



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
)
JULIE'S LIMOUSINE &) Docket No. CAA-04-2002-1508
COACHWORKS, INC.,)
)
RESPONDENT)

ORDER ON RESPONDENT'S MOTION TO DISMISS

INITIAL DECISION

Issued: November 14, 2003
Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

For Complainant: Lucia C. Mendez, Esquire
Nadine Orrell, Esquire
U.S. EPA, Region IV
61 Forsyth Street, SW
Atlanta, GA 30303-3104

For Respondent: Ward A. Meythaler, Esquire
Merkle & Magri, P.A.
550 North Reo Street, Suite 301
Tampa, FL 33609

Background

On June 28, 2002, the United States Environmental Protection Agency, Region IV (the "EPA" or "Complainant") filed a Complaint against Julie's Limousine & Coachworks, Inc. ("Respondent") pursuant to the EPA's enforcement authority under Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d).¹ The Complaint alleges that Respondent, a limousine and coach rental company, failed to conform to certain requirements governing service work on motor vehicle air conditioners ("MVACs") in violation of Section 609 of the CAA, 42 U.S.C. § 7671h, and the implementing regulations for the servicing of MVACs found in 40 C.F.R. Part 82, Subpart B.

Specifically, Count I of the Complaint alleges that Respondent used an uncertified technician from January 1, 1997 through approximately June 17, 1998 to perform service or repair of MVACs involving refrigerant for consideration in violation of Section 609(c) of the CAA and 40 C.F.R. § 82.34(a)(2). Count II alleges that Respondent failed to use approved refrigerant recycling or recovery equipment when servicing MVACs for consideration from January 1, 1997 through July 22, 1998 in violation of Section 609(c) of the CAA and 40 C.F.R. § 82.34(a)(1). Count III charges that Respondent failed to provide timely certification to the EPA for its MVAC recovery equipment in violation of Section 609(d) of the CAA and 40 C.F.R. § 82.42(a). Count IV alleges that Respondent failed to respond truthfully to a Section 114(a) information request letter in violation of Section 114(a) of the CAA. Complainant seeks a civil administrative penalty of \$43,018.50 for the alleged violations.

Respondent filed an Answer on July 25, 2002, denying or claiming to have insufficient knowledge of the allegations made by Complainant and contesting the EPA's jurisdiction over this matter. Respondent's challenge to EPA's jurisdiction was based on the assertion that the Complaint is barred by the statute of limitations and by the twelve-month limitation on the initiation of administrative enforcement actions set forth in Section

¹This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

113(d)(1) of the Clean Air Act.²

On August 9, 2002, Respondent submitted a Motion to Dismiss, or in the Alternative, for a Bill of Particulars ("Motion to Dismiss I"), which was opposed by Complainant. See Complainant's Memorandum in Response to Respondent's Motion to Dismiss and Bill of Particulars ("Response I"). Respondent proffered several arguments to support its Motion to Dismiss, including the assertion that Complainant had produced no proof that "the Administrator of the EPA and the Attorney General have jointly determined that a longer period of violation is appropriate for this administrative penalty action," as required under Section §113(d)(1) of the CAA. Motion to Dismiss I at 11.

In its Response to Respondent's Motion to Dismiss I, Complainant provided photocopies of correspondence between the EPA and United States Department of Justice ("DOJ") reflecting that on April 8, 2002 the DOJ "concurred" with the EPA's request for a waiver of the twelve-month statutory limitation on the EPA's authority to initiate an administrative enforcement action against Respondent pursuant to Section 113(d)(1) of the CAA. Response I, Exhibit 5. The submitted EPA correspondence consisted of two documents: a February 15, 2002 Memorandum from a person who signed (unreadable signature) the Memorandum for Phyllis P. Harris, Regional Counsel and Director of the Environmental Accountability Division, that was sent to Bruce B. Buckheit, Director of the Air Enforcement Division ("AED"), Office of Regulatory Enforcement ("ORE"), Office of Enforcement and Compliance Assurance ("OECA"), stating that the "memorandum requests a waiver of the twelve-month statutory limitation on EPA's authority to initiate an administrative complaint for penalties" against Respondent and that the "case represents an appropriate use of this waiver authority;" and a responsive letter from Bruce Buckheit, which was addressed to the Assistant Attorney General for the Environmental and Natural Resources Division, DOJ, dated March 5, 2002, stating that the AED of OECA "concurs and joins with Region 4 in requesting that a waiver of

² Section 113(d)(1) of the CAA states that the Administrator's authority to issue an administrative order under this paragraph "shall be limited to matters where the total penalty sought does not exceed \$200,000 and 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 larger penalty amount or longer period of violation is appropriate for administrative penalty action." 42 U.S.C. § 7413(d)(1). The first alleged date of violation in this matter occurred on January 1, 1997.

the 12-month limitation...is appropriate...." Response I, Exhibit 4.

Respondent's Motion to Dismiss and Motion for Bill of Particulars were denied in an Order entered November 26, 2002. Observing that proof of the waiver determination should have accompanied the Complaint and not the EPA's Response to the Motion to Dismiss, I nonetheless determined that Complainant had presented documentation demonstrating that the required waiver had been obtained to prosecute the alleged CAA violations in this case. Order Denying Respondent's Motion to Dismiss and Order Denying Respondent's Motion for Bill of Particulars at 5. Noting that the waiver from the DOJ was dated April 8, 2002 and that the Complaint was subsequently filed on June 28, 2002, I found that the Complaint survived Respondent's challenge as being untimely and that the Complaint should not be dismissed on this ground. *Id.*

After the parties engaged in a prehearing information exchange, an Order Scheduling Hearing was issued setting May 5, 2003 as the date for hearing.

On April 1, 2003, Complainant filed a Motion for Partial Accelerated Decision and Motion to Strike Affirmative Defenses and Memorandum of Law in Support ("Motion for Partial Accelerated Decision"), along with a Motion in Limine, which were opposed by Respondent. Complainant's Motion for Partial Accelerated Decision requested an accelerated decision on Counts II, III, and IV of the Complaint and an order striking affirmative defenses 1-4, 6-11, and 14-16 from Respondent's Answer, while the Motion in Limine sought to prevent Respondent from introducing certain evidence at the hearing. Complainant's Motion for Partial Accelerated Decision and Motion in Limine were denied in an Order entered May 2, 2003.

On April 9, 2003, Respondent filed Respondent's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction ("Motion to Dismiss II"), arguing that the waiver submitted by the EPA to comply with Section 113(d)(1) of the CAA was ineffective because it was signed by a person who did not have the authority to grant a waiver. Specifically, Respondent alleged that the March 5, 2002 letter signed by Bruce Buckheit, Director of AED, ORE, OECA, cannot serve as the Section 113(d)(1) waiver because Complainant had not demonstrated that Mr. Buckheit had been delegated the authority to grant such a waiver. Motion to Dismiss II at 7. Additionally, Respondent challenged Mr. Buckheit's waiver determination authority on the ground that his redelegated authority from the Assistant Administrator for

Enforcement and Compliance ("AA for OECA") was limited by EPA Headquarters Delegation §7-6-A ¶ 3.b. to multi-Regional cases, cases of national significance or nationally managed programs, and that this case did not fit any of those categories. *Id.*

Complainant opposed the Motion to Dismiss II, arguing that the proper waivers were obtained and signed by the authorized personnel. Complainant's Response to Respondent's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction ("Response II") at 2. Citing Headquarters Delegation §7-6-A ¶ 3.e. and a June 6, 1994 Memorandum from the AA for OECA concerning Redelegations of Enforcement Authority, Complainant argued that Mr. Buckheit had the "authority to sign, on behalf of EPA, Section 113(d)(1) waivers." Response II at 2, Exhibits 1, 2.

In an Order on Respondent's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction issued April 23, 2003, the Motion to Dismiss II was denied on the basis that the EPA had shown that the Section 113(d)(1) waiver in the instant matter was issued by a person at the EPA who had authority to issue such waiver.³ Order On Respondent's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction at 2. Specifically, I found that Complainant had provided documentation to show that the authority for enforcement actions under Section 113(d)(1) has been redelegated to the Division Director level in the ORE, which includes the Director of the AED (Response II, Exhibits 1-2). *Id.*

On April 25, 2003, Respondent submitted a Motion for Reconsideration of Decision Regarding Subject Matter Jurisdiction ("Motion for Reconsideration"). Respondent claimed that Complainant withheld some pages of the Delegation Manual that were submitted as exhibits attached to Complainant's Response II, and again argued that the instant matter is not a multi-Regional case, or a case of national significance or nationally managed programs. Motion for Reconsideration at 2-4.

In opposing the Motion for Reconsideration, Complainant

³ In the Order On Respondent's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction issued April 23, 2003, I observed that the Delegation Manual states that the Administrator has delegated authority to make waiver determinations to the Regional Administrators and the AA for OECA. The Delegation Manual then provides that this authority may be redelegated to the Division Director level. See U.S. EPA, Delegation Manual § 7-6-A ¶¶ 2., 4. (1994).

cited Headquarters Delegation §7-6-A ¶ 1.b., and reiterated its claim that "the EPA's Clean Air Act Section 113(d)(1) waiver was properly executed by Bruce Buckheit, the current Director of the Air Enforcement Division in OECA, who has the authority to sign, on behalf of EPA, the Section 113(d)(1) waivers." Complainant's Response to Respondent's Motion for Reconsideration of Decision Regarding Subject Matter Jurisdiction at 2. Complainant noted that "Title VI Section 609 of the CAA is a nationally managed program" ... and "thus it is implemented by EPA, thereby meeting the requirements of delegation 7-6-A paragraph 3.b." *Id.* at 2-3. Respondent's Motion for Reconsideration was denied in an Order entered April 30, 2003.

An evidentiary hearing was held on May 5 through 8, 2003 in Tampa, Florida. On the third day of the hearing, Respondent submitted a Third Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss III"). Transcript at 578-90. Respondent's motion was based on its assertion that the EPA had failed to show that the case involved a nationally managed program and, thus, the AA for OECA, and correspondingly the Director of AED, ORE, OECA, did not have delegated authority to make the waiver of the twelve-month limitation under Section 113(d) of the CAA. Motion to Dismiss III at 2-3. Respondent's Motion to Dismiss III was held in abeyance until after the hearing and both parties had the opportunity to again address the jurisdictional issue in their post-hearing briefs.⁴ Transcript at 590.

On September 5, 2003, the EPA filed Complainant's Reply to Respondent's Third Motion to Dismiss ("Response III"). In defending its position that the waiver determination was properly made in the instant matter, Complainant asserted that Mr. Buckheit, Director of AED, ORE, OECA, in fact had concurred in the Region's waiver determination. Response III at 2, n.1. In this regard, Complainant maintained that "Mr. Buckheit's determination functions as a concurrence with the Region's determination." *Id.* at 4. Noting that paragraphs 1.b. and 2. of Regional Delegation §7-6-A state that waiver authority rests with the Region 4 Director of Air, Pesticides & Toxics ("Region 4 Director of Air & Pesticides"), Complainant contended that "after then Division Director [Air & Pesticides], Winston Smith, made a determination that the case could proceed, his attorney, the Regional Counsel, requested concurrence from the designee of the

⁴ Pursuant to Respondent's request, the EPA was ordered to respond to Respondent's Motion to Dismiss III prior to the filing of the post-hearing briefs.

AA for OECA as well as a joint determination from the Attorney General on his behalf." Response III at 7.

On September 12, 2003, Respondent filed Respondent's Reply in Support of Third Motion to Dismiss. Respondent asserted that "the EPA has, until its most recent pleading, repeatedly taken the position that Mr. Buckheit made the 12-month waiver determination here and had the authority to do so under the limitations in paragraph 3.b because this was purportedly a case involving a nationally managed program." Respondent's Reply in Support of Third Motion to Dismiss at 3. According to Respondent, the February 15, 2002 Memorandum by Ms. Harris is not a waiver determination but rather is merely a request for a waiver determination by Mr. Buckheit. *Id.* at 11. Alternatively, Respondent argued that, contrary to the EPA's assertion, the Regional Counsel and Director of the Environmental Accountability Division, Ms. Harris, did not have delegated authority to make a waiver determination. *Id.* Respondent further argued that the EPA had produced no evidence to show that the RA or Region 4 Director of Air & Pesticides actually did make a waiver determination. *Id.* at 12. Finally, Respondent argued that the EPA is judicially estopped from taking the position that the waiver determination was made by the Region 4 Director of Air & Pesticides. *Id.*

A post-hearing telephonic conference with both parties was conducted on October 2, 2003 to discuss issues concerning subject matter jurisdiction raised by Respondent in its Motion to Dismiss III and by Complainant in its Response III. Although Complainant admitted that it mistakenly had characterized this case as one involving a "nationally managed program," it reiterated its assertion that the waiver determination was properly executed by Mr. Buckheit and argued that his authority to make such a determination is not limited by the circumstances listed in Headquarters Delegation §7-6-A, ¶ 3.b. When I pointed out that my reading of the EPA and DOJ's correspondence concerning the Section 113(d)(1) waiver determination led me to believe that the waiver was initiated and requested by Region 4, that concurrence with the waiver request was obtained from a designee of the AA for OECA, and that the DOJ agreed with the waiver of the twelve-month limitation, the EPA changed its position and argued that Region 4 requested the waiver. At that juncture, the EPA was directed to submit a written brief verifying the facts surrounding the waiver determination in the instant matter.

On October 15, 2003, the EPA filed Complainant's Response to Respondent's Reply Motion in Support of Third Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Response IV"). The EPA

states that "Region 4 made a determination that a waiver for the Julie's Limousine case was appropriate and requested OECA's concurrence." Response IV at 14. The EPA contends that its position concerning the waiver determination has not changed in that it consistently has maintained that the EPA properly invoked its administrative penalty authority and that Mr. Buckheit, the Director of AED, ORE, OECA, had authority to determine that a waiver of the twelve-month limit was appropriate in this case. *Id.* at 3. In this regard, the EPA explains that Mr. Buckheit's decision to "concur" with a "determination" made by Region 4 was in fact a "determination" that a waiver was appropriate, and thus, the EPA did not mischaracterize the facts concerning the waiver determination. *Id.* at 14-15. In support of its position that the waiver determination authority was properly invoked in this matter, the EPA has proffered affidavits of Winston A. Smith, the former Region 4 Director of the Air & Pesticides Division, and Richard Biondi, the Acting Division Director of AED, ORE, OECA.⁵

In response, Respondent maintains that the EPA lacks subject matter jurisdiction in this case because the EPA and DOJ's joint waiver of the statutory limitation on administrative penalty authority pursuant to Section 113(d)(1) of the CAA was not valid. Respondent's Surreply in Support of Third Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Exclude. Specifically, Respondent argues that the waiver determination authority exercised by the EPA was not in accordance with the EPA Delegation Manuals and its implementing memorandums. *Id.* at 2-5. Respondent vigorously challenges the EPA's characterization of the facts surrounding the waiver determination as presented in the EPA's earlier pleadings and therefore argues that the EPA should be judicially estopped from advancing its current position. *Id.* Additionally, Respondent moves to exclude all new evidence proffered by the EPA subsequent to the hearing. *Id.* at 11-13.

For the reasons discussed below, having fully considered the record in the case, the arguments of counsel, and being fully advised, I find that the EPA lacks administrative jurisdiction over this matter.⁶

⁵The Affidavit of Beverly Spagg, identified as Attachment 5, was not included with the Attachments filed with the Administrative Law Judge.

⁶An interlocutory order, with appeal to the Environmental Appeals Board, would have been more appropriate, but the EPA's position

Discussion

The CAA provides a twelve-month statutory limitation on the EPA's authority to initiate an administrative complaint for the assessment of an administrative penalty for violations of the CAA and its implementing regulations. 42 U.S.C. § 7413(d)(1). The CAA, however, further provides an exception to the twelve-month limitation where administrative penalty action is deemed appropriate. *Id.* Specifically, Section 113(d)(1) of the CAA, in pertinent part, states:

The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed \$200,000 and 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 larger penalty amount or longer period of violation is appropriate for administrative penalty action.^{7]}

42 U.S.C. § 7413(d)(1).

The EPA Administrator's authority to determine jointly with the Attorney General in accordance with Section 113(d)(1) of the CAA the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action, *inter alia*, has been delegated to the Regional Administrators ("RAs") and the AA for OECA.⁸ U.S.

concerning the party exercising waiver determination authority for the EPA was not fully flushed out until the filing of Complainant's Response III and Respondent's Reply in Support of Third Motion to Dismiss, the post-hearing conference call with both parties, and EPA's Response IV. See Section 22.29 of the Rules of Practice, 40 C.F.R. § 22.29.

⁷The determination by the Administrator and Attorney General is not subject to judicial review. 42 U.S.C. § 7413(d)(1).

⁸Pursuant to Section 301(a) of the CAA, 42 U.S.C. 7601(a), "[t]he Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient."

EPA, Delegation Manual, Clean Air Act, §7-6-A ¶¶ 1.b, 2 (August 4, 1994) ("Headquarters Delegation §7-6-A").⁹ This authority to determine jointly with the Attorney General the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action will hereinafter be referred to as the "waiver determination" authority. Thus, the Administrator's delegated waiver determination authority may follow one of two routes; the RA or the AA for OECA. Headquarters Delegation §7-6-A further authorizes redelegation of the RA and AA's waiver determination authority to the Division Director level. Headquarters Delegation §7-6-A ¶ 4.

Headquarters Delegation §7-6-A places several constraints on the waiver determination authority delegated to the RAs and AA for OECA which are set forth in the limitations section of the delegation. Headquarters Delegation §7-6-A ¶ 3. Such constraints implicitly apply to the authorities that are redelegated to the Division Director level. The pertinent limitations require that the AA for OECA "concur in any determination regarding the authority delegated under paragraph 1.b." (emphasis supplied) and that the AA for OECA or his/her designee notify any affected RAs or their designees when exercising his/her waiver determination authority delegated under paragraph 1.b.¹⁰ Headquarters Delegation §7-6-A ¶¶ 3.b., e.

In the instant matter, the alleged CAA violations cited in the Complaint occurred several years before the EPA sought to file its Complaint against Respondent. Thus, before the administrative Complaint could be filed, the Administrator for the EPA or his/her designee and the Attorney General or his/her designee had to jointly determine that the matter was appropriate for administrative penalty action. 42 U.S.C. § 113(d)(1); *In re Lyon County Landfill*, CAA Appeal No. 98-6, 8 E.A.D. 559 (EAB, Aug. 26, 1999). Generally, the EPA initiates the joint waiver determination process by requesting the waiver from the DOJ.

⁹The EPA has proffered the Clarification of Enforcement Delegations-Decision Memorandum as approved by the Administrator on August 3, 1994 for Headquarters Delegation §7-6-A. The prior Headquarters Delegation §7-6-A dated May 11, 1994 omitted ¶ 3.e., thereby requiring the August 3, 1994 Clarification of Enforcement Delegations-Decision Memorandum.

¹⁰Headquarters Delegation §7-6-A also limits the delegated authorities of the AA for OECA to "multi-Regional cases, cases of national significance or nationally managed programs." Headquarters Delegation §7-6-A ¶ 3.b.

When the AA for OECA initiates the process by requesting the waiver, the AA for OECA or his/her designee must notify any affected RAs or their designees. Headquarters Delegation §7-6-A ¶ 3.b. When the RA or his/her designee initiates the waiver determination process, the AA for OECA is required to concur with the waiver determination. Headquarters Delegation §7-6-A ¶ 3.e.

Here, the record reflects that the joint waiver determination with the Attorney General was sought through the route of the Administrator's delegated authority to the RA for Region 4 with the concurrence of the AA for OECA. The text of the EPA and DOJ's correspondence concerning the exercise of the waiver determination authority shows that the waiver was initiated and requested by Region 4, that concurrence with the waiver request was obtained from a designee of the AA for OECA, and that the DOJ agreed with the waiver of the twelve-month limitation.

For example, the February 15, 2002 Memorandum from a person who signed (unreadable signature) the Memorandum for Phyllis P. Harris, Regional Counsel and Director of the Environmental Accountability Division, that was sent to Bruce B. Buckheit, Director of the AED, ORE, OECA, states that the "memorandum requests a waiver of the twelve-month statutory limitation on EPA's authority to initiate an administrative complaint for penalties" against Respondent and that the "case represents an appropriate use of this waiver authority." The responsive letter from Mr. Buckheit, which was addressed to the Assistant Attorney General for the Environmental and Natural Resources Division, DOJ, dated March 5, 2002, states that the AED of OECA "concurs and joins with Region 4 in requesting that a waiver of the 12-month limitation...is appropriate..."¹¹ In a letter from the DOJ to Phyllis Harris dated April 8, 2002, the Assistant Section Chief, Environmental Enforcement Section, replies that she agrees that the matter is appropriate for administrative penalty action and that she concurs with the waiver determination pursuant to Section 113(d)(1) of the CAA.

I turn next to the issue of whether the waiver was issued by the proper parties, including the question of whether the waiver determination authority was exercised properly by the EPA. As such, I must determine whether the EPA's waiver request was

¹¹ The EPA never produced documentation that the AA for OECA or his/her designee notified the Region 4 RA or his/her designee that there had been an exercise of the waiver determination authority. Headquarters Delegation §7-6-A ¶ 3.b.

propounded and signed by the proper person within Region 4 exercising his/her delegated waiver determination authority. Region 4 Delegation §7-6-A submitted by the EPA shows that the authorities delegated to the RA under Headquarters Delegation §7-6-A, including the waiver determination authority, are redelegated to the Region 4 Director of Air & Pesticides. U.S. EPA, Region IV, Delegations Manual, Chapter 7 (Clean Air Act), §7-6-A (November 15, 1993)("Region 4 Delegation §7-6-A").¹² Region 4 Delegation §7-6-A also specifies that the limitations contained in Headquarters Delegation §7-6-A apply to the redelegation and that further redelegation is not authorized. Region 4 Delegation §7-6-A ¶¶ 3., 4.

A Memorandum concerning the Redelegations of Enforcement Authority from Steven A. Herman, AA for OECA, to the RAs, AAs, and OECA Office Directors dated June 6, 1994 has been presented by the EPA. The OECA Delegations of Authority matrix attached to the Memorandum reflects that the AA for OECA redelegated all authorities delegated to the AA for OECA under Headquarters Delegation §7-6-A to the Director of FFE0 and the ORE Division Director level.¹³

The EPA has also produced Memorandums for the Redelegation of Enforcement Authority under Headquarters Delegation §7-6-A from Steven A. Herman, AA for OECA, to Robert Van Heuvelen, Director, ORE, OECA, dated August 12, 1994 and from a person acting for Robert Van Heuvelen to Kathie A. Stein, Director of AED, ORE, OECA, dated August 12, 1994. These Memorandums state that because Headquarters Delegation §7-6-A dated August 4, 1994 delegated certain authorities that inadvertently had been deleted from the delegations approved by the Administrator in May 1994, the previously omitted authority now delegated in Headquarters Delegation §7-6-A was being redelegated to the Director of ORE, OECA, and then again redelegated to the Director of AED, ORE, OECA. The redelegated authority was identified as "paragraph 3.d. of Delegation 7-6-A to concur in any determination made jointly with the Attorney General in accordance with the Clean Air Act when a matter involving a larger penalty or a longer period of violation is appropriate for administrative penalty

¹² The Region 4 Delegation §7-6-A predates the August 4, 1994 Headquarters Delegation §7-6-A, and is not accompanied by a Decision Memorandum.

¹³ Headquarters Delegation §7-6-A prior to August 4, 1994 did not include the limitation set forth at ¶ 3.e.

action."¹⁴ The Memorandums further provide that this redelegation of authority was to be added to the redelegations matrix signed by Steve Herman on June 6, 1994.

Upon reviewing Headquarters Delegation §7-6-A, Region 4 Delegation §7-6-A, and the February 15, 2002 Memorandum requesting the waiver, I am compelled to find that the waiver determination authority exercised by the EPA was not valid. Foremost, the EPA did not follow its own Delegation Manuals and the person who propounded and signed the waiver request did not have authority to do so under the Delegation Manuals.¹⁵

As previously discussed, the record reflects that the joint waiver determination with the Attorney General was sought through the route of the Administrator's delegated authority to the RA for Region 4 with the concurrence of the AA for OECA. The February 15, 2002 Memorandum that initiated and requested the waiver was from a person who signed (unreadable signature) the

¹⁴ The citation to paragraph 3.d. of Headquarters Delegation §7-6-A is in error because paragraph 3.d. states: "The Assistant Administrator for Enforcement and Compliance Assurance may waive his/her consultation and concurrence requirements by memorandum." Apparently, the AA for OECA was referring to paragraph 3.e. which states: "The Assistant Administrator for Enforcement and Compliance Assurance must concur in any determination regarding the authority delegated under paragraph 1.b."

¹⁵ According to the Headquarters Delegation:

It is EPA's policy that, in order for other Agency management officials to act on behalf of the Administrator, the authority granted by Congress or the Executive Branch must be delegated officially. This is accomplished through the Agency's delegation process.

These internal delegations are recorded in the 'EPA Delegations Manual,' a record of the authority of an Agency employee or representative to act on behalf of the Administrator. This Manual is both a legal and a management document. First, it is a legal record of the authority of an Agency employee or representative to act on behalf of the Administrator. Second, it reflects the management philosophy of the Agency by establishing communication requirements among organizations.

Delegation Manual, Introduction to the Delegation Manual (Feb. 22, 1995).

memorandum for Phyllis P. Harris, Regional Counsel and Director of the Environmental Accountability Division. The waiver request sought the concurrence of Bruce B. Buckheit, Director of AED, ORE, OECA, and such concurrence was given by Mr. Buckheit's Memorandum dated March 5, 2002.

Also, as explained above, the EPA Administrator delegated his/her waiver determination authority to the RAs by Headquarters Delegation §7-6-A, and the Region 4 RA's waiver determination authority was then redelegated to the Region 4 Director of Air & Pesticides.¹⁶ Region 4 Delegation §7-6-A provides that further redelegation is not authorized and that the limitations contained in the Headquarters Delegation apply to the redelegation.

However, the February 15, 2002 Memorandum initiating and requesting the waiver was not signed by the RA or the Region 4 Director of Air & Pesticides but rather was prepared and signed by a person on behalf of the Region 4 Regional Counsel and Director of the Environmental Accountability Division.¹⁷ The February 15, 2002 Memorandum requesting the waiver is deemed to be evidence that the waiver determination was made by the person signing on behalf of the Region 4 Regional Counsel and Director of the Environmental Accountability Division rather than the RA or the Regional Director for Air & Pesticides. Neither the Regional Counsel nor the Regional Director of the Environmental Accountability Division has delegated waiver determination authority.

The EPA's argument that the February 15, 2002 Memorandum was prepared and signed by the Regional Counsel's designee as the "attorney" for the Region 4 Director of Air & Pesticides, the RA, and/or the Region is not persuasive.¹⁸ First, the Regional Counsel's role as attorney for the Region cannot be used to

¹⁶ I do not reach the question, raised by Respondent, that the Region 4 Delegation §7-6-A reflected in the Region 4 Delegation Manual is not properly documented by a Decision Memorandum from the RA.

¹⁷ In Complainant's Response IV, the EPA identified the person signing the February 15, 2002 Memorandum as "the then Regional Counsel's designee." Response IV at 5. If the Regional Counsel did not have delegated waiver determination authority, then, under the principle of *delegatus non potest delegare*, any designee of the Regional Counsel would not have waiver determination authority.

¹⁸ Otherwise, the authority of the Regional Counsel would be unlimited.

supplant delegation authority.¹⁹ I emphasize that I am bound by the record before me and that EPA policy or custom concerning the Region's handling of these type of cases cannot trump the Delegation Manuals. I also observe that the February 15, 2002 Memorandum does not indicate whether it was signed for Ms. Harris in her capacity as Regional Counsel or as the Regional Director of the Environmental Accountability Division. Second, the October 14, 2003 affidavit of Winston A. Smith, the former Region 4 Director of Air & Pesticides, proffered by the EPA to support its argument that the Region 4 Director of Air & Pesticides had determined that the waiver was appropriate, does not adequately establish the EPA's position. See Respondent's Surreply in Support of Third Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Exclude at 13-22.

Inasmuch as the EPA did not properly exercise its delegated waiver determination authority, I further conclude that the EPA and DOJ's joint waiver of the twelve-month statutory limitation on the EPA's authority to initiate an administrative complaint for the assessment of an administrative penalty pursuant to Section 113(d)(1) of the CAA was not valid and, thus, the EPA lacked jurisdiction to issue the Complaint. Accordingly, the EPA does not have administrative jurisdiction over this matter.²⁰

In light of the determination that the waiver was not valid, I need not reach the additional arguments raised by Respondent. For example, I do not address Respondent's arguments that the EPA is estopped from advancing its position that the waiver was properly requested by the Region 4 Director of Air & Pesticides rather than the AA for OECA,²¹ that any documents proffered by the EPA after the hearing to support its current position that the waiver was properly obtained are inadmissible, and that the Region 4 Delegation §7-6-A is not properly documented and supported by a memorandum from the RA.

Additionally, I do not reach the issue of whether the

¹⁹ See note 15.

²⁰ The burden of proving jurisdiction lies with the EPA. Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24; *Lyon County Landfill, supra*, at 568.

²¹ The issue of whether the AA for OECA may only exercise his/her waiver determination authority in multi-Regional cases, or cases of national significance or nationally managed programs is now moot inasmuch as the EPA maintains that the waiver was requested by Region 4 rather than the AA for OECA.

requirement that the AA for OECA concur in any determination regarding the authority delegated under paragraph 1.b. of Headquarters Delegation §7-6-A has been properly redelegated to the Director of AED, ORE, OECA.²²

Order

Complainant's Third Motion to Dismiss for Lack of Subject Matter Jurisdiction is Granted.

The Complaint is dismissed for lack of jurisdiction.

Appeal Rights

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, sua sponte, to review this decision.

Barbara A. Gunning
Administrative Law Judge

Dated: November 14, 2003
Washington, DC

²² The redelegation authority cited in paragraph 4 of Headquarters Delegation §7-6-A appears to refer only to the waiver determination authority delegated in paragraph 1.b. and not the "limitations" in paragraph 3. The text of paragraph 3.e. does not include the term "designee." The Redelegation Memorandums dated August 12, 1994, incorrectly cite paragraph 3.d. as authority for the redelegation of the authority to concur in any determination made jointly with the Attorney General.

In the Matter of Julie's Limousine & Coachworks, Inc., Respondent
Docket No. CAA-04-2002-1508

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion To Dismiss Initial Decision**, dated November 14, 2003 was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale
Legal Staff Assistant

Dated: November 14, 2003

Original and One Copy by Pouch Mail to:

Patricia Bullock
Regional Hearing Clerk
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy by Pouch Mail to:

Lucia C. Mendez, Esquire
Nadine Orrell, Esquire
Associate Regional Counsel
U.S. EPA
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

Copy by Certified Mail Return Receipt to:

Ward Meythaler, Esquire
Robert W. Merkle, Esquire
Merkle & Magri, P.A.
550 North Reo Street, Suite 301
Tampa, FL 33609