UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
INTERNATIONAL PAPER COMPANY	**)**	**Docket No. CAA-R6-P-9-LA-98030**
MANSFIELD, LOUISIANA	**)**	
Respondent	**)**	

INITIAL DECISION

This matter arises under Sections 111(b) and 114 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7411(b) and 7414. The complaint, filed June 30, 1998, alleges in two counts that Respondent International Paper Company ("Respondent"), at its paper mill in Mansfield, Louisiana, violated two implementing regulations of that Act: 40 C.F.R. § 60.7(a)(1), by not notifying the Louisiana Department of Environmental Quality of the start up date of certain construction, within thirty days of its commencement; and 40 C.F.R. § 60.7(a)(3), by failing to include the facility's *design input heat capacity*, the *identification of the fuels to be combusted*, and the *anticipated annual capacity factor* for the facility's operation in its concededly timely notice of the actual date of initial startup. Respondent answered the complaint denying the alleged violations and requesting a hearing. Prior to the hearing, both parties moved for additional discovery, which motions were granted in part and denied in part. An evidentiary hearing in this matter was held on March 3, 1999 in Shreveport, Louisiana.

For the reasons that follow, the Court finds that International Paper did not violate the notification of commencement of construction requirement at 40 C.F.R. § 60.7(a)(1) and that, while

a violation of § 60.7(a)(3) was established, it was a technical violation warranting no more than a nominal penalty in this instance.

STATUTORY AND REGULATORY BACKGROUND

Both counts of the complaint relate to Respondent's construction of a gas turbine and heat recovery steam generator ("HRSG") at its Mansfield, Louisiana mill. The regulations at issue in this case are the New Source Performance Standards ("NSPS") found at 40 C.F.R. § 60. The NSPS regulations were promulgated pursuant to CAA §§ 111(b) and 114 and include, inter alia, General Provisions (40 C.F.R. § 60, Subpart A); Standards for Performance for Industrial-Institutional Steam Generating Units (40 C.F.R. § 60, Subpart Db); and Standards of Performance for Stationary Gas Turbines (40 C.F.R. § 60, Subpart GG).

The NSPS subpart Db requirements apply to steam generating units built after June 19, 1984, with a heat input capacity from fuels combusted in the steam generating unit of greater than 29 MW (100 million Btu/hour). The NSPS subpart GG regulations apply to stationary gas turbines constructed after October 3, 1977, with a heat input at peak load equal to or greater than 10.7 gigajoules per hour, based on the lower heating value of the fuel used.

The NSPS regulations require affected facilities to notify state (in states with approved permit programs) and federal regulators at certain stages in the creation of a new emissions source.

FINDINGS AND CONCLUSIONS

The dispute here[1] centers on whether the facts, properly understood, constitute violations of the CAA as alleged in the complaint.

Respondent, a Delaware corporation authorized to do business in Louisiana, is a person for purposes of CAA Section 113(d), 42 U.S.C. § 7413(d). Respondent owns a paper mill located at

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[1]In preliminary matters, Complainant also sought to preclude discussion of the following items: penalty assessments for other violations of New Source Performance Standards ("NSPS") issued by EPA or the Louisiana Department of Environmental Quality ("LDEQ"); any written material prepared by EPA relating to the violations charged and to the penalty calculation in this case other than the penalty rationale prepared by John Jones and CAA Stationary Source Civil Penalty Policy of October 1991; discussion of any penalty guidance other than the CAA Civil Penalty Policy; any penalty policy guidance documents or other materials produced by EPA to determine penalties for NSPS violations; required NSPS notifications submitted by other affected facilities to EPA or LDEQ since 1995; and notification form(s) required by either EPA or LDEQ in the submittal of NSPS notifications. In addition, Complainant filed a motion in limine on February 27, 1999, seeking to preclude discussion at hearing of items that Respondent had unsuccessfully sought through its discovery motion and, on March 1, 1999, a motion to add exhibits. Complainant's additional exhibits were admitted into evidence at hearing pursuant to the parties' stipulation. As to the motion in limine, Respondent's reply resolved several issues presented by Complainant's motion. Specifically, Respondent stated that it would not attempt to introduce evidence related to penalties assessed in other New Source Performance Standards ("NSPS") cases or any penalty guidance documents other than the CAA Stationary Source Civil Penalty Policy ("Penalty Policy"). Respondent also stated in its reply, however, that it intended to discuss at hearing and examine witnesses regarding any notification forms required by either EPA or the Louisiana Department of Environmental Quality ("LDEQ") for certain NSPS provisions. Respondent further stated it did not agree that evidence should be limited to the penalty rationale prepared by John Jones and the Penalty Policy and that it intended to examine witnesses on how the penalty proposed in this case relates to other penalties assessed by EPA for similar violations, and on the basis for the penalty here in light of all evidence presented at the hearing.

The issues not resolved by Respondent's reply were ruled on at the outset of the hearing. Respondent's request that it be allowed to examine Complainant's witnesses regarding the basis of the penalty proposed by Complainant in light of the evidence presented at hearing was granted. Tr. 14. Respondent's request that it be allowed to ask witnesses about the calculation of penalties in other similar cases was narrowed to allow Respondent to pose such questions only as to cases in which all the facts relevant to the penalty were the same as those alleged in the instant case. Tr. 14-15. As to the last issue, questions relating to required notification forms, Respondent's request was granted after Respondent clarified that it intended to ask only about forms related to the specific regulations that are at issue here. Tr. 16.

1202 Louisiana Highway 509 in Mansfield, Louisiana. Respondent's gas turbine/HRSG was constructed in 1995. The HRSG has a heat input capacity of 286.4 million Btu/hour and thus is an "affected facility" for purposes of 40 C.F.R. § 60.40b(a) and subject to subparts A and Db. The gas turbine has a heat input at peak load greater than 10.7 gigajoules per hour and thus is an affected facility for purposes of 40 C.F.R. § 60.330(a) and subject to subparts A and GG.

The violations alleged in this case stem from information developed in the course of three inspections of Respondent's paper mill. The first inspection was an annual inspection of the mill conducted by Richard Bromley, an inspector for LDEQ's Northwest Regional Office on June 28, 1995. Tr. 27. During that inspection, Bromley requested that Respondent provide the actual date of the commencement of construction for the gas turbine/HRSG unit to his office. Tr. 134. Respondent, after consulting with its contractor, submitted a letter on June 30, 1995, two days after receiving LDEQ's request, indicating that construction commenced on March 1, 1995. Gov. Exhibit 12.

During his next yearly inspection, on June 13, 1996, Bromley concluded there were deficiencies in Respondent's initial notice of actual startup. Tr. 32-34. Subsequent to this inspection, on June 18, 1996, LDEQ sent a notice of deficiency to Respondent requesting additional information concerning the startup of the gas turbine/HRSG unit. Tr. 34; Gov. Exhibit 16. Specifically, Respondent was directed to provide certain items of information that 40 C.F.R. § 60.49b(a) requires be included in the notification of initial date of actual startup submitted pursuant to 40 C.F.R. § 60.7(a)(3). Respondent submitted this information on June 20, 1996, two days after receiving LDEQ's request. Gov. Exhibit 16.

The third inspection was conducted by EPA inspector Jeffrey Whitney pursuant to CAA §

114, and took place on February 3 and 4, 1998. Tr. 58. Whitney testified that before he visits a facility he reviews EPA's files and copies of the facility's latest permit and inspection report, as well as files in LDEQ's office. Tr. 58-59. On his visit to Respondent's mill Whitney reviewed records Respondent is required to keep pursuant to NSPS and PSD regulations, including notices supplied to LDEQ relating to construction and startup of the gas turbine/HRSG unit. Tr. 59. At the conclusion of his inspection he held a close out interview with members of Respondent's management. Tr. 64-65. After Whitney's inspection, on June 30, 1998, the complaint in this matter was filed.

COUNT I

Count I charges Respondent with failing to fulfill the NSPS subpart A notification requirements. 40 C.F.R. § 60.7(a) directs that:

> Any owner or operator subject to the provisions of this part shall furnish the Administrator written notification as follows:
>
> > (1) A notification of the date construction (or reconstruction as defined under 40 C.F.R. § 60.15) of an affected facility is commenced postmarked no later than 30 days after such date. The requirements shall not apply in the case of mass produced facilities which are purchased in completed form.

The parties stipulated that construction of the gas turbine and HRSG commenced on March 1, 1995.[2] With a March 1 commencement date, notification of the commencement date was due no later than April 1, 1995.

[2]While there was discussion and testimony at hearing concerning the possibility that construction may have commenced before March 1, perhaps in the last week of February (Tr. 150-51 (Rice)), neither party has sought to change the stipulated date of March 1, 1995, to any earlier date. Therefore, the stipulated date will be treated as the date of commencement of construction in this decision.

On March 15, 1995 Respondent submitted a letter to Gustave Von Bodungen, Assistant Secretary of LDEQ's Air Quality Division providing information about the status of Respondent's gas turbine/HRSG unit. Gov. Exhibit 12. This letter was a semiannual progress report submitted as required by Respondent's PSD and state air permits and is described as "**Project Progress and Activities Report**." The progress report consists of a boxed table with two columns, one denominated "activities" and the other "status." Under "activities" are elements of the project and under "status" is a corresponding listing of the month and year (and, in one instance, the month, year *and day)* an activity was started and, in some instances, completed. Each "activity" and corresponding "status" is separately boxed within the larger box containing the progress and activity report. The last activity entry appears on a separate page and refers to the gas turbine/HRSG. Its status is described as "began site work for GE Gas Turbine and HRSG," but unlike the other items, no date or month in which the site work began is specified within its box. *Id*.

Complainant argues that this progress report does not constitute notification that Respondent had begun construction of the gas turbine/HRSG for purposes of the NSPS rules, noting that no reference was made to the NSPS rules or section 60.7 in the progress report, and that at no time during the three inspections at the paper mill did Respondent mention this report or represent that it was submitted to satisfy the part 60.7(a)(1) notification requirement. Rather, Complainant contends that notification was not given until June 30, 1995 in the form of Respondent's reply to Bromley's request that Respondent supply LDEQ with the date of commencement of construction.

Respondent argues that the progress report submitted to satisfy the conditions of its PSD permit provided the information required by 40 C.F.R. § 60.7(a)(1) and thus met the requirements of the rule. In its view, any additional submission of this information would have been superfluous.

Respondent notes, and EPA witnesses confirmed during the hearing, that 40 C.F.R. § 60.7(a)(1) does not require a separate notice, that no special form is required to provide notice, and that there is no requirement that the regulatory provision be cited when notice is supplied. In support of its position that the PSD progress report satisfied section 60.7(a)(1) Respondent quotes the testimony of Addison Tatum, who testified that LDEQ tries to "allow for one reporting to suffice for other requirements when it makes sense to do so." Tr. 163. Mr. Tatum is currently an environmental research analyst for LDEQ, and was LDEQ's lead permit reviewer for Respondent's project at the times relevant to the violations alleged in the complaint. Mr. Herschel Rice, Respondent's Environmental, Health and Safety Manager and a licensed engineer, testified that in his opinion "began site work" and "commenced construction" are synonymous terms. Tr. 131. The parties stipulated that construction commenced for the turbine and the HRSG as of March 1, 1995. Thus, EPA viewed the Respondent's commencement of the "site work" as constituting the type of construction contemplated by the notification requirement of 40 C.F.R. § 60.7.

Respondent further asserts that the PSD progress report satisfied the purpose of the rule in that it put the LDEQ on notice that construction had commenced. According to Respondent, the purpose of the rule is laid out clearly in the preambles to the proposed and final NSPS rules where it is stated that section 60.7 is intended "to allow the Administrator to locate sources in this part and to inform the sources about applicable regulations in an effort to minimize future problems." 39 Fed. Reg. 36,946, 36,948 (Oct. 15, 1974); 40 Fed. Reg. 58418, 58,416 (Dec. 16, 1975). The purpose, Respondent adds, as described in the preambles, was echoed by Whitney's testimony (Tr. 60-61) and Complainant's written penalty calculation (Gov. Exhibit 20). Moreover, Respondent maintains, LDEQ was intimately familiar with the gas turbine/HRSG project as a consequence of the permitting

process that preceded its construction.[3]

The Court finds that the PSD progress report satisfied the notification requirement of 40 C.F.R. § 60.7(a)(1). On its face Gov. Exhibit 12, dated March 15, 1995, states that Respondent "*Began* site work for GE Gas Turbine and HRSG" as of March 15th (emphasis added). As the past tense of "begin," it is clear that Respondent notified LDEQ of its action relating to the turbine and the HRSG at least as of that date. Respondent is correct that the rule does not prescribe a special form for notification and that neither EPA nor LDEQ has created a form for notification under part 60.7(a)(1).

Although EPA suggested during the hearing and in its post hearing brief, that the document was suspect in that the activity listed in the block was the only block, among the eleven blocks in the document, without a date inside the block itself, there is no basis to conclude on this record that the document was fabricated. Indeed, it was admitted as one of the government's exhibits. Tr. 12. Further, the Court notes that many of the other dates in the other blocks are general in nature, referring in one instance to only the month, and for the remainder, only to a month and year without a specific date. In addition, it is understandable that the month was omitted for the block in contention, as the activity occurred in the same month as the date of the letter. Tr. 149. Thus, as of March 15, 1995, Gov. Exhibit 12, on its face, informed that construction had commenced for the

[3]Respondent also sought to assert for the first time at hearing that Respondent was not in violation because its gas turbine/HRSG was excepted from the requirement to supply a notification of the commencement of construction pursuant to part 60.7(a)(1). Tr. 125-26. This section excuses "mass produced facilities which are purchased in completed form" from the commencement of construction notification requirement. 40 C.F.R. § 60.7(a)(1). Complainant's objection that such defense was not timely raised and that to allow Respondent to assert it would unduly prejudice Complainant was sustained. Respondent was allowed to make an offer of proof on the issue. Tr.127-28.

turbine and HRSG.

Further, even if it were assumed for the sake of argument that the notice was insufficient, the Court could not ignore the circumstances which preceded the alleged violation and which demonstrate that such an ostensible violation was only technical in nature.

Were it the case that the regulating agency, either LDEQ or EPA, had no idea that a regulated source was in the process of construction, there would be obvious environmental concerns, underscoring the importance of the notice. However, that was not the situation at all in this instance, as evidenced by the detailed permit process that preceded the construction.
LDEQ was fully informed of the project as far back as 1993 and in fact issued its approval of it in February 1994.

Additionally, nothing was offered through EPA's Mr. Bromley as to importance of the notification of the commencement of construction *as applied to this case*. Rather, his testimony spoke only in general terms that large paper mills have a significant impact on the environment. Tr. 58.

EPA's second witness, Mr. Whitney, when expressly asked the purpose behind the notification of commencement requirement, explained that it was to put an agency on notice that a facility is constructed:

> Q What is the purpose of listing the date of construction commencement in the regs? Why do we worry about that?
>
> A Well, we want to know when a regulated source is constructed. *We can't regulate something <u>if we don't know its there</u>*, and therefore, we want to know if it's there and when it's there. And this allows us to make our

> own determinations of which regulations might apply and to possibly notify the facility — contact the facility concerning applicable regs.

Tr. 60-61 (emphasis added).

Further, Mr. Whitney elaborated that by having notice of commencement of construction, LDEQ would know that NSPS applies, enabling them to regulate the facility. Yet, he conceded that prior to his inspection he had reviewed Respondent's permits and knew that NSPS provisions applied to both the turbine and the HRSG. Tr. 67. Thus, even assuming arguendo that International Paper's March 15th letter was deficient, given that LDEQ had actual knowledge of the ongoing construction, through the permit approval process, and knew through that same process that NSPS applied to it, it is clear that the underlying purpose of the regulation was satisfied, and that only a very nominal penalty would be in order.

COUNT II

In Count II Respondent is charged with filing an incomplete notification of the actual date of initial startup for its HRSG. 40 C.F.R. § 60.49b(a), NSPS subpart Db, provides in pertinent part:

> The owner or operator of each affected facility shall submit notification of the date of initial startup, as provided by § 60.7. This notification shall include:
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> > (1) The design input heat capacity of the affected facility and identification of the fuels to be combusted in the affected facility,
> >
> > ***
> >
> > (3) The annual capacity factor at which the owner or operator anticipates operating the facility based on all fuel fired and based on each individual fuel fired . . .

40 C.F.R. § 60.49b(a)(emphasis added).

Respondent timely submitted its notice of actual date of initial startup on August 31, 1995, notifying LDEQ of the initial startup date of August 28, 1995 pursuant to 40 C.F.R. § 60.7(a)(3).

Respondent concedes that its notice did not explicitly include the items from part 60.49b(a) underlined above, but asserts that its notice of actual startup referenced both its PSD permit number and its state air permit number and that these permits, on their face, contain the missing information. Thus, Respondent maintains, by referencing its permits with their numbers, it satisfied the requirements of 40 C.F.R. § 60.49b(a)(1).

According to Mr. Rice, LDEQ's request to supplement the August 31, 1995 notification after Mr. Bromley's 1996 inspection was a "redundant request."

> All of this information was readily available, and everybody was aware of what these items were. This was *boilerplate information* that was common knowledge and had been presented numerous times in the application and the permit and in discussions that we had had.

Tr. 141 (emphasis added).

At the hearing Respondent also produced a chart listing the location of the three missing items in various permit materials submitted to, or received from, LDEQ and EPA. Respondent Exhibit 4. It is noteworthy that EPA did not challenge Respondent's assertion that the three missing pieces of information, forming the basis for Count II, were contained in multiple documents, beginning with the PSD Permit Application. Respondent's Exhibit 4 summarizes the locations where this information appeared: the design input heat capacity was listed in the PSD permit application submitted August 10, 1993, PSD Permit No. PSD-LA-93 (M-3), and State Permit No. 0760-00006-02 issued by LDEQ on February 24, 1994 and a permit revision dated July 8, 1994. Id. The type of fuel to be combusted in the HRSG unit was provided in the PSD permit application, the PSD permit, the state permit

modification and the July 8, 1994 permit revision.[4] Id. Finally, the hours of operation, used to determine the anticipated annual capacity factor, were set forth in the PSD permit application, the state permit modification and the July 8, 1994 permit revision. *Id*. Mr. Rice confirmed that, under the terms of the permits, only natural gas could be used as the fuel and that LDEQ certainly knew the design input capacity of the HRSG, a detail highlighted by the fact that its modification was the subject of the permit modification. He was also able to clearly explain that the annual capacity factor is the amount of fuel used, divided by the maximum amount of fuel that could have been used. In this instance, given that it was to be in operation 24 hours a day, seven days a week and 52 weeks a year, the calculation was an anticipated factor of 1, meaning one hundred percent of the time. Tr. 145-146.

Further, Respondent notes that the hearing testimony established that Bromley had copies of Respondent's permits available to him and reviewed them prior to each inspection. Tr. 40. All of this, Respondent contends, shows that the many cross references to its permits satisfied the requirements of the rule .

In addition, Respondent argues that it satisfied the underlying purpose of the notification of the actual date of initial startup rule which, as described in Complainant's penalty worksheet, "is to inform the appropriate regulatory agencies that the clock has started for the period of time allowed for completion of performance testing of the affected facility..." Gov. Exhibit 20 at p. 7. However, as reflected in Respondent's Exhibit 1, Respondent was already discussing the anticipated stack testing with LDEQ on June 14, 1995, two weeks before Mr. Bromley would make his first inspection and six weeks before the August 28, 1995 actual startup date. That LDEQ was on notice that the

[4]The Court does not subscribe to the assertion of EPA in its brief that Respondent's creation of a chart only serves to demonstrate the fact of violation. In litigation parties routinely create documents to summarize and highlight the basis for the arguments being advanced.

clock had begun for the period of time allowed for completion of the performance testing for the HRSG unit was further confirmed by the fact that an LDEQ representative was present to observe the stack testing of the gas turbine/HRSG unit in November of 1995. Tr.45, 139. In addition, Mr. Rice testified that, although the notice was sent to Bromley and an LDEQ official who attended the gas turbine/HRSG stack testing in November of 1995, no LDEQ officials gave any indication that Respondent's August 31, 1995 notice was deficient in any way. Tr. 138-39.

In contrast to Section 60.7(a)'s bare requirement for a "notification of the date construction ... is commenced...," Section 60.49 b(a) is much more precise about the obligation it creates. It spells out the specific items that the notification must include and, among them, are the three items that were not included in Respondent's notification. Given the express language of the section, Respondent's contention, that cross references to documents which contain the missing items satisfies the requirement, is rejected. The regulation creates no alternative means for conveying the information, such as by cross reference. Accordingly, a violation was established. However, in determining an appropriate penalty, not only would it be inappropriate to view the violation simply as a snapshot, divorced from the information International Paper had already submitted to LDEQ regarding the required information, but the Court must also take into account the purpose behind the requirement together with any demonstrated harm from the failure to formally submit the items in the context of the facts in this case.

The importance of providing the required information was not demonstrated on this record. Indeed Mr. Bromley, when asked about the three required elements, could only respond:

> Yes. Okay. That means that they should respond with the annual

capacity factor, the heat rating of the subject unit, and whatever --

I forget what the third one was.

Tr. 53.

Similarly, though the three missing items formed the basis for EPA's assertion that a $20,000.00 penalty should be assessed, Mr. Whitney, though presented as an expert in his field as an inspector, did not make the case for demonstrating the importance of including the information with the notice of actual startup. When asked what one of the factors, the annual capacity factor, was, he responded:

A Well, without looking at the regulatory definition of annual capacity factor, it's a ratio of fuels to be combusted throughout the year to something else. I'd have to look at the definition.

Tr. 69

However, the definition was not as complex as his answer suggested. Counsel for Respondent followed up by asking:

Q ... Isn't it true that the annual capacity factor is the ratio of fuel which could potentially be used, the maximum amount of fuel, to the amount of fuel that will actually be used?

A That sounds correct.

Tr. 69.

Even on EPA's questioning on redirect, when directly asked about it, the witness still did not explain the importance of including the missing pieces of information.

Q As an expert in your field as an inspector, why do you think that

notifications are required?

A ...[t]he notification of date of actual start-up, Subpart DB requires those specific elements to be included ... because now the unit has started, and here are the factors. And either something's changed or nothing's changed, but here they are, and the unit is now up and running.

Tr. 72. Thus, the witness offered no information concerning the intrinsic importance behind the missing three pieces of information. Further, it appears that none of the missing factors could be changed from those terms accepted with the permit's approval, as amended, without another permit amendment approval process being undertaken. The witness reiterated that it *is* part of his job to review the permit and the permit's conditions before he inspects a facility. Tr. 73.

Not only was the intrinsic value of the information not explained on this record but it was also clear that no actual harm resulted from their omission in the notice of startup. This was reflected in the testimony of EPA's final witness, Mr. John L. Jones, who was tendered as an expert on air enforcement and the Clean Air Act penalty policy and was the individual who calculated the proposed penalty. Tr. 77. Mr. Jones conceded that, as there was no emission violation, the gravity of the violation was attributable to its duration and the importance to the regulatory scheme of notifying the agency of the missing items from the notice of initial startup. Tr.80. Although asked directly to explain the importance of the reporting and notification for Count I to the regulatory scheme, Mr. Jones' answer *offered no explanation*, stating only that the penalty policy allows a $5,000. penalty for a late report. While he believed he could have treated the turbine and HRSG as separate affected facilities, requiring two notifications, he recognized that, as the units operated together, they should

be considered as a single violation. Tr. 87. Similarly, when discussing Count II, involving the incomplete notification in the actual startup notice, Counsel for EPA asked Mr. Jones to explain the importance of the failure to include the information for the regulatory scheme.

> Q For the next gravity component, what was the importance of the reporting and notification for count two to the regulatory scheme?
>
> A The penalty policy allows for a range of 5,000 to 15,000 for an incomplete notification. And I made a decision, based on the seriousness of this violation, to go with the low end of $5,000.

Thus, at no time did the witness offer any explanation of how the absence of this information impacted the regulatory scheme by setting forth, for example, the importance of the missing information. Instead, the witness merely mechanically followed the penalty policy reciting its mantra that an incomplete notification requires in all instances a minimum five thousand dollar assessment. Similarly, the witness rigidly followed the penalty policy in calculating the actual or possible harm component of the violation's gravity, conceding that, no matter what type of violation is involved, under the policy, the minimum penalty for that aspect is $5,000. Tr.111.

In fact, on cross examination, the witness conceded the relative lack of importance of the missing information in the particular context of this proceeding. Mr. Jones agreed that the only purpose for the missing information is where a facility is claiming an exemption from the Nox limitation. Tr.106. Further, the witness conceded that Respondent's timely, but technically inadequate notification of actual startup, did satisfy one of the purposes of the requirement by starting the clock running for stack testing. Tr. 106. Yet, the witness stated that if Respondent had in fact discussed stack testing with LDEQ prior to providing the notice of actual construction, it still would have had no impact in

his calculation of the penalty when considering the aspect of the importance to the regulatory scheme. Tr. 108.

Other aspects surrounding the Respondent's violation of the regulation also need to be considered. Although the Court has found that the notice, while timely, was deficient in the three particulars cited and that a cross reference to the required information is not sufficient to comply with the regulation, the court cannot robotically end its consideration of the appropriate penalty there. After all, the permitting process that preceded this construction project, began in 1993 and, by August 10th of that year, the Respondent had filed its permit application with LDEQ. From the very outset of that process Respondent declared that the NSPS regulations applied to the HRSG and the gas turbine, that the fuel would be natural gas and listed the design input capacity. EPA exhibit 4, Tr. 120-121. The LDEQ permit for the project, referenced as number PSD-LA-93, issued February 24, 1994, listed, under the specific conditions section of the document, the design input capacity and identified the fuel to be burned. EPA exhibit 6, Tr. 46-47. As of July 8, 1994, LDEQ had approved a change in the permit reflecting that design input hear capacity would be 286.4 million BTUs/hour. EPA exhibit 8, Tr. 48. The same exhibit 8 reflects that the operating schedule would be 24 hours per day, 7 days per week, 52 weeks per year. Tr. 50. EPA's Mr. Bromley did not dispute that under such a schedule, the annual capacity factor would be 100 percent, explaining that the number would have to be calculated but that he did not know how to perform the calculation. Tr. 51. It is also noted that the August 31, 1995 notification of initial startup, as well as prior correspondence from the Respondent, referenced the permit for the project, PSD-LA-93, as well as the Permit Number, 0760-00006-02.

Determination of an Appropriate Penalty

Section 113(e) of the CAA, 42 U.S.C. § 7413(e), provides that when assessing a penalty under section 113 consideration must be given to the following factors:

> (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 . . . 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).

In addition, the Consolidated Rules of Practice governing this proceeding direct the presiding judge to consider any civil penalty guidelines issued under the relevant act, to explain in detail how the penalty to be assessed corresponds to any penalty criteria set forth in the Act involved and, if the presiding officer departs from the penalty proposed by the complainant, to provide specific reasons for any such departure. 40 C.F.R. § 22.27(b). For purposes of calculating penalties for CAA violations EPA applies its Clean Air Act Stationary Source Civil Penalty Policy of October 1991 ("Penalty Policy").

Respondent opposes Complainant's proposed penalty, arguing that based on an application of the statutory penalty factors to the facts of the instant case, no penalty should be imposed. Respondent maintains that Complainant, in calculating its proposed penalty, did not give consideration to all of the statutory factors and misapplied certain of those factors that it did consider.[5] In its view the penalty should be reduced based on its good faith efforts to comply, a

[5]Respondent also maintains EPA's decision to seek imposition of a penalty where LDEQ chose not to seek one constitutes an inappropriate exercise of EPA's overfiling authority and thus an abuse of discretion in the instant case. The fact that Respondent disagrees with EPA's exercise of its prosecutorial discretion is not relevant to the determination of the appropriate penalty here.

statutory factor that Jones testified is encompassed by the Penalty Policy's degree of cooperation factor. Tr. 109. Moreover, Respondent argues that its PSD progress report put the appropriate regulatory authorities on notice that construction of the gas turbine/HRSG had begun, and that its notice of startup was timely and contained a reference to permits which contained the information required by section 60.49b(a). Further, Respondent asserts that its efforts to contact LDEQ to schedule and attend the stack tests were not given appropriate consideration in Jones' penalty calculation. Tr. 138-39. Finally, Respondent adds that it responded to LDEQ's requests for information promptly in both instances[6] (Gov. Exhibits 13 and 17) and that both Bromley and Whitney testified that Respondent was cooperative at all times during their inspections. Tr. 42, 66.

Having considered the applicable penalty guidelines, the Court departs from the analysis of the

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To the extent that Respondent is simply arguing that the facts of this case warrant no penalty, or a lower penalty than that proposed by Complainant, that argument is addressed in the following discussion of the appropriate penalty to be assessed in this matter.

Respondent does not appear to be arguing that Complainant technically overfiled as that term has been used in the line of Harmon cases. See, e.g., Harmon Inds., Inc. v. Browner, 1999 U.S. App. Lexis 22405, *6 (8th Cir. 1999). Overfiling is, at its essence, a claim that a regulated entity is being fined twice for the same conduct by a primary regulating authority and a related authority which derives its authority by a delegation from the primary authority. It is the Court's view that when a delegated authority fails to take any action, an overfiling claim is inapposite. Thus, assuming for the sake of argument that the holding in Harmon, an action arising under the Resource Conservation and Recovery Act, is applicable to the instant case which arises under the CAA, the facts of the instant case do not support an overfiling claim. LDEQ initiated no enforcement action, an essential element of overfiling as it is described in Harmon, against Respondent involving the violations alleged by Complainant in this matter.

[6]The Court does not subscribe to the EPA's view, expressed during the hearing, that International Paper's prompt response, immediately supplying the information requested for what would later become the Counts in this matter, should be viewed as an implicit admission that it had not already provided it. Rather, the Court views the Respondent's response as a reasonable, non-confrontational, approach to LDEQ's request. Rather than stirring a controversy, it decided to provide (in its view again) the requested information, which only required a non-burdensome one page letter for each request.

proposed penalty offered by EPA. By mechanically following its Penalty Policy, EPA's analysis did not fairly take into account the reality of the particular surrounding facts. At the outset, it is noted that Complainant determined, for purposes of penalty calculation, that Respondent derived no economic benefit from its violations, and that, as to violation history, no similar violations had been committed by Respondent.[7] However, its analysis did not fairly consider that the omitted items were cross referenced and that the underlying purpose of the regulation was satisfied, as LDEQ knew there was construction and by the fact that plans were made for stack testing before Mr. Bromley's first inspection. Further, EPA was unable to answer, let alone demonstrate, the impact from the omission of the three items. No explanation of the intrinsic importance of including the

information was offered. Instead, the witnesses spoke in generalities that paper mills generate pollution and consequently there is a need to know of new air sources.

Under the Penalty Policy, the seriousness of the violation factor is broken down into three subcategories – actual or possible harm, size of the violator and importance to the regulatory scheme. Determination of the actual or possible harm caused by a violation involves an examination of the level of a violation, the toxicity of the pollutant concerned, the sensitivity of the environment and the duration of the violation. Jones testified that he assessed a value of zero for the level, toxicity and sensitivity elements because the violations at issue here were not emissions violations and thus presented no actual or potential harm to the environment. Tr. 86; Gov. Exhibit 19.

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[7]In response to Respondent's arguments, Complainant asserted, *for the first time*, in its posthearing reply brief that Respondent is due no reduction under this factor because, it alleges, Respondent has a history of noncompliance which Complainant elected not to introduce earlier in this proceeding. Complainant's untimely (and unproved) assertions concerning Respondent's compliance are rejected as inimical to the hearing process.

The size of the business is not in dispute, leaving the importance to the regulatory scheme as the pivotal factor for evaluating the seriousness of the violation in this case. Respondent engaged in extensive discussions with LDEQ before embarking on construction of its gas turbine/HRSG. These discussions resulted in the issuance of a PSD and state permit from LDEQ which clearly indicated that Respondent's gas turbine/HRSG was subject to NSPS subparts Db and GG. Further, the PSD progress report, while not sufficient to satisfy the requirement of the rule, did inform LDEQ that work was proceeding on the gas turbine/HRSG project.

Respondent had already established through the PSD and state permitting process that its HRSG was subject to subpart Db. While Respondent's notice was incomplete, the missing information was available to the regulatory authorities in Respondent's permits and Respondent ensured that an official from LDEQ attended the stack testing of Respondent's gas turbine and HRSG. Tr. 141, 45; Respondent's Exhibit 4. Moreover, the sulfur dioxide and particulate matter standards noted by Complainant do not apply to Respondent's HRSG because it burns natural gas. Tr. 105.

These facts demonstrate that the purpose of the regulations was to a substantial degree satisfied and that the regulatory scheme was largely unimpaired by Respondent's violations.

As to the duration of a violation, the Penalty Policy provides that the longer a violation goes uncorrected the larger the penalty amount assessed under this factor. For Count II, Jones stated that he chose to treat Respondent's violation as a one day violation.[8] Tr. 89; Gov. Exhibit 23.

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[8]Having dismissed Count I, Respondent's arguments, citing F.C. Haab Co. Inc., Dkt. No. EPCRA-III-154 (Initial Decision June 30, 1998), 1998 WL 422194 (E.P.A.), in opposition to EPA's use of amulti-day penalty are moot, given that Count II was considered a one day violation.

Respondent further objects to the amounts proposed by Complainant under the "duration of the violation" factor, observing that the Penalty Policy states that the longer a violation goes uncorrected the greater the risk of harm (Penalty Policy at 10), and asserts that for a notification violation there is no greater risk of harm to justify a greater penalty.

The record in this case establishes that Respondent cooperated closely with regulatory authorities throughout the process of constructing its gas turbine/HRSG, including during the three inspections that preceded the filing of the complaint in this matter.

Further, Respondent's argument that it made a good faith effort to comply with the initial notice of actual startup rules is credible. Respondent's cross reference to its PSD and state permits does not satisfy the requirements of 40 C.F.R. § 60.49b(a), but the timely submission of the report does show a good faith effort to comply.

Conclusion

Based on the foregoing, it is determined that $3,000.00 (Three Thousand Dollars) is an appropriate penalty amount to be assessed in this case.

Order

For the reasons set forth above, Respondent, International Paper Company is found to have violated 40 C.F.R. § 60.49b(a). For this violation a civil penalty in the amount of $3,000.00 (three thousand dollars) is assessed. As specified in 40 C.F.R. § 22.27, this decision constitutes an Initial Decision which, unless appealed in accordance with that section or unless the Administrator elects to review the same, sua sponte, will become the final order of the Administrator in accordance with

§ 22.27(c).

Respondent shall pay the civil penalty within 60 days from the date of this Order. Payment shall be made by mailing, or presenting, a cashier's or certified check made payable to: Treasurer of the United States of America, U.S. Environmental Protection Agency, and mailed to

EPA Region 6
Regional Hearing Clerk
P.O. Box 360582M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address must accompany the check. Failure to pay the penalty within the prescribed period may result in the assessment of interest on the civil penalty.

William B. Moran
United States Administrative Law Judge

Dated: January 19, 2000