UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
LAKE COUNTY, MONTANA	)	**Docket No. CAA-8-99-11**
	)	
Respondent	)	

Rules of Practice–Motions to Supplement Record and/or Reopen Hearing-Good Cause
Although Rule 22.28, entitled "Motion to reopen a hearing" is in Subpart E, "Initial Decision and Motion to Reopen a Hearing" of the Part 22 Rules of Practice and thus is not applicable to motions to supplement the record and/or reopen the hearing filed prior to the issuance of an initial decision, the requirement of Rule 22.28 that "good cause" be shown as to why the evidence sought to be introduced was not adduced at the hearing was used as a guide in denying Complainant's motions to supplement the record, or alternatively to reopen the hearing, to introduce evidence obtained from a third party under CAA § 114 subsequent to the close of the hearing.

Clean Air Act, § 608-Recycling and Emission Reduction Program-Disposal of Refrigerated Appliances-Remaining Refrigerant
Respondent, the operator of a landfill and the person taking the final step in the disposal of small appliances containing CFC-12, a class I substance, as the refrigerant was obligated by 40 C.F.R. § 82.156(f)(1) to recover " remaining refrigerant" in accordance with Section 82.156(h), or at least check for the presence of refrigerant in the appliances, prior to crushing the appliances for recycling, notwithstanding there was no evidence the appliances in fact contained refrigerant.

Clean Air Act, § 608-Recycling and Emission Reduction Program-Disposal of Refrigerated Appliances-Liability for Penalty
Respondent, the operator of a landfill and the person taking the final step in the disposal of small appliances containing CFC-12, a class I substance, was liable for a civil penalty for failure to evacuate the appliances of remaining refrigerant as required by Section 82.156(f)(1) prior to crushing the appliances for recycling, notwithstanding there was no evidence of an actual release of refrigerant to the environment.

Clean Air Act-Rules of Practice-Burden of Persuasion-Preponderance of Evidence
Evidence held to make it more likely than not, which is a preponderance, that two of six refrigerators referred to in the complaint, which were in a scrap pile prior to being crushed for recycling had not been evacuated of refrigerant (CFC-12) as required by Section 82.156(f)(1) and thus, Complainant had carried its burden of persuasion in accordance with Rule 22.24 of the Rules of Practice that these refrigerators were in violation.

Clean Air Act, § 113 (e)- Penalty Assessment Criteria-
Seriousness of Violation - Penalty Policy
Where penalty computed in accordance with Appendix X, Clean Air Act Civil Penalty Policy For Violations of 40 C.F.R. Part 82, Subpart F, greatly overstated both the risk of an actual release of CFCs to the environment and the quantity thereof, penalty policy was disregarded in determining penalty for violation of Section 82.156(f)(1).

Appearances for Complainant:

Jessie A. Goldfarb, Esq.,
Dana J. Stotsky, Esq.
Senior Enforcement Attorneys
U.S. EPA, Region 8
Denver, Colorado

Appearance for Respondent:

Robert J. Long, Esq.
Deputy Lake County Attorney
Polson, Montana

Initial Decision

The complaint in this proceeding under Section 113 (d)(1)(B) of the Clean Air Act, 42 U.S.C. § 7413(d)(1)(B), issued on September 30, 1999, by the Assistant Regional Administrator, Office of Enforcement, U.S. EPA, Region 8, charged Respondent, Lake County, Montana, with violating regulations at 40 C.F.R. Part 82, Protection of Stratospheric Ozone: Recycling and Emissions Reduction. Specifically, the complaint alleged that the County violated 40 C.F.R. § 82.156 (f) when it failed to: (1) recover the chlorofluorocarbon-12 ("CFC-12") refrigerant that remained in six refrigerators in accordance with § 82.156(h); or (2) verify that the CFC-12 had previously been evacuated from the refrigerators. For this alleged violation, Complainant proposed to assess the County a penalty of $36,000.

The County answered, denying, inter alia, knowledge of the allegations and of the alleged violations (Answer, dated October 25, 1999). The County denied liability for any "penalty" and requested a hearing.

After pretrial proceedings, which included Complainant's responses to the County's requests for admission, a hearing on this matter was held in Polson, Montana on September 14 and 15, 2000.

Based upon the entire record including the proposed findings and conclusions of the parties, I make the following:

Findings of Fact[1/]

1. Respondent, Lake County, is a county created by or pursuant to the laws of the State of Montana and is thus a "municipality" and a "person" as defined in CAA § 302 (f) and (e).

1. The County operates a landfill located at 3500 Kerr Dam Road, Polson, Montana. Although the County has admitted paragraph 1 of the complaint which alleges that the landfill is located in Polson, Montana, it seems unlikely that it is within the Polson city limits and also on the Flathead Indian Reservation (infra, finding 3). Moreover, it is noted that the County's proposed findings of fact state that the location [Post Office address] of the landfill is as above.

2. On May 18, 1999, the landfill was inspected by Ms. Betsy Wahl, an environmental protection specialist employed at the Montana Office of the U.S. EPA, Helena, Montana, accompanied by Mr. Lewis McLeod, air quality technician for the Confederated Salish and Kootenai Tribes of the Flathead Nation (Tr. 22, 27; Inspection Report, C's Exh 1). Ms. Wahl testified that she was on the Flathead Reservation that day to investigate a complaint regarding an asphalt plant located in St. Ignatius, Montana (Tr.26). She explained that she kept a list of landfills and when she was in the area performed what she referred to as a

[1/] Proposed findings not accepted are either rejected or considered unnecessary to the decision.

"Title VI inspection", which is the subchapter concerning protection of stratospheric ozone in the Clean Air Act. She was accompanied by Mr. McLeod, because for safety reasons she did not do inspections alone and because she wanted an "extra set of eyes and ears. "Mr. McLeod indicated the Lake County landfill was on the Flathead Indian Reservation and that he always accompanied EPA inspectors on inspections on what he referred to as a "federal reserve". [2/]

3. Ms. Wahl estimated that they arrived at the Lake County landfill between 9:00 and 10:00 in the morning (Tr.28). This is confirmed by the inspection report, which she prepared on June 3, 1999, which reflects that the inspection began at approximately 9:10 AM at the check-in station to the landfill (C's Exh.1). After presenting her credentials to the landfill monitor at the check-in station, she asked to see the landfill manager. Ms. Susan Brueggeman, Solid Waste Program Manager for the County, is not located at the landfill. Contacted by phone, however, Ms. Brueggeman gave permission for the inspection and suggested that Mr. Jim Jones, landfill operator, be contacted for any questions regarding refrigerant management and disposal at the landfill (Tr.29, 30).

4. After meeting Mr. Jones, Ms. Wahl and Mr. McLeod were shown refrigerant recovery equipment which is housed in a shed located at the landfill. The recovery equipment was manufactured by White Industries, Model No. 01620LU, and was designed to handle R-12, R-22, R-500 and R-502 refrigerant. Although it

[2/] Tr. 104, 110. Mr. Long, counsel for the County, was skeptical of Mr. McLeod's assertion that the landfill was on tribal land (Tr. 114-15).

is not clear, information as to the refrigerant the equipment was designed to extract apparently came from the nameplate or Mr. Jones. [3/] There was one almost empty recovery container of approximately 30 # capacity, which Ms. Wahl testified was located under a relatively dusty table (Tr.31). The container bore a label which indicated that it was owned by Johnstone Supply, followed by a phone number (Inspection Report). Ms. Wahl stated that there were cobwebs surrounding the container which gave the appearance that it had not been used in the recent past (Tr.31). The inspection report quotes Mr. Jones as stating that he was unaware of how often recovered refrigerant is shipped off-site or when the last shipment occurred.

5. Mr. Jones is reported to have explained that every three or four months or when there are a large number of appliances in the staging area, the recovery equipment is loaded onto a truck and the refrigerant is recovered from the appliances. The appliances are then labeled or painted with a red "X" and moved to the metal pile for recycling. Ms. Wahl and Mr. McLeod then proceeded to the " Refrigerated Appliance"staging area where appliances are stored prior to recovery of refrigerant or verification that the refrigerant had been removed. Although the inspection report indicates that photographs-a Photograph Log and 15 photographs are among attachments to the inspection report - of the staging area and of the metal pile were then taken, Ms. Wahl testified that the photos were

[3/] Tr 41. Mr. Bruce Agrella, identified infra finding 19 , testified that because all of the recovered refrigerant was treated as contaminated or "junk", the type of refrigerant the extractor was designed to extract was not a concern (Tr. 232-33).

actually taken on their second trip to the landfill after obtaining Mr. McLeod's personal camera from his house (Tr.56, 57).

6. The metal pile, which contained numerous crushed appliances, was then inspected. At least six refrigerators were identified in the metal pile that appeared to have refrigerant charges in tact, i.e., there was no evidence of removal or evacuation of refrigerant. All of the refrigerant hoses and lines appeared to be intact and none of the refrigerators showed any evidence of having been painted or marked with a large X. Although it appears that there were many more than six refrigerators or refrigerated appliances in the pile, there is no testimony as to the condition of these appliances, i.e., were the lines open or disconnected, were the compressors attached, did these appliances show evidence of evacuation. or were these appliances considered to be simply inaccessible. Ms. Wahl testified that Lewis and I looked as closely as we could at all exposed surfaces [of refrigerators] in the pile (Tr.51). When questioned about this circumstance, Mr. Jones stated that he was unaware that the refrigerators in the metal pile had not had the refrigerant removed. The initial site visit, having taken about 30 minutes, concluded at approximately 9:40 AM.

7. There is no evidence in the record of the distance between the landfill and the Lake County offices in Polson. See finding 3. The inspection report, however, states that at approximately 10:00 AM., Ms Wahl and Mr. McLeod went to (not arrived at) the Lake County offices in Polson to meet Ms. Susan Brueggeman, Solid Waste Program Manager for the County. After presenting her credentials,

Ms. Wahl presented a verbal summary of the inspection and asked for a copy of the County's policy on the removal of appliance refrigerants. Ms. Brueggeman stated that she would obtain information on the most recent shipment to the recycler and is reported to have stated that the landfill does not keep records on each appliance received and that no log exists on the recovery of refrigerants from appliances at the landfill. The interview is reported to have concluded at approximately 10:30 AM.

9. Attachment A to the inspection report is a document entitled "POLICY"[4/]

Lake County Solid Waste Management District
Removal of Appliance Refrigerants

It is the policy of the district that refrigerated appliances are handled as follows at the Lake County Landfill:

1. The landfill monitor will require that all refrigerated appliances be placed in the 'Refrigerated Appliance' area.

2. Refrigerated appliances brought in by county container trucks must be pulled from the waste and delivered to the area by landfill personnel/equipment. Container sites are posted prohibiting the disposal of refrigerated appliances in order to avoid damage to the refrigerant system that may occur during dumping.

3. On a periodic basis, program personnel will check the appliances for refrigerants. Those containing refrigerants will be evacuated with EPA-approved equipment and techniques to minimize the loss of gases to the atmosphere.

4. Once an appliance is determined to be free of refrigerants, a large 'X' is painted on the appliance and it is taken to the metal pile for recycling.

5. Refrigerant gases are evacuated into a tank; once full the tank is delivered

[4/] This "Policy"statement is also Exhibit 2 in a binder of Complainant's prehearing exhibits numbered from 1 through 12. However, only Exhibit Nos. 1, 2, 4 and 12 are in evidence.

to a refrigerant recycler.

The Policy is dated August 1995 and was signed by Susan K. Brueggeman, Solid Waste Program Manager and by Paddy R. Trusler, Administrator, Lake County Land Services.

10. Ms. Wahl and Mr. McLeod returned to the Landfill at approximately 11:15 AM to take the photos as outlined in the Photograph Log. Photograph Nos. 1 and 2 are overviews of the landfill with the scrap pile in the right foreground and the refrigerated appliance staging area at a higher elevation in the background (Tr. 35, 36). Photo Nos. 3, 4, and 5 are close-ups of appliances in the staging area prior to refrigerant removal. Ms. Wahl stated that the scrap metal pile contained numerous "white goods", that is washers and dryers, etc. in addition to refrigerated appliances (Tr.36, 37). She described the scrap metal pile as containing partially crushed appliances and pieces of scrap metal. The scrap metal pile is depicted in Photo Nos. 6, 7 and 15 from which it appears that the great majority of appliances in the pile were refrigerated. Photo Nos 8 through 13 allegedly depict refrigerators in the scrap pile with the refrigerant charge intact. Ms. Wahl testified that the compressor units were still attached and that the lines appeared to be intact (Tr. 47). She stated that there was no evidence of removal or evacuation of refrigerant that she could see. Additionally, she testified that there were no red X's on any of the appliances in the scrap pile and that there were no X's on any visible surface of the six refrigerators referred to in the complaint (Tr. 47, 51).

11. Under cross-examination, Ms. Wahl acknowledged that she had no information

that the County had failed to take all refrigerated appliances to the staging area.[5/] She insisted, however, that the County's action in developing a policy on how to recover refrigerant from appliances and then failing to follow the policy provided credible evidence that the County did not recover refrigerant. Under further cross-examination, she acknowledged that she was greatly influenced by the fact that she did not see any X's on any of the appliances in the scrap metal pile (Tr.68-70). She explained that because the scrap metal pile was the first area observed when driving into the landfill, the lack of an "X" could mean that a member of the public had delivered a refrigerated appliance to the pile rather than the staging area. She identified Photo Nos. 6 and 7 as intended to show the lack of "X's" on appliances in the metal pile (Tr. 71). The photos, however, depict more than two sides of only a small number of appliances in the foreground and on these only a portion of a third side is visible. Ms. Wahl reiterated, however, that they walked around the pile several times, that they were "up on the pile", that they looked as closely as they could at the pile and saw no X on any of the appliances (Tr. 72, 73).

12. Asked if there were means other than leaving a cut or crimped line to evacuate a

---

[5/] Tr. 64-66. Ms. Wahl testified, however, that at other landfills in Montana which she had inspected appliance repair shops were permitted to bring appliances which were no longer functional to landfills and that these landfills maintain records of the appliances and the repair shops from which the appliances were received (Tr. 66, 67). A memorandum from Ms. Brueggeman, dated October 6, 1999, subsequent to the County's receipt of the complaint, states that appliance repair businesses may only bring appliances to the landfill which have been evacuated and that this is reflected by the appliance being spray painted with a large "X"(C's Exh 4). There is, however, no evidence that appliance repair shops or businesses brought appliances to the landfill.

refrigerator, Ms. Wahl replied that the recovery equipment used by Lake County makes a small hole in the refrigerant line to recover refrigerant from that appliance (Tr. 84). Respondent's Exhibit No. 1 is a piece of approximately 3/16" diameter copper tubing approximately 3 1/2" in length with the larger of two holes reportedly made by the type of refrigerant recovery equipment used by the County. Ms. Wahl was unable to identify which hole was made by the County's recovery equipment .[6/] Asked how then was she competent to testify that the six refrigerators in the metal pile referred to in the complaint had not been evacuated, she replied that both she and Lewis [McLeod] looked closely at the refrigerant systems in the appliances, looking for any bends or buckles in copper tubing similar to Respondent's Exh No.1 and any tears or rips in the line. Asked whether it was her testimony that she would have found the holes, she reiterated that [they] looked closely at the six refrigerated appliance systems and saw no holes (Tr.86). She estimated that holes [in lines on the appliances, if they existed], could have been seen from a distance of a couple of feet. Questioned as to whether Photo Nos. 8 through 13 showed that the County did not evacuate the refrigerators depicted in the photographs, she stated that the photos were taken to document the refrigerated appliances which, upon inspection, showed no indication that the refrigerant had been removed (Tr.88, 89, 90, 91). She made

[6/] Tr. 85. Although the County moved for the admission of its Exhibit No.1 (Tr.308), the record does not contain an express ruling on that motion. Exhibit No. 1 was, however, treated as if it were in evidence and in order to eliminate any doubt, Respondent's Exhibit No. 1 is admitted into evidence.

no claim that the photos captured the fact that the appliances had not been evacuated.

13. The final factor relied upon Ms.Wahl to support her conclusion that the six refrigerators referred to in the complaint had not been evacuated was that there was no evidence of disposal [of recovered refrigerant] (Tr. 91, 92). She emphasized that she had asked for information on disposal from Susan Brueggeman and Jim Jones at the time of the inspection, but had not received any such information. Asked what information she was looking for, she replied an invoice, a statement or any records, even though she acknowledged that the County was not required to maintain records of refrigerant disposal (Tr. 93, 94).

14. Asked how she determined that the six refrigerators referred to in the complaint contained CFC-12, Ms. Wahl replied that her determination was based on her experience in performing inspections and upon the appearance of the appliances (Tr.40) She explained that appliances manufactured prior to 1995 primarily contained CFC-12 and that the colors of the appliances depicted in the photos were not the colors of appliances that people use in their homes today. She testified that the phase-out of ozone depleting refrigerants, including CFC-12, became effective December 31, 1995 (Tr.41) The preamble to Subpart F-Recycling and Emission Reduction- states that there are an estimated 159 million household refrigerators and freezers currently in operation all of which use CFC-12, 58 Fed Reg. 28660 at 28665 (May 14, 1993).

15. Mr. McLeod testified that he was looking for three different things when he

inspected the metal pile for evidence that refrigerant had previously been recovered from the refrigerators (Tr. 112, 113). The first and most obvious was [whether] the lines had been cut and crimped and folded back which would indicate that the system had been evacuated. The second thing was whether the valve on the high side of the compressor would have been in some way relieved and the third thing was whether there were any holes in the lines. He described holes [made by the recovery equipment] as larger than pinholes and readily available [visible]. He testified that he saw no cuts or crimps and that, although he looked at the lines at the highest point in the system and down by the compressor and the gas bypass lines, he found no holes. He said that the caps were still on the valves of the two refrigerators which he closely inspected.

16. Mr. McLeod limited his close inspection to two refrigerators, because he considered that it was unsafe to be climbing [on the pile] and because the other refrigerators were inaccessible unless the refrigerators were turned in some way (Tr.113-14, 117). He emphasized that he could only testify to the absence of "pinholes" on the two refrigerators which he closely inspected. He opined, however, that these two refrigerators were representative of refrigerators in the pile. Despite Mr. McLeod's concerns as to the safety of climbing on the pile, Mr. Jones, infra finding 24, testified that he saw Ms.Wahl "up on the scrap pile" in the afternoon [morning of May 18, 1999] (Tr. 267), and thus confirmed her testimony (finding 11) that she was "on the scrap pile".

17. In further testimony, Mr. McLeod stated that he ran his hand along an accessible

portion of the copper tubing on the two refrigerators which he closely inspected (Tr.115, 119). He indicated that the [extraction] device would leave abrasions on the tubing, but did not specifically testify that he found no such abrasions. Nevertheless, he was confident that he was feeling the original intact lines on these refrigerators, because a damaged [punctured] line would have been dented (Tr. 123). There is a dent on the copper tubing opposite the hole made by the extraction equipment (R's Exh 1). Mr. McLeod identified the refrigerators which he closely inspected as shown in Photo Nos.7, 8 and 15 (Tr. 120-23). Although Photo No.7 was taken to depict the scrap pile rather than any particular refrigerator, he testified that one of the two [white or off-white], damaged refrigerators shown on the right hand side and slope of the scrap pile in the photo as a refrigerator which he closely inspected. Photo No. 8 shows a portion of the open back of a refrigerator, the back panel having been removed. Visible in the photo are what appear to be the motor and fan blades, the compressor and intact copper tubing. Although Mr. McLeod was not able to identify the location of this refrigerator with reference to photos of the scrap pile, dead weeds or other vegetation are visible which indicate that this refrigerator may have been in that location for an extended period of time.[7/] After some hesitation, he identified a white or off-white refrigerator lying at an angle on the left of the scrap pile in Photo No. 15 as the second of the two refrigerators which he closely inspected

[7/] It is noted, however, that Mr. Agrella testified that they were constantly [frequently] using the loader or the Cat [bulldozer] to push the pile higher and steeper to make more room for "white goods" (Tr. 235).

(Tr. 122-23). Although this refrigerator appears to be largely open, it is not clear whether the open side is the front or back, and no lines or tubing are visible in the photo.

18. Mr. McLeod testified that the valves on the two refrigerators which he closely inspected had caps (Tr.124). He explained that these caps were similar to caps on tire valves and that evacuating the system through the valves was the normal way for repair facilities which have a vacuum pump to remove the refrigerant (Tr. 124-25, 126-27). He acknowledged that the fact the valves had caps did not necessarily mean that the appliances had not been evacuated and that the two refrigerators which he closely inspected could have been evacuated through the valves (Tr. 119, 126). He reiterated that the lines on these two refrigerators were the only refrigerator lines concerning which he could say with confidence were lacking in "pinholes" (Tr. 125).

19. Mr. Bruce Agrella referred to his job, which he has held for 20 years, as the Lake County Solid Waste Foreman. He stated that in practice "I oversee and do all that's up with Lake County solid waste and transportation." (Tr.223). Although he was working on May 18, 1999, he was not at the landfill that day and has never met Ms. Betsy Wahl, the EPA inspector. He explained the landfill's policy with respect to refrigerated small appliances as to take them "up on the hill" or "staging area", check them for Freon and evacuate the Freon, mark them and move them down for disposal (Tr.224-25). He estimated that this was performed four to six times a year (Tr.226). He described the extractor as requiring a

generator to generate electricity to operate and a crimping tool [connected to a hose which leads to the extractor and a tank] which clamps on and punctures the refrigerator line (Tr. 228). He identified the larger of two holes in the piece of copper tubing (R's Exh 1) as having been made by the crimping tool (Tr. 229-30). By means of a mercury vacuum pressure gauge, the extractor informs the operator whether there is any [refrigerant] in the system. Mr. Agrella estimated that only ten to 15 percent of the refrigerators had any pressure at all and that only a small portion of these were fully charged.

20. Describing the process after the initial pressure check, Mr. Agrella testified that you "(t)urn the machine on and [it] completes the cycle" (Tr. 231). He stated that when it gets down to three, four inches of mercury vacuum, the machine shuts off automatically, we remove the equipment, put an X [on the refrigerator], and go to the next one. He pointed out that the purpose of marking was so that the operator [of equipment moving the refrigerators to the scrap pile] would know that a refrigerator could be removed [because it had been checked or evacuated], and that they did not have any criteria as to how big the mark had to be, which depended on the space available (Tr. 231-32). He explained the fact that Betsy Wahl and Lewis McLeod did not see any X's on refrigerators in the scrap pile by noting that the scrap pile had been there for a year, that landfill personnel had used a fluorescent orange paint for marking and that the sun had faded the paint to non-detectable (Tr. 234, 236-37). It would seem, however, that the fact appliances in the pile were moved in the process of consolidating and making the

pile more steep (supra note 7) would make it more likely that an X or some part thereof would be visible on an exposed surface of an appliance, while at the same time making it less likely that the exposure to the sun would be of sufficient duration to make the X non-detectable.

21. Mr. Agrella was quite certain that the scrap pile had been there a year, because the man who had the contract to crush and bail scrap material had been having trouble with his equipment and was behind schedule (Tr. 239-40). He indicated that the man and his equipment were at the landfill for two and a half months in 1999 and that for some of that time "he was broke down." In other testimony, however, he stated that he did not know how long it had been since a refrigerator from the staging area had been added to the scrap pile and that the last load by the operator of the crushing equipment [prior to May 18, 1999] had gone out [from the landfill] on February 9, 1999 (Tr. 237-39). Nevertheless, he testified that he could tell that the refrigerators in the scrap pile observed by Betsy Wahl and Lewis McLeod had been there a year by the way it, the pile, was located (Tr. 238). He observed that anything recently added to the pile would have been on the outer edges and that at that stage, [appliances in the pile] would have been handled and re-handled (supra note 7).

22. Mr. Agrella testified that material in the extractor tank is disposed of when the machine shuts off and indicates that the tank is full (Tr. 240). He stated that the landfill had two tanks and that when one is full, he takes it down for disposal and they give me the other tank and he puts it back in service. He estimated that he

had disposed of a tank [of CFC's] a month or six weeks prior to the EPA inspection and dismissed the cobwebs on the tank observed by Ms. Wahl by the assertion that "....you can make cobwebs in a day or two" (Tr. 240-41). He explained that he knew that the tank had not been used, because he had brought the tank back and put it [in the shed] and they had not performed any extractions between that time and the EPA inspection on May 18, 1999 (Tr. 242). Mr. Agrella testified that he had brought the tank down to a refrigerator place (Schulz Refrigeration) in town (Polson) and that he had always done that. He did not ask for or obtain a receipt because none was required.

23. Under cross-examination, Mr. Agrella had no other explanation than that the paint had faded for the fact that X's were not visible on the refrigerators in the scrap pile referred to in the complaint (Tr.257). He asserted, however, that he honestly felt that there was an X somewhere on [those refrigerators]. Closely examining photos of refrigerators in the record, he acknowledged that he could see neither X's, vestiges nor residues thereof (257-58, 262).

24. Mr. James Jones described himself as a heavy equipment operator at the landfill (Tr. 266). He testified that he first met Ms. Wahl when she came to the landfill [on May 18, 1999] and wanted to see the equipment used to extract Freon (Tr.267). He denied being asked any questions [by Ms. Wahl] relating to the disposition of recovered refrigerant or for any records relating thereto He said that they could have moved a refrigerator from the scrap pile to make it more accessible, but that they were not asked to do so (Tr. 269-70). Although Mr.

Jones testified that Craig Elverud and occasionally Bruce Agrella also performed extractions [at the staging area of the landfill], he indicated that he (Jones) performed by far the greater number (Tr. 271). He could not recall when the last extractions were performed prior to May 18, 1999, but estimated that it was within four to six months. He emphasized that the only movement of refrigerators to the scrap pile was shortly after the refrigerators were evacuated. He described the paint used to mark refrigerators after evacuation as a cheap, red paint similar to that used by surveyors to mark grade stakes (Tr. 271-72). In other testimony, he stated that he used red paint, yellow paint or whatever happened to be handy [when he ran out of red paint] (Tr. 281).

25. Where the X's were placed on the refrigerators depended on how the refrigerators were laying (Tr. 274). Although Mr. Jones testified that previous to the EPA inspection [and this case] he had not been aware of problems with fading paint , he stated that he was not concerned with [whether X's were visible] when he was moving the refrigerators from one to three days after he [personally] took care of the evacuation (Tr. 282). This is also a possible or likely explanation for the presence of apparently unmarked refrigerators in the scrap pile.

26. Mr. Jones testified that on rare occasions he had observed persons delivering [discarded] refrigerators to the scrap pile rather than to the staging area (Tr. 277, 282-83). When that happened, he retrieved the refrigerator and took it to the staging area which he referred to as Section D. He described the tool used to puncture tubing [to evacuate or check for the presence of Freon] as a "vice

grip"(Tr. 276). He stated that the hole [made by the vice grip] was as depicted by the piece of copper tubing (R.'s Exh 1), that the vice grip was attached wherever "you could get it in there" [to grip the tubing] and that, unless you looked [very closely] you would not see the hole. In further testimony, he explained that there was a rubber boot on the needle of the vice grip [to prevent Freon from escaping] and that the vice grip was connected to a hose to the evacuation machine (Tr. 278-79).

27. Under date of April 11, 2000, the County resubmitted requests for admission which had been submitted during the ADR process and to which Complainant had declined to respond. After considering Complainant's objections, Complainant was ordered to respond to Request Nos. 1 through 6 (Order, dated June 28, 2000). Request No. 1 asks Complainant to admit that none of the refrigeration systems on the refrigerators depicted in Photos 8 through 13 was tested to determine whether they were charged in excess of four inches of mercury vacuum and Request No. 2 asks the same question with respect to the six refrigerators referred to in the complaint which allegedly had refrigerant lines in tact, i.e., there was no evidence of removal or evacuation of refrigerant. Request No. 3 asks Complainant to admit that, with respect to the refrigerators referred to in Request No. 2, which allegedly had refrigerator lines and hoses in tact, these lines and hoses were not inspected to determine the presence of a hole 1/16th of an inch in diameter. Request No. 4 asks Complainant to admit, with respect with respect to the allegation that none of the refrigerators in the metal pile were painted with a

large “X”, that the original intact surface of each of the four sides and the original intact surface of the top and bottom of each of these refrigerators were not inspected. Request No. 5 asks Complainant to admit that no testing of refrigerators referred to in the complaint was performed to determine the presence of Chlorofluorocarbon-12 and Request No. 6 asked Complainant to admit that it did not determine whether the refrigerators referred to above were or were not evacuated of refrigerant when they were received at the County’s facility. Complainant’s response, dated July 12, 2000, admitted Request Nos 1, 2, and 5 and denied with qualifications Nos. 3, 4, and 6. Upon motion by the County, Complainant was ordered to file an amended answer to the request for admissions (Order, dated August 24, 2000). Complainant did so under date of August 19, 2000, maintaining its qualified denial of Request Nos. 3, 4, and 6. However, at the hearing Complainant retracted its previous denial of Request No. 6, admitting that request (Tr. 7).

28. On November 30, 2000, Complainant moved to supplement the record to include an Agency request, dated September 22, 2000, for information to Schulz Refrigeration pursuant to CAA § 114(a)(1) and Schulz’s reply thereto, dated October 10, 2000. Information Schulz Refrigeration was asked to furnish included “(a)ll records and information on quantities of used (recovered) refrigerant received for the years 1998, 1999, and 2000.” Schultz’s reply, signed by Mr. Richard L. Schulz, stated, among other things, that it had received three pounds 10.25 oz. of used refrigerant from the Lake County Landfill on March 19,

1999, and 12 oz. on August 24, 2000.[8/] While it would seem that this precise information is, of necessity, based on records maintained by Schulz Refrigeration, the reply does not so state. Moreover, although the request asked for "all records and information" no such records were included or referred to in the reply. The motion points out that Mr. Richard Schulz was among expected witnesses listed in the County's prehearing exchange and that Mr. Schulz was in the courtroom during the hearing.

29. Unsurprisingly, the County has opposed the motion , arguing that Rule 22.28 applies only after an initial decision has been issued and that inasmuch as no initial decision has been issued, there is no authority for Complainant's motion, that there appears to be no [sound] reason for Complainant's failure to produce Mr. Schulz's testimony at the hearing and that Complainant is attempting to introduce evidence obtained by compulsion from a non-party without notice to the County after the period for discovery, prehearing exchange and the trial of this matter (Response to Motion to Supplement the Record, dated December 11, 2000). Attached to the response is a statement on the letterhead of Schulz Refrigeration, dated April 4, 2000, signed by Mr. Richard Schulz, to the effect

---

[8/] Although. Ms. Wahl estimated the amount of refrigerant in the refrigerators at issue here at five pounds each (Tr.187), the preamble to the regulation states that the quantities of refrigerant for each unit in the household refrigeration [refrigerators and freezers] category are quite small, ranging from six ounces to one pound of CFC-12 , 58 Fed. Reg.28860, 28665 (May 14, 1993) See also Exhibit 3-1, Phaseout Regulatory Impact Analysis: Compliance with Section 604 of the Clean Air Act for the Phaseout of Ozone Depleting Chemicals (1992) at 3-2, which indicates that charge sizes for household refrigeration range from 0.19-0.44 kg. In view of this data, Ms. Wahl's estimate is erroneous and is not accepted.

that the Lake County Solid Waste Program delivers evacuated refrigerants from its extraction program at the County landfill to this business for recycling and that to the best of his recollection Lake County delivered a full extraction tank to this business in February or March of 1999. This statement purports to be based on the fact that on March 25, 1999, Bruce Agrella of the County program purchased hose for the County's extraction equipment and refers to an attached copy of receipt [sales ticket], which is not attached to the copy of the statement in the record. The statement goes on to say that at the same visit, he (Agrella) picked up the County's emptied tank for use in the landfill's recovery program The County asserts that either Mr. Schulz's statement of April 4, 2000, or his statement of October 10, 2000, is false and that, consequently, Mr. Schulz is not a reliable source of evidence.

30. Complainant filed a reply to the County's response to the motion to supplement the record under date of December 22, 2000, attaching thereto a motion to reopen the hearing in the event its motion to supplement the record was denied. The County filed a response to this motion under date of January 2, 2001, arguing, among other things, that Mr. Schulz is not a credible witness and that even if his evidence were assumed to be true, it does not aid Complainant's case, because no one knows whether the six refrigerators referred to in the complaint contained "remaining refrigerant."[9/] For the reasons set forth infra, Complainant's motions

---

[9/] Tr. 40. Ms. Wahl testified that she and Mr. Mcleod, did not check refrigerators in the scrap pile for refrigerant, because neither EPA or the Tribe have test equipment (Tr.40). Moreover, the prohibition on the venting of CFCs to the environment applies to EPA personnel

to supplement the record, or alternatively to reopen the hearing, will be denied.

31. Ms. Betsy Wahl explained the calculation of the proposed penalty (Tr. 172-73). For this purpose, she used Appendix X of the Clean Air Act Stationery Source Civil Penalty Policy , a copy of which was attached to the complaint and of which official notice is taken, and which is entitled in part " Clean Air Act Civil Penalty Policy For Violations of 40 C.F.R. Part 82, Subpart F." Among factors which the statute (CAA § 113(e)) requires be considered in determining a penalty are the "..... economic benefit of non-compliance, and the seriousness of the violation." The economic benefit from non-compliance was determined to be less than $500 and in accordance with the penalty policy, hereinafter Appendix X, the proposed penalty as calculated did not include an amount for economic benefit (Tr. 175-76; Statement As To Determination Of Proposed Penalty, C's Exh 12, at 2).

32. The next factor considered in determining the proposed penalty was the seriousness of the violation, which in accordance with Appendix X corresponds to gravity (Tr.176). Appendix X provides that the portion of the penalty for the violation reflecting gravity or potential for harm should be based on two factors: 1) the risk of actual loss of refrigerant to the environment [and] 2) the importance of compliance to the statutory or regulatory scheme (Id.4). Ms. Wahl testified that she choose the moderate category for the risk of loss of refrigerant to the environment and major for the importance of compliance to the statutory or

---

as well as to employees of the County and they would have been obligated to recover and properly dispose of any CFCs released in the course of such testing.

regulatory scheme (Tr. 178-79). She chose the moderate category for the risk of loss of refrigerant because, in accordance with Appendix X, she considered that there was a significant risk of such loss to the environment (Tr.188-89). She quoted from Appendix X which provides at 4 that a larger penalty is appropriate for class I chemicals because of their greater potential for ozone depletion and she testified that CFC-12, the refrigerant involved here, is a class I chemical (Tr.180, 186-87).

33. Ms. Wahl testified that, in considering the importance of compliance to the statutory or regulatory scheme, she followed Appendix X which provides that "(t)he failure to follow required practices in § 82.156" is among violations in the major potential for harm category (Id. 5; Tr.183-85). Additionally, she emphasized that she chose "major", because she found no evidence that refrigerant had been recovered from the six appliances in the scrap pile (Tr. 190). She pointed out that Appendix X also provides that, if analysis of the two factors constituting potential for harm [i.e., risk of loss of refrigerant to the environment and importance of compliance to the statutory or regulatory scheme] results in two different designations, the more serious designation should be used (Id. 6; Tr 184-85).

34. Plugging a major potential for harm and a major extent of deviation from the requirements into Matrix 1 of Appendix X resulted in a penalty of $15,000 for the first noncomplying refrigerator (Id.7; Tr. 185-86). Ms. Wahl then used Matrix 2, the matrix for multiple violations, in Appendix X to calculate the penalty for

the other five allegedly noncomplying refrigerators. A major potential for harm and a major extent of deviation from the requirements applied to this matrix yields a penalty of $3,000 each for these refrigerators or a total of $15,000 (Id.8; Tr.186). Although Appendix X provides that the penalty is to be scaled to the size of the violator, no such multiplier or adjustment factor was applied here because Lake County is a public entity (Tr. 190-91). Ms. Wahl did, however, adjust the gravity component of the penalty upward by 20 percent to reach the total of $36,000, because by developing a policy on the handling of refrigerant [with which it failed to comply], the County demonstrated that it was well aware of the requirements of Section 608 of the Clean Air Act and of the applicable regulations (Tr. 191).

35. Ms. Wahl testified that the County had not raised any issue concerning ability to pay nor had Complainant received any financial records [from the County] to date (Tr. 191-92). Because this was her first inspection of the Lake County landfill under Section 608 of the Clean Air Act, there were no payments of penalties by the County for the same violation to consider. She stated that she saw no evidence of good faith efforts to comply, that the duration of the violation was one day or one time for each appliance and that she found no " other factors as justice may require" [to consider] in determining the penalty (Tr.192-93).

Conclusions

A. Complainant's motions to supplement the record so as to receive the Agency's information request to Schulz Refrigeration, dated September 22, 2000, and

Schulz's reply thereto, dated October 10, 2000 or, alternatively, to reopen the hearing to hear Mr. Schulz's testimony, are denied.

B. The record shows that the refrigerators referred to in the complaint used a class I substance, i.e., CFC-12, as the refrigerant. The County's obligation to recover "remaining refrigerant" in accordance with Section 182.56(f)(1) from small appliances containing class I or class II refrigerants received for disposal exists irrespective of whether the appliances are shown to have contained any refrigerant.[10/]

C. Complainant has failed to carry its burden of persuasion that four of the six the final step in the disposal process of a small refrigerators in the scrap pile referred to in the complaint had not been evacuated, or checked for the presence, of refrigerant (CFC-12). The evidence does, however, make it more likely than not, which is a preponderance, that the two refrigerators in the scrap pile which were closely inspected by Mr. McLeod were not evacuated or checked for the presence of refrigerant (CFC-12).

D. The County may be assessed a civil penalty for failure to evacuate small appliances of remaining refrigerant as required by Section 82.156(f)(1) prior to crushing for recycling, notwithstanding there is no evidence that refrigerant (CFC-12) was actually released to the environment.

[10/] Section 82.152 states that *small appliance* means any of the following products that are fully manufactured, charged and hermetically sealed in a factory with five (5) pounds or less of refrigerant: refrigerators and freezers designed for home use, room air conditioners (including window air conditioners and packaged terminal air conditioners), packaged terminal heat pumps, dehumidifiers, under the counter ice makers, vending machines, and drinking water coolers.

E. An appropriate penalty is the sum of $6,000.

Discussion

A. Complainant's Motions To Supplement the Record or Alternatively, To Reopen The Hearing.

At the outset, it is necessary to address the standard which should be applied in deciding Complainant's motions to supplement the record or alternatively, to reopen the hearing in light of the fact that an initial decision has not been issued. Rule 22.28 essentially provides that a motion to reopen the hearing to take additional evidence shall be filed no later than 20 days after service of the initial decision and shall show good cause why such evidence was not adduced at the hearing.[11/] In Commercial Cartage Co., 1997 CAA LEXIS 15, at * 61 (E.P.A.), it was held that a motion to reopen the record prior to the issuance of an initial decision would be addressed at the ALJ's discretion under Rule 22.16 "Motions" rather than under Rule 22.28. The decision in F.C. Haab Company, Inc.., 1997 WL 821114 (E.P.A.), however, disagreed with that conclusion, observing that there was nothing in the language of Rule 22.28 that would limit its application to the 20- day period following the issuance of an initial decision. While that observation is accurate, it overlooks the fact that the Part 22 Rules of Practice are divided into subparts, Rule 22.28 being in Subpart E, entitled "Initial Decision and Motion to

[11/] Rule 22.28, entitled "Motion to reopen hearing" provides: (a) Filing and content. A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: state briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why the evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

Reopen a Hearing." Moreover, circumstances may readily be envisaged where disposition of the motion clearly would or should be at the ALJ's discretion, e.g., if the motion to reopen were made after the parties had rested, but prior to adjournment or, if the motion to reopen were made after adjournment, but while counsel and the parties were in the court room or readily available. It is concluded that Chempace Corporation, Order Granting Motion To Supplement Record, 1998 WL 846736 (E.P.A.), cited by Complainant, sets forth the proper rule in instances where a motion to reopen the hearing or to supplement the record is made prior to the issuance of an initial decision. Chempace recognized that the standards of Rule 22.28 were not strictly applicable, but were useful guidelines.

Here, Complainant has moved to supplement the record to include a request for information pursuant to CAA § 114(a)(1) served on Schulz Refrigeration subsequent to the hearing and Schulz's response thereto. The request was served on Schulz because Mr. Agrella testified that is where he delivered recovered refrigerant. (finding 18). Schulz's reply stated that three pounds 10.25 ounces of recovered refrigerant were received from the landfill at the only time relevant here, March 19, 1999. Complainant points out that Mr. Agrella testified that the scrap pile had been there for a year, that these documents would prove that the County failed to recover all but three pounds 10.25 ounces of the refrigerant from all of the refrigerators in the scrap pile, including the six at issue here, that the evidence is not cumulative because no similar evidence was introduced, that if Mr. Schulz had been called as a witness by the County, he would have been questioned by Complainant

concerning the quantities of used refrigerant received from the landfill during the years 1998 and 1999, and that the documents proffered were not in existence at the time of the hearing. According to Complainant, these documents will serve to clarify the issue of whether the County violated Section 82.156(f)(1).

As indicated (finding 29), the County has opposed the motion arguing, inter alia, that Rule 22.28 applies only after an initial decision has been issued and that, even if the Rule does apply, Complainant has not shown "good cause" why the evidence sought to be introduced was not adduced at the hearing, i.e., for its failure to call Mr. Schulz as a witness. Moreover, the County asserts that Mr. Schulz's statement violates several provisions of the Part 22 [Rules of Practice], including the rule requiring the prehearing exchange of witness lists and exhibits and the rule that the author of written testimony be subject to cross-examination. The County also alleges that by placing Mr. Schulz's statement before the ALJ, Complainant's counsel has violated Rules of Professional Responsibility, i.e., Rules 3.4(c), 3[.]4 (e) and 3.5(a).[12/] As indicated (finding 29), the County has attached to its opposition to Complainant's motion the statement of Mr. Schulz that, to the best of his recollection, Lake County delivered a full refrigerant extraction tank to this business in February or March of 1999. The County says that Mr. Schulz's statement of October 10, 2000, upon which Complainant now proposes that the ALJ rely, is in obvious conflict with the prior statement of April 4, 2000, and that the

[12/] The references are to the ABA Model Rules of Professional Conduct rather than to the Model Rules of Professional Responsibility. I find no merit to the County's assertions in this respect.

evidence offered is unreliable. For all of these reasons, the County argues that Complainant's motion should be denied.

Replying to the County's response, Complainant points out that its motion accompanied its proposed findings and conclusions and brief which were filed on November 30, 2000, and that this date is well before the 20-day period that will [commence to] run after service of the initial decision (Response, dated December 22, 2000, at 1). Complainant contends that the fact that its information request, dated September 22, 2000, and Schulz's reply, dated October 10, 2000, were not in existence at the time of the hearing constitute "good cause" why the evidence was not adduced at the hearing. Notwithstanding these arguments, Complainant contemporaneously filed a motion to reopen the hearing in the event its motion to supplement the record was denied. This motion seeks to introduce the same evidence, that is, Mr. Schulz's response of October 10, 2000, to EPA's information request, the only difference being that Mr. Schulz would be subject to cross-examination.

Objecting to the motion, the County reiterates what it characterizes as the large and irreconcilable conflict between Mr. Schulz's statement, dated April 4, 2000, and the October statement compulsorily obtained by EPA and asserts that, because there is no documentary evidence supporting Mr. Schulz's statements (see, however finding 28), any findings made by the ALJ after a reopened hearing would, of necessity be based solely on Mr. Schulz's credibility. The County asserts that a hearing is not necessary to determine that he is not credible. (Response to

Complainant's Motion to Reopen Hearing, dated January 2, 2001).

Complainant has emphasized the severe sanctions for false and misleading statements set forth in its request for information as a reason why it is more likely that Schulz's October statement is accurate.[13/]

While attempts to introduce evidence into the record through the medium of post-hearing briefs are ordinarily rejected, Mr. Schulz's statement, dated April 4, 2000, will be considered for the limited purpose of deciding Complainant's pending motions. At the outset, it should be noted that the mentioned statement begins with the phrase "(t)o the best of my recollection" and a statement based upon Mr. Schulz's "best recollection", which may not be accurate, is not necessarily in

---

[13/] Reply to Respondent"s Response to Complainant's Motion to Supplement the Record, December 22, 2000. The view that § 114(a) allows the Administrator to compel the production of the information sought from Schulz here is not as obvious as Complainant believes. Firstly, § 608, the National recycling and emission reduction program, is not a purpose for which information may be requested within the language of subparagraph (a) "(f)or the purpose of ..(ii) determining whether any person is in violation of any such standard or regulation [under §§ 7411, 7412 or 7429] or any requirement of such [implementation] plan under §§ 7410 or 7411(d); secondly, given the context, that is, "determining whether any person is in violation" within the meaning of subparagraph (a)(ii) does not apply to § 608, it is unlikely that subparagraph (a) "for the purpose of (iii)...carrying out any provision of this chapter...." includes enforcement under § 113; and thirdly, even if Schulz is regarded as the owner or operator of an "emission source" within the language of § 114 in ¶ (a)(1) that, "the Administrator may require any person who owns or operates any emission source, who manufactures emission control equipment or process equipment, who the Administrator believes may have information necessary for the purposes of this subsection, or who is subject to any requirement of this chapter..., the limitation that the information sought be necessary for the "purposes of this subsection" is applicable. Because of the limitations on the scope of § 114(a)(1) recited above, regarding Schulz as "any person who is subject to any requirement of this chapter"is seemingly contrary to the statutory rule of construction "*ejusdem generis*." Moreover, it is noted that the final sentence of § 113(e) provides that the court shall not assess penalties for noncompliance with administrative subpoenas under § 307 or actions under § 114 where the violator had sufficient cause to violate or fail or refuse to comply with the subpoena or action.

irreconcilable conflict with a more precise statement which he issued at a later date and which appears to be, but is not stated to be, based on records maintained by his firm. Be that as it may, acceptance of the later statement as accurate casts doubt on Mr. Agrella's testimony that he brought a [full] tank of extracted CFC's to town (Schulz Refrigeration) a month or six weeks prior to the EPA inspection, but does not have the significance attributed to it by Complainant, because of Mr. Agrella's testimony without that only 10 to 15 percent of refrigerators delivered to the landfill "had any pressure at all."[14/] Moreover, because the refrigerators at issue contained only from six ounces to one pound of refrigerant when fully charged rather than the five pounds assumed by Ms. Wahl (supra note 8), the small quantity of refrigerant which Schulz stated that it received from the landfill is hardly persuasive evidence that the County failed to recover remaining refrigerant prior to delivery of the appliances to the scrap pile for recycling.

[14/] Complainant has cited a statement in the preamble to the regulation, 58 Fed. Reg. 28660, 28665 (May 14, 1993), to the effect that approximately 90% of regulated refrigerant in the household refrigeration category would be available for recovery at the time of disposal [of the appliance] as a reason for disregarding Mr. Agrella's estimate(Complainant's Reply to Respondent's Proposed Findings and Conclusions, dated 1/02/01, at 5).The actual quote is that "approximately 90% of this [refrigerant] would be recovered at disposal" and Complainant has inserted the word "available". While it is certainly logical to consider the refrigerant as "available" for recovery rather than as "recovered", this addition highlights the fact that the amount of refrigerant recovered at disposal will depend on a host of factors such as equipment used, skill and diligence of the operators and, of course, the amount available for recovery. Similarly, the amount available for recovery at disposal depends, or may depend on, inter alia, the reason the appliance is being discarded and handling of the appliance prior to its delivery to the landfill. This situation is in no way comparable to the amount of CFC-12 normally in a fully charged household refrigerator (note 8, supra), where generalized information is more apt to be accurate. Mr. Agrellas's estimate is based on his experience in recovering refrigerant from appliances at the landfill and is considered a credible estimate by a credible witness.

Consolidated Rule 22.28 is not applicable because an initial decision has not been issued. Nevertheless, a showing of some exceptional circumstance, i.e., "good cause", should be necessary in order to grant a motion to supplement the record or to reopen the hearing, which was filed some two and a- half months after the hearing was adjourned. Contrary to Complainant's apparent position, the fact that the evidence sought was not in existence at the time of the hearing does not constitute good cause. If the rule were otherwise, there would be nothing to preclude a party, subsequent to the hearing, from searching for additional witnesses or creating additional exhibits which might support its case. While Complainant's assertion that it was not obligated to notify the County of its information request to Schulz Refrigeration pursuant to CAA § 114(a)(1) is accurate, Section 114(a)(1) does not alter or suspend in any manner the operation of the Consolidated Rules of Practice in proceedings such as that at bar and, to be admissible, evidence and information obtained by Complainant under Section 114 must comply with the Part 22 Consolidated Rules. Chempace upon which Complainant relies is clearly distinguishable and affords no support for the instant motions, because there the document sought to be introduced predated the hearing, concerned a matter about which there was testimony at the hearing which the document, if admitted, would clarify, and the ALJ expressly found that admission of the document would not prejudice either party. These findings are not applicable here. It follows that Complainant's motions to supplement the record or, alternatively, to reopen the hearing must be and are denied.

B. The County's Obligation To Recover Remaining Refrigerant From Small Appliances Received for Disposal Exists Irrespective of Whether the Appliances Are Shown to Have Contained Any Refrigerant

The regulation, 40 C.F.R. Part 82, is entitled "Protection of Stratospheric Ozone" and the part applicable here is Subpart F-"Recycling and Emissions Reduction"- Sections 82.150-82.166, inclusive. Section 82.156(f) provides that effective July 13, 1993, persons who take step in the disposal process of a small appliance must either: (1) recover any remaining refrigerant from the appliance in accordance with paragraphs (g) or (h) of this section as applicable; or (2) verify that the refrigerant has been evacuated from the appliance or shipment of appliances previously. Section 82.156(g) applies to MVACs or MVAC-like appliances and is not applicable here. Section 82.156(h) provides that the person recovering refrigerant from small appliances for purposes of disposal must either: (1) recover 90% of the refrigerant in the appliance when the compressor in the appliance is operating, or 80% of the refrigerant in the appliance when the compressor in the appliance is not operating; or (2) evacuate the small appliance to four inches of mercury vacuum. These recovery percentages are apparently based on the efficiency of the recovery device or equipment (Part 82, Subpart F, Appendix C)

The County does not claim that it obtained, or made any effort to obtain, signed statements from the persons from whom the appliances were received for disposal at the landfill that all refrigerant which had not previously leaked had been recovered from the appliances and Section 82.156(f)(2) is not applicable. The record shows that the County's policy was to evacuate the appliances to four inches

of mercury vacuum in accordance with Section 82.156(h)(2) and Section 82.156(h)(1) also is not applicable. In this regard, the County argues that it does not have a duty to do anything to a refrigerator which is void of refrigerant and that the record shows this applies to 85% to 90% of the refrigerators (appliances) that are received at the landfill (Response to Complainant's Motion to Reopen the Hearing at 3). The County further argues that, if the six refrigerators in the scrap pile referred to in the complaint were pressurized to a depth of no less four inches of mercury vacuum, the County did not violate the law irrespective of whether, inter alia, Schulz ever took an ounce of CFCs from the County (Id.). The County asserts that, because Complainant did not pressure check the refrigerators and the County was not afforded the opportunity to do so, no one knows whether the refrigerators contained any remaining refrigerant. Therefore, the County contends that a violation of Section 82.156(f)(1) has not been established.

The County's argument is plausible, but in effect obviates its obligation under Section 82.156(f)(1) to recover any remaining refrigerant in the appliance in accordance with § 82.156(h)(2), that is, in this case, "evacuate the small appliance to four inches of mercury vacuum." While it is true that the County is not, and may not be, required to recover refrigerant from an appliance from which the refrigerant has leaked or escaped or from which the refrigerant has previously been evacuated, implicit in Section 82.156(f)(1) is the requirement for the operator to determine if the refrigerant content or pressure of the appliance is no less than four inches of mercury vacuum prior to crushing or otherwise disposing of the appliance.

Therefore, and notwithstanding the fact that Rule 22.24 of the Consolidated Rules of Practice places on Complainant the burden of presentation and persuasion that the violation occurred as alleged in the complaint, the County was obligated to determine and to know if the refrigerant in refrigerated appliances had reached a depth of no less than four inches of mercury vacuum pressure prior to placing the appliances in the scrap pile for crushing and disposal. Because Complainant would never be able to meet its burden of persuasion, any other holding, would, as a practical matter, make the regulation unenforceable.

It is concluded that the County may not hide behind the assertion that nobody knows whether the six refrigerators referred to in the complaint contained "remaining refrigerant" and that Complainant has established a violation, if a preponderance if the evidence shows that one or more of the six refrigerators in the scrap pile referred to in the complaint had not been evacuated, or checked for the presence of refrigerant.

C. <u>It Is More Likely Than Not, Which Is A Preponderance Of Evidence, That Two of Six Refrigerators In the Scrap Pile Referred To in the Complaint Had Not Been Evacuated of Refrigerant</u>

Ms. Wahl's determination that the six refrigerators in the scrap pile referred to in the complaint had not been evacuated of refrigerant was based on the fact that no X's were visible on any of the appliances in the pile (indeed, it is unlikely that the complaint would have been issued had Ms. Wahl and Mr. McLeod observed X's on any of the appliances), that the hoses and lines on these refrigerators appeared to be in tact and showed no evidence of having been crimped or

punctured, and upon the fact that the County was unable to produce any written evidence of the disposal of recovered refrigerant (findings 7, 10-13).

Opposed to this evidence is the County's written policy that all refrigerated appliances brought to the landfill for disposal will be delivered to the staging area, that appliances would not be removed from the staging area until any remaining refrigerant had been recovered and an X painted on the appliance, and that it is possible, but not likely, that X's were on the portion of the refrigerators in the scrap pile not visible to the inspectors. Also supporting the County's case is Mr. Agrella's testimony that only 10% to 15% of the appliances delivered to the landfill have any pressure or charge at all, that he delivered recovered refrigerant to Schulz Refrigeration a month or six weeks prior to the EPA inspection and that no records of the disposal of recovered refrigerant are required.

Although Ms. Wahl's testified that she and Mr. McLeod examined the lines and hoses on the refrigerators in the scrap pile closely for evidence of crimping or puncturing and found none, she did not testify or offer any opinion as to the condition of other refrigerated appliances in the scrap pile. Moreover, Mr. McLeod considered that only two of the refrigerators were sufficiently accessible that the lines or tubing could be closely examined without the refrigerators being turned. These are the two refrigerators upon which he was able to run his hand along a portion of the copper tubing (finding 17). These were the only refrigerators of which Mr. McLeod was comfortable testifying that the refrigerant had not been evacuated. While there is no evidence of an actual release of CFCs to the

environment, the County may, nevertheless, be assessed a penalty for the violation of Section 82.156(f)(1) with respect to these two refrigerators. This is because Section 82.150(a), the introductory paragraph of Subpart F, states that the purpose of the recycling and emission reduction regulation is to reduce emissions of class I and class II refrigerants to the lowest achievable level during the service, maintenance, repair, and disposal of appliances.[15/] The disposal of refrigerated appliances is involved here and it is obvious that this goal cannot be achieved, if appliances containing unknown quantities of CFCs are crushed preparatory to recycling, thus permitting CFCs present in the appliances to escape to the environment.

D. An Appropriate Penalty Is the Sum of $6,000

As indicated (findings 26-30), Complainant followed the penalty policy, Appendix X, Clean Air Act Civil Penalty Policy For Violations of 40 C.F.R.Part 82, Subpart F, in calculating the proposed penalty of $36,000. This resulted in a penalty of $15,000 for the first refrigerator allegedly in violation, $3,000 for each of the other five refrigerators allegedly in violation which was enhanced by 20% for alleged culpability. While the evidence shows that two refrigerators rather than six were in violation, Complainant's method of computation would result in a revised penalty of $21,600 ($15,000 + $3,000 + $3,600). This is clearly out of proportion in

[15/] Section 82.150, entitled "Purpose and scope", provides :(a) The purpose of this subpart is to reduce emissions of class I and class II refrigerants to the lowest achievable level during the service, maintenance, repair, and disposal of appliances in accordance with section 608 of the Clean Air Act."

> that two refrigerators in violation should not result in 60% of the penalty for six refrigerators in violation, unless there is greater risk of a release or a greater quantity at risk, neither of which is shown here. It is concluded that the penalty determined by Complainant greatly overstates the seriousness (gravity) of the violation and fails to afford any recognition to the County's good faith efforts to comply. Therefore, it is my determination to disregard the penalty policy (Appendix X) as I am permitted to do by Rule 22.27(b) of the Consolidated Rules of Practice.[16/]

Appendix X states that penalties assessed for violations of CAA § 608 and 40 C.F.R. Part 82, Subpart F, will be the sum of an economic benefit component and a gravity component (Id .2). Complainant determined that the economic benefit garnered by the County from the violations was less than $500 and in accordance with Appendix X did not include any such component or amount in the proposed penalty. There is no evidence in the record of any economic benefit reaped by the County from the violations alleged in the complaint and, consequently, no basis for including such an amount in the penalty determined herein.

Concerning the seriousness (gravity) of the violation, Appendix X concentrates on the risk

---

[16/] Clean Air Act § 113(e), Penalty Assessment Criteria, which is made applicable to SubChapter VI "Stratospheric Ozone Protection" by § 113(d)(1)(B), provides in pertinent part: (1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the 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....."

of an actual release of refrigerant (CFCs) to the environment seemingly paying little attention to the quantity. While the Appendix obliquely recognizes that the quantity may or should affect the penalty, stating that Regions should consider how much refrigerant is normally in the system, e.g., 20,000 pounds or two pounds (Id.4), it does not appear that the quantity of refrigerant released or at risk of being released to the envi-ronment is factored into the penalty matrix. In any event, it is clear that each of the two refrigerators which have been found in violation here, if they contained any refrigerant whatsoever, are at the low end of the range in the example, because it is unlikely that the refrigerators contained more than one pound of refrigerant even if fully charged.[17/]

Here, while the risk of some loss of refrigerant to the environment is real, the quantity is such that the seriousness of the violations must be tempered thereby. Only potential loss is at issue here and Appendix X states reasonably enough that in most cases an actual loss would result

---

[17/] Note 8 , supra. Because it argues that Complainant has not sustained its burden of proof and that the complaint should be dismissed, the County has not on brief pursued the question of whether multiple violations are proper. In cross-examination of Ms. Wahl, however, counsel for the County questioned why all refrigerators in the scrap pile were not one violation (Tr.193-96). Section 608(a)(1) of the Act requires the Administrator to promulgate regulations establishing standards and requirements regarding the use and disposal of class I substances during the service, repair, or disposal of appliances and industrial process refrigeration and § 608(a)(2) requires the Administrator to promulgate regulations establishing standards and requirements for the use and disposal of class I and class II substances not covered by paragraph (1), including the use and disposal of class II substances during service, repair, or disposal of appliances and industrial process refrigeration. Additionally, Section 608(b), entitled "Safe disposal", provides that the regulations under subsection (a) shall establish standards and requirements for the safe disposal of class I and class II substances including essentially that such substances contained in bulk in appliances be removed from each appliance prior to its disposal or delivery for recycling. In view of this language, it is reasonable to regard each appliance received at the landfill for disposal from which the refrigerant has not been recovered prior to crushing for recycling as required by § 82.156(f)(1) as a separate violation. It should be noted that the Environmental Appeals Board has held that determining the unit of violation for the purpose of penalty computation is essentially a matter of statutory interpretation. See, e.g., Microban Products Company, FIFRA Appeal No. 99-13, 2001 WL 221511 (EAB, February 23, 2001)

in higher penalties than a potential loss. Appendix X, in comparing a system containing 20,000 pounds of CFC-12 with a system containing two pounds of CFC-12, the maximum quantity at risk of release here, for the purpose of determining whether the potential for harm is major, moderate or minor, states that the two- pound system would fall into the category of a relatively low risk of actual loss (Id.4, 5), obfuscating the risk of loss and the quantity at risk. Moreover, while the 90% recovery of refrigerant in the appliance when the compressor is operating and the 80% recovery when the compressor is not operating set forth in Section 82.156(h)(1) are apparently based on the efficiency of recovery equipment available at a reasonable cost, this provision is seemingly recognition of the fact that some loss of refrigerant to the environment at disposal is inevitable. Also, while Section 608)c) prohibits the knowing venting or release to the environment of class I and class II substances in the course of maintaining, service, repair or disposal of appliances, de minimis release associated with good faith attempts to recapture, recycle or safely dispose of such substances are not within the prohibition. Although the Agency considers only emissions which occur while complying with the recovery and recycling regulation and which achieve the lowest achievable level of emissions are within the *de minimis* exception, 58 Fed. Reg 28667 (May 14, 1993), the mere existence of such an exception for knowing venting confirms the fact that some releases during repair and disposal are to be expected. This is relevant to the seriousness of the violation and thus to the amount of the penalty.

The second factor which Appendix X requires be considered in determining whether the potential for harm is major, moderate, or minor is the importance of the requirement at issue to the statutory or regulatory scheme (Id.5). While there can be little doubt that evacuating refrigerated appliances of remaining refrigerant is important to the statutory (CAA § 608 (a)(3)(A)) and

regulatory (40 C.F.R. § 81.150(a)) goal of reducing emissions of class I and class II substances to the lowest achievable levels during the service, maintenance, repair and disposal of appliances, this factor is simply punitive if imposed without regard to the quantity at risk.

Another factor which the statute requires be considered in determining a penalty is the violator's full compliance history and good faith efforts to comply. There is no record of prior violations of the emission reduction regulation by the County and, of course, no evidence of payment by the County of penalties previously assessed for the same violation.

Contrary to Complainant, I find that the County's written policy concerning the disposal of refrigerated appliances is evidence of good faith efforts to comply rather than evidence of culpability warranting an enhancement of the penalty. In this regard, Ms. Wahl testified that she found no evidence of good faith efforts to comply, but identified only six refrigerators in the scrap pile as showing no evidence refrigerant had been evacuated. Additionally, Mr. Agrella testified that he delivered recovered refrigerant to Schulz Refrigeration and, of course, if the record were supplemented as desired by Complainant, there would be further evidence of delivery of recovered refrigerant to Schulz, albeit the quantity would be small. It should be emphasized that, for all that appears, the County religiously adhered to its policy that all refrigerated appliances brought to the landfill for disposal be delivered to the staging area. While it does appear that the County would have permitted appliance repair shops to bring refrigerated appliances marked with an X directly to the scrap pile (note 5, supra), there is no evidence of appliance deliveries to the landfill by repair shops.

The violations occurred when the refrigerators from which the refrigerant had not been evacuated, or which had not been checked for the presence of refrigerant, were moved or crushed,

leaving it unknown whether refrigerant was present and permitting any refrigerant present to escape to the environment. As did Complainant, I consider this is to be a one-time violation for each refrigerator. Under all of the circumstances, it is my determination that a penalty of $3,000 for each refrigerator found in violation is proper. This is the sum calculated by Complainant for each refrigerator after the first considered to be in violation using the matrix for multiple violations in Appendix X. It is concluded that this sum will adequately deter future violations by the County. The County is a municipality under the Act (finding 1) and no adjustments for the size of business or impact of the penalty on the business are warranted.

A penalty of $6,000 is considered to be appropriate and will be assessed.

Order

Respondent, Lake County, having violated the Act and regulation as alleged in the complaint and in the particulars as found above, a penalty of $6,000 is assessed against it in accordance with Section 113(e) of the Clean Air Act (42 U.S.C. § 7413(e)) . [18/] Payment of the full amount of the penalty shall be made by sending a certified or cashier's check payable to the Treasurer of the United States to the following address within 60 days of the date of this Order:

Mellon Bank
(Regional Hearing Clerk)
EPA - Region 8
P.O. Box 360859
Pittsburgh, PA 15251-6859

[18/] Unless this decision is appealed to the Environmental Appeals Board in accordance with Rule 22:30 (40 C.F.R. Part 22), or unless the EAB elects to review the same sua sponte as therein provided, this decision will become the final decision of the EAB and of the Agency in accordance with Rule 22.27(c).

Dated this _____ day of July 2001.

_____
Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this **Initial Decision**, dated July 24, 2001, **IN RE: LAKE COUNTY, MONTANA, Docket No. CAA-8-99-11,** were mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed, certified mail, return receipt requested, to Respondent and Complainant (see list of addressees).

_____
Rachele D. Jackson
Legal Staff Assistant

Date: July 24, 2001

ADDRESSEES:

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Robert J. Long, Esq.
Deputy Lake County Attorney
Lake County Courthouse
106 Fourth Ave. East
Polson, MT 59860-2183

Jessie A. Goldfarb, Esq.
Dana J. Stotsky, Esq.
Enforcement Attorney
Legal Enforcement Program
U.S. EPA Reg. VIII
999 - 18th St., Suite 500
Denver, CO 80202-2466

POUCH MAIL

Ms. Tina Artemis
Regional Hearing Clerk
U.S. EPA - Region 8
999 -18th Street, Suite 500
Denver, CO 80202-2466

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
LAKE COUNTY, MONTANA	)	**DOCKET NO. CAA-8-99-11**
	)	
Respondent	)	

ERRATUM ON JUDGE NISSEN'S INITIAL DECISION

The first sentence of the fourth paragraph on page 26 of the Initial Decision filed July 24, 2001 should read as follows:

Complainant has failed to carry its burden of persuasion that four of the six refrigerators in the scrap pile referred to in the complaint had not been evacuated, or checked for the presence, of refrigerant (CFC-12).

Dated this _____ day of August 2001.

_____
Spencer T. Nissen
Administrative Law Judge