

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
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)
Lu Verne G. Kienast) Docket No. CAA-5-2001-007
L.G. Kienast Utility)
Construction,)
)
Respondents)

ORDER DENYING RESPONDENTS' MOTION
TO COMPEL EPA TO MAKE DISCOVERY

On October 10, 2001, Respondents moved, pursuant to 5 U.S.C. § 556(c), 42 USC § 7607(a) and 40 CFR § 22.19(c) for an order directing the United States Environmental Protection Agency to produce a memorandum from EPA Region 5 (Region 5 Memo) which was referenced as an "enforcement sensitive memorandum" in a letter from EPA's Office of Enforcement and Compliance Assurance to Lois J. Schiffer, Assistant Attorney General of the United States Department of Justice. Respondents seek disclosure of EPA's alleged justification for requesting a waiver of the twelve-month limitations period set forth in Section 113(d)(1) of the Clean Air Act, to initiate this proceeding. Respondents assert that in order to determine whether the justification was valid, all documents relevant to this justification must be disclosed, including the Region 5 Memo.

In support of its request, Respondents argue that the Administrative Law Judge (ALJ) has the legal duty to examine the EPA's alleged justification for requesting the waiver and to find on the record whether it was valid or not. In support of its argument, Respondent cites to **Lyon County Landfill, EPA Docket No. CAA-5-96-011 (ALJ, April 4, 2000)**. Such a record is necessary for judicial review, Respondents urge. Respondents contend that it is "EPA's burden to show, by clear and convincing evidence, that its purported waiver of the limitations period was for a good and valid purpose, and not arbitrary or capricious." Respondents assert that the provision in Section 113(d) of the Clean Air Act, "Any such determination by the Administrator and Attorney General shall not be subject to judicial review," is an unconstitutional violation of the separation of powers doctrine, and that this case is an appropriate vehicle to test that

doctrine in court.

Complainant, in its Response to Respondent's Motion to Compel (Response), objects to Respondents' request on grounds that Respondents failed to demonstrate that the requested Region 5 Memo has significant probative value on a disputed issue of material fact, that Respondents cannot in this forum challenge the constitutionality of a statutory provision, that Respondents misstate the applicable case precedent, and that EPA properly denied Respondents' request for the Region 5 Memo through the Freedom of Information Act (FOIA) on the basis that the Memo contained deliberative process, attorney-client, and attorney work-product privileged information. Complainant notes that Respondents have a pending FOIA appeal before the EPA General Counsel, for *de novo* review of the denial of release of the Region 5 Memo under FOIA.

Section 113(d)(1) of the Clean Air Act (CAA) authorizes the administrative assessment of civil penalties, and includes the following provision:

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 Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

In ***Lyon County Landfill***, the respondent pointed out that the Department of Justice and EPA documents concurring with the request for waiver of the 12 month limitation did not indicate that the penalty sought exceeded \$200,000 or that the period of violation exceeded the 12 month limit. The respondent asserted that jurisdiction was not established because the complainant had not shown that the matter involved "a larger penalty amount or longer period of violation," either of which would make a waiver determination appropriate. ***Lyon County Landfill, EPA Docket No. 5-CAA-96-011 (ALJ, Order Granting Respondent's Motion to Dismiss Complaint, August 21, 1998)***(attachment 4 to Response). The proposed penalty was less than \$200,000, and the violations allegedly occurred on two days, which were two years prior to the

date the complaint was filed. Judge Gunning found that the violations were not a "longer period of violation" under Section 113(d)(1), having occurred on only two days, and thus failed to meet the conditions for a waiver of the Section 113(d)(1) limitations. *Id.* Judge Gunning dismissed the complaint on the basis that alleged violations did not qualify for a waiver and that it therefore was invalid.

EPA appealed the decision on the basis that Administrative Law Judges (ALJs) may not determine the validity of a waiver. The Environmental Appeals Board (EAB) carefully distinguished decisions of EPA's prosecutorial discretion from decisions of jurisdiction. ***Lyon County Landfill, CAA Appeal No. 98-6 (EAB, August 26, 1999)***. EAB explained:

[T]he decision to seek a waiver of the jurisdictional limitations in CAA section 113(d)(1) may be viewed simply as a policy decision regarding whether to proceed in an administrative or judicial forum. That type of decision is appropriately reserved to enforcement personnel. * * * *

The Presiding Officer's review of the waiver determination in this case, however, simply analyzed whether the statutory conditions for a waiver determination were satisfied. . . . The question examined by the Presiding Officer was not whether the waiver was "appropriate" but rather whether it could have been lawfully issued. As such, the Presiding Officer was not second-guessing an exercise of enforcement discretion, as the Region alleges, . . . but rather was making a legal determination regarding whether the statutory conditions for use of a waiver were satisfied. By reviewing the waiver determination, the Presiding Officer was seeking to ensure that administrative penalty authority was properly invoked such as to provide a jurisdictional basis for her proceeding. This function is distinct from the determination whether a waiver, if available, should actually be granted in a particular case.

Certainly, neither an ALJ nor the [EAB] may invalidate a waiver determination simply because, in the ALJ's (or Board's) judgment, a case should have been brought in a judicial forum. Within EPA, that type of judgment would interfere with the enforcement discretion entrusted to the Office of Enforcement and Compliance Assurance However, it is legitimate

for an ALJ to ensure that a statute actually authorizes a penalty action based on the facts of a particular case. . . . simply ensuring that administrative penalty authority is, in fact, legally available.

Id., *slip op. at 11-12.* The EAB then addressed EPA's challenge to Judge Gunning's interpretation of the term "longer period of violation" in Section 113(d)(1). Particularly considering EPA's policy arguments, the EAB interpreted the term "longer period of violation" as "a period of time greater than 12 months between the first date of a violation and the date of the complaint." *Id.*, *slip op. at 24.* The EAB found that the alleged violations met that condition and reinstated the complaint.

The subsequent Initial Decision on remand, dated April 4, 2000, cited by Respondents, merely summarized the ALJ's dismissal of the complaint and the EAB's decision on appeal, and then addressed the issues of liability and penalty.

The Complainant in this matter proposes a total penalty of \$115,600, and therefore the penalty limitation of Section 113(d)(1) was met. The Complaint, dated May 18, 2001, alleges that Respondents violated the Clean Air Act and implementing regulations in 1998. The first alleged date of violation occurred more than 12 months prior to the date of the Complaint, thus exceeding the time limitation of Section 113(d)(1). Consequently, EPA has no authority to assess civil administrative penalties except where the Administrator and Attorney General determine that a "longer period of violation is appropriate for administrative penalty action." The interval between the alleged violations and the Complaint constitutes a "longer period of violation," under the *Lyon County Landfill* precedent established by the EAB, so there is no question that the conditions for a waiver were met.

Therefore, EPA and the Justice Department were qualified to make a determination as to whether this case was "appropriate for administrative penalty action," as provided in Section 113(d)(1).

Respondents' request for the undersigned to examine the EPA's justification for requesting the waiver of the limitations period and determine whether it was "for a good and valid purpose, and not arbitrary or capricious," in essence urges the ALJ to determine whether it was "appropriate for administrative penalty action." As concluded by the EAB, this determination is not subject to review by the ALJ. Consequently, there is no basis for the undersigned to examine the Region 5 Memo.

Accordingly, Respondents' Motion to Compel EPA to Make Discovery is **DENIED**.

So ordered.

Stephen J. McGuire
United States Administrative Law Judge

November 30, 2001
Washington, D.C.