205(c) and 213(d), the sections under which EPA initiated this administrative enforcement matter. Section 22.5 of the CROP governs service of process, including service of foreign entities, and it does not require "the transmittal of documents abroad" to serve foreign corporations. EPA served Taotao China and Jinyun through the agent they had formally authorized to receive service of process on their behalf. Service on their authorized agent apprised them of the pendency of the action and afforded them an opportunity to timely respond with their objections. Service in this matter did not violate due process.

Liability. Under the plain language of the CAA, the applicable regulations, the COCs themselves, and relevant case law, new motor vehicles sold, introduced into commerce, or imported into the United States must conform in all material respects to the information applicants provide in their COC applications. Appellants' vehicles contained catalytic converters that did not conform to the design specifications described in the relevant COC applications, and therefore Appellants' vehicles did not conform, in all material respects, to the information provided in the COC applications. As a result, Appellants vehicles were not covered by their respective COCs and Appellants are liable for violating the CAA and its implementing regulations.

Penalty Determination. The ALJ had authority to assess a penalty in this case. CAA section 205(c)(1) authorizes EPA to seek administrative penalties against violators of section 203(a)(1) and/or 213(d) up to a total penalty of $200,000, unless EPA and the Department of Justice ("DOJ") jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment. In this case, EPA and DOJ jointly determined that this matter warranted a larger penalty. Additionally, and in any case, the lack of a joint determination would not preclude the ALJ from assessing administrative penalties in this matter; it would only affect the total penalty amount that could be assessed.

The Mobile Source Penalty Policy, which EPA developed as guidance to facilitate fair, consistent, and equitable application of the criteria set forth in CAA section 205(c)(2), provides an appropriate framework for assessing a penalty for the violations in this matter. The ALJ provided a reasonable explanation for the penalty she assessed, including her: adoption of a measure of the economic benefit proposed by Appellants' expert witness; determination of the egregiousness of the violations; decision to use "scaling factors" to account for variations in the number and size of vehicles and engines, and; penalty adjustment against Taotao China and Jinyun based on history of noncompliance. Finally, the EPA and DOJ joint determination did not limit EPA's or the ALJ's authority to consider relevant factors in fashioning an appropriate penalty for the violations in this matter.

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

I. *STATEMENT OF THE CASE*

Taotao USA, Inc. ("Taotao USA"), Taotao Group Co., Ltd. ("Taotao China"), and Jinyun County Xiangyuan Industry Co., Ltd. ("Jinyun") (collectively referred to as "Appellants")[1] appeal from an Initial Decision that Chief Administrative Law Judge ("ALJ") Susan L. Biro issued holding these companies liable for violations of the Clean Air Act's ("CAA") mobile source program and assessing a civil penalty. The United States Environmental Protection Agency's Office of Enforcement and Compliance Assurance ("EPA") filed a complaint alleging that Appellants manufactured and imported into the United States motorcycles and recreational vehicles with catalytic converters that differed from the catalytic converters described in Appellants' respective applications for

[1] In the proceedings below and on appeal the parties and the Administrative Law Judge ("ALJ") have used multiple designations to refer to each Appellant. This decision adopts the designations the ALJ used in her Initial Decision for each individual party.

certificates of conformity ("COCs"). As a result, EPA alleged the imported vehicles were uncertified, in violation of CAA sections 203(a) and 213(d), 42 U.S.C. §§ 7522(a), 7547(d), and their implementing regulations codified at 40 C.F.R. §§ 86.407-78, 1051.255, 1068.101.

The ALJ found Appellants jointly and severally liable: Taotao USA for importing 109,964 uncertified new vehicles, comprised of 67,527 highway motorcycles and 42,437 recreational vehicles; Taotao China for manufacturing, offering for sale, or introducing or delivering for introduction into commerce the uncertified highway motorcycles; and Jinyun for manufacturing, offering for sale, or introducing or delivering for introduction into commerce the uncertified recreational vehicles. She held Taotao USA jointly and severally liable for the total penalty amount of $1,601,149.95; Taotao China jointly and severally liable with Taotao USA for $247,982.55 of the total penalty; and Jinyun jointly and severally liable with Taotao USA for $1,353,167.40 of the total penalty.

Taotao USA appealed to the Environmental Appeals Board ("Board") challenging the ALJ's authority to rule on this matter and the ALJ's liability and penalty determinations. Taotao China and Jinyun filed a separate appeal that raised similar challenges and disputed that EPA had adequately served them.

For the reasons set forth below, the Board affirms the Initial Decision, including the liability and penalty determinations, and the ALJ's order on service of process.

II. *LEGAL AND FACTUAL HISTORY*

A. *The CAA's Title II Mobile Source and Certificate of Conformity Program*

Title II of the CAA regulates emissions from new motor vehicles and new motor vehicle engines,[2] as well as from nonroad engines and nonroad vehicles.[3]

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[2] A motor vehicle is defined in relevant part as a self-propelled vehicle capable of transporting a person or persons (or any material or affixed apparatus) that is intended for use on a street or highway. *See* 40 C.F.R. § 85.1703. Motorcycles intended for use on a street or highway include any motor vehicle with a headlight, taillight, and stoplight that has either two wheels or three wheels and a curb mass less than or equal to 1749 pounds. *Id*. § 86.402-98.

[3] Nonroad vehicles are powered by nonroad engines, which are internal combustion engines that are not used in motor vehicles, and include, among other things, recreational vehicles such as the off-highway motorcycles and all-terrain vehicles that are

CAA §§ 202(a), 213(a), 42 U.S.C. §§ 7521(a), 7547(a). The EPA Administrator prescribes emission standards for any air pollutant that causes or contributes to air pollution "which may reasonably be anticipated to endanger public health or welfare." *Id.* §§ 202(a), 213(a). EPA has developed emission standards that apply to new motor vehicles and engines as well as nonroad vehicles and engines throughout their entire useful lives. *See* CAA §§ 202(a), (d), 213(a), 42 U.S.C. §§ 7521(a), (d), 7547(a). EPA enforces these emission standards through a mandatory pre-market testing and certification program to confirm that motor vehicles and engines and nonroad vehicles and engines will conform to the applicable emission standards set forth in the regulations. CAA §§ 206(a)(1), 213(d), 42 U.S.C. §§ 7525(a)(1), 7547(d); 40 C.F.R. §§ 86.407-78, 1051.101, 1068.101(a)(1).[4]

The CAA and its implementing regulations require that new motor vehicles and engines and nonroad vehicles and engines sold, imported, or introduced into commerce be covered by a certificate of conformity. CAA §§ 203(a)(1), 213(d), 42 U.S.C. §§ 7522(a)(1), 7547(d); 40 C.F.R. §§ 86.407-78(a), 1068.101(a)(1). The certificate of conformity ("COC") is, in effect, "a license that allows an automobile manufacturer to sell vehicles to the public." *United States v. Chrysler Corp*., 591 F.2d 958, 960 (D.C. Cir. 1979).

EPA issues COCs for distinct engine families based on the written information manufacturers provide in the corresponding COC application. *See* 40 C.F.R. §§ 86.416-80, 86.420-78 (motor vehicles and engines such as highway motorcycles); *id.* §§ 1051.201, 1051.205 (nonroad recreational vehicles and engines). For each COC application a manufacturer divides vehicles into "groupings whose engines are expected to have similar emission characteristics throughout their useful life." *Id.* § 86.420-78(a) ("Each group of engines with similar emission characteristics shall be defined as a separate engine family."); *id.* §§ 1051.205(a)-(b), 1051.230(b). Vehicles in the same engine family must have,

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the subject of this enforcement proceeding. *See* CAA § 216(10), (11), 42 U.S.C. § 7550(10), (11); 40 C.F.R. § 1051.1 (listing recreational vehicles).

[4] Emission standards for nonroad vehicles are enforced in the same manner as standards prescribed for new motor vehicles and new motor vehicle engines. CAA § 213(d), 42 U.S.C. § 7547(d); 40 C.F.R. § 1068.101(a)(1) ("You may not sell, offer for sale, or introduce or deliver into commerce in the United States or import into the United States any new engine or equipment after emission standards take effect for that engine or equipment, unless it has covered by a valid certificate of conformity * * *.").

among other things, "identical" or "the same" number, location, volume, and composition of catalytic converters.[5] *Id.* § 86.420-78(b); *id.* § 1051.230(b). A test vehicle, also referred to as the emission data vehicle ("EDV"), is used to collect emission and other test data to prepare the COC application and is selected from the distinct engine family that it represents. *Id.* §§ 86.421-78, 86.422-78, 86.423-78, 86.431-78, 86.436-78; *id.* § 1051.235. If EPA determines the application is complete and the EDV emission tests demonstrate that the engine family meets all CAA requirements, EPA will issue a COC. *Id.* § 86.437-78(a)(2)(i), (iii) (stating that the COC "will cover all vehicles represented by the test vehicle and will certify compliance with no more than one set of applicable standards"); *id.* § 1051.255(a); *id.* § 1068.103(a) (stating that the COC covers vehicles and engines that "conform to the specifications described in the certificate and the associated application for certification").

B. *Penalty Assessment Authority for Title II Violations, Statutory Criteria, and Penalty Policy*

The CAA and its implementing regulations prohibit the sale or offering for sale, the introduction or delivery for introduction into commerce, or the importation into the United States of any new motor vehicle or engine, or nonroad vehicle or engine, unless such vehicle or engine is covered by a certificate of conformity. CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1) (new motor vehicles and engines); CAA § 213(d), 42 U.S.C. § 7547(d); 40 C.F.R. § 1068.101(a)(1) (nonroad vehicles). The CAA authorizes EPA to commence a civil action against any person who violates sections 203(a)(1) and 213(d) and to assess and recover civil penalties up to $25,000 per vehicle or engine.[6] *See* CAA §§ 205(a)-(b), 42 U.S.C. §§ 7524(a)-(b).

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[5] The written information manufacturers must provide in a COC application includes "a description of their engine, emission control system and fuel system components." 40 C.F.R. § 86.416-80(a)(2)(i); *see also id.* § 1051.205(a)-(b) (requiring manufacturers to describe "the engine family's specifications and other basic parameters of the vehicle's design and emission controls" and "describe in detail all system components for controlling exhaust emissions").

[6] EPA adjusts the statutory amount of $25,000 to account for inflation. *See* Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015; 40 C.F.R. § 19.4. The proposed penalty in this matter was increased in accordance with the applicable inflation policies at the time the penalties were assessed. Initial Decision at 16 n.29 (ALJ, Aug. 7, 2018) (ALJ dkt.

The CAA also authorizes EPA to seek administrative penalties for sections 203(a) and 213(d) violations, in lieu of commencing a civil action. CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1). The statute limits the maximum penalty that EPA can seek against each section 203(a) and 213(d) violator in an administrative enforcement proceeding to $200,000,[7] "unless the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment." *Id*. The CAA provides that "[a]ny such determination by the Administrator and the Attorney General shall not be subject to judicial review." *Id*.

In determining an appropriate penalty amount, the CAA requires that EPA consider "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 [CAA Title II], 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(c)(2), 42 U.S.C. § 7524(c)(2). In addition, EPA regulations require ALJs to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" and to "consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

EPA has issued guidelines to assess penalties for violations of the CAA's Title II vehicle and engine emissions certification requirements and EPA's Mobile Source program. *See* U.S. EPA, *CAA Mobile Source Civil Penalty Policy, Title II of the Clean Air Act, Vehicle and Engine Emissions Certification Requirements* (Jan. 2009) ("Mobile Source Penalty Policy"); *In re Peace Indus. Grp.*, 17 E.A.D. 348, 351 (EAB 2016).

C. *The Parties*

Taotao China is a foreign corporation organized under the laws of the People's Republic of China. Initial Decision at 10 (ALJ, Aug. 7, 2018) (ALJ dkt. #177) ("Init. Dec.").[8] Taotao China manufactures, among other items, all-terrain

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#177) ("Init. Dec."). The adjusted maximum penalty amount per vehicle/engine was not at issue in this case.

[7] EPA also adjusts the maximum administrative penalty amount to account for inflation. *See supra* note 6.

[8] This final decision and order cites to the Initial Decision. The Initial Decision, in turn, cites to the evidence in the record relied upon by the ALJ. *See, e.g.*, Init. Dec.

vehicles ("ATVs") and motorcycles. *Id*. Jinyun, also a corporation organized under the laws of the People's Republic of China, is a subsidiary corporation of Taotao China. *Id.* Jinyun manufactures nonroad recreational vehicles. *Id*.

Taotao USA is a corporation organized under the laws of the State of Texas. *Id*. Taotao USA "is the exclusive U.S. importer of vehicles manufactured by Taotao China and Jinyun, and it sells those vehicles to dealers throughout the United States." *Id*. Taotao USA only purchases vehicles from Taotao China and Jinyun. *Id*.

Appellants are part of several related companies owned and/or controlled by Yuejin Cao and Matao "Terry" Cao, who are father and son respectively. *Id*. Yuejin Cao is the owner of Taotao China and the President of both Taotao China and Jinyun. Matao Cao is the owner of Taotao USA and, at the time of the violations alleged in the Complaint, was the President and registered agent for that company. *Id.* at 11.

D. *Appellants' Applications for COCs*

For each engine family in this case, the record contains applications for COCs submitted to EPA on behalf of Taotao China, Jinyun, and Taotao USA. *See* CXs[9] 1-4 (COC applications and supporting documents submitted on behalf of Taotao China and Taotao USA for the engine families identified in Counts 1-4 of the Amended Complaint); CXs 5-10 (COC applications and supporting documents submitted on behalf of Jinyun and Taotao USA for engine families identified in Counts 5-10 of the Amended Complaint).

Each of the ten COC applications was signed by Yuejin Cao and stated that either Taotao China or Jinyun was the "original manufacturer" of the highway motorcycles or recreational vehicles referenced in the COC applications. *See, e.g.*, CX 1 at EPA-0006; CX 5 at EPA-000156. Each COC application also included a cover letter addressed to EPA's Office of Transportation and Air Quality and signed

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at 10-15. Some of the documents to which these citations refer, and other documents referenced in this decision, may contain information claimed as Confidential Business Information ("CBI"). While this decision relies on such evidence, the decision itself does not contain any information claimed to be CBI. The Board has maintained the documents claimed as CBI under seal and reviewed the documents in accordance with the procedures of 40 C.F.R. pt. 2, subpt. B.

[9] CX stands for Complainant's Exhibit.

by Matao Cao that contained a "Statement of Identicality." *See, e.g.*, CX 2 at EPA-000041; CX 6 at EPA-000191. Each Statement of Identicality stated that "all our [motorcycles manufactured in the Model Year identified in the application] are identical in all material respects to the motorcycles described in this application for certification." *See, e.g.*, CX 2 at EPA-000041; CX 6 at EPA-000191. The ten respective cover letters also each contained a Statement of Conformity acknowledging either that Taotao China manufactured and assembled the highway motorcycles or that Jinyun manufactured and assembled the recreational vehicles and stating that the vehicles in each respective engine family are or will be compliant with all applicable EPA regulations at the time of final assembly. *See, e.g.*, CX 3 at EPA-000084; CX 7 at EPA-000224. Finally, each of the ten COC applications included a contractual agreement between Taotao USA and either Taotao China or Jinyun, executed by Matao Cao and Yuejin Cao, which names Taotao USA as the exclusive importer of the vehicles for distribution into the United States, sets forth the parties' respective obligations to facilitate the sale and distribution of vehicles in the United States, and designates Taotao USA as the agent on behalf of Taotao China and Jinyun for service of process from EPA. *See, e.g.*, CX 4 at EPA-000133 to -135; CX 8 at EPA-000272 to -274.

Each COC application also identified the catalytic converter as an "emission related part" and contained a detailed description of the catalytic converter used for that engine family. *See, e.g.*, CX 1 at EPA-000011; CX 9 at EPA-000299. This included the ratio of precious metals within each catalytic converter – platinum, palladium, and rhodium (Pt:Pd:Rh) – that "promote the desired chemical reaction, i.e., oxidation or reduction, necessary to reduce harmful pollutants in the exhaust emissions from engines." *See* CX 176 at EPA-002408 (Declaration of Ronald M. Heck (Nov. 25, 2016)); *id.* at EPA-002409 ("Different combinations of precious metals and other materials can produce different chemical reactions or different rates of reaction."); *see also* Appellants Reply Brief 4 & n.4 (Nov. 19, 2018) (stating there are "five separate catalytic converter 'designs'" described in Appellants' ten COC applications, and listing the catalytic converter precious metal ratios for each of the ten engine families).

E. *Proceedings Below and on Appeal*

In accordance with CAA section 205(c)(1), 42 U.S.C. § 7524(c)(1), before filing the Complaint alleging that Appellants manufactured and imported into the United States motorcycles and recreational vehicles with catalytic converters that were not the same as those described in the applications for COCs, EPA jointly determined with the United States Department of Justice ("DOJ") that it was appropriate to pursue administratively a penalty above the statutory maximum, as

adjusted for inflation, against Taotao USA, Taotao China, and Jinyun for violations of CAA sections 203(a) and 213(d) and applicable regulations codified at 40 C.F.R. parts 86, 90, 1051 and 1068. *See* Letter from Phillip A. Brooks, Dir. Air Enforcement Div., U.S. EPA, to John C. Cruden, Assistant Att'y Gen., U.S. Department of Justice ("DOJ") (Jan. 30, 2015) (ALJ dkt. #111 attach. H) (request to waive the statutory limitation on administrative penalties). Letter from Karen S. Dworkin, Assistant Section Chief, U.S. DOJ, to Phillip A. Brooks, Dir. Air Enforcement Div., U.S. EPA (Mar. 17, 2015) (ALJ dkt. #38 ex. 26) (hereinafter "CX 26") (concurrence with waiver request).

EPA thereafter filed an initial Complaint alleging eight counts of violations (four against Taotao USA and Taotao China, and four against Taotao USA and Jinyun) for violations of the certification requirements of the CAA and its implementing regulations and identifying a total of 64,377 uncertified vehicles belonging to eight different engine families. Complaint ¶¶ 36-67 (Counts 1-4), 68-99 (Counts 5-8) (Nov. 12, 2015) (ALJ dkt. #1) ("Compl."). EPA alleged that because the catalytic converters in the vehicles identified in the Complaint did not conform to the design specifications described in the relevant COC applications, the vehicles did not conform in all material respects to the specifications in the COC applications and therefore were not covered by those COCs. *Id.* ¶¶ 37-38, 45-46, 53-54, 61-62, 69-70, 77-78, 85-86, 93-94.

After filing the Complaint, EPA discovered additional non-compliant vehicles, informed DOJ of this development, and obtained DOJ's concurrence to include additional vehicles and potential new violations in the joint determination. *See* Letter from Karen S. Dworkin, Assistant Section Chief, U.S. DOJ, to Phillip A. Brooks, Dir. Air Enforcement Div., U.S. EPA (Mar. 24, 2016) (ALJ dkt. #111 attach. J) (referencing EPA's February 1, 2016 letter to DOJ);[10] Letter from Karen S. Dworkin, Assistant Section Chief, U.S. DOJ, to Phillip A. Brooks, Dir. Air Enforcement Div., U.S. EPA (June 2, 2016) (ALJ dkt. #38 ex. 28) (hereinafter "CX 28") (referencing EPA's May 6, 2016 letter to DOJ).[11]

Shortly thereafter, EPA filed an Amended Complaint adding two new counts to the Complaint (against Taotao USA and Jinyun) and additional vehicles

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[10] Letter from Phillip A. Brooks, Dir. Air Enforcement Div., U.S. EPA, to John C. Cruden, Assistant Att'y Gen., U.S. DOJ (Feb. 1, 2016) (ALJ dkt. #111 attach. I).

[11] Letter from Phillip A. Brooks, Dir. Air Enforcement Div., U.S. EPA, to John C. Cruden, Assistant Att'y Gen., U.S. DOJ (May 6, 2016) (ALJ dkt. #111 attach. K).

to most of the counts already pled. Amended Complaint ¶¶ 119-134 (June 14, 2016) (ALJ dkt. #24) ("Amend. Compl."). The Amended Complaint identified a total of 109,964 alleged non-compliant vehicles belonging to ten different engine families. *Id*. ¶ 38. The first four counts alleged that Taotao China manufactured, offered for sale, or introduced or delivered for introduction into commerce, and that Taotao USA imported into the United States, 67,527 uncertified highway motorcycles. *Id*. ¶¶ 38, 40-78. The remaining counts alleged that Jinyun manufactured, offered for sale, or introduced or delivered for introduction into commerce, and that Taotao USA imported into the United States, 42,437 uncertified recreational vehicles. *Id*. ¶¶ 38, 79-134.

In proceedings before the ALJ Taotao China and Jinyun moved to dismiss the matter against them, asserting that EPA had not properly served them. Respondents' Motion to Quash and Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(5) and Brief in Support (Dec. 16, 2015) (ALJ dkt. #4) ("Mot. to Quash"). The ALJ denied the motion. Order on Motion to Quash and Dismiss (ALJ, June 21, 2016) (ALJ dkt. #26) ("ALJ Mot. to Quash Order"). In May 2017, the ALJ issued a partial accelerated decision on liability that held the three Appellants liable for the violations alleged in the Amended Complaint. Order on Partial Accelerated Decision and Related Motions at 30-31 (ALJ, May 3, 2017) (ALJ dkt. #65) ("ALJ Liability Order"). The ALJ denied Appellants' motion for reconsideration or interlocutory appeal of the partial accelerated decision. Order on Respondents' Motion for Reconsideration or Interlocutory Appeal (ALJ, June 15, 2017) (ALJ dkt. #73). In October 2017, the ALJ conducted a three-day hearing on the penalty amount and, in August 2018, issued an Initial Decision assessing penalties against the three Appellants. *See* Init. Dec. at 3, 50. The ALJ incorporated the partial accelerated decision on liability and the order addressing Appellants' motion for reconsideration of that decision into her Initial Decision, stating that the two orders "together represent this Tribunal's rulings on liability in this matter" and explaining that the Initial Decision thus would not revisit the issue of liability. *Id.* at 3 & n.5.

Taotao USA filed an appeal and Taotao China and Jinyun jointly filed a separate appeal challenging similar aspects of the Initial Decision. Appeal Brief (Sept. 6, 2018) ("Taotao USA App. Br."); Appeal Brief (Sept. 20, 2018) ("Taotao China & Jinyun App. Br."). The Board consolidated the appeals. Order Consolidating Appeals, Allowing a Consolidated Response, Extending the Response Deadline, and Authorizing Service by Email (EAB, Sept. 27, 2018). EPA filed a consolidated response. EPA's Response Brief (Oct. 24, 2018) ("EPA Resp. Br."). Appellants filed a joint reply brief and EPA filed a sur-reply. *See* Appellants'

Reply Brief (Nov. 19, 2018) ("Appellants Reply Br."); Complainant's Sur-Reply in Opposition to Appellant Reply Brief (Nov. 29, 2018) ("EPA Sur-Reply").[12]

III. *PRINCIPLES GOVERNING BOARD REVIEW*

The Board generally reviews an ALJ's findings of fact and conclusions of law on a de novo basis. *See In re Carbon Injection Sys.*, LLC, 17 E.A.D 1, 14 (EAB 2016); 40 C.F.R. § 22.30(f) (in an enforcement proceeding, the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law * * * contained in the decision or order being reviewed"); Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of [an] initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). All matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b). The complainant has the burdens of presentation and persuasion to prove that "the violation occurred as set forth in the complaint and that the relief sought is appropriate." *Id*. § 22.24(a). Once the complainant meets those burdens, the respondent has the burdens of presentation and persuasion to prove any affirmative defense(s) that excuse it from liability. *Id*.; *In re Gen. Motors Auto. – N. Am.*, 14 E.A.D. 1, 54-55 (EAB 2008) (describing burden of proof for affirmative defenses*); see also Pac. Coast Fed'n Fishermen's Assns. v. Glaser*, 937 F.3d 1191, 1197 (9th Cir. 2019) (once a plaintiff establishes its prima facie case the burden of proving defenses such as a statutory exception is on defendant not on plaintiff).

The Board is authorized to "assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed." 40 C.F.R. § 22.30(f). However, in cases where an ALJ has provided a reasonable explanation for the penalty assessment, and the assessed amount falls within the range of penalties provided in any relevant penalty guidelines, the Board generally will not substitute its judgment for that of the ALJ absent a showing that the ALJ committed clear error or an abuse of discretion in assessing the penalty. *In re Chase*, 16 E.A.D. 469, 484 (EAB 2014); *In re Euclid of Va., Inc.*, 13 E.A.D. 616, 686-87 (EAB 2008); *In re Mayes*, 12 E.A.D. 54, 95-96 (EAB 2005), *aff'd*, No. 3:05-CV-478 (E.D. Tenn. Jan. 4, 2008).

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[12] This procedural history section briefly describes some relevant portions of the complex procedural history of this case. The entire record contains voluminous pleadings, briefs, motions, orders, and exhibits, all of which were considered in the course of deciding these consolidated appeals.

IV. *ANALYSIS*

A. *Service of Process*

Taotao China and Jinyun challenge the ALJ's determinations that EPA properly executed service of process upon them and that service met due process requirements. *See* Taotao China & Jinyun Appeal Br. at 3-10. The ALJ determined that 40 C.F.R. section 22.5 of the Consolidated Rules of Practice ("CROP") provides the applicable law of the forum for service of process and that service was proper. ALJ Mot. to Quash Order at 2. Taotao China and Jinyun claim that Texas law is the law of the forum and that, as corporations organized under the laws of the People's Republic of China, the Complaint needed to be served abroad under the "Hague Service Convention." *See* Taotao China & Jinyun Appeal Br. at 4-6. They further argue that even if the CROP were to apply, service was not compatible with due process requirements. *See* Taotao China & Jinyun Appeal Br. at 5.

Appellants' arguments lack merit. EPA properly executed service on Taotao China and Jinyun under the applicable rules and due process requirements.

1. *The Law of the Forum that Defines Service of Process for this Administrative Enforcement Matter is the CROP Section 22.5*

The Hague Service Convention is a multilateral treaty intended to provide a simple way to serve process abroad and to assure that defendants sued in foreign jurisdictions receive actual and timely notice of suit. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 ("Hague Service Convention"); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988). But the Hague Service Convention applies only if the internal law of the forum requires service by transmission of documents abroad. 486 U.S. at 700, 704.[13] Where service on a domestic agent is valid and complete under both the applicable law of the forum and the Due Process Clause, the Convention has no further implications. *See id.* at 707.

Taotao China and Jinyun argue that under Rule 4(h) of the Federal Rules of Civil Procedure ("FRCP"), "the governing law in this case is the law of the state where service was effected, in this case, Texas." Taotao China & Jinyun Appeal

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[13] The internal law of the forum is determined by the applicable rules of procedure. *See, e.g.*, *Taft v. Moreau*, 177 F.R.D. 201 (D. Vt. 1997) (explaining that federal law rather than state law governed service of process in diversity actions).

Br. at 4. They claim that Texas law requires "transmitting documents abroad," and therefore, the Hague Convention applies. *Id*. at 5. Appellants are mistaken.

Rule 4 of the FRCP, which controls service of process in federal district courts, does not dictate service of process in administrative enforcement actions that EPA files under the CROP. *Katzson Bros., Inc. v. U.S. EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988); *In re B & L Plating, Inc*., 11 E.A.D. 183, 188 n.10 (EAB 2003). Federal courts have long recognized that agencies are free to fashion their own rules of procedure, *see, e.g., Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*., 435 U.S. 519, 543-44 (1978), and EPA has established the CROP as its own procedural rules. *See Katzson*, 839 F.2d at 1399.

The CROP contains procedures for assessing administrative civil penalties under CAA sections 205(c) and 213(d), the sections under which EPA initiated this administrative enforcement matter. *See* 40 C.F.R. § 22.1(a)(2). Section 22.5 of the CROP governs service of process, including service of foreign entities. *Id*. § 22.5(b)(1)(i)-(iii). The Board consistently has followed section 22.5 when addressing service under section 205 of the Clean Air Act. *See, e.g*., *In re Peace Indus. Grp.*, 17 E.A.D. 348, 362 (EAB 2016); *In re Jonway Motorcycle (USA) Co., Ltd.*, CAA Appeal No. 14-03, at 5 (EAB Nov. 14, 2014) (Default Order and Final Decision). Accordingly, the law of the forum that governs service of Appellants in this case is the CROP section 22.5, not the FRCP or Texas law.

The CROP section 22.5 does not require "the transmittal of documents abroad" to serve foreign corporations. Rather, it authorizes EPA to serve foreign corporations, like Taotao China and Jinyun, through "*any other person authorized by appointment* or by Federal or State law *to receive service of process*." 40 C.F.R. § 22.5(b)(1)(ii)(A) (emphases added). Service under the CROP may be accomplished by personal delivery, among other methods. *Id*. § 22.5(b)(1)(i).

EPA served copies of the Complaint and the CROP on Taotao USA, as the agent authorized to receive service of process on behalf of Taotao China and Jinyun, through personal service on Matao Cao, President and registered agent for Taotao USA at the time of service. *See* Confirmation for Process Serving attached to Proof of Service (filed Nov. 25, 2015) (ALJ dkt. #2).[14] The ALJ concluded, and

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[14] *See supra* Section II.D (explaining that each of the COC applications included a contractual agreement between Taotao USA and either Taotao China or Jinyun designating Taotao USA as the agent on behalf of Taotao China and Jinyun for service of process from EPA); *see also* Respondent Jinyun's Amended Answer to Complaint and Request for Hearing ¶ 17 (Aug. 17, 2016) (ALJ dkt. #35) (admitting to contractual agreement between

we agree, that service on Taotao USA's President met the requirements of section 22.5 and EPA did not need to follow the Hague Service Convention. *See* ALJ Mot. to Quash Order at 2-3.

2. *Service Did Not Violate Due Process Requirements*

Taotao China and Jinyun do not challenge the determination that EPA followed service under the CROP section 22.5. *See* Taotao China & Jinyun App. Br. at 4-8. Rather, they assert that service under the CROP violated due process requirements because: 1) their appointment of Taotao USA was involuntary as they only did so to comply with EPA regulations; 2) they do not conduct business in the United States; 3) service was not translated into the language of the intended recipient; and 4) the EPA rules that require applicants for COCs to name an agent for service of process located in the United States have no other purpose but to circumvent the Hague Service Convention. *See* Taotao China & Jinyun App. Br. at 5-10.

Significantly, Appellants raise the first three arguments listed above for the first time on appeal. Appellants did not argue these points before the ALJ. *See* Mot. to Quash at 2-6 (arguing that the correct procedures were those set forth in the Hague Service Convention; that Taotao USA "ha[d] not been authorized to act as an authorized agent" for Taotao China or Jinyun; and that the EPA regulations requiring designation of agents for Certificates of Conformity circumvent the Hague Service Convention). Therefore, Appellants waived these first three arguments. *See, e.g.*, *In re Martex Farms, S.E.*, 13 E.A.D. 464, 478 (EAB 2008), *aff'd*, 559 F.3d 29 (1st Cir. 2009); *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998), *pet. for rev. denied* 114 F. Supp. 2d 775 (N.D. Ind. 1999).

In any event, service of a foreign national through a domestic agent, as the CROP allows, does not violate principles of due process. Due process requires that foreign nationals be assured of "either personal service, * * * or substituted service

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Jinyun and Taotao USA, "in which [Jinyun] appoints Taotao USA, Inc. as its agent for service of process from EPA"); Respondent Taotao [China]'s Amended Answer and Request for Hearing ¶ 16 (Aug. 17, 2016) (ALJ dkt. #37) (admitting to contractual agreement between Taotao China and Taotao USA, "in which Taotao [China] appoints Taotao USA, Inc. as its agent for service of process from EPA"); CX 11 at EPA-000364 to -365 (letter dated September 2015 signed by Matao Cao identifying himself as Taotao USA's President); Respondent Taotao USA Inc.'s Original Answer and Request for Hearing ¶ 12 (Jan. 19, 2016) (ALJ dkt. #10) (admitting that Matao Cao was Taotao USA's registered agent).

that provides 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Volkswagenwerk*, 486 U.S. at 705 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950)). Substituted service (i.e., indirect service) under the CROP has been found to satisfy due process requirements because its procedures are reasonably calculated to convey the required information (i.e., provide notice of the pendency of the action) and afford a reasonable time for response and appearance. *See Katzson*, 839 F.2d at 1399-1400 (noting that direct personal service is not required under the CROP and that service by mail received by a secretary satisfied due process requirements); *see also* 40 C.F.R. §§ 22.5(b)(1) (requiring that a copy of complaint together with a copy of the CROP be served on respondents), 22.15(a) (affording 30 days after service to answer complaint).

Here, personal service on their authorized agent apprised Taotao China and Jinyun of the pendency of the action and afforded them an opportunity to timely respond with their objections.[15] There was nothing improper about service upon Taotao China's and Jinyun's designated agent. The Supreme Court in *Volkswagenwerk* rejected the notion that service through a foreign corporation's involuntary agent for service of process necessarily violates due process requirements. *See generally* 486 U.S. 694, 707-08 (affirming lower court ruling that a domestic subsidiary was the foreign corporation's involuntary agent for service notwithstanding foreign corporation's failure or refusal to appoint subsidiary formally as an agent). Thus, where, as here, Taotao China and Jinyun formally appointed Taotao USA as their agent for service of process, there is no violation of due process requirements.

Finally, we reject Taotao China's and Jinyun's argument that the EPA rules that require COC applicants to name an agent for service of process located in the United States circumvent The Hague Service Convention. Forums are free to adopt rules that provide for service upon foreign entities. *See* ALJ Mot. to Quash Order

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[15] Contrary to Taotao China and Jinyun's assertions, the CROP does not require that the complaint be translated into the language of foreign respondents. 40 C.F.R. §§ 22.5, .14. Notably, federal courts have refused to find service inadequate when a multinational corporation whose representatives have demonstrated an ability to conduct business in the English language attempts to invalidate service on the grounds that the documents served should have been translated into the language of the intended recipient. *See, e.g.*, *Hunt v. Mobil Oil Corp*., 410 F. Supp. 4, 9 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir. 1977).

at 3 (citing *Volkswagenwerk*, 486 U.S. at 706). The CROP procedures do not violate due process, and the EPA rules that require COC applicants to name a domestic agent for service of process adequately provided fair notice to Taotao China and Jinyun that by seeking certification from EPA to introduce their vehicles into United States commerce they could be subject to EPA jurisdiction.[16]

For the reasons explained above, we reject Appellants' challenge to service of process and affirm the ALJ's determination that EPA's service of process did not violate due process.

B. *Liability*

We affirm the ALJ's determination that Appellants are liable under the CAA because they sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported into the United States highway motorcycles and recreational vehicles that were not covered by COCs in violation of CAA sections 203(a) and 213(d), 42 U.S.C. §§ 7522(a), 7547(d). *See* ALJ

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[16] Appellants' argument could be construed as a challenge to the validity of the regulations which were promulgated in 2005 (section 1051.205(w)) and 2006 (section 86.416-80(a)(2)(ix)). *See* Test Procedures for Testing Highway and Nonroad Engines and Omnibus Technical Amendments, 70 Fed. Reg. 40,420, 40493-94 (July 13, 2005) (adding section 1051.205(w) to require applicants to name a domestic agent for service of process); Amendments to Regulations for Heavy-Duty Diesel Engines, 71 Fed. Reg. 51,481, 51,486 (Aug. 30, 2006) (adding section 86.416-80(a)(2)(ix) to require applicants to name a domestic agent for service of process). The Board generally does not entertain challenges to rulemaking in an administrative enforcement proceeding. *See, e.g.*, *In re Woodkiln Inc*., 7 E.A.D. 254, 269-70 (EAB 1997); *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994). This presumption of nonreviewability in the administrative context is especially appropriate where, as here, Congress has set precise limits on the availability of a judicial forum for challenging regulations promulgated under CAA section 202, 42 U.S.C. § 7521, and on the type of action in which such challenges can be brought. *See* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (requiring challenges to regulations or requirements promulgated under CAA section 202 to be brought within sixty days of promulgation by a suit in the United States Court of Appeals for the District Court of Columbia); *id*. § 307(b)(2) (clarifying that review that could be obtained under subsection (b)(1) is not subject to judicial review in civil or criminal enforcement proceedings); *Echevarria*, 5 E.A.D. at 634 (explaining that while CAA section 307(b) makes direct reference to preclusion of judicial review, its effect is to make it unnecessary for an administrative agency to entertain as a matter of right a party's challenge to a rule subject to this statutory provision). In addition, Appellants have provided no compelling reason why the Board should depart from this practice.

Liability Order at 24-25, 30. The new vehicles that Appellants manufactured and imported did not conform, in all material respects, to their respective COC applications because the vehicles' catalytic converters did not conform to the approved design specifications described in the COC applications that were authorized by EPA. Specifically, the ALJ found, and Appellants do not dispute, that the vehicles were equipped with catalytic converters that contained precious--metal contents different in volume and composition from those described in the COC applications.

Under the plain language of CAA section 203(a), 42 U.S.C. § 7522(a), the applicable regulations, the COCs themselves, and relevant case law, new motor vehicles sold, introduced into commerce, or imported into the United States must conform to the information applicants provide to EPA in their COC applications. As noted above in Section II.A, the regulations state that COCs will be issued for distinct engine families based on the written information provided in the corresponding COC application. *See* 40 C.F.R. §§ 86.416-80, 86.420-78 (highway motorcycles); *id.* §§ 1051.201, 1051.205 (recreational vehicles); *see also* ALJ Liability Order at 25. As the ALJ found, engines or vehicles with catalytic converters that differ in volume or composition from what was described in the COC application are not part of the same engine family. *See* ALJ Liability Order at 25; *see also id.* at 26 (stating there is "no material conformity" when catalytic converters' precious metal contents are different in volume and composition from those described in the COC application).

The COCs themselves unequivocally state that they do not apply to any vehicles other than those described in the COC applications. For each of the ten engine families at issue in this matter, the COC states that it "covers only those vehicles which conform, in all material respects," to the design specifications "described in the documentation required by" either 40 C.F.R. part 86 (highway vehicles) or 40 C.F.R. parts 1051, 1065, and 1068 (recreational vehicles). CX 43 to CX 52, EPA-000640 to -649 (each COC is one page). The COC application is the required documentation that the Agency uses to determine whether to grant a COC for an engine family, and the COC language makes clear that it covers "*only* those vehicles" that conform, in all material respects, to the design specifications in the COC application. *See id.* (emphasis added).

Under relevant case law a material difference in an emission-related part, such as a catalytic converter, from what is described in the COC application would render a vehicle uncovered by its COC. *See United States v. Chrysler Corp.*, 437 F.Supp. 94 (D.D.C. 1977), *aff'd* 591 F.2d 958 (D.C. Cir. 1979). In *Chrysler Corp.*, the district court held, as a matter of law, that "where one or more parts

erroneously installed in a vehicle" are "intimately related to" and "may reasonably be expected to affect emission controls," that "vehicle is not covered by the certificate of conformity for the vehicle, even though it may in fact meet emission standards." *Id.* at 97. The court of appeals affirmed and explained that the regulation in force at the time stated 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." 40 C.F.R. § 85.074-30(a)(2) (1976), *cited in Chrysler*, 591 F.2d at 961. The appellate court concluded that the "clear language" of the statute, the regulations, and the "policies favoring presale certification" supported the district court's holding. *Chrysler*, 591 F.2d at 960.

On appeal, Appellants' raise several arguments as to why they are not liable under the CAA. All of Appellants' arguments lack merit. For the reasons explained below, we affirm the ALJ's finding of liability.

1. *COCs Do Not Cover Vehicles that May "Match" the EDV But Do Not Conform to the Information Included in COC Applications*

Appellants argue that they are not liable under the CAA because the vehicles they manufactured and imported were identical to the EDVs used to determine compliance with emission limits. *See* Taotao China & Jinyun App. Br. at 14-22; Taotao USA App. Br. at 12-16. The argument falls short, however, because the applicable statute and regulations require new motor vehicles to be covered by a COC and, as discussed above, Appellants' vehicles were not. Appellants' argument ignores how the prospective, pre-market certification program Congress enacted in the CAA works: the EDV must conform, in all material respects, to the information included in the application for a COC, and all vehicles produced for sale must conform, in all material respects, to the information provided in the COC application.[17] As a practical matter, a catalytic converter's

[17] Appellants assert that as large manufacturers under 40 C.F.R. § 86.437-78(a), the regulations allow them to demonstrate that the catalytic converters from production vehicles tested by EPA or at EPA's direction match the catalytic converters installed in the EDVs for each respective engine family, and that this information alone demonstrates that the motorcycles are covered by their respective COCs. *See, e.g.*, Taotao USA App. Br. at 6, 9; Taotao China & Jinyun App. Br. at 14-18. Appellants raise this argument for the first time on appeal, and thus they have waived this argument. *See, e.g.*, *In re Martex Farms, S.E.*, 13 E.A.D. 464, 478 (EAB 2008), *aff'd*, 559 F.3d 29 (1st Cir. 2009). In any event, as previously explained, vehicles produced for sale must conform in all material

design and composition determine performance and longevity in a given application. *See* CX 176 at EPA-002409 (Declaration of Ronald M. Heck (Nov. 25, 2016)). "Changing a catalytic converter's design or composition, such as the quantity or ratio of precious metals * * * is likely to change how the catalytic converter will perform over time in a given application." *Id.*

The ALJ found that the EDV can only represent the vehicles to be manufactured for sale precisely because the EDV is supposed to conform to the information presented in the COC application, not because the EDV itself is the standard of production untethered from the requirements of the CAA and its implementing regulations. *See, e.g.*, ALJ Liability Order at 14 (citing Dr. Heck's declaration and explaining that when, as here, catalytic converters do not match the information provided in the COC applications, it is "problematic for the Agency's certification program because '[n]o data from the approved certification applications can be used to predict how * * * catalytic converters [with different precious metal ratios] will perform.'"). It is essential to the success of the pre-market certification program that EDVs conform, in all material respects, to the information in the COC application. As such, vehicles produced for sale must conform, in all material respects, to the information in the COC application and to the EDV. This is what the CAA and the regulations require. Without that requirement, the Agency could not determine whether a given EDV would comply with the CAA's emission standards absent costly aftermarket testing of individual vehicles, which would thwart congressional intent and inhibit the Agency's effective implementation of the CAA. In other words, Appellants' argument is contrary to the law and seeks to undermine or diminish the critical role Congress contemplated for pre-market COCs. *See, e.g.*, *Chrysler*, 591 F.2d at 961.

2. *Appellants' Interpretation of the Applicable Regulations is Erroneous and Contrary to Applicable Precedent*

Appellants argue that the ALJ's reliance on the *Chrysler* decision is misplaced because the regulation it interpreted has been updated and *Chrysler* dealt with a set of circumstances that significantly differ from the ones here. We disagree. The *Chrysler* decision is germane to this enforcement proceeding and underscores how critical the information COC applicants provide to EPA is to the successful implementation of the CAA's mobile source emission control program. Appellants do not provide any support for their theory that subsequent regulatory

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respects to the information provided in the COC application; it is not enough to demonstrate that the produced vehicles "match" the EDV.

change by itself renders the *Chrysler* case inapposite. As set forth below, the regulatory history of the rule revision expressly stated the change was administrative in nature and did not affect the requirements of the Act's pre-market certification program for new vehicles and engines. Nor do Appellants present any analysis or cite to legal authority that convinces us to modify or set aside the ALJ's reliance on *Chrysler*.

The regulation that governed the incorrectly configured motor vehicles in *Chrysler* required specific language in the COC that stated that the 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 which are produced during the [specifically identified] model year production period * * *." 40 C.F.R. § 85.074-30(a)(2) (1976), *cited in Chrysler*, 591 F.2d at 961; Motor Vehicle Certification Procedures, 39 Fed. Reg. 7545, 7552 (Feb. 27, 1974) (promulgating 40 C.F.R. § 85.074-30); *see also* ALJ Liability Order at 26-27. At the time the violations in *Chrysler* occurred, EPA had signaled its intent to regulate highway motorcycle emissions but did not promulgate a final rule until 1977.[18] The Federal Register notices that document the development of emission standards for highway motorcycles make clear that the Agency intended the certification procedures for highway motorcycles to mirror the already-established certification procedures for light-duty motor vehicles.[19] Thus, the final rule for motorcycles contained the following identical language requirement for certification, with the exception that it applied to motorcycles, not

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[18] *See* Advance Notice of Proposed Rulemaking: Emission Regulations for New Motorcycles, 39 Fed. Reg. 2108, 2108, 2110 (Jan. 17, 1974) (explaining that highway motorcycle certification procedures would "be patterned after existing regulations, especially those covering new light duty gasoline-fueled and diesel-powered vehicles"). EPA issued a subsequent notice of proposed rulemaking in 1975, and then in 1977 promulgated the final rule containing emission standards for new highway motorcycle vehicles and engines. *See* Emission Regulations for New Motorcycles, 40 Fed. Reg. 49,496, 49,497 (Oct. 22, 1975) (Notice of Proposed Rulemaking) ("An approach similar to that used for evaluation of the design of light duty vehicles is being adopted for motorcycles."); Emission Regulations for New Motorcycles, 42 Fed. Reg. 1122 (Jan. 5, 1977) (Final Rule).

[19] A light-duty vehicle was defined as a passenger car or passenger car derivative capable of seating 12 passengers or less. Emissions Standards for Light-Duty Trucks, 38 Fed. Reg. 21,362, 21,363 (Aug. 7, 1973) (codified at 40 C.F.R. § 85.002(a)(5) (1973)). The current definition of a light-duty vehicle remains the same. *See* 40 C.F.R. § 86.1803-01.

motor vehicles: "This certificate covers only those new motorcycles which conform in all material respects, to the design specifications that applied to those vehicles described in the application for certification and which are produced during the [specifically identified] model year period * * *." 42 Fed. Reg. at 1134 (codified at 40 C.F.R. § 86.437-78 (1977)). Therefore, the language on the COC at issue in *Chrysler* was essentially identical to the language on the COC issued to a highway motorcycle manufacturer pursuant to 40 C.F.R. § 86.437-78 (1977).

Additionally, the relevant regulatory history for the technical amendment made in 1981 to 40 C.F.R. § 86.437-78 undermines Appellants' theory about the significance of the regulatory change. At that time, the Agency revised the motor vehicle certification procedures "to reduce the administrative burdens of emission certification" in order to achieve "cost and resource savings."[20] Revisions to Motor Vehicle Emission Certification Procedures, 46 Fed. Reg. 50,464, 50,464 (Oct. 13, 1981), *cited in* ALJ Liability Order at 27. Instead of specific language on the COC that, previously, would vary for different classes of vehicles and engine types, the technical amendment to 40 C.F.R. § 86.437-78 "simply require[d] a statement" on the COC containing "uniform language" that would "apply to all vehicles and engines." 46 Fed. Reg. at 50,471. The Agency explained that the change in wording would have "no effect on the motor vehicle industry which is familiar with these requirements." *Id.*; *see also* ALJ Liability Order at 27-28. The language change allowed the Agency "to reduce the cost of preparing and printing certificates, since uniform language will apply to all vehicles and engines. These changes [were] administrative in nature and [did] not affect the substantive requirements of the regulations." 46 Fed. Reg. at 50,471; *see also* ALJ Liability Order at 27-28. In other words, these administrative changes had no substantive effect on the Agency's pre-market vehicle and engine certification program.

The ALJ provided a thorough analysis of the *Chrysler* decision and specifically addressed the administrative change that Appellants rely on to support

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[20] Over the previous ten years, the motor vehicle certification program had evolved considerably due to "rapidly changing vehicle emission control strategies" and as a result the Agency and manufacturers gained considerable emission control experience. Revisions to Motor Vehicle Emission Certification Procedures, 46 Fed. Reg. 50,464, 50,464 (Oct. 13, 1981). Emissions standards that had "periodically increased in stringency" were stabilizing and thus EPA and manufacturers had "greater confidence in the [emission] control systems" due to the relatively reduced rate of innovation. *Id.* As a result, the Agency envisioned more flexibility in the certification program to evaluate familiar control strategies and equipment. *Id.*

their claim. *See* ALJ Liability Order at 26-29. She rejected their argument, holding that "this amendment did not revoke the substantive requirement that vehicles conform to the design specifications [COC applicants] relied on in their applications for certification." *Id.* at 27. The ALJ concluded that "the rulings in *Chrysler* remain intact: nothing substantive changed when the Agency decided it did not need a regulation mandating precise verbiage" as to the specific model and manufacturer to be included in COCs the Agency issued, and that "[t]here is simply no meaningful distinction between *Chrysler* and this case."[21] *Id.* at 29.

Appellants also wholly mischaracterize the holding from *Chrysler*, which does not mention EDVs, let alone discuss differences between EDVs and production vehicles. Taotao USA App. Br. at 13; Taotao China & Jinyun App. Br. at 22 (stating that in *Chrysler* "the parts equipped onto the EDV were different from the parts on the production vehicles," and that "the present matter involves no such facts"). Most importantly, the COCs here specifically stated that they applied only to the vehicles described in the COC applications. *See* CX 43 to CX 52, EPA-000640 to -649. We reject Appellants' arguments on this issue.

3. *Appellants Included Design Specifications in Their COC Applications to Which Their Vehicles Did Not Materially Conform*

Manufacturers are responsible for specifying a vehicle's design in their COC application, but Appellants argue they are not required to manufacture and import vehicles that conform to the design specifications they provided to the Agency in each COC application. *See* Taotao China & Jinyun Appeal at 21-22; Taotao USA Appeal at 12-13. Specifically, Appellants assert they are not liable because the regulation does not require manufacturers to specify precious metal concentrations for catalytic converters in the COC application, and EPA does not

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[21] EPA has similarly argued that the operative language in *Chrysler* was "substantively identical" to the language used in the COCs issued to Appellants in this matter. *See* EPA Resp. Br. at 40; *see also* Complainant's Motion for Partial Accelerated Decision at 33 (same). Indeed, the COC at issue in *Chrysler* covered "only those new motor vehicles or motor vehicle engines which conform, in all material respects, to the design specifications described in the application for this certificate," *Chrysler*, 437 F.Supp. at 95-96, while the COCs issued to Appellants in this matter "cover[] only those vehicles which conform, in all material respects, to the design specifications that applied to those vehicles described in the documentation required by" either 40 C.F.R. part 86 (for highway motorcycles) or 40 C.F.R. parts 1051, 1065, and 1068 (for recreational vehicles). CX 43 to CX 52, EPA-000640 to -649 (each COC is one page).

"have any catalytic converter design standards or specifications." Taotao China & Jinyun App. Br. at 21-22; Taotao USA App. Br. at 12-13.

The governing regulation states in relevant part that engines covered by a COC are "limited to those that * * * conform to the specifications described in the certificate and the associated application for certification." 40 C.F.R. § 1068.103(a). The term "'specifications' includes the emission control information label and any conditions or limitations identified by the manufacturer or EPA." *Id.* Appellants argue that within section 1068.103(a) the term "specifications" should be read narrowly. Taotao China & Jinyun App. Br. at 21; Taotao USA App. Br. at 12.

Appellants cite to the current version of 40 C.F.R. § 1068.103 that went into effect on December 27, 2016, eighteen months after EPA issued the most recent COC in this matter and "well after" EPA filed its Amended Complaint. *See* Order on Respondents' Motion for Reconsideration or Interlocutory Appeal at 3 (June 15, 2017) (ALJ dkt. #73) ("ALJ Reconsideration Order"). Previously, 40 C.F.R. § 1068.103(a) stated that "'specifications' includes any conditions or limitations identified by the manufacturer or EPA," but in December 2016 the regulation was amended to read "'specifications' includes the emission control information label and any conditions or limitations identified by the manufacturer or EPA." *See* Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 81 Fed. Reg. 73,478, 74,224 (Oct. 25, 2016) (effective Dec. 27, 2016) (codified at 40 C.F.R. 1068.103(a)). Appellants acknowledge that the current 40 C.F.R. § 1068.103 does not apply to this matter but nonetheless argue that the example of an emission control information label as a "specification" is evidence that the regulation in effect at the time of their violations should be interpreted narrowly. Taotao China & Jinyun App. Br. at 21 n.19; Taotao USA App. Br. at 12 n.12.

As the ALJ found, the term "specifications" was meant to be inclusive and construed broadly such that for a vehicle or engine to be covered by a COC it must conform to the specifications described in the COC application, the specifications on the emission control information label *and* any other conditions or limitations identified by the manufacturer or EPA as appropriate. *See* ALJ Reconsideration Order at 4 & n.4 (citing cases) ("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."). In this instance, each COC application was replete with information detailing the form and structure of the engine family's catalytic converter as well as the ratio of the active precious metals

– platinum, palladium, and rhodium (Pt:Pd:Rh) – that each catalytic converter contained. *See, e.g.*, CX 1 at EPA-000011; CX 6 at EPA-000198.

Significantly, Appellants' argument completely ignores and conflicts with controlling Board precedent on what constitutes a specification with respect to COCs and COC applications. *See In re Jonway Motorcycle (USA) Co., Ltd.*, CAA Appeal No. 14-03, at 20, 21 (Nov. 14, 2014) (Default Order and Final Decision); *see also* ALJ Reconsideration Order at 4-5. In *Jonway,* we issued a default order and final decision against several respondents who were alleged, among other things, to have manufactured or imported both highway motorcycles and recreational vehicles with catalytic converters that "did not materially conform to their (purported) certified configuration" because the vehicles were equipped with "catalysts with significantly less volume or cell density than the certified catalyst design" for that engine family. *Jonway*, CAA Appeal No. 14-03, at 20, 21. We explained that a COC covers only those vehicles that "'conform to the specifications' in the COC and associated application," where "[t]he term 'specifications' includes 'any conditions or limitations identified by the manufacturer or EPA.'" *Id.* at 22 (citing 40 C.F.R. § 1068.103(a)). We addressed both highway motorcycles and recreational vehicles in *Jonway* and explained that although CAA § 203, 42 U.S.C. § 7522, specifies the acts prohibited for highway motorcycles, whereas 40 C.F.R. § 1068.101 does the same for recreational vehicles, "the two sections are quite similar." *Jonway*, CAA Appeal No. 14-03, at 22. Appellants' argument that a catalytic converter's precious metal content included in the COC application cannot be a "specification" or condition upon which the Agency grants a COC is contrary to our holding in *Jonway*. *See* ALJ Reconsideration Order at 5.

Appellants' theory that the Agency has not introduced design specifications into the regulations, and thus Appellants cannot be held liable for not adhering to them, also runs counter to the long history of vehicle and engine emission regulation using COCs. Appellants committed to ensuring that the vehicles in each engine family they manufactured or imported would contain catalytic converters with the specific chemical and physical properties stated in the COC applications. When the vehicles were manufactured and imported with catalytic converters that differed in volume and composition from the information provided in the COC applications, Appellants failed to conform their vehicles to the design specifications that they had included in the COC applications. *See Chrysler*, 591 F.2d at 960 ("[A]n automobile [i]s 'materially' different if the difference in parts reasonably may be expected to affect emission controls.").

Finally, the COC application process ensures that manufacturers can be held accountable for the performance and emissions of the vehicles they introduce into commerce. To accept Appellants' argument that they are not required to adhere to the design specifications included in the COC application, and rather that their vehicles are covered by their respective COCs because the production vehicles match their respective EDVs, would significantly undermine the purpose of the COC application process. The CAA and its implementing regulations required Appellants to ensure that the precious metal concentrations in the catalytic converters conformed to the design specifications included in their COC applications, not merely that they conform to the precious metal concentrations of the respective EDVs. *See* ALJ Liability Order at 29 & n.33. Without requiring this conformity between the COC application and the vehicles produced, manufacturers could produce vehicles completely untethered to the COC application and the statutory and regulatory requirements it embodies and subvert the purpose of the congressionally mandated pre-market certificate program.

We affirm the ALJ's determination that Appellants' vehicles were required to materially conform to the design specifications in their COC applications.

4. *Taotao China and Jinyun Are "Manufacturers" Under the CAA*

Taotao China and Jinyun assert that the ALJ erred when she held them liable as "manufacturers" under the CAA. Taotao China & Jinyun App. Br. at 10-13. They allege that as foreign manufacturers they cannot apply for or hold a COC and thus cannot be held liable under the CAA, nor did they manufacture the "allegedly 'non-conforming' catalytic converters." *Id.* at 11-12; *see also* ALJ Liability Order at 21-23. They further assert that the Agency seeks to hold them liable as manufacturers "based on nothing more than an overly broad and irrational interpretation of the applicable statute and related definition of manufacturer." Taotao China & Jinyun App. Br. at 11.

The plain language of the CAA undermines their contentions. The CAA defines the term "person" as, among other things, an individual, corporation, partnership, or association. CAA § 302(e), 42 U.S.C. § 7602(e). The CAA defines the term "manufacturer," in relevant part, as:

> [A]ny 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 in connection with the distribution of new motor vehicles, new motor

> vehicle engines, new nonroad vehicles or new nonroad engines * * *.

CAA § 216 (1), 42 U.S.C. § 7550(1). Based on the plain language of the statutory provisions, Taotao China and Jinyun are both "persons" and "manufacturers" under the CAA because they are both corporations that engaged in the manufacturing or assembling of new motor vehicles. *See* ALJ Liability Order at 21-22; *see, e.g.*, CX 1 at EPA-000006; CX 10 at EPA-000326 (identifying Taotao China and Jinyun, respectively, as the "original manufacturer" of the imported highway motorcycles and recreational vehicles).

Taotao China and Jinyun essentially argue that the statutory definition of "manufacturer" should be read narrowly to encompass only a United States importer or manufacturer despite the broad and inclusive language used in the definition. *See, e.g.*, CAA § 216(1), 42 U.S.C. § 7550(1) (stating that "*any person*" engaged in manufacturing, assembling, importing, among other things, is a "manufacturer" under the CAA) (emphasis added); *accord Jonway*, CAA Appeal No. 14-03, at 13 (explaining that the CAA's definition of "'[m]anufacturer' is broadly defined"). They do not cite any statutory, regulatory, or case law authority to substantiate their argument that only United States importers or manufacturers can be "manufacturers" as defined in the CAA. In an attempt to illustrate that without this narrow reading of the statute the CAA would be "overly broad," Taotao China and Jinyun assert that "[b]y this definition a manufacturer is anyone who manufactures or assembles new vehicles, anywhere in the world, whether or not it produces vehicles to be sold in the United States or solely in its own foreign country." Taotao China & Jinyun App. Br. at 12. While Taotao China and Jinyun are correct that the CAA's definition of manufacturer can apply to foreign manufacturers, *see* 42 U.S.C. § 7550(1), they omit the language set forth in the CAA and its implementing regulations that prohibits only those foreign manufacturers that produce vehicles to sell, distribute into commerce, or import *into the United States*. *See* CAA § 203(a), 42 U.S.C. § 7522(a) (emphasis added); *see also* CAA § 213(d), 42 U.S.C. § 7547(d); 40 C.F.R. §§ 86.407-78(a), 1068.101(a). In fact, the Agency has previously pursued and held liable foreign manufacturers who violated the CAA when selling their vehicles in the United States. *See, e.g.*, *In re Peace Indus. Grp.*, 17 E.A.D. 348, 350-51 (EAB 2016) (describing an enforcement action holding two Chinese corporations liable for, among other things, selling or importing thousands of highway motorcycles and recreational vehicles not in compliance with an EPA-issued certificate of conformity); *Jonway,* CAA Appeal No. 14-03, at 2, 13-14 (holding Chinese corporations liable for violations of CAA certification, labeling, and warranty requirements in connection with the import and introduction into United

States commerce of highway motorcycles and recreational vehicles); *see also* Control of Emissions from Highway Motorcycles, 69 Fed. Reg. 2398, 2410 (Jan. 15, 2004) ("Every company that manufactures motorcycles for introduction into commerce in the U.S. * * * is covered by EPA regulations.").

Finally, Taotao China and Jinyun assert that they cannot be held liable as manufacturers under the CAA because they did not manufacture the "allegedly 'non-conforming' catalytic converters." Taotao China & Jinyun App. Br. at 11 & n.8 (stating that the catalytic converters installed on each of the ten engine families were produced by one of two unrelated companies, neither of which is a party in this matter). Taotao China and Jinyun raised this argument unsuccessfully before the ALJ, who rejected it as "entirely unsubstantiated" based on the clear statutory language that undermines their argument. *See* ALJ Liability Order at 23. As the ALJ explained, nothing in the CAA's definition of manufacturer suggests that a manufacturer is limited to a person who builds parts or components of a vehicle. *Id.* Rather, the definition clearly states that "*[a]ny* person engaged in the manufacturing *or* assembling of new motor vehicles, new motor vehicle engines, new nonroad vehicles *or* new nonroad engines," is a manufacturer under CAA section 216. 42 U.S.C. § 7550(1) (emphases added). The CAA definition of "manufacturer" is broad by design, and statutory construction principles mandate that we not go beyond the ordinary meaning and structure of the statute when the language itself is clear. *See, e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2364 (2019) (citations omitted); *see also* ALJ Liability Order at 23 ("This Tribunal will not read non-existent language into the congressionally-crafted definition of 'manufacturer.'").

For the reasons explained above, we reject Appellants' arguments and affirm the ALJ's decision on liability.

C. *Penalty*

We also affirm the ALJ's penalty assessment. Appellants challenge the penalty assessed on several grounds, including the ALJ's authority to impose a penalty above the waivable maximum for administrative cases under CAA section 205(c)(1), 42 U.S.C. § 7524(c)(1), the applicability of the Mobile Source Penalty Policy to this matter, and the way in which the ALJ considered the penalty policy in this matter. *See generally* Taotao USA App. Br. at 3, 16-24; Taotao China & Jinyun App. Br. at 2, 22-36.

The ALJ had authority to assess a penalty in this case. As noted in Section II.B above, CAA section 205(c)(1) authorizes EPA to seek administrative penalties against violators of sections 203(a) and 213(d) up to a total penalty of $200,000,

adjusted for inflation,[22] unless EPA and DOJ "jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment." 42 U.S.C. § 7524(c)(1). The alleged lack of a joint determination would not preclude the ALJ from assessing administrative penalties in this matter; it would only affect the total penalty amount that could be assessed.

We begin our analysis by addressing Appellants' arguments that the Mobile Source Penalty Policy does not offer an appropriate framework for the violations alleged in this matter. *See infra* Section IV.C.1. We then address Appellants' arguments that the ALJ erred in how she considered the penalty policy in this matter. *See infra* Section IV.C.2.

1. *The Mobile Source Penalty Policy Provides an Appropriate Framework for Calculating the Penalty for the Violations Alleged in this Matter*

Appellants claim that the Mobile Source Penalty Policy does not provide an appropriate framework for this case. Taotao China & Jinyun App. Br. at 30-31; *see* Taotao USA App. Br. at 22. Taotao China and Jinyun argue that the penalty policy is silent on penalty calculations for violations that merely harm the regulatory scheme but do not cause harm to the environment in the form of excess emissions, and that the penalty policy does not provide examples of certification violations that do not cause excess emissions. Therefore, they reason, the Mobile Source Penalty Policy implicitly excludes certification violations "that do not exceed emissions"—the type of violations found in this case. Taotao China & Jinyun App. Br. at 31. Taotao USA claims that the penalty policy does not distinguish "between situations where there are actual excess emissions and situations where there are no emissions-related violations" and that because of limitations in the EPA and DOJ joint determination, it makes no sense to calculate the penalty by relying on the method the penalty policy provides. *See* Taotao USA App. Br. at 22. Appellants are mistaken.

EPA developed the Mobile Source Penalty Policy to facilitate fair, consistent, and equitable application of relevant statutory criteria in the assessment of penalties for violations of Title II requirements. *See* Mobile Source Penalty Policy at 1-3.[23] As noted above in Section II.B of this decision, Title II of the CAA

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[22] *See supra* notes 6-7.

[23] *See also* U.S. EPA, *EPA General Enforcement Policy #GM-21, Policy on Civil Penalties* 4 (Feb. 16, 1984) (explaining EPA's goals in developing guidance documents for the assessment of penalties); *In re CDT Landfill, Corp.*, 11 E.A.D. 88, 117 (EAB 2003)

requires EPA and the ALJ to consider the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, and the violator's history of compliance with CAA Title II, among other factors. CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2). The Mobile Source Penalty Policy considers these statutory criteria and provides a methodology for their application. *See* Mobile Source Penalty Policy at 2-3.

Contrary to Appellants' arguments, the Mobile Source Penalty Policy specifically provides guidance for "the manufacture and sale, or the importation, of uncertified vehicles or engines in violation of Section 203(a)(1) of the [CAA]," the precise type of violations alleged in this enforcement matter. Mobile Source Penalty Policy at 1; Amend. Compl. ¶¶ 45-49, 55-59, 65-69, 74-78, 84-88, 94-98, 104-108, 114-118, 122-126, 130-134. It also recognizes the importance of assessing penalties for violations that harm the regulatory scheme but that may not cause harm from excess emissions and provides examples of certification violations that may not result in excess emissions. Mobile Source Penalty Policy at 15 ("Even in the absence of harm in the form of excess emissions, the gravity component of the penalty should reflect the seriousness of the violation in terms of its effect on the regulatory program."); *see, e.g.*, *id*. at 13 (providing example). In addition, as explained in Section IV.C.2.b.ii below, the Mobile Source Penalty Policy distinguishes between violations that cause harm from excess emissions and those that do not involve excess emissions.

We therefore reject Appellants' contention that the Mobile Source Penalty Policy does not provide an appropriate framework.

2. *The ALJ Provided a Reasonable Explanation for the Penalty She Assessed*

The Mobile Source Penalty Policy describes methodologies for calculating penalties that includes consideration of the economic benefit to the violator that resulted from the violation and a gravity component that reflects the seriousness of the violation. *See* Mobile Source Penalty Policy at 3-22. This produces a figure

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(noting that "penalty policies serve to facilitate the application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments").

that may be adjusted to account for the facts and circumstances of a given case. *Id*. at 23-26.

Appellants challenge the ALJ's decision to adopt a measure of economic benefit proposed by their own expert witness and how she considered the Mobile Source Penalty Policy to determine and adjust the gravity of the violation. *See generally* Taotao USA App. Br. at 19-24; Taotao China & Jinyun App. Br. at 32-36. We examine each of these challenges below.

a. *The Economic Benefit*

In determining the economic benefit, the ALJ adopted the fourth measure of economic benefit presented by Appellants' economic expert, Jonathan S. Shefftz. Init. Dec. at 21. Mr. Shefftz combined the cost estimates of the necessary staffing, consultants, and engineers to ensure that the catalytic converters in the imported vehicles accurately conformed to the descriptions provided in the COC applications, as well as "the net cost of purchasing compliant catalytic converters from a different supplier." *Id*. These two costs amount to $219,299. *See* Respondents' Exhibit 1 at 21 (Expert Opinion on Financial Factors in Civil Penalty Setting Including Economic Benefit and Ability to Pay (June 16, 2017)) ("RX 1").

Taotao USA challenges the ALJ's decision to adopt the fourth scenario and asserts that the economic benefit should have been based on the cost of purchasing and installing the right catalytic converter alone or on the costs of ensuring that the catalytic converters in the imported vehicles matched the COCs, but not both. *See* Taotao USA App. Br. at 21-22.[24] To support this assertion Taotao USA presents two theories. First, Taotao USA argues that Appellants "could have simply listed the correct catalytic converter concentrations on the COC applications, and given that the EDVs [emission data vehicles] with the uncertified catalytic converters passed the useful life emissions and [EPA's] decision to approve the design specifications could have only been based on those tests, * * * , the only economic benefit would then be the cost of additional staffing alone," (i.e., about $104,961). *Id*. Second, it argues that had Appellants "used catalytic converters with the certified specifications, there would be no avoided costs, and the economic benefit would be $114,338" (i.e., the cost of installing compliant catalytic converters). *Id*.

[24] Taotao China's and Jinyun's appeal brief does not challenge the economic benefit determination.

Taotao USA's arguments lack merit. The ALJ provided a reasonable explanation for her conclusion that the fourth scenario was the most comprehensive and presented the best measure of economic benefit available in this proceeding.

The ALJ concluded that both types of economic benefit (i.e., staffing costs and costs of having compliant catalytic converters) should be recovered. She explained that "once the COCs for their engines as described and purportedly tested were approved and issued by EPA, [Appellants] were legally obliged to purchase and install in those engines catalytic converters matching the description in their COC applications or not import vehicles under those COCs." Init. Dec. at 21. Appellants instead purchased and installed catalytic converters with metal ratios that did not conform to the description they had provided in their COC applications and still imported and sold their vehicles under their COCs. *Id*. These vehicles, she observed, were less expensive for Appellants by about $115,000 in total, and she concluded that this actual economic benefit may be recovered by the government. *Id*.

The ALJ further elaborated that "once the COCs for their vehicles were issued, [Appellants] were *also* obliged to incur the cost of staffing, etc., to ensure that what they were actually purchasing and installing in their engines matched what was in their approved COC applications." *Id*. She relied on EPA's expert witness in the Agency's vehicle and engine certification and compliance program, Cleophas Cawthorn Jackson, who testified that "generally manufacturers engage in quality control processes to ensure production consistency, both internally and externally with their supplier base, as often as every quarter." *Id*. The ALJ explained that Appellants "were not undertaking such quality control, or at least undertaking it competently, and did not do so over the course of many years." *Id*. at 21-22. Appellants, she noted, "incurred a financial savings as a result and perhaps a competitive advantage as well," and concluded that these savings may also be recovered by the government. *Id*. at 22.

The evidence in this case provides ample support for the ALJ's conclusions. Even Appellants' expert witness considered that the most comprehensive approach to calculating the economic benefit of noncompliance derived in this case "and the most accurate approach [he] felt was justified here," involved consideration of the cost of staffing and the cost of having compliant catalysts. ALJ Hearing Transcript ("Tr.") at 897-98 (Mr. Shefftz's testimony); *see id*. at 866-69. And the Mobile Source Penalty Policy contemplates that *all* categories of economic benefit derived from noncompliance, which may include the benefit from delayed costs, avoided

costs, and any competitive advantage obtained, are appropriately included in the economic benefit calculation.[25] *See* Mobile Source Penalty Policy at 4-7.

The ALJ also provided solid reasoning for rejecting Taotao USA's theories that the measure of economic benefit should have been based on either the cost of staffing or on the cost of purchasing and installing compliant catalyst, but not both. In rejecting Appellant's theory that the only economic benefit would have been the avoided cost of additional staffing, she correctly observed the speculative nature of this claim, noting that "there is insufficient evidence that [Appellants'] vehicles, utilizing the design specifications as actually built, would meet emission standards throughout their useful life and/or that a COC application that accurately described [Appellants'] catalysts would have been approved." Init. Dec. at 22. The available data shows that most of the catalytic converters in the imported "vehicles contained only palladium, which, Mr. Jackson testified would increase their likelihood of poisoning and make them less effective later in their useful lives." *Id*. (citing Tr. at 136).[26]

As to Taotao USA's theory that the only economic benefit would have been the avoided cost of installing and purchasing compliant catalysts, the ALJ explained

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[25] As support for using only the cost of purchasing and installing the right catalytic converter as the measure of economic benefit, Taotao USA points to statements EPA made in its Initial Post-Hearing Brief, that for "missing or nonconforming catalysts * * * 'the cost of purchasing and installing the catalytic converter' *is an* appropriate measure of the violator's economic benefit." Taotao USA App. Br. at 21 (quoting Complainant's Initial Post-Hearing Brief 6 (Dec. 21, 2017) (ALJ dkt. #169) ("EPA Post-Hearing Br.") (emphasis added). Taotao USA mischaracterizes and takes EPA's position out of context. EPA's statement was that the cost of purchasing and installing the catalytic converter provides *a* measure of economic benefit, not that it is *the* sole measure. EPA Post-Hearing Br. at 6. EPA was referencing the Penalty Policy, which proposes using the cost of purchasing and installing the proper equipment as an estimate of the economic benefit when information regarding the actual amount saved from noncompliance is not available. *Id*.; Mobile Source Penalty Policy at 4, 8 (describing rule of thumb estimate of economic benefit). In this case, however, the amount saved from noncompliance was available as Mr. Schefftz' report relied on actual catalytic converter prices that Appellants had supplied for compliant catalytic converters and also considered other costs that would have been necessary to ensure compliance.

[26] Taotao USA would like us to consider the EDVs emission data as evidence that the imported vehicles would meet emission standards throughout their useful lives. But as explained fully in Section IV.C.2.b.(i) below, this argument lacks merit.

that "[t]o know they were complying with the CAA, regardless of what converters they purchased, [Appellants] would have had to monitor and evaluate that the catalysts they were buying and installing on their engines * * * in fact meet their claimed specifications." *Id*. As already explained, by not doing so, Appellants obtained an economic advantage.

In sum, Appellants did not use catalytic converters with the certified specifications thereby avoiding the cost of purchasing compliant catalysts, and they did not incur quality control expenses that other manufacturers typically expend to ensure production consistency. We therefore affirm the ALJ's well-reasoned economic benefit determination.

b. *The Gravity of the Violations*

In assessing the gravity of the violations, the ALJ was guided by the Mobile Source Penalty Policy, which sets out a methodology for quantifying the gravity of a violation by considering the "actual or potential harm" of the violation, the "importance to the regulatory scheme" of the legal requirement, and "scaling factors," among other factors. Mobile Source Penalty Policy at 11-23.

Actual or potential harm of the violation, as explained in the penalty policy, focuses on whether and to what extent the violator's activity resulted in, or was likely to result in, the emission of a pollutant in violation of the standards for particular vehicles or engines. *Id*. at 11. To quantify the "actual or potential harm" from the emission of a pollutant in violation of an applicable standard, the Mobile Source Penalty Policy considers, among other things, the "egregiousness" of the violation. *Id*. at 12-14. Egregiousness can be categorized as "major," "moderate," or "minor." *Id*. at 13-14.

Importance to the regulatory scheme, the penalty policy explains, concerns the requirement's importance to achieving the goals of the Clean Air Act and its implementing regulations and "should always be taken into account in determining the egregiousness of the violation." *Id*. at 15. Scaling factors, for their part, account for variations in the number of vehicles/engines and engine size to avoid the gravity amount resulting in penalties that are inappropriately or unreasonably large. *Id*. at 15, 17-19.

The gravity of a violation can be adjusted to reflect, among other factors, the violator's "degree of willfulness and/or negligence" and "history of noncompliance." *Id*. at 23-26.

Appellants claim error in the ALJ's conclusion that the violations presented a risk of harm to the environment and harmed the regulatory scheme, and in the scaling approach she adopted. Taotao USA App. Br. at 18-20; Taotao China & Jinyun App. Br. at 28, 32-36. In addition, Taotao USA claims error in the egregiousness levels selected, and Taotao China and Jinyun dispute the adjustment to the gravity component based on history of noncompliance. Taotao USA App. Br. at 19-20, Taotao China & Jinyun App. Br. at 36. Finally, Appellants claim the ALJ could not consider "actual or potential harm" or "degree of willfulness/negligence" because of limitations in the EPA and DOJ joint determination. *See generally*, Taotao USA App. Br. at 3, 16-19; Taotao China & Jinyun App. Br. at 2, 22-29. We address these arguments below.

(i) *The ALJ Provided a Reasonable Explanation for Concluding that the Violations Created a Risk of Harm to the Environment and Harmed the Regulatory Scheme*

The ALJ concluded that the risk of harm to the environment from the violations is not theoretical and that the violations harmed the regulatory scheme. Init. Dec. at 31-32. Appellants claim that the evidence shows that there is no risk of potential harm to the environment, that they did not harm the regulatory scheme, and that EPA failed to show harm to the regulatory scheme. *See* Taotao USA App. Br. at 18; Taotao China & Jinyun App. Br. at 32-36. Appellants' arguments lack merit. The evidence does not support their claim.

In concluding that the violations presented a risk of harm to the environment, the ALJ relied on EPA's evidence that: the catalysts contained platinum, palladium, and rhodium "in ratios different than described in [Appellants'] associated COC applications;" the catalytic converters in the imported vehicles that were tested essentially contained palladium-only catalytic converters; and palladium-only catalytic converters raise concerns about their long-term durability because they may be subject to poisoning at higher engine mileage. Init. Dec. at 32.

The ALJ further observed that because Appellants manufactured and imported vehicles that "did not match their COCs," Appellants actions "conflicted with the regulations," which "clearly harmed the regulatory scheme." *See id*. at 31. The ALJ explained that the risks of excess emissions caused by not having valid COCs also harmed the regulatory scheme because "the scheme was designed to prevent such risks," and that by providing inaccurate information Appellants caused EPA to rely on false information, which undermines the entire certification program. *Id*. at 31, 33. We find ample support for these conclusions.

Further, Appellants have failed to produce countervailing evidence to rebut the evidence in the record and the conclusions that reasonably can be drawn from such evidence. The only evidence Appellants cite is an alleged stipulated fact that they claim the ALJ relied on in her liability determination. *See* Taotao USA App. Br. at 13-14, 20; Taotao China & Jinyun App. Br. at 33-35; Appellants Reply Br. at 17-18. Specifically, Appellants argue that EPA stipulated that "all useful life emissions data submitted to [EPA] for certification were conducted on vehicles that were identical to those alleged in the Complaint." Taotao China & Jinyun App. Br. at 34; *see* Taotao USA App. Br. at 20. Taotao China and Jinyun claim this is significant because the EDVs were tested and their useful life emissions test data allegedly did not show excess emissions. In Appellants' view, this demonstrates the long-term viability of the catalytic converters in the imported vehicles and that the imported vehicles "neither harmed the regulatory scheme, nor created a risk for excess emissions." Taotao China & Jinyun App. Br. at 34.

Appellants mischaracterize EPA's statements. The record shows that Appellants, not EPA, asserted "that the EDV[s] that passed the emissions standards contained a catalytic converter [that] conformed to the catalytic converter on imported vehicles." Respondents' Motion to Dismiss for Failure to State a Claim 9 (Nov. 28, 2016) (ALJ dkt. #52). EPA asked the ALJ to construe that statement as an admission by Appellants that "their vehicles, including their EDVs and imports, were equipped with catalytic converters different from those described in the relevant COC applications." Complainant's 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 17 (Jan. 3, 2017) (ALJ dkt. #56). EPA's request that the ALJ treat Appellants' statement as an admission that the catalytic converters were different cannot be construed as a joint stipulation that the catalytic converters in the EDVs conformed to the catalytic converters in the imported vehicles.

Appellants also mischaracterize the ALJ's liability order. As support for their claim that the ALJ relied on the alleged stipulation, Appellants point to language on pages 30 to 31 of her liability order. Appellants Reply Br. at 17-18. But in her order, the ALJ simply outlined the arguments made by both parties with respect to the number of violations for which Appellants were culpable. She did not adopt any such alleged stipulation. ALJ Liability Order at 30-31.

To the contrary, as explained earlier in this decision, the ALJ dismissed as irrelevant to the question of liability the argument that the imported vehicles had the same catalytic converters as the EDVs, a conclusion with which we agreed. *See supra* Section IV.B.1. In the penalty phase, the ALJ declined to rely on the EDVs

useful life emissions tests data as evidence of the long-term viability of the catalysts in the imported vehicles (i.e., as evidence of lack of potential harm from excess emissions or harm to the regulatory scheme). *See* Init. Dec. at 32-33. As she aptly noted, the very nature of this case calls into question the reliability of the information provided in the COC applications to obtain useful emissions information. *Id*. at 33. The only evidence in the record regarding the catalytic converters of the EDVs consists of descriptions Appellants provided in the applications. *See generally* CXs 1-10. She observed that "'all of the engine families named in the Amended Complaint relied on an EDV from a previous model year for certification, meaning the EDVs were not manufactured at the same time as the [imported vehicles],'" which led her to conclude that "performance characteristics of the EDVs cannot be presumed to apply to vehicles in this case based on a shared production process." *Id*. at 32 (quoting Complainant's Reply Post-Hearing Brief 6 (Jan. 19, 2018) (ALJ dkt. #175)). Indeed, the record shows that the COC applications for the engine families identified in Counts 9 and 10 used a model year 2010 to certify model year 2015 and 2016 engine families. *See* CX 9 at EPA-000288 to -290, -318; CX 10 at EPA-000323 to -329, -351. Appellants provided no evidence to demonstrate that the EDVs in fact accurately represented the imported vehicles, and we have no reason to second-guess the ALJ's decision to reject Appellants' EDV emission "data" as evidence of the long-term viability of the catalytic converters in the imported vehicles.

Based on the foregoing, we affirm the ALJ's determination that the violations at issue created a risk of harm to the environment and harmed the regulatory scheme. The ALJ's rejection of Appellants' arguments and her determinations on this issue are well-reasoned, and within the parameters contemplated by the CAA and the Mobile Source Penalty Policy.

(ii) *The ALJ Provided a Reasonable Explanation for Selecting Egregiousness Levels*

In determining the egregiousness level for the violations, the ALJ concluded that EPA appropriately selected a "moderate" egregiousness level for Counts 1-8 and a "major" level for Counts 9-10. Init Dec. at 32. Taotao USA argues that because "there is no allegation in this action, nor evidence, that the violations caused excess emissions," the level of egregiousness for all counts should have been "moderate." Taotao USA App. Br. at 19-20. Taotao USA claims further that because the waiver determination allegedly did not allow an increase based on potential emissions and "failed to show how the harm to the regulatory scheme is egregious, all violations should be characterized as 'Minor.'" *Id*. at 20. Taotao

USA's arguments lack merit. The levels the ALJ adopted are consistent with the record and the guidance provided by the Mobile Source Penalty Policy.

The Mobile Source Penalty Policy recommends applying "major," the most egregious category, "to violations where excess emissions are likely to occur." Mobile Source Penalty Policy at 13. The penalty policy contemplates a major designation "if vehicles or engines are uncertified and there is no information about the emissions from these vehicles or engines," or if "test data of the uncertified engines shows the engines to exceed emissions standards." *Id*. Therefore, violations can be classified as "major" even without proof that excess emissions in fact occurred. EPA explained that it did not order Appellants to conduct emission testing for the vehicles in Counts 9 and 10 because these violations were discovered after the initial Complaint was filed, testing is a "lengthy process," that can take months to complete, and Appellants could have voluntarily undertaken testing and submitted the data but did not. *See* Init. Dec. at 26 (citing Amelie Cara Isin's testimony, Tr. at 595, 835).[27] The ALJ found, and we agree, that EPA's explanations were reasonable. Because EPA had no emission data for the vehicles in these two counts and Appellants produced no reliable data for these vehicles, the ALJ appropriately adopted a "major" level of egregiousness for the violations identified in Counts 9 and 10.

Similarly, the egregiousness level selected for the violations in Counts 1 through 8 is consistent with the guidance provided by the Mobile Source Penalty Policy. A "moderate" egregiousness level is appropriate for "violations involving uncertified vehicles or engines where the emissions from the vehicles or engines are likely to be similar to emissions from certified vehicles or engines." Mobile Source Penalty Policy at 13. This would encompass a situation where the emissions from the uncertified vehicles or engines will not cause excess emissions. The ALJ explained that a "moderate" level was selected in part because the emission test data available for the vehicles in Counts 1 through 8 did not reveal excess emissions. Init. Dec. at 25, 32. Because this matter involved uncertified vehicles and the available data for these counts did not reveal excess emissions, the ALJ appropriately selected a "moderate" egregiousness level.

In addition, Taotao USA's argument that the violations should have been classified as "minor" lacks support. "Minor," which is the lowest egregiousness category, applies to violations that involve "vehicles or engines with emission

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[27] Ms. Isin was the lead investigator in the Agency's case against Appellants. *See* Init. Dec. at 5.

control labels that are defective, but the certification status of the engine nevertheless can be determined from the label." Mobile Source Penalty Policy at 14. Nothing in the record suggests that the violations that occurred here are consistent with the "minor" classification as described in the penalty policy.

Accordingly, we affirm the ALJ' selection of the level of egregiousness.

(iii) *The ALJ Provided a Reasonable Explanation for Adopting EPA's Scaling Strategy*

The ALJ adopted the scaling strategy that EPA proposed, which consisted of dividing the vehicles into two groups: one comprising the vehicles in Counts 1-8, and the other comprising the vehicles in Counts 9-10. *See* Init. Dec. at 34. She endorsed EPA's approach because "the violations in Counts 9 and 10 were discovered after the initial Complaint was filed," and Appellants were on notice, as early as December 24, 2013, of the certification violations under Counts 1-8, six months to a year and a half before they submitted COC applications for the engine families identified in Counts 9-10. *Id*. (citing CX 92 and CXs 9-10). She reasoned that Appellants "knew about problems with their catalytic converters, [and] could have made changes to their manufacturing/quality control/importation processes before importing the vehicles in Counts 9 and 10, but chose not to." *Id*.

Appellants assert that EPA erred "by [not] grouping all counts together for scaling purposes." Taotao USA App. Br. at 20; Taotao China & Jinyun App. Br. at 36. To support their assertion of error Taotao China and Jinyun argue that the notice of violation was issued to Taotao USA, Inc. only, not Taotao China and Jinyun. Therefore, they "can't [be] imputed with a notice, they were never given." Taotao China & Jinyun App. Br.at 36.[28] Appellants' argument lacks merit.

Contrary to Appellants' assertions, the notice of violation, which EPA sent by email and certified mail, was addressed to all the parties, not just Taotao USA. *See* CX 92 at EPA-001112 to -1114 (Letter from Phillip A. Brooks, Dir. Air Enforcement Div., U.S. EPA to Matao Cao, President Taotao USA, Inc, and Yuejin Cao, President Taotao China and Jinyun (Dec. 24, 2013); CX 93 at EPA-001117 to -1118 (E-mail from Jackie Wang, Taotao USA, to Amelie Isin, U.S. EPA (Dec. 24, 2013, 11:15pm) (responding to an email from Ms. Isin to Matao Cao and Yuejin Cao regarding "Taotao – Notice of Violation"). In addition, on February 6, 2014, EPA sent a request for information addressed to all three parties about the

[28] Taotao USA does not provide support for its assertion of error.

investigation of the violations detected earlier. *See* CX 94 at EPA-001120 to -1122 (Letter from Phillip A. Brooks, Dir. Air Enforcement Div., U.S. EPA to Matao Cao, President Taotao USA, Inc, and Yuejin Cao, President Taotao China and Jinyun (Feb 6, 2014)).

Moreover, the scaling strategy that EPA proposed and the ALJ adopted is consistent with the guidance of the Mobile Source Penalty Policy. The penalty policy affords ample discretion to decide how to scale violations in cases that, like this one, involve multiple violations, more than a single size vehicle/engine, multiple shipments and/or different levels of egregiousness. Mobile Source Penalty Policy at 18; *accord In re Peace Indus. Grp.*, 17 E.A.D. 348, 356 (EAB 2016) ("enforcement personnel have discretion as to how they apply scaling factors"). Specifically, the penalty policy states that "the litigation team has the discretion to use the sum total of all violations for [scaling]" or to "'group' violations, and re-start the scaling factor [] for each group." Mobile Source Penalty Policy at 18. In this case EPA reasonably exercised such discretion—it grouped the first eight counts together and restarted scaling for Counts 9 and 10 because Appellants knew about the problems with the engine families identified in Counts 1-8, yet they continued to engage in the violative conduct. We affirm the ALJ's adoption of the scaling strategy.

(iv) *The ALJ Justified Her Penalty Adjustment Against Taotao China and Jinyun Based on History of Noncompliance Under the CAA, the Guidance of the Penalty Policy, and the Evidence in the Record*

In assessing the penalty EPA proposed, and the ALJ adopted, a 20% penalty increase to the gravity component based on a 2010 Administrative Settlement Agreement ("ASA") between Taotao USA and EPA involving Taotao USA's importation of 3,768 nonroad vehicles from China with emissions-related parts that did not conform with the descriptions provided in the COC applications for each of the engine families. CX 67 at EPA-000808, -811, -823 (2010 ASA (June 28, 2010)); *see* Tr. at 598-600 (Ms. Isin's testimony regarding the 2010 ASA).[29] Zhejiang Taotao Industry Co. manufactured the vehicles underlying the 2010 ASA. *See* Init. Dec. at 39 n.44. Taotao China and Jinyun dispute the 20% penalty increase against them because the ASA was "signed only by Taotao USA for vehicles

[29] Ms. Isin assisted in drafting the 2010 ASA. *See* Init. Dec. 11.

produced by neither T[aotao China] nor J[inyun]." Taotao China & Jinyun App. Br. at 36.

The CAA requires that in assessing an administrative penalty under section 205(c)(2), EPA consider, among other things, the violator's history of compliance with CAA Title II and actions taken to remedy the violation. CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2). The Mobile Source Penalty Policy facilitates the implementation of these criteria by considering a violator's history of noncompliance. *See* Mobile Source Penalty Policy at 25-26. The penalty policy explains that "where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response." *Id.* at 25. In these situations, the penalty policy suggests adjusting the gravity-based portion of the penalty upward, unless the previous violation was caused by factors entirely out of the control of the violator. *Id*. Generally, a violation is considered similar if the Agency's previous enforcement response should have alerted the party to a particular type of compliance problem. *Id*. In the case of uncertified vehicles, any violation of the vehicle and engine requirements under Title II of the CAA or its implementing regulations is considered a similar violation. *Id*. at 26.

The Mobile Source Penalty Policy recognizes the challenge of determining whether a previous instance of noncompliance should trigger the adjustment for previous violations in cases involving large corporations with many divisions or wholly owned subsidiaries. Its approach is to "begin with the assumption that if the same parent corporation controlled both the corporate organization with the prior violation and the organization with the current violation, the adjustment for history of noncompliance should apply, unless the violator can demonstrate there was no corporate control or oversight linkage between the two organizations." *Id*. Such an approach thwarts parties from "changing operators or shifting responsibility for compliance to different groups as a way of avoiding increased penalties." U.S. EPA, *EPA General Enforcement Policy #GM-22, A Framework for Statute-Specific Approaches to Penalty Assessment* 22 (Feb. 16, 1984) (also noting that "[t]he Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are in different geographic locations," and that "[t]his often reflects, at best, a corporate-wide indifference to environmental protection.").

In this case, the ALJ determined that imputing prior history of noncompliance to Taotao China and Jinyun was appropriate because EPA "presented sufficient evidence to tie them to the prior violations outlined by the 2010 ASA." Init. Dec. at 39. She noted that "the evidence * * * joins all three

[Appellants] in serving the same business enterprise under the ownership and control of the Cao family." *Id*. And she concluded that "[i]n the absence of evidence to the contrary, this is sufficient to implicate Taotao China and Jinyun in the prior violations that were the subject of the 2010 ASA." *Id*.

Her conclusion is consistent with the record, the CAA, and the guidance provided by the penalty policy. Appellants have not demonstrated that there was no corporate control or oversight linkage between them and Taotao USA and/or the manufacturer of the vehicles involved in the ASA. Rather, the evidence supports the opposite conclusion—based on the extensive familial, financial, and business operational ties among the Appellants and the Cao family, Taotao China and Jinyun were more likely than not part of the same corporate organization with the ability to exert control and/or oversight over the vehicles underlying the 2010 ASA. For example, Ms. Isin testified that while Zhejiang Taotao Industry Co. manufactured the vehicles that gave rise to the ASA, she believed the company was "a predecessor" of Taotao China or Jinyun that was "most likely the same company" as Appellants but with a different name. Init. Dec. at 39 n.44 (citing Ms. Isin's testimony, Tr. at 812). Appellants do not refute Ms. Isin's statement or present any evidence to the contrary. Ample evidence in the record also demonstrates that all three Appellants are part of a family controlled global corporate enterprise. As noted in Section II.C. above, Matao Cao is Yuejin Cao's son, and, at the time of the events that led to this enforcement matter, Matao Cao owned Taotao USA; Yuejin Cao owned Taotao China, and; Jinyun was a subsidiary of Taotao China.[30] Matao Cao and Yuejin Cao collectively owned the factory that produced the vehicles that Taotao China and Jinyun sold to Taotao USA. CX 191 at EPA-002523 (Appellants' presentation to EPA describing corporate ownership and relationship between Taotao USA and other Cao family-owned companies). In addition, Matao Cao admitted that Taotao USA only purchased vehicles from Taotao China-owned companies, which supports the conclusion that the manufacturer of the vehicles involved in the 2010 ASA was part of the Taotao enterprise.[31] *See* Init. Dec. at 10 (citing CX 216 (Matao Cao's Deposition at 45-46)).

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[30] *See also*, CX 35 at EPA-000607 (Taotao Group Commercial Profile) (listing Taotao China's subsidiaries); CX 168 at EPA-002296 (Taotao Group Company) (updated corporate profile); CX 191 at EPA-002522 (describing corporate structure and relationship between Taotao USA and Taotao China owned companies in Appellants' presentation to EPA).

[31] Appellants also claim that the ALJ improperly "grouped all [Appellants] together" based on Mr. Jackson's testimony (EPA's expert witness in the Agency's COC

The unrefuted evidence shows that Taotao China and Jinyun were aware of the particular compliance problems that gave rise to this matter and exercised a measure of control over the ASA violations and the importation of vehicles with similar violations to those underlying the ASA. *See, e.g.*, Init. Dec. at 39 (noting that Taotao China ordered some of the catalyst testing conducted in August 2011 in response to the 2010 ASA and that Yuejing Cao was aware of the ASA violations).[32] Taotao China and Jinyun thus bore responsibility for the delays in achieving compliance with the ASA and in avoiding similar violations to the ones underlying it.[33] This conduct provides additional support for the upward adjustment. Therefore, an upward adjustment against Taotao China and Jinyun is

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program) that he was told by Yuejin Cao that all the companies were related. Taotao China and Jinyun App. Br. at 31-32. They claim that Mr. Jackson's testimony is hearsay and that he was not sure what companies Yuejin Cao was referring to. *Id*. To the extent that Taotao China and Jinyun raise these arguments as a challenge to the upward adjustment against them for history of noncompliance, the arguments lack merit. Mr. Jackson's testimony is one of several pieces of evidence the ALJ relied on to in concluding that all three Appellants serve the same business enterprise. Other evidence in the record cited here and in the ALJ's decision fully supports the ALJ's conclusion. In addition, Appellants provide no compelling reason not to rely on Mr. Jackson's testimony. Hearsay is admissible in EPA administrative proceedings, *see* 40 C.F.R. § 22.22, and the ALJ chose to credit it as reliable. *Accord In re Ocean State Asbestos Removal, Inc*., 7 E.A.D. 522, 530 (EAB 1998) (noting that the Board generally defers to the factual findings of the ALJ when those findings are based on a witness credibility determination); *In re William E. Comley, Inc.*, 11 E.A.D. 247, 266 (EAB 2004) ("Hearsay evidence is clearly admissible under the liberal standards for admissibility of evidence in the 40 C.F.R. pt. 22 rules, which are not subject to the stricter Federal Rules of Evidence.").

[32] *See also* CX 216 at 129-30, 134-5 (Matao Cao Deposition (Sept. 6. 2017)).

[33] Taotao USA attributed its delay in complying with the ASA to delays in receiving information from Jinyun and Taotao China. *See, e.g.*, CX 71 at EPA-000865 (Email from Mike Hillman, General Manager, Taotao USA, to Christopher Thompson, Acting Branch Chief, Mobile Source Enforcement Branch, U.S. EPA (Jan. 11, 2012)) (explaining difficulties in obtaining catalyst tests reports, required under ASA, from companies in China); CX 73 at EPA-000883 (Email from Matao Cao, Owner, Taotao USA, to Christopher Thompson, Acting Branch Chief, Mobile Source Enforcement Branch, U.S. EPA (Feb. 24, 2012)) (explaining that all of the reports from the lab in China are issued under the name China Taotao).

justified, and we affirm the ALJ's decision to impute history of noncompliance to all three Appellants.[34]

(v) *The Violations Are Covered by the EPA and DOJ Joint Determination*

We now address Appellants' remaining arguments that because the ALJ's penalty assessment considered penalty criteria that took into account the violations' "actual or potential harm" and the violators' degree of "willfulness and/or negligence," the violations were not covered by the EPA and DOJ joint determination. *See generally*, Taotao USA App. Br. at 3, 16-19; Taotao China & Jinyun App. Br. at 2, 22-29. Appellants' arguments lack merit. The joint determination did not limit EPA's or the ALJ's authority to consider relevant factors in fashioning an appropriate penalty for the violations.[35] CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1).

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[34] Taotao China and Jinyun also suggest that the ALJ's penalty assessment did not consider "each Appellant's distinct benefit, culpability and history of noncompliance," Taotao China & Jinyun App. Br. at 1-2, 31, and claim that the penalty "calculations wholly lacked any individualized Appellant by Appellant analysis." *Id*. at 31-32. These arguments lack merit. The CAA is a strict liability statute, and as a general matter "the government's interest is in recovering an appropriate penalty based on the facts of the violation, not based on the relative fault of the individual defendants." *In re City of Wilkes-Barre,* 13 E.A.D. 332, 349 (EAB 2007). In any event, the penalty imposed in this case considered the role of each Appellant in importing and manufacturing the noncompliant vehicles. As the sole importer Taotao USA was found responsible for the entire penalty, whereas Taotao China and Jinyun were apportioned responsibility for the penalty, jointly and severally with Taotao USA, based on the non-compliant vehicles each of them manufactured. *See* Init. Dec. at 50 & n.55.

[35] CAA waiver determinations under Tittle II are not subject to judicial review, nor are such determinations under Title I. CAA §§ 113(d)(1)(C), 205(c)(1), 42 U.S.C. §§ 7413(d)(1)(C), 7524(c)(1). Significantly, the Board examines joint determinations, such as those authorized under CAA sections 113(d)(1)(C) and 205(c)(1), only for appropriately narrow purposes in the context of an individual case such as to ensure that a statute authorizes a penalty action based on the facts of a particular case and that administrative penalty authority is, in fact, legally available. *See, e.g., In re Lyon Cty. Landfill*, 8 E.A.D. 559, 567-68 (EAB 1999); *In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 508-23 (EAB 2004). These factors are satisfied here. In addition, the Board does not evaluate issues pertaining to the waiver that are entrusted to EPA's

As noted in Section II.B. above, for EPA to seek penalties above the statutory cap for administrative penalties, EPA and DOJ had to jointly determine that this "matter" warranted a larger penalty. EPA and DOJ made this determination through a series of letters. *See supra* Section II.E. Together these letters reflect EPA's and DOJ's joint determination that in this matter it was appropriate for EPA to seek a penalty above the statutory cap for administrative cases against Appellants for violations of the certification requirements of Title II of the CAA and implementing regulations.[36] *Id*.

Appellants' predicate their challenge on DOJ's June 2016 letter, in which DOJ agreed that it was appropriate for EPA to include additional vehicles and new violations in the Complaint. Specifically, EPA could pursue administrative penalties above the statutory cap for administrative cases "for additional recreational vehicles (* * * totaling 1681) that have been found to violate the certification requirements of the [CAA] and its implementing regulations," and "for certain potential additional violations that may occur in the future." CX 28 at EPA-000546 (responding to EPA's May 6, 2016 letter). DOJ delineated that EPA could include additional vehicles in the enforcement action, not to exceed 125,000 vehicles, and additional violations that may occur in the future "as long as such [future] violations are *substantially similar* to those covered under the waivers already issued to date." *Id*. The letter explained that violations that are "*substantially similar* to those covered under waivers already issued to date" include "future violations[] that harm the regulatory scheme, but that do not cause excess emissions; and [violations] of provisions on certification, labeling, incorrect information in manuals, or warranty information violations."[37] *Id*.

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enforcement discretion, such as whether to bring a particular case in an administrative or judicial forum. *See Lyon Cty.*, 8 E.A.D. at 567.

[36] The letters identify the purpose of EPA's request (i.e., to increase the penalty amount above the statutory cap for administrative penalties of Title II violations); the parties against whom EPA was seeking to impose administrative penalties above the statutory cap (i.e., the three Appellants in this case identified as "Taotao USA, Inc., Jinyun County Xiangyuan Industry Co., Ltd., and Taotao Group Co., Ltd."); the statutory and regulatory provisions alleged to have been violated (i.e., CAA sections 203(a) and 213(d) and applicable regulations); and the type of violations (e.g., violations of the certification requirements of the CAA) and maximum number of vehicles for which penalties could be sought (i.e., 125,000). *See e.g.*, ALJ dkt. #111 attach. H; CXs 26, 28.

[37] DOJ also asked that EPA consult with them "to discuss the path forward for any violations that are *not substantially similar*" and provided examples of violations "not

All the violations that EPA included in the Amended Complaint were "substantially similar to those covered under the waivers" issued prior to the DOJ June 2016 letter. In its amendments to the Complaint, EPA did not include any non-certification violations: EPA simply increased the number of vehicles from 64,377 to 109,964, for precisely the same type of violations that had been initially subject to the EPA/DOJ determination and pled in the initial Complaint, violations of the certification requirements. Specifically, EPA added two counts to the Complaint (i.e., Counts 9 and 10), that allege certification violations (1,681 in total) for two engine families not included in the initial Complaint.[38] EPA also increased the number of vehicles for seven of the eight counts already pled in the initial Complaint adding a total of 43,906 vehicles to the engine families identified in Counts 1 to 3 and 5 to 8.[39]

DOJ's June 2016 letter did not, nor could it, alter the statute and regulations that provide the criteria and considerations used to determine an appropriate

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substantially similar" (e.g., violations "that go beyond mere harm to the regulatory scheme; that cause excess emissions; that are other than violations of provisions on certification, labeling, incorrect information in manuals, or warranty information violations; or *that are willful, knowing, or otherwise potentially criminal*; or that increase the aggregate number of waived vehicles in the matter to over 125,000 total."). CX 28 at EPA-000546 to -547 (second emphasis added). Tellingly, the letter uses the qualifier "or otherwise potentially criminal" after "willful" and "knowing," signaling that DOJ contemplated the type of willful and knowing behavior that amounts to potentially criminal conduct, which DOJ, and not EPA, has authority to bring in federal court.

[38] *See* Amend. Compl. ¶¶ 126, 134 (alleging that Jinyun and Taotao USA "sold, offered for sale, introduced or delivered for introduction into commerce, or imported (or caused the foregoing acts with respect to)" a total of 1,681 "uncertified recreational vehicles purportedly from" two new engine families "in violation of sections 203(a)(l) and 213(d) of the CAA, 42 U.S.C. §§ 7522(a)(l) and 7547(d), and of 40 C.F.R. § 1068.l0l(a)(l), (b)(5)"). Of the 1,681 vehicles, 1,290 belong to the engine family identified in Count 9, and 391 to the engine family in Count 10.

[39] We further note that this matter was not predicated on harm from actual excess emissions, or criminal or potentially criminal behavior. *See, e.g.*, Init. Dec. at 30 (noting that the violations in this case are based upon regulatory provisions relating to certification and are not seeking a penalty based upon proof that the violative vehicles in fact caused excess emissions), 38 (explaining that to the extent willfulness and negligence were considered it was only for purposes of calculating an appropriate administrative penalty, not for assessing criminal, civil or administrative liability).

administrative penalty under Title II of the CAA. *See* CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2) (listing penalty criteria that shall be considered in determining civil penalties for Title II violations); 40 C.F.R. § 22.27(b) (requiring presiding officers to "consider any civil penalty guidelines issued under the Act"). "Actual or potential harm" and "degree of willfulness and/or negligence," are factors set forth in the Mobile Source Penalty Policy that fall under the criteria CAA section 205(c)(2) requires EPA and the ALJ to consider when assessing the amount of civil penalties for Title II violations.[40] As described in Section IV.C.2.b of this decision, "actual or potential harm" of the violation focuses on whether the violative activity actually resulted, or was likely to result, in excess emissions, not just that emissions actually occurred. The "degree of willfulness and/or negligence" of a violator focuses on the actions of the violator; it is not, however, an analysis of the criminality of the violation. *See* Mobile Source Penalty Policy at 23-24 (describing the analysis of the "degree of willfulness and/or negligence" in the context of determining an appropriate civil penalty, which does not include any analysis of criminality), *see also* U.S. EPA, *EPA General Enforcement Policy #GM-21, Policy on Civil Penalties* 4-5 (Feb. 16, 1984).[41] Therefore, the ALJ did not clearly err or abuse her discretion in considering the Mobile Source Penalty Policy and these factors in her assessment of the penalty. For the reasons stated above, we reject Appellants' argument that the violations were not covered by the EPA and DOJ joint determination.

In sum, we conclude that the Mobile Source Penalty Policy provides an appropriate framework for assessing a penalty for the violations in this matter and we affirm the penalty the ALJ assessed.

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[40] As explained *supra*, Section IV.C.2.b, "actual or potential harm" are factors that inform and help determine the gravity of a violation. "Degree of willfulness and/or negligence" are factors that can also help assess the gravity of a violation and "action[s] taken [by the alleged violator] to remedy the violation." CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2).

[41] The Mobile Source Penalty Policy applies only in the context of administrative enforcement, not in the criminal context.

V. *CONCLUSION AND ORDER*

The Board affirms the ALJ's Initial Decision, including the liability and penalty determinations, and the order on service of process.[42] Accordingly, Taotao USA is jointly and severally liable for the total penalty assessed in this case: $1,601,149.95. Taotao China is jointly and severally liable with Taotao USA, for $247,982.55 of the total penalty; and Jinyun is jointly and severally liable with Taotao USA, for $1,353,167.40 of the total penalty.

Payments shall be made by any method or combination of methods specified on EPA's payment website https://www.epa.gov/financial/makepayment. Payments must be identified with "Docket No. CAA-HQ-2015-8065." If Respondents fail to pay the penalty within the prescribed statutory period after entry of this decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

So ordered.

[42] Arguments raised by Appellants not explicitly addressed in this decision were considered and rejected as meritless.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Final Decision and Order in the matter of Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd., CAA Appeal Nos. 18-01 and 18-02, were sent to the following persons in the manner indicated:

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Dated: ***Mar 05 2020***

Eurika Durr
Clerk of the Board