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 STAY

By Motion dated February 19, 2004, Respondent moved to stay further proceedings in this case pending decision of the Environmental Appeals Board ("EAB") in the matter of *Julie's Limousine & Coachworks, Inc.*, CAA Appeal No. 03-06. Complainant filed its Response opposing the Motion to Stay on March 9, 2004. On March 19, 2004, Respondent filed a Reply in Support of its Motion to Stay.

A. Standards

The Consolidated Rules of Practice contain no standards for evaluating a motion to stay. Thus, ruling on a motion to stay is largely a discretionary matter and "incident to [the court's] power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see also Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Ray and Jeanette Veldhuis*, Docket No. CWA-9-99-0008, 2002 EPA ALJ LEXIS 27 (ALJ 2002); *John Crescio*, Docket No. 5-CWA-98-004, 1999 EPA ALJ LEXIS 25 (ALJ 1999).

In deciding whether to stay a proceeding, the following factors are generally considered: whether the stay will serve the interests of judicial economy, result in unreasonable or unnecessary delay, or eliminate any unnecessary expense and effort; the extent, if any, of hardship resulting from the stay and of adverse effect on the judge's docket; and the likelihood of records relating to the case being preserved and of witnesses being available at the time of any hearing. *Environmental Protection Services, Inc.*, Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 25 (ALJ 2003) (denying stay based on related FOIA action pending in Federal court in light of prior stays granted, impending hearing date, and questionable effect of FOIA action on defenses raised); *Veldhuis*, 2002 EPA ALJ LEXIS 27 (denying stay based upon pending Supreme Court decision on related issue in light of stage and age of case); *Bituma-Stor, Inc.*, Docket No. EPCRA-07-99-0045, 2000 EPA ALJ LEXIS 37 (ALJ 2000) (denying stay based upon involuntary bankruptcy proceeding filed by Respondent's creditors in light of the non-effect of bankruptcy on EPA enforcement actions); *The Ford Motor Co.*, Docket No. RCRA-05-99-010, 2000 EPA ALJ LEXIS 21 (ALJ 2000) (denying stay to await EPA Headquarters' clarification of novel issue presented in case based on age and stage of case); *U.S. Dept. of Navy*, Docket No. RCRA-III-9006-061, 1999 EPA ALJ LEXIS 54 (ALJ 1999) (granting unopposed

stay to await opinion from OLC where requirements of compliance order have been fulfilled); *John Crescio*, 1999 EPA ALJ LEXIS 25 (granting stay pending EAB decision in case where same violation by same legally challenged method is alleged); *Fountain Foundry Corp.*, Docket No. CAA-0005-94, 1994 EPA ALJ LEXIS 71 (ALJ 1994) (denying stay based on pending district court decision on respondent's motion for declaratory judgment where respondent did not demonstrate why judgment on the issue in administrative proceeding would not adequately and more efficiently address it, and where unreasonable delay may result); *Unitex Chemical Corp.*, Docket No. TSCA-92-H-08, 1993 EPA ALJ LEXIS 146 (ALJ 1993) (granting a stay of one year or until decision by D.C. Circuit, whichever occurs first, where D.C. Circuit had already scheduled briefs and oral argument, and decision would affect most or all claims in the administrative proceeding); *Hall-Kimbrell Environmental Services, Inc.*, Docket Nos. TSCA-II-ASB-92-0235 *et al.*, 1992 EPA ALJ LEXIS 216 (ALJ 1992) (denying stay based upon pending district court decision on complaint against EPA filed by the respondent where administrative proceedings were close to being set for hearing, both forums had jurisdiction over the same question of law, and administrative complaints were filed first).

Thus, essentially, motions to stay are decided on questions of efficiency and fairness. A court may consider granting a stay of the proceedings where a similar case in another, or higher, court has the "propensity to be dispositive" on *the* issue at hand and a decision has not yet been rendered. *Sam Galloway Ford, Inc. v. Universal Underwriters Insurance Co.*, 793 F. Supp. 1079, 1081 (M.D. Fla. 1992) (denying motion to stay based on pending state supreme court decision relating to only *one of many* potentially dispositive issues in case); *U.S. Dept. of Navy*, 1999 EPA ALJ LEXIS 54; *John Crescio*, 1999 EPA ALJ LEXIS 25. Similarly, where a legal issue in an administrative proceeding is pending on appeal in another proceeding before the EAB, but the respondent has other viable legal and factual defenses not based on that issue, a motion to stay the proceeding may be denied. *Chem-Met Services, Inc.*, Docket No. RCRA-V-W-011-92, 1992 EPA ALJ LEXIS 365 (ALJ 1992).

However, a court generally may not grant a stay so extensive that it is "immoderate or indefinite" in duration, and a trial court abuses its discretion by issuing "a stay of indefinite duration in the absence of a pressing need." *Landis*, 299 U.S. at 255, 257. In determining whether to stay proceedings indefinitely, a "pressing need" is identified by balancing interests favoring a stay against interests frustrated by a stay, but "overarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases before it." *Cherokee Nation of Oklahoma v. U.S.*, 124 F.3d 1413 (Fed. Cir. 1997) (Court of Federal Claims' concern for avoiding duplicative litigation and conserving judicial resources was not "pressing need" sufficient to stay proceedings pending "speculative and protracted" quiet title suits).

B. Procedural History

On September 28, 2001, Complainant initiated a 9-count Complaint (Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, MM-05-2001-0006) against Respondent, Counts 1 and 2 of which alleged violations of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq*. (hereinafter "the 2001 Complaint"). Count 1 alleged that Respondent violated Section 113(a)(3) of the CAA, 42 U.S.C. § 7413(a)(3), and its implementing regulations at 40 C.F.R. § 82.156(f), by failing to obtain and retain verification statements for proper evacuation of ozone depleting refrigerants prior to disposal of at least 49 small appliances, one motor vehicle, and one shipment of small appliances between July 22, 1999 and August 31, 2000. Count 2 alleged that Respondent violated Section 113(a)(3) of the CAA, 42 U.S.C. § 7413(a)(3), and its implementing regulations at 40 C.F.R. §§ 82.166(i) and (m), by failing to retain records relative to the proper evacuation of ozone depleting refrigerants on at least 146 separate occasions between July 22, 1999 and August 31, 2000. The 2001 Complaint proposed a penalty of $357,500 for the violations alleged in Counts 1 and 2.

By Order dated August 13, 2002, Counts 1 and 2 of the 2001 Complaint were dismissed on the grounds that Complainant had failed to meet the jurisdictional prerequisite set forth in Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), of obtaining the Attorney General's agreement to "waive" the time and penalty caps set forth in Section 113(d)(1) *before* the Complaint was filed.[1] *See Strong Steel Products, LLC*, 2002 EPA ALJ LEXIS 52 at *9 (ALJ 2002) (Order Granting Respondent's Motion to Dismiss Counts 1 and 2).

Almost a year later, on June 20, 2003, Complainant initiated the instant action. An amended Administrative Complaint was filed on January 16, 2004. The amended Complaint alleges in two counts violations of the Clean Air Act. 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.

[1] As discussed in further detail herein, Section 113(d)(1) of the CAA states that the EPA 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).

Furthermore, paragraph 51 of the amended 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.

The Complaint contains no specific allegations regarding how or when this approval was obtained nor are any exhibits in this regard attached thereto.

On January 29, 2004, Complainant provided this Tribunal with Notice regarding the decision issued by my honorable colleague, Judge Barbara Gunning, on November 14, 2003 in *Julie's Limousine & Coachworks, Inc.*, Docket No. CAA-04-2002-1508, 2003 EPA ALJ LEXIS 192 (ALJ 2003). In her Order, Judge Gunning dismissed the administrative action against Julie's Limousine pending before her on the basis that certain jurisdictional prerequisites to the filing of CAA Administrative Complaints had not been met. Specifically, Judge Gunning found that, according to EPA's internal delegations manual, the Regional Administrator ("RA") for Region 4 or his designated delegatee - the Director of the Air, Pesticides & Toxics Division ("Director of APT") - was required to jointly determine with United States Attorney General that a waiver of CAA § 113(d)(1) was appropriate before an administrative complaint could be filed. In that neither the RA nor the Director of APT made such a determination, Judge Gunning held that the jurisdictional prerequisites for filing the administrative action had not been met and thus she lacked jurisdiction over the matter. In the Notice, Complainant asserted that the facts of *Julie's Limousine* were distinguishable from those here and, in any event, *Julie's Limousine* was wrongly decided and was currently being appealed by EPA to the EAB.

By Motion dated February 23, 2004, Respondent moved to stay further proceedings in this case pending the EAB's decision in *Julie's Limousine* ("Motion"). In its Motion, Respondent asserts that the "waiver documents that ALJ Gunning held to be defective are similar to the documents Region 5 has submitted in this case," and thus, if Judge Gunning's decision in *Julie's Limousine* is upheld by the EAB, Respondent claims it "strongly suggests that this Court lacks subject matter jurisdiction over this proceeding." Therefore, Respondent argues, in that *Julie's Limousine* will be "dispositive, or at least highly useful" to determining subject matter jurisdiction over this case, it is in the interest of judicial economy to stay this proceeding until the EAB rules in that case.

Complainant filed its Response opposing the Motion to Stay on March 9, 2004 ("Response"). In the Response, Complainant asserted that the waiver determination in this case was distinguishable from that in *Julie's Limousine* and was made in accordance with EPA's delegations manual. Complainant also stated that unlike *Julie's Limousine*, the present case "could be characterized as a nationally significant case." Further, Complainant argued that

granting a stay will result in harm to the environment in that Respondent is currently out of compliance and will likely only come into compliance if a decision is rendered against it in this proceeding. In addition, Complainant asserts that a stay could result in loss of relevant evidence because the violations in this case are already four years old, and witnesses memories fade and documents and witnesses become unavailable as time passes. Finally, Complainant revealed that, "as a precautionary measure," also on March 9, 2004, it had filed *yet another* Complaint against Respondent (Docket No. CAA-05-2004-0015) asserting essentially the same CAA violations after obtaining new documentary evidence of CAA § 113(d)(1) determinations from the Attorney General's and EPA Administrator's delegatees regarding the appropriateness of instituting an administrative action.[2]

On or about March 19, 2004, Respondent filed a Reply in Support of its Motion to Stay ("Reply") in which it challenged the characterization of this case as distinguishable from *Julie's Limousine* and, in particular, challenged Complainant's assertion that this case is one of "national significance," citing to several of the Region's own documents which purportedly belie this assertion. Moreover, Respondent asserted that Complainant has failed to show that it would be unfairly prejudiced by a stay and vigorously contested Complainant's characterization that a decision is required to bring it into compliance. Respondent attached an Affidavit in support of its allegations made therein regarding its compliance activities.

C. Relevant CAA Law

Section 113(d)(1) of the CAA contains a 12-month/$200,000 penalty cap limitation on the EPA's authority to unilaterally initiate an administrative complaint for violations of the CAA and its implementing regulations. 42 U.S.C. § 7413(d)(1). For cases not meeting the limitation, it provides a methodology for EPA to nevertheless obtain authority to file an administrative action, that is, to procure a "*waiver*" of the limitation. *Id*. Specifically, Section 113(d)(1) states, in pertinent part, that:

> The Administrator's authority under this paragraph [to issue an Administrative action for violations] 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*

[2] For reasons of judicial economy and efficiency, the undersigned has also been designated to preside over Docket No. CAA-05-2004-0015. Currently pending in that matter is Respondent's April 5, 2004 Motion to Dismiss on the basis that the action is duplicative of the instant matter.

administrative penalty action.[3]

42 U.S.C. § 7413(d)(1) (italics and bold added).[4]

In recognition of the fact that it is neither efficient nor appropriate for *the* one EPA Administrator to personally exercise all the authorities invested in him under the CAA, such as making *all* such Section 113(d)(1) waiver determinations with the Attorney General, Section 301(a) of the CAA provides that "[t]he Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter . . . as he may deem necessary or expedient."[5] 42 U.S.C. § 7601(a).

As a result, and in fact, the EPA Administrator has delegated his authority to make CAA § 113(d)(1) waiver determinations with the Attorney General to eleven (11) different people: the ten EPA Regional Administrators ("RAs"), and the one Assistant Administrator for [the Office

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

[4] 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 $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, *including* Table 1).

[5] While the EPA Administrator is given free reign to decide to whom and to what extent he delegates his authorities under the CAA to his subordinates, there is a formal process for accomplishing and documenting such delegations. According to the EPA Headquarters Delegation Manual:

> 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 Delegations Manual (Feb. 22, 1995) attached as Complainant's Prehearing Exchange Exhibit No. 59.

of] Enforcement and Compliance Assurance ("AA for OECA") situated at EPA Headquarters in Washington, D.C. *See* U.S. EPA, Delegation Manual, Clean Air Act, § 7-6-A ¶¶ 1.b, 2 (Aug. 4, 1994) ("HQ Del. 7-6-A") attached as Complainant's Prehearing Exchange Exhibit No. ("C's PHE Ex.") 48. However, such delegation provides as a limitation that:

> The Assistant Administrator for Enforcement and Compliance Assurance may exercise these authorities [making a CAA waiver determination on behalf of the Administrator] *in multi-regional cases, cases of national significance or nationally managed programs*. The Assistant Administrator for Enforcement and Compliance Assurance or his/her designee must ***notify*** any affected Regional Administrators or their designees when [making joint determinations with the Attorney General under the CAA].
>
> The Assistant Administrator for Enforcement and Compliance Assurance must ***concur*** in any determination regarding the authority delegated under paragraph 1.b. [when joint determinations are made by the *RAs* and the Attorney General].

HQ Del. 7-6-A ¶¶ 3.b. and 3.e. (emphasis added). Thus, when exercising the Administrator's authority to make CAA § 113(d)(1) waiver determinations, the AA for OECA must "notify" the affected RA(s). When the RAs exercise the Administrator's delegated authority to make CAA § 113(d)(1) waiver determinations, they must obtain the "concurrence" of the AA for OECA.[6]

Apparently, in further recognition of how busy RAs and the AA for OECA also are, HQ Del. 7-6-A provides that "[t]his authority may be redelegated to the Division Director level." HQ Del. 7-6-A ¶ 4. And, in fact, the RAs and the AA for OECA have redelegated their authority under HQ Del. 7-6-A to make waiver determinations with the Attorney General in regard to CAA § 113(d)(1).

As to the relevant RAs, in the opinion issued in *Julie's Limousine*, Judge Gunning found that the RA for Region 4 (wherein Julie's Limousine operated) had redelegated his CAA § 113(d)(1) authority solely to Region 4's Director of APT. *See Julie's Limousine*, 2003 EPA ALJ LEXIS 192 at *27 (citing Region 4 Delegation 7-6-A).[7] The documents filed in this case

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[6] It is clear from both CAA § 113(d)(1), which requires the determination be made "jointly" by the EPA Administrator *and* the Attorney General from the Department of Justice (DOJ), as well as by the Administrator's delegation to RAs *and* the AA for OECA, with concurrence or notice to the other, that the allocation of authorities was most likely the result of a thoughtfully negotiated sharing of important and prestigious powers between Federal Agencies and between intra-agency offices. For that reason alone, it would be appropriate to carefully and narrowly read each delegation, not expanding it beyond its own terms.

[7] Region 4 Delegation 7-6-A also provides that further redelegation is not authorized and that the limitations contained in the HQ Del. 7-6-A apply to the redelegation.

reflect that the RA for EPA Region 5, which is where Respondent operates, has redelegated his waiver authority to two people: the "Director, Air and Radiation Division" and the "Director, Superfund Division." *See* Region 5 Delegation 7-6-A ¶ 2 (Feb. 4, 2000) attached as C's PHE Ex. 48. That regional delegation further notes that "[e]xercise of these authorities is subject to review and concurrence by the Regional Counsel," and provides that the AA for OECA "must concur in any determination." *Id.* at ¶ 3.a, b. Finally, this delegation provides that the authorities provided therein "may not be redelegated." *Id.* at ¶ 4.

As for the AA for OECA, it appears that he *may have* redelegated his authority to make CAA § 113(d)(1) joint determinations to the Director, FFEO (Federal Facilities Enforcement Office) and the Division Director level of ORE (Office of Regulatory Enforcement), which would include the Director of ORE's Air Enforcement Division, and/or solely to the OECA's ORE Director, who in turn redelegated the authority to the Director of the Air Enforcement Division.[8] *See* C's PHE Ex. 47 (June 6, 1994 Memorandum from Steven A. Herman).

D. *Julie's Limousine*

[8] The evidence currently of record is not completely clear regarding the redelegation of the CAA § 113(d)(1) waiver authority by the AA for OECA. The Agency has proffered a Memorandum from the AA for OECA, dated ***June 6, 1994***, wherein the matrix attached to it indicates that he delegated essentially all his authority under the Clean Air Act given to him in "Delegation 7-6-A" to the "Director, FFEO and ORE Division Director level." C's PHE Ex. 47. However, this delegation is dated two months *before* the Administrator's ***August 4, 1994*** Delegation *to him* of such CAA authority as proffered by the Agency in this case. C's PHE Ex. 46. The record does not contain any earlier version of Delegation 7-6-A. However, the Agency has also submitted two Memoranda dated August 12, 1994 (*i.e. after* August 4, 1994 when the Administrator delegated his CAA § 113(d)(1) authority to the AA for OECA), in which to correct inadvertent deletions made by the Administrator in prior delegations, the AA for OECA purportedly redelegates to the ORE Director (who, in turn, redelegates to his Air Enforcement Division Director) his authority in "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 action. However, "paragraph ***3.d***." of Delegation 7-6-A relates only to limitations on the authority granted in the delegation, allowing the AA for OECA to "***waive*** his/her consultation or concurrence requirements by memorandum," and provides no authority to *make* determinations under CAA § 113(d)(1) or *concur* in determinations. In *Julie's Limousine*, Judge Gunning notes that on August 3, 1994, the Agency issued a Memorandum correcting a Delegation 7-6-A issued on May 11, 1994 which omitted ¶ ***3.e.*** *Julie's Limousine*, 2003 EPA ALJ LEXIS 192 at *18, n.9, *24, n. 13. That paragraph does impose upon the AA for OECA the obligation to concur in any CAA § 113(d)(1) determination made by the RAs, but it is unclear if that authority was subsequently redelegated to anyone by the AA for OECA.

In her decision rendered in *Julie's Limousine*, Judge Gunning characterized the Agency delegations and redelegations discussed above as establishing out "two routes" for fulfilling the CAA § 113(d)(1) requirement that there be a joint determination that waiver of the 12 month/$200,000 limit is appropriate in cases such as *Julie's Limousine*[9] and here where the limits for EPA unilaterally instituting administrative actions are exceeded. One route is to go through the Administrator's delegated authority to the RA and obtain the *concurrence* of the AA for OECA. The other route, available *only* in multi-regional cases, cases of national significance, or involving a nationally managed program, is to go through the Administrator's delegated authority to the AA for OECA and *notify* the relevant RA. *Julie's Limousine*, 2003 EPA ALJ LEXIS 192 at *18.

As evidence that it had fulfilled the CAA § 113(d)(1) requirements prior to filing the Complaint in *Julie's Limousine*, the Agency proffered three pieces of correspondence: (1) a February 15, 2002 Memorandum from a person who signed (unreadable signature) for Phyllis P. Harris, Regional Counsel and Director of the Environmental Accountability Division, sent to Bruce B. Buckheit, Director of the Air Enforcement Division, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, 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 Julie's Limousine and that the "case represents an appropriate use of this waiver authority;" (2) a responsive letter dated March 5, 2002 from Bruce Buckheit, which was addressed to the Assistant Attorney General for the Environment and Natural Resources Division ("ENRD"), DOJ, stating that he "concurs and joins with Region 4 in requesting that a waiver of the 12-month limitation . . . is appropriate . . . ;" and (3) a letter dated April 8, 2002 from DOJ to Phyllis Harris reflecting that DOJ "concurred" with EPA's request for a waiver of the twelve-month statutory limitation to initiate an administrative enforcement action against Respondent pursuant to Section 113(d)(1).

Judge Gunning's decision suggests that the Agency's position regarding the legal significance of the three documents shifted over time. Initially, EPA asserted that the action involved a "nationally managed program" and thus the CAA § 113(d)(1) determination could be *and was* obtained through the Administrator's delegated authority to the AA for OECA as evidenced by the correspondence of Mr. Buckheit, who made the determination for the Agency. *Julie's Limousine*, 2003 EPA ALJ LEXIS 192 at *7-10. It was only after hearing, apparently, that EPA recognized it was mistaken that the action involved a nationally managed program and so recast the CAA § 113(d)(1) determination process as having gone through the delegated authority to the RA with the AA for OECA concurring. *Id.* at *10-11, 13. At that point, EPA asserted that Winston A. Smith, Region 4's Director of APT, actually made the Section 113(d)(1)

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[9] The Administrative Complaint filed in *Julie's Limousine* on June 28, 2002 alleged violations beginning in 1997. *Julie's Limousine*, 2003 EPA ALJ LEXIS 192 at *2. Thus, since the "first alleged date of violation" occurred *more than* 12 months prior to the initiation of the action, CAA § 113(d)(1) conditioned the Administrator's authority to file it on the joint determination with the Attorney General that it was appropriate to do so.

waiver determination and his counsel, Phyllis Harris, requested concurrence with this determination from the AA for OECA and DOJ. *Id.* at *11-12. Thereafter, it proffered an affidavit from Winston A. Smith in support of this position, although EPA continued to argue that Mr. Buckheit made a CAA § 113(d)(1) "determination" for the Agency. *Id.* at *15.

Judge Gunning found that the record reflected that EPA's 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. *Id.* at *20-21. Further, she found that the determination for the Agency was made by Phyllis Harris of Region 4, that concurrence with the determination was obtained from a designee of the AA for OECA, and that the Attorney General (or his designee at DOJ) agreed with the determination. *Id.* at *28. Unfortunately for EPA, however, Judge Gunning found that Phyllis Harris, Region 4's Regional Counsel and Director of the Environmental Accountability Division, was not someone to whom the RA in Region 4 had delegated his authority to make waiver determinations under CAA § 113(d)(1). *Id.* at *26-30. The RA in Region 4 had redelegated that authority only to Region 4's Director of APT. *Id.* Judge Gunning rejected the Region's assertions that Ms. Harris was authorized to make CAA § 113(d)(1) determinations as attorney for the Region, the RA, or the Director of APT, or that the determination had actually been made by Winston Smith. *Id.* at *29. Thus, Judge Gunning found that 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 invalid and, therefore, the EPA lacked jurisdiction to issue the Complaint. *Id.* at *30. Accordingly, she held that she did not have administrative jurisdiction over the matter and dismissed the action. *Id.* at *32.

E. *Strong Steel*

In its response to the Motion to Stay, Complainant alleges that there are "at least two significant factual distinctions between the present case and the *Julie's Limousine* case." Response at 3. The first distinction Complainant appears to be asserting is that it is relying upon a *different action* or step in the process from that relied upon in *Julie's Limousine* to prove that EPA made the requisite determination under CAA § 113(d)(1).[10] Complainant, however, does not seem to be arguing that it followed the AA for OECA route with notification to the RA. Rather, as was the case in *Julie's Limousine*, it too pursued and perfected obtaining the waiver through the Administrator's delegation to the RAs. However, Complainant asserts that the initial regional memorandum (*i.e.*, the Phyllis Harris Memorandum in *Julie's Limousine*) was not a waiver "determination;" instead, the Section 113(d)(1) determination by EPA was made at the end of the process through the signing of the Complaint. Response at 4.

[10] Making such a determination in regard to this case was required by CAA § 113(d)(1) because the total penalty sought in this action well exceeds $200,000 and the first alleged date of violation set out in the Complaint proceeds its filing by more than 12 months.

As indicated above, under the RA delegation route in Region 5, to meet the requirements of CAA § 113(d)(1) EPA would have had to: (1) obtain a determination of appropriateness from its RA or his delegatee, the Director of the Air and Radiation Division or the Director of the Superfund Division (HQ Del. 7-6-A ¶¶ 1.b, 2; Region 5 Del. 7-6-A ¶¶ 1.b, 2); (2) have the Regional Counsel review and concur with determination (Region 5 Del. 7-6-A ¶ 3.a); (3) obtain the concurrence of the AA for OECA or his lawful delegate (HQ Del. 7-6-A ¶ 3.e and/or Region 5 Del. 7-6-A ¶ 3.b); and (4) obtain a determination of appropriateness from the Attorney General or his designee (CAA § 113(d)(1)).

Complainant states that the determination process was initiated in this case by a memorandum from George Czerniak, Chief of Region 5's Air Enforcement and Compliance Assurance Branch, to OECA and DOJ requesting approval under CAA § 113(d)(1) to file the administrative action. C's PHE Ex. 49. EPA acknowledges that Mr. Czerniak had no delegated authority to make a CAA waiver determination and that the Memorandum "is neither a determination nor a recording of such." Notice at 2; Response at 3. However, Complainant asserts that that Memorandum did trigger a legally significant action: a letter from Richard Biondi, signing for Bruce Buckheit, the Director of the Air Enforcement Division of the ORE, addressed to the Assistant Attorney General and dated November 18, 2002 in which he concurred and joined with Region 5 in requesting the CAA § 113(d)(1) waiver since "EPA believes that an administrative penalty order would be an appropriate enforcement response in this case." C's PHE Ex. 50. This correspondence was, in turn, responded to by a letter dated December 17, 2002 from W. Benjamin Fisherow, Deputy Chief of DOJ's Environmental Enforcement Section to Mr. Czerniak, wherein Mr. Fisherow states that "[b]ecause the proposed case appears appropriate for administrative action, pursuant to the authority delegated to me under Environment and Natural Resources Division Directive No. 01-1, I hereby concur with the requested waiver."[11] C's PHE Ex. 51. Finally, Complainant argues that Cheryl L. Newton, the

[11] By Directive No. 01-1, dated January 18, 2001, the Assistant Attorney General for the ENRD (Environmental and Natural Resources Division) delegated his authority "to approve assessments of administrative penalties under the Clean Air Act" to among others the "Deputy Section Chiefs . . . of the Environmental Enforcement Section." *See* C's PHE Ex. 48. Directive No. 01-1 also provides that "upon application by the Administrator, Environmental Protection Agency, under section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1), the Section Chief and Deputy Section Chiefs of the Environmental Enforcement Section are each hereby authorized to concur in or deny the commencement of a proceeding for the assessment of an administrative penalty greater than $200,000 or for the assessment of an administrative penalty for an alleged violation occurring more than 12 months prior to the initiation of the Administrative action." Further attached to C's HE Ex. 48 is a copy of 28 C.F.R. § 0.65a, which provides that "[w]ith respect to any matter assigned to the Land and natural Resources Division in which the Environmental Protection Agency is a party, the Assistant Attorney General in charge of the Land and Natural Resources Division, and such members of his staff as he may specifically designate in writing, are authorized to exercise the functions and responsibilities undertaken by the Attorney General in the Memorandum of Understanding between the

Acting Director of Air & Radiation Division of Region 5 (a person with delegated authority from the RA), made "the determination" required by Section 113(d)(1) as evidenced by her signature on the Complaint filed in this case on June 18, 2003.[12]

Thus, unlike in *Julie's Limousine*, in this case the Region is not arguing that the initial Memorandum sent by Mr. Czerniak starting the process for the CAA § 113(d)(1) waiver (issued by Phyllis Harris in *Julie's Limousine*) was "the determination" or even evidenced the Agency determination having been made by others. Rather, execution of the Complaint, the final step in the process, constituted the Agency's "joint determination" under CAA § 113(d)(1). Complainant asserts that "[t]here is nothing in the statute, the regulations or the delegations manual that requires the request for approval to derive from the Director of the Air and Radiation Division." Response at 3-4. Further, Complainant asserts that a reading of *Julie's Limousine* to "require a sequential and narrow concurrence process - i.e. , first there must be a determination by the Air Director and then there must be approval or concurrence by Headquarters and the Department of Justice . . . would be legal error. . ." Response at 4, n. 5.

In its Reply, Respondent asserts that while Complainant may be arguing it perfected obtaining the CAA § 113(d)(1) waiver, its argument is belied by the fact that it has filed another new Complaint with identical allegations after obtaining a whole new set of waiver documents. Reply at 1-2. Further, Respondent asserts that the Agency in *Julie's Limousine* made similar arguments to Judge Gunning which were rejected. *Id.* at 2-3

As to the second distinction, Complainant argues that this case is one of "national significance." Specifically, Complainant seems to be asserting that this is a case of "national significance" as that term is used in HQ Del. 7-6-A because it sought a penalty over $500,000, citing C's PHE Ex. 57. That exhibit is a Memorandum from the AA for OECA to various regional personnel dated July 11, 1994, which states in a footnote that "[w]here the Region has not prepared a bottom line penalty before filing an administrative case, cases will be presumed to be nationally significant if the proposed penalty sought in the complaint to be filed is greater than or equal to $500,000." Respondent challenges this characterization of the case, pointing to Agency documents created before the Complaint was filed (C's PHE Exs. 49, 56) wherein EPA stated that the case did "not present any nationally significant issues" and noted that "[s]ince [the

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Department of Justice and the Environmental Protection Agency (42 FR 48942) . . ." The Memorandum of Understanding, however, does not appear relevant to CAA § 113(d)(1) determinations. There does not appear to be anything among these documents wherein the Attorney General, himself, delegates his CAA § 113(d)(1) waiver authority.

[12] The Complainant's pleadings in regard to the Motion to Stay do not suggest that its Regional Counsel reviewed and approved the exercise of the Agency's authority by Ms. Newton as required by Region 5 Del. 7-6-A ¶ 3.a. However, the Agency has included in its PHE (Exs. 61 and 62) two "Office of Regional Counsel Concurrence Sheets" which might evidence satisfaction of this requirement. No definitive ruling can be made on this issue at this point.

internal initial bottom line amount for settlement] is below the $500,000 amount this is not a nationally significant enforcement case." Reply at 3-5.

Complainant does not make it clear in its motion exactly why it believes that characterizing this case as one of "national significance" is legally significant in terms of the CAA § 113(d)(1) waiver issue. As indicated above, acting in "cases of national significance" is a limitation placed upon the AA for OECA to exercise the CAA § 113(d)(1) waiver authority in HQ Del. 7-6-A ¶ 3.b. In this case, the Agency does not appear to be asserting that the AA for OECA or his delegatee made such legal determination.[13]

F. Discussion

In this proceeding, Respondent requests a stay for an indefinite duration, inasmuch as the time at which the EAB will issue a decision in *Julie's Limousine* is unknown.[14] The appeal in

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[13] As indicated above, under EPA's delegations, making the determination that a waiver is appropriate via this route requires a determination be made jointly by: (1) the Administrator's delegatee - the AA for OECA, or his lawful delegatees; (2) the Attorney General or his lawful delegatee; and (3) that the AA for OECA (or his lawful delegatee) *notify* the relevant RA of the determination. Although it is not clear from the pleadings, Complainant may be arguing, at least in the alternative, that the correspondence from Richard Biondi for Bruce Buckheit, an ORE Division Director (the AA for OECA's lawful delegate) and W. Benjamin Fisherow, Deputy Chief of DOJ's Environmental Enforcement Section (the Attorney General's lawful delegate) meets the first two requirements of this route. The Region does not explicitly allege at any point in its pleadings that the AA for OECA notified Region 5 or his "designee" that he exercised his authority to jointly determine with the Attorney General that a CAA § 113(d)(1) waiver was appropriate in this case as required by HQ Del. 7-6-A ¶ 3.b. However, it is noted that a copy of the letter from Richard Biondi was sent to two persons in the Region (neither of which were the RA), and the Region's Director of the Air and Radiation Division signed the Complaint which alleged that the waiver had been obtained. The Region's Director of the Air and Radiation Division is the RA's delegatee for CAA § 113(d)(1) waiver determinations and perhaps would be an appropriate designee for receiving such notices. Moreover, HQ Del. 7-6-A uses the phrase "designee," rather than delegate, which suggests perhaps that informal notice from Headquarters' staff to Regional staff was all that would be required. Without formal briefing on this issue, no final determination in this regard is being made here.

[14] It is noted, however, that the EAB has a goal under the Government Performance Review Act of completing review of cases pending before it, on average, within 12 months of receipt. The EAB represents that it has met this goal in each of the last three fiscal years (2001-2003). Thus, if the EAB were to meet its goal in the *Julie's Limousine* case, it should issue a decision by the end of November 2004, or seven months from now, possibly prior to the time this case will be heard. Therefore, if the decision in that case impacts the jurisdiction of this

that case was filed on December 1, 2003 and the initial briefs were filed in late January/mid-February, 2004. As of the date of this Order, the EAB has not scheduled *Julie's Limousine* for oral argument. Therefore, either a "pressing need" must be demonstrated by the parties or the stay should be limited in duration.

However, it is unnecessary at this point to determine whether EPA perfected the process to obtain the requisite waiver determination under CAA § 113(d)(1). In its pleadings, Respondent does not detail on what basis it exactly believes that the determination made by the Agency in this case was invalid.[15] On the other hand, it does appear evident from the record that EPA is arguing that the CAA § 113(d)(1) "determination" by the Agency was made at a *different point* in the process and in a *different way* from that asserted in *Julie's Limousine*, and, unlike in the *Julie's Limousine* case, the person the Agency identifies here as having, in writing, evidenced this "determination" prior to the time the Complaint was filed is someone whom the delegations identify as having authority to do so. Thus, while the EAB's decision in *Julie's Limousine* may certainly touch upon the CAA § 113(d)(1) waiver process used in this case, it seems in no way certain that a decision in that case would be dispositive on the issue of jurisdiction in this case.

Moreover, there are other factors that strongly mitigate against staying this case. First, the violations are quite old, some dating back as far as December 1, 1998. *See* Amended Complaint ¶¶ 27-31. In addition, the Amended Complaint mentions allegedly relevant activities that occurred some nine months prior, in March of 1997. *Id*. at ¶36. Thus, relevant documents and the memories of witnesses will be at least seven years old by the time this case is heard without a stay, and would be far older if this case is stayed. It is simply inappropriate to assume relevant records will continue to be safely maintained and the memories of witnesses will continue to be retained as we come to the close of a decade after the relevant matters occurred. Moreover, both of the parties and the undersigned are well aware that over time witness testimony can be lost for good through death or disability of the witnesses.[16]

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case, it can be decided upon prior to the time the parties expend resources at hearing.

[15] In its Prehearing Exchange, Respondent asserted that neither the AA for OECA nor the RA may subdelegate their CAA § 113(d)(1) authority lower than the division director level and that no one with properly subdelegated authority issued a waiver on behalf of the Administrator, citing *Julie's Limousine,* and that the Amended Complaint may have exceeded the scope of the alleged waivers. However, it is not possible to determine from this exactly who Respondent is asserting purportedly exercised the waiver authority for the Administrator but lacked the delegated authority to do so, or what Respondent is referring to regarding exceeding the waiver given.

[16] At the time of hearing in the case styled *Strong Steel, LLC* (Docket. Nos. RCRA-05-2001-0016, CAA-05-2001-0020, MM-05-2001-0006), which the majority of the violations herein were formally part, one of the key witnesses' had suffered significant injuries in a car accident and thus was unable to testify in person.

Second, this case was initiated in June, 2003. The Office of Administrative Law Judges has an established goal under the Government Performance Review Act of completing its cases within 18 months. If a stay were to be entered, it would be a certainty that this case would not be completed within the goal period.

Third, it is noted that Respondent is an entity of significant financial means. *See* C's PHE Exs. 6 and 7. It has never claimed in connection with this case an inability to pay the substantial penalty or an inability to defend the claim made herein fully. Thus, being required to proceed with this case despite the oft chance that such activities are at some point deemed unnecessary will not impose an unreasonable financial burden on Respondent.

Fourth, even if the undersigned stayed this case, the same matters at issue, more or less, would continue to be litigated by the parties in that the Complainant has recently filed an essentially identical Complaint after obtaining another set of CAA § 113(d)(1) waivers. *See In the Matter of Strong Steel LLC*, Docket No. CAA-05-2004-0015. If it turns out that the EAB's decision in *Julie's Limousine* results in the dismissal of this case, the time and effort spent by the parties in this case will be saved when they litigate the next case.

Therefore, I find there is no "pressing need" warranting staying this case indefinitely or temporarily.

CONCLUSION

Based upon the foregoing, Respondent's Motion to Stay is hereby **DENIED**.

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 30, 2004
Washington, D.C.