

**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	)	CAA Appeal No. 18-01 & 18-02
Co., Ltd.	)	
	)	
Dkt. No. CAA-HQ-2015-8065	)	
	)	

---

**REPLY IN SUPPORT OF MOTION TO EXTEND**

Taotao USA, Inc. (“Taotao USA”), Taotao Group Co., Ltd. (“Taotao Group”) and Jinyun County Xiangyun Industry Co., Ltd. (“JCXI”) (collectively “Appellants”) submit this reply to Appellee’s Response in Opposition to Appellants’ Motion to Extend. The Reply will show that Appellee’s opposition to the requested extension lacks good faith, and Appellee’s opposition as well as its request to file a surreply has no purpose other than to deny Appellants their rights to due process and to seek a strategic advantage by requesting relief that is neither warranted, nor permitted under the rules, the agency itself is tasked with promulgating.

In their Motion to Extend the Reply Deadline, and Allow Separate Reply Briefs or an Extended Reply Brief (Dkt. No. 15) (hereinafter “Appellants’ Motion”), Appellants requested an extension of the deadline to file their reply brief, with the necessary motion for leave, by fourteen days. Appellants’ Motion at 4. Appellants’ Motion further asked that the reply brief be expanded, in the manner that it was expanded for Appellee in terms of Appellee’s response, or that Appellants be permitted to submit two separate reply briefs. *See id.* In opposing Appellants’ Motion, Appellee’s claim that Appellants’ Motion is procedurally deficient, untimely and fails to provide

sufficient information to warrant the Board's exercise of discretion to allow supplemental briefing. *See* Dkt. No. 16 (“Agency’s Opposition”) at 1. Basically, Appellee argues that Appellants’ Motion is procedurally deficient because it does not give sufficient reasons for the reply brief; it is untimely because it is not made sufficiently in advance of a ten-day deadline; and it fails to file sufficient information because, again, it does not give reasons for the reply brief. *See generally* Agency’s Opposition.

**A. The Agency’s Opposition Lacks Good Faith**

Time and again, Appellants have agreed to requests for extensions made by Appellee (“EPA” or the “Agency”), while the Agency has declined to extend Appellants the same courtesy. *See e.g.* Dkt. No. 2; *c.f.* Dkt No. 7, 9. Further, the Agency claims that Appellants’ Motion to Extend is the latest in a long line of late filings by Respondents, *see* Agency’s Opposition at 5, but fails to disclose the Agency’s own pattern of late filing, which included the filing of a motion the day before the evidentiary hearing. *See* Initial Decision (“The Agency asked to supplement its prehearing exchange for *a seventh time* the day before the hearing.”) (emphasis added). Finally, the Agency has a pattern of opposing Appellants’ motions and then filing its own motions requesting the same relief, and for the same reasons as the ones they opposed. *See e.g.* Respondents’ Motion for Depositions; *c.f.* Complainant’s Motion for Deposition; *see also* Dkt. No. 2; *c.f.* Dkt No. 7. The Agency’s most recent opposition to Appellants’ request for extension similarly lacks good faith.

In their Motion to Extend (Dkt. No. 2), Appellants’ Taotao Group and JCXI requested an extension based on the length of the Initial Decision and the complicated nature of the issues, which they claim “makes it highly improbable for Appellants’ counsel to submit an adequate brief in the time allowed under the applicable regulations, without causing unnecessary confusion as to the

issues that pertain to Taotao USA, Inc.’s (the importer), liability and penalty assessment determination, and those that solely pertain to Taotao Group and JCXI (the alleged manufacturers).” Dkt. No. 2 at 2. As stated above, the Agency opposed the extension. *See id.* at 3. However, shortly thereafter, the Agency filed its own request for an extension based on the same or similar reasons for an extension, as those stated in Appellants’ request. *See Agency’s Motion to Consolidate Appeal, Allow a Consolidated, Extend the Response Deadline, and Authorize Service by Mail (Agency’s Motion to Extend)* (Dkt. No. 7, 12) at 3-4 (“The issues presented for appeal by Taotao USA, Taotao Group, and JCXI raise intricate matters of regulatory interpretation in the context of rigorously contested litigation and a complex factual background . . . Complainant requests an extension of time to file its response by 14 days to Wednesday, October 24, 2018. The request is reasonable given the complex, overlapping issues presented in the appeals.”).

Similarly, Appellee now opposes Appellants’ request for an expanded reply brief, while the Agency itself requesting an expanded response. *See Agency’s Opposition* at 7 (arguing that the filing of two briefs cannot be a means of circumventing limitations on length that the EAB might otherwise require.”); *c.f.* *Agency’s Motion to Extend* (Dkt. 7, 12) at 3 (requesting the length limitation for the consolidated response brief “be extended to a maximum of 28,000 words or alternately 60 page” equating . . . “the length to which Complainant would be entitled were it to file two separate briefs in response.”). Therefore, the Agency basically continues to request special treatment from the Board and opposes the same treatment to Appellants.

In its Opposition, the Agency requests an opportunity for the Agency to surreply, without providing any reasons or even authority to do so, while simultaneously opposing Appellants’ Motion on the grounds that the motion fails to provide sufficient reasons for supplementary briefing, and arguing that supplemental briefing is unnecessary). *See Agency’s Opposition* at 6, 8.

Appellants, in fact, have the right to submit a reply, with a motion for leave, as indicated under the applicable rules, and in the Board’s Practice Manual. *See* EAB Practice Manual (Aug. 2013) at 41 (recognizing that the reference to “all other briefs” in 40 C.F.R. § 124.19(d)(3) includes reply briefs); *c.f.* 40. C.F.R. § 22.30 (a)(3) (similar language referencing “all other briefs.”); *see also* 40 C.F.R. § 22.4(a)(2) (The EAB has the authority to “do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding . . .”); EAB Practice Manual, Pleading Templates, A-11 (“Motion for Leave to File Reply Brief Under 40 C.F.R. *parts 22* or 124”) (emphasis added).<sup>1</sup>

On the other hand, the Agency has no such right under the same rules, and is attempting to create such a right by circumventing its own rules in an effort to cause undue prejudice to Appellants’ and their procedural rights.

For the foregoing reasons, the Agency’s request for surreply, as well as its reasons for opposing Appellants’ Motion demonstrates a lack of good faith, and the Agency continues to make requests and oppositions for no purpose other than to gain an unwarranted strategic advantage over Appellants.

**B. Appellants’ Motion is not procedurally deficient**

In support of its unsubstantiated argument that Appellants’ Motion is procedurally deficient, the Agency argues that the request for extension fails to provide sufficient basis for the reply brief. *See* Agency’s Opposition at 4, 6. More specifically, the Agency argues that Appellants’ Motion requests an extension but fails to fully provide reasons for the reply. *Id.* at 3. In making the foregoing argument, the Agency relies on 40 C.F.R. 22.16(a), which states that all motions shall state their grounds with particularity. *See* Agency’s Opposition at 4 (citing 40 C.F.R.

---

<sup>1</sup> The template shows that said motions are filed by Appellant or Petitioner.

22.16(a)). The Agency's argument confuses Appellants' Motion, and its opposition on the grounds of procedural deficiency lacks merit.

Contrary to the Agency's position, Appellants' request for extension need only state the grounds for the requested extension with particularity. *See* 40 C.F.R. § 22.16(a)(2); *see also* 40 C.F.R. § 22.7(b). Here, Appellants' Motion clearly states the grounds for the requested extension. *See generally* Appellants' Motion. Appellants' Motion points out that a 10-day deadline typically applies to an appellant's reply to a 30-page or 14,000-word response, whereas the Agency's response is twice the length said typical response. Appellants' Motion at 4. Furthermore, Appellants' Motion states that "given the length of the response brief, and the confusion on issues caused by the submission of a single response," it is highly improbable for Appellants' counsel to submit an adequate brief in the time allowed under the applicable regulations. *Id.* Therefore Appellants' Motion sufficiently states its grounds with particularity.

The Agency's argument that the grounds for Appellants' Motion, which requests an extension to file their reply brief, and the motion for leave thereof, should state the reasons for the reply with particularity are unfounded. Appellants' do not need to state their grounds for the reply, those grounds need only be stated in their motion for leave to submit a reply, which the Board may then grant or deny. *See* EAB Practice Manual (citing 40 C.F.R. § 124.19) ("In its motion requesting leave to file a reply, the petitioner must specify those arguments in the response to which the petitioner's seeks to reply and the reasons that support the petitioner's need to file a reply to those arguments.").

**C. Appellants' Motion is not untimely.**

The Agency argues that Appellants did not submit their request for extension sufficiently in advance. *See* Agency's Opposition at 5. Basically, the Agency claims that Appellants' had 10

days to reply to their response, *see id.*, and whereas Appellants' Motion was filed 3 days in advance of the deadline, waiting a week (which included a weekend) to file a request for extension was untimely. *See id.* at 5, n. 2. In the Agency's position, therefore, Appellants should have reviewed the Agency's 85-page response and filed a request for extension in less than 5 business days. Such a position is absurd, and challenges the Agency's own motion to extend (see below).

As noted in Appellants' Motion, on September 11, 2018, the Board ordered the Agency to submit a response by October 10, 2018. *See* Appellants' Motion at 3; *see also* Dkt. No. 4. At the time of this Order, Appellant Taotao USA had already submitted its appeal brief, and the Agency knew that Taotao Group and JXCI would be filing a separate brief on September 25, 2018. Dkt. No. 3; Dkt. No. 4. Nevertheless, the Agency filed its Motion for Extension on September 27, 2018, twenty-one days after Taotao USA filed its appeal and brief (Dkt. No. 3), seven days after Taotao Group and JXCI had filed their appeal brief (Dkt. No. 5), and sixteen days after the Order setting the response deadline (Dkt. No. 4), for reasons that existed at the time Appellant Taotao USA submitted its notice and appeal brief, and Appellants' Taotao Group and JXCI submitted their motion for extension of the deadline of their appeal briefs. *See* Appellants' Motion to Extend at 3-4.

The Agency therefore claims that Appellants' motion, submitted about a week after the response is untimely, but their similar motion, which was filed about 21 days after Taotao USA's appeal brief, sixteen days after the Order setting response deadline, and seven days after all appeal briefs had been filed, was somehow timely. Such a hypocritical view of the rules is unwarranted and unseemly.

Notably, although the Agency claims that Appellants are wrong in their assertion that the governing rules do not clearly provide a deadline for the filing of briefs, the Agency points to rules

applicable to prehearing motions, rather than those applicable to appeal briefs. *See* Agency's Opposition (Dkt. No. 16) at 5 (pointing to 40 C.F.R. §§ 22.30, 22.16(b) in support of its claim that the rules clearly provide reply brief deadlines in this appeal). As stated above, the Agency claims that "a ten-day deadline for a reply to be filed is clearly provided for in the governing rules." The Agency supports such an assertion by stating that section 22.30 (e)(1) provides that all motions made during the course of an appeal shall conform to 40 C.F.R. § 22.16, while section 22.16(b) states the following: "The movant's reply to any written response must be filed within 10 days after service of such response . . ." *See* Agency's Opposition at 5. Contrary to the Agency's assertion of the "clearly provided deadline," *see id.*, while section 22.30 does point to section 22.16 for motions on appeals, 22.16(b) is titled "Response to *motions*." 40 C.F.R. § 22.16(b) (emphasis added). Therefore, the 10-day deadline stated in section 22.16(b), only pertains to a movant's reply to responses *to motions*, not to an appellant's reply to responses *to appeals*.

Further, Appellants' Motion was timely because it was filed sufficiently in advance of even a ten-day deadline. *See* Dkt. No. 15. As stated in Appellants' Motion, the Agency's response (which is more than twice the length of a typical response) was filed on October 24, 2018, and an unredacted version of it was received in the mail on October 25, 2018. Appellants' Motion at 3. It took Appellants merely five business days to review the lengthy response, and determine an initial need for a reply. *Id.* It is unfair to ask Appellants to provide all the reasons for a motion for leave to submit a reply, within one-week of receiving an expanded response, when the rules allow 10 days to provide said reasons for a reply to a response that is half the size of the Agency's response.

**D. The Agency's Request for a Sur-reply is Unfair, prejudices Appellants' rights to this appeal, and serves no purpose other than to gain an unwarranted advantage over Appellants.**

The governing rules, and the Board's Practice Manual, provides appellants or petitioners with the opportunity to submit reply briefs, provided that the brief is accompanied by a motion for

leave, which the Board may grant in its discretion. *See* EAB Practice Manual at 41; *see also* 40 C.F.R. § 124.19. No such opportunity is available to Appellee, under those rules. A sur-reply is only permitted, upon motion, in permit appeals, excluding PSD or NSR appeals, where the time to reply is 15-days, and where an appellant has a right to file a reply brief without leave. *See Id.* Clearly, that is not the case here, as the Agency, itself has pointed out in its opposition to Appellants' Motion. *See* Agency's Opposition at 5. Therefore, the Agency has no right to a sur-reply brief, and Appellants' respectfully request that no such right be created for, or given to, the Agency in the interest of justice and impartiality. *See* 40 C.F.R. § 22.4(a)(2).

### **CONCLUSION**

Because of the Agency's unwarranted opposition to a request for extension of the appeal brief, Appellant Taotao USA was forced to file an appeal brief without an extension, which was later granted to Taotao Group and JCXI, as well as the Agency.<sup>2</sup> Again the Agency is opposing the requested relief without any justified basis for doing so. The Agency has already submitted its response, which was twice the size of a response permitted under the governing rules, yet the Agency is opposing, not a motion for leave to file a brief (which will be filed in the future), but an extension to allow Appellants time to file such a motion for leave based solely on a claim that the requested extension should have been filed less than a week after the lengthy response was received. However, regardless of whether the motion to extend was requested a day or two after receiving the Agency's response, or in about a week, as here, the requested extension will not, and cannot prejudice the Agency, whose own briefing is now complete, given that the reply will not raise any new issue but merely address new issues and arguments raised in the Agency's response. Therefore, Appellants' respectfully request the Board to grant their motion.

---

<sup>2</sup> Because the Agency had objected to an extension to the appeal briefs, Taotao USA submitted its brief without requesting an extension, in case the opposed extension to Taotao Group and JCXI was not granted.



Respectfully Submitted,

/s/William Chu

William Chu

Texas State Bar No. 04241000

The Law Offices of William Chu

4455 LBJ Freeway, Suite 1008

Dallas, Texas 75244

Telephone: (972) 392-9888

Facsimile: (972) 392-9889

wmchulaw@aol.com

Date: November 5, 2018

**Attorney for Appellants**

**CERTIFICATE OF SERVICE**

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.

Date: November 5, 2018

/s/William Chu

William Chu