

**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 No. 18-01 & 18-02

**COMPLAINANT'S RESPONSE IN OPPOSITION TO APPELLANTS' MOTION TO
EXTEND THE REPLY DEADLINE, AND ALLOW SEPARATE REPLY BRIEFS OR AN
EXPANDED REPLY BRIEF**

By motion filed with the Environmental Appeals Board (the Board), Taotao USA, Inc.(Taotao USA), Taotao Group Co., Ltd. (Taotao Group), and Jinyun County Xiangyun Industry Co., Ltd. (JCXI) (collectively "Respondents") request that the Board extend the deadline for Respondents to file reply briefs to November 19, 2018, and allow Taotao Group and JCXI to file their own reply brief, separate from the brief to be filed by Taotao USA, "or alternatively, a single expanded brief that accounts for the length of the response." Motion to Extend the Reply Deadline, and Allow Separate Reply Briefs or an Extended Reply Brief (Motion to Extend).

The Respondents' motion is procedurally deficient, untimely and fails to provide sufficient reason for the Board to exercise its discretion to grant the relief Respondents seek. Therefore, for reasons discussed below, the Board should deny the Motion to Extend and the relief sought.

Alternatively, the Board should provide for a single reply brief with a limitation on length and that is confined to new issues, with an opportunity for Complainant to surreply. *Infra*, at p.3.

I. Background

On August 7, 2018, Chief Administrative Law Judge Susan L. Biro issued an Initial Decision in this matter assessing a penalty against Respondents jointly and severally for violations of Sections 203(a)(1) and 213(d) of the Clean Air Act, 42 U.S.C. §§ 7522(a)(1) & 7547(d). On September 6, 2017, Taotao USA, Inc. filed a Notice of Appeal and brief in CAA Appeal No. 18-02 identifying four issues for appeal. Also on September 6, 2017, Taotao Group and JCXI filed a Notice of Appeal in CAA Appeal No. 18-01, listing six issues for appeal, with a motion requesting additional time in which to file their appeal brief.

On September 11, 2018, the Board issued its “Order Granting Motion for Extension of Time and Setting Deadline for Responses,” in which it granted Taotao Group and JCXI’s motion, and extended the deadline for Complainant’s responses to both CAA Appeal 18-01 and CAA Appeal 18-02 to October 10, 2018. On September 25, 2018, Complainant filed a procedural motion that included a request to consolidate the appeals and allow for Complainant to file a single response brief in opposition. Motion to Consolidate Appeals, Allow a Consolidated Response, Extend the Response Deadline, and Authorize Service by Mail. The Board granted the Complainant’s Motion in its entirety. Pursuant to 40 C.F.R. § 22.12(a) both appeals are now consolidated. Order Consolidating Appeals, Allowing a Consolidated Response, Extending the Response Deadline, and Authorizing Service by Email (Consolidation Order), September 28, 2018, at p. 3. The Complainant’s Response Brief in Opposition (Response Brief) was timely filed with the Board on October 24, 2018, and served on Respondents on that date by email and by UPS Mail, all in accord with the procedures for service under the Consolidation Order, and Part 22 rules and the Board’s guidance on filing and serving briefs containing confidential business information.

II. Argument

For reasons discussed below, the Motion to Extend is procedurally deficient,

untimely and fails to provide sufficient information to warrant the Board's exercise of discretion to allow supplemental briefing. Complainant respectfully requests that the Board deny Respondents' Motion and the requested relief in its entirety.

Alternatively, Complainant requests that the Board: (a) provide one reply brief on behalf of Respondents; (b) provide a reasonable limitation on length of the reply brief, for example 20 pages in length, or a word-count equivalent, (c) provide limitations that confine the issues and arguments raised to those raised in Complainant's Response Brief in Opposition, and not previously addressed in Respondents' Appeal Briefs, and (d) provide Complainant an opportunity to file a surreply subject to the same limitation on length and confined to issues raised in the reply brief. This alternative request is consistent with the Consolidation Order, and the reasons for consolidation of matters in one appeal, and the fact that common counsel represents Respondents in this proceeding and has done so for the entire duration of the proceeding before the ALJ. A single brief with a reasonable limitation on length and confined in scope also makes sense in light of the extensive briefing before the Board in the initial appeal briefs and Response Brief submitted to date and serves in the interest of efficiency and finality of this matter.

1. Respondents' Motion is Procedurally Deficient

Respondents' Motion to Extend goes to considerable length to explain the history of the proceeding before the Board¹, but in five pages of explanation there is barely a whisper as to why

¹ Respondents state that the Response Brief consists of about 30,000 words, excluding the table of contents, table of authorities, certificates and signatures. Respondents further state that they are not challenging our brief based on length. Complainant would inform the Board that the number of words in the Response Brief is in compliance with the word limitation established by the Board in the Consolidation Order. Complainant made this determination of compliance through the use of the WordCount feature provided in the MS Word program that was used, and following the procedure set out in 40

supplemental briefing is needed. The only reference in five full pages is the following: “The response brief raises several new issues that Respondents did not have the opportunity to address, which will be more fully explained in their motions for leave, and accompanying briefs.” Motion to Extend at 3. The reference to “several new issues” without further particulars is inadequate in that it fails to put Complainant and the Board on notice as contemplated under the governing rules and is for that reason procedurally deficient warranting denial of the relief requested. This is further explained below.

40 C.F.R. § 22.30 governs the appeal from an Initial Decision of an Administrative Law Judge. 40 C.F.R. § 22.30(e)(3) states that a party must file a motion for extension sufficiently in advance of the due date to allow other parties to have a *reasonable opportunity to respond* to the request and to provide the Board with a reasonable opportunity to issue an order. 40 C.F.R. § 22.30(e)(3) (*emphasis added*); see also 40 C.F.R. § 22.7(b). In the Motion to Extend, Respondents refer to “several new issues” that will be more fully explained in further motions. This vague reference falls far short of providing Complainant with a reasonable opportunity to respond in that it fails to provide Complainant with sufficient information on which to formulate a response other than opposing until more information is revealed, and the Motion to Extend is procedurally deficient on that basis. In addition, the absence of information other than a reference to “several new issues” fails to provide the Board with a reasonable opportunity to issue an order and the Motion is procedurally deficient on that basis. 40 C.F.R. § 22.30(e)(3). See also 40 C.F.R. 22.16(a)(“all motions shall ... (2) state the grounds therefore with particularity”).

2. Respondents’ Motion is Untimely

C.F.R. § 22.30 (a)(3) (filers may rely on the word processing used to determine the word count and may exclude certain portions of the brief, and must include other portions of the brief).

The Respondents seek to extend the time for filing reply briefs by 14 days from November 5, 2018 to November 19, 2018. Motion to Extend, at p. 1. This extension should be denied because it was not timely made in accordance with governing regulations. This is further explained below.

The Motion to Extend is the latest in a long line of late filings by Respondents. See Initial Decision at p. 5, fnt 11 (ALJ notes frequent late filings without regard for directions in previous ALJ orders). Respondents assert that the rules do not clearly provide a deadline for filing of reply briefs in 40 C.F.R. Part 22. Motion to Extend, at 1 fnt 1. Respondents are wrong – a ten-day deadline for a reply to be filed is clearly provided for in the governing rules. 40 C.F.R. § 22.30, governs motions on appeal and provides that all motions made during the course of an appeal shall conform to 40 C.F.R. § 22.16, unless otherwise provided. 40 C.F.R. § 22.30 (e)(1). 40 C.F.R. § 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 and shall be limited to issues raised in the response.” Clearly, a timely reply brief in this proceeding would have to be filed with the Board not later than November 5, 2018. Respondents are aware of this deadline. See Motion to Extend, at p.1, and yet Respondents waited over a week to contact Complainant with respect to seeking a time extension.²

² Complainant's Response Brief was filed with the Board on October 24, 2018, and served on Respondents on that date by email and by UPS Mail. Under the rules, a reply brief would have to be filed within ten days of October 24. 40 C.F.R. § 22.7(a) (the computation of time includes Saturdays, Sundays, and Federal holidays) When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day. *Id.* Under the rules, the computation of time in this proceeding require that a reply brief would need to be filed by Monday, November 5, 2018 in order to be timely. Respondents refer to receiving the unredacted version of the Response Brief the next day by mail. Motion to Extend at 3. This is immaterial in that the only difference between the redacted version of the Response Brief served on October 24 and the mailed version Respondents received the following day was a mere handful of redacted words that Complainant removed to comply with rules with respect to confidentiality. Also, Respondents refer to “five business days, Motion to Extend at 3, which is immaterial in that the rules count business days and Saturdays Sundays and Federal holidays the same. 40 C.F.R. § 22.7(a).

The rule requires sufficient time in advance of the due date to allow an opponent a reasonable opportunity to respond to the request and to provide the Board with a reasonable opportunity to issue an order. 40 C.F.R. § 22.30(e)(3). Respondents' unreasonable delay makes the Motion to Extend untimely because it resulted in there being insufficient time for Complainant to reasonably respond. The unreasonable delay is untimely because it does not provide the Board with a reasonable opportunity to issue an order.

3. Leave to File a Reply Brief is Discretionary with the Board and Supplemental Briefing is not Warranted in this Proceeding

Part 22 rules do not provide for reply briefs as a matter of right. The provisions of 40 C.F.R. § 22.30 provides for an initial notice of appeal and describes the content thereof. 40 C.F.R. § 22.30(a)(1)(iii)(the content of the appeal brief shall include a summary of the order or ruling appealed from, a statement of the issues presented for review, the relevant facts, and argument on the issues presented) The rule further provides for the appellee's filing of a response brief. 40 C.F.R. § 22.30(a)(2). Pursuant to 40 C.F.R. § 22.30(a)(2), "[f]urther briefs may be filed only with the permission of the [Board]." *Id.* The Board clearly has discretion to grant requests to file reply and/or surreply briefs.

In this proceeding, the Board should decline to exercise discretion to grant supplemental briefing. The Respondents have not provided sufficient information to warrant otherwise. There has been extensive briefing to date on the issues presented on appeal and Respondents have not identified new issues or arguments that could not have been presented in the initial appeal briefs. Also, the Board should deny the request for supplemental briefing in the interest of finality, efficiency and the effective use of its resources.

In actuality, the Response Brief does not raise a single "new issue." Each of the issues that the Response Brief addressed and each of the associated arguments was directly responsive to a specific issue and associated argument raised by the Respondents in their initial appeal briefs.

4. Leave to File a Separate Brief on Behalf of Taotao Gropu and JCXI Should be Denied

Respondents request to submit two separate reply briefs is objectionable. As the ALJ noted, the Respondents are joined in the same business enterprise under the ownership of the Cao family. Initial Decision at 39. As noted by EPA in support of Complainant's Motion for Consolidation of the Appeals in this proceeding before the Board, the matter at bar arises from a single proceeding before the ALJ that involves the same parties all of whom are represented by common counsel. See Consolidation Order at 2. The matter involves a common set of facts and presents common questions of facts and law. *Id.* Serving two reply briefs would thwart steps the Board has taken to expedite and simplify its consideration when it ordered the appeals to be consolidated and would be a procedural step backward in that regard. Further, the filing two briefs cannot be a means of circumventing limitations on length that the EAB might otherwise require.

CONCLUSION


Respondents' Motion to Extend fails because it is procedurally deficient and untimely. It further fails to identify new issues or other reasons that are sufficiently compelling as to warrant further briefing in this proceeding. Respondents have further failed to explain why issues were not, and could not have been, made in their initial appeal briefs, and why additional briefing is necessary for the resolution of this matter or how such further

briefing would assist the Board in its deliberations. To the further extent that Respondents' effort appears aimed at raising issues and supplementing arguments that could, and should, have been raised and made in their appeal briefs. For all of the foregoing reasons, the Motion to Extend and relief requested therein should be denied.

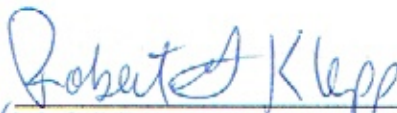
Alternatively, Complainant requests that the Board limit Respondents to a single reply brief, limited to a reasonable length, confined as to the issues and arguments raised, with an opportunity for Complainants to surreply.

Respectfully Submitted,

11/5/18
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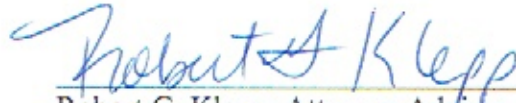
CERTIFICATE OF SERVICE

I certify that the Complainant's Opposition to Motion to Extend the Reply Deadline, and Allow Separate Reply Briefs or an Extended Reply Brief in In re Taotao USA, Inc., et al., Docket No. CAA-HQ-2015-8065, CAA Appeal Nos. 18-01 & 18-02, was filed and served on the Environmental Appeals Board this day through the Environmental Appeals Board E-Filing System.

I certify that the foregoing Motion was sent this day by email for service on Respondents' counsel identified below at the email addresses listed below:

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