UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
STRONG STEEL PRODUCTS, LLC,	)	**Docket No. CAA-5-2003-0009**
	)	
Respondent.	)	

ORDER ON RESPONDENT'S MOTION TO DISMISS
AND COMPLAINANT'S CROSS MOTION FOR ACCELERATED DECISION

I. Background

On June 20, 2003, Complainant initiated the instant action, and an Amended Administrative Complaint was filed on January 16, 2004. The Amended Complaint charges Respondent with two counts of violating the Clean Air Act (CAA), by failing to comply with regulations governing the proper evacuation of ozone depleting refrigerants prior to disposal. Count I alleges that from December 1, 1998 to March 1, 2002, Respondent disposed of small appliances without recovering refrigerants from them or verifying that the refrigerant had been previously evacuated from them on at least 70 occasions in violation of 42 U.S.C. § 7413(a)(3) and 40 C.F.R. § 82.156(f). Count II alleges that from December 1, 1998 to March 2002, Respondent did not maintain or retain records regarding refrigerants on 137 separate occasions in violation of 42 U.S.C. § 7413(a)(3) and 40 C.F.R. §§ 82.166(i) and (m). The Amended Complaint proposes a combined penalty in the amount of $611,260.

Section 113(d) of the CAA (42 U.S.C. §7413(d)), in pertinent part, limits EPA's jurisdiction to initiate an action under its provisions as follows:

> 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.[1]

---

[1] Under 40 C.F.R. Part 19 ("Adjustment of Civil Monetary Penalties for Inflation"), promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, the

Accordingly, with regard to jurisdiction, Paragraph 37 of the original Complaint, alleges that:

> The Attorney General and the Administrator have approved of the filing of an administrative action against Strong pursuant to section 113(d) of the CAA, 42 U.S.C. §7413(d), for violations of the CAA alleged in the Complaint which occurred more than 12 months prior to the filing of this Complaint. They have also approved of an administrative action for the violations alleged in this Complaint wherein the proposed penalty may exceed $220,000.

In its Answer, Respondent denied the violations and asserted, *inter alia*, that Complainant had no authority to seek a penalty in this matter under Section 113(d) of the CAA, as neither the Administrator nor the Attorney General made the determination to waive the limitation on EPA's authority under Section 113(d).

In response, in its Prehearing Exchange, Complainant provided documents to show that a valid waiver determination was, in fact, made under CAA Section 113(d). These documents include: (1) a memorandum, dated October 11, 2002 (Region 5 Waiver Request) from George Czerniak, Chief of the Air Enforcement and Compliance Assurance Branch at EPA Region 5, to Bruce Buckheit, Director of the Air Enforcement Division (AED) in the Office of Enforcement and Compliance Assurance (OECA) in Washington D.C. and William Brighton, Assistant Chief of the Environmental Enforcement Section of the Environmental and Natural Resources Division (ENRD) of the U.S. Department of Justice (DOJ); (2) a letter, dated November 18, 2002, entitled "Request for Waiver of Penalty Amount and 12-Month Limitation on EPA Authority to Initiate Administrative Case," (OECA Waiver Request) from Richard Biondi, Acting Director of AED, on behalf of Bruce Buckheit, to Hon. Thomas L. Sansonetti, Assistant Attorney General of ENRD; (3) a letter, dated December 17, 2002 (DOJ Concurrence) from W. Benjamin Fisherow, Deputy Chief of the Environmental Enforcement Section of the ENRD, to Mr. Czerniak, concurring with the requested waiver; (4) a copy of the Complaint and cover letter, dated June 18, 2003, each signed by Cheryl L. Newton, the Acting Director of the Air and Radiation Division (ARD) in Region 5; and (5) an Office of Regional Counsel Concurrence Sheet in regard to the waiver request for the Complaint.

On January 29, 2004, Complainant provided notice of the decision issued by my honorable colleague, Judge Barbara Gunning, in *Julie's Limousine & Coachworks, Inc.*, 2003 EPA ALJ LEXIS 192 (Initial Decision, November 14, 2003). In her Order, Judge Gunning dismissed the administrative complaint against Julie's Limousine on the basis that the jurisdictional prerequisites of Section 113(d) of the CAA had not been met. Specifically, Judge Gunning found that, according to EPA's Delegations Manual, the Regional Administrator or his

---

$200,000 total maximum penalty applies to violations occurring on or before January 30, 1997 (40 C.F.R. § 19.2). For violations occurring after January 30, 1997, the applicable total maximum civil penalty is $220,000 (40 C.F.R. § 19.4 and Table 1).

designated delegatee, the Director of a particular Division (APTMD) in EPA's Region 4, or the Director of AED in OECA in certain types of cases, was required to determine jointly with United States Attorney General that a waiver of CAA § 113(d)(1) was appropriate. In *Julie's Limousine*, to support its claim that the required waiver had been obtained, EPA presented: (1) a memorandum from Phyllis Harris, the Regional Counsel and Director of the Environmental Accountability Division, to Bruce Buckheit, the Director of AED in OECA; (2) a letter from Bruce Buckheit to the Assistant Attorney General of ENRD, stating that he concurs and joins with the Region in requesting a waiver; and (3) a letter from the Assistant Section Chief of the Environmental Enforcement Section of ENRD to Ms. Harris. After the hearing, EPA additionally offered into evidence the affidavits of Winston Smith, the Acting Director of APTMD, and Richard Biondi, the Acting Director of AED. Noting that EPA abandoned an argument that Mr. Buckheit independently made the determination, Judge Gunning found that EPA failed to demonstrate that Ms. Harris had the delegated authority to make a CAA waiver determination on behalf of the Agency. Therefore, Judge Gunning held that no valid waiver had been obtained and thus, she lacked jurisdiction over the matter. In light of the determination that the waiver was invalid, Judge Gunning did not reach the issue of the admissibility of the affidavits offered by EPA post-hearing. EPA subsequently filed an appeal of Judge Gunning's decision with Environmental Appeals Board (EAB).

By Motion dated February 23, 2004, the Respondent here (Strong Steel Products, LLC) moved to stay further proceedings in this case pending the decision of the EAB in *Julie's Limousine*, asserting that the waiver documents that Judge Gunning held defective in that case are similar to the documents the EPA had submitted in the present case. In reply, EPA asserted that the waiver determination in this case was different than that in *Julie's Limousine* and there was no certainty that *Julie's Limousine* would be dispositive of the issue of jurisdiction in this case. The Motion to Stay was denied by Order dated April 30, 2004. *Strong Steel Products, LLC*, 2004 EPA ALJ LEXIS 12 (EPA ALJ, 2004)

On July 23, 2004, the EAB issued its decision in *Julie's Limousine*, holding that the Director of AED in OECA (Bruce Buckheit) did not have authority in that case to make the waiver determination, but that EPA was not required to produce contemporaneous documentation of a *Regional official's* waiver determination in order to prove that it was made. The EAB concluded that the proffered affidavit of Mr. Smith, the Acting Director of APTMD, was a critical piece of evidence which could prove that he made the proper waiver determination on behalf of the Agency. Therefore, the EAB remanded the case to Judge Gunning for a determination as to the admissibility of the affidavit of Mr. Smith, and for further proceedings as necessary. *Julie's Limousine & Coachworks, Inc.*, 2004 EPA App. LEXIS 23 (EPA App., 2004)

On August 24, 2004, Judge Gunning dismissed the case on remand, finding that the affidavit of Mr. Smith was inadmissible as untimely, and that EPA had, therefore, not established that a waiver determination was made by a person with delegated authority to do so. *Julie's Limousine & Coachworks, Inc.*, 2004 EPA ALJ LEXIS 134 (ALJ, August 26, 2004). No appeal of that decision was taken by the Agency.

Meanwhile, on August 5, 2004, the Respondent here filed a Motion to Dismiss the

present matter for lack of subject matter jurisdiction (Motion). In its Motion, Respondent challenges the validity not only of EPA's waiver determination, but also of DOJ's waiver determination. Complainant filed a Response and Cross Motion for Accelerated Decision on August 23, 2004 (Response), claiming that the undersigned has jurisdiction because the waiver determinations of DOJ and EPA were validly made by persons with delegated authority. In the alternative, if jurisdiction is not established, Complainant requests that the stay be lifted on the Complaint filed against Respondent on March 4, 2004, Docket No. CAA-05-2004-0015, which was filed to preserve substantially the same allegations of violation in the event the present Complaint is dismissed.

Respondent submitted a Reply to EPA's Response on September 3, 2004. Complainant submitted a request to file a Sur-Reply along with a Sur-Reply on September 20, 2004. Respondent opposed the request to file the Sur-Reply on September 23, 2004, and Complainant filed a Reply to the Opposition on October 4, 2004.

II. Motion for Leave to File Sur-Reply

A. Arguments of the Parties

Complainant's Request to File Instanter Sur-Reply (Request) states that the Sur-Reply is necessary to respond to two issues. The first issue, whether the general delegation of authority from the Attorney General included a delegation of his CAA § 113(d) waiver authority to the Assistant Attorney General under 28 C.F.R. § 0.65, is new, being briefed for the first time in Respondent's Reply, Complainant asserts. Respondent's Motion only concluded that 28 C.F.R. § 0.65a did not refer to or include CAA § 113(d) waiver authority, but did not discuss the other paragraphs of 28 C.F.R. § 0.65 upon which Complainant relied. The other issue concerns two exhibits attached to the Reply, Exhibits H and I, which are complaints and waiver documents in two administrative cases, intended to rebut the credibility of declarations regarding Region 5's procedures for CAA waivers. Complainant asserts that Respondent has mis-characterized the declarations and the facts in those cases, that it would be unfair to allow Respondent to add the two exhibits which were not previously filed in this case, and that it would be inappropriate to rely on them without allowing Complainant to explain the inaccuracies in Respondent's arguments.

In its Memorandum in Opposition to the Request, Respondent asserts that Complainant has not shown good cause to file the Sur-Reply. As to the first issue, Respondent argues that Complainant should have presented its arguments regarding the Attorney General's alleged delegation of authority in its Response to the Motion to Dismiss. Respondent explains that EPA only included a copy of 28 C.F.R. §§ 0.65a, 0.66, 0.67 and 0.69 in its Prehearing Exchange, and did not include a complete copy of Section 0.65, so it could be deduced that EPA was not relying on other parts of Section 0.65. Respondent suspects that Complainant was aware of cases cited in Respondent's Reply when it was drafting its Response, and having not elected to discuss those cases in its Response, Complainant should not be allowed to do so in the Sur-Reply.

As to the second issue, Respondent asserts that Complainant's arguments concerning Exhibits H and I to Respondent's Reply have no bearing on whether the Motion to Dismiss should be granted. Respondent argues that if Exhibits H and I must be stricken for not being included in the prehearing exchange, then many of EPA's documents attached to its motions and responses, including the declarations regarding Region 5's procedures for CAA waivers, would have to be stricken for the same reason. Respondent argues that if those declarations are considered, then the rebuttal evidence, namely the administrative cases marked Exhibits H and I, must also be considered.

Respondent asserts further that Complainant did not support its charge of Respondent mis-characterizing the facts in the two administrative cases. Respondent concludes that the arguments in Complainant's Sur-Reply are of no value in considering the Motion to Dismiss. If the request to file the Sur-Reply is granted, Respondent requests an opportunity to file a short sur-reply responding to the arguments in Complainant's Sur-reply, consistent with the principle that the moving party should file the first and last briefs on its motion. Opposition at 3, 10.

B. Discussion and Conclusion

The Consolidated Rules of Practice, 40 C.F.R. Part 22 (Rules) provide for a response and a reply to a motion, and that any additional responsive documents may be permitted only by order of the presiding judge. 40 C.F.R. § 22.16(a). The Rules provide further that the movant's reply "shall be limited to issues raised in the response." 40 C.F.R. § 22.16(b). The preamble to the proposed amendments to 40 C.F.R. Section 22.16(a) explains as follows:

> Paragraph (a) would be revised to place explicit limits on motion practice and to provide a common understanding that the routine practice shall be the filing of a motion, a response and a reply, without any further briefing. Any further responsive documents concerning the motion would be allowed only by order of the Presiding Officer. . . . The proposed amendments are intended to establish more control over motion practice in an effort to simplify the proceeding, and to reduce delays and litigation costs. EPA believes that a motion-response-reply structure is both necessary and sufficient to present the issues fully for the Presiding Officer. The proposed rule specifically provides the movant an opportunity for a reply because responses to motions often raise issues not addressed in the motion itself. The proposed rule then limits the scope of the reply to those issues raised in the response, in order to avoid giving an unfair advantage to the movant. For those instances where this motion-response-reply format may not be appropriate, the Presiding Officer may order an alternative approach."

63 Fed. Reg. 9470 (Feb. 5, 1998).

The motion-response-reply structure is not a requirement that a reply be filed or that a

sur-reply is always unnecessary. If an issue is fully briefed in a motion and a response, then no reply is necessary; if an issue is not fully briefed in a motion, response and reply, then a sur-reply may be necessary. There are several instances in which a sur-reply may be necessary and appropriate. For example, where a response to a motion is filed with a cross-motion, then a reply to the motion generally also constitutes or includes a response to the cross-motion, and similarly, a sur-reply to the motion may constitute a reply to the cross-motion. As another example, where a reply raises issues beyond those raised in the response, and the opposing party elects not to move to strike those issues as violating the requirement of Section 22.16(b) that the reply "shall be limited to issues raised in the response," the opposing party may instead elect to file a sur-reply.

As to the first issue Complainant wishes to address, a response to Respondent's arguments as to 28 C.F.R. § 0.65 presented in its Reply is necessary for a complete briefing on the issue of the delegation from the Attorney General. The Motion to Dismiss did not address the paragraphs of Section 0.65 that Complainant relied upon. The arguments on the relevant paragraphs were initiated in Complainant's Response, which Respondent addressed for the first time in its Reply, so the proposed Sur-Reply operates as a reply thereto. Moreover, Respondent's assumption that Complainant relied on 28 C.F.R. § 0.65a based on its Prehearing Exchange documents does not warrant a prohibition on Complainant presenting its arguments as to the paragraphs in the Code of Federal Regulations (CFR) that it in fact relied upon. Complainant need not have presented copies of any portions of the CFR in its Prehearing Exchange, as the CFR are easily accessible to the public. The fact that Complainant did so should not operate against it.

As to the second issue, Complainant is not requesting that Exhibits H and I be stricken from the record, but only that it have the opportunity to present arguments as to those documents. Complainant raised the argument about Region 5's procedures for CAA § 113(d) waivers in its Response, and upon Respondent's responsive argument that Region 5 did not follow those procedures, it is appropriate to allow Complainant to reply to such responsive argument. Accordingly, the Sur-Reply will be accepted into the record.

Respondent, however, has not shown that a sur-reply in response to Complainant's Sur-Reply is necessary. There is no requirement or strict standard that the moving party file the first and last briefs on its motion. Respondent has not pointed out any argument in the Sur-Reply to which Respondent has not had opportunity to respond. Therefore, its request to file a sur-reply is DENIED.

III. Motion to Dismiss

Respondent presents three arguments in support of its Motion to Dismiss based upon lack of jurisdiction due to the absence of a valid CAA waiver. First, Respondent argues that the

Attorney General never delegated his authority to grant waivers under Section 113(d) of the CAA, and that the DOJ Concurrence, signed by a Deputy Section Chief, is therefore not valid. Second, Respondent argues that Complainant has not identified any person in EPA Region 5 with delegated authority to make the waiver determination who made the determination for this case. Third, Respondent argues that OECA merely concurred in the Region's waiver determination, that OECA was delegated the authority to make waiver determinations only for cases of multi-Regional cases, national significance, and nationally managed programs, and that this case does not fit those criteria, so the OECA Waiver Request is not valid.

> The Rules provide as follows in regard to motions to dismiss:
>
> The Presiding Officer, upon motion of respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of complainant.

40 C.F.R. § 22.20(a). The Rules do not address "other grounds," and therefore the Federal Rules of Civil Procedure (FRCP) are useful as guidance. Respondent's Motion is analogous to a motion to dismiss for lack of jurisdiction over the subject matter under FRCP 12(b)(1). When such a motion is filed, the court has a duty to weigh the evidence and resolve any factual disputes. *Scarfo v. Ginsburg*, 175 F.3d 957, 961 (11th Cir. 1999); *Robinson v. Government of Malay*, 269 F.3d 133, 141 (2nd Cir. 2001)("A district court 'may' consult evidence to decide a 12(b)(1) motion . . . [i]t 'must' do so if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction"). The plaintiff has the burden to support allegations of jurisdictional facts by competent proof. *Grafon Corp. v. Hauserman*, 602 F.2d 781, 783 and n. 4 (7th Cir. 1979); *Sapperstein v. Hager*, 188 F.3d 852, 856 (7th Cir. 1999). The plaintiff must establish jurisdiction by a preponderance of the evidence. *Southway v. Central Bank of Nigeria*, 328 F.3d 1267, 1274 (10th Cir. 2003)(plaintiff must present affidavits or other evidence sufficient to establish the court's subject matter jurisdiction by a preponderance of the evidence); *Makarova v. United States*, 201 F.3d 110,113 (2nd Cir. 2000); *McNutt v. General Motors Acceptance Corp.* 298 U.S. 178, 189 (1936). The First Circuit has stated, "determining whether a case belongs in federal court should be done quickly, without an extensive fact-finding inquiry. 'To make the "which court" decision expeditiously and cheaply,' a judge must simplify the inquiry." *Spielman v. Genzyme Corp.*, 251 F.3d 1, 4-5 (1st Cir. 2001), quoting *Pratt Central Park Ltd Partnership v. Dames & Moore*, 60 F.3d 350, 352 (7th Cir. 1995).

Respondent has challenged the factual basis for the claim that the Attorney General and EPA Administrator "jointly determine[d]" that this matter "is appropriate for administrative penalty action" under CAA § 113(d), or, as worded in Paragraph 37 of the original Complaint, that they "have approved" of administrative action where the penalty and time limits exceed the limitations in CAA § 113(d). In order to defeat the Motion, Complainant must prove, by a preponderance of the evidence, that the officials with delegated authority from the Attorney General and the EPA Administrator made the necessary waiver determination. *Julie's Limousine & Coachworks, Inc.*, 2004 EPA App. LEXIS 23, *28-29 (EPA App., 2004).

A. DOJ's Alleged Waiver Determination

1. Arguments of the Parties

Complainant presents the DOJ Concurrence from W. Benjamin Fisherow, the Deputy Chief of the Environmental Enforcement Section of DOJ's ENRD, to show that the Attorney General's delegate issued a waiver determination for this case. Mr. Fisherow states in the letter that he is acting "pursuant to the authority delegated to me under Environment and Natural Resources Division Directive No. 01-1. . . . " Complainant's Prehearing Exchange (CX) 51. ENRD Directive No. 01-1, which was renumbered as ENRD Directive 01-2, is a redelegation from the Assistant Attorney General (of ENRD) of certain authorities, including a delegation of the authority to grant waivers under Section 113(d) of the CAA to Section Chiefs, Deputy Section Chiefs and Assistant Section Chiefs of the Environmental Enforcement Section.

Respondent asserts that there is no delegation of authority from the Attorney General to the Assistant Attorney General to grant such waivers, so the redelegation of such authority in ENRD Directive 01-2 from the Assistant Attorney General is therefore not valid. Assuming that Complainant relied on 28 C.F.R. § 0.65a as the delegation Attorney General, which delegates the functions in a Memorandum of Understanding (MOU) between DOJ and EPA, Respondent asserts the MOU is relevant only to civil litigation, and does not refer to administrative litigation or CAA § 113(d).

In its Response, Complainant asserts that the Attorney General delegated his waiver determination authority pursuant to 28 C.F.R. § 0.65, and points out that Section 0.65a was mistakenly included in its Prehearing Exchange rather than 0.65(a). ENRD Directive 01-2 specifically refers to 28 C.F.R. § 0.65 and 0.65(a), and not 0.65a. Response, Exhibit 7. Complainant argues that 28 U.S.C. § 510 provides broad authority to the Attorney General to delegate responsibilities, and that courts will uphold a subdelegation unless there is a clear indication that Congress intended to limit it, citing *Fleming Mohawk Wrecking and Lumber Co.*, 331 U.S. 111, 120-122 (1947). Complainant asserts that 28 C.F.R. § 0.65(a), (a)(3) and (d) confer from the Attorney General to the Assistant Attorney General for ENRD broad authority, including authority to make CAA waiver determinations. Those provisions state as follows: "The following functions are assigned to . . . the Assistant Attorney General in charge of the Land and Natural Resources Division: (a) Civil suits and matters in Federal and State courts (and administrative tribunals) by or against the United States, its agencies [or] officers . . . , and also nonlitigation matters, relating to: . . . (3) . . . air resources controlled or used by the United States, [or] its agencies, . . . (d) matters involving air . . . and other types of pollution . . . ." Complainant adds that although the delegation does not specifically identify waiver determinations, Respondent has not provided persuasive evidence that such authority has not been delegated. Complainant asserts that courts have upheld subdelegations where there was a gap in explicit internal delegation, citing *Salazar v. Reich*, 940 F. Supp. 96 (S.D.N.Y. 1996). Furthermore, ENRD Directive 01-2, signed by ENRD Assistant Attorney General and her supervisor, the Associate Attorney General, specifically identifies 28 C.F.R. § 0.65 as a source of

the ENRD Assistant Attorney General's authority. Response, Exhibit 7.

In Reply, Respondent asserts that 28 C.F.R. § 0.65(d) only pertains to civil and criminal suits, not administrative proceedings, and does not cover the administrative act of granting a waiver. Respondent argues that 28 C.F.R. § 0.65(a)(3) does not apply because EPA's requests for waiver are not a "matters in . . . administrative tribunals," where the requests precede any action in an administrative tribunal. Respondent argues further that "the United States, its agencies [or] officers . . . ." does not include the Region 5 Director of the ARD, who initiated this case. In addition, Respondent argues that "air resources controlled or used by the United States" do not include ozone in the stratosphere, which Section 608 of the CAA and the regulations at issue are intended to protect.

Respondent asserts that such a general delegation as Section 0.65 does not cover the specific waiver function, which was authorized after such delegation, and that if the Attorney General intended to delegate waiver authority under CAA §113(d), he had to do so explicitly, because it is a "unique authority entirely different from anything the Attorney General may have contemplated" in issuing 28 C.F.R. § 0.65. Reply at 10. In support of its argument, Respondent cites to *United States v. Spain*, 825 F.2d 1426 (10th Cir. 1987) and its progeny, which hold that a general delegation of authority in 28 C.F.R. § 0.100(b), to permanently schedule drugs under 21 U.S.C. § 811(a), from the Attorney General to the Drug Enforcement Agency (DEA), did not cover the function under 21 U.S.C. § 811(h) to temporarily add a drug to the list of controlled substances, as it was promulgated before Section 811(h) and was fundamentally different than the previously existing authority of Section 811(a). Respondent points out that Section 0.65 has been amended six times between 1969 and 1985, which amendments would not have been needed if Section 0.65 is as broad as Complainant believes. Respondent argues that any acquiescence on the part of the Assistant Attorney General is no substitute for express delegation, and that the signature of the Associate Attorney General on ENRD Directive 01-2 does not suggest that a delegation from the Attorney General was made because the Assistant Attorney General did not have authority to delegate the Attorney General's powers.

Complainant asserts that *United States v. Spain* and the related cases cited by Respondent are not applicable to the delegation under 28 C.F.R. § 0.65. First, Complainant argues that courts do not require that a delegation include a specific reference to each statutory section for which authority is to be delegated, citing *United States v. Touby*, 909 F.2d 759 (3rd Cir. 1990)(holding that the revisions to 28 C.F.R. § 0.100(b), referring to the amendments to the statute, were sufficiently explicit to delegate 21 U.S.C. § 811(h) powers to the DEA), *aff'd, Touby v. United States*, 500 U.S. 160 (1990). Second, Complainant argues that the delegation in 28 C.F.R.
§ 0.100(b) (1973) of "functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act," in effect at the time of *United States v. Spain*, is significantly different than that of 28 C.F.R. § 0.65(a)(3) and (d), which do not specify a statute and thus covers a broader range of authorities. Third, Complainant points out that *United States v. Spain* and the related cases involved criminal sanctions and a fundamentally new and different authority, and that the courts have a heightened standard for delegation where they deprive a

person of liberty without due process. In contrast, Complainant argues, CAA § 113(d) is merely an ordering of priorities between two executive agencies, and that Respondent "has no right, interest or standing to challenge how they conduct their internal business." Sur-Reply at 6. Complainant argues further that CAA § 113(d) does not have a fundamentally different impact *on a respondent*, whereas 21 U.S.C. § 811(h), which established new summary procedures for classifying a substance as a drug, had a profound impact on a person's criminal liability and due process rights. Complainant asserts that the amendments of 28 C.F.R. §0.65 indicate that the Attorney General revised that provision when new or fundamentally different authorities were enacted, but the fact that he did not amend it for delegating CAA § 113(d) authority indicates that he determined that an amendment was not necessary.

2. Discussion and Conclusion

The provisions at issue, 28 C.F.R. § 0.65(a)(3) and (d), provide as follows:

> The following functions are assigned to and shall be conducted, handled or supervised by the Assistant Attorney General in charge of the Land and Natural Resources Division:
> (a) Civil suits and matters in Federal and State courts (and administrative tribunals) by or against the United States, its agencies, officers or contractors, or in which the United States has an interest, whether for specific or monetary relief, and also nonlitigation matters, relating to:
> * * *
> (3) The water and air resources controlled or used by the United States, its agencies, officers or contractors without regard to whether the same are in or related to the lands enumerated in Paragraphs (a)(1) and (2) of this section,
> * * * *
> (d) Civil and criminal suits and matters involving air . . . and other types of pollution * * * *.

Respondent's very narrow interpretation of 28 C.F.R. § 0.65 is not persuasive.[2] The fact that the

[2] Respondent does not explain why the word "matters" in Section 0.65(d) cannot include administrative proceedings. Complainant does not address that argument, but states that chlorofluorocarbons (CFCs), the refrigerants at issue in this case, are pollutants. Sur-Reply, n. 4. EPA in rule preambles has referred to CFCs as "pollutants"(*see*, 64 Fed. Reg. 16373, 16379 (April 5, 1999), 57 Fed. Reg. 32250 (July 21, 1992)), and they are regulated as hazardous waste under the Resource Conservation and Recovery Act, 40 C.F.R. § 261.31. They are not, however, designated as "hazardous air pollutants" under Section 112 of the CAA. *See*, 50 Fed Reg 24313 (June 10, 1985)(declining to classify CFC-113 as a hazardous air pollutant). It is not necessary to decide whether CAA §113(d) waiver determinations are "matters . . . involving . . . pollution" under Section 0.65(d), as it is concluded herein that waiver determinations are within the scope of 28 C.F.R. Section 0.65(a)(3).

waiver determination is a prerequisite to the filing of any action in an administrative tribunal does not mean that such request cannot be considered an integral part of a "matter[] in . . .[an] administrative tribunal[]." The argument that the Region 5 Director of the ARD, who issues the complaint, is not "the United States, its agencies [or] officers . . . ." is meritless in light of the delegation from the EPA Administrator to the Regional Administrators and the delegation from the Region 5 Administrator to the ARD Director, to initiate CAA complaints. EPA Delegation 7-6-A and Region 5 Delegation 7-6-A, in Complainant's Prehearing Exchange Exhibit ("CX") 48 and Response, Exhibits 3, 4. Respondent does not cite to any authority for its argument that "air resources" do not include the stratosphere. Furthermore, Section 608 of the CAA and its implementing regulations (40 C.F.R. Part 82) protect ozone in the stratosphere for the purpose of protecting the air, water and land resources controlled or used by the United States. Therefore enforcement actions alleging violations of 40 C.F.R. Part 82 "relat[e] to . . . The water and air resources controlled or used by the United States . . . ." As explained in the Notice of Proposed Rulemaking for 40 C.F.R. Part 82:

> Stratospheric ozone shields the earth's surface from dangerous ultraviolet (UV-B) radiation. In response to growing scientific evidence, a national and international consensus has developed that certain human-made halocarbons deplete stratospheric ozone.
> * * * *
> Potential environmental impacts from increased UV-B exposures include risks to marine organisms, risks to crops and impacts due to increased concentration of tropospheric (ground-level) ozone.
> * * * *
> In addition, tropospheric ozone, an air pollutant formed as a result of photochemical reactions involving ultraviolet radiation, has been shown to adversely affect human health, agricultural crops, forests and materials.

56 Fed. Reg. 49548 (Sept. 30, 1991); *see also*, 57 Fed. Reg. 58644 (Dec. 10, 1992).

As to Respondent's argument that the Attorney General had to delegate the CAA §113(d) waiver authority *explicitly*, there are significant differences between 28 C.F.R. Sections 0.100(b) and 0.65(a)(3). First, the Section 0.100(b) delegates power from the DOJ to another executive agency, the DEA, whereas Section 0.65 delegates power within DOJ from the Attorney General to an Assistant Attorney General. Second, Section 0.100(b), delegating authority under one statute, is a much more specific delegation than Section 0.65(a)(3), which delegates broad authority without referencing any statutes. Third, 21 U.S.C. Sections 811(a) and 811(h) are substantive authorities which determine criminal liability, whereas waiver determination under CAA Section 113(d) is a procedural matter of allocating some civil enforcement cases for administrative enforcement. Therefore, Respondent's application of *United States v. Emerson*, 846 F.2d 541, 548 (9th Cir. 1988) and *United States v. Touby*, 909 F.2d 759 (3rd Cir. 1990), urging that an explicit delegation is required due to the contrast between the authorities covered by Section 0.65 and the waiver determination authority of CAA § 113(d), is inapposite. Section 0.65 does not need a more explicit delegation of the authority to make waiver determinations

under CAA § 113(d). Because Section 0.65(a) broadly refers to functions rather than to specific statutes,[3] it covers statutory authorities that are encompassed by those functions even if the statutory authorities were enacted after 0.65(a) was promulgated. Therefore, there is no need for Section 0.65(a) to refer to Section 113(d), or to other 1990 CAA statutory amendments, to encompass them. The amendments to other paragraphs of Section 0.65 that Respondent refers to do not impact the scope of Section 0.65(a).

It is concluded that the authority to issue waiver determinations under CAA § 113(d) is properly delegated by the Attorney General to the Assistant Attorney General by 28 C.F.R. § 0.65(a), and therefore that the subdelegation from the Assistant Attorney General in ENRD Directive 01-2 to the Deputy Section Chiefs was valid.

B. Region 5 ARD Director's Alleged Waiver Determination

1. Arguments of the Parties

The parties agree that the ARD Director in Region 5, Ms. Cheryl L. Newton, has authority delegated from the Regional Administrator, under EPA Delegation 7-6-A, to make a valid waiver determination under CAA § 113(d). What they disagree on is whether the ARD Director made such a waiver determination in this case.

Respondent in its Motion asserts that the waiver documents in this case are "strikingly similar" to those in *Julie's Limousine*, namely a memorandum from a Regional official to Mr. Buckheit requesting a waiver, and a letter to the Assistant Attorney General of ENRD from Bruce Buckheit, stating that he "concurs and joins with" the Region in requesting a waiver. Motion at 14-15 and Attachments C, D, F, G. Respondent asserts further that Complainant presents "a very muddled explanation" of who issued the waiver, which indicates that the ARD Director only concurred with the waiver by signing the Complaint on June 18, 2003. Motion at 17. Respondent's position is that the ARD Director could not have granted the waiver by merely signing the Complaint.

Respondent argues that the pronouns and grammatical structure in Paragraph 37 of the original Complaint are not consistent with a waiver being granted by the ARD Director's signature on the Complaint. Paragraph 37 states as follows:

> The Attorney General and the Administrator have approved of the filing of an administrative action against Strong pursuant to Section 113(d) of the CAA . . .for violations . . . which occurred more than 12 months prior to filing of this Complaint. They have also approved of an administrative action for the

[3] It is noted that Section 0.65(a)(4), which lists matters that are excluded from the delegation, refers to specific statutes.

> violations alleged in this Complaint wherein the proposed penalty may exceed $220,000.

Respondent explains that references to the "Administrator" and the pronoun "They" are distinct from the references to the ARD Director as the "Complainant" in the remainder of the Complaint, so if the ARD Director had intended to grant the waiver by signing the Complaint, Paragraph 37 would have referred to "Complainant" rather than "Administrator." Furthermore, Respondent explains, citing to grammar textbooks, that the words "have approved" mean that the approval occurred in the past, not simultaneously with signing the Complaint. Motion, Exhibits H, I.

In addition, the Regional Counsel Concurrence Sheet for the waiver request for the original Complaint does not show the Director of ARD's initials and date, but does show them on the Concurrence Sheet for the Amended Complaint. CX 61, 62. Respondent notes that in response to his FOIA request to provide copies of all Section 113(d) waivers for this proceeding, Mr. Buckheit responded to the request without including the Complaint. Therefore, Respondent argues, approvals for the waiver and for the complaint are two distinct activities, and the ARD Director could not have approved the waiver request for the Complaint in this matter.

In its Response, Complainant asserts that both Bruce Buckheit, Director of AED, and Cheryl L. Newton, Director of Region 5 ARD, made the waiver determination. Mr. Buckheit's determination was made through his letter dated November 18, 2002, and signed by Mr. Biondi, Acting Director of AED, and Ms. Newton's determination was documented by her signature on the Complaint dated June 18, 2003, and on its cover letter, and on an internal Concurrence Sheet. CX 61. Complainant adds that the Regional Counsel's delegatee, Mr. Thomas Leverett Nelson, signed off on April 11, 2003 on a Concurrence Sheet, for his approval of the Complaint. Complainant states that its established internal procedures for CAA cases requiring Section 113(d) waivers required approval from OECA and DOJ prior to the Region 5 ARD's review and approval. Complainant presents Declarations of Mr. Nelson and Ms. Linda Rosen, which describe these procedures as follows: A waiver request, signed by Mr. Czerniak, Branch Chief of the Air Enforcement and Compliance Assurance Branch (AECAB) within ARD, is sent to OECA and DOJ, and after Region 5 receives the concurrence from OECA and DOJ, a Region 5 attorney drafts the complaint, which is then used as the vehicle to obtain the ARD Director's approval. Response, Exhibits 1, 2.

In accordance with those procedures, in this case, Complainant states that "[by signing the complaint Ms. Newton was making her own determination, as the Acting Director of ARD, that a waiver was appropriate and that issuance of the Complaint was appropriate" and was thereby "documenting the last step in the joint determination" of the waiver. Response at 33. Complainant argues that although the ARD Director needed the concurrence of OECA in the waiver, it did not matter whether OECA, DOJ or Region 5's ARD Director concurred first, as long as all three concur prior to the Complaint being filed. EPA Delegation 7-6-A ¶ 3.e states that the Assistant Administrator for OECA "must concur in any determination regarding the authority delegated under paragraph 1.b," which is the delegation to the ARD Director "to

determine jointly with" DOJ the circumstances under which a matter . . .is appropriate for administrative penalty action." Response, Exhibit 4. Region 5 Delegation 7-6-A ¶3.b contains very similar language. Response, Exhibit 3. Complainant argues that the reference in Paragraph 1.b to "any determination" does not mean only the ARD Director's determination, which must then be followed by OECA's concurrence. Complainant argues that these Delegations "must be read in context with the Administrators's stated goal of operating the enforcement program in a manner which is flexible, efficient, empowers regional managers and maximizes delegations." Response at 37. To require the ARD Director to approve the waiver before OECA approves, and then to approve the complaint, is not an efficient use of the ARD Director's time and is not specifically required by the Delegations. Complainant urges that the ARD Director's approval of the Complaint includes a determination under CAA § 113(d), that the complaint is appropriate and that her signature is proof thereof.

Complainant disagrees with Respondent's analysis of the grammar and language of Paragraph 37 of the Complaint. Complainant explains that Paragraph 37 is merely a recitation of the statutory language, modified to indicate that approvals were obtained, and the fact that it refers to the "Administrator" rather than "Complainant" is not dispositive as to who approved the filing of the Complaint. The language in the present perfect tense, "have approved," means that the action "began in the past and is finished by the time of speaking or writing," as stated by the grammar textbook presented by Respondent (Motion, Exhibit I), and is consistent with the ARD Director approving of the Complaint at the time of signing it.

Although Ms. Newton, the ARD Director, was not identified as a witness in its Prehearing Exchange, Complainant explains that she need not testify where the evidence of her approval is her signature on the Complaint, cover letter and Concurrence Sheet. Her initials were not on the Concurrence Sheet for the waiver (CX 62) because it was merely a sign-off sheet for documenting concurrence with the waiver *request* to OECA and DOJ, which preceded the Concurrence Sheet for the Complaint. Region 5's procedures do not provide for the ARD's participation in the waiver process until after OECA's and DOJ's concurrence.

In its Reply, Respondent argues that approval of the complaint and the waiver determination are two separate functions, as shown in the separate delegations for each function. Respondent asserts that the ARD Director, having authority to both make waiver determinations and issue complaints, must consciously make the waiver determination before the action can proceed and must create a proper record of such determination, or else there is no subject matter jurisdiction.

Respondent quotes from the EAB's decision in *Julie's Limousine,* 2004 EPA App. LEXIS 23, *63 n. 48 (EPA App., 2004)(quoting *Schoonejongen v. Curtis-Wright Corp.*, 143 F.3d 120, 132 (3d Cir. 1998), that "where, based upon customary practices, one would otherwise expect a heavy paper trail, 'an inference of fact arises from a complete absence of contemporaneous documentation.'" Emphasizing EPA's burden of proof for all jurisdictional facts, Respondent argues that failure to produce evidence or testimony of Ms. Newton suggests that what she would say would be adverse to Complainant's case. Respondent points out that the

Declarations of Linda Rosen and T. Leverett Nelson do not say anything about the waiver determination in this matter. Respondent suggests that it is not credible that the CAA § 113(d) waiver process includes memos, letters, concurrence sheets and other records, but that this heavy paper trail stops at the ARD Director's final decision.

Respondent further attacks the credibility of the allegation that it is Region 5's routine practice for the waiver determination to be finalized by the ARD Director signing the complaint. First, Respondent asserts that the former ARD Director, who signed the CAA Complaint filed against Respondent on September 28, 2001 (2001 Complaint), did not include the 2001 Complaint with the waiver determination documents requested by Respondent under FOIA. Reply, Exhibit G. Respondent asserts that if he had intended his signing of the Complaint to constitute the waiver determination, he would have included it in response to the FOIA request. Second, Respondent points out that the 2001 Complaint, and Complainant's response to the successful motion to dismiss the 2001 Complaint, indicated that the OECA concurrence, not the 2001 Complaint, constituted the waiver determination. Reply, Exhibit E. Third, the complaints and CAA § 113(d) waiver documents in *Norbrook Plating Company*, EPA Docket No. CAA-5-2000-005 and in *B & L Plating*, EPA Docket No. CAA-5-2000-012, showing that waiver documents were dated after the complaints were filed (Reply, Exhibits H, I), indicate that any alleged routine practice in Region 5 for waiver determinations was disregarded in those cases.

In its Sur-Reply, Complainant asserts that in *Norbrook Plating*, EPA had maintained that the violations occurred within a 12 month period of time so a waiver was neither required nor alleged in the complaint, that it requested the waiver only as a "protective request," and that the same counsel for the respondent as in the present matter signed a Consent Agreement and Final Order admitting jurisdiction. Reply, Exhibit H. In *B & L Plating*, Complainant points out, neither the ALJ nor the EAB found any defect in jurisdiction, and the issue was not raised by the respondent.

2. Discussion and Conclusions

Complainant bears the burden of proving that the ARD Director made the waiver determination. *Julie's Limousine,* 2004 EPA App. LEXIS 23, *53 (EPA App., 2004) (EPA has the "obligation to put forward evidence to prove jurisdiction arises once its assertion of jurisdiction has been challenged."). Complainant must support its factual allegations with competent proof and establish by a preponderance of evidence that the waiver determination was properly made. The EAB has held that there is no requirement that CAA § 113(d) waiver determinations be signed by the person with delegated authority. *Id.* at *56. The EAB stated that the issue of whether or not the EPA Regional office "has validly exercised its delegated authority depends not on the existence of contemporaneous documentation, but on whether [the Regional office] has otherwise presented evidence adequate to show that the appropriate person made the required determination." *Id.* at *58.

The ARD's signature on the Complaint is *prima facie* evidence that she reviewed and

agrees with the contents of the Complaint, including the statement contained in Paragraph 37 of the Complaint, *i.e.*, that the Administrator has approved of an administrative action although the penalty and time limitations are exceeded. It may be inferred that the ARD Director confirmed that the Administrator or his delegate made a determination that such action was appropriate.

The question is whether the ARD Director was the delegate who had made such a determination. Respondent's argument that the language of Paragraph 37 of the Complaint shows that the ARD Director did not make the determination, is not persuasive. The words "have approved" reasonably may be interpreted to mean that the ARD Director has reviewed the waiver issue and approved it, and her signature on the Complaint and initials on the Complaint Concurrence Sheet may document such approval of the waiver. This interpretation is consistent with the instruction in the grammar textbooks presented by Respondent that the present perfect tense, such as "have approved," is used "to show completed action . . .action that occurred at an unspecified past time," or "an action that began in the past and is finished by the time of . . . writing." Motion, Exhibits H, I. The fact that different terms were used in the Complaint – the Administrator and the Complainant – does not establish that they referred to different persons. The use of such terms reflects the common practice in legal drafting of using "boilerplate" and text which is "cut and pasted" from legal authorities and other sources.

The evidence shows that the ARD Director was the last reviewer in the review chain for the CAA 113(d) waiver in EPA Region 5. Complainant presents a Declaration of T. Leverett Nelson, Chief of the Multi-Media Branch of the Office of Regional Counsel (ORC) in Region 5 since June 1, 2003, formerly a Section Chief therein, in which he describes the "routine and accepted practice" of Region 5 for waiver approvals. This practice included, after DOJ's and OECA's approval, "the preparation and routing of a complaint for approval and signature." Response, Exhibit 1 (Declaration of T. Leverett Nelson, dated August 12, 2004 (Nelson Declaration)) ¶ 9. He stated that the ARD Director "would document his or her approval by virtue of his or her signing off on the Complaint and perhaps the sign-off sheet," and that "[t]here was no separate documentation of the approval" of the ARD Director. *Id.* He also stated that "[t]hese procedures have been in place for many years and had been followed in many administrative cases" and that they were developed and agreed upon by the ARD and ORC. *Id.* Mr. Nelson did not address the scope of the ARD Director's review of complaints, but as to his scope of review, he stated that, "by concurring on the actual administrative complaint I was concurring on the filing of an administrative penalty action which exceeded the penalty and/or time limitations of section 113(d) of the Clean Air Act." Nelson Declaration ¶ 13.

Linda Rosen, Section Chief in ARD since May 2002, formerly Master Engineer in ARD from 1996 to May 2002, stated in her Declaration that at the time of the October 2002 waiver request, ARD "had procedures for obtaining and documenting the approval and concurrence of the [ARD] Director, and as appropriate, Regional Counsel, Headquarters [OECA} and the Department of Justice for the filing of any administrative action" requiring concurrence under CAA § 113(d), and that those procedures "have been in effect for as long as I am aware and have been used on other administrative penalty enforcement actions." Response, Exhibit 2 (Declaration of Linda Rosen, dated August 4, 2004 (Rosen Declaration)) ¶¶ 10, 13. A part of

those procedures outlined in her Declaration is that the "a concurrence package," which included the proposed complaint and concurrence sheet and perhaps a short memo from Mr. Czerniak, would be prepared for the ARD Director, who "would not concur on the filing of an administrative case involving a penalty greater than $200,000 until after Headquarters and [DOJ] had approved or concurred in the waiver request," that the ARD "Director's signature on the administrative complaint was considered her approval and concurrence on the filing of an administrative penalty action exceeding the $200,000 and/or one year limits," and that "[t]here was no separate memo documenting the [ARD] Director's approval of the filing of the administrative complaint." *Id.* ¶¶ 12, 13.

An inference may be drawn that the ARD Director, following the routine practice of being the last reviewer in the review chain for the Complaint, putting her initials on the Complaint Concurrence Sheet, and signing the Complaint, reviewed the issue of, and gave final approval of, *inter alia*, an administrative action being appropriate under CAA § 113(d), where the penalty and time limitations therein were exceeded. The inference is supported by the presumption of regularity of acts of public officers, which can only be rebutted with clear evidence to the contrary. *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), citing, *inter alia*, *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). The inference is also supported by the "time-honored principle that a man is presumed to have read, and will be responsible for, an instrument that he signs, in the absence of fraud, misrepresentation or duress." *Warrington v. Dawson*, 798 F.2d 1533 n. 7 (5th Cir. 1986); *see, Raiczyk v. Ocean County Veterinary Hospital*, 377 F.3d 266, 270 (3rd Cir 2004)(signing a contract creates a conclusive presumption that the signer read, understood and assented to its terms).

Respondent's argument that the waiver request and complaint approval were two distinct actions is supported by the evidence, namely the Waiver Request Concurrence Sheet and the Complaint Concurrence Sheet. However, that does not necessarily lead to the conclusion that the waiver *approval* and the complaint approval were two mutually exclusive actions. Ms. Rosen's Declaration (¶¶ 11-13), as corroborated by Mr. Nelson's Declaration (¶ 9), indicates that the Concurrence Sheet for the waiver request was to document concurrence on Mr. Czerniak's memo, and the Complaint Concurrence Sheet, circulated after the memo, was to document concurrence on the Complaint, including concurrence on the filing of an administrative action where CAA § 113(d) penalty and/or time limits were exceeded.

Respondent provides evidence that in some instances, EPA officials did not consider a complaint as a documentation of a CAA § 113(d) waiver approval. Respondent's counsel submitted a request under FOIA for, *inter alia*, "All documents by which the Administrator or her delegatee approved, pursuant to § 113(d) of the Clean Air Act . . . the filing of the . . . Complaint," and "All documents by which any EPA employee requested that the Administrator or her delegatee approve the filing of the . . . Complaint." Motion, Exhibit A. Respondent's counsel suggested in the request that it be referred to the Director of AED in OECA, who "is

likely to have the documents I am requesting." *Id.* The suggestion was apparently followed, as Mr. Buckheit, Director of AED, responded to the FOIA request. In his response letter, he stated, "Enclosed are all responsive, non-confidential documents," and "All documents that contain the Agency's action to request a waiver under Section 113(d) of the Clean Air Act from the Department of Justice have been provided." *Id.* However, the letter also stated, "Whether documents which may be responsive to the filing of the complaint is a matter best determined by the region which filed the administrative complaint, here Region 5. We believe these matters are best taken up in the context of discovery in that tribunal." *Id.* Indeed, given the various procedures for waiver requests and approvals in different EPA Regional offices, and even within Region 5, as evidenced by *Julie's Limousine, B & L Plating, Norbrook Plating*, and Complainant's position in response to the motion to dismiss the 2001 Complaint, Mr. Buckheit may not have known the routine practice in Region 5. Furthermore, he may not have considered that Respondent's counsel in its "Request for Documents *Relating to*" the Complaint was requesting a copy of the Complaint itself. Motion, Exhibit A (emphasis added). Thus, his failure to include the Complaint among the documents responsive to the FOIA request does not establish that *Region 5* considered the Complaint not to constitute a document by which the ARD Director approved the Complaint under CAA § 113(d).

Another item of evidence shows that an official in Region 5 - the former ARD Director – did not consider a complaint to be a documentation of a CAA § 113(d) waiver approval. Respondent's counsel submitted a request under FOIA for, *inter alia*, "All documents by which the Administrator or her delegatee approved, pursuant to § 113(d) of the Clean Air Act . . . the filing of [the 2001 Complaint] . . . against Strong Steel Products," and "All documents by which any person associated with USEPA Region V requested that the Administrator or her delegatee approve the filing of" the 2001 Complaint. The former ARD Director[4] submitted a response which enclosed "some of the documents responsive to [the] request" and "a listing of the potentially responsive documents which have been determined to be exempt from mandatory disclosure" under Exemptions 5 and 7 of FOIA. The 2001 Complaint was not enclosed with or listed in the response. However, Complainant's position as to the 2001 Complaint was that the waiver determination was made by OECA rather than by Region 5. Complainant's counsel argued that OECA's AED Director gave approval for the waiver, as counsel stated that the Administrator's delegatee "on June 12, 2001 . . . approved of the filing of the Complaint and waiving of the time and penalty limitations." Reply Exhibit E. That approval is presumed to refer to the letter from Bruce Buckheit, which was dated June 12, 2001, which preceded the date of the 2001 Complaint, filed September 28, 2001. Reply, Exhibit G. Thus, the former ARD Director and the Complainant may not have considered the approval and signing of the 2001 Complaint to constitute the waiver determination, because they considered OECA's AED Director to have made the waiver determination. In the present matter, Complainant is arguing that *both* OECA's AED Director *and* Region 5's ARD Director made the waiver determination. Response at 3.

[4] The response to the FOIA request was signed by another person for the ARD Director. The signature appears to be that of Ms. Cheryl Newton.

The letters from Mr. Buckheit dated June 12, 2001 and November 18, 2002 are virtually identical. Both letters state that OECA's AED "concurs and joins with Region V in requesting that a waiver of the penalty amount and 12-month limitation . . . is appropriate . . . . For the reasons set forth in the separate . . . memorandum from Region V, EPA believes that an administrative penalty order would be an appropriate enforcement response in this case." Motion, Exhibit A; Reply, Exhibit G. Given the fact that, in the 2001 case, Complainant relied on Mr. Buckheit's letter alone as the waiver determination, and in the present matter Complainant relies on both his letter and the signature of the Region 5 ARD Director as constituting a waiver determination, a question arises as to whether the ARD Director in fact relied on Mr. Buckheit's letter as the waiver determination in this case, or whether she made a waiver determination herself, before signing the Complaint.

Stated differently, the question is whether the ARD Director in fact determined whether the Complaint is appropriate for administrative action where the CAA § 113(d) penalty and time limitations were exceeded, or whether she merely "rubber stamped" the Complaint. There are no criteria in Section 113(d) of the CAA as to the type or timing of action which is sufficient for the Administrator to "jointly determine" that an administrative penalty action is appropriate. It has been held that a letter from DOJ that is sent to EPA after issuance of the complaint does not constitute a valid determination. *Strong Steel Products, LLC,* 2002 EPA ALJ LEXIS 52 (EPA ALJ, 2002)(Order Granting Respondent's Motion to Dismiss Counts 1 and 2). Because the word "determine" is not defined in the CAA, it will be interpreted by its common meaning. The dictionary defines it as "to fix conclusively or authoritatively," "to settle or decide by choice of alternatives or possibilities," to "resolve," to "come to a decision about by investigation, reasoning, or calculation." Webster's Ninth New Collegiate Dictionary, p. 346 (1990). Thus, to "determine" presumes that there is a choice (*e.g.*, approving and not approving) and a decision, through acts of review and/or reasoning. Even the word "approved," which was used in Paragraph 37 of the Complaint, presumes an act of reviewing information and choosing to approve or not approve. "Approved" is defined as "to have or express a favorable opinion of," "to accept as satisfactory," "to give formal or official sanction to." *Id.* at 98.

Courts have distinguished "approval" from mere "rubber stamping" in several contexts. In the context of the military contractor defense to a product liability claim, akin to the Federal Tort Claims Act exception for government acts involving discretionary functions of government, the government's "approval" must constitute a discretionary function, an exercise of judgment, an informed decision and considered choices, which requires more than a rubber stamp. In *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989), the court held that where the government official merely accepts, without any substantive review or evaluation, decisions on military equipment design made by a contractor, then the contractor rather than the government, is exercising discretion. The court held that at a minimum, the federal officer approving the design must not only sign it but know what is there. Evidence of such lack of government discretion included the fact that clearly unqualified government employees were reviewing highly technical designs, and signing off on imprecise or general guidelines rather than the specific design. 865 F.2d at 1481. In *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 748 (9th Cir. 1997), where the record showed no discussion between the

government officials and the contractors regarding the design of a critical feature of a product, and where the design required engineering analysis and many technical, military and social considerations, the Ninth Circuit held that the government had not approved the product. In a different context, where a magistrate signed a search warrant without reading it, and failed to note that the prosecutor had not signed it and not listed the property to be seized, the Eighth Circuit affirmed the suppression of evidence seized, on the basis that the magistrate had not approved the warrant but merely rubber stamped it. *United States v. Decker*, 956 F.2d 773 (8th Cir. 1992). In yet another context, the Federal Circuit found no "substantial justification" under the Equal Access to Justice Act for the government's claim, where there was no evidence that government officials responsible for terminating an employee made an independent decision, and did no more than rubber stamp a facially proper recommendation which was revealed to be in fact based on the supervisor's improper motivation. *Chiu v. United States*, 948 F.2d 711 (Fed. Cir. 1991).

Thus, evidence of the ARD Director's review and/or reasoning could include, for example, testimony or documentation of her participation in a discussion, her statement of reasoning, oral briefing, or written materials submitted to her, regarding the waiver. Her testimony, however, is not necessary for Complainant to prove that she in fact made the waiver determination prior to signing the Complaint. The Supreme Court has stated, "Inquiry into the mental processes of administrative decision-makers is usually to be avoided." *United States v. Morgan*, 313 U.S. 409, 422 (1941). The Consolidated Rules of Practice provide that an adverse inference may be drawn for failure to provide information required in the prehearing exchange or requested in a motion for discovery. 40 C.F.R. § 22.19(g)(1). Respondent has not pointed to any specific request for the ARD Director's testimony or admission on the issue in the prehearing exchange or discovery, and thus no adverse inference will be drawn from a lack of testimony from the ARD Director.

As noted by the EAB, the customary practice in the EPA Regional office is relevant to consideration of the evidence. *Julie's Limousine*, 2004 EPA App. LEXIS 23, *63 n. 48 (EPA App., 2004). In *Julie's Limousine*, the Agency argued that the Regional office's practice was that a waiver determination would be made after the Regional APTMD Director was orally briefed by staff on the facts of the case, that he manifested his waiver determination by Regional Counsel having drafted documents requesting OECA's concurrence, and that he corroborated his waiver determination by authorizing his designee to sign the complaint. Reply, Exhibit C. The EAB noted that the APTMD Director's affidavit, which indicated that he was briefed on the relevant issues, that he at some point decided that administrative action was appropriate, and that he instructed Regional Counsel to seek a waiver from OECA, appeared to "strongly support" and if true "would appear to establish" the complainant's position that he made the waiver determination. *Id.* at *63. The EAB was not, however, convinced in that case that the complaint itself demonstrated the waiver determination, particularly because the APTMD Director did not sign the complaint. *Id.* at *59, n. 45.

In the present case, the ARD Director did sign the Complaint, and is presumed to have read therein the allegations of fact and detailed discussion of the potential penalty, which alleged

at least 70 violations for Count I and at least 137 violations for Count II occurring more than one year ago, and which alleged that they were serious violations and serious deviations from the regulations, involving failure to comply for three years, and lack of cooperation and negligence. The information in the Complaint is relevant to a waiver determination, and may have been sufficient information for the ARD Director to evaluate the case and make a determination as to whether administrative action was appropriate. The Concurrence Sheet for the Complaint, being initialed by Ms. Newton on the date the Complaint was issued, further corroborates the argument that she reviewed the Complaint on the day it was issued and "concurred" in the taking of administrative action and in the contents of the Complaint. Response, Exhibit 1, Attachment 3.

The record does not show that she reviewed any additional information. The Rosen Declaration states that after OECA and DOJ approved of or concurred on a waiver request, a concurrence package would be prepared for the ARD Director, which package "would include the proposed administrative complaint and a concurrence sheet" and "It may have also include (sic) a short memo from Mr. Czerniak to the Division Director explaining the action." Response, Exhibit 2, ¶ 12. Ms. Rosen does not indicate in her Declaration whether or not the ARD Director reviewed documents associated with the waiver, such as a proposed penalty memo, Mr. Czerniak's waiver request, and the OECA and DOJ approvals. The additional information provided in these documents include a detailed discussion of the proposed penalty, a description of the violations, and Mr. Czerniak's justification for the waiver request to Mr. Buckheit. Response, Exhibit 2 Attachment 1 (Czerniak memorandum, dated October 11, 2002). It does not appear that these documents would have been of significant assistance to the ARD Director in making a waiver determination, as they were drafted prior to the Complaint for purposes of requesting approvals from Mr. Buckheit and others when the Complaint did not yet exist, and much of the information in those documents is contained in the Complaint.

The exception is Mr. Czerniak's justification for the waiver. His justification stated that Respondent is the subject of an existing administrative enforcement action, that it would conserve EPA and DOJ resources to consolidate them with the existing action, that a waiver was previously approved for the same violations, that the increase in violations and penalty are not significant enough to justify a judicial referral to DOJ as they are merely repeat violations of the same regulations, that injunctive relief would be straightforward, and that the case does not present any nationally significant issues. Response, Exhibit 2, Attachment 1. This information is not of a complex or technical nature that would indicate that it is necessary to present to the ARD Director in order for her to make an informed decision. Moreover, there is no evidence of any requirement, policy, or routine practice indicating that this or any other document other than the Complaint was necessary for the ARD Director to make the waiver determination. Therefore, and considering the evidence that the routine practice was to provide only the complaint and its concurrence sheet, the fact that there is no evidence that she reviewed additional documents does not weigh against a finding that she in fact made a waiver determination.

There is no evidence refuting the presumption that, before signing the Complaint, the ARD Director reviewed it and approved administrative action where the penalty and time

limitations of CAA § 113(d) were exceeded. There is no evidence of errors or omissions in the Complaint, factors weighing in favor of DOJ prosecuting the case, or highly technical information beyond her capability to meaningfully review, that suggest that she merely rubber stamped the Complaint without reviewing the CAA § 113(d) waiver issue. Furthermore, there is no evidence that she merely rubber stamped a general or unsupported recommendation from Mr. Czerniak; his waiver request included specific reasons for requesting a waiver. There is no evidence that Mr. Buckheit's letter concurring in the waiver request was reviewed by the ARD Director, and, according to the Rosen Declaration, it was not a routine practice in Region 5 to include it in the concurrence package for her review. Therefore, fact that Mr. Buckheit concurred in the waiver request does not undermine the presumption that the ARD Director reviewed and approved a waiver under CAA § 113(d).

Accordingly, it is concluded that Complainant has shown by a preponderance of the evidence that the ARD Director made a waiver determination under CAA § 113(d).

C. Regional Counsel's Alleged Concurrence on the Waiver

Respondent's position is that the alleged Section 113(d) waiver was invalid because the Regional Counsel never concurred in it before issuance of the Complaint, as required by Region 5 Delegation 7-6-A. The Regional Counsel never signed the waiver request Concurrence Sheet, and only a Branch Chief, Mr. Nelson, signed the Concurrence Sheet for the Complaint.

Complainant responds that the Regional Counsel delegated authority in a Sign-Off Policy to Section Chiefs to concur in CAA § 113 waivers, and that Mr. Nelson, Section Chief, approved the filing of the Complaint on or about April 11, 2003, in accordance with Region 5 Delegation 7-6-A ¶ 3.a, as evidenced by his Declaration and his initials on the Complaint Concurrence Sheet. Response, Exhibit 1, and Attachments 1 and 3 thereto. Complainant explains that the limitation in Region 5 Delegation 7-6-A ¶ 4.0 not to subdelegate applies only to the authorities delegated, not to the limitation in Paragraph 3.a. Mr. Nelson attaches to his Declaration a portion of the Office of Regional Counsel's Sign-Off Policy, which he states is currently in effect and has been since 1995 or 1996. Response, Exhibit 1, Attachment 1; CX 60.

Respondent argues that the Sign-Off Policy is not a delegation of authority, and does not refer to CAA § 113(d) waiver determinations.

Region 5 Delegation 7-6-A, Paragraph 3.a. states, "Exercise of these authorities [including the CAA waiver determination] is subject to review and concurrence by the Regional Counsel." Response, Exhibit 3. Complainant's argument that Mr. Nelson had authority delegated from the Regional Counsel to concur in CAA § 113(d) waiver determinations is not supported by the record.

The "Office of Regional Counsel - Sign-Off Policy" is an undated, unsigned document which states that "This policy sets forth procedures for the review and sign-off of various work

products that are generated or approved by the Office of Regional Counsel," and which includes charts that "specify various work products routinely produced or reviewed by staff attorneys, and state the review chain and level of sign-off required for each such work product." Response, Exhibit 1, Attachment 1; CX 60. It states further, "Obviously, some documents that are not covered should receive management sign-off . . . Attorneys should use their judgment regarding documents not listed here . . . ." *Id.* Importantly, it states, "Delegations play a role in sign-off policy, but the two concepts are distinct" and "In the Limitations sections of many Headquarters and Region 5 Delegations . . . there often are requirements that . . . the Regional Counsel . . . concur in advance on an action or document . . .[t]hus, delegations sometimes dictate the ORC signoff level" and "Attorneys should consult the delegations for the particular environmental statute at issue to ensure . . . the document is being signed and issued by the Regional official who holds the delegated authority; and . . . all limitations in the applicable delegation have been met, including any explicit requirement for advance concurrence by a certain management level in ORC." *Id.* The chart merely shows that for final product CAA administrative penalty complaints and consent agreements, the Section Chiefs alone are listed on the review chain.

However, the limitation on the waiver determination authority of the ARD Director, expressed in Paragraph 3.a of the Delegation, does not mandate that the Regional Counsel actually review and document concurrence in each exercise of the ARD Director's authority. The words "subject to" does not mandate action (review and concurrence), but indicates a potential for action, *i.e.*, that the Regional Counsel *may* review and concur in the exercise of delegated authority. The common meaning of "subject to" is "*likely* to be conditioned, affected or modified in some indicated way: having a contingent relation to something and usually dependent on such relation for final form, validity or significance." Webster's Third New International Dictionary at 2275 (unabridged, 2002)(emphasis added). The definition does not indicate that "subject to" means the same as "invalid without." This conclusion is supported by the contrasting mandatory words in the following Paragraph 3.b., that OECA "must concur" in any waiver determination. If EPA intended to *require* Regional Counsel to review and concur, Paragraph 1.a could easily have been drafted with the same phrasing as Paragraph 1.b. This conclusion is also supported by the words "subject to any determination made by the Deputy Administrator . . ." in Paragraph 3.d, in which the term "any" emphasizes that there is only a *potential* for a determination by the Deputy Administrator to affect an exercise of the delegated authority. Accordingly, the lack of evidence that the Regional Counsel in fact concurred in the CAA § 113(d) waiver, or delegated authority to Mr. Nelson to concur in the waiver determination, does not invalidate the waiver determination and thus is not fatal to jurisdiction.

D. <u>Summary</u>

It is concluded that Complainant has shown by a preponderance of the evidence that the Region 5 ARD Director, who had delegated authority from the Administrator to make waiver determinations under CAA § 113(d), in fact made such a waiver determination for the Complaint, to establish jurisdiction in this matter. In light of this conclusion, it is not necessary to decide the issue of whether a waiver determination for the Complaint was also made by the

AED for OECA.

ORDER

1. Complainant's Request to File Instanter Sur-Reply to Respondent's Motion to Dismiss is **GRANTED.**

2. Respondent's request to file a sur-reply to Complainant's Sur-Reply is **DENIED.**

3. Respondent's Motion to Dismiss is **DENIED.**

4. Complainant's Cross Motion for Accelerated Decision on Jurisdiction is **GRANTED.**

_____

Susan L. Biro
Chief Administrative Law Judge

Dated: November 22, 2004
Washington, D.C.