UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	**Docket No. RCRA-5-2001-0016**
STRONG STEEL PRODUCTS, LLC,	**)**	**CAA-5-2001-0020**
Detroit, Michigan	**)**	**MM-5-2001-0006**
	)	
Respondent	**)**	
	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COUNTS 1 AND 2

Background

This proceeding was initiated by a 9-count Complaint filed September 28, 2001 by the United States Environmental Protection Agency ("EPA" or "Complainant")[1] against Strong Steel Products, LLC ("Respondent"), a Michigan corporation owning a 9.1 acre facility in Detroit, Michigan which, among other things, purchases and shreds scrap metal products in order to recover metallic content.[2] Counts 1 and 2 of the Complaint allege violations of the Clean Air Act ("CAA"), 42 U.S.C.§§ 7401 *et seq*., while counts 3 through 9 allege violations of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §§ 6901 *et seq*.

This Order pertains only to Counts 1 and 2 of the Complaint alleging violations of the CAA and filed pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d).

Count 1 of the Complaint alleges that Respondent violated Section 113(a)(3) the CAA, 421 U.S.C. § 7414(a)(3), and its implementing regulations at 40 CFR § 82.156(f) by failing to

[1]The Complaint was filed jointly by Bharat Mathur, Director of the Air and Radiation Division of EPA (Region 5) and Joseph M. Boyle, Chief of the Enforcement and Compliance Assurance Branch of the Waste, Pesticides and Toxics Division of EPA (Region 5). Complaint, pp. 43-44. Mr. Boyle filed the Complaint regarding the alleged violations of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), and Mr. Mathur filed the Complaint regarding the alleged violations of the Clean Air Act ("CAA"). Complaint, pp. 1-2.

[2]Complaint, ¶¶ 14-17; Answer, ¶¶ 14-17.

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.[3] Count 2 of the Complaint alleges that Respondent violated Section 113(a)(3) of the CAA, 42 U.S.C. § 7413(a)(3), and its implementing regulations at 40 CFR §§ 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.[4] Complainant proposes a penalty of $357,500 for the violations alleged in Counts 1 and 2 of the Complaint, consisting of $327,000 for Count 1 and $30,500 for Count 2.[5]

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice") at 40 CFR Part 22 (2000).

Respondent filed "Respondent's Motion to Dismiss Counts I and II of Complaint for Lack of Subject Matter Jurisdiction" and its "Memorandum in Support of Respondent's Motion to Dismiss Counts I and II of Complaint for Lack of Subject Matter Jurisdiction" on May 16, 2002.[6] Complainant filed "Complainant's Response to Respondent's Motion to Dismiss Counts I and II and Accelerated Decision as to Count VI" and "Complainant's Motion in Support of its Response to Respondent's Motion to Dismiss Counts I and II and Accelerated Decision as to Count VI" on June 3, 2002. Respondent filed its "Reply Memorandum in Support of Respondent's Motion to Dismiss Counts I and II for Lack of Subject Matter Jurisdiction" on June 11, 2002. Complainant filed a "Motion and Memorandum of Law in Support of Complainant's Sur-Reply for Counts I & II and Reply for Count VI" on June 25, 2002. Respondent field "Respondent's Memorandum in Opposition to Region V's Motion and Memorandum of Law in Support of Complainant's Sur-Reply for Counts I & II" on July 10, 2002. Complainant filed "Complainant's Motion and Memorandum of Law in Response to Respondent's Motion to Strike Exhibits and Opposition to Sur-Reply" on July 29, 2002. These pleadings included numerous attachments.[7]

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[3]Complaint, ¶¶ 67-72.

[4]Complaint, ¶¶ 73-78.

[5]Complaint, ¶ 160.

[6]As specified by 40 CFR § 22.5(a)(1), documents are considered "filed" when they are "received by the appropriate Clerk," which in the instant case is the U.S. EPA Regional Hearing Clerk for Region 5.

[7]40 CFR § 22.16(a) states, in relevant part: "Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate." In the instant case, Complainant's "Motion and Memorandum of Law in Support of Complainant's Sur-Reply for Counts I & II and Reply for Count VI" (filed June 25, 2002), "Respondent's Memorandum in Opposition to Region V's Motion and Memorandum of Law in Support of Complainant's Sur-Reply for Counts I & II" (filed July 10, 2002), and "Complainant's Motion and Memorandum of Law in Response to Respondent's Motion to Strike Exhibits and

Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), authorizes the administrative assessment of civil penalties under the Act and includes the following provision:

> The [EPA] 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. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

For violations occurring after January 30, 1997, the $200,000 statutory limit set forth in Section 113(d)(1) has been legislatively increased to $220,000.[8]

The parties agree that the 12-month and $220,000 limits set forth in Section 113(d)(1) apply to Counts 1 and 2 in the instant case, as the first date of the violations alleged in Counts 1 and 2 occurred on July 22, 1999, more than 12 months prior to initiation of the administrative action on September 28, 2001, and the proposed penalty for Counts 1 and 2 (occurring after January 30, 1997) - $357,500 - is in excess of $220,000.[9]

Respondent contends that the joint determination of the Administrator of the U.S. EPA ("Administrator") and the Attorney General (i.e.,that this matter, which exceeds the time and penalty caps of Section 113(d)(1) with regard to Counts 1 and 2, is nevertheless appropriate for administrative penalty action) is defective. Respondent argues that the Administrator lacks the authority to issue an administrative order assessing a civil administrative penalty for Counts 1 and 2 in this case, and that this Tribunal must dismiss those counts for lack of subject matter jurisdiction. Specifically, Respondent contends that the "joint determination" is defective for

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Opposition to Sur-Reply" (filed July 29, 2002) are all "additional documents" within the meaning of 40 CFR § 22.16(a), and they are all permitted under Section 22.16(a).

[8]Under 40 CFR 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 CFR § 19.2). For violations occurring after January 30, 1997, the applicable total maximum civil penalty is $220,000. (40 CFR § 19.4, *including* Table 1).

[9]*See, e.g.*, Complainant's Response to Respondent's Motion to Dismiss Counts I and II and Accelerated Decision as to Count VI (hereinafter *Complainant's Response*), p. 6: "The Complainant and Respondent agree that section 113(d) of the Clean Air Act is applicable to Counts I and II since the first violations occurred more than one year preceding the filing of the Complaint and the proposed penalty is in excess of $220,000."

three reasons. First, Respondent argues that the Attorney General did not agree to "waive"[10] the time and penalty caps until *after* the Complaint was filed, and that such waiver was a necessary prerequisite to the Administrator's authority to initiate a penalty for Counts 1 and 2, including this Tribunal's jurisdiction to hear the case. Second, Respondent contends that the Administrator's waiver was defective because it specifically waived only the 12-month time limit and not the $220,000 penalty limit. Third, Respondent argues that the Administrator's waiver was defective because the person who signed the waiver did not have the delegated authority to do so.

Complainant responds, first, that the Attorney General did, in fact, effectively waive the time and penalty caps *prior* to Complainant's filing of the Complaint and, alternatively, that the Administrator and the Attorney General were not required to agree that the matter was appropriate for administrative penalty action prior to the filing of the Complaint, but only prior to issuance of a final order in this matter by the Environmental Appeals Board ("EAB"). Second, Complainant contends that the Administrator was not required to specifically "waive" each (or either) of the $220,000 and/or 12-month limits, but was only required to "determine that [the] matter ... is appropriate for administrative penalty action."[11] Alternatively, Complainant argues that the Administrator did, in fact, specifically "waive" each of the statutory limitations. Third, Complainant contends that the person who signed the Administrator's waiver did, in fact, have the delegated authority to do so.

For the reasons discussed below, it is concluded that the Attorney General's determination (i.e., that this matter, which exceeds the time and penalty caps of Section 113(d)(1) with regard to Counts 1 and 2, is nevertheless appropriate for administrative penalty action) is invalid because such determination was not made until after the initiation of the Complaint. Therefore, the Administrator lacks the authority to issue an administrative order assessing a civil administrative penalty for Counts 1 and 2 in this case, and this Tribunal must dismiss those counts for lack of subject matter jurisdiction. This finding being dispositive of the motion, the Court need not consider Respondent's arguments regarding the validity of the Administrator's portion of the "joint determination." **HELD:** Respondent's Motion to Dismiss Counts I and II of Complaint for Lack of Subject Matter Jurisdiction is **GRANTED** and said counts are **DISMISSED**.

Discussion

[10]Although the terms "waive" or "waiver" do not appear in Section 113(d)(1) of the CAA, the terms are used in this Order for convenience and refer to the Administrator's and/or the Attorney General's determination that the matter is appropriate for administrative penalty action despite the exceeded penalty and/or time limits of Section 113(d)(1).

[11]CAA, Section 113(d)(1), 42 U.S.C. § 7413(d)(1).

I. Judicial Review of the "Waiver" Determination

Section 113(d)(1) states that: "Any such determination by the Administrator and the Attorney General [that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action] shall not be subject to judicial review." The EAB offered a detailed analysis of this provision in *In re Lyon County Landfill*, 8 E.A.D. 559 (EAB, Aug. 26, 1999), explaining:

> At one level, it may be reasonable to view waiver determinations solely as an element of EPA's prosecutorial discretion. Decisions about which cases to prosecute, what violations to allege, what amounts of penalties to seek, and whether to bring an administrative or judicial penalty action may all turn on prosecutorial judgment and agency policy. Indeed, the decision to seek a waiver of the jurisdictional limitations in CAA section 113(d)(1) may be viewed simply as a policy decision regarding whether to proceed in an administrative or judicial forum. That type of decision is appropriately reserved to enforcement personnel.
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> The Presiding Officer's review of the waiver determination in this case, however, simply analyzed whether the statutory conditions for a waiver determination were satisfied. The question examined by the Presiding Officer was not whether the waiver was "appropriate" but rather whether it could have been lawfully issued. As such, the Presiding Officer was not second-guessing an exercise of enforcement discretion ... but rather was making a legal determination regarding whether the statutory conditions for use of a waiver were satisfied. By reviewing the waiver determination, the Presiding Officer was *seeking to ensure that administrative penalty authority was properly invoked such as to provide a jurisdictional basis for her proceeding*. This function is distinct from the determination whether a waiver, if available, should actually be granted in a particular case.
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> Certainly, neither an ALJ nor the Board may invalidate a waiver determination simply because, in the ALJ's (or Board's) judgment, a case should have been brought in a judicial forum. Within EPA, that type of judgment would interfere with the enforcement discretion entrusted to the Office of Enforcement and Compliance Assurance ("OECA"). However, *it is legitimate for an ALJ to ensure that a statute actually authorizes a penalty action based on the facts of a particular case. An ALJ who independently reviews the jurisdictional basis of a case is not superseding OECA's role but is simply ensuring that administrative penalty authority is, in fact, legally available*.
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> The CAA requires, in general, that administrative penalty assessments under section 113(d)(1) be made after opportunity for a hearing on the record in accordance with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554, 556. CAA § 113(d)(2)(A), 42 U.S.C. § 7413(d)(2)(A). EPA's regulations governing APA proceedings provide for a hearing to be presided over by an ALJ and the opportunity for appeal to the Board. 40 C.F.R. §§ 22.04(c), .30. In the course of Part 22 proceedings, Presiding Officers may

hear and decide issues of fact, law, and discretion. *Id.* § 22.04(c)(7). In addition, a Presiding Officer has the authority to dismiss an administrative penalty action at any time on the basis of the Agency's "failure to establish a prima facie case or *other grounds [that] show no right to relief on the part of the complainant." Id.* § 22.20(a) (emphasis added). *This authority is clearly broad enough to cover a ruling on the issue of jurisdiction, especially in cases where jurisdiction is potentially limited by statute.*[12]

Under the EAB's construction of the "judicial review prohibition" in Section 113(d)(1) of the CAA, this Tribunal in the instant case clearly has the authority to consider the arguments set forth in Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and to review the joint waiver determination in order to determine whether administrative penalty authority was properly invoked so as to provide a jurisdictional basis for this Tribunal to consider Counts 1 and 2 of the Complaint.

II. Standard of Review

As noted *supra*, this proceeding is governed by the "Rules of Practice" at 40 CFR Part 22. 40 CFR § 22.20(a) states, in relevant part: "The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing ... on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." As the Rules of Practice do not provide a specific standard by which to evaluate a motion to dismiss, guidance may be found in the Federal Rules of Civil Procedure ("FRCP") and related case law.[13]

Contrary to Complainant's assertion that "[m]otions for dismissal under 40 C.F.R. §22.20(a) are similar to motions for summary judgment under Rule 56 of the [FRCP],"[14] Respondent's "Motion to Dismiss for Lack of Subject Matter Jurisdiction" in the present case should *not* be analyzed under the "summary judgement" standard, but rather is analogous to a

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[12] *In re Lyon County Landfill*, 8 E.A.D. 559, 566-568 (EAB, Aug. 26, 1999) (citations and footnote omitted) (emphasis added and in original).

[13] *See, e.g., In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 *including* n.20 (EAB, Oct. 6, 1993); *In re Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524, n.10 (EAB, Feb. 24, 1993), and cases cited therein.

[14] Complainant's Response, p. 6 [Section IV.A.2.a. ("Counts I and II - Legal Standard of Review - Motion to Dismiss")]. However, Complainant later correctly asserts, when arguing that this Tribunal should consider the "Declaration of Joseph Cardile" submitted as Attachment # 3 to Complainant's Response, that: "A district court may look to evidence beyond the face of the pleadings to determine subject matter jurisdiction. US EEOC v. KWMT, Inc., D.C. Ia., 1988, 718 F.Supp. 1421, Cestorano v. U.S., C.A. 3d 200, 211 F3d 749. The Court is free to consider evidence outside of the pleadings to resolve factual jurisdictional issues. Daily v. City of Pennsylvania, D.C.Pa. 2000, 98 F.Supp.2d 634. The Presiding Officer's authority is similar to that of the district court in examining the evidence relevant to determining the merits of a motion to dismiss." Complainant's Response, p. 11.

"motion to dismiss for lack of jurisdiction over subject matter" under FRCP 12(b)(1).[15] Similarly, Respondent's motion to dismiss for lack of subject matter jurisdiction in the instant case – analogous to a FRCP 12(b)(1) motion – should *not* be analyzed as a "motion to dismiss for failure to state a claim" under FRCP 12(b)(6).[16] The distinction is an important one, as the court explained in *Hair v. Tennessee Consol. Retirement System*, 790 F.Supp. 1358, 1362 (M.D.Tenn. 1992):

> Where the court's subject matter jurisdiction is challenged by way of a motion filed under [FRCP] 12(b)(1), it is the plaintiff who has the burden of proving jurisdiction. The Court has a duty to resolve any factual disputes on a Rule 12(b)(1) motion. *A Rule 12(b)(1) motion is not analogous to a Rule 12(b)(6) motion where if genuine disputes of material fact exist the motion should be treated as a motion for summary judgment under Rule 56 and denied*.[17]

A Rule 12(b)(1) motion may either challenge the jurisdictional sufficiency of the allegations set forth in the complaint on its face (a "facial attack") or challenge the accuracy of the asserted factual basis for jurisdiction (a "factual attack"). The court in *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727 (11th Cir. 1982), explained the difference between a "facial" and a "factual" 12(b)(1) motion as follows:

> The central inquiry ... is whether the 12(b)(1) motion attacked the complaint on its face or whether the motion attacked the asserted factual basis of jurisdiction. If the motion to dismiss is a facial attack on the complaint, then the reviewing court must consider the allegations in the plaintiff's complaint as true. These protections are similar to the procedural safeguards retained when the court grants a 12(b)(6) motion for failure to state a claim. *Such protections do not attach when the district court's jurisdictional decision is based upon the court's resolution of disputed facts*. The former fifth circuit has accepted the reasoning of

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[15] *See, e.g., Southeast Bank v. Gold Coast Graphics Group*, 149 F.R.D. 681, 683, *including* n.2 (S.D.Fla. 1993) ["When a court must dismiss a case for lack of jurisdiction, the court should not adjudicate the merits of the claim. Since the granting of summary judgment is a disposition on the merits of the case, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of subject matter jurisdiction... Moreover, a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction cannot be converted into a motion for summary judgment." (Citations omitted)]; *Solomon v. Solomon*, 516 F.2d 1018, 1027 (3rd Cir. 1975) ["...[L]ack of subject matter jurisdiction should be raised and adjudicated by a motion to dismiss, not a motion for summary judgment." (Citations omitted)]; *U.S. v. Tazzioli Const. Co.*, 796 F.Supp. 1130, 1131 (N.D.Ill. 1992) ["Lack of subject matter jurisdiction is appropriately raised in a motion to dismiss under [FRCP] 12(b)(1)."

[16] *See, e.g., Gervasio v. U.S.*, 627 F.Supp. 428, 430 (N.D.Ill. 1986); *Silver Motor Freight Terminal, Inc. v. Teamsters Local Union No. 957*, 537 F.Supp. 188, 191 (S.D.Ohio 1982); *Motion Picture Projectionists v. Fred Corp.*, 845 F.Supp. 1255, 1257 (N.D.Ill. 1994); *U.S. ex rel. Stinson, Lyons, et al. v. Blue Cross*, 755 F.Supp. 1040, 1046-1047 (S.D.Ga. 1990); *Hair v. Tennessee Consol. Retirement System*, 790 F.Supp. 1358, 1362 (M.D.Tenn. 1992).

[17] *Hair*, 790 F.Supp. at 1362 (citations omitted) (emphasis added).

> the third circuit that: "*The factual attack ... differs greatly for here the trial court may proceed as it never could under 12(b)(6) or [FRCP] 56.* Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction – its very power to hear the case – there is substantial authority that the trial court is *free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist*."[18]

The court in *U.S. ex rel. Stinson, Lyons, et al. v. Blue Cross*, 755 F.Supp. 1040 (S.D.Ga. 1990), also provides a useful analysis of the differing standards of review under FRCP 12(b)(6) and "facial" and "factual" 12(b)(1) motions:

> A Rule 12(b)(6) motion attacks the legal sufficiency of the complaint. In essence, the movant says, "Even if everything you allege is true, the law affords you no relief." Consequently, in determining the merit of a Rule 12(b)(6) motion, a court is to assume that all of the factual allegations of the complaint are true. In contrast, a Rule 12(b)(1) motion challenges the district court's subject-matter jurisdiction. A Rule 12(b)(1) motion can take either of two forms. One form is "a facial attack on the complaint, requiring the court merely to assess whether the plaintiff has alleged a sufficient basis of subject matter jurisdiction." To weather this type of challenge, "[a] plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion ... is raised – the court must consider the allegations in the plaintiff's complaint as true." The other form of a Rule 12(b)(1) motion is a *factual* attack on the subject-matter jurisdiction of the court. Such an attack "challenges the facts on which jurisdiction depends and matters outside of the pleadings, such as affidavits and testimony, are considered." Under a factual attack, the plaintiff bears the burden of proof that subject-matter jurisdiction exists.[19]

Thus, under a "factual" 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, "...the trial court must consider the evidence to satisfy itself as to the existence of its power to hear the case,"[20] and "[t]he court may consider conflicting evidence and decide for itself the

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[18] *Eaton*, 692 F.2d at 731-732 *including* n.9 [*quoting Motenson v. First Fed. Sav. & Loan*, 549 F.2d 884, 891 (3rd Cir. 1977) (footnote omitted), *quoted in Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981)] (citations omitted) (emphasis added).

[19] *U.S. ex rel. Stinson, Lyons, et al.*, 755 F.Supp. at 1046-1047 (citations omitted) (emphasis in original).

[20] *United Transp. Unions 385 & 77 v. Metro-North Commuter*, 862 F.Supp. 55, 58 (S.D.N.Y. 1994).

factual issues that determine jurisdiction."[21] Further, the party claiming jurisdiction bears the burden to show by a preponderance of the evidence that subject matter jurisdiction does exist. As the court explained in *First Nat. Bank of Chicago v. Steinbrink*, 812 F.Supp. 849 (N.D.Ill. 1993), citing *Grafon Corp. v. Hauserman*, 602 F.2d 781 (7th Cir. 1979):

> ...[A]ny conflict in the evidence submitted must be viewed in light of the fact that
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> the party invoking jurisdiction carries the ultimate burden of presenting "competent [factual] proof" of proper subject matter jurisdiction.[22]

Grafon Corp., citing the U.S. Supreme Court in *McNutt v. General Motors Acceptance Corp.*, stated:

> We are ... aware that in a ... [great] number of cases the facts presented in support of and in opposition to such a motion may present a substantial factual controversy, the resolution of which requires the district court to weigh the conflicting evidence in arriving at the factual predicate upon which to base the legal conclusion that subject matter jurisdiction either exists or does not. In cases where the jurisdiction of the court is challenged as a factual matter, the party invoking jurisdiction has the burden of supporting the allegations of jurisdictional facts by competent proof. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); ... The Court in *McNutt* also said: "And where [the allegations of jurisdictional facts] are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the *party alleging jurisdiction justify his allegations by a preponderance of evidence*." 298 U.S. at 189, 56 S.Ct. at 785.[23]

Thus, Respondent's motion in this case is analogous to a "factual" motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1), and Complainant must show by a preponderance of the evidence that this Tribunal has subject matter jurisdiction over Counts 1

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[21] *Rodgers v. Scott*, 901 F.Supp. 224, 227 (N.D.Tex. 1995). *See also*, *Forsyth v. Eli Lilly & Co.*, 904 F.Supp. 1153, 1156 (D.Hawai'i 1995); *Cantley v. Simmons*, 179 F.Supp.2d 654, 655 (S.D.W.Va. 2002); *Ernst v. Depositors Economic Protection Corp.*, 862 F.Supp. 709, 713 (D.R.I. 1994); *Whiteco Metrocom v. Yankton Sioux Tribe*, 902 F.Supp. 199, 200-201 (D.S.D. 1995).

[22] *First Nat. Bank of Chicago v. Steinbrink*, 812 F.Supp. at 852 (citation omitted).

[23] *Grafon Corp. v. Hauserman*, 602 F.2d 781, 783 *including* n.4 (7th Cir. 1979) (citations omitted) (emphasis added), *quoting McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936).

and 2 of the Complaint.[24] As discussed below, assuming as a matter of law that the "determination" required under Section 113(d)(1) of the CAA must be made before the filing of the Complaint, the jurisdictional question in the instant case turns on whether the Attorney General's waiver was issued before or after the Complaint was filed on September 28, 2001. While Complainant maintains that such determination was effectively made on September 14, 2001, Respondent counters that the determination date was none other than October 1, 2001.

III. Attorney General's "Section 113 Determination"

As previously stated, Respondent argues that the Attorney General did not agree to "waive" the time and penalty caps set forth in Section 113(d)(1) of the CAA until *after* the Complaint was filed, and that such waiver was a necessary prerequisite to the Administrator's authority to seek a penalty for Counts 1 and 2 and this Tribunal's jurisdiction to consider the assessment of such a penalty. Complainant responds that the Attorney General did, in fact, effectively waive the time and penalty caps *prior* to Complainant's filing of the Complaint and, alternatively, that the Administrator and the Attorney General were not required to agree that the matter was appropriate for administrative penalty action prior to the filing of the Complaint, but only prior to issuance of a final order in this matter by the EAB. In adjudicating these issues, the Court must first address Complainant's legal argument regarding the requisite timing of the waiver.

A. The Attorney General's "Section 113 Determination" Was Required Prior to Complainant's Filing of the Complaint Regarding Counts 1 and 2

Section 113(d)(1) of the CAA states, in pertinent part:

> The Administrator may *issue an administrative order* ... assessing a ... penalty... The Administrator's *authority under this paragraph* shall be limited ... except where the Administrator and the Attorney General jointly determine that a matter ... is appropriate for administrative penalty action.

(Emphasis added).

Complainant construes this statutory provision such that the "Administrator's authority" which is "limited" by Section 113(d)(1), except upon a joint waiver determination, is *not* the authority to "initiate" an action by filing a complaint, but rather the authority to "issue an

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[24] *See, e.g., Gervasio v. United States*, 627 F.Supp. 428 (N.D.Ill. 1986) (Motion to dismiss predicated on taxpayer's alleged failure to meet jurisdictional prerequisites to bringing tax refund suit as set forth in the Internal Revenue Code treated as a "factual" Rule 12(b)(1) motion); *Southeast Bank v. Gold Coast Graphics Group*, 149 F.R.D. 681 (S.D.Fla. 1993) (Motion to dismiss for failure to comply with the procedural and statute of limitations requirements of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") treated as a "factual" Rule 12(b)(1) motion).

administrative order," which does not occur until an "Initial Decision" of this Tribunal becomes a "Final Order" 45 days after it is served upon the parties or the EAB files it's Final Order upon review of an Initial Decision pursuant to 40 CFR §§ 22.27 and 22.31. That is, Complainant contends that the Administrator and the Attorney General need not determine that a matter "is appropriate for administrative penalty action" until some time after this Tribunal has heard the case and issued an Initial Decision.[25] Complainant argues that the Section 113(d)(1) limitations must be so liberally construed for two reasons: 1) the CAA is a "remedial" statute which is designed to protect human health, and 2) to require the waiver prior to filing the complaint would lead to an "absurd result" because "[s]ince dismissal with prejudice is disfavored the Complainant could seek leave to amend the complaint on the next day ... [and] [t]his is unnecessary paperwork."[26] Such arguments however, lack merit.

1) "Remedial Nature" of the Clean Air Act

Regarding the "remedial nature" of the CAA, Complainant observes that:

> Where a remedial statute is designed to protect human health the courts are "obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purpose." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).[27]

The First Circuit in *Dedham Water* in fact held:

> [The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")] is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes. With this in mind, we join with the Second Circuit in proclaiming that "[w]e will not interpret [42 U.S.C.] section 9607(a) [CERCLA Section 107(a)] in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise." *New York v. Shore Realty Corp.*, 759 F.2d 1032,

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[25]As a practical matter, it would be difficult for the Administrator and the Attorney General to determine precisely when their joint waiver was "due" under Complainant's construction of Section 113(d)(1). Up until the the 45 days after service of the Initial Decision expired, the waiver would be finally due, unless a party moved to reopen the hearing, appealed to the EAB, moved to set aside a default order that constituted an Initial Decision, or the EAB elected to review the Initial Decision *sua sponte*. (40 CFR § 22.27(c)). If the EAB in fact reviewed the Initial Decision, then the Administrator and the Attorney General would not know when their joint waiver was due until the moment that it *was* due - upon filing of the Final Order by the EAB. (40 CFR § 22.31(b)).

[26]Complainant's Response, p. 26.

[27]*Id.* at 22.

1045 (2nd Cir. 1985).[28]

While it is true that the CAA, like CERCLA, is a "remedial statute designed to protect public health and the environment" and should therefore be construed "liberally to avoid frustration of the beneficial legislative purposes," the First Circuit's interpretation of Section 107(a) of CERCLA in *Dedham Water* simply does not suggest the construction of Section 113(d)(1) of the CAA which Complainant proposes. Section 113 (d)(1) clearly and unambiguously articulates the specific congressional intent to limit the Administrator's authority to issue administrative penalty assessment orders to matters involving less than $220,000 in total penalty and first alleged violations occurring less than 12 months "prior to the initiation of the administrative action" unless these limitations are waived. To construe Section 113(d)(1) to require the waiver before initiation of the action rather than before issuance of the final order does not frustrate in the least the Administrator's ability to issue administrative penalty assessment orders within the statutorily prescribed limits. In either case, the prescribed limitations must not be exceeded or else must be waived. Further, as Respondent points out, "even in the absence of a waiver EPA can respond to alleged violations by issuing notices of violation, or by requesting the Department of Justice ("DOJ") to take civil or criminal enforcement action."[29]

2) "Absurd Result" of "Leave to Amend"

Regarding the "absurd result" envisioned by Complainant that a dismissal of Counts 1 and 2 must be "without prejudice" so that Complainant "could seek leave to amend the Complaint on the next day" leading to "unnecessary paperwork," such a result is not suggested by the relevant case law. To the contrary, although liberal leave is granted to amend a complaint to cure defective allegations of jurisdictional facts in existence *at the time the complaint was filed*,[30] a complaint cannot be amended to *create* jurisdictional facts retroactively where they did not previously exist or to cure defects in the jurisdictional facts themselves *nunc pro tunc*.[31] As the Attorney General's "waiver" in the instant case was a jurisdictional prerequisite to filing the

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[28]*Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (citations omitted).

[29]Complainant's Reply, p. 4.

[30]*See, e.g., Kaufman v. W.U. Tel. Co.*, 224 F.2d 723 (5th Cir. 1955); *Stern v. Beer*, 200 F.2d 794 (6th Cir. 1952); *Roberson v. Bitner*, 218 F.Supp. 764 (E.D.Tenn. 1963); *Gillespie v. Schomaker*, 191 F.Supp. 8 (E.D.Ky. 1961).

[31]*See, e.g., Church of Scientology of Colorado v. United States*, 499 F.Supp. 1085 (D.Colo. 1980); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989); *Iron Cloud v. Sullivan*, 984 F.2d 241 (8th Cir. 1993); *Field v. Volkswagenwerk AG*, 626 F.2d 293 (3rd Cir. 1980); *Smith v. Fisher Peirce Co.*, 248 F.Supp. 815 (E.D.Tenn. 1965); *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770 (5th Cir. 1986); *Maybruck v. Haim*, 290 F.Supp. 721 (S.D.N.Y. 1968).

Complaint (as discussed below), the Complaint cannot be "amended" to create the "fact" of the waiver having been issued prior to the filing of the Complaint on September 28, 2001 (assuming for the moment that it was not issued until October 1, 2001). The defect in the Complaint is not curable by amendment and leave to amend would invariably be denied.

The EAB explained in *Asbestos Specialists*:

> ...[A]dministrative pleadings are intended to be "'liberally construed' and 'easily amended.'" It is only where the *defect in the complaint is not curable by amendment that leave to amend should be denied...* In *Forman v. Davis*, [371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)], the Supreme Court listed several examples of circumstances under which it may be appropriate to deny leave to amend a flawed complaint: "undue delay, bad faith or dilatory motive..., repeated failure to cure deficiencies..., undue prejudice..., [and] *futility of amendments...*" *Forman v. Davis*, 371 U.S. 178 (1962).[32]

The Board in *Asbestos Specialists* therefore concluded:

> Therefore, as a general rule, dismissal with prejudice under the Agency's rules should rarely be invoked ... [and] should be reserved for ... occasions ... where it is clear that a more carefully drafted complaint would still be unable to show a right to relief on the part of the complainant.[33]

An amended complaint is "futile" if it does not present any new facts, but only theories.[34] The operative facts are those in existence at the time the complaint was filed.[35] In the present case, an amended Complaint could not plead any new facts, but only theories, and could not alter the fact that the Attorney General's waiver was untimely issued (as explained below) on October 1, 2001. An amended Complaint in this case for the purposes of establishing subject matter jurisdiction in this Tribunal over Counts 1 and 2 of the Complaint would therefore be futile, and leave to amend would therefore be denied.[36] Thus, Complainant's concerns regarding the

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[32] *In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 828 (EAB, Oct. 6, 1993) (citations omitted) (emphasis added).

[33] *Id.* at 830.

[34] 3 Moore's Federal Practice 3d, § 15.15(3); *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 677 (9th Cir. 1993).

[35] *See* notes 30 and 31, *supra*.

[36] *See, e.g., Southeast Bank v. Gold Coast Graphics Group*, 149 F.R.D. 681 (S.D.Fla. 1993) [Counterclaims were "forever barred" (149 F.R.D. at 685) for failure to comply with the procedural and statute of limitations requirements of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA")]. However, as Judge Gunning observed in *Lyon County* upon dismissing the complaint for lack of subject matter jurisdiction due to an invalid Section 113 waiver: "...[T]he EPA is not completely without remedy as it may still file a complaint in

"absurd results" of "unnecessary paperwork" in order to amend the Complaint are unfounded.

3) Attorney General's "Waiver" Required at Time Complaint was Filed

The Attorney General's waiver was, in fact, a jurisdictional prerequisite to Complainant's filing of the Complaint regarding Counts 1 and 2 in the instant case. Complainant does not argue that the waiver was not necessary to overcome the Section 113 time and penalty amount limitations on the Administrator's authority to issue an *order* in this case. Complainant admits that the Administrator clearly did *not* have the authority to issue a penalty order sought for Counts 1 and 2 of this case, absent the joint "waiver" determination, as the statutory penalty amount and time limitations are exceeded. Since the Administrator did not have the authority to issue an order sought absent the waiver, Complainant did not have the authority to seek the penalty sought by filing the Complaint absent the waiver.

Complainant's argument to the contrary - that the waiver establishing jurisdiction is not required before this Tribunal and/or the EAB hears the case, but only before a "final order" is issued - is at odds with the Court's "independent obligation to assure [itself] of jurisdiction."[37] This fundamental obligation of the Court was explicitly recognized by the EAB in *Lyon County*, where the Board held:

> By reviewing the waiver determination [under Section 113(d)(1) of the CAA], the Presiding Officer was seeking to ensure that administrative penalty authority was *properly invoked* such as to provide a jurisdictional basis *for her proceeding*.[38]

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federal district court, subject to the five-year statute of limitations at 28 U.S.C. § 2462." *In the matter of Lyon County Landfill*, Docket No. 5-CAA-96-011, Order Granting Respondent's Motion to Dismiss Complaint, 11 (OALJ, Aug. 21, 1998), *rev'd on other grounds*, *In re Lyon County Landfill*, 8 E.A.D. 559 (EAB, Aug. 26, 1999). *See also*, *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986): "'A dismissal for want of jurisdiction bars access to federal courts and is *res judicata* only of the lack of a federal court's power to act. It is otherwise without prejudice to the plaintiff's claims, and the rejected suitor may reassert his claim in any competent court.' *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348 (5th Cir. 1985). It is inconsistent for a district court to issue a judgment on the merits based on a finding that the court lacks subject matter jurisdiction. A decision issued by a court without jurisdiction over the subject matter is not conclusive of the merits of the claim asserted."

[37] *Floyd v. District of Columbia*, 129 F.3d 152, 155 (D.C. Cir. 1997), *citing Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982). *See also*, *Joyce v. U.S.*, 474 F.2d 215, 219 (3rd Cir. 1973) ("Where there is no jurisdiction over the subject matter, there is ... no discretion to ignore that lack of jurisdiction."); *Oppel v. Empire Mut. Ins. Co.*, 92 F.R.D. 494, 496 (S.D.N.Y. 1981) ("This Court ... is 'duty bound' to dismiss an action whenever it appears that jurisdiction over the subject matter is lacking."); *Brandford Nat. Life Ins. Co. v. Union State Bank*, 794 F.Supp. 296, 297 (E.D.Wis. 1992) ("Although the parties themselves have not addressed the issue of subject matter jurisdiction, this court is obligated to raise the issue *sua sponte* when it appears that subject matter jurisdiction is lacking.")

[38] *In re Lyon County Landfill*, 8 E.A.D. 559, 567 (EAB, Aug. 26, 1999) (emphasis added).

The EAB in *Lyon County* overruled the Administrative Law Judge's ("ALJ") determination that the "Section 113 waiver" in that case was invalid[39] and therefore reinstated the Complaint. However, in "...affirm[ing] the [ALJ's] decision to evaluate the legality of EPA and DOJ's joint waiver,"[40] the Board affirmed the reasoning of that portion of the ALJ's decision which held:

> [Because the waiver is invalid], under Section 113(d)(1) of the [CAA], the Administrator lacks the authority to issue an administrative order ... [in this case]. Consequently, as the presiding [ALJ] in this matter, I have no authority to issue such an administrative order, and the Complaint in this matter [should be] dismissed for lack of jurisdiction.[41]

The ALJ's analysis in *Lyon County* speaks precisely to the instant case. Here also, if the waiver is invalid (*i.e.*, non-existent), then the Administrator lacks the authority to issue an order for an administrative penalty. Concomitantly, this Court would not have authority to issue an Initial Decision, and the Complaint must be dismissed for lack of subject matter jurisdiction. If, as Complainant asserts, the waiver could come at any time prior to the "final order," then this Tribunal would be without the means to determine whether the waiver was "invalid" and would be incapable of performing it's "obligation"[42] to "ensure that administrative penalty authority [is] properly invoked such as to provide a jurisdictional basis *for [this ALJ] proceeding*."[43] Because this Tribunal must review the joint "waiver" determination in order to assure itself of subject matter jurisdiction over the matter before it, both the Administrator's and the Attorney General's portions of that determination must be finalized prior to the filing of the complaint, and Complainant's arguments to the contrary are without legal support.

This construction is supported also by the Department of Justice ("DOJ"), Environment and Natural Resources Division ("ENRD"), Directive No. 01-1 (Jan. 18, 2001), submitted as Attachment 11 to Complainant's Response.[44] That Directive states:

> ...[U]pon application by the Administrator, [EPA], under Section 113(d)(1) of the [CAA], 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

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[39] *Id.* at 575: "[W]e overrule the Presiding Officer's holding that remote-in-time violations of a non-continuing nature do not qualify for a waiver under CAA section 113(d)(1)."

[40] *Id.* at 576.

[41] *In the matter of Lyon County Landfill*, Docket No. 5-CAA-96-011, Order Granting Respondent's Motion to Dismiss Complaint, 10-11 (OALJ, Aug. 21, 1998).

[42] *Brandford Nat. Life Ins. Co.*, 794 F.Supp. at 297.

[43] *Lyon County*, 8 E.A.D. at 567 (emphasis added).

[44] *See also*, Complainant's Response, p. 9, n.12.

> 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.[45]

The DOJ's reference to "commencement of a proceeding" is synonymous with the term "initiation of the administrative action" in Section 113(d)(1) of the CAA, which is not defined by Section 113(d). However, as the ALJ found in *Lyon County*, "[t]he filing of the complaint with the Regional Hearing Clerk is the logical point at which to consider an action initiated because of its precise date and because of the respondent's notice of the action..."[46]

Finally, the conclusion that the Attorney General's "waiver" must be issued prior to the filing of the complaint in order to establish subject matter jurisdiction is supported, if not required, by the long line of case law previously noted which holds that the operative facts when considering a motion to dismiss for lack of subject matter jurisdiction (or a motion to amend a complaint in order to cure a jurisdictional defect) are those in existence *at the time the complaint is filed*. For example, in *Church of Scientology of Colorado v. United States*, 499 F.Supp. 1085 (D.Colo. 1980), the plaintiff sought a refund of taxes paid based on the plaintiff's claimed tax exempt status. The relevant statute required that a taxpayer who brings such a suit in district court must first pay the tax assessment before commencing the suit for a refund. The plaintiff not having paid the assessment, the court raised the jurisdictional question on its own motion, whereupon the plaintiff tendered a check for the disputed amount which the government accepted shortly before the hearing on the jurisdictional issue. Both parties argued that this payment cured the jurisdictional defect. The court, however, dismissed the action for lack of subject matter jurisdiction, explaining:

> Of course, defective jurisdictional allegations may be amended... Amendment, however, is proper *only as to matters of "form" in stating the jurisdictional allegations, not of "substance" in creating these facts* to confer jurisdiction *nunc pro tunc*. Even if the proposed stipulation is treated as a stipulated motion for leave to amend the complaint, it fails to confer jurisdiction since *this Court lacked jurisdiction when the case was filed. Facts occurring after the complaint is filed cannot confer jurisdiction on a federal court if sufficient jurisdictional facts did not exist at the time the complaint was filed. See Farmers' Alliance Mutual Ins. Co. v. Jones*, 570 F.2d 1384, 1387 (10th Cir. 1978); *Lyons v. Weltmer*, 174 F.2d 473 (4th Cir. 1949); *Seaboard Finance Co. v. Davis*, 276 F.Supp. 507, 509 (N.D.Ill. 1967); *Hagen v. Payne*, 222 F.Supp. 548, 553 (W.D.Ark. 1963);

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[45]Department of Justice, Environment and Natural Resources Division, Directive No. 01-1 at 4-5 (Jan. 18, 2001) (Complainant's Response, Attachment 11) (emphasis added).

[46]*In the matter of Lyon County Landfill*, Docket No. 5-CAA-96-011, Order Granting Respondent's Motion to Dismiss Complaint, 8 (OALJ, Aug. 21, 1998), *rev'd on other grounds*, *In re Lyon County Landfill*, 8 E.A.D. 559, 566-568 (EAB, Aug. 26, 1999).

Wright, Miller and Cooper, *Federal Practice and Procedure* Section 3608, vol. 13, pp. 661-62 (1975); Hart and Wechsler, *The Federal Courts and the Federal System* 1063, 1102 (2d ed. 1973).[47]

Similarly, the court in *Southeast Bank v. Gold Coast Graphics Group*, 149 F.R.D. 681 (S.D.Fla. 1993), granted the Federal Deposit Insurance Corporation's ("FDIC") motion to dismiss for lack of subject matter jurisdiction due to the claimants' failure to comply with the procedural and statute of limitations requirements of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").[48]

The reasoning of these cases is applicable to the instant case. The Administrator's and the Attorney General's "joint determination" is a jurisdictional prerequisite to the Administrator's authority to issue a penalty assessment order in this case regarding Counts 1 and 2 of the Complaint. The existence of the "waiver" is not a matter of "form" which can be cured by amendment, but one of "substance" in establishing the Administrator's jurisdiction. The "fact" of such waiver must therefore be in existence at the time the Complaint is filed. As discussed below, in the instant case it was not and the Court lacks subject matter jurisdiction over Counts 1 and 2, as such jurisdictional deficiency cannot be cured by amendment of the complaint.[49]

B. The Attorney General's "Waiver" was Issued on October 1, 2001

In light of the foregoing analysis, the jurisdictional question turns on whether the Attorney General's waiver was issued before or after the Complaint was filed on September 28, 2001. Complainant maintains that such determination was made on September 14, 2001, while Respondent contends that it was made on October 1, 2001. Thus, as discussed *supra*, Respondent's motion in this case is analogous to a "factual" motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1), and Complainant must show by a preponderance of the evidence that this Tribunal has subject matter jurisdiction over Counts 1 and 2 of the Complaint.

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[47]*Church of Scientology of Colorado v. United States*, 499 F.Supp. 1085, 1088 (D.Colo. 1980) (citations omitted) (emphasis added).

[48]*See also*, *Kaufman v. W.U. Tel. Co.*, 224 F.2d 723 (5th Cir. 1955); *Stern v. Beer*, 200 F.2d 794 (6th Cir. 1952); *Roberson v. Bitner*, 218 F.Supp. 764 (E.D.Tenn. 1963); *Gillespie v. Schomaker*, 191 F.Supp. 8 (E.D.Ky. 1961); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989); *Iron Cloud v. Sullivan*, 984 F.2d 241 (8th Cir. 1993); *Field v. Volkswagenwerk AG*, 626 F.2d 293 (3rd Cir. 1980); *Smith v. Fisher Peirce Co.*, 248 F.Supp. 815 (E.D.Tenn. 1965); *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770 (5th Cir. 1986); *Maybruck v. Haim*, 290 F.Supp. 721 (S.D.N.Y. 1968).

[49]However, *see* note 37, *supra*, regarding Complainant's ability to file its claims in "any competent court" (*Voisin's Oyster House, Inc.*, 799 F.2d at 188, *quoting Daigle*, 774 F.2d at 1348), including federal district court [*In the matter of Lyon County Landfill*, Docket No. 5-CAA-96-011, Order Granting Respondent's Motion to Dismiss Complaint, 11 (OALJ, Aug. 21, 1998)], despite a dismissal for lack of subject matter jurisdiction before this Tribunal.

Further, "...no presumptive truthfulness attaches to [Complainant's] allegations, and the existence of disputed material facts will not preclude [this Tribunal] from evaluating for itself the merits of jurisdictional claims."[50] In evaluating the jurisdictional claim, this Tribunal "... may consider conflicting evidence and decide for itself the factual issues that determine jurisdiction,"[51] and "...any conflict in the evidence submitted must be viewed in light of the fact that the party invoking jurisdiction carries the ultimate burden of presenting 'competent [factual] proof' of proper subject matter jurisdiction."[52] For the reasons discussed below, it is held that the Attorney General's "waiver" determination under Section 113(d)(1) of the CAA was made on October 1, 2001.

1) Complainant's Proffered Evidence

Complainant maintains that the Attorney General's portion of the "joint determination" was issued on September 14, 2001. In support of this position, Complainant points to seven pieces of evidence: 1) a copy of a facsimile of a DOJ "waiver" determination, signed by W. Benjamin Fisherow [Deputy Chief, DOJ, Environmental Enforcement Section ("EES")], which is undated but which bears a fax transmission date of September 14, 2001 [submitted with Complainant's pre-hearing exchange as Complainant's Exhibit ("CX") 5];[53] 2) the "Declaration of Joseph Cardile," an engineer with EPA Region 5 stating that he received an e-mail on September 17, 2001 from T. Leverett Nelson (the supervisor of counsel for Complainant in this case - Richard J. Clarizio, EPA Region 5 Assistant Regional Counsel), which e-mail stated that Mr. Nelson had received a facsimile of DOJ's "waiver" determination on September 17, 2001, and that such waiver had been sent by fax on September 14, 2001;[54] 3) a copy of Mr. Nelson's e-mail of September 17, 2001 (CX 45);[55] 4) a copy of a facsimile of a page from the DOJ, EES telephone directory which lists as one of multiple fax numbers the number printed in the fax transmission line containing the September 14, 2001 date at the top of the DOJ "waiver" submitted as CX 5;[56] 5) the "Declaration of T. Leverett Nelson" stating that CX 5 represents the

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[50] *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 732, n.9 (11th Cir. 1982) [*quoting Motenson v. First Fed. Sav. & Loan*, 549 F.2d 884, 891 (3rd Cir. 1977) (footnote omitted), *quoted in Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981)].

[51] *Rodgers v. Scott*, 901 F.Supp. 224, 227 (N.D.Tex. 1995).

[52] *First Nat. Bank of Chicago v. Steinbrink*, 812 F.Supp. 849, 852 (N.D.Ill. 1993) (citation omitted).

[53] Complainant's Response, Attachment 1; CX 5.

[54] Complainant's Response, Attachment 3 (hereinafter *Cardile Declaration*).

[55] Complainant's Response, Attachment 4; CX 45.

[56] Complainant's Response, Attachment 5.

"the letter which I received documenting DOJ's approval;"[57] 6) the "Declaration of William D. Brighton" stating that Mr. Brighton (Assistant Section Chief, DOJ, EES) drafted the letter offered as CX 5 on behalf of Mr. Fisherow and implying that a legal assistant had typed the "October 1, 2001" date onto the waiver letter;[58] and, 7) the "Declaration of W. Benjamin Fisherow" stating that Mr. Fisherow signed the undated letter drafted by Mr. Brighton, and that Mr. Fisherow's normal practice thereafter would have been to "have it sent promptly by fax and by mail to the addressee and the other individuals designated on the letter to receive copies."[59]

The purported DOJ "waiver" offered as CX 5 bears a fax transmission line which states: "09/14/01 FRI 16:44 FAX 202 616 6584."[60] This letter is signed by Mr. Fisherow and is addressed to George Czerniak (Chief, Air Enforcement and Compliance Assurance Branch, Air and Radiation Division, EPA, Region 5). The letter offered as CX 5 also indicates "cc:" to "Eric Cohen, Branch Chief, Office of Regional Counsel, EPA Region 5 (BY FAX: 312-886-0747),"[61] and also "cc:" to "Bruce Buckheit, Director, Air Enforcement Division, Office of Enforcement and Compliance Assurance, EPA."[62]

Mr. Cardile's Declaration states that, "I am an engineer employed by the [U.S. EPA], Region V, Air and Radiation Division,"[63] and explains that "[a]s part of my duties ... I am responsible for preparing any request for a waiver of the limits imposed pursuant to section 113(d) of the [CAA]."[64] Mr. Cardile's Declaration goes on to explain that as part of "certain internal procedures"[65] Mr. Cardile drafted a memorandum on behalf of Mr. Czerniak requesting a joint "Section 113 waiver" from the Administrator and the Attorney General, which request was sent to Bruce Buckheit (Director, Air Enforcement Division, EPA) by memorandum dated May 25, 2001 (CX 44).[66] Mr. Cardile's Declaration further states that Mr. Buckheit then sent a letter dated June 12, 2001 to John Cruden [Acting Assistant Attorney General, DOJ,

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[57]Complainant's Motion and Memorandum of Law in Support of Complainant's Sur-Reply for Counts I & II and Reply for Count VI (hereinafter *Complainant's Sur-Reply*), Exhibit 3, p. 2 (hereinafter *Nelson Declaration*).

[58]Complainant's Sur-Reply, Exhibit 2 (hereinafter *Brighton Declaration*).

[59]Complainant's Sur-Reply, Exhibit 1 (hereinafter *Fisherow Declaration*).

[60]Complainant's Response, Attachment 1; CX 5.

[61]*Id.*

[62]*Id.*

[63]Cardile Declaration, ¶ 1.

[64]*Id.* at ¶ 17.

[65]*Id.* at ¶ 19.

[66]*Id.* at ¶ 21.

Environment and Natural Resources Division ("ENRD")] concurring with Mr. Czerniak and requesting that DOJ concur in the "waiver" determination (CX 4).[67] Finally, Mr. Cardile's Declaration states:

> On or about September 17, 2001, I received an e-mail message from T. Leverett Nelson regarding DOJ's approval of the waiver request. Mr. Nelson is Mr. Clarizio's [Complainant's counsel in this case] supervisor. He is a supervisor in the Region V Office of Regional Counsel. According to Mr. Nelson, he had received DOJ's approval of the waiver request on September 17, 2001. He also informed me that the written approval letter had been faxed on the preceding Friday - September 14, 2001. A copy of the signed DOJ waiver approval letter that was faxed on September 14, 2001, is included as [CX 5].[68]

Thus, the events described by Mr. Cardile's "Declaration" may be summarized as follows: Mr. Cardile (EPA Region 5 engineer) drafted a "waiver request" for Mr. Czerniak (EPA Region 5), who sent that request to Mr. Buckheit (EPA Headquarters), who concurred with Mr. Czerniak and, by letter dated June 12, 2001, issued the Administrator's waiver determination and requested from Mr. Cruden (DOJ, ENRD) DOJ's concurrence with such determination. On September 14, 2001, some unknown person at the DOJ Environmental Enforcement Section faxed to Mr. Nelson (EPA Region 5 Office of Regional Counsel) a copy of DOJ's "waiver determination" which was signed by Mr. Fisherow (DOJ, EES) but was undated except for the fax transmission line bearing the September 14, 2001 date of transmission. Mr. Nelson received this fax on September 17, 2001, on which date he informed Mr. Cardile by e-mail of such receipt.

Mr. Nelson's e-mail of September 17, 2001 to, among others, Mr. Cardile, states: "I just received the approved waiver from DOJ today. It was faxed on Friday [September 14, 2001]. I will make copies and distribute them. Thanks. -Rett."[69]

The copy of a facsimile of a page from the DOJ (ENRD) telephone directory lists as one of multiple fax numbers the number printed in the fax transmission line at the top of the DOJ "waiver" submitted as CX 5 (that number being 202-616-6584).[70] This directory page lists nineteen "fax numbers" for the EES of ENRD of DOJ and is "continued" from the previous page. None of these fax numbers are attached to names of individual people or offices.

The "Declarations" of Mr. Nelson, Mr. Brighton, and Mr. Fisherow are described in

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[67] *Id.* at ¶ 22.

[68] *Id.* at ¶ 23.

[69] Complainant's Response, Attachment 4, p. 2; CX 45, p. 4.

[70] Complainant's Response, Attachment 5.

greater detail *infra* in section III.B.3 ("Resolution of Conflicting Evidence") of this Order.

2) Respondent's Proffered Evidence

Respondent asserts that the Attorney General's portion of the "joint determination" was issued on October 1, 2001. In support of this position, Respondent relies on two pieces of evidence: 1) Complainant's January 25, 2002 response to Respondent's request for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552;[71] and 2) a copy of a DOJ "waiver" determination, signed by Mr. Fisherow and dated October 1, 2001.[72]

On October 26, 2001, Respondent submitted to Complainant a FOIA request which sought, among other things:

> All documents by which the Attorney General of the United States of America or his delegatee approved, pursuant to § 113(d) of the [CAA], 42 U.S.C. § 7413(d), the filing of an Administrative Complaint by [Complainant] against [Respondent]...
> ...
> All documents which are attached to, enclosed with, referred to, or incorporated by reference in, any of the documents described above.[73]

Complainant responded to this FOIA request by letter dated January 25, 2002 and signed by Bharat Mathur,[74] Director, Air and Radiation Division, EPA - Region 5, stating:

> Enclosed, you will find copies of some of the documents responsive to your request. The records consist of the documents described in Enclosure A of this letter.
> I am unable to provide all of the information responsive to your request. Enclosure B is a listing of the potentially responsive documents which have been determined to be exempt from mandatory disclosure...[75]

"Enclosure A" to this FOIA response lists the only two documents that were provided in

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[71]Respondent's Motion to Dismiss Counts I and II of Complaint for Lack of Subject Matter Jurisdiction (hereinafter *Respondent's Motion*), Attachment A, Exhibit 2.

[72]Respondent's Motion, Attachment A, Exhibit 2, p. 6; Complainant's Response, Attachment 2.

[73]Respondent's Motion, Attachment A, Exhibit 1, pp. 1-2.

[74]As noted *supra* at note 1, the complaint in the present case explains that Mr. Mathur filed the complaint against Respondent regarding the alleged violations of the Clean Air Act ("CAA"). Complaint, pp. 1-2.

[75]Respondent's Motion, Attachment A, Exhibit 2, p. 1.

response to the FOIA request: the "10/01/01" letter from Mr. Fisherow to Mr. Czerniak, described as "Granting of waiver request," and the "6/12/01" letter from Mr. Buckheit to Mr. Cruden, described as "HQ approval of waiver and request for DOJ approval."[76] "Enclosure B" to this FOIA response lists twelve documents (or sets of documents), including numerous e-mails, which were "potentially responsive" but which were deemed exempt from disclosure.[77] Neither "Enclosure A" nor "Enclosure B" list the undated copy of the DOJ "waiver" which was purportedly faxed on September 14, 2001 (CX 5) or Mr. Nelson's September 17, 2001 e-mail notifying Mr. Cardile that Mr. Nelson had received the DOJ "waiver." (CX 45).

The letter signed by Mr. Fisherow, dated October 1, 2001 and described in the FOIA response as "Granting of waiver request," is identical to the letter submitted by Complainant as CX 5, including the identical signature, except that Respondent's copy of the letter has the date "October 1, 2001" typed between the DOJ page header and the addressee line. It does not contain a fax transmission line, and it is stamped as "RECEIVED" by the "Air Enforcement Branch, U.S. EPA, Region 5" on October 24, 2001.[78] The "October 1, 2001" date is in a different type-font than is the rest of the letter, such that the date appears to have been typed onto a previously computer-generated letter.

3) Resolution of the Conflicting Evidence

As this Tribunal "... may consider conflicting evidence and decide for itself the factual issues that determine jurisdiction,"[79] "...any conflict in the evidence submitted must be viewed in light of the fact that the party invoking jurisdiction carries the ultimate burden of presenting 'competent [factual] proof' of proper subject matter jurisdiction."[80] Further, "the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence."[81] In the present case, Complainant has not shown by a preponderance of the evidence that the Attorney General's "waiver determination" was made on September 14, 2001, rather than on October 1, 2001.

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[76] *Id.* at p. 3.

[77] Id. at pp. 4-5.

[78] *Id.* at p. 6; Complainant's Response, Attachment 2.

[79] *Rodgers v. Scott*, 901 F.Supp. 224, 227 (N.D.Tex. 1995).

[80] *First Nat. Bank of Chicago v. Steinbrink*, 812 F.Supp. 849, 852 (N.D.Ill. 1993) (citation omitted).

[81] *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936), *quoted in Grafon Corp. v. Hauserman*, 602 F.2d 781, 783, n.4 (7th Cir. 1979).

a) Mr. Cardile's "Declaration"

The Declaration of Mr. Cardile, an engineer in the Region 5 office of the EPA who had drafted the letter for Mr. Czerniak requesting that Mr. Buckheit request of Mr. Cruden that DOJ concur in the "waiver," is simply too far removed to shed any light upon the intent or meaning of CX 5. The DOJ letter is signed by Mr. Fisherow, addressed to Mr. Czerniak, and faxed to Mr. Nelson. While Mr. Cardile's knowledge of the purported September 14, 2001 DOJ "waiver" is derived from an e-mail sent by Mr. Nelson, neither Mr. Nelson nor Mr. Cardile appear on the letter as intended recipients of even a copy of the letter. Mr. Cardile's "declaration" that Mr. Nelson sent him an e-mail stating that he (Mr. Nelson) had received a fax of the letter falls well short of tending to show that the letter offered as CX 5 was the Attorney General's operative "Section 113 waiver" in this case.

b) Mr. Nelson's e-mail of September 17, 2001

Mr. Nelson's e-mail of September 17, 2001 (CX 45) states: "I just received the approved waiver from DOJ today. It was faxed on Friday. I will make copies and distribute them."[82] Mr. Nelson's e-mail does not elaborate upon his reasons for construing this letter as DOJ's "approved waiver." Mr. Nelson does not appear on the letter as an intended recipient of a copy of the letter. Complainant argues that a copy of this letter (CX 5) was "faxed to Mr. Eric Cohen, the Branch Chief of the EPA, Office or (sic) Regional Counsel,"[83] as evidenced by the "cc:" to Mr. Cohen "BY FAX: 312-886-0747" on the face of the letter offered as CX 5, together with the fact that Mr. Nelson received the fax. However, Mr. Nelson's September 17, 2001 e-mail states that Mr. Nelson will copy and distribute the letter, which e-mail is addressed to, among others, Eric Cohen. Had Mr. Cohen received a copy of the letter, it would have been unnecessary for Mr. Nelson to distribute a copy to him.[84] Further, as indicated on the face of the letter, Mr. Cohen was the only person to be "copied" by fax. Therefore, if the fax received by Mr. Nelson

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[82]Complainant's Response, Attachment 4, p. 2; CX 45, p. 4.

[83]Complainant's Response, p. 10.

[84]On a related point, Respondent argues that: "There is no explanation how Mr. Nelson might have received the fax that DOJ supposedly sent to Mr. Cohen." (Respondent's Reply, pp. 7-8). In this regard, the Court observes that Mr. Nelson is "a supervisory attorney in the [EPA], Region V, Office of Regional Counsel" (Nelson Declaration, ¶ 1) and Mr. Cohen is the Branch Chief of the Region V Office of Regional Counsel. Thus, it is not impossible to imagine that Mr. Nelson could have fielded the fax addressed to Mr. Cohen. However, even if CX 5 had been faxed to Mr. Cohen, that fact would not tend to show, therefore, that the fax was intended to be DOJ's final waiver determination. Indeed, the evidence that the Office of Regional Counsel received this fax, while none of the other intended recipients named on the face of the letter (including the addressee) received the letter offered as CX 5, suggests that CX 5 was something other than the final operative "waiver" determination, such as a "draft" of the waiver circulated as part of the "internal procedures" and "discussions with [EPA] HQ and DOJ on the [waiver] request." (Cardile Declaration, ¶ 19). This inference is supported also by Mr. Fisherow's Declaration that: "When I sign this type of letter, my practice is to have it sent promptly by fax *and by mail to the addressee and the other individuals designated on the letter to receive copies*," [Fisherow Declaration, ¶ 4 (emphasis added)].

was indeed the "copy" of the final letter so indicated, then Mr. Czerniak and Mr. Buckheit should have received their copies of the letter offered as CX 5 by mail. Complainant offers no evidence to that effect.

c) Mr. Nelson's "Declaration"

Mr. Nelson's Declaration states, in pertinent part:

> I remember asking [Mr. Brighton] the status of DOJ's review and approval for several weeks in a row during our weekly calls... I remember [Mr. Brighton] giving me verbal assurance in September that the request was approved. *I do not remember the exact date*. I also remember telling Rich Clarizio and others shortly after receiving [Mr. Brighton's] verbal assurance that the request was approved. *I do not independently remember this date* but I believe that the attached e-mail dated September 17, 2001 [CX 45] is *most likely on or about that date*. I *may* have informed them verbally earlier. I also believe that the attached faxed letter [CX 5] is a copy of the letter which I received documenting DOJ's approval.[85]

Mr. Nelson's Declaration essentially states that, while he does not independently recall precise dates, he received CX 5 on or about September 17, 2001 and informed Mr. Cardile and Mr. Cohen (among others on the e-mail) of such receipt by e-mail on September 17, 2001 (CX 45). Thus, Mr. Nelson's Declaration does not offer anything new beyond that which is stated in his e-mail of September 17, 2001 (CX 45). Again, Mr. Nelson is not designated on the letter to receive a copy, and the fact that he did receive a copy does not indicate that the letter is the operative DOJ "Section 113 waiver." Indeed, the fact that Mr. Nelson, who is not a named recipient on the face of the letter, was the *only* person to receive the undated letter offered as CX 5 suggests that the letter was *not* the operative DOJ "Section 113 waiver."[86]

d) DOJ Telephone Directory Page

The copy of a facsimile of a page from the DOJ, EES telephone directory lists as one of multiple fax numbers the number printed in the fax transmission line at the top of the purported DOJ "waiver" submitted as CX 5 (that number being 202-616-6584).[87] However, this directory page contains nineteen "fax numbers" for the EES and is "continued" from the previous page so that it remains unknown how many fax numbers exist within the EES. None of these fax numbers are attached to names of individual people or offices. Complainant makes no attempt to

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[85]Nelson Declaration, ¶¶ 2-3 (emphasis added).

[86]See note 84, *supra*.

[87]Complainant's Response, Attachment 5.

show precisely who in the EES actually sent the fax on September 14, 2001 and does not offer any "declaration" or affidavit from such person that the letter was intended to be DOJ's "Section 113 waiver" in this case. Therefore, the directory page tends to show only that the letter was sent from the EES of the DOJ but does not shed light upon the intent or accuracy of the letter as DOJ's final operative waiver and does not identify the sender.[88]

e) Mr. Brighton's "Declaration"

Mr. Brighton's Declaration states, in pertinent part:

> 3. ... During the week of September 10, 2001 I prepared a *draft* letter transmitting DOJ's concurrence on the requested waiver. I prepared the letter for the signature of W. Benjamin Fisherow, Deputy Chief of EES. I did not date the letter, because *I did not know whether or not it would be sent on the same day that I prepared it and expected that it would be date-stamped before it was sent*. Attachment 1 [the October 1, 2001 DOJ waiver letter] is an accurate copy of the letter that I prepared, *except for the October 1, 2001 date, which was added later as explained below, and the signature*.
> 4. I personally handed the Strong Steel waiver letter to Mr. Fisherow on September 13 or 14, 2001, and recommended that he sign and send the letter as soon as possible... Mr. Fisherow told me that he would sign the letter and take care of sending it.
> 5. At the end of September, 2001, *I came across the original of the Strong Steel waiver letter, signed by Mr. Fisherow. The signed original was undated, as it had been when I gave the letter to Mr. Fisherow. I asked my legal assistant to mail the original of the letter to EPA Region 5. She gave me a copy of the letter as mailed, which then showed the date of October 1, 2001 in a different type-face than the rest of the letter*. Attachment 1 is a true and accurate copy of that document from my file.[89]

Thus, Mr. Brighton candidly acknowledges that the undated letter which he prepared for Mr. Fisherow's signature was indeed a "draft" letter, which he "expected ...would be date-stamped before it was sent". Upon later discovering that the original letter (which was still undated) had not been sent, Mr. Brighton asked his legal assistant to do so, who apparently typed the "October 1, 2001" date onto the letter before mailing it. Mr. Brighton's Declaration does not indicate that the legal assistant incorrectly dated the letter.[90] Mr. Brighton's Declaration does not

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[88] *See* note 113, *infra*.

[89] Brighton Declaration, ¶¶ 3-5 (emphasis added).

[90] Mr. Brighton's Declaration hedges a bit by stating that he discovered the un-mailed letter "at the end of September" but that the legal assistant presented him with a "copy of the letter as mailed" bearing the "October 1, 2001" date. [Indeed, Mr. Brighton does not explicitly state that his legal assistant, or anyone else, typed the October

claim any knowledge of when the letter offered as CX 5 was faxed, or by whom. Indeed, Mr. Brighton's Declaration does not claim any knowledge of the letter having been faxed at all. Therefore, Mr. Brighton's Declaration indicates that, although Mr. Brighton presented Mr. Fisherow with an undated draft waiver letter on or about September 14, 2001, the original signed and dated DOJ waiver letter was mailed on October 1, 2001. This Declaration suggests, therefore, that the October 1, 2001 letter was the operative DOJ "Section 113 waiver."

f) Mr. Fisherow's "Declaration"

Mr. Fisherow's Declaration states, in pertinent part:

> 3. ...I signed a letter drafted by Mr. Brighton to provide EPA with DOJ's concurrence on the requested waiver. Two copies of that letter, one undated but bearing a line of print indicating that it was received by fax on September 14, 2002 (sic), are attached as Attachments 1 and 2. Despite the difference in the dates shown on these copies, Attachments 1 and 2 are clearly copies of the same letter signed by me.
> 4. When I sign this type of letter, my *practice* is to have it sent promptly *by fax and by mail to the addressee and the other individuals designated on the letter to receive copies*.[91]

Mr. Fisherow's Declaration does not claim any direct knowledge of when the letter offered as CX 5 was faxed or by whom, stating only that it is Mr. Fisherow's general practice to have someone both fax and mail such letters to the intended addressees and copy recipients. In the instant case, however, the letter offered as CX 5 was *neither faxed nor mailed* to the addressee or either of the intended copy recipients. Rather, CX 5 was sent only to Mr. Nelson by fax who works in the same office as one of the intended copy recipients (Mr. Cohen), but who was neither an addressee nor an individual designated on the letter to receive a copy. Complainant offers no evidence that anyone other than Mr. Nelson received a copy of the letter offered as CX 5 before the Complaint was filed on September 28, 2001. Thus, Mr. Fisherow's Declaration does not claim specific knowledge of the sending of either the September 14, 2001 fax or the October 1, 2001 letter, but indicates that the September 14, 2001 fax was *not* in accord with Mr. Fisherow's usual "practice" in handling "Section 113 waivers."

g) Conflicting DOJ Letters and the FOIA Response

1, 2001 date onto the letter before mailing it. However, Mr. Brighton strongly implies that (as he had "expected") it was his legal assistant who typed the date onto the letter]. It is significant, however, that Mr. Brighton does not imply that the "October 1, 2001" date was a "mistake" or that it does not reflect the date on which the letter was mailed. In this regard, Mr. Brighton's Declaration strongly undercuts Complainant's argument that "[i]t is possible that [the October 1, 2001 date] was a typographical or similar minor error." Complainant's Response, p. 10, n.14.

[91]Fisherow Declaration, ¶¶ 3-4 (emphasis added).

Finally, the record contains the two different versions of DOJ's "waiver" letter. Complainant argues that the operative letter is the one submitted as CX 5 bearing a fax transmission line which states: "09/14/01 FRI 16:44 FAX 202 616 6584."[92] This letter is signed by Mr. Fisherow, addressed to Mr. Czerniak, and indicates "cc:" to Mr. Cohen and Mr. Buckheit. While the "cc:" to Mr. Cohen indicates "by fax,"[93] the "cc:" to Mr. Buckheit does not. This letter does not indicate any date other than the one in the fax transmission line. Respondent, on the other hand, asserts that the operative letter is the one dated October 1, 2001 and described in Complainant's FOIA response as "Granting of waiver request."[94] This letter is identical to the letter submitted by Complainant as CX 5, including the identical signature, except that the date "October 1, 2001" is typed between the DOJ page header and the addressee line, it does not contain a fax transmission line, and it is stamped as "RECEIVED" by the "Air Enforcement Branch, U.S. EPA, Region 5" on October 24, 2001.[95] The "October 1, 2001" date is in a different type-font than is the rest of the letter, such that the date appears to have been typed onto a previously computer-generated letter.

4) The October 1, 2001 letter is the Attorney General's operative Section 113 waiver.

For the following reasons, the Court concludes that the October 1, 2001 letter is the Attorney General's operative "Section 113 waiver" in this case:

First, the October 1, 2001 letter *has* a date which is an integrated part of the document. The letter offered as CX 5 does not contain any date at all absent the fax transmission line, which is extraneous to the document itself. While the reliability of such printed fax transmission lines has been the subject of scant judicial opinion, at least one court has had occasion to address the issue. In *Total Containment, Inc. v. Environ Products, Inc.*, 921 F.Supp. 1355 (E.D.Pa. 1995), referring to the fax transmission line as a "burn-in," the court held:

> Defendants have not offered any circumstantial guarantees of trustworthiness for the fax burn-in. Neither the sender nor the recipient of the fax has been identified. No phone records – assuming this was a long-distance fax – that correlate with the alleged time and date of the fax have been introduced. Absent any such circumstantial guarantees, I conclude that the fax burn-in is insufficiently trustworthy, in and of itself, to be admissible to establish the date of this document. *Compare Select Creations, Inc. v. Paliafito America, Inc.*, 830 F.Supp. 1223, 1239 (E.D.Wis. 1993) (fax inadmissible where the proponent neither established the identity of the individual who allegedly sent the document

[92]Complainant's Response, Attachment 1; CX 5.

[93]*Id.*

[94]Respondent's Motion, Attachment A, p. 3.

[95]*Id.* at p. 6; Complainant's Response, Attachment 2.

> nor offered evidence that the fax was the document allegedly received) *with People v. Hagan*, 145 Ill.2d 287, 164 Ill.Dec. 578, 588, 583 N.E.2d 494, 504 (1991) (admission of fax was proper where there was testimony as to how the fax was sent and received, and the fax machine operator and addressee identified the fax).[96]

The court in *Total Containment* therefore held that the document there at issue could not be admitted as an exception to the rule against hearsay under FRCP 803(24).

Although hearsay is not necessarily inadmissible in the instant proceeding,[97] *Total Containment* is nevertheless instructive in that printed fax transmission lines are not inherently reliable evidence. Further, in holding that "the fax burn-in is insufficiently trustworthy ... to establish the date of this document,"[98] the court understood that the fax "burn-in" was not an integrated element of the document itself. This is particularly instructive in this case where the October 1, 2001 version of the letter *does have a date in the body of the document itself.*

Second, and relatedly, the existence of the October 1, 2001 date on the DOJ waiver letter renders the previous version of the letter (CX 5) an incomplete document. The date of the waiver is a material element of the letter. Therefore, the CX 5 letter was incomplete and not the operative waiver and was superceded by the October 1, 2001 operative, or "final," waiver.[99]

Third, the letter dated October 1, 2001 is stamped as "RECEIVED" by the "Air Enforcement Branch, U.S. EPA, Region 5" on October 24, 2001. The letter offered as CX 5 bears no such "received" stamp. The obvious import of this stamp is that the letter upon which it appears is the one which was sent to and received by the addressee, Mr. Czerniak, who is the Chief of the "Air Enforcement Branch, U.S. EPA, Region 5." The point here is not just the date on which the letter was received but that this letter (bearing the October 1, 2001 date) was sent *to the addressee*. As Mr. Fisherow's Declaration states: "When I sign this type of letter, my practice is to have it sent promptly by fax and by mail to the addressee and the other individuals designated on the letter to receive copies."[100]

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[96]*Total Containment*, 921 F.Supp. at 1370. The court also noted: "Apparently, a fax burn-in can be rather easily faked. The time and date printed by the machine can be changed merely by resetting the machine. Alternatively, the burn-in from one document can be photocopied onto another document with an office copier." *Id.* at 1370, n.3.

[97]40 CFR § 22.22(a)(1) states, in pertinent part: "The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value..."

[98]*Total Containment*, 921 F.Supp. at 1370.

[99]In this regard, Mr. Fisherow's statement in his Declaration that "[d]espite the difference in the dates shown on these copies, Attachments 1 and 2 are clearly copies of the *same letter* signed by me" [Fisherow Declaration, ¶ 3 (emphasis added)], is not legally correct. The two documents are not the "same letter" because one bears a material component (the date) that the other does not.

[100]Fisherow Declaration, ¶ 4.

Complainant argues that the letter offered as CX 5:

> ...[I]ndicate[s] that a copy was faxed to Mr. Eric Cohen, the Branch Chief of the EPA, Office or (sic) Regional Counsel... On its face, with the fax confirmation header and the indication that the letter was faxed to Mr. Cohen, [CX 5] supports that the Attorney General's delegatee informed Complainant that he approved of the filing of this administrative complaint on or about September 14, 2001.[101]

The evidence in the record does not, in fact, support the conclusion that CX 5 was faxed to Mr. Cohen, but rather that it was faxed to Mr. Nelson in the same office, who then made copies and distributed them to, among others, Mr. Cohen.[102] Mr. Cohen is not the addressee of the letter (Mr. Czerniak is the addressee), but only one of two people (the other being Mr. Buckheit) to whom the letter was to be "cc-ed." Complainant offers no evidence that CX 5 was sent to either Mr. Czerniak or Mr. Buckheit.[103] The letter dated October 1, 2001, however, is clearly stamped as "received" by Mr. Czerniak's office. Thus, the fact that the "waiver" letter was to be "cc-ed" to Mr. Cohen by fax, together with the evidence that CX 5 was faxed to Mr. Nelson who works in the same office as Mr. Cohen, does not tend to show that CX 5 was the operative DOJ "waiver" determination. Rather, the stamp on the October 1, 2001 letter indicating that it was sent to and received by the intended addressee supports the conclusion that the October 1, 2001 letter was the operative DOJ "waiver" determination.

Fourth, the October 1, 2001 letter is described in Complainant's FOIA response as "Granting of waiver request."[104] Complainant argues:

> ...[T]he Region's [FOIA] response clearly does not admit anything. In fact it indicates that the release is a release of 'some of the documents' requested and that the region was 'unable to provide all of the information' requested.[105]

If the Complainant now suggests that CX 5 was the operative DOJ "waiver" but EPA was somehow "unable to provide" it in response to the FOIA request, such assertion strains credulity and directly contradicts EPA's release of the October 1, 2001 "Granting of waiver request" FOIA letter. Moreover, Complainant's FOIA response stated:

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[101]Complainant's Response, pp. 10-11.

[102]*See* Complainant's Response, Attachment 4, p. 2; CX 45, p. 4 (Mr. Nelson's e-mail of September 17, 2001).

[103]As indicated on the face of the letter, Mr. Cohen was the only person to be "copied" by fax. Therefore, if the fax received by Mr. Nelson was indeed the "copy" of the final letter so indicated, then Mr. Czerniak and Mr. Buckheit should have received their copies by mail. Complainant offers no evidence to that effect.

[104]Respondent's Motion, Attachment A, p. 3.

[105]Complainant's Response, p. 10, n.13.

> Enclosed, you will find copies of *some of the documents* responsive to your request. The records consist of the documents described in *Enclosure A* of this letter.
>
> I am *unable to provide all of the information* responsive to your request. *Enclosure B* is a listing of the potentially responsive documents which have been determined to be exempt from mandatory disclosure...[106]

"Enclosures A and B" together list *all potentially responsive* documents. "Enclosure A" lists the October 1, 2001 letter as "Granting of waiver request."[107] "Enclosure B" lists twelve documents (or sets of documents), including numerous e-mails. However, neither "Enclosure A" nor "Enclosure B" lists the letter offered as CX 5 or Mr. Nelson's September 17, 2001 e-mail (CX 45) notifying Mr. Cardile that Mr. Nelson had received the DOJ "waiver." Therefore, at the time of the FOIA response, Complainant itself considered the October 1, 2001 letter to be the operative DOJ "waiver" determination and did not list the letter now offered as CX 5 as even being "potentially responsive" to the FOIA request.

Finally, Complainant's characterization of the October 1, 2001 date as a "typo" fails to explain why, if the Attorney General had effectively made the "Section 113 waiver" determination on September 14, 2001 by faxing the undated letter to Mr. Nelson, the Attorney General would then send *another* determination, this time specifically dating the document and mailing it to Mr. Czerniak.[108] That is, while Complainant offers some description (via the Declarations of Mr. Fisherow and Mr. Brighton) of how the events transpired, the evidence suggests that the author (Mr. Brighton), signor (Mr. Fisherow), and all of the intended recipients of the letter (Mr. Czerniak, Mr. Cohen, and Mr. Buckheit) intended and believed the October 1, 2001 letter to be the operative DOJ "Section 113 waiver."[109] This Tribunal simply cannot ignore the "October 1, 2001" date integrated into the original signed waiver letter or dismiss this pivotal date as a mere "typo." This is especially true in light of the evidence that the letter offered as CX 5 was merely faxed to someone (Mr. Nelson) in the office of someone (Mr. Cohen) who was to be "copied" on the letter, with no evidence that CX 5 was sent by any means to anyone else, including the addressee (Mr. Czerniak) in a wholly different office. It is significant that despite

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[106]Respondent's Motion, Attachment A, Exhibit 2, p. 1 (emphasis added).

[107]Respondent's Motion, Attachment A, p. 3.

[108]The court in *Security Ins. Co. of Hartford A/S/O Motorola, Inc. v. DHL Worldwide Express NV*, 2002 WL 1303136 (N.D.Ill., June 13, 2002) (No. 00-C-1532) made a similar observation, stating: "Of course, Security Insurance does not explain why, if Motorola had timely faxed the intent letter in the first place, Motorola would fax the letter again on November 20, 1998." 2002 WL 1303136, *7, n.6.

[109]As noted *supra*, Mr. Fisherow expected the final, operative waiver letter to be faxed *and mailed* to the *addressee and intended copy recipients* and does not claim direct knowledge of the letter having been faxed. Mr. Brighton considered the undated letter to be a "draft," expected the final, operative letter to be "dated" prior to being "sent," and does not claim knowledge of the September 14, 2001 fax. While Mr. Czerniak's office stamped the "October 1, 2001" letter as "Received" on October 24, 2001, Complainant does not offer any evidence, such as affidavits or declarations of Mr. Czerniak, Mr. Buckheit, or Mr. Cohen, that the September 14, 2001 fax was received by any of these intended recipients of the DOJ "waiver" letter.

its current argument, Complainant does not offer the "declaration" or affidavit of any intended recipient named on the face of the letter. Nor does Complainant offer the "declaration" or affidavit of the sender of the September 14, 2001 fax. Indeed, Complainant does not attempt to precisely *identify* the sender of the fax.[110]

Complainant's characterization of the "October 1, 2001" date on the original signed letter which was mailed to the intended addressee as "a typographical or similar minor error"[111] is neither factually accurate nor legally compelling. As Mr. Brighton's Declaration suggests, the date is not a "typo," but rather accurately reflects the date on which the letter was sent. Mr. Brighton's Declaration also indicates that the addition of the date to the letter before it was sent was not an "error" because Mr. Brighton expected all along that the final operative letter would be dated before it was sent. Further, as explained in detail *supra*, the dating of the letter *was* of legal significance because the Attorney General's decision to "waive" the statutory time and penalty limitations set forth in Section 113(d)(1) of the CAA must be made prior to the filing of the Complaint.

For the foregoing reasons, the Court finds that Complainant has failed to demonstrate that the DOJ letter bearing a fax transmission line with the date of September 14, 2001 (CX 5) was the Attorney General's operative "Section 113 waiver" in this case. It is further found that the DOJ letter dated October 1, 2001 is the Attorney General's operative "Section 113 waiver." The Attorney General's "Section 113 waiver" regarding Counts 1 and 2 in this case is therefore invalid because such determination was not made until after the "initiation of the administrative action" on September 28, 2001. Having so held, the Court therefore does not consider Respondent's arguments regarding the validity of the Administrator's portion of the "joint determination."

ORDER

The 12-month and $220,000 limits set forth in Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1), apply to Counts 1 and 2 of the Complaint in the instant case, as the first date of the violations alleged in Counts 1 and 2 occurred on July 22, 1999, more than 12 months prior to initiation of the administrative action on September 28, 2001, and the proposed penalty for Counts 1 and 2 – $357,500 – is in excess of $220,000. Therefore, the Administrator has no authority to issue an order against Respondent assessing an administrative penalty for Counts 1 and 2 of the Complaint unless the Administrator and the Attorney General have jointly determined that Counts 1 and 2 are appropriate for administrative penalty action. This "joint determination" must have been made prior to Complainant's having filed the Complaint in order for this Tribunal to have subject matter jurisdiction over Counts 1 and 2 of the Complaint.

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[110]See, *Total Containment*, supra at 1370; *Select Creations, Inc. supra*, at 1239; *People v. Hagan*, supra, at 588; *See also, U.S. v. Galiczynski*, 44 F.Supp.2d 707, 715-716 (E.D.Pa. 1999) (*discussing* rules of various states concerning proof of service by fax, including the identity of the sender).

[111]Complainant's Response, p. 10, n.14.

The Attorney General's "waiver" of the Section 113 limitations regarding Counts 1 and 2 in this case was issued on October 1, 2001. Because this "waiver" was not effective until after the Complaint was filed on September 28, 2001, this Tribunal lacks subject matter jurisdiction over Counts 1 and 2 of the Complaint. Accordingly, Respondent's Motion to Dismiss Counts 1 and 2 for lack of subject matter jurisdiction is **GRANTED** and said counts are **DISMISSED.**

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Stephen J. McGuire
United States Administrative Law Judge

August 13, 2002
Washington, D.C.

In the Matter of Strong Steel Products, LLC, Respondent
Docket Nos. RCRA-05-2001-0016; CAA-05-2001-0020 & MM-05-2001-0006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Granting Respondent's Motion To Dismiss Counts 1 And 2**, dated August 13, 2002 was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: August 13, 2002

Original and One Copy by Pouch Mail to:

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