

## ***EPA Early Bird Loses the Worm***

Nearly everyone knows that it is possible to lose a legal case by waiting too long to assert your rights. It is also possible to lose your case by acting too early. For example, an Administrative Law Judge (ALJ) recently dismissed a complaint that the Chicago office of the United States Environmental Protection Agency (EPA) filed against a Detroit business seeking a penalty of \$357,500, because the EPA office filed the complaint one business day too early.

In 1990, Congress added a unique provision to the Clean Air Act (CAA) that requires both the United States Attorney General and the EPA Administrator to jointly grant permission before any EPA regional office may commence an administrative penalty action that either seeks more than \$200,000 in penalties, or involves an alleged violation that is more than twelve months old. No other federal environmental statute has such a provision. It is not entirely clear why Congress imposed this limitation on EPA's CAA administrative penalty authority. Congress may have intended to encourage EPA to file administrative penalty complaints promptly, and to give the Department of Justice (DOJ) the right to insist that a case involving a large penalty be pursued in court by DOJ attorneys.

On September 28, 2001, EPA's Region 5 office in Chicago filed an administrative complaint against Strong Steel Products, L.L.C. (Strong) of Detroit, seeking \$357,500 in administrative penalties for alleged violations of the CAA, plus \$155,000 for alleged violations of the Resource Conservation and Recovery Act (RCRA). Region 5 had to obtain permission from both DOJ and the EPA Administrator before filing its complaint because the earliest violation was more than twelve months old, and because the complaint sought substantially more than \$200,000 in penalties.

Under the Freedom of Information Act (FOIA), Strong's attorney asked EPA to provide copies of all documents showing that the Attorney General and the EPA Administrator had given their permission to file the complaint. In response to the FOIA request, Region 5 provided a copy of a June 12, 2001 letter from the Director of the Air Enforcement Division at EPA headquarters, and an October 1, 2001 letter to Region 5 signed by the Deputy Chief of the Environmental Enforcement Section at DOJ.

Strong filed a motion asking the ALJ to dismiss the CAA portions of the complaint on grounds that Region 5 had failed to obtain the statutorily required permission before filing the complaint. Strong argued that DOJ's permission was not effective until October 1, 2001, the date on its letter. Strong also argued that the June 12, 2001 letter from EPA was ineffective because, although it granted permission to seek penalties for violations more than twelve months old, it did not give permission to seek more than \$200,000 in penalties.

Region 5 argued that DOJ had faxed to Region 5 an undated signed copy of the permission letter on or about September 14, 2001, approximately two weeks before Region 5 filed the complaint. It submitted two declarations by the DOJ attorneys who drafted and signed the permission letter, although neither of them directly said that he had faxed the permission letter to Region 5 in September, and neither said that the October 1, 2001 letter had been dated or mailed mistakenly.

Region 5 sought to explain the fact that it had provided only the October 1, 2001 letter, and not the September 14, 2001 fax, when it responded to Strong's FOIA request, by stating that its response to Strong's FOIA request explained that it was not providing all responsive documents.

As for the EPA approval, Region 5 submitted a declaration by the Air Enforcement Division Director stating that he had intended by his memorandum to permit Region 5 to seek more than \$200,000 in penalties, as well as to seek penalties for violations more than twelve months old.

The ALJ held that both the Attorney General and the EPA Administrator had to give their approvals before the complaint was filed. He rejected Region 5's argument that such permission could be given after the complaint was filed as long as it was given before the agency's final order assessing a penalty. He carefully scrutinized the declarations submitted by the DOJ attorneys and Region 5 staff members, and noted that none of them described the October 1, 2001 date on the final DOJ letter as a mistake. He declined to consider the September 14, 2001 fax as a final permission letter, because DOJ had sent the fax not to the addressee named on the letter, but instead to an attorney in the Office of Regional Counsel. He noted that the Region 5 response to Strong's FOIA request described the October 1, 2001 letter with the words "Granting of waiver request" and did not even acknowledge the existence of the September 14, 2001 fax. The ALJ concluded that the October 1, 2001 letter, rather than the September 14, 2001 fax, was the effective DOJ permission letter. Because the DOJ letter was effective three calendar days (or one business day) after Region 5 had filed its complaint, the ALJ concluded that Region 5 acted without legal authority when it filed the complaint, and he, therefore, dismissed the CAA portion of the complaint.

The case will continue with respect to the alleged violations of RCRA.

*In the matter of Strong Steel Products, L.L.C.*, Docket No. RCRA-5-2001-0016, CAA-5-2001-0020.

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