IN RE JULIE'S LIMOUSINE & COACHWORKS, INC.

CAA Appeal No. 03-06

REMAND ORDER

Decided July 23, 2004

Syllabus

Region IV appealed from an initial decision entered by Administrative Law Judge ("ALJ") Barbara A. Gunning, dismissing Region IV's complaint against the Appellee, Julie's Limousine & Coachworks, Inc. ("Julie's Limousine"), for lack of subject matter jurisdiction. The complaint alleged violations of Clean Air Act ("CAA") section 609 and its implementing regulations, related to the servicing of motor vehicle air conditioners. Section 113(d)(1) of the CAA, however, imposes a presumptive twelve-month statute of limitations on such administrative enforcement actions. In order for the U.S. Environmental Protection Agency ("EPA" or "Agency") to initiate an administrative penalty action more than twelve months after the occurrence of a violation, as it did in this case, section 113(d)(1) requires that the Administrator of the EPA and the U.S. Attorney General must jointly determine that a waiver of the statutory limitation is appropriate. The ALJ ruled that Region IV had failed to demonstrate the existence of a properly authorized waiver and, therefore, found that EPA did not have jurisdiction to pursue the enforcement action against Julie's Limousine.

While finding that the Administrator may delegate his or her waiver authority under section 113(d)(1), and has in fact done so, the ALJ concluded that Region IV had not adequately shown that the waiver determination in this case was made by a person with delegated authority to do so. On appeal, Region IV offered two arguments in defense of the validity of EPA's waiver determination. First, Region IV argued that the Director of EPA's Air Enforcement Division ("AED"), in the Office of Regulatory Enforcement ("ORE") in the Office of Enforcement and Compliance Assurance ("OECA"), had the independent authority to make waiver determinations, and exercised that authority in this case when he concurred and joined in Region IV's request for a waiver under section 113(d)(1). Recognizing that the relevant delegation also allows a Regional official to make waiver determinations in certain circumstances (with OECA concurrence), Region IV argued in the alternative that the appropriate Regional official had, in fact, made the required determination in this case, despite the lack of contemporaneous documentation. Accordingly, Region IV concluded that OECA's concurrence completed EPA's waiver process.

The Appellee maintained that the Director of AED lacked authority under the relevant EPA delegation to independently make a waiver determination in this instance on behalf of the Agency. Additionally, Appellee argued that Region IV was estopped from advancing the position that the Regional official with delegated authority made the section 113(d)(1) waiver determination because Region IV had not introduced this argument during the early stages of the proceedings below. The Appellee also argued that, even if not estopped, Region IV's second argument must fail because the evidence Region IV offered

to demonstrate that the appropriate Regional official made the waiver determination was inadequate. Finally, the Appellee argued below, and again on appeal, that certain of Region IV's evidence - including the affidavit of the Regional official who allegedly made the waiver determination - was untimely and therefore inadmissible. The ALJ did not rule on the issue of admissibility in the proceedings below.

Held: The Board found that, considering the language of the relevant delegation, Region IV had failed to provide a defensible explanation for its position that the Director of AED had the authority in this instance to independently make the required waiver determination. Additionally, the Board concluded that the principle of judicial estoppel did not apply in this case because, even accepting the Appellee's interpretation of Region IV's arguments during the proceedings below, Region IV had not advanced positions that were sufficiently incompatible to create the perception that the tribunal below had been misled. The Board observed also that Region IV's argument that OECA had independently made the waiver determination ultimately did not succeed below; thus, the Board concluded that Region IV had not previously prevailed in a manner that meaningfully prejudiced the Appellee or threatened the integrity of the tribunal.

Additionally, the Board concluded that Region IV could rely on EPA's Delegations Manual to demonstrate the existence of a delegation of authority from the Regional Administrator to the Director of Region IV's Air, Pesticides & Toxics Management Division, and that Region IV was not required to produce contemporaneous documentation of the Regional official's determination in order to prove that the Regional official had made the waiver determination.

Accordingly, the Board concluded that the Regional official's affidavit was a critical piece of evidence, and that it was error on the part of the ALJ not to rule on its admissibility. Therefore, the Board remanded the case to the ALJ with instructions for the ALJ to rule on the admissibility of the challenged evidence and to engage in additional proceedings, as necessary, consistent with the Board's opinion.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

This is an appeal by the U.S. Environmental Protection Agency ("EPA" or "Agency"), Region IV, from an Initial Decision by Administrative Law Judge Barbara A. Gunning ("ALJ"). Region IV initiated the underlying Clean Air Act ("CAA" or "Act") penalty action on June 28, 2002, alleging that Julie's Limousine & Coachworks, Inc. ("Julie's Limousine")[1] violated section 609 of the CAA and EPA's implementing regulations governing the service and repair of motor vehicle air conditioners ("MVACs").[2]

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[1] Julie's Limousine is a limousine service company located in Clearwater, Florida. We also refer to Julie's Limousine as "Respondent" in the context of the proceedings below, and as "Appellee" in the context of this appeal.

[2] *See* 40 C.F.R. part 82, subpart B.

In her Initial Decision, the ALJ dismissed the complaint, finding that Region IV had failed to demonstrate that EPA had jurisdiction to initiate the penalty proceeding. *See* Order on Respondent's Motion to Dismiss (Nov. 14, 2003) (hereinafter "Initial Decision").[3] At issue was the presumptive twelve-month statute of limitations on administrative penalty actions for CAA violations, and whether EPA had validly obtained a waiver of this time limitation pursuant to CAA section 113(d)(1) prior to initiating the penalty action against Julie's Limousine. *See* CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). Specifically, the ALJ found that Region IV failed to establish the existence of a valid EPA-Department of Justice ("DOJ") joint determination, as required under section 113(d)(1). The ALJ's conclusion in this regard grew from her finding that EPA had failed to show that the Agency officials with delegated authority to do so had made the required determination. On appeal, Region IV argues that the ALJ's findings of fact and conclusions of law are erroneous, and asks that the Environmental Appeals Board ("Board") reverse the Initial Decision. Julie's Limousine opposes Region IV's appeal.

For the reasons described below, the Board remands the case to the ALJ for a ruling on the admissibility of the affidavits that Region IV submitted after conclusion of the evidentiary hearing, and for further proceedings, as necessary, consistent with the Board's opinion.

I. *BACKGROUND*

A. *Statutory Background*

The Clean Air Act, among other things, authorizes EPA to seek administrative penalties for violations of the regulations promulgated pursuant to section 609 of the Act. *See* CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). EPA, however, does not have unconstrained authority to pursue such administrative remedies. CAA section 113(d)(1) imposes certain limitations on EPA's authority, including the following limitation relevant to this appeal:

> The Administrator's authority under this paragraph shall be limited to matters where * * * the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a * * * longer period of violation is appropriate for administrative penalty action. Any such

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[3] When a decision to dismiss disposes of "all the issues and claims in the proceeding," as was the case here, the decision constitutes an initial decision. 40 C.F.R. § 22.20(b)(1).

> determination by the Administrator and the Attorney General shall not be subject to judicial review.

CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). In *In re Lyon County Landfill*, the Board had occasion to interpret the statutory language regarding matters involving a "longer period of violation." *See In re Lyon County Landfill*, 8 E.A.D. 559 (EAB 1999), *aff'd*, No. 02-907, 2004 U.S. Dist. LEXIS 10650 (D. Minn. June 7, 2004). We found that this provision authorizes EPA to initiate administrative penalty actions more than twelve months after a violation occurs, as long as EPA and DOJ make the required joint determination. *Id.* at 575.

B. *Factual and Procedural Background*

The manner in which this issue unfolded in the proceeding below is particularly convoluted. It involved, over the course of the proceeding, a complaint, a response, and three sequential motions to dismiss the case for lack of subject matter jurisdiction (as well as a motion for reconsideration of the ALJ's order denying Respondent's second motion to dismiss).[4] The relevant factual and legal arguments described below evolved over the course of these proceedings.

On June 28, 2002, Region IV filed its complaint against Julie's Limousine alleging several violations of section 609 and EPA's implementing regulations.[5] The Respondent filed an answer on July 25, 2002, denying or claiming insufficient knowledge as to the allegations in Region IV's complaint. Additionally, the Respondent challenged EPA's jurisdiction, asserting that the complaint was time-barred because of the section 113(d)(1) twelve-month limitation on the initiation of administrative penalty actions. Answer at 4. The answer was followed, on August 9, 2002, by a Motion to Dismiss or in the Alternative for a Bill of Particulars ("Motion to Dismiss I"), in which the Respondent argued, among other things, that Region IV had produced no proof that EPA and the Attorney General had made the joint determination required under CAA section 113(d)(1). *See* Motion to Dismiss I at 11; Init. Dec. at 3.

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[4] There was also a telephone conference for which it appears that there is no transcript in the record. *See* Init. Dec. at 7.

[5] The complaint, which sought $43,018.50 in penalties, included four counts. Count I alleged that Respondent used an uncertified technician from January 1, 1997, until June 17, 1998, to service and repair MVACs, in violation of CAA § 609(c). Count II alleged that Respondent used unapproved refrigerant recycling or recovery equipment from January 1, 1997, until July 22, 1998, in violation of CAA § 609(c). Count III alleged that Respondent failed to provide timely certification for its MVACs recovery equipment, in violation of CAA § 609(d). Count IV alleged that Respondent failed to respond truthfully to an official EPA information request letter, in violation of CAA § 114(a). *See generally* Complaint.

In its opposition to Motion to Dismiss I, Region IV claimed generally that EPA and DOJ had made the required determination, and provided photocopies of correspondence between EPA and DOJ allegedly reflecting that determination. *See* Complainant's Memorandum in Response to Respondent's Motion to Dismiss and Bill of Particulars ("Response I"). The correspondence consisted of three documents: (1) a February 15, 2002 Memorandum from Phyllis P. Harris, Regional Counsel and Director of Region IV's Environmental Accountability Division, to Bruce B. Buckheit, Director of EPA's Air Enforcement Division ("AED"), Office of Regulatory Enforcement ("ORE"), Office of Enforcement and Compliance Assurance ("OECA"), requesting a section 113(d)(1) waiver in the Julie's Limousine case ("Harris Memorandum");[6] (2) a March 5, 2002 letter from Mr. Buckheit, addressed to the Assistant Attorney General for the Environmental and Natural Resources Division, DOJ, stating that AED "concurs and joins" with Region IV in requesting a waiver of the statutory time limitation on administrative enforcement actions ("Buckheit Letter"); and (3) an April 8, 2002 letter to Ms. Harris from Ellen M. Mahan, Assistant Section Chief, Environmental Enforcement Section, DOJ, concurring with EPA's request to commence an administrative enforcement action ("DOJ Letter").[7] On the basis of the evidence that Region IV provided, the ALJ denied Respondent's Motion to Dismiss I.[8]

On April 9, 2003, Julie's Limousine filed Respondent's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction ("Motion to Dismiss II"), in which it argued that Region IV had failed to demonstrate that Mr. Buckheit had the delegated authority to make the determination required by the Act, and therefore that the waiver was ineffective. Specifically, Respondent argued that Region IV had provided no proof that the Assistant Administrator for OECA had redelegated authority to Mr. Buckheit, and that, in any event, the Assistant Administrator's authority was limited to multi-Regional cases, cases of national significance, and nationally managed programs, and that the Julie's Limousine case did not fall into any of these categories. Motion to Dismiss II at 7. According to Respondent, in cases other than multi-Regional, nationally significant, or nationally managed

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[6] The Memorandum from Ms. Harris was signed on her behalf by her Deputy Bill Anderson, and described the Julie's Limousine case, requested a waiver of the twelve-month limitation in CAA § 113(d)(1), and expressed Region IV's view that the "case represents an appropriate use of this waiver authority." Harris Memorandum at 1;*see also* Brief in Support of Appeal ("App. Br.") at 6.

[7] Mr. Buckheit and Winston A. Smith, the Director of Region IV's Air, Pesticides & Toxics Management Division ("APTMD"), were copied on this correspondence. *See* DOJ Letter at 2.

[8] *See* Order Denying Respondent's Motion to Dismiss and Order Denying Respondent's Motion for Bill of Particulars (ALJ, Nov. 26, 2002). After the Parties engaged in a prehearing information exchange, an evidentiary hearing was scheduled for May 5 through May 8, 2003. On April 1, 2003, Region IV filed Complainant's Motion for Partial Accelerated Decision and Motion to Strike Affirmative Defenses and Memorandum of Law in Support, along with a Motion in Limine, all of which were denied. *See* Order on Complainant's Motion for Partial Accelerated Decision, Motion to Strike Affirmative Defenses, and Motion In Limine (May 2, 2003).

cases, the relevant authority rests with the various Regional Administrators rather than with OECA. In this regard, the Respondent noted that Region IV had provided no evidence to demonstrate that the Regional Administrator had made a valid waiver determination.[9] *Id.* Region IV opposed the motion, observing that paragraph 3.e of Delegation 7-6-A in EPA's Delegations Manual ("EPA Delegation 7-6-A") gave Mr. Buckheit authority to "concur in any determination" regarding 113(d)(1) waivers. *See* Complainant's Response to Respondent's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction ("Response II") at 1. Region IV also cited a June 6, 1994 Memorandum from Steven A. Herman, the former Assistant Administrator for OECA, concerning redelegations of enforcement authority.[10] *Id.* at 2. The ALJ denied the Respondent's Motion to Dismiss II, finding that Region IV had "provided documentation to show that the authority for enforcement actions under Section 113(d)(1) has been delegated to the Division Director level in [ORE], which includes the Director of the [AED]." Order on Respondent's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction (ALJ, Apr. 23, 2003).[11]

On April 25, 2003, Respondent submitted a motion for reconsideration of the ALJ's dismissal of Motion to Dismiss II. Motion for Reconsideration of Decision Regarding Subject Matter Jurisdiction ("Motion for Reconsideration"). In this motion, the Respondent claimed that the exhibits that Region IV had submitted with Response II had excluded relevant pages of the EPA Delegations Manual. *Id.* at 2. Respondent again argued that OECA's delegation of authority was limited to multi-Regional cases, cases of national significance, and nationally managed programs, and that the Julie's Limousine case did not fall into any of these catego-

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[9] The Respondent also claimed that, in Response I, Region IV had "already argued that it was Mr. Buckheit, not the Regional Administrator, who purportedly issued the waiver." Motion to Dismiss II at 7. In Response I, however, Region IV merely cited the correspondence described above, and stated that "[i]n order to secure jurisdiction of this civil penalty case, EPA need only secure a waiver of the limitation period. EPA has fully complied with this requirement, as the requisite waivers were obtained on March 5, 2002, and April 8, 2002." Response I at 7 (citation omitted). Region IV did not further specify the particular route by which the waiver was obtained. While Region IV did imply that the date of Mr. Buckheit's letter to DOJ (March 5, 2002) was the date on which EPA's waiver decision was made, this is ambiguous at best, because even if Region IV had made the initial determination, EPA's decisionmaking process was not complete until OECA had concurred. *See* EPA Delegation 7-6-A ¶¶ 1.b, 3.e.

[10] Inexplicably, Region IV did not address the Appellee's arguments in Motion to Dismiss II regarding whether or not the appropriate Regional official had made the necessary determination, or whether the authority delegated to the Assistant Administrator for OECA (and any redelegation of that authority) was limited to multi-Regional cases, cases of national significance, or nationally managed programs.

[11] The ALJ correctly observed that, according to the EPA Delegations Manual, the Administrator's authority to make waiver determinations has been delegated to the Regional Administrators and to the Assistant Administrator for OECA, and that this authority may be redelegated to the Division Director level. *See* Init. Dec. at 5 n.3 (citing EPA Delegation 7-6-A ¶¶ 2, 4).

ries. *Id.* at 4. The Respondent did not renew its earlier argument that Region IV had failed to show that the appropriate Regional official had made the necessary determination. Region IV responded by reiterating its claim that the Director of AED in OECA has the authority to make the determination required under CAA section 113(d)(1), and noting that "Title VI Section 609 of the CAA is a nationally managed program." Complainant's Response to Respondent's Motion for Reconsideration of Decision Regarding Subject Matter Jurisdiction ("Reconsideration Response") at 2. Region IV concluded that the program "is implemented by EPA, thereby meeting the requirements of delegation 7-6-A paragraph 3.b." *Id.*; *see also* Init. Dec. at 6. The ALJ denied Respondent's Motion for Reconsideration. *See* Order on Respondent's Motion for Reconsideration of Decision Regarding Subject Matter Jurisdiction (ALJ, Apr. 30, 2003).

An evidentiary hearing was held May 5 through May 8, 2003. On the third day of the hearing the Respondent filed its Third Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss III"). In this motion, the Respondent argued that Region IV's characterization of the CAA section 609 program as a nationally managed program was erroneous, and therefore that the Director of AED in OECA did not have delegated authority in this instance to make the determination required by CAA section 113(d)(1). Motion to Dismiss III at 3-4. On September 5, 2003, Region IV filed Complainant's Reply to Respondent's Third Motion to Dismiss ("Response III"), in which it argued that the Buckheit Letter represented OECA's concurrence with a waiver determination made by Region IV. Response III at 4. Region IV's response also observed that Regional Delegation 7-6-A redelegated authority for making section 113(d)(1) waiver determinations to the Director of Region IV's Air, Pesticides & Toxics Management Division ("APTMD"), and argued that Winston A. Smith (who was acting in that position during the relevant period) had made the necessary determination.[12] Response III at 7. Region IV argued further that after Mr. Smith made the necessary

[12] While, in general, the record suggests that Region IV's strategy for demonstrating that EPA had made the required waiver determination may have changed over the course of the proceeding below (*see* Init. Dec. at 3-8), it is not clear from the record that Region IV's current position (that Mr. Smith made the waiver determination and that Mr. Buckheit concurred in that determination) is fundamentally inconsistent with Region IV's statements in response to the first two motions to dismiss. On their face, the documents Region IV provided in support of its response to the first motion to dismiss indicate that Mr. Buckheit had "concurred" with Region IV's request for a waiver. *See* Buckheit Letter at 1. Additionally, in Response II, Region IV specifically argued that Mr. Buckheit had exercised his concurrence authority under EPA Delegation 7-6-A ¶ 3.e (and not that he had acted solely under OECA's general grant of authority under EPA Delegation 7-6-A ¶ 2). Response II at 1-2. It strikes us that Region IV's early statements were ambiguous in as much as they did not directly address Region IV's role in the waiver determination process or specifically outline what procedural path was followed. Rather, they appear to have been premised on the notion that OECA's determination made it unnecessary to verify what else may have occurred in the Region. Viewed in this light, the statements cannot reasonably be taken to suggest that Mr. Buckheit had exclusive authority in this circumstance. This issue is discussed further in Part II.B.4 below.

determination, the Regional Counsel, on his behalf, requested OECA concurrence and a reciprocal determination from DOJ.[13] *Id.*

On September 12, 2003, Julie's Limousine filed Respondent's Reply in Support of Third Motion to Dismiss ("Reply III"), highlighting perceived inconsistencies in Region IV's arguments and arguing that the Harris Memorandum was not itself a determination but merely a request for OECA to make a waiver determination. *See* Reply III at 11; Init. Dec. at 7. Alternatively, Respondent argued that if the Harris Memorandum was itself a determination, it was invalid because Ms. Harris did not have delegated authority to make such determinations and because Region IV had offered no evidence to show that an appropriate Regional official had made the necessary determination.[14] Reply III at 11-12. Finally, Respondent argued that Region IV was estopped from taking the new position that the Region IV Director of APTMD had, in fact, made the requisite determination. *Id.* at 12-13.

The ALJ convened a telephone conference with both parties on October 2, 2003, to further explore the issues raised in the Respondent's Motion to Dismiss III, Region IV's Response III, and the Respondent's Reply III. During the conference, Region IV acknowledged that it had mistakenly characterized the Julie's Limousine case as involving a nationally managed program. *See* Init. Dec. at 7. However, Region IV maintained that the authority delegated to OECA was not limited by the reference in EPA Delegation 7-6-A to multi-Regional cases, cases of national significance, and nationally managed programs. *Id.* Region IV also argued that the person with delegated authority within Region IV had properly made the statutory determination and that OECA had appropriately concurred with that determination, as provided in EPA Delegation 7-6-A ¶ 3.e. The ALJ then directed Region IV to submit a written brief "verifying the facts surrounding the waiver determination." *See* Init. Dec. at 8.

On October 5, 2003, Region IV filed the requested brief, in which it argued both that "Region IV made a determination that a waiver for the Julie's Limousine case was appropriate and requested OECA's concurrence," and that the Director

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[13] Although the Harris Memorandum did not specifically mention DOJ concurrence, in seeking a waiver though OECA, it seems clear that Region IV was implicitly requesting that the Agency seek formal DOJ concurrence as well. *See infra* note 47. Moreover, the fact that the Harris Memorandum never expressly mentioned "concurrence" is a semantic distinction without probative value (substantively, the memorandum reaches a conclusion regarding the appropriateness of a waiver and seeks to have OECA adopt and act on that conclusion). *See* Harris Memorandum at 1.

[14] Contrary to Appellee's assertions, Region IV never argued in its briefs that the Regional Counsel had the authority to make this § 113(d)(1) waiver determination herself. Reply III at 11. Rather, Region IV's position was that after Mr. Smith made the required determination, he tasked the Regional Counsel with communicating that decision to OECA and requesting concurrence. *See* Response III at 7.

of AED in OECA has the authority, and in this case exercised the authority, to independently make section 113(d)(1) waiver determination. See Complainant's Response to Respondent's Reply in Support of Third Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Response IV") at 14. Additionally, in support of its position, Region IV submitted affidavits from Winston A. Smith ("Smith Affidavit") and from Richard Biondi, the Acting Division Director of AED, ORE, OECA ("Biondi Affidavit").

On October 27, 2003, the Respondent filed a surreply to Response IV, in which it "vigorously challenge[d] the EPA's characterization of the facts," and urged that the waiver determination was never made by a person with authority to do so. *See* Respondent's Surreply in Support of Third Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Exclude ("Surreply") at 2-5. Additionally, Respondent argued that any evidence offered subsequent to the evidentiary hearing, including the affidavits that Region IV submitted along with its Response IV, should be excluded. *Id.*; *see also* Init. Dec. at 9.

On November 14, 2003, the ALJ granted Respondent's Motion to Dismiss III, finding that Region IV had failed to demonstrate that the person with delegated authority within Region IV had made the required statutory determination. *See generally* Init. Dec. The ALJ concluded, therefore, that the joint EPA/DOJ waiver determination was not valid, and that EPA lacked jurisdiction to issue the administrative complaint in the current enforcement action.[15] *Id.* at 16. Notably, in so ruling, the ALJ determined that she did not need to reach the question of the admissibility of the Winston Smith affidavit. *Id.* Accordingly, that document was never admitted into evidence.

Region IV filed its Notice of Appeal on December 12, 2003, followed by a Brief in Support of Appeal on January 20, 2004.[16] The Appellee filed its response

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[15] The ALJ found that Region IV had abandoned its argument that the Director of AED had himself made the required determination. The Initial Decision, therefore, did not address whether the language in Delegation 7-6-A regarding "multi-Regional cases, cases of national significance or nationally managed programs" limits OECA's delegated authority. *See* Init. Dec. at 16 n.21. The ALJ also did not reach other issues raised by the Respondent, including whether EPA is estopped from advancing certain arguments; whether documents offered after the evidentiary hearing are inadmissible; whether proof of a delegation of authority to Mr. Smith requires production of a memorandum signed by the Regional Administrator; and whether the Assistant Administrator for OECA properly redelegated his authority to concur in waiver determinations to the Director of AED, ORE, OECA (this last issue was not raised on appeal). *Id.* at 15-16.

[16] On December 1, 2003, Region IV requested an extension of time to file its appeal brief. *See* Complainant's Motion to Extend Time for Filing Appeal Brief. The Board granted Region IV an extension of time to file its appellate brief, however, required that Region IV file a notice of appeal by the otherwise applicable deadline. *See* Order Regarding Motion for Extension of Time for Filing Appeal Brief (EAB, Dec. 9, 2003).

brief on February 19, 2004.[17] Additionally, Region IV filed a motion for leave to submit a reply brief on March 26, 2004, which Appellee opposes.[18]

II. *DISCUSSION*

A. *Standard of Review*

The EAB reviews the ALJ's factual and legal conclusions *de novo*.[19] 40 C.F.R. § 22.30(f); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b); *see also In re Friedman*, 11 E.A.D. 302, 314 (EAB 2004), *Friedman v. EPA*, No. 04-0517 LKK DAD (E.D. Cal. docketed Mar. 16, 2004). Just as the ALJ must resolve factual controversies based on a preponderance of the evidence, 40 C.F.R. § 22.24(b), factual findings made by the Board similarly must be supported by a preponderance of the evidence. *See Friedman*, 11 E.A.D. at 314. This standard is intended to "'instruct the fact finder concerning the degree of confidence society thinks he should have in the correctness of his factual conclusions.'"[20] *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994) (quoting *In re Winship*, 397 U.S. 358, 370 (1970)); *accord Friedman*, E.A.D. at 314.

In this case, Region IV's appeal challenges the Initial Decision based on issues of both law and fact. As explained below, we disagree with certain of the ALJ's conclusions and believe the ALJ erred in not ruling on the admissibility of Region IV's posthearing evidence. We, therefore, remand the case for further action consistent with this opinion.

B. *Analysis*

Parties to an administrative penalty action have the right to appeal, among other things, "issues concerning subject matter jurisdiction." 40 C.F.R. § 22.30(c).

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[17] The Board also granted Respondent's request for an extension of time to file its brief. *See* Order Regarding Motion for Extension of Time for Filing Response Brief (EAB, Feb. 11, 2004).

[18] Because the Board does not believe that the factual and legal issues raised in the proceeding below and in the initial briefs on appeal require additional development, Region IV's motion for leave to file a reply is hereby denied.

[19] The Board generally defers to an ALJ's factual finding where the credibility of witnesses is at issue, because the ALJ is able to observe first-hand a witness' demeanor during testimony and is therefore in the best position to evaluate his or her credibility. *Friedman*, 11 E.A.D. 314 n.15. (citing *In re Ocean State Asbestos Removal, Inc*., 7 E.A.D. 522, 530 (EAB 1998)).

[20] We have defined "preponderance of the evidence" in this context to mean "more likely true that not." *In re The Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001) (citing *Ocean State*, 7 E.A.D. at 530); *In re Lyon County Landfill*, 10 E.A.D. 416, 427 n.10 (EAB 2002), *aff'd*, 2004 U.S. Dist. LEXIS 10650 (D. Minn. June 7, 2004).

In this case, EPA's jurisdiction to pursue an administrative penalty action against Julie's Limousine depends in part on the existence of a valid waiver of the twelve-month statutory time limitation in CAA section 113(d)(1). *See Lyon County Landfill*, 8 E.A.D. at 567-68. In general, an administrative tribunal may make the legal and/or factual findings necessary to assure itself that it has subject matter jurisdiction over the case before it. *Id*. at 567-68.[21]

As Region IV correctly observes, "a valid determination by EPA, in combination with the concurring determination by the Department of Justice, would support jurisdiction in this case." App. Br. at 14. However, in order to demonstrate that there has been a valid determination by EPA, Region IV must show that the appropriate person, or persons, within EPA made the requisite statutory determination. Region IV makes two arguments in this regard. First, Region IV argues that Mr. Buckheit, the Director of AED, ORE, OECA, independently made the required determination when he concurred and joined in Region IV's request for a waiver, and that the EPA Delegation 7-6-A requires nothing more.[22] App. Br. at 19-23. Additionally, Region IV argues that Mr. Smith, the Director of APTMD in Region IV, to whom the Regional Administrator has delegated his section 113(d)(1) authority, in fact made the waiver determination in this case, and that Mr. Buckheit appropriately concurred with Region IV's determination consistent with EPA Delegation 7-6-A ¶ 3.e. App. Br. at 15-19.

1. *OECA's Role in the Waiver Determination*

Section 301(a) of the CAA provides that the Administrator may "delegate to any officer or employee of the [U.S. EPA] such of his powers and duties under this chapter, except the making of regulations subject to section 7606(d) of this title, as he may deem necessary or expedient." 42 U.S.C. § 7601(a). Thus, the Act allows for delegation of much of the Administrator's CAA authority. Consistent with section 301(a), the Administrator has delegated authority to implement the CAA enforcement program, and EPA Delegation 7-6-A describes certain of these delegated CAA enforcement authorities.

The delegation addresses a broad range of enforcement-related activities, including the Administrator's authority, under section 113(d)(1) of the CAA, to make determinations necessary to waive the twelve-month statutory limitation on initiating administrative penalty actions. *See* EPA Delegation 7-6-A ¶¶ 1.a, 1.b. The authorities identified in EPA Delegation 7-6-A are delegated to the Regional

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[21] However, the Act specifically precludes judicial review of the waiver determination itself. CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1) ("Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.").

[22] The ALJ did not find it necessary to address this issue in the proceeding below. *See* Init. Dec. at 16 n.21.

Administrators and to the Assistant Administrator for OECA. *Id.* ¶ 2. The delegation also specifically authorizes redelegation within each office to the Division Director level. *Id.* ¶ 4. The relevant delegation language reads as follows:

> 1. Authority.
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> a. To make findings of violation, to issue notices of violation, to issue orders, to issue or withdraw complaints, to issue penalty orders, to issue administrative compliance orders, to give written notice of a proposed administrative penalty, to issue field citations, and to negotiate and confer with the alleged violator pursuant to the Clean Air Act (CAA), to sign consent agreements memorializing settlements between the Agency and respondents, and to compromise, modify or remit administrative penalties, except for new source review orders.
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> b. To determine jointly with the Attorney General in accordance with the CAA the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action.
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> 2. To Whom Delegated. Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance.
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> 3. Limitations.
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> a. Once the alleged violator files an answer or fails to file an answer in the specified time period, the Regional Counsels or their designees will conduct all negotiations.
>
> b. The Assistant Administrator for Enforcement and Compliance Assurance may exercise these authorities in multi-Regional cases, cases of national significance or nationally managed programs. The Assistant Administrator for Enforcement and Compliance Assurance or his/her designee must notify any affected Regional Administrators or their designees when exercising any of the above authorities except for issuing notices of violations, issuing complaints, issuing field citations and making findings of violation. In addition, once the alleged violator files an answer or fails to file an answer in the specified time period, the Assistant Administrator for Enforcement and

> Compliance Assurance or his/her designee will conduct all negotiations.

EPA Delegation 7-6-A ¶¶ 1-3.b.

The Appellee argued below that the language of the delegation limits OECA's authority to exercise its delegated authority to situations involving multi-Regional cases, cases of national significance, and cases involving nationally managed programs.[23] Region IV offers two arguments for the proposition that OECA's authority is not so limited. We find neither of Region IV's arguments persuasive.

2. *Relationship Between Multi-Regional and Nationally Significant Cases and OECA'S Authority to Conduct Negotiations*

Region IV argues first that the initial sentence in paragraph 3.b, which states that OECA "may exercise these authorities in multi-Regional cases, cases of national significance, or nationally managed programs," merely qualifies the preceding paragraph 3.a, which otherwise delegates authority for conducting "all negotiations" to the "Regional Counsels or their designees." App. Br. at 21 n.25. That is, Region IV concludes that OECA has the authority to make waiver determinations in matters that do not involve multi-Regional cases, cases of national significance, or nationally managed programs, because the qualification regarding multi-Regional and nationally significant cases does not relate to OECA's general grant of authority under EPA Delegation 7-6-A ¶ 2. *Id.* Region IV argues further that OECA properly exercised its delegated authority when Mr. Buckheit issued a letter to DOJ in which he "concurred and joined" in Region IV's request for a waiver. *Id.* at 22. This argument breaks down at the very start, however, because paragraph 3.b cannot plausibly be read as Region IV suggests.[24]

Region IV's argument that the qualification regarding multi-Regional and nationally significant cases relates only to OECA's authority to conduct enforcement-related negotiations is simply unsupported by the text of the delegation.[25]

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[23] The ALJ found that the issue was moot because the Region ultimately decided to rely on an argument that the necessary determination had been made by Region IV, rather than by OECA. However, in our view, it is not at all clear that Region IV abandoned its position that OECA had made the required determination.

[24] It is worth noting that Region IV's assertion that Mr. Buckheit made an independent "determination" when he concurred and joined with Region IV's request for a waiver is not unreasonable. However, since Region IV has failed to show that this case was among the classes of cases for which Mr. Buckheit had delegated authority to make the necessary determination, whether or not his action may be reasonably construed as a "determination" is immaterial.

[25] Region IV states:

Continued

Nothing about the language of paragraph 3.b lends itself to the interpretation that Region IV advances. Additionally, to the extent that we examine the materials in the record relating the underlying intent of the delegation, this material, too, tends to cut against Region IV's position.

Indeed, paragraph 3.b appears to read as a provision that is entirely distinct from the preceding paragraph 3.a. While paragraph 3.a addresses only the authority to conduct negotiations with violators, paragraph 3.b relates more generally to the multitude of authorities that are the subject of the delegation. For example, the first sentence of paragraph 3.b refers to "these authorities" — a reference that alone is inconsistent with an understanding that the sentence deals only with a single authority (the authority to conduct negotiations). To the extent that there is any ambiguity in the language of the first sentence, however, the second sentence of paragraph 3.b makes it clear that the reference in the first sentence, and paragraph 3.b in general, is intended to encompass all the authorities enumerated in paragraph 1.[26] While paragraph 3.b does include an exception to the exclusivity of the Regional Counsels' authority under paragraph 3.a, this qualification appears in the third sentence of paragraph 3.b and not in the first sentence as Region IV suggests.[27]

Region IV's proffered reading would functionally sever the three sentences of paragraph 3.b. *See* App. Br. at 20-21. Region IV would read the first sentence into the preceding paragraph 3.a, and then presumably read the second sentence and the third sentence together, eliminating entirely any interaction between these sentences and the first sentence of paragraph 3.b. *See id.* at 21 n.25. Thus, while the first sentence would address only OECA's ability to conduct negotiations in multi-Regional cases, cases of national significance, and nationally managed programs, the following two sentences would more broadly address OECA's obliga-

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(continued)

> [T]he permissive language appears to be a qualification of a limitation in the immediately preceding paragraph which provides that, after a Respondent has answered or failed to answer in the specified time period, "the Regional Counsels or their designees will conduct all negotiations." The permissive language suggests that OECA can conduct the negotiations in multi-Regional cases, cases of national significance, or nationally managed programs.

App. Br. at 21 n.25.

[26] The second sentence conditions OECA's exercise of "any of the above authorities," with the exception of certain specifically enumerated authorities from paragraph 1.a, making it clear that this paragraph is intended to generally address the whole range of authorities subject to the delegation.

[27] The third sentence explains that, in instances where OECA exercises its authority under paragraph 3.b, "once the alleged violator files an answer or fails to file an answer in the specified time period, the Assistant Administrator for [OECA] or his/her designee will conduct all negotiations." EPA Delegation 7-6-A ¶ 3.b.

tions when it exercises any of the authorities subject to the delegation. The result would be to substantively divorce the first sentence from the remainder of paragraph 3.b. Nothing in the EPA Delegations Manual or elsewhere provides any basis for such an obvious distortion of the text, and such a reading defies established rules of textual interpretation. *See, e.g., Walker v. Bain*, 257 F.3d 660, 666 (6th Cir. 2001) ("In resolving questions of statutory interpretation, we must first look to the language of the statute itself. * * * We read statutes and regulations with an eye to their straightforward and commonsense meanings. * * * When we can discern an unambiguous and plain meaning from the language of a statute, our task is at an end.") (quoting *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 910 (6th Cir. 2000); *Bartlik v. U.S. Dep't of Labor*, 62 F.3d 163 (6th Cir. 1995)) (internal quotation marks and citations removed).

The Region's interpretation is also unsupported by generally related policy statements in the record. For example, the July 11, 1994 Memorandum from Assistant Administrator, Steve A. Herman, entitled "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases" ("Herman Memorandum"), and the attached May 1994 Report of the EPA Regional Enforcement Impacts Task Force ("Task Force Report") fail to support the interpretation of EPA Delegation 7-6-A that Region IV advances.[28] By their own terms, the guidance documents address the "division of roles and responsibilities between the Regions and Headquarters in the enforcement and compliance assurance program" and articulate "the general framework and guidance that the Agency will hereafter follow in the processing and management of civil regulatory enforcement cases." Herman Memorandum at 1-2. The Herman Memorandum generally identifies "the roles of Headquarters and Regional personnel in each category" of case, including "national program" cases, "national violator" cases, "national initiatives," and "single region cases." *Id.* at 5-6. This policy discussion clearly signals that the multi-Regional or national nature of a case is significant as to all aspects of case management, and not just the authority to conduct negotiations. *See* Task Force Report Ch. V, at 15-16 (discussing responsibility for the "development, management, and settlement" of cases). No part of the approach outlined in the memorandum identifies any special link between the multi-Regional nature of a case and the authority to conduct negotiations.[29]

While the Herman Memorandum and the Task Force Report do not have the binding effect of Agency regulation, they represent the only evidence in the re-

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[28] While these guidance documents do not directly interpret EPA Delegation 7-6-A, they do relate, generally, to the allocation of responsibility for enforcement matters between EPA Headquarters and the Regions, and they were created in connection with the reorganization effort that occurred at the same time the current version of EPA Delegation 7-6-A was issued.

[29] Similarly, the Task Force Report broadly discusses Headquarters' involvement in nationally significant, multi-Regional, and national initiative cases. *See* Task Force Report Ch. V, at 15.

cord addressing the Agency's intent regarding OECA's authority in purely Regional cases versus nationally significant enforcement cases. In light of the language of the EPA Delegations Manual itself, and the policy statements in the record, the Board finds Regions IV's reading of the EPA Delegations Manual, as reflected in footnote 25 of Region IV's opening brief, to be strained beyond credibility.[30]

3. *Permissive Reading of the Word* "*May*"

Region IV also argues, more generally, that the first sentence of paragraph 3.b does not limit OECA's authority because the word "may" should be construed as being permissive rather than restrictive. App. Br. at 21. Region IV observes that when "the words 'shall' and 'may' are used in the same statute or regulation, 'shall' is usually interpreted to impose a mandatory obligation and 'may' is usually interpreted to grant discretion." *Id.* (citing *Farmer's & Merchants' Bank v. Fed. Reserve Bank*, 262 U.S. 649, 662-63 (1923)). While this general principle may be valid, Region IV fails to explain how it can be reasonably applied in this instance to reach the conclusion that Region IV advocates.

Region IV argues that the language regarding multi-Regional and national cases merely indicates "that it may be advisable for OECA to take the lead in multi-Regional and other important cases, but that OECA may also take the lead, and make waiver determinations unilaterally, in other cases as necessary." App. Br. at 20. This reading of the delegation language severely strains the plain language of the text and would transform the first sentence of paragraph 3.b into extraneous surplusage.[31]

Additionally, OECA's guidance, while stressing the importance of flexibility, does not provide any support for Region IV's position. For example, the Herman Memorandum begins by describing the "basic framework for the Headquarters/Regional relationship" from the Task Force Report as "concluding that

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[30] We note also that the appearance of the contested language under the heading "Limitations" is probative to the extent that this heading creates an expectation that the provisions that follow will, in some respect, restrict the general authority otherwise granted by the delegation.

[31] Such an reading would violate fundamental principles of textual interpretation. *See Hedin v. Thompson*, 355 F.3d 746, 750 (4th Cir. 2004) ("A court must interpret a statute so as to give each word meaning and to avoid creating surplusage.") (citing *Pa. Dept. of Pub. Welfare v. Davenport*, 495 US 552, 562 (1990)). A more permissive reading of the first sentence in paragraph 3.b might be appropriate if necessary to provide the Assistant Administrator for OECA with authority in multi-Regional cases, cases of national significance, and cases involving nationally managed programs. However, paragraph 2 already identifies the Assistant Administrator for OECA as one of the parties to whom enforcement authority is delegated generally. Therefore, the language regarding national and multi-Regional cases would add nothing to the delegation provision under Region IV's reading of the text.

Headquarters involvement was appropriate in a number of contexts: a) cases or issues that rise to a level of national attention; b) multi-regional cases against the same company; c) national initiative cases." Herman Memorandum at 1. Thereafter, the Herman Memorandum indicates that "OECA retains the authority to take action, after consultation with the Regional Administrator, in the place of a Region in the rare situation where the Region is unprepared to respond to a problem *of national concern* or to assume the lead in a case which is *of paramount national interest*."[32, 33] *Id.* at 7 (emphasis added).

As Region IV observes, the intent of EPA Delegation 7-6-A would be clearer were it to state that the Assistant Administrator for OECA may exercise the delegated authorities "*only* in multi-Regional cases, cases of national significance or nationally managed programs." App. Br. at 21. This observation alone cannot rescue Region IV's argument regarding the effect of the delegation. As explained above, nothing in the text of the delegation or in the generally related guidance material in the record supports Regions IV's alternative reading.

Ultimately, Region IV fails to put forward a plausible argument to justify its reading of EPA Delegation 7-6-A. Moreover, both the text of EPA Delegation 7-6-A and the related policy indications in the record fail to support Region IV's position.[34] In our view, the phrase "may exercise," as used in EPA Delegation 7-6-A, is best understood as a limitation on the authority otherwise conferred upon OECA by the delegation, rather than a grant of unbridled discretion. In any event, Region IV has not offered a reasonable explanation for its alternative reading of this language. The Board concludes, therefore, that Region IV has failed to show that OECA had the delegated authority, in this instance, to independently waive the twelve-month limitation in section 113(d)(1) of the Act.[35]

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[32] Indeed, to some degree, the sentence regarding OECA's ability to exercise the delegated authorities in multi-Regional cases, cases of national significance, and nationally managed programs is permissive. For example, the substitution of "shall" for "may" would significantly change the nature of the provision by making OECA's exercise of authority in multi-Regional and nationally significant cases mandatory rather than discretionary.

[33] Similarly, the Task Force Report points out that "Administrative enforcement authorities have largely been delegated to regional offices" and opines that "OECA should be included in the decision-making process at any time that it becomes apparent that a[n] * * * administrative case will raise issues of national precedence or significance." Task Force Report Ch. V. at 16.

[34] We note with curiosity that Region IV makes no attempt to address the guidance documents discussed above in its brief, or to offer contrary evidence of Agency intent; nor did it do so in the proceeding below.

[35] We do not rule out the possibility that an argument might be made to justify a finding of broader OECA authority under EPA Delegation 7-6-A; however, the arguments made by Region IV in this case clearly miss the mark.

4. *Regional Waiver Determination*

Region IV argues that the appropriate Regional official made the required section 113(d)(1) determination, and that OECA concurred in the valid Regional determination as provided in EPA Delegation 7-6-A ¶ 3.e. Appellee offers several arguments why Region IV's position should be rejected.

a. *Judicial Estoppel*

As a preliminary matter, the Appellee renews its argument from below that Region IV is judicially estopped from taking the position that EPA satisfied the conditions of EPA Delegation 7-6-A by way of a Regional determination with OECA concurrence. Respondent's Brief in Opposition to Appeal ("Resp. Br.") at 36-38. According to the Appellee, Region IV initially argued that Mr. Buckheit alone made the determination required under CAA section 113(d)(1). *Id.* at 37. Moreover, Appellee argues, Region IV "succeeded in persuading the ALJ to accept its earlier position that Mr. Buckheit, not the Regional Administrator, made the waiver determination." *Id.* Therefore, Appellee concludes, Region IV cannot now argue that the waiver determination was made by Region IV and concurred upon by OECA, because this would represent an "inconsistent position [taken] to derive an unfair advantage or impose an unfair detriment on [Appellee]." *Id* at 38.

The principle of judicial estoppel dictates that "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citing *Davis v. Wakelee*, 156 U.S. 680, 689, (1895)); *accord Newfield Exploration Co. v. Applied Drilling Tech.*, No. 01-2746, 2002 U.S. Dist. LEXIS 24911, at *10 (E.D. La. Jan 2, 2003).

Judicial estoppel is intended to protect the integrity of the judicial process by preventing a party from "'prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire*, 532 U.S. at 749 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). While observing that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," the Supreme Court enunciated the salient factors as follows:

First a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." A third consideration is whether

the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51. The Court indicated, however, that these are not "inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Id.* at 751.

In our view, the Appellee's argument for application of this principle in the instant case fails to "tip the balance of equities" in two important respects. *See id.* First, the Board does not find Region IV's representations during the proceeding below to have been materially inconsistent in the sense ordinarily necessary for the application of judicial estoppel. Second, Region IV did not prevail before the tribunal in a manner that meaningfully prejudices the Appellee or threatens the integrity of the adjudicatory process.

Cases applying judicial estoppel uniformly involve arguments of fact and/or law that are manifestly both "different *and* inconsistent." *Newfield Exploration*, 2002 U.S. Dist. LEXIS 24911, at *10 (emphasis added). That is, it is not sufficient that the positions are merely substantively different; to some degree they must be mutually exclusive. *See Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795, 800-02 (1999). In *Newfield Exploration,* for example, the plaintiff owned a stationary oil well that was destroyed after impact with a ship. *Newfield Exploration*, 2002 U.S. Dist. LEXIS 24911, at *2. The plaintiff, in a prior proceeding, had secured a judgment for damages against the ship owner, based on factual arguments that the plaintiff's injury was not caused or occasioned by any fault of the plaintiff and that the oil well was, at the time of the impact, in sound condition. *Id.* at *3-4. The plaintiff thereafter sought damages against the builders of the oil well based on an argument that the plaintiff's damages were caused by defects in the well's structure and construction. *Id.* at *6. Because both factual assertions could not be true, and because the Court had already awarded damages based on the plaintiff's earlier assertions, the court in *Newfield* held that judicial estoppel precluded the plaintiff from asserting that the cause of its damages was anything other than the collision with the ship. *Id.* at *27.

Similarly, in *New Hampshire v. Maine,* the Supreme Court applied judicial estoppel in an interstate territorial dispute, where New Hampshire argued that the term "Middle of the River" (as used in a 1740 royal decree identifying the Piscataqua River boundary, now the border between Maine and New Hampshire) meant along Maine's shoreline, despite having derived benefit in an previous litigation by agreeing that the term meant "the middle of the main channel of navigation."[36]

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[36] Also, the Supreme Court declined to apply the doctrine of judicial estoppel in circumstances where there is not necessarily a genuine conflict between the two positions taken by a party. *See Cleveland*, 526 U.S. at 805.

New Hampshire, 532 U.S. at 749.

In the instant case, Region IV's early jurisdictional arguments focused on demonstrating that Mr. Buckheit had the authority to act on waiver determinations under EPA's delegations. Even assuming that Region IV had expressly argued that Mr. Buckheit, and not a Regional official, had the exclusive authority to make the necessary determination,[37] the resulting dichotomy does not involve positions that are, in fact, irreconcilable. On the one hand, based on its reading of EPA Delegation 7-6-A, Region IV argues that OECA's determination that a section 113(d)(1) waiver is justified is sufficient alone to demonstrate that the statutory criteria for initiating a penalty action have been satisfied. *See* App. Br. at 19-23. On the other hand, Region IV argues that Mr. Smith, the appropriate Regional official, in fact exercised his authority to make the required determination at the Regional level. Even assuming that we agreed with Region IV's first argument, there is no reason why it could not also be true that Mr. Smith validly made the necessary determination at the Regional level (which would still require a valid concurrence by OECA). At most, if both arguments are accepted as true, Mr. Smith's determination becomes an unnecessary redundancy, because OECA's determination alone is all that was technically required. In fact, these arguments can be reasonably viewed as complimentary alternatives rather than clearly incompatible opposites (unlike the circumstances typical of cases where judicial estoppel has been applied).[38]

At bottom, Region IV never took the affirmative position that Mr. Smith — the key actor as it turns out — had not made a determination on the waiver issue in this case. Rather, based apparently on the belief that the OECA concurrence memorandum was by itself a sufficient response to the Appellee's delegation-based challenge, Region IV simply proceeded on the assumption that the Region's internal decisionmaking process was immaterial. While Region IV's position on the question of whether or not this case should be viewed as a "nationally significant" or "nationally managed" case did shift during the course of the case, we do not regard this as a sufficient basis for the application of judicial estoppel, particularly when the Region's articulation of the underlying facts was not internally incompatible.

Apart from the question of whether Region IV took materially inconsistent positions, we find no significant prejudice to Appellee associated with Region IV's advocacy on this point. Here, Region IV's "success" relating to its original position regarding the delegation issue was limited to the successful defense of a

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[37] We do not believe that this is necessarily clear from the record. *See supra* note 12.

[38] Indeed, while we reject it on substantive grounds, we view Region IV's interpretation of the delegation as allowing EPA to effectuate a waiver in this case by either route.

motion to dismiss, which the Appellee was free to revive at any time (and did effectively).

Moreover, we do not believe that entertaining the Region's argument that Mr. Smith made the requisite determination threatens the integrity of the tribunal or provides Region IV with an unfair advantage. Indeed, Region IV ultimately *lost* on the merits of its "earlier" argument, based on the subsequent arguments and evidence presented by the Appellee. Thus, unlike in the cases cited above, there is no prior ruling still standing to create the impression of judicial inconsistency.

There is no doubt that the parties and the tribunal would have been better served had Region IV clearly explained its own role in the waiver determination process earlier in the proceedings; however, because Region IV's arguments over the course of those proceedings were not fundamentally irreconcilable, and because the ALJ ultimately did not rely on those arguments to the benefit of Region IV in a manner that threatens the integrity of the tribunal, we find that the doctrine of judicial estoppel does not apply.

b. *Region IV's Waiver Determination*

Substantively, Region IV argues that the Regional official with delegated authority (Mr. Smith) in fact made the determination required under section 113(d)(1) for waiver of the twelve-month statutory limitation on initiating CAA administrative penalty actions. App. Br. at 17. Accordingly, Region IV asserts that OECA's concurrence with Region IV's valid waiver determination completed the internal steps required for a valid EPA waiver determination, and that the waiver process as a whole was validly completed upon DOJ's concurrence with EPA's waiver determination.[39] *Id.* at 22 n.28. Whether the Regional official with delegated authority made the necessary waiver determination or not is a question that Region IV bears the burden of proving.[40] *See McNutt v. Gen. Motors Acceptance Corp*., 298 U.S. 178, 189 (1936); *Lupo v. Human Affairs Int'l*, 28 F.3d 269, 273 (2d Cir. 1994).

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[39] Appellee does not contest the validity of DOJ's waiver determination. *See generally* DOJ Letter.

[40] We note, however, that EPA was not necessarily required to affirmatively prove jurisdiction at the time it filed the complaint. *See* Resp. Br. at 33. Rather, Region IV's obligation to put forward evidence to prove jurisdiction arises once its assertion of jurisdiction has been challenged. *See La Reunion Francaise S.A. v. Barnes*, 247 F.3d 1022, 1026 (9th Cir. 2001) ("Plaintiff bears the burden of production after a defendant challenges the facts underlying the jurisdictional allegations."); *Bank One, Tex. v. Montle*, 964 F.2d 48, 50 (1st Cir. 1992) ("Generally, once challenged, the party invoking subject matter jurisdiction * * * has the burden of proving by a preponderance of the evidence the facts supporting jurisdiction.").

As an initial matter, Appellee contends that the existence of the Regional Administrator's delegation of authority to Mr. Smith has not been adequately proven. Resp. Br. at 38-40. Conversely, Region IV maintains that the presence of Regional Delegation 7-6-A in the Delegations Manual sufficiently demonstrates that the Regional Administrator has redelegated the authority to the Region IV Director of APTMD to make section 113(d)(1) waiver determinations. We conclude that the presence of a delegation in the EPA Delegations Manual serves as compelling evidence that such delegation of authority has in fact occurred.[41] Since no evidence has been presented to bring the accuracy of the Delegations Manual into question with regard to the delegation at issue, the Board finds that Regional Delegation 7-6-A constitutes an adequate showing of a redelegation within Region IV.[42] We further find that it is not reasonably in dispute that during the relevant time frame Mr. Smith was the Regional official vested with the redelegated authority.

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[41] The EPA Delegations Manual addresses both delegations from the Administrator to senior EPA management and redelegations from senior management to lower-level EPA officials. The primary function of the EPA Delegations Manual is to formally record delegations of authority within the Agency. The Introduction to the Manual addresses this purpose and provides a detailed explanation of the policies and procedures governing the delegation and redelegation of authority. For example, the Manual addresses general tenets governing EPA delegations, criteria for evaluating and submitting delegations, and requirements relating to the format and content of delegations. EPA Delegations Manual, Intro ¶¶ 2-4. By its own terms, the EPA Delegations Manual requires that all delegations must comply with the formal delegation procedures described therein. Significantly, the EPA Delegations Manual expressly identifies itself as "a legal record of the authority of an Agency employee or representative to act on behalf of the Administrator." *Id*., Intro ¶ 1. It strikes us as reasonable for EPA to use this mechanism to consolidate and formally document its delegations. In light of the procedurally rigorous nature of the EPA Delegations Manual and the express recognition of the Manual as a legal record of EPA delegations, it also strikes us as reasonable for EPA to rely on the Manual, in the context of such administrative proceedings, as authoritative proof that a delegation exists. Thus, we find that the presence of a delegation in the EPA Delegations Manual (including Regional delegations) provides a sufficient evidentiary basis for the Board to conclude that a delegation of authority has in fact occurred. On the other hand, where there is a factual basis to suspect that the Delegations Manual is somehow inaccurate (e.g., evidence of a revocation of a delegation that is not yet reflected in the EPA Delegations Manual), we may require further proof of a currently valid EPA delegation. To the extent that *In re U.S. Army Training Center & Fort Jackson*, No. CAA 04-2001-1502, 2003 EPA ALJ LEXIS 187 (ALJ, Sept. 12, 2003) - a recent ALJ decision cited by Appellee - augurs in a different direction, we decline to follow it.

[42] Notably, it appears that numerous court cases have relied on the representations of federal agency delegation manuals, including EPA's. *See Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 147 (1980); *Amigos Bravos v. EPA*, 324 F.3d 1166, 1172 (10th Cir. 2003); *W. Neb. Res. Council v. EPA*, 793 F.2d 194, 199 (8th Cir. 1986); *Pa. Mun. Auths. Ass'n v. Horinko*, 292 F. Supp. 2d 95, 105 (D. D.C. 2003); *United States v. Rohm & Hass Co.*, 790 F. Supp. 1255, 1261 (E.D. Pa 1992), *rev'd*, 2 F.3d 1265 (3d Cir. 1993). Indeed, the Board itself has cited the EPA Delegations Manual authoritatively as evidence of EPA delegations. *E.g., Lyon County Landfill*, 8 E.A.D. 559, 567 (EAB 1999), *aff'd*, No. 02-907, 2004 U.S. Dist. LEXIS 10650 (D. Minn. June 7, 2004); *In re Woodcrest Mfg, Inc*., 7 E.A.D. 757, 766 (EAB 1998); *In re Rohm & Hass Co.*, 2 E.A.D. 358, 369 nn.20, 21 (CJO 1987).

It also appears that the ALJ, at least implicitly, determined that an exercise of delegated authority must be accompanied by contemporaneous documentation signed by the person with delegated authority.[43] However, we are aware of no general rule requiring that every exercise of delegated authority be accompanied by a contemporaneous writing signed by the delegate and do not believe such a requirement is appropriate. For example, in other situations where formal agency action is specifically required, such as federal employee appointments, the person with delegated authority need not necessarily sign the document that embodies the decision. *See, e.g.*, *Nat'l Treasury Employees Union v. Reagan*, 663 F.2d 239, 246 n.9 (D.C. Cir. 1981) (holding that only properly authorized officials can make appointments but that employee appointment letters need not be written by the appointing authorities as long "as the appointing authorities exercise their discretion in making the appointment"); *Horner v. Acosta*, 803 F.2d 687, 693 (Fed. Cir. 1986) (same); *see also Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 132 (3d Cir. 1998) (observing that "the law recognizes an oral delegation or exercise of authority which may be proved by parol evidence").

Nothing in the relevant EPA delegations or in the underlying statutory provision expressly requires that section 113(d)(1) waiver determinations be signed by each person involved in the decisionmaking process, or that they must be in writing at all.[44] However, as this case makes clear, failure to generate such con-

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[43] The ALJ stated, "I must determine whether the EPA's waiver request was propounded and signed by the proper person within Region 4 exercising his/her delegate waiver determination authority." Init. Dec. at 12. To the extent that this can be read as categorically requiring that all concurrence requests be in writing and signed by the Regional official with delegated authority to make § 113(d)(1) determinations, the Board disagrees. It is certainly true that the current jurisdictional dispute would be more easily resolved if, for example, the Director of APTMD had generated a separate document memorializing his determination and the Regional Counsel had thereafter sent a memorandum requesting OECA concurrence (even if that memorandum did not mention the separate determination document), or if the Harris Memorandum had expressly stated that it was drafted in response to a request from Mr. Smith and that it was intended to memorialize Mr. Smith's informed decision that a waiver was appropriate. Thus, the difficulty here is not simply that Mr. Smith did not sign the memorandum requesting a waiver (although that certainly would have been prudent as a policy matter), but that no contemporaneous record of any kind exists reflecting Mr. Smith's determination. However, the lack of a contemporaneous record does not preclude a showing by other means that the event in question did in fact occur.

[44] The legislative history of the Act is also devoid of any suggestion that Congress intended to create any such requirement. In the report of the U.S. House of Representatives, Committee on Energy and Commerce, on H.R. 3030 the Committee notes that such determinations are not subject to judicial review, but expresses its "expectation" that EPA and DOJ will "maintain a record of those determinations and the basis and reasons for them since the Committee would most likely be interested, as time goes on, in such matters." H.R. Rep. No. 101-490, at 393 (1990), *reprinted in* 2 A Legislative History of the Clean Air Act Amendments of 1990, at 3417 (1993). While this discussion indicates a general desire for EPA to preserve some record of its waiver decisions, it stops well short of recognizing a formal requirement that such decisions must be accompanied by contemporaneous documentation of

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temporaneous records can serve to complicate EPA's enforcement efforts. Accordingly, whether or not Region IV has validly exercised its delegated authority depends not on the existence of contemporaneous documentation, but on whether Region IV has otherwise presented evidence adequate to show that the appropriate person made the required determination. Accordingly, below we examine the evidence that Region IV has proffered to prove its case.

Region IV offers two primary pieces of evidence[45] to demonstrate the exercise of delegated authority on the part of the appropriate Regional official, Mr. Smith — the Harris Memorandum and the Smith Affidavit. Region IV argues that the content of the Harris Memorandum, considered in combination with the Smith Affidavit, demonstrates that Mr. Smith in fact made the required determination before the Harris Memorandum was forwarded to OECA. App. Br. at 17-19.

The Harris Memorandum represents the first documented action related to EPA's exercise of its section 113(d)(1) authority in this case. While the Harris Memorandum itself clearly does not establish that Mr. Smith made the waiver determination, it demonstrates that Region IV personnel, at some level, did evaluate the case and take action with the intent of securing a waiver under 113(d)(1).[46] *See generally* Harris Memorandum. The ALJ observed that, absent evidence to the contrary, the waiver request is "evidence that the waiver determination was made by the person signing" the request itself. Init. Dec. at 15. To our way of thinking, this observation assumes too much.

The probative value of this evidence is affected by, among other things, the content of the memorandum. In this regard, it is worth noting that in her February 15 memorandum Ms. Harris does not suggest that she herself made the determination. In fact, the Harris Memorandum does not ascribe to anyone responsibility for the analysis or the ultimate determination to request a waiver. Rather, the memorandum appears to seek a waiver on behalf of Region IV generally.[47] For example,

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(continued)
each step in the decisionmaking process — and clearly no such requirement was included in the statute itself.

[45] Region IV also argues that the ultimate issuance of the complaint manifested Mr. Smith's determination that a § 113(d)(1) waiver was appropriate. We, however, are not convinced in this case that the complaint itself functions to demonstrate that Mr. Smith made the required statutory determination, particularly since Mr. Smith did not sign the complaint.

[46] We agree with the ALJ that Ms. Harris was not authorized to make the required determination herself, because the Region IV Regional Administrator's authority had not been redelegated to either position Ms. Harris occupied. *See* Init. Dec. at 15.

[47] Given the concurrence framework of EPA's delegation of waiver authority, it does not strike us as remarkable that Ms. Harris would cast her memorandum as a request for waiver, or that Region IV left it to OECA to forward the Agency's request along to DOJ for their concurrence.

based on an analysis of the case, the memorandum states that "*EPA* wishes, therefore, to initiate an administrative complaint for penalties," that "*we* believe it is particularly appropriate for resolution through administrative rather than a judicial forum," that "*[t]he Region* believes that the matter can be settled fairly and readily," that "*[t]he Region* is about to complete its preparation of an administrative complaint," and that "*[w]e* look forward to [OECA's] response." Harris Memorandum at 2 (emphasis added). In short, nothing about the content of the Harris Memorandum is inconsistent with Region IV's assertion that the memorandum was essentially a memorialization of Mr. Smith's decision, although it does not expressly so state. However, while the Harris Memorandum is not inconsistent with Region IV's argument, it also is not by itself dispositive, and without additional facts it is insufficient to prove that jurisdiction exists.

Presumably recognizing the insufficiency of the record, Region IV offered additional evidence in connection with its Response IV. This evidence was intended to further explain its handling of the waiver process leading up to the issuance of the Harris Memorandum. The evidence included affidavits from Mr. Smith and Mr. Biondi, intended to show that Mr. Smith had, in fact, made the required determination prior to initiation of the enforcement action against Julie's Limousine. In our view, Mr. Smith's affidavit has the potential to be particularly enlightening in this regard. Significantly, however, the Appellee challenged as untimely all evidence submitted by Region IV after the June 5-8, 2003 evidentiary hearing, including the Smith Affidavit, and the ALJ declined to rule on this question of admissibility. Accordingly, the Smith affidavit was never admitted into evidence and cannot serve as a basis for our decision.

We find that it was error for the ALJ not to rule on the admissibility of this potentially pivotal piece of evidence. On its face, the Smith Affidavit appears to strongly support Region IV's position that Mr. Smith made the required determination prior to issuance of the Harris Memorandum. *See* Response IV at 4-5. It indicates that Mr. Smith was briefed on the relevant issues, that he did, at some point, make a "decision" that a waiver of the statutory time limitation was appropriate, and that he instructed the Regional Counsel to communicate with OECA with the intent of securing a formal EPA waiver of the CAA § 113(d)(1) time limitation.[48] *See* Smith Aff. ¶ 7. Additionally, the record suggests that both the

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[48] We note also that Region IV's "customary practice" is not entirely irrelevant to the inquiry. Where, based on customary practices, one would otherwise expect a heavy paper trail, "an inference of fact arises from a 'complete absence of contemporaneous documentation.'" *Schoonejongen v. Curtiss-Wright Corp*., 143 F.3d 120, 132 (3d Cir. 1998). On the other hand, if, as suggested by Mr. Smith's statement, the customary practice in Region IV was for the Director of APTMD to ask the Regional Counsel to send a memorandum to OECA requesting a § 113(d)(1) waiver, then the absence of a memorandum to OECA signed by Mr. Smith himself is of less value than it would be if Mr. Smith's customary practice was to generate such documents when seeking a 113(d)(1) waiver. *See In*

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staff in APTMD and the Regional Counsel proceeded in a manner consistent with these representations.[49] Assuming, as the Smith Affidavit suggests, that Mr. Smith was briefed on the case, decided that an administrative penalty action was appropriate, and thereafter requested that the Regional Counsel present the case to OECA to secure a waiver of the statutory time limitation, these facts would appear to establish that Region IV met its obligation under EPA Delegation 7-6-A.[50]

c. *Determining the Admissibility of Region IV's Posthearing Evidence*

The Board believes, in general, that questions regarding the admissibility of evidence are best addressed, in the first instance, as part of the ALJ's management of the administrative penalty proceeding. In this vein, we have said in the past that the admission of evidence is a matter particularly within the discretion of the administrative law judge.[51] *In re Titan Wheel Corp.*, 10 E.A.D. 526, 541 (EAB 2002); *In re J.V. Peters*, 7 E.A.D. 77, 99 (EAB 1997), *aff'd sub nom. Shillman v. United States*, No. I:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), *cert. denied*, 531 U.S. 1071 (2001); *In re Sandoz*, 2 E.A.D. 324, 332 (CJO 1987). Indeed, EPA's regulations "grant significant discretion to the [ALJ] to conduct administrative proceedings and to make determi-

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re Strong Steel Prods., L.L.C., Dkt. Nos. RCRA-5-2001-0016, CAA-5-2001-0020, MM-5-2001-0006, 2002 EPA ALJ LEXIS 52 at n.84 (ALJ Aug. 13, 2002) (inferring that a document sent by facsimile from DOJ to EPA was not intended as DOJ's formal communication on the matter in question in part because it reflected a deviation from the DOJ official's customary practice).

[49] The fact that the Regional Counsel sent the letter to Mr. Buckheit, and that Mr. Smith's staff "provided Phyllis Harris' office with the information about the Julie's Limousine case" is unimportant. Contrary to Appellee's suggestion, nothing precludes the person with delegated authority from instructing subordinates to gather information incidental to such decision-making, or from requesting other personnel to carry out the activities necessary to implement the chosen course of action. *See Shreveport Engraving Co. v. United States*, 143 F.2d 222, 227 (5th Cir. 1944) ("'An agency may as a general rule employ others to assist him in the purely ministerial or mechanical details of his duty,' and the completed acts when done will be regarded as the acts of the agent though ministerial portions thereof have been performed by others.") (quoting 2 Am. Jur. Agency § 199); *see also* Resp. Br. at 27-28.

[50] We note Appellee's argument that Mr. Smith's failure to use the word "determination" in his Affidavit precludes a finding in Region IV's favor. Resp. Br. at 29. We would not regard the absence of this term as fatal. The statute and the EPA delegation require only that the responsible official(s) determine that a case is appropriate for penalty action. Assuming that Mr. Smith, after being briefed on the case, engaged the Regional Counsel to request a formal § 113(d)(1) waiver, he would necessarily have determined that the case was appropriate for administrative enforcement.

[51] By this we do not mean to suggest that the Board lacks the discretion to address issues of admissibility when we deem it appropriate, but rather that it is preferable for the ALJ, who is well situated to evaluate the relevant facts, to make the initial determination.

nations regarding the admissibility of evidence during such proceedings." *In re CDT Landfill Corp.*, 11 E.A.D. 88, 107 (EAB 2003).

In keeping with this precedent, we decline to rule on the admissibility of the evidence Region IV submitted in connection with its Response IV. Rather, we remand the case, with direction for the ALJ to enter a ruling on the admissibility issue and to engage in additional proceedings, as necessary.

III. *CONCLUSION*

For the foregoing reasons, the Board remands this matter to the ALJ for a ruling on the admissibility of the evidence that Region IV submitted after the evidentiary hearing, and for further proceedings, as necessary, consistent with this opinion.

So ordered.