UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
LYON COUNTY LANDFILL,	)	DOCKET NO. 5-CAA-96-011
	)	
	)	
RESPONDENT	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

Appearances:

For Respondent:

Richard Maes, Esq.
Lyon County Attorney
Lyon County Courthouse
607 West Main Street
Marshall, MN 56258

Jay D. Carlson, Esq.
First National Bank Bldg.
15 Broadway, Suite 206
Fargo, ND 58107

For Complainant:

Andre Daugavietis, Esq.
Maria Esther Gonzalez, Esq.
Associate Regional Counsel
Office of Regional Counsel
U.S. EPA, Region V
77 West Jackson Boulevard
Chicago, IL 60604-3590

Background

This civil administrative penalty proceeding arises under Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1). The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40

C.F.R. §§ 22.01 et seq.

The United States Environmental Protection Agency ("EPA" or "Complainant") initiated this proceeding by filing with the Regional Hearing Clerk a Complaint against Lyon County Landfill, the Respondent, on August 14, 1996. The Complaint charges the Respondent with six (6) violations of Section 112 of the Clean Air Act, 42 U.S.C. § 7412, for its alleged failure to comply with the regulations of the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for asbestos. 40 C.F.R. Part 61, Subpart M. Specifically, the Complaint charges the Respondent with alleged violations of 40 C.F.R. § 61.154 for improper asbestos-containing waste handling and related recordkeeping. The Complaint alleges that the violations occurred on July 20 and 21, 1994, and proposes a civil administrative penalty of $58,000 for the alleged violations.

The EPA's alleged administrative jurisdiction in this matter is set forth in the general allegations of the Complaint. The Complaint alleges that even though the period of violations began more than 12 months before the filing of the Complaint, the EPA and Attorney General had determined that the case is appropriate for administrative action. Specifically, Count 21 of the Complaint states "[e]ven though the period of violations alleged began over 12 months ago, U.S. EPA and the U.S. Attorney General have determined that this case is appropriate for administrative resolution, and have jointly waived for this case the applicable limitation of Complainant's authority to issue an administrative penalty order under the Clean Air Act Section 113(d)(1)."

In a Prehearing Order entered on June 4, 1997, the parties were directed to submit their prehearing exchange. As part of its prehearing exchange, the EPA submitted numerous documents and exhibits which it intended to introduce into evidence at the hearing together with a brief narrative description of each proposed exhibit. The narrative describing Complainant's Exhibit C-19 was that of "[a] copy of the extension of time for filing this Complaint administratively." The document identified as C-19 was a letter dated May 10, 1996, from the Department of Justice to the EPA regarding the EPA's May 2, 1996, request for a waiver under Section 113(d) of the Clean Air Act to allow the EPA to administratively proceed in this matter against the Respondent. Rather than grant the waiver, however, the Department of Justice requested additional information from the EPA in order to determine whether the grant of waiver is appropriate in this case.

EPA's Request to Supplement its Prehearing Exchange

Four days before the scheduled hearing, the EPA sought to supplement its prehearing exchange by filing two documents.[(1)] In its request to supplement its prehearing exchange, the EPA notes that the first document proffered is the document described in its prehearing exchange as "Complainant's Exhibit C-19 - A copy of the extension of time for filing this Complaint administratively." The EPA explains that it was furnishing this document as the correct document described and intended as Exhibit C-19.

The document proffered by the EPA with its request to supplement its prehearing exchange is a memorandum dated July 18, 1996, from the Department of Justice to the EPA. In this memorandum, the Department of Justice concurs with the EPA's request for a waiver of the 12 month limitation for initiating administrative cases pursuant to Section 113(d) of the Clean Air Act for a case involving the Respondent as described in the EPA Region V's Memorandum of May 2, 1996 ("Waiver").

In connection therewith, the EPA included a letter dated June 19, 1996, to the Department of Justice from the Air Enforcement Division of EPA's Office of Enforcement and Compliance Assurance, stating that it concurred and joined with EPA Region V in requesting that a waiver of the 12 month limitation on EPA's authority to initiate administrative penalty actions is appropriate in this matter. This letter notes that Section 113(d) of the Clean Air Act "prescribes $200,000 penalty and 12 month duration limitations on EPA's authority to issue administrative penalty orders."

On June 1, 1998, the Respondent filed its opposition to the EPA's request to supplement its prehearing exchange, objecting to the EPA's submission of the Waiver as a proposed Exhibit at the hearing. The Respondent bases its opposition on the arguments of fundamental fairness and substantial prejudice. In this regard, the Respondent contends that it has been denied any opportunity to review and investigate the validity of this document or to establish through independent research the accuracy and validity of the claims contained therein.

In its opposition to the EPA's request to supplement the prehearing exchange, the Respondent notes that the EPA in its Complaint alleged that the EPA and Attorney General had determined that this case is appropriate for administrative resolution and had jointly waived the time limitations for jurisdiction for this case and that such allegation acknowledges the limitation of the EPA's authority to issue an administrative penalty order under Section 113(d)(1) of the Clean Air Act. Thus, without the requisite waiver, the Respondent argues that the EPA has no jurisdiction and would be time barred from filing an administrative complaint in this matter. The Respondent complains that the EPA is now attempting to correct the deficiency in its case by submitting additional documents which are inconsistent with its prehearing exchange and are factually inconsistent on their face. In this regard, the Respondent avers that the Complainant's proposed Exhibit C-19 is a letter dated May 10, 1996, from the Department of Justice to the EPA refusing to waive the 12 month limitation period. According to the Respondent, there would be no foundation upon which to introduce the Waiver at the hearing as the EPA had not listed any witnesses who could testify to any knowledge regarding the waiver request, and that it would be denied its due process right to cross examine any of the seven different Government employees who presumably have had knowledge or information regarding this waiver request.

In addition, the Respondent notes that pursuant to Section 113(d) of the Clean Air Act, the Administrator's authority to issue administrative penalty orders is "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 action." The Respondent argues that the Waiver which the EPA seeks to introduce does not indicate that the penalty sought is greater than $200,000 or that a longer period of violation is established, either of which would make a waiver determination appropriate. The Respondent therefore argues that the EPA lacks the appropriate authority to pursue this administrative penalty order and that its motion to dismiss the Complaint due to lack of jurisdiction should be granted.

An evidentiary hearing in this matter was conducted in Marshall, Minnesota, from June 3 to 4, 1998.[(2)] At the beginning of the hearing, the Respondent renewed its objections to the EPA's proposed introduction of the Waiver as an Exhibit. The EPA argued that it should be allowed to rectify its error by simply providing the correct document which was correctly described and identified in the Complaint and its prehearing exchange. The EPA asserted that the Respondent was not prejudiced by the late submission because the Respondent had been on notice that a waiver had been obtained. The EPA rejected the Respondent's argument that a waiver was unavailable in this case, arguing that the proper waiver had been obtained pursuant to Section 113(d)(1) of the Clean Air Act. The Waiver was received into the record as an Exhibit, but a ruling on the Respondent's motion for dismissal was held in abeyance.

After the transcript from the hearing was made available to the parties, both parties submitted for consideration proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. Reply briefs have also been submitted.

In its post-hearing brief, the Respondent reiterates its arguments concerning the admissibility of the Waiver and the EPA's lack of jurisdiction in this matter. The EPA has responded to these arguments by submitting that it has administrative jurisdiction in this matter because a determination pursuant to Section 113(d) of

the Clean Air Act has been issued that exempts the limitation of the EPA's administrative authority where the violation occurred more than 12 months prior to the initiation of the administrative action.

Admissibility of the Proffered Waiver

As a preliminary matter, I address the Respondent's contentions that the Waiver is inadmissible. The Respondent argues that the Waiver is inadmissible because the late submission of this document is prejudicial and violates fundamental fairness.

The Respondent alleges prejudice but has not adequately supported this allegation by demonstrating such prejudice. The Complaint provided the Respondent with fair notice of the existence of the waiver obtained under Section 113(d)(1) of the Clean Air Act, and the EPA's request to supplement to its prehearing exchange in order to correct the filing of the wrong supporting document is ministerial in nature. Further, the record reflects that the Respondent was prepared to proceed on the merits of the case. I note, however, that this determination that any prejudice suffered by the Respondent is not sufficient to rule the Waiver inadmissible does not excuse the EPA's extreme tardiness in submitting the proper document to support the EPA's alleged jurisdiction.

The Respondent's argument that the Waiver is inadmissible because it has not been afforded the opportunity to cross examine the individuals who prepared the document is not persuasive. The Waiver is an official document prepared in the ordinary course of business by the Government and its authors ordinarily are not subject to cross-examination at hearing. Moreover, the *ex parte* determination of whether a matter is appropriate for administrative penalty action is not subject to review and may not be challenged by a respondent. A serious challenge to the authenticity of the Waiver has not been set forth by the Respondent.

Jurisdiction

I now turn to the Respondent's argument that the EPA lacks administrative jurisdiction in this matter, notwithstanding the purported waiver. This civil administrative penalty proceeding arises under Section 113(d)(1)of the Clean Air Act. Section 113(d)(1) of the Clean Air Act provides in pertinent part:

> The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

42 U.S.C. § 7413(d)(1).

It is well established that when interpreting a statute, the plain meaning of the words used in the statute ordinarily should be applied. Words are to be interpreted as taking their ordinary, contemporary, common meaning. See Perrin v. United States, 444 U.S. 37, 42 (1979). As there is a strong presumption that Congress expresses its intent through the language it chooses, legislative history is examined to determine only whether there is " 'clearly expressed legislative intention' " contrary to statutory language. United States v. James, 478 U.S. 597, 606 (1986) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). In this case, I am unaware of any legislative history for Section 113(d)(1) of the Clean Air Act which indicates a congressional intent contrary to the interpretation of the plain meaning of the statutory language discussed below. [(3)] See S. Rep. No. 228, 101st Cong., 2d Sess. 360 (1990).

The first half of the sentence of the statutory provision in Section 113(d)(1) of the Clean Air Act at issue is clear and unambiguous. The EPA's authority to issue an administrative order assessing a civil administrative penalty is limited to matters where the "total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more that 12 months prior to the initiation

of the administrative action" (emphasis added). Thus, when either of the two cited limitations exists, a penalty amount in excess of $200,000 or the first date of violation occurred more than one year before the initiation of the administrative action, the EPA does not have administrative authority over the matter.

The term "initiation of administrative action" is not defined by Section 113(d) of the Clean Air Act. The Respondent, however, suggests that the term means the date on which the EPA files the administrative complaint, as previously determined by another EPA Administrative Law Judge in Coleman Trucking, Inc., 5-CAA-96-005 (1996 CAA LEXIS 6) (Nov. 6, 1996) (Order Denying Motion for Judgment on Pleadings). The EPA has not responded to this proposition. While noting that an Administrative Law Judge's holding in another case is not binding as precedent, I agree with and adopt the interpretation of the term "initiation of administrative action" to mean the date the Complaint was filed with the Regional Hearing Clerk as found by Judge Charneski in Coleman Trucking, supra at 2-3. The 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 through the concomitant service requirement. See Sections 22.05(a) and (b) of the Rules of Practice, 40 C.F.R. § 22.05(a) and (b).

In examining the phrase "first alleged date of violation occurred no more than 12 months prior to the [filing of the complaint]," three basic factual scenarios come to mind; a continuing violation, an intermittent or repeated violation, and a short-term violation. There are variations of each of these scenarios based on the duration of the violation. For example, there may be an extended continuing violation of one year's duration or longer or a shorter continuing violation which lasts many days but less than one year. There may be an intermittent or repeated violation which spans a period of in excess of one year or a much shorter period. Finally, there may be a short-term violation ranging from one day to a few days.

Regardless of the nature or duration of the violation, however, the first half of the sentence in Section 113(d)(1) provides that the first alleged date of violation must have occurred no more than 12 months before the filing of the complaint. I note with particular interest that Congress specified that the first alleged date of violation, rather than the last alleged date of violation, is the starting date for calculating the one-year limitations period in which the complaint must be filed. The inclusion of this date assumes greater importance when analyzing the latter part of the sentence.

The second half of the sentence of Section 113(d)(1) at issue provides an exception to the aforementioned limitations on the Administrator's authority. This exception provides for the Administrator to have authority where "the Administrator and Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action." The existence of a "larger penalty amount or longer period of violation" are conditions precedent to the Administrator's and Attorney General's determination that a matter is appropriate for administrative action. Thus, in a civil administrative penalty proceeding in which the limitations apply and a waiver has been issued, a party may challenge the existence of these conditions.

The undisputed facts in this case regarding the issue of jurisdiction are that the total penalty sought is $58,000 and that the Complaint was filed on August 14, 1996, which is more than two years after the alleged dates of violation on July 20 and 21, 1994. Thus, the dispositive issue as to jurisdiction in this matter is whether the phrase "longer period of violation" refers to the duration of the penalty in question or simply the remoteness in time of the filing date of the complaint in relation to the date of the alleged violation.

At first glance, the phrase "longer period of violation" may appear to refer simply to the intervening period between the violation and the filing of the complaint referenced in the first half of the sentence regardless of the duration of the violation. However, upon closer examination and applying the plain language rule, I find that the phrase "longer period of violation" refers to the duration of the alleged violation or violations and not simply the remoteness of the filing date of the complaint.

First, I observe that Congress chose to qualify the term "violation" with the phrase "longer period of" rather than a qualifier more directly related to the remoteness of the violation. Second, I note that when examining the parallelism between the first half of the sentence and the second half of the sentence, the phrase "larger penalty amount" directly relates back to "$200,000", indicating that the phrase "longer period of violation" relates back to a period of violation longer than "the first alleged date of violation [which] occurred no more than 12 months prior" to the filing of the complaint. Thus, an exception to the one-year limitation period may be obtained when there is a violation of a longer period; that is, when the violation period itself exceeds the 12-month period prior to the filing of the complaint.(4) An example of this type of situation is where there is a continuing or repeated violation spanning a period of more than 12 months and this violation continued into the one-year period preceding the filing of the complaint. Again, I emphasize that Congress specified that the first alleged date of violation is used to calculate the one-year limitation period for filing the complaint. In the absence of this language specifying "the first alleged date of violation," it would be reasonable to find that the phrase "longer period of violation" refers simply to the remoteness of the intervening period between the date of violation and the filing of the complaint.

A determination that the language "longer period of violation" refers simply to the 12 month period of time between the first alleged date of violation and the filing of the complaint when the violation itself is for a shorter period is a strained construction of the sentence and is contrary to the plain language rule. In addition, I note that the inclusion of the language "involving a larger penalty amount or longer period of violation" is rendered superfluous by the *carte blanche* waiver posited by the EPA to be available upon joint determination with the Department of Justice. I must assume that Congress attached some significance to this language because it chose to include this language in the statute.

Finally, I look to the overall intent of the waiver as indicated by the express terms of the exception. In order for the exception to apply, the total penalty amount must exceed $200,000 or there must be a "longer period of violation." The Respondent points out that a proposed penalty in the amount of $200,000 or greater strongly indicates that there was an egregious or very serious violation. The Respondent then persuasively suggests that this level of violation is more consistent with finding that the phrase "longer period of violation" refers to a continuing or repeated violation which exceeded the one-year limitations period rather than a single-day violation which occurred more than two years before the complaint was filed. I agree that the overall language of the exception is more consistent when the phrase "longer period of violation" is interpreted to mean the duration of the violation rather than simply the period of time between the violation and the filing of the complaint, particularly in view of the corresponding $200,000 exception provision. Also, I note that most Clean Air Act violations appropriate for civil administrative penalty action are compatible with a one-year statute of limitations, except where there is a protracted continuing violation.

In conclusion, I find that because the conditions for an exception to the limitations on the Administrator's authority under Section 113(d)(1) of the Clean Air Act have not been met, the July 18, 1996, waiver is invalid. Accordingly, under Section 113(d)(1) of the Clean Air Act, the Administrator lacks the authority to issue an administrative order against the Respondent assessing a civil administrative penalty in the amount of $58,000 for alleged violations of Section 112 of the CAA on July 20 and 21, 1994, pursuant to the Complaint filed on August 14, 1996. Consequently, as the presiding Administrative Law Judge in this matter, I have no authority to issue such an administrative order, and the Complaint in this matter is dismissed for lack of jurisdiction. As pointed out by the Respondent at the hearing, the EPA is not completely without remedy as it may still file a complaint in federal district court, subject to the five-year statute of limitations at 28 U.S.C. § 2462.

As a final comment, I note that since the enactment of Section 113(d)(1) of the

Clean Air Act, the Environmental Appeals Board ("EAB") has addressed the issue of the application of the five-year statute of limitations at 28 U.S.C. § 2462 to a violation which is not continuing in nature and an ongoing violation which continued into the five-year period preceding the filing of the complaint. See Matter of Lazarus, Inc., TSCA Appeal No. 95-2 (EAB, Sept. 30, 1997). The EAB found that an action for penalties is not barred by the statute of limitations where the violation continued into the five-year period preceding the filing of the complaint, but that the statute of limitations may be invoked as a defense to actions for penalties for a violation of a requirement which is not continuing in nature and when the statutory period has expired. Id. at 74-83. In other words, the last day of a continuing violation may be used to calculate the period of time in which a complaint must be filed for statute of limitations purposes. To the contrary, Section 113(d)(1) of the Clean Air Act provides that the first alleged date of violation is used to calculate the limitations period. Therefore, it appears that an exception to the EAB's holding in Lazarus is carved out by the statutory one-year limitations period for filing a complaint in civil administrative penalty cases set forth at Section 113(d)(1) of the Clean Air Act. I note that the determination in this case that an exception to the one-year limitations period is available where a violation continued into the one-year period preceding the filing of the complaint is compatible with the holding in Lazarus.

ORDER

The Complaint is dismissed for lack of jurisdiction.

Appeal Rights

Inasmuch as this Order disposes of all issues and claims in the above-cited proceeding, it constitutes an Initial Decision. See Section 22.27(a) of the Rules of Practice, 40 C.F.R. § 22.27(a). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, an Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within twenty (20) days of service of this Order, or the Environmental Appeals Board elects to review this decision sua sponte.

Original signed by undersigned

_____

Barbara A. Gunning
Administrative Law Judge

Dated: 8-21-98
Washington, DC

1. This filing was received by the Office of Administrative Law Judges in Washington, D.C. on June 1, 1998, with the hearing scheduled to begin on June 2, 1998, in Marshall, Minnesota.

2. The hearing was scheduled to commence on June 2, 1998, but due to the absence of a court reporter the hearing did not begin until June 3, 1998.

3. The EPA's authority to assess civil administrative penalties under the Clean Air Act was added by amendment in 1990. See Pub. L. No. 101-549, § 701, 104 Stat. 2672. The Senate Report concerning the 1990 amendments to Section 113(d) of the Clean Air Act notes that the proposed bill provides that the administrative penalties cannot exceed $200,000 for any particular violation and that the penalties are limited to violations that are alleged to have begun no more than 12 months prior to the assessment. The Senate Report contains no reference to the exception under Section 113(d)(1). S. Rep. No. 228, 101st Cong., 2d Sess. 360 (1990).

4. The June 19, 1996, letter from the EPA to the Department of Justice states that Section 113(d) of the Clean Air Act "prescribes $200,000 penalty and 12 month duration limitations on EPA's authority to issue administrative penalty order" (emphasis added).