UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	**)**	
	)	
F.R.&S., Inc.,	**)**	**Docket No. CCA-03-2002-0215**
	)	
Respondent	**)**	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: January 31, 2005
Washington, D.C.

Appearances

For Complainant: Jennifer M. Abramson, Esq.
Russell S. Swan, Esq.
U.S. Environmental Protection Agency
Region 3
Philadelphia, Pennsylvania

For Respondent: William F. Fox, Esq.
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I. Statement of the Case

The United States Environmental Protection Agency ("EPA") initiated this enforcement proceeding by filing an administrative complaint against F.R.&S., Inc. ("F.R.&S."), pursuant to Sections 113(a)(3) and (d) of the Clean Air Act ("the Act"). 42 U.S.C. §§ 7413(a)(3) & (d). In the complaint, EPA charges four violations of the Act resulting from F.R.&S.'s operation of its Pioneer Crossing Landfill ("PCL"), a Municipal Solid Waste ("MSW") facility.

The complaint charges that respondent failed to comply with Section 111 of the Clean Air Act, 42 U.S.C. § 7411, and the implementing Standards of Performance for Municipal Solid Waste Landfills ("the Landfill NSPS"), codified at 40 C.F.R. Part 60, Subpart WWW. Count I alleges a failure to conduct adequate surface methane monitoring as required by 40 C.F.R. §§ 60.753(d) and 60.755(c)(1). Count II alleges a violation of 40 C.F.R. §§ 60.755(c)(4) and 60.753(d) for failure to take corrective action when monitored surface methane exceeded the prescribed regulatory level. Count III alleges a failure to control all collected landfill gas as required by 40 C.F.R. §§ 60.752(b)(2) and 60.753(e). Count IV alleges a failure to comply with

portable analyzer performance evaluation requirements in violation of 40 C.F.R. 60.755(d)(3). For these four violations, EPA seeks a civil penalty of $71,500. 42 U.S.C. §§ 7413(d) & (e).

A hearing in this matter was held on October 21 and 22, 2003, in Philadelphia, Pennsylvania. It is held that F.R.&S. violated the Landfill NSPS as alleged in the complaint. A civil penalty of $42,000 is assessed for these four violations.

II. Joint Stipulations

The parties have stipulated to the following:

1. EPA has jurisdiction over F.R.&S., Inc. and the subject matter of this administrative proceeding pursuant to Sections 113(a)(3) and (d) and Section 111 of the Clean Air Act (CAA, Clean Air Act or the Act), 42 U.S.C.§§ 7413(a)(3) and (d) and 42 U.S.C. § 7411;

2. EPA listed municipal solid waste landfills as a source category under the authority of Section 111 of the CAA, 42 U.S.C. § 7411;

3. Pursuant to Sections 111 and 114 of the CAA, 42 U.S.C. §§ 7411 and 7414, EPA promulgated Standards of Performance for Municipal Solid Waste Landfills ("the Landfill NSPS"), codified at 40 C.F.R. Part 60, Subpart WWW, Sections 60.750-60.759;

4. The Landfill NSPS includes requirements pertaining to, *inter alia*, air emissions standards, operational standards for collection and control systems, compliance, monitoring, reporting, record keeping and testing;

5. In 25 Pa. Code § 122.1 & § 122.3, the Standards for Performance for New Stationary Sources and Emission Guidelines for Existing Sources promulgated in 40 C.F.R. Part 60 were adopted by the Pennsylvania Department of Environmental Protection ("PADEP") and incorporated by reference into the Pennsylvania Code. Pursuant to Section 111(c) of the Clean Air Act, 42 U.S.C. § 7411(c), the authority to administer these regulatory requirements was delegated to PADEP.

6. Respondent F.R.&S., Inc. is a Pennsylvania corporation and is a "person" as that term is defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e), and within the meaning of Sections 113(a)(3) and (d) of the CAA, 42 U.S.C. §§ 7413(a)(3) and (d);

7. Pioneer Crossing Landfill ("PCL") is a disposal facility, located at 727 Red Lane Road in Birdsboro, Pennsylvania, where solid household waste is placed in or on land for permanent disposal;

8. PCL includes an original section, and a 1993 expansion of Cells 1, 2, 3A and 3B ("1993 expansion");

9. The 1993 expansion increased the total volume design capacity of PCL beyond the permitted volume design capacity of the original section;

10. Respondent F.R.&S., Inc. commenced construction of Cells 1, 2, 3A and 3B after May 30, 1991;

11. At all times relevant to this proceeding, Respondent F.R.&S., Inc. owned and operated PCL;

12. At all times relevant to this proceeding, the design capacity of PCL's original section and Cells 1, 2, 3A and 3B combined is greater than 2.5 million megagrams and 2.5 million cubic meters;

13. At all times relevant to this proceeding, Respondent F.R.&S., Inc. designed, installed and operated a landfill gas collection and control system servicing the original section and Cells 1, 2, 3A and 3B of PCL;

14. On April 10 and 11, 2002 duly authorized representatives Bowen "Chip" Hosford and Bruce Augustine from EPA and Elias Rivera from the Pennsylvania Department of Environmental Protection ("PADEP") inspected PCL for compliance with the Landfill NSPS;

15. Prior to the inspection, Respondent F.R.&S., Inc. had been following the same pattern since on or about April 2001 to monitor the surface concentration of methane on a quarterly basis ("the April 2001 quarterly surface monitoring pattern");

16. On February 14, 2001, Respondent F.R.&S., Inc. submitted the April 2001 quarterly surface monitoring pattern to PADEP for review. On February 23, 2001, PADEP approved the April 2001 quarterly surface monitoring pattern;

17. During the inspection of April 10-11, 2002, EPA inspectors used two (2) Photovac MicroFID portable monitors, both of which satisfy the instrument specifications of 40 C.F.R. § 60.755(d)(2), the performance evaluation requirements of 40 C.F.R. § 60.755(d)(3), and the calibration requirements of 40 C.F.R. § 60.755(d)(4);

18. On a quarterly basis since at least [the] 1st Quarter 2001 and during the inspection of April 10-11, 2002, PCL officials used a Foxboro TVA 1000 portable monitor to conduct surface methane monitoring;

19. Prior to each monitoring session of the inspection of April 10-11, 2002, EPA inspectors determined background concentration in accordance with 40 C.F.R. § 60.755(c)(2);

20. Throughout the inspection of April 10-11, 2002, meteorological conditions were typical and the surface monitoring conducted by EPA inspectors was in accordance with section 8.3.1 of Method 21 of 40 C.F.R. Part 60, Appendix A-7, except that the probe inlet was placed

within 5 to 10 centimeters of the ground;

21. During the inspection of April 10-11, 2002, EPA inspectors and PCL officials monitored the surface concentration of methane at: (a) some of the points along the April 2001 quarterly surface monitoring pattern; (b) other points on the surface of PCL which were not being monitored by Respondent F.R.&S., Inc. on a quarterly basis, and [(c)] pipes protruding from sheds associated with PCL's subsurface gas migration system;

22. At four of the monitored points not being monitored by Respondent F.R.&S., Inc. on a quarterly basis, GW-28, GW-41, GW-29, and the Shed on the east perimeter road, respectively, EPA inspectors and PCL officials each detected surface methane concentrations above the 500 parts per million above background surface methane operational standard;

23. Part of PCL's collection and control system includes a subsurface gas migration system, located along the eastern perimeter of PCL, which was installed to minimize the off-site migration of subsurface gas;

24. The subsurface gas migration system operates, in part, by intercepting and extracting migrating subsurface landfill gas using perforated collection lines connected to blower vacuums;

25. During the inspection of April 10-11, 2002, (a) the subsurface gas migration system collection lines were routed to two (2) sheds which each housed blower vacuums, (b) a pipe protruded from each shed, (c) at one of the sheds, the protruding pipe was venting collected gas directly to the atmosphere and (d) EPA inspectors and PCL officials monitored the methane concentration in the vented gas at this shed to be greater than 10,000 parts per million;

26. On April 17, 2002, Respondent F.R.&S., Inc. capped the collection lines leading to the blowers, and connected to main landfill gas collection and control system;

27. On May 15, 2002, F.R.&S., Inc. re-monitored around the three points, GW-28, GW-41, and GW-29, respectively, where the exceedances of the 500 parts per million above background surface methane operational standard had been documented during EPA's April 10-11, 2002 inspection, and no exceedances were detected;

28. On September 19, 1996, September 23, 1996 and October 10, 1996, PADEP's Air Quality Program issued Respondent F.R.&S., Inc. Notices(s) of Violation concerning Malodor Emissions which constituted violations of state regulatory and statutory air requirements;

29. On September 27, 2002, the Commonwealth of Pennsylvania, Department of Environmental Protection and F.R.&S., Inc. executed a Consent Agreement of Civil Penalty concerning violations of Pennsylvania's Air Pollution Control Act, PADEP regulations and permit requirements, and federal Landfill NSPS provisions.

Joint Stipulations (October 21, 2003).

III. Discussion

A. Liability

(i.) Count I

Here, EPA alleges that F.R.&S. violated 40 C.F.R. §§ 60.753(d) and 60.755(c)(1) for failing to adequately monitor the surface concentration of methane. This alleged monitoring violation involves Cells 1, 2, 3A, and 3B of the Pioneer Crossing Landfill. The parties have stipulated that F.R.&S. designed, installed, and operated a landfill gas collection and control system servicing the original section of the landfill, as well as Cells 1, 2, 3A, and 3B, of PCL. Jt. Stip. No. 13. *See* CXs 37-40. Accordingly, the provisions of 40 C.F.R. §§ 60.753(d) and 60.755(c)(1) come into play.

Section 60.753 is titled, "Operational standards for collection and control systems." It provides, in part:

> Each owner or operator of an MSW landfill with a gas collection and control system used to comply with the provisions of § 60.752(b)(2)(ii) of this subpart shall:
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> * * * * *
>
> (d) Operate the collection system so that the methane concentration is less than 500 parts per million above background at the surface of the landfill. To determine if this level is exceeded, the owner or operator shall conduct surface testing around the perimeter of the collection area and along a pattern that traverses the landfill at 30 meter intervals and where visual observations indicate elevated concentrations of landfill gas, such as distressed vegetation and cracks or seeps in the cover. The owner or operator may establish an alternative traversing pattern that ensures equivalent coverage. A surface monitoring design plan shall be developed that includes a topographical map with the monitoring route and the rationale for any site-specific deviations from the 30 meter intervals. Areas with steep slopes or other dangerous areas may be excluded from the surface testing.

40 C.F.R. § 60.753(d) (2001).[1]

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[1] 40 C.F.R. § 60.755(c)(1) (2001) similarly provides for surface methane monitoring at 30-meter intervals, adding that the monitoring is to be done on a quarterly basis and specifying the equipment to be used.

Insofar as Count I is concerned, the following facts are not in dispute. On February 14, 2001, F.R.&S. submitted a quarterly surface monitoring pattern plan to the Pennsylvania Department of Environmental Protection (also referred to as "PADEP") for review. Jt. Stip. No. 16. As noted, the Commonwealth of Pennsylvania has been delegated the authority by the Administrator of EPA to enforce the Landfill NSPS of 40 C.F.R. Part 60, Subpart WWW. Jt. Stip. No. 5. On February 23, 2001, PADEP approved respondent's April 2001 quarterly surface monitoring plan. Jt. Stip. No. 16.[2]

Thereafter, on April 10-11, 2002, EPA conducted an inspection of the PCL facility. Upon reviewing respondent's quarterly monitoring reports for the year 2001(CXs 37-40), EPA determined that F.R.&S. was not monitoring Cells 1, 2, 3A, and 3B for surface methane concentration at 30-meter intervals as required by 40 C.F.R. §§ 60.573(d) and 60.755(c)(1). Tr. 184-190. Respondent submitted a revised surface monitoring map to PADEP on June 12, 2002, which included this "1993 expansion area" of Cells 1, 2, 3A, and 3B, and which EPA determined satisfied the surface monitoring requirements of the Landfill NSPS. Tr. 177.

F.R.&S. does not challenge complainant's assertion that its 2001 quarterly monitoring reports (CXs 37-40) show that Cells 1, 2, 3A, and 3B were not monitored for methane concentration at 30-meter intervals. Instead, respondent argues that there can be no finding of a violation because it was operating under the terms of the Surface Monitoring Plan which the Pennsylvania Department of Environmental Protection had approved on February 23, 2001. Resp. Br. at 9-10. Respondent's argument is as follows:

> The problem in this case as it relates to whether there was adequate surface monitoring by Pioneer Crossing stems from a regulatory interpretational difference between the EPA and the DEP. Based on the DEP interpretation of the monitoring requirements, Pioneer Crossing was in compliance, but based on the EPA interpretation, Pioneer Crossing was not. When the EPA and DEP became aware of their interpretation difference as a result of the April 10-11, 2002 inspection, they agreed upon an interpretation they would both follow, and based on the agreement, Pioneer Crossing amended its Surface Monitoring Plan to conform to the agreement reached between EPA and DEP.

Resp. Br. at 10.[3]

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[2] The actual surface monitoring plan approved by PADEP has not, however, been introduced into evidence.

[3] With respect to the Landfill NSPS monitoring requirements, EPA Inspector Bowen Hosford referenced an "interpretational difference" between EPA and PADEP, but he did not explain that difference. Tr. 90. EPA Inspector Bruce Augustine, however, did not believe that any such interpretational difference existed. Tr. 233. David Brown, respondent's Director of

EPA dismisses respondent's argument, stating that the monitoring provisions at issue are clear on their face and that they provided respondent with fair notice as to what was required for compliance. EPA submits that the facts of the case, considered in the context of the Landfill NSPS regulatory scheme, support a finding of a violation. Compl. Br. at 17-24.

The starting point for the analysis of this issue must be the regulatory provisions in question. In that regard, EPA is correct in its assertion that the provisions of the involved regulations, 40 C.F.R. §§ 60.753(d) and 60.755(c)(1), are clear on their face. These regulations require the surface testing for methane concentration over the entire surface of the landfill -- *i.e.*, "along a pattern that traverses the landfill" -- at 30-meter intervals. The regulations make no mention that the landfill to be monitored must be covered, capped, or otherwise inactive. Indeed, such an interpretation would seem contrary to the very purpose of the regulations at issue, which is to allow for the detection of excessive surface concentration of methane gas. Even respondent's Director of Engineering for the Pioneer Crossing Landfill testified that he would *not* find it "unusual" that surface concentrations of methane would be detected in areas that have not been capped or covered, and which had not reached final grade. Tr. 301. (This is the very area which F.R.&S. did not monitor in this case). Respondent's Director of Engineering added, "I would expect to find some exceedences in an area like that." *Id.*

In fact, F.R.&S. does not offer a reading of these monitoring regulations different from that advanced by EPA. Nor does respondent argue that the regulations are in any way unclear. Rather, respondent argues that it should not be held in violation under the circumstances of this case because the monitoring plan which it submitted to the Pennsylvania Department of Environmental Protection for review (although not in evidence), and which apparently excluded a substantial portion of the landfill from monitoring, was ultimately approved by the State agency. As explained below, respondent's reliance upon this argument is misplaced.

It is against the backdrop of the clear monitoring provisions of Sections 60.753(d) and 60.755(c)(1) that F.R.&S. submitted its methane gas monitoring plan to PADEP. Even prior to that submission, as part of the September 25, 1998, plan approval permit, PADEP imposed permit conditions implementing the surface monitoring requirements of the Landfill NSPS. Condition 20 of the Plan Approval states:

> At a minimum, the owner/operator shall monitor the surface concentration of methane in any areas, which are controlled by the permanent gas collection system, once per calendar quarter. A surface monitoring design plan shall be submitted to the

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Engineering, testified that prior to the EPA inspection of April 10, 2002, PADEP required surface monitoring for "[c]losed and capped areas and areas that have been inactive for a period of time." Tr. 295. PADEP Inspector Thomas Rivera, however, did not seem to be of the opinion that there was an interpretational difference in how EPA and the State read the Landfill NSPS monitoring requirements. Tr. 151.

> Department within ninety (90) days of issuance of this Plan Approval. *This monitoring shall conform to 40 CFR Subpart WWW, Section 60.753(d) and 60.755(c).*

CX 4, at 3 (Condition 20) (emphasis added).

Accordingly, when it drafted the methane monitoring plan for submission to PADEP, F.R.&S. was (or at least should have been) aware of the precise monitoring Landfill NSPS requirements to be addressed in its plan. In other words, respondent received "fair notice." *See Morton L. Friedman and Schmidt Construction Company*, CAA Appeal No. 02-07 (EAB Feb. 18, 2004). Nonetheless, it appears to have submitted a plan for State approval that fell far short of the regulatory monitoring requirements.[4]

Moreover, under the facts of this case, it is not quite clear just what the Pennsylvania Department of Environmental Protection approved in terms of respondent's monitoring plan. Nor is it clear that an interpretational difference existed between EPA and PADEP regarding the Landfill NSPS surface monitoring provisions. *See* n.3, *supra*. The only thing that is clear here is that F.R.&S. did not satisfy the surface monitoring requirements of Sections 60.753(d) and 60.755(c)(1). Accordingly, respondent is found in violation of these regulations. Nonetheless, as discussed, *infra*, given the circumstances surrounding respondent's failure to comply, a penalty substantially lower than that sought by EPA will be assessed for this violation.

(ii.) <u>Count II</u>

In the event that the methane gas concentration exceeds 500 parts per million or more above background, as in this case, the Landfill NSPS requires that certain corrective action be taken by the owner or operator. 40 C.F.R. § 60.755(c)(4). The owner or operator has 10 days in which to remedy this problem and to re-monitor so as to show compliance. If the re-monitoring still reveals a methane concentration in excess of the 500 parts per million, the owner or operator has a second chance, *i.e.*, another 10 days in which to remedy the problem. In the event that excessive methane concentration levels still exist after this second 10-day period, Section 60.755(c)(4) provides for other remedial measures to be taken, which need not be identified for purposes of this case. Thus, one can be in violation of this regulation not by exceeding the 500 parts per million above background standard, but by failing to engage in remedial action once that event occurs.

Insofar as this case is concerned, the parties have stipulated that during the EPA inspection of April 10-11, 2002, both the EPA inspectors and PCL officials detected surface

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[4] Also there is no evidence in the record that Cells 1, 2, 3A, and 3B were located in an area that was near the landfill's "working face" or was too steep or too dangerous to be monitored. Tr. 191-193. In addition, the evidence does not support a finding that the monitoring which respondent did perform constituted "an alternative traversing pattern that ensures equivalent coverage" within the meaning of 40 C.F.R. § 60.753(d).

methane concentrations exceeding the 500 parts per million above background at monitoring points
GW-28, GW-29, GW-41, and at the "Shed on the east perimeter road." Jt. Stip. No. 22. Moreover, at the closing conference which took place following the inspection, the EPA inspectors brought their methane monitoring concerns to the attention of the Pioneer Crossing Landfill officials. Tr. 73-74; CX 7. Accordingly, the facts establish that PCL was on notice of excessive surface methane concentrations and that the Section 60.755(c)(4) remediation and re-monitoring clock had started to run.

Thereafter, on May 9, 2002, more than 10 days after the EPA inspection during which the excessive methane concentrations were detected, PADEP Inspector Rivera conducted a follow-up inspection of the Pioneer Crossing Landfill. On May 9, Inspector Rivera found that respondent had taken no action to remedy the methane levels at GW-28, GW-29, and GW-41. Tr. 144-146; CXs 13 & 14.

In its defense, F.R.&S. relies upon the testimony of David Brown, the company's Director of Engineering, that none of the inspectors, either Federal or State, informed respondent at the April 11 closing conference that respondent was in violation of the Landfill NSPS at they relate to surface monitoring. Resp. Br. at 11. F.R.&S. also argues that "[b]ecause those points were outside of the approved Surface Monitoring Plan area, Pioneer Crossing did not conduct re-monitoring within 10 days." *Id.*

Respondent's argument as to why it did not violate Section 60.755(c)(4) is unpersuasive. In that regard, it is undisputed that F.R.&S. was aware, as a result of EPA's inspection on April 10-11, 2002, that the methane concentration at GW-28, GW-29, and GW-41 exceeded the 500 parts per million above background standard. Whatever the terminology used by the EPA inspectors at the closing conference -- whether they actually told respondent it was in "violation" or whether the inspectors told the company representatives that they were "concerned" with the surface methane readings -- the fact of the matter is that respondent was alerted that there were excessive levels of methane gas concentration on the surface of the landfill. That knowledge required respondent to take remedial action and then to re-monitor within 10 days. Even had it been held, with respect to Count I, that these monitoring points were located in a portion of the landfill that respondent was not required to monitor, which is not the case, the same result would obtain. Accordingly, EPA has established that F.R.&S. violated 40 C.F.R. 60.755(c)(4).

(iii.) <u>Count III</u>

This count alleges a violation of 40 C.F.R. §§ 60.752(b)(2) and 60.753(e) for failure to control all collected landfill gas. In the complaint, EPA states that pursuant to these regulations landfill gas collection and control systems are to be designed, installed, and operated in a manner which minimizes off-site migration of subsurface gas and which routes all collected gas to control systems which meet the applicable requirements of 40 C.F.R. § 60.752(b)(2)(iii). Here, EPA

alleges that F.R.&S. collected subsurface gas and routed it to a shed where it was vented to the atmosphere in violation of Sections 60.752(b)(2) and 60.753(e). *See* Compl. ¶¶ 40-44.

The key facts relating to this count are not in dispute. Part of the Pioneer Crossing Landfill gas collection and control system includes a gas migration system located along the eastern perimeter of the landfill. This gas collection and control system was installed to minimize the off-site migration of subsurface gas. Jt. Stip. No. 23. This subsurface gas migration system operates, in part, by intercepting and extracting migrating subsurface gas through the use of perforated collection lines connected to blower vacuums. Jt. Stip. No. 24.

"During the inspection of April 10-11, 2002, (a) the subsurface gas migration system collection lines were routed to two (2) sheds which housed blower vacuums, (b) a pipe protruded from each shed, (c) at one of the sheds, the protruding pipe was venting collected gas directly to the atmosphere and (d) EPA inspectors and PCL officials monitored the methane concentration in the vented gas at this shed to be greater than 10,000 parts per million." Jt. Stip. No. 25. On April 27, 2002, F.R.&S. capped the collection lines leading to the blowers and connected to the main landfill gas collection and control system. Jt. Stip. No. 26. Respondent's remedial actions of April 27 brought it into compliance with the Landfill NSPS.

F.R.&S. maintains (without any citation to the record evidence) that the facts of the case do not warrant a finding of a violation. Its argument essentially is as follows:

> In Pioneer Crossing's 1998 DEP Air Quality Plan Approval, it was agreed that "the off-site gas migration collection trenches" would be connected to the landfill gas collection and control system.[5] Later in 1998, it was discovered that approximately 100,000 cubic yards of waste was buried under the Smith Trailer Park and that it was generating methane gas. The trash buried under the Smith Trailer Park did not come from F.R.&S. or Pioneer Crossing. Because of the trash buried under the Smith Trailer Park and the methane being generated by that trash, the DEP was very concerned about the public health, safety and welfare of the park residents.
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> After learning of the safety risk to the Smith Trailer Park residents, Pioneer Crossing disconnected the subsurface gas migration system from the landfill's collection and control system and began to operate that system as it was originally designed and approved (i.e. vented to the atmosphere). The benefit of operating the subsurface gas migration system as originally designed and

[5] PADEP's Solid Waste Program approved the construction of the subsurface gas migration system on October 24, 1997. RXs G & H.

> approved (i.e. vented to the atmosphere) was that it provided a strong vacuum that was able to draw methane away from the Smith Park residents.

Resp. Br. at 13-14.

As explained below, respondent's defense is rejected and it is held that EPA has established a violation of Sections 60.752(b)(2) and 60.753(e).

Critical to the finding of a violation under these facts is that in the September 25, 1998, plan approval permit, PADEP's Air Quality Program required that the subsurface gas migration lines be permanently connected to the landfill gas collection system and flare. CX 4, Conditions 4(b) & 18(c).[6] In that regard, a 1997 Plan Approval Application Review document states:

> Along the east and north sides of the fill areas, the company has constructed gas migration collection trenches. These trenches were installed at the request of the Department (Waste Management) to control gas migration off the landfill property. The trenches consist of perforated pipe with a porous backfill such as stone or tire chips. A pump maintains a vacuum on the pipe thereby exhausting any collected gas in the soil outside the fill. The trenches have worked to reduce the gas in the soil. *At present these trenches are vented to the atmosphere, but this proposal will tie them into the gas collection system and flare.*

CX 5, at 1 (emphasis added). Moreover, Brown, F.R.&S.'s Director of Engineering, agreed that according to the regulations the gas being vented to the atmosphere should have been controlled. Tr. 365.[7]

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[6] A "flare" was described as "some kind of control device" in which the landfill gases are burned and reduced to carbon dioxide and water. Tr. 33-34.

[7] Brown also testified, however, that connecting the subsurface gas migration system to the main collection and control system would provide too much oxygen to the flare. Tr. 319-320. He explained:

> The decision was made, and it was essentially made by myself that the most effective way to assure the maximum vacuum to the gas extraction trench would be to disconnect the back from the collection system and turn the blowers back.... And, again, the whole reason for this was to do everything that we could to assure that none of the Pioneer gas was migrating to the trailer park. It was a safety issue to a large extent.

In sum, there is no dispute that respondent's permit, as well as the applicable provisions of the Landfill NSPS, required that all subsurface gas be collected. The fact that F.R.&S. may have disconnected part of this gas collection system out of safety concerns for nearby trailer park residents is not a defense to its failure to comply with the regulations. Clearly, this action to disconnect part of the gas collection system is contrary to the specific terms of its permit as well as to the applicable provisions of the Landfill NSPS. Moreover, there is no evidence to support respondent's assertion that PADEP knew and approved of its actions.

(iv.) Count IV

The Landfill NSPS requires the performance of the instrumentation used for surface monitoring to be evaluated periodically, including a requirement to complete a calibration precision test prior to placing the analyzer into service and at subsequent 3-month intervals, or at the next use, whichever is later. 40 C.F.R. § 60.755(d)(3) (2001); Section 8.1.2 of Method 21, 40 C.F.R. Part 60, Appendix A-7.1.

In the complaint, EPA alleges that F.R.&S. violated the performance evaluation requirements of Section 60.755(d)(3) by failing to conduct calibration precision testing as required by section 8.1.2 of Method 21. Compl. ¶ 50.

Respondent admits to the cited violation. It "acknowledges that it did not do quarterly precision calibration testing using three test samples (instead of just one test sample) as required by regulation and Testing Method 21." Resp. Br. at 16. Respondent limits its argument to the size of the penalty proposed by complainant. Accordingly, it is held that EPA has established that F.R.&S. committed the 40 C.F.R. § 60.755(d)(3) (2001) violation as alleged in the complaint.

B. Civil Penalty

Section 113(d)(1) of the Clean Air Act authorizes the assessment of a civil penalty for each violation of the Act. 42 U.S.C. § 7413(d)(1). It allows for the assessment of up to $25,000 for each violation. This maximum penalty amount has been increased to $27,500 as a result of the Civil Monetary Penalty Inflation Adjustment Act (*see* 40 C.F.R. Part 19).[8]

Tr. 320-321. Brown added that this disconnected configuration further benefitted the Smith Trailer park by providing "a low resistant path for any methane being generated by trash on the trailer park side." Tr. 325.

[8] As noted, EPA seeks a combined penalty of $71,500 for the four violations committed by F.R.&S. In its brief, however, complainant notes that its "proposed penalty of $71,500 is less than one-third of the statutory maximum for these violations" and that "the instant facts and evidence could support a much higher penalty." Compl. Br. at 43 & 45. This reference is a curious one. To the extent that EPA argues that the penalty it seeks is reasonable because it is less than the maximum penalty that it could have sought, its argument is rejected. Any civil penalty assessed in this matter must be based solely upon the evidence. Moreover, the fact that

Section 113(e)(1) of the Act is titled, "Penalty assessment criteria." It sets forth the factors that are to be taken into account in the assessment of a penalty. Section 113(e)(1) in part provides:

> [T]he Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1).

It is against this statutory background that the record evidence must be examined and the penalty determined. Upon an examination of this evidence, F.R.&S. is assessed a civil penalty of $2,000 for Count I, $15,000 for Count II, $10,000 for Count III, and $15,000 for Count IV. A discussion of the penalty factors is set forth below.

(i.) Size of the Business

In considering this penalty criteria, EPA reviewed a Confidential Business Information (CX 20) submitted by respondent. Compl. Br. at 51. EPA submits that the case development officer who determined the Agency's proposed penalty "did not assess any penalty based on the "Size of Business." Compl. Br. at 51-52.

(ii.) Economic Impact on the Business

EPA correctly notes that F.R.&S. has not raised an "inability to pay" defense in this case. Compl. Br. at 55. Nonetheless, EPA recited the testimony of its financial expert witness, Leo Mullin. This witness was qualified as an expert in the areas of "ability to pay" and "economic impact on a business." Tr. 268. Essentially, Mullin conducted a financial review of the respondent and concluded that it had the financial means to pay the penalty proposed by complainant, without a significant adverse impact upon the company. *Id.*

Because the testimony of Mullin regarding the details of his financial analysis are subject to Confidential Business Information protection, and because respondent challenges neither

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EPA believes that it could have sought a higher penalty has no bearing upon the penalty determination.

Mullin's conclusion, nor any aspect of his analysis in reaching that conclusion, there is no need to repeat that financial information here. Instead, it is sufficient to note that EPA's discussion of this evidence appearing in the confidential portion of its post-hearing brief is accepted as supporting its view that respondent can pay the penalty assessed in this case. Compl. Br. at 55-56 (unredacted portion).

(iii.) Compliance History and Good Faith

With respect to respondent's compliance history, EPA cites three instances in 1996, in which PADEP issued to F.R.&S. Notices of Violation for Malodor Emissions. Jt. Stip. No 28; CX 26. In addition, EPA cites another Notice of Violation issued to respondent by PADEP in 2001, which, unlike the previous notices for Malodor Emissions, involves the Landfill NSPS that are the subject of the present enforcement proceeding. Compl. Br. at 52-53, citing CX 27. Accordingly, respondent's compliance history is so noted.

Insofar as respondent's "good faith" is concerned, the record does not support a finding that F.R.&S. acted in good faith with respect to Counts II and IV. With respect to Counts I and III, however, it appears that respondent believed (albeit incorrectly) itself to be complying with the Landfill NSPS surface monitoring and gas control and collection provisions.

(iv.) Duration of the Violation

The monitoring violation in Count I existed for the four reporting quarters of 2001. The failure to respond to the excessive methane levels in Count II lasted approximately one month. The duration of the subsurface gas collection violation of Count III was two to three years, while the calibration precision testing violation in Count IV appears to have spanned a period greater than the three months admitted to by respondent. Nonetheless, in calculating the proposed penalty the EPA case development officer did not consider the durations of the violations to warrant an increase in the penalty sought. Moreover, in its post-hearing brief, EPA does not argue otherwise. Compl. Br. at 51.

(v.) Payment by Violator for Previous Penalties

EPA effectively concedes that there is no evidence that F.R.&S. previously paid penalties for violations of the regulations at issue in this case. Compl. Br. at 54.

(vi.) Economic Benefit

EPA does not maintain that respondent experienced an economic benefit as a result of its non-compliance with the Landfill NSPS. Compl. Br. at 45-46.

(vii.) Seriousness of the Violation

The violations at issue here are serious in nature. First, landfill gases present a threat to human health and to the environment. They contain methane and carbon dioxide, precursors to ozone formation, as well as non-methane organics and hazardous air pollutants. Tr. 205-206. These health and environmental dangers were identified in the preamble to the proposed Landfill NSPS. *See* 56 Fed. Reg. 24468, 24473-74 (May 30, 1991).

Second, the Pioneer Crossing Landfill is located next to the Smith Trailer Park, where approximately 30 to 40 families reside. Tr. 207, 316. In fact, three of the monitoring points where EPA detected excessive surface methane concentrations were at GW-28, GW-29, and GW-41, all which are located on the eastern perimeter of the landfill next to the trailer park.

(viii.) Other Factors as Justice May Require

Only the circumstances involving Count I warrant consideration under this penalty factor. While respondent ultimately was found liable for not monitoring the entire surface of the landfill for methane gas, it raised some doubt as to whether the Commonwealth of Pennsylvania sanctioned the monitoring plan which EPA found to be inadequate. In that regard, one EPA inspector testified that there was an interpretational difference between the Pennsylvania Department of Environmental Protection, while another EPA inspector testified that no such difference existed. Nonetheless, PADEP was responsible for inspecting the PCL landfill and it did not take any enforcement action against respondent on the basis of the company's surface monitoring reports for the year 2001. In sum, while F.R.&S. was responsible for complying with the surface monitoring provisions of 40 C.F.R. §§ 60.753(d) and 60.755(c)(1), it appears that part of the failure to monitor Cells 1, 2, 3A, and 3B was due in some measure to its belief that PADEP did not require the monitoring of these areas. Thus, the reduction in the penalty amount sought by EPA in Count I.

ORDER

It is held that F.R.&S., Inc., violated 40 C.F.R. §§ 60.753(d) and 60.755(c)(1) as alleged in Count I; §§ 60.755(c)(4) and 60.753(d) as alleged in Count II, §§ 60.752(b)(2) and 60.753(e) as alleged in Count III, and §60.755(d)(3) as alleged in Count IV. For these violations, respondent is assessed a civil penalty of $42,000. 42 U.S.C. §§ 7413(a)(3), (d) & (e). Respondent is directed to pay this civil penalty within 60 days of the date of this order.[9]

[9] Payment is to be made by certified or cashier's check, payable to "Treasurer of the United States of America," Mellon Bank, EPA Region 3 (Regional Hearing Clerk), P.O. Box 360515, Pittsburgh, Pennsylvania, 15251.

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, this decision shall become a Final Order as provided in 40 C.F.R. § 22.27(c).

Carl C. Charneski
Administrative Law Judge