

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

<b>In the Matter of:</b>	)	
	)	
<b>Taotao USA, Inc.,</b>	)	
<b>Taotao Group Co., Ltd., and</b>	)	<b>Docket No.</b>
<b>Jinyun County Xiangyuan Industry</b>	)	<b>CAA-HQ-2015-8065</b>
<b>Co., Ltd.,</b>	)	
	)	
<b>Respondents.</b>	)	

**RESPONSE TO COMPLAINANT’S MOTION REQUESTING OFFICIAL NOTICE**

COME NOW Respondents Taotao USA, Inc. (Taotao USA), Taotao Group Co., Ltd. (Taotao Group), and Jinyun County Xiangyuan Industry Co. Ltd. (“JCXI”) and file their Response to Complainant’s Motion Requesting Official Notice.

On June 23, 2017, Complainant filed a Motion Requesting Official Notice (the “Motion”), requesting the Presiding Officer take official notice of certain matters. *See generally* Motion Requesting Office Notice. The Motion fails to clearly identify the facts it seeks official notice of. *Id.* Further, the Motion improperly seeks judicial notice of matters subject to reasonable dispute. *Id.* at 1-2.

Federal Rules of Evidence allow a court to take judicial notice of a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(a). The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”) similarly grants the Presiding Officer the authority to take official notice of “any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency.” 40 CFR § 22.22(f). The taking of

"judicial notice of court records" generally has a limited purpose. *Manix Energy Ltd. v. James (In re James)*, 300 B.R. 890, 895 (Bankr. W.D. Tex. 2003). It is often "merely a way of simplifying the process of authenticating documents which would generally require certification under Federal Rules of Evidence 901 and 902, and overcoming rule 1002 best evidence problems. *Id.*

The party requesting judicial notice has the burden of persuading the trial judge that the fact is appropriate for judicial notice. *Id.* at 892. The party must (1) persuade the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source whose accuracy cannot reasonably be questioned, and (2) must also supply the court with the source material needed to determine whether the request is justified. *Id.*; *Hines ex rel Sevier v. Sec'y of HHS*, 940 F.2d 1518, 1526 (Fed. Cir. 1991). Complainant has failed to meet this burden.

**A. The existence of a joint waiver determination is not readily determined by CX026 and CX028, and is subject to reasonable dispute.**

The Motion requests the Presiding Officer to make an official notice that Complainant has met its burden of proof to establish subject matter jurisdiction. *See* the Motion at 1-2. In support of its request, Complainant points to exhibits CX026 and CX028, which include two letters allegedly signed by Karen S. Dworkin concurring to some letters sent to her by Phillip A. Brooks, the Director of Air Enforcement Division in the Office of Enforcement and Compliance Assurance. CX026 and CX028. The letters from Mr. Brooks to which Ms. Dworkin appears to concur with are not in evidence. The exhibits fail to conclusively establish that (1) Ms. Dworkin has the delegated authority to make a waiver determination; (2) the contents of the letters sufficiently meet the requirements of a valid waiver; (3) Mr. Brooks, the Complainant in this matter, has the delegated authority to make a waiver determination; (4) Mr. Brooks has made any such

determination; and (5) the facts relied upon in making such a determination. *See* CX026 and CX028; *see also* Motion to Dismiss for Lack of Subject Matter Jurisdiction at 4-7.

In the Motion, Complainant does not merely request judicial notice of the fact that the EPA and the Department of Justice have the discretionary authority to jointly waive the limit for administrative penalties, nor does it request judicial notice of records that the letters identified as Complainant's exhibits CX026 and CX028 are authentic. *See generally* Motion Requesting Official Notice. Complainant instead requests that the Presiding Officer officially notice that the exhibits constitute a valid waiver of statutory jurisdictional limits, thereby establishing subject matter jurisdiction as a matter of fact, bypassing Complainant's burden of establishing jurisdiction. *See id.* at 1-2. Because the Board, and Administrative Law Judges, on several occasions, has been tasked with determining the validity of similar letters purporting to satisfy the statutory jurisdictional limits of administrative actions, the matter is clearly subject to reasonable dispute. *See In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498 (EAB 2004); *In re Lyon County Landfill*, 8 E.A.D. 559 (EAB 1999); *In the Matter of Strong Steel Prods., LLC*, 2004 EPA ALJ LEXIS 144 (ALJ Nov. 22, 2004).

Furthermore, even though the Motion does not clearly request official notice of the authenticity of the letters, it is important to note that even if the letters were authenticated by judicial notice or otherwise, the letters may still be found inadmissible on other grounds, such as hearsay. Complainant bears the burden of establishing, by a preponderance of the evidence, that the officials with delegated authority from the Attorney General and the EPA Administrator made the necessary waiver determination. *See In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. at 508; *see also Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 and n. 4 (7th Cir. 1979) (the plaintiff has the burden to support allegations of jurisdictional facts by competent proof). Complainant

cannot escape this burden through a request for official notice, without a determination on the validity and admissibility of its proposed exhibits CX026 and CX028.

Therefore, the matter Complainant seeks official notice of is incapable of immediate and accurate determination; Complainant has failed to identify a source whose accuracy cannot be reasonably questioned; and the matter is not only subject to reasonable dispute, it is in fact disputed. *See generally* Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction. Accordingly, Complainant's request for official notice of the matter should be denied.

**B. The Motion fails to specify the facts it seeks the Presiding Officer to officially notice.**

The scope of judicial notice covers only adjudicative facts. *Manix Energy Ltd. v. James (In re James)*, 300 B.R. at 894. The Motion merely lists certain policies and requests judicial notice of the policies, without identifying what facts Complainant seeks the Presiding Officer to judicially notice. *See* the Motion at 2. It is therefore unclear whether Complainant is requesting (1) a judicial notice of the existence and authenticity of the listed EPA policies, (2) a judicial notice that said policies are customarily used to determine penalties in administrative proceedings, (3) a judicial notice that the agency is specialized in applying the policies in penalty calculations, or (4) a judicial notice that said policies must be considered in determining the penalty in this matter. *See id.* at 2. While a court may judicially notice the existence and authenticity of records, such as portions of EPA guidelines, judicial notice of any of the remaining matters stated above is not permitted under the relevant rules. *See* Fed. R. Evid. 201, 40 C.F.R. 22.22; *see also Pentair Thermal Mgmt., LLC v. Rowe Indus.*, No. 06-cv-07164 NC, 2013 U.S. Dist. LEXIS 47390, at \*13 (N.D. Cal. Mar. 31, 2013). It is unclear if the Motion requests the Presiding Officer to determine that the policies are relevant to, or otherwise admissible in, this matter. *Manix Energy Ltd. v. James (In re James)*, 300 B.R. at 896. ("Judicial notice, while it may

cure authentication, does not cure any customary objections involved in the admissibility of evidence, such as relevance, prejudice, or hearsay.”).

Finally, Complainant’s request for official notice of the policies is unnecessary given that Complainant has identified a witness, Ms. Amelie Isin, to testify on the calculation of the proposed civil penalty and penalty calculations in general under the EPA’s Clean Air Act Mobile Source Civil Penalty Policy. *See* Complainant’s Third Motion to Supplement the Prehearing Exchange at 3. It is not clear why Complainant is unable to authenticate the documents at the hearing, through witness testimony. The invocation of the rules on official notice does not relieve Complainant of the duty to gather, organize, and present evidence to the court. *See Manix Energy Ltd. v. James*, 300 B.R. at 896.

**PRAYER**

For the foregoing reasons, Respondents pray that the Presiding Officer deny Complainant’s Motion Requesting Official Notice.

Respectfully Submitted,



08/10/17  
Date

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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing instrument in the Matter of Taotao USA, Inc., et al., Docket No. CAA-HQ-2015-8065, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judge's E-Filing System.

I certify that a copy of the foregoing instrument was sent this day via electronic mail to the following e-mail addresses for service on Complainant's counsel: Edward Kulschinsky at Kulschinsky.Edward@epa.gov, Robert Klepp at Klepp.Robert@epa.gov, and Mark Palermo at Palermo.Mark@epa.gov.

08/10/17  
Date



\_\_\_\_\_  
William Chu