UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	**)**	**Docket No. CAA-5-99-047**
	)	
CDT LANDFILL CORPORATION,	**)**	
an Illinois Corporation,	**)**	
	)	
Respondent	**)**	

Clean Air Act (Section 111)-New Source Performance Standards Applicable to Municipal Solid Waste Landfills (Subpart WWW)-Failures to Submit Reports and to Timely Apply for Permit-Stationary Source Civil Penalty Policy- Determination of Penalty-Ability to Pay.

Where penalties for Respondent's failure to submit an annual non-methane organic compound emission (NMOC) rate report, late submission of a second report, failure to submit a gas collection and control system (GCCS) design plan and failure to file a timely application for a Title V operating permit determined in accordance with Clean Air Act Stationary Source Penalty Policy gave little or no consideration to Respondent's good faith efforts to comply, failed to recognize permits issued by the Illinois Environmental Protection Agency (IEPA) and overstated the seriousness of the violations, Penalty Policy was disregarded. While application of factors set forth in CAA § 113(e)(1) ,.e g.., "duration and seriousness" of the violations, would have justified a penalty substantially reduced from that sought by Complainant, but Complainant treated "ability to pay", i.e., the statutory factors " size of the business and the economic impact of the penalty on the business", as solely a matter of mitigation, the burden of which was on Respondent, and evidence in the record did not support a finding that Respondent had the ability to pay any penalty, no penalty was assessed. Where performance test method required by regulation (40 C.F.R. § 60.754(d)) was not appropriate in that it did not result in tests on samples representative of actual emissions from enclosed combustion devices (engines) and use of an alternate test method required the approval of the Administrator, count alleging failure to timely conduct performance tests was dismissed.

Appearances:

For Complainant: James J. Cha, Esquire
Louise C. Gross, Esquire
Padmavati G. Klejwa, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
Chicago, Illinois

For Respondent: Scott M. Hoster, Esquire
Davis, Kaplan, Dystrup & Hoster, P.C.
Joliet, Illinois

Initial Decision

This proceeding was initiated by a Complaint filed on September 30, 1999, by the Acting Director of the Air and Radiation Division, United States Environmental Protection Agency (U.S. EPA), Region 5 (Complainant) pursuant to Sections 111 and 113 of the Clean Air Act (CAA), 42 U.S.C. §§ 7411 and 7413. The Complaint alleges that CDT Landfill Corporation (CDT) (Respondent), a corporation doing business in the State of Illinois, violated certain provisions of 40 CFR Part 60, Subpart WWW (Subpart WWW rules), pertaining to New Source Performance Standards (NSPS) for Municipal Solid Waste (MSW) Landfills. Four counts of violation are alleged, for which Complainant proposes the assessment of a civil penalty of $72,380. Specifically, the complaint alleges that CDT : 1) violated 40 CFR §§ 60.752(b) and 60.757(b) by failing to timely submit an annual non-methane organic compound (NMOC) emission rate report with the Administrator of the EPA or her delegate; 2) violated 40 CFR §§ 60.752(b)(2)(i) and 60.757(c) by failing to submit a gas collection and emission control system design plan within a year after reporting an NMOC emission rate greater than 50 megagrams per year; 3) violated 40 CFR §§ 60.752(b) and 70.5 by failing to timely file an application to obtain a Clean Air Act Permit Program (CAAPP) permit; and, 4) violated 40 CFR §§ 60.8 and 60.752(b)(2)(iii)(B) by failing to timely conduct performance testing of its gas collection and emission control system.

Respondent answered under date of November 3, 1999, admitting certain factual allegations of the complaint, but denying others and alleging that "the penalty proposed is excessive."[1] This was considered to be a request for hearing.

An evidentiary hearing on this matter was held in Chicago, Illinois on January 17, 2001.

Prehearing proceedings included a "Motion to Limit Evidence at Hearing" filed by Complainant on January 9, 2001, and a "Motion to Exclude Evidence"filed by Complainant on January 12, 2001. These motions sought to bar Respondent from presenting evidence concerning its financial condition other than financial schedules submitted to Complainant on or about September 25, 1999, and to bar Respondent from moving into evidence the "Combined Balance Sheet As of September 30, 2000,'"which was submitted under cover of a letter from counsel, dated January 8, 2001. The former motion was based on the fact that Complainant had requested, and the ALJ had directed, Respondent to furnish financial and income statements, tax returns or other data, if Respondent intended to make its ability to pay the proposed penalty an

[1]Answer, ¶ 36.

issue. Complainant alleged that information supplied, financial schedules principally consisting of estimates of the cost of landfill closure, submitted by a letter, dated September 25, 2000, was totally inadequate. The latter motion was based on the contention that Respondent had ample opportunity to supply the information previously and upon the fact that Consolidated Rule 22.22(a) provides, inter alia, that documents or proposed exhibits which have not been made available to the other party at least 15 days prior to the hearing shall not be admitted into evidence in the absence of a showing of good cause. At the hearing, the Combined Balance Sheet was admitted into evidence over Complainant's objection, based upon the change in [Respondent's] circumstances (Tr. 21; R's Exh 25). The change referred to is the fact that CDT had withdrawn its application to the City of Joliet for an expansion of its landfill and allegedly was "out of business". The ALJ observed that "additional evidence [as to Respondent's financial condition] would be helpful." These matters are discussed infra in connection with Respondent's "ability to pay".

Based upon the entire record, including the proposed findings and conclusions of the parties and briefs submitted by Complainant[2] , I make the following:

Findings of Fact

1. Respondent, CDT Landfill Corporation, is an Illinois corporation doing business in the State of Illinois.

2. Respondent operates a municipal solid waste (MSW) landfill located at 2851 Mound Road, Joliet, Illinois. The landfill, designated Site No. 1978170005 by the Illinois Environmental Protection Agency (IEPA), Division of Land Pollution Control, was opened in March, 1984, and began accepting waste in August, 1984, under Permit No.1983-19-OP. On November 13, 1990, the IEPA issued a supplemental permit authorizing CDT to modify the referenced solid waste management site by the installation of a landfill gas collection and management system in accordance with plans prepared by Geotech, Inc. (R's Exhs 7 & 9). Based upon an application submitted by CDT on June 14, 1991, the IEPA, Division of Air Pollution Control, issued a permit on December 3, 1991, for the construction of emission sources and/or air pollution control equipment consisting of the landfill gas recovery and flare system as described in the referenced application (R's Exh 13). Although labeled a "Construction Permit", this was arguably a joint construction / operation permit as it contained a firing rate limit of 48.6 million btu/hr, a yearly operating limit of 8,760 hours and other operating restrictions, e.g., no visible emissions from operation of the flare and the

[2] Respondent has contented itself with submitting Proposed Findings of Fact and Conclusions of Law and has not submitted a separate brief.

temperature of the flare must be at least 1400 ∘ F.[3] Be that as it may, installation and operation of the gas collection and extraction system was approved by a letter from IEPA, dated April 29, 1998 (R's Exh 10). The landfill was closed in May 1993 and the IEPA determined that the closure was complete in accordance with CDT's closure plan and that the minimum 15-year post-closure period began running on March 31, 1997 (Id.).

3. In June of 1991, CDT applied to the IEPA for a permit for a new solid waste management facility for the disposal of general municipal and non-hazardous special waste which was described, inter alia, as "adjacent to an existing facility". Although the heading of the IEPA letter, dated January 19, 1993, approving this application refers to "LPC # 1987170006-Will County, CDT Landfill Corp.-Expansion Site," the opening sentence of the letter, Permit No.1992-083-LF (R's Exh 11), is as follows: "Permit is hereby granted to CDT Landfill Corporation for a new solid waste management facility for the disposal of general municipal and non-hazardous waste consisting of a single unit with 58 acres of general disposal area adjacent to an existing facility, all in accordance with the application and plans prepared by Donald L. Reger, P.E." This was both a construction and an operating permit issued by the IEPA, Division of Land Pollution Control. This unit or facility apparently began accepting waste in June, 1993. On October 29, 1999, the IEPA, Bureau of Land, issued "Permit Modification No. 28 to Permit No. 1992-083-LF ....approving modification of an existing municipal solid and non-hazardous special waste landfill in accordance with the application signed and sealed by Mandev S. Rehal, P.E. on November 4, 1998..." (R's Exh 12). Among other things, Modification No. 28 conditionally approved operating authorization for a landfill gas extraction/collection system.

4. On April 13, 1995, CDT entered into a Gas Rights Agreement with KMS Joliet Power Partners, L.P., a limited partnership (KMS), for the purpose of authorizing KMS to extract landfill gas from the landfill premises (C's Exh 19). Among other things, the Agreement recited that KMS is a co-generation and independent project-developer, experienced in the development, ownership and operation of energy projects which utilize landfill gas as a fuel source or end product (Article I, Section 1.1). The Agreement further recited that the parties desire that KMS install, own and operate, under the control of CDT, the Gas Management System

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[3] The permit is subject to the Standard Conditions For Construction/Development Permits issued by the IEPA (1985) and Paragraph 6 of that document provides in part (a): Unless a joint construction/operation permit has been issued, a permit for operating shall be obtained from the Agency before the facility or equipment covered by this permit is placed into operation. The addition of the phrase "shall be capable of" would have removed the ambiguity as to whether it was intended to be an operating as well as a construction permit.

within that portion of the Landfill identified as Site No.1978170005, that CDT assume full responsibility for the installation of a gas management system to extract landfill gas from that portion of the Landfill identified as Site No. 1978170006, subject to the provisions of Section 6.4, and that KMS shall operate such Gas Management System under the control of CDT (Section 1.5).

5. Section 2.8 of the Agreement defined the "Gas Management System"[4] and provided that " (u)pon installation, the Gas Management System shall be deemed a part of the Landfill." The Agreement contemplated that KMS would assign certain of the rights granted to KMS thereunder to a third party which would own the Gas Management System and extract and sell the landfill gas as fuel, that KMS would purchase the gas and use it to generate electricity, that KMS would construct, own and operate an electric generating facility on the Landfill Premises and that CDT has agreed to lease to KMS a site located on the Landfill Premises for the purpose of constructing and operating the Project Facility. "Project Facility" was defined in Section 2.22 as meaning all machinery, equipment and fixtures utilized to generate Product and installed, owned and operated by KMS on a portion of the Landfill Premises leased from CDT.

6. Section 6.4 of the Agreement referred to in finding 4 provided in part that CDT shall have the obligation to install facilities to extract landfill gas from that portion of the Landfill designated as Site No. 1978170006 so that landfill gas from that portion of the Landfill is available to fuel the Project Facility, and to install all equipment necessary for the delivery to the Gas Management Facility of landfill gas extracted from that portion of the Landfill designated as Site No.1978170006. Section 6.5 of the Agreement provided that after installation by CDT of the facilities and equipment described in Section 6.4, KMS shall assume full responsibility for the routine maintenance, repair, replacement and operation of said facilities and equipment. Section 7.1 of the Agreement provided that KMS shall, at its sole cost and expense, secure all permits, authorizations, approvals (including siting approvals) and any easements and rights-of-way off CDT's property, necessary for the extraction of landfill gas from the Landfill Premises, the generation of electricity from landfill gas and the transmission of that electricity to the purchaser (Commonwealth Edison). Section 7.4 provided that KMS shall be responsible for compliance with all applicable laws in the

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[4] Section 2.8 defined the "Gas Management System" as meaning that physical collection system consisting of gas collection walls, lateral pipes, header pipes, valves, flexible hosing, connectors, condensate sumps, condensate collection lines, air compression lines, centrifugal blowers, thermal destruction flare, and all appurtenant and ancillary housing and protective devices installed and operated for the purpose of managing landfill gas at the Landfill Premises and preventing the escape or migration of landfill gas into the ambient environment.

performance of its obligations hereunder with respect to the Project Facility, the Gas Management System and the gas management system to be installed by CDT on Site No. 197817006, including environment laws involving land, air, water and noise.

7. On August 14, 1995, IEPA, Division of Air Pollution Control, issued a Construction Permit to KMS for the construction of two (2) process gas power combustors at the CDT landfill.[5] An operating permit for these combustors was issued by IEPA, Division of Air Pollution Control on June 24, 1999 (R's Exh 16). On July 17, 1998, IEPA issued a construction permit to KMS Macon Power for the construction at the CDT landfill of two 21.6 mmBtu/hr reciprocating engines fueled by landfill gas.[6] KMS' application for an operating permit for these engines was determined to be incomplete apparently because of NSPS and the reasons for this determination were addressed in a letter from KMS Energy, Inc., dated August 30, 1999 (R's Exh 8). Among other things, the letter stated: The engines for which an operating permit is required are internal combustion engines which in combination with two existing engines are designed to reduce NMOC emissions by 98 weight percent or reducing the outlet NMOC concentration of all control vents to less than 20 parts per million by volume (ppmv), dry basis as hexane at 3 percent oxygen (40 CFR § 60.752 (b)(2)(iii)(B). Additionally, the letter states that KMS will operate the NMOC control system so as to comply with 40 CFR § 60.753 [Operational standards for collection and control systems] and notifies IEPA that the CDT Landfill will be closed as of August 1999.[7] Regarding the latter statement, the estimated active life span of Site

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5 R's Exhibit 14. The preamble to the regulation (61 Fed. Reg. 9905 et seq., March 12, 1996) states that best demonstrated technology (BDT) is a combustion device capable of reducing NMOC emissions by 98 weight-percent (Id.9907). The cited preamble further states that while energy recovery is strongly recommended, the cost analysis is based on open flares because they are applicable to all affected and designated facilities regulated by the standards and EG.

6 R's Exhibit 15. The permittee is incorrectly identified as " KMS Macon Power"which apparently refers to a landfill located in and operated by Macon County where KMS performs services similar to those performed for CDT. It is clear, however, that the permit is intended to apply to activities at the CDT Landfill, because the address given, 2851 Mound Road, Joliet, is that for CDT. This is confirmed by Item 1 of the KMS Chronology (R's Exh 18).

7 Section 60.753 provides in part that "(e)ach owner or operator of an MSW landfill with a gas collection and control system used to comply with the provisions of § 60.752(b)(2)(ii) of this subpart shall: (a) Operate the collection system such that gas is collected from each area, cell or group of cells in which

No. 1978170006 was five years (finding 15). CDT withdrew its application for an expansion of the landfill to include an additional 24-acre parcel of land when it appeared that the application would not be approved by the Joliet City Council (Chicago Tribune article, dated September 28, 2000, C's Exh. 21).

8. Regulations applicable to municipal solid waste landfills, 40 C.F.R. Part 60, Subpart Cc-Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills and Subpart WWW-Standards of Performance for Municipal Solid Waste Landfills-were promulgated on March 12, 1996 (61 Fed. Reg.9919, March 12, 1996) and in accordance with § 111(b)(1)(B) of the Act were effective on promulgation. The Subpart Cc emission guidelines apply to each existing MSW landfill for which construction, reconstruction, or modification was commenced before May 30, 1991 (§ 60.32c(a)). The provisions of Subpart WWW apply to each municipal solid waste landfill that commenced construction, reconstruction or modification after May 30, 1991 (§ 60.750(a)). Modification means an increase in the permitted volume design capacity by either vertical or horizontal expansion based on its design capacity as of May 30, 1991.[8] Physical or operational changes made to an existing MSW landfill solely to comply with Subpart Cc of this part are not considered construction, reconstruction, or modification for the purposes of this section (§§ 60.32c(b); 60.750(a)). Section 60.752(b) provides that the owner or operator of an MSW landfill subject to this subpart with a design capacity greater than or equal to 2.5 megagrams and 2.5 million cubic meters is subject to part 70 or part 71 permitting requirements.

9. The regulations define municipal solid waste landfill or MSW landfill as meaning an entire disposal facility in a contiguous geographical space where household

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waste has been placed for:5 years or more if active; or (2) 2 years or more, if closed or at final grade. In addition, § 60.753(e) provides in part: Operate the system such that all collected gases are vented to a control system designed and operated in compliance with § 60.752(b)(2)(iii).

[8] Section 60.751. This is the definition added to Subpart WWW by the amendments, corrections, and clarifications effective August 17, 1998 (63 Fed.Reg.32743, June 16, 1998). Prior to the amendment, the general new source definition applied which provided with certain exceptions that any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of Section 111 of the Act (§ 60.14(a)).Because the amended definition restricts rather than expands the meaning of " modification" as applied to landfills, persons subject to the regulation are not adversely affected thereby.

waste is placed in or on land (§§ 60.31(c); 60.751). The cited definition goes on to provide that an MSW landfill may receive other types of RCRA Subtitle D wastes and that "(p)ortions of an MSW landfill may be separated by access roads." Further that "(a)n MSW landfill may be publicly or privately owned " and "may be a new MSW landfill, an existing MSW landfill or a lateral expansion." Section 60.752(a) provides that each owner or operator of an MSW landfill having a design capacity less than 2.5 megagrams by mass or 2.5 million cubic meters by volume shall submit an initial design capacity report to the Administrator as provided by § 60.757(a). Landfill owners or operators were required to file an amended design capacity report when an increase in the maximum design capacity resulted in a maximum design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters.[9]

10. Section 60.757 is entitled "Reporting requirements" and provides in part that "(e)xcept as provided in § 60.752(b)(2)(i)(B), (a) each owner or operator subject to the requirements of this subpart shall submit an initial design and capacity report to the Administrator."[10] Section 60.752(b) provides that each owner or operator of an MSW landfill having a design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters, shall either comply with paragraph (b)(2) of this section or calculate an NMOC emission rate for the landfill using the procedures specified in § 60.754. Section 60.752 (b)(2) provides that, "(i)f the calculated emission rate is equal to or greater than 50 megagrams per year, the owner or operator shall:(i) submit a collection and control system design plan prepared by a professional engineer to the Administrator within one year." The NMOC emission rate calculations specified in § 60.754 are not an alternative to the requirement that landfills having NMOC emission rates equal to or greater than 50 megagrams submit a collection and control system design plan, because § 60.752(b) goes on to provide that the NMOC emission rate shall be recalculated annually,

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[9] Section 60.752(a)(1) provides that the owner or operator shall submit to the Administrator an amended design capacity report as provided for in § 60.757.(a)(3), which in turn provides that an amended design capacity report shall be submitted to the Administrator within 90 days of an increase in the maximum design capacity of the landfill to or above 2.5 million megagrams or 2.5 million cubic meters.

[10] The design capacity report required by § 60.752(a) was due by June 10, 1996, for landfills that commenced construction, modification, or reconstruction on or after May 30, 1991, but before March 12, 1996, or within 90 days after the date construction, modification or reconstruction commenced for landfills that commence construction, modification or reconstruction on or after March 12, 1996 (§ 60.757(a)(1)(i) and (ii)). See, however, finding 14 for an IEPA modification of the June 10, 1996, date.

except as provided in § 60.757(b)(1)(ii), and § 60.754 makes it clear that, if the calculated or recalculated NMOC emission rate is equal to or greater than 50 megagrams per year § 60.752(b)(2) applies whether Tier 1, Tier 2 or Tier 3 procedures are used. In accordance with § 60.752.(b)(2)(ii), a collection and control system that captures the gas generated within the landfill as required by paragraphs (b)(2)(ii)(A) or (B) or (b)(2)(iii) of this section shall be installed within 30 months after the first annual report in which the emission rate equals or exceeds 50 megagrams per year, unless Tier 2 or Tier 3 sampling demonstrates that the emission rate is less than 50 megagrams per year, as specified in § 60.757(c)(1) or (2). Section 60.752(b)(2)(iii)(B) provides in part that the reduction efficiency or parts per million by volume shall be established by a performance test to be completed no later than 180 days after the initial startup of the approved control system using the test methods specified in § 60.754(d). Section 60.757 (b) provides that each owner or operator subject to the requirements of this subpart shall submit an NMOC emission rate report to the Administrator initially and annually thereafter, except as provided in paragraphs (b)(1)(ii) or (b)(3) of this section.[11]

11. On October 8, 1996, CDT by counsel submitted to IEPA an Initial Design Capacity and Non Methane Organic Compounds ("NMOC") Emission Rate Report for its Site No. 1978170006 (R's Exh 1). Among other things, the Report indicated that the landfill was adjacent to Site No. 1978170005, that it was a "new" MSW landfill, that it had IEPA land permits Nos. 1993-083-LF (DE) and 1993-058-SMO (OP) issued on January 19,1993, and June 4, 1993, respectively, and an air construction permit , No. 91060054, issued on December 3, 1991. The Report also indicated that it began accepting solid waste in June 1993, that it had a maximum design capacity of 1.41 million Mg (megagrams) 1.98 m^3 (cubic meters) and that it occupied 58.1 acres. Because the design capacity was less than 2.5 million Mg or 2.5 million cubic meters, NMOC emission calculations were not included.

12. On November 18, 1996, CDT by counsel submitted to IEPA an Initial Design Capacity and Non Methane Organic Compounds ("NMOC") Emissions Rate

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[11] Section 60.757 (b)(1)(ii) provides in part that if the estimated NMOC emissions rate as reported in the annual report to the Administrator is less than 50 megagrams per year in each of the next 5 consecutive years, the owner or operator may elect to submit an estimate of the NMOC emission rate for the next five year period in lieu of an annual report. Section 60.757(b)(3) provides that each owner or operator subject to the requirements of this subpart is exempted from the requirements of paragraphs (b)(1) and (2) of this section, after the installation of a collection and control system in compliance with § 60.752(b)(2).,during such time as the collection and control system is in operation and in compliance with §§ 60.753 and 60.755.

Report for its Site No. 1978170005 (R's Exh 2). Among other things, this Report stated that the site was adjacent to Site No. 1978170006, that the facility was a closed MSW landfill which has accepted waste since November 8, 1987, and that it has IEPA land Permit Nos. 1983-19-DE and 1983-19-OP; 1992-136-SP, issued on March 7, 1984, August 3, 1984, and June 9, 1992, respectively. The Report further states that this landfill first accepted solid waste in August of 1984 and was closed in May of 1993. The maximum design capacity of this landfill is reported as 2.06 million Mg (2.89 million cubic meters) and it is reported to have occupied 73 acres. Again, because the design capacity was considered to be below 2.5 million Mg , NMOC emission calculations were not included.[12]

13. A memorandum, dated December 30, 1996, from Kim Swanson, a paralegal in the offices of counsel for CDT, to Frank Acevedo, EPA, refers to a letter from IEPA, dated May 21, 1996 (R's Exh 6), which announced Federal reporting requirements for the control of NMOC emissions from MSWLs, summarizes the factual situation regarding the two IEPA sites at the CDT Landfill, refers to the filing of separate Design Capacity and NMOC reports for the MSWL landfills designated as IEPA Site Nos.1978170006 and 1978170005 described in findings 11 and 12, and states that in a telephone conversation on November 19, 1996, with Dixon Nwaji of IEPA, he (Swanson) was informed that both reports were rejected because one report should be submitted covering both sites (R's Exh 4). As a basis for his position, Mr. Nwaji reportedly cited the [Answer to] Question No.4 in the Municipal Solid Waste and Landfill New Source Performance Standards and Emission Guidelines-Questions And Answers (No.10 in the 1998 version in the record, C's Exh 26), which is misleading without the factual predicate for the questions, because in the example given the original landfill was only in the process of closing and was still accepting waste. [13] Moreover, the example assumes the matter at issue, because it

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[12] The preamble to the amendments and clarifications to the regulation states that if a landfill design capacity is less than either 2.5 million Mg or 2.5 million cubic meters, the landfill is exempt from all provisions except the design capacity report (63 Fed. Reg.32745-746, June 16, 1998). The basis of this exemption is not apparent because, although §60.752(a)(2) refers to a design capacity exemption in paragraph (a) by which landfills with a design capacity less than 2.5 million megagrams by volume or 2.5 million cubic meters by mass were exempt from the requirements of § 60.752 (b) through § 60.759 of this subpart, paragraph (a) of § 60.752 does not contain any such exemption.

[13] Question No. 10 is as follows: Question: How are contiguous or adjacent landfills handled? For example, a county landfill, built in the early 1970s, is in the process of closing, however, it is still accepting waste. As an expansion to the existing landfill, another cell obtained a permit in February 1993, but is still under construction. These two landfill sites are separated by an access road. In order to

refers to an expansion of the existing landfill. Also, the example refers to a "cell" as being permitted, which is realistic only in the sense that a "cell" is part of a permitted landfill[14]. Although the term "cell" is not defined in the regulation, Ms. Michele Laur, an environmental engineer involved in the promulgation of the MSWL air regulations, explained the common understanding of the term as applied to landfills. She described landfills as large parcels of land, which are not filled all at one time, but are broken into grids that we call "cells" (Tr. 88, 89). She explained that as one cell receives all of the waste that it can handle [i.e., is filled], a new cell is prepared by putting in a liner which is required by Subtitle D regulations [40 C.F.R.§ 258.40]. Mr. Swanson's memorandum asserted that CDT Landfill Corp. IEPA Site 1978170006 is a new landfill, not a modification of Site No. 1978170005, and that IEPA Site No. 1978170006 is not a cell of IEPA Site No. 1978170005. Additionally, the memorandum stated that the IEPA Initial Capacity and NMOC Emission Rate Report form was not designed to accommodate reporting from two separate landfill sites, and argued that there were two separate sites, having separate site and permit numbers, although their mailing address is the same and they are owned by the same corporation. Mr. Acevedo was asked for his advice in the matter.

14. A memorandum to the File, dated February 10, 1997, by Mr. Swanson, identified in finding 13, recites the separate Initial Design Capacity and NMOC reports submitted by CDT and the conversations with Dixon Nwaji wherein he was informed that EPA interpreted the rule as requiring a combined report for all sites owned by one company [at one or adjacent locations] and it made no difference that the sites had separate numbers, because, inter alia, Land Division numbers are separate from Air Division numbers and the Air Department did not recognize land numbers. The memo recounts efforts to obtain a more definitive answer from EPA

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calculate its emissions, is this considered one landfill or two? Also, is the addition of these cells a modification, or would it be considered a new source? Another county landfill has two cells separated by a county road. Is this considered one landfill or two? A third landfill has cells or sites separated by a golf course. Answer :A landfill is considered a single landfill if the cells are contiguous and under common ownership or control, even if a road or golf course separates the cells. This is the historical interpretation for source definition for all NSPS, and it has been adopted for landfills. The addition of a cell that increases the volumetric design capacity for one of these cells would be considered a modification, not the opening of a separate new landfill. A modification causes the entire landfill (the permitted cells and the newly permitted cell) to become subject to the NSPS.

[14] Among the definitions of "cell" is a small compartment, receptacle or cavity. Webster's Third International Dictionary of the English Language (1981)

in Washington with the result that several days after January 30, 1997, Mr. Swanson was notified that CDT should file a combined report covering both sites. Mr. Nwaji reportedly assured Mr. Swanson that CDT would not be penalized for the late submittal because the separate reports were previously submitted in a timely manner. Although, as noted in finding 10 the federal regulation, § 60.757(a)(1), reflects that an initial design capacity report was to be submitted on or before June 10, 1996, an IEPA letter, dated August 19, 1996, from the Division of Air Pollution Control " To All Municipal Solid Waste Landfill Facilities" concerning, inter alia, federal reporting requirements for NMOC emissions, states that required information should be reported to the Agency no later than October 1, 1996 (R's Exh 6).

15. CDT submitted a combined Initial Design Capacity and NMOC Emission Rate report covering Site Nos. 1978170005 and 1978170006 under date of March 5, 1997 (R's Exh 3). This Report in common with the separate reports submitted to the IEPA for the mentioned sites were on forms promulgated by the IEPA, but unlike the separate report submitted for Site No. 1978170006 on October 8, 1996, had not been updated to reflect the modified reporting date deadline of October 1, 1996. The form provides at ¶ 3 that a separate form must be submitted for each landfill. The Report here states that "(a)s per Dixon Nwaji, we have been instructed to complete one form for both landfills". Attachments reflecting NMOC calculations for the year 1996 indicate an emission rate of 350 Mg/Yr for Site No. 1978170005 and 192 Mg/Yr for Site No. 1978170006. The maximum design capacity of Site No. 1978170005 was reported to be 2,060,000 Mg, resulting in an average acceptance rate of 229,000 Mg/yr during the 9 years the landfill was active. That site was then considered to be 12 years of age. The maximum design capacity of Site No. 1978170006 was reported to be 1,410,000 Mg, the active life of the landfill was estimated as 5 years and the age of the active landfill site was reported as 3 years. This resulted in an average annual acceptance rate of 282,000 Mg/yr. Combining the two sites indicated total design capacity of 3.47 million Mg and NMOC emissions in 1996 of 542 Mg/Yr.

16. By a letter to CDT, dated November 17, 1998, the IEPA issued a Non-Compliance Advisory for violations identified during a record review (C's Exh 5). Among other things, an attachment to the letter states that CDT is the owner or operator of a MSWL which has commenced construction, reconstruction or modification on or after May 30, 1991, and therefore, is subject to the Subpart WWW Federal regulations. Additionally, the letter states that, based upon the initial design capacity report received from CDT on March 7, 1997, the [landfill] is a major source, which was required to file a Clean Air Act Permit Program (CAPP) permit application before March 12, 1997. It noted that CDT did not file an application for a CAPP permit before March 12, 1997, and, in fact, had yet to submit such an application. The attachment also pointed out that CDT had reported a NMOC Tier I emissions rate in excess of 50 Mg/year on March 7, 1997, and, therefore, was

subject to the requirement of installing a gas collection and control system (GCCS). CDT failed to submit a GCCS design plan within one year after reporting NMOC emissions at a rate greater than 50 Mg/year. In fact, IEPA had yet to receive such a design plan. IEPA suggested that CDT complete the attached CAPP permit application and submit it to IEPA, Bureau of Air, Permit Section within 30 days of receipt of the Non-Compliance Advisory and that, within 30 days of receipt of the Advisory, it submit a GCCS design and construction permit application to the Bureau of Air, Permit Section.

17. By a letter, dated January 29, 1999, CDT by counsel referred to the Non-Compliance Advisory described in finding 16 (C's Exh 6) and responded to an IEPA letter to CDT, dated January 11, 1999 (not in the record). The CDT letter points out that the landfill designated as IEPA Site No. 1978170005 is certified closed and has a development and operating permit for a gas collection system. The letter states that [a copy] of the operating permit issued by IEPA to CDT is enclosed along with a survey prepared by Ruettiger, Tonelli & Associates, Inc. showing the specific gas collection system locations. With respect to Site No. 1978170006, the currently open and operating landfill, the letter stated that the site has a development permit for a gas collection system, but no operating permit. A survey prepared by T.J. Lambrecht Construction showing the gas management system as built was enclosed and the letter stated that an application for an operating permit was being prepared and would be submitted sometime in February. The letter further stated that CDT was in the process of preparing a CAAP permit application.

18. It appears that on or about May 8,1998, CDT employed Andrews Environmental Engineering (Andrews) of Springfield, Illinois , to review the permitting status/operational practices of the gas management system operated by KMS at the CDT Landfill.[15] The mentioned letter (note 15, supra) points out that there are two existing [landfill] units with two separate sets of landfill regulations and that the construction permit for the flare was issued in the name of CDT Landfill. Andrews asked KMS for a copy of the operating permits for the flare and for the reciprocating engines, for a copy of the construction plans and design documents for the GCCS which is to be installed in the other landfill unit [Phase II] and for a copy of the annual report for the reciprocating engines. KMS replied under date of May 18, 1998 (R's Exh 22), confirming that the construction permit for the gas collection system and flare was issued in the name of CDT Landfill and that in applying for an operating permit for the collection system, CDT did not include the flare. KMS stated that it would provide technical information required for the flare operating permit and CDT could then complete the application. KMS stated that it

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[15] Fax Data Sheet from Andrews to Danny Geiss, CDT, dated May 8,1998; Andrews' letter to KMS, dated May 11, 1998, R's Exhs 20 and 21.

anticipated providing the information to CDT within the next two weeks. KMS acknowledged that it had overlooked applying for an operating permit for the reciprocating engines and stated that the application should be completed within the next two weeks. Regarding the gas [collection] system installation, KMS stated most of the wells in Phase II have been installed and that "we" are in the process of installing interconnecting pipeline. Once that work is completed, KMS indicated it would be submitting an application to operate that part of the system which is installed.[16] Regarding an Annual Report for the reciprocating engines, KMS stated that, because it had not filed for a permit to operate, there is no requirement at this time to file an annual report.

19. On February 8, 1999, the CDT landfill was inspected by Vivian Doyle and Sarah Graham of the US EPA for the purpose of determining compliance with the NSPS for MSWLs (Report of Inspection, C's Exh 1). They met with Danny Geiss, President, Jeff Geiss and a Mr. Jim Love of KMS Services and were informed that the GCCS had been installed by and contracted to KMS. Mr. Love reportedly explained the operation of the GCCS in detail, from which it appears that landfill gas (LFG) is collected by means of underground pipes, that LFG is collected from the system by means of power from a Caterpillar engine, which is fueled by LFG, that one Caterpillar engine is in continual operation while another Caterpillar engine is under construction and that the engine in operation, in addition to drawing LFG from the system, powers a generator, which generates electricity, which is sold to Commonwealth Edison.[17] In the event of a malfunction, the system shuts down and a gas flare is used as a backup, which, although it must be turned on manually, is fed by a vacuum created by a blower, and provides continuous gas extraction.

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[16] The extent by which the installation of GCCS for Phase II (Site No.0006) had been completed at this time is unclear. It is noted, however, that Andrews Environmental Engineering submitted to CDT an itemized cost estimate totaling $538,250 for installation of gas probes, gas wells, condensate tanks and associated piping for a conveyance line (Andrews' Fax Data Sheet, dated September 1, 1998, R's Exh 19).

[17] While this would appear to be referring to reciprocating engines, otherwise identified as Engine Nos. 3 & 4, KMS had a construction, but not an operating permit for these engines (finding 7). KMS, however, had been issued both a construction and an operating permit for the" power combustors", Engines 1 & 2 (Id.). It appears that performance testing of all four engines was not conducted until September, 2000. See letter to EPA from counsel for KMS, dated October 26, 2000 (C's Exh 18), enclosing a copy of what is described as a"Volatile Organic Material Emission Compliance Study"on four Caterpillar Engine Stacks at CDT Landfill. Reasons for the delay in conducting this testing will appear infra.

The report states that there are 20 gas wells in the existing landfill Phase I (Site No.1978170005) while 18 wells have been drilled in what is referred to as Phase II (Site No. 1978170006) of the landfill.

20. The Report of Inspection indicates that Phase I has an active gas [collection system], which is permitted to operate, while Phase II is an active landfill with an inactive gas [i.e., non-powered collection system] which reportedly is awaiting an operating permit. An operating permit for this GCCS was conditionally approved by Modification No. 28 to Permit No.1992-083-LF issued by IEPA on October 29, 1999 (finding 3). Among other things, the inspection report concludes that, although CDT has a construction permit for the flare, it does not have an operating permit for the flare and although it was required to submit a GCCS design plan within one year of reporting NMOC emissions greater than 50 Mg/yr, it had not done so. Additionally, because CDT had reported a design capacity of greater than 2.5 million megagrams and 2.5 million cubic meters, it was required to submit a CAAP permit application which it had failed to do. The report concludes that because one site was open and the other was closed, Mr. Geiss did not realize that the two sites would be combined for the purpose of NMOC calculations.

21. On May 4, 1999, EPA issued a Findings of Violation (FOV) to CDT (C's Exh 12). The letter enclosing the FOV stated that CAA § 113(a)(3) gave EPA several enforcement options which included issuing an administrative compliance order, issuing an administrative penalty order, or bringing a civil or criminal action and that the option selected may depend on the length of time CDT takes to achieve continuous compliance. CDT was given an opportunity to confer concerning the violations, efforts to comply and steps to be taken to prevent future violations of the same nature. Findings in the FOV included the assertion that since May 12, 1996, CDT's MSW landfill has had a design capacity greater than or equal to 2.5 million megagrams or 2.5 million cubic meters by volume, that the calculated emission rate for the landfill is equal to or greater than 50 megagrams per year and that CDT filed its initial design capacity report with the State of Illinois on November 18, 1996. Specific violations alleged were that CDT had failed to submit an NMOC emission rate report to the Administrator annually as required by 40 C.F.R. § 60.757(b), failed to submit a gas collection and emission control system design plan within a year after reporting an NMOC emission rate greater than 50 megagrams per year in violation of § 60.757(c) and failed to file an application to obtain a CAAP permit in violation of §§ 60.752(b) and 70. 5(d). Complainant relies on an affidavit by Kevin Fergusson, an office administrator employed by IEPA, to support the allegations that CDT failed to submit an NMOC Emission Rate Report for the calendar year 1997 and failed to submit a gas collection and control system design plan (C's Exh 29). CDT submitted Annual Emission Rate Reports to IEPA for the calendar year 1998 on July 8,1999, and for the calendar year 1999 on March 7, 2000 (C's Exh 4; R's Exh 17). Among other things, the former report shows NOX emissions of 5.31 tons as compared with 0.1540 tons allegedly reported for the year 1997 and

particulate emissions of zero. The latter report shows NOX emissions of 0.0005 tons and particulate emissions of 14.760 tons, apparently due to the operation of a sand and gravel plant and a "Jaw Crusher", which were assertedly not in operation during the calendar year1998. The 1999 report also reflects that a single open flare system, which began operation in January 1993, operates at this location, having an AFCM flow rate of 200 and an operating temperature of 1600 ∘ F.

22. On September 8, 1999, EPA issued a letter (Pre-filing Notice) informing CDT that it intended to file an administrative complaint against CDT seeking civil penalties for violations of NSPS applicable to MSWLs (C's Exh 13). CDT was given a final opportunity to furnish any information which it believed should be considered before the complaint was issued, including financial information such as balance sheets and income statements relevant to its ability to pay a civil penalty. CDT responded under date of September 22, 1999, pointing out that it submitted its Initial Design Capacity and NMOC Emission Rate Reports on March 7, 1997, for its operational landfill, IEPA designation 1978170006, and its closed landfill, IEPA designation 1978170005 (C's Exh 8). The letter asserted that, based upon advice from its former consultants, CDT believed that it had complied with all relevant regulations concerning stationary sources and that no further reporting or testing would be necessary. Since becoming aware of its Title V obligation, CDT alleged that it had filed the application, met with representatives of EPA and proposed a time line for performing the necessary work.

. 23. The matters referred to above had been discussed at a meeting with EPA officials on July 15, 1999, and CDT asserted that shortly thereafter, it had provided EPA with a schedule and explanation of the proposed work. At EPA's request, George Noble, CDT's engineering consultant had shortened the testing schedule and the projected time to complete work associated with emission testing. CDT pointed out, however, that the technical nature of the necessary work, the testing needed to assure that the flare is in working order, the need to obtain IEPA approval and IEPA review of the application and testing procedures were not matters within CDT's control. The letter further stated that CDT had been operating its landfill gas collection system at site 1978170005 since April 29, 1998, and that it had applied for an operating permit for the gas management system at the 1978170006 site. CDT requested that no penalty be assessed, because it was in the process of closing all landfill sites and ceasing operations and asserted that any penalty may jeopardize its ability to properly close the landfill and satisfy post-closure requirements. The letter, however, did not include any financial information. As indicated at the outset of this decision, EPA's complaint proposing a penalty of $72, 360 was issued on September 29,1999.

24. CDT's assertion that it has filed a Title V CAAP permit application with IEPA is accurate, the application having been submitted on June 30, 1999 (C's Exh 23; KMS Chronology, R's Exh 18). The application was prepared for CDT by George

Noble, a professional engineer and environmental consultant (Tr.108, 110, 112). Mr. Noble also prepared a Title V permit application for KMS who owned and operated what he referred to as the " gas combustors" at the landfill (Tr.110, 111). Subsequently, he stated that KMS owned and operated the "engines", which presumably included the combustors (Id.). Mr Noble testified that when he began working on the Title V application, he found that [CDT] had permits in place for the various cells from the Land Division of IEPA and was in full compliance with the requirements with the Bureau of Land, but only in partial compliance with [requirements] of the Bureau of Air (Tr.111-12, 118, 127). He identified the "out-of- compliance" Bureau of Air condition [concerning CDT] as the lack of an operating permit for the flare (Tr. 116, 127). It is noted, however, that the Title V application for the combustors (Engines 1 & 2) submitted on behalf of KMS on August 29, 1999, reflected that emissions tests on the combustors had not been performed (KMS Chronology, R's Exh 18). Mr. Noble testified that there was some confusion as to the testing requirement for the flare, because the temperature monitoring [apparently desired by IEPA] was only applicable to a closed flare, while the flare at CDT, which was owned by KMS, was open (Tr.117-18). He indicated that this situation took two or three months to be resolved and that KMS had now installed what he called an "infrared" monitoring system.

25. Mr. Noble submitted Title V applications for CDT and KMS and a schedule by which the out of compliance condition would be corrected. He explained that CDT had solid waste permits for the "old landfill", which was referred to as 005, and for the " new landfill", which was referred to as 006, and also for what he termed a "transfer station" (Tr.113). Mr. Noble had experience with the IEPA, including the Bureau of Land, having dealt with that Agency since its creation in 1972, and was familiar with how they treated the sites at the CDT landfill (Tr.114). He testified that the Bureau of Land considered 005 and 006 to be separate landfills having separate permits, and that, because site 005 was closed, the final cover having been placed, CDT considered that cell was closed and no longer an issue (Tr.124). He explained that CDT did not understand the implications of the NMOC reporting requirements and was surprised to discover that they had reporting requirements for a landfill they considered to be closed (Tr. 123).

26. Mr. Noble testified that he found the [NSPS] landfill regulations issued by EPA in 1996 to be very, very difficult to understand (Tr.115-16). He explained that his job was to advise his clients of the records they were supposed to keep and the reports they were supposed to make to the IEPA and that there was confusion as to exactly what was required to be recorded and that required to be reported, because hidden in the record keeping section were further reporting requirements .[18]Asked when he

[18] Tr. 116. Although most reporting requirements are in § 60.757, § 60.758 is entitled "Recordkeeping requirements " and paragraph (c) lists exceedances

first became aware of the IEPA information letter [concerning NSPS and Emission Guidelines for MSWLs], dated May 21, 1996 (R's Ex 6), Mr. Noble replied that he received it from IEPA in February 1999 when he was researching the permit requirements (Tr.126). He did not know whether CDT had a copy of that letter. There is no information in the record as to the distribution of the May 21 letter and only the August 19 amendment is addressed: "To All Municipal Solid Waste Facilities" (finding 14). The letter states that IEPA will be implementing the NSPS pursuant to the existing delegation agreement between IEPA and USEPA [19].

27. Mr. Noble was familiar with the gas collection system at the CDT landfill. He testified that the system was currently pulling gases from both the closed cell and the cell that was receiving waste (Tr.121). Ms. Sarah Graham, an environmental engineer employed by EPA, accompanied Ms. Doyle on the inspection of the CDT landfill conducted on February 8, 1999 (Tr. 31; finding 19). She described the landfill as two mounds of small hills, one closed and covered with vegetation, and the other partly covered in vegetation and the other part [of the second mound] still accepting trash (Tr.33). She stated that it was basically "a pile of garbage." She testified that there were two parcels of land which were receiving trash and that there was a small road or open area about the width of a two-lane highway between them. She further testified that there were two engines at the time of the inspection, one of which was operating and one of which was under construction (Id). In accordance with the explanation by Mr. Love (finding 19), she understood that the engines were the primary emission control system and that the flare was a backup system (Tr.37). She answered affirmatively the question of whether the study submitted to EPA by counsel for KMS on October 26, 2000 (supra note 17), satisfied the requirement for performance testing (Tr.63).

28. As indicated (finding 10), Section 60.752(b)(2 (iii))(B) provides for a performance test of the approved [gas] control system to be completed no later than 180 days after initial startup using test methods specified in Section 60.754 . Section 60.754 of the Part WWW regulations is entitled "Test methods and procedures"and § 60.754.(a)(3) provides in part that "(f)or the performance test required by § 60.752(b)(2)(iii)(B), Method 25C or Method 18 of appendix A of this part shall be used to determine compliance with the 98 weight-percent efficiency or the 20 ppmv outlet

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which are required to be recorded and reported.

[19] That agreement, executed by USEPA on April 8, 1988, and by IEPA on April 28, 1988 (C's Exh 25), provides, inter alia, that IEPA will have primary responsibility for the implementation and enforcement of NSPS and NESHAPS in the State of Illinois. The agreement expressly provides, however, that the delegation in no way limits USEPA's concurrent authority to, as provided in CAA § 111(c)(2), enforce any standard of performance under that section.

concentration level, unless another method to demonstrate compliance has been approved by the Administrator...." See also § 60.754(d) which contains the identical language.[20] Method 25C is entitled "Determination of Non-Methane Organic Compounds (NMOC) in MSW Landfill Gases", and requires, inter alia, the collection of samples by means of a stainless steel probe. The method is not intended for measuring emissions from engines and, accordingly, cannot conclusively demonstrate compliance with the 98% destruction efficiency or 20 ppmv by outlet concentration required by NSPS [§ 60.752(b)(2)(iii)(B)] (KMS Chronology, Item 23). It appears that the issue of the appropriate test methodology to use on the engines was first raised by Mostardi Platt Associates, Inc., a contractor specializing in air [pollution] matters, when in August 1999, it tested similar engines for KMS at the Macon County Landfill. Indeed, the engines at the Macon County Landfill did not pass emission tests, because the required methodology (Method 25C) did not provide representative samples and was not appropriate (Chronology at 4). Thereafter, Mostardi Platt, at the direction of KMS, engaged in evaluation and discussions with IEPA and EPA to identify an acceptable alternative test protocol for the engines at the Macon County and CDT landfills. This occurred during the period October, 1999, through the early months of 2000, and resulted in the determination that Method 25A appeared to be the most appropriate alternative test method for these types of engines (Chronology, Items 24, 30, 36, and 38).

29. Although CDT had an operating permit for a gas collection system at its landfill (findings 3 and 7), the combustors, Engine Nos. 1 & 2, had not been performance tested. Installation of Engines 3 and 4 was completed in January, 2000, start up of the generator for Engine No. 4 taking place on January 28, 2000, and installation of the "operating logic" for these engines was completed on April 11, 2000 (Chronology at 4). In the meantime, Mostardi Platt conducted for KMS testing of the flare on January 18, 2000, and the results were submitted to IEPA and EPA on February 29, 2000 (Id). On April 17, 2000, KMS employed Mostardi Platt to perform diagnostic testing on the engines at CDT using proposed alternate Method 25A. This diagnostic testing was performed on all four engines at CDT on July 5 and 6, 2000, and the results indicated that the samples tested were more representative [of actual engine emissions] (Chronology, Items 39-42). On August 8, 2000, Mostardi Platt submitted a written request to IEPA for emission testing of the engines at Macon County using the alternative test method and KMS authorized Mostardi Platt to develop and implement a test protocol for emissions testing of the engines at CDT using alternative testing methodology (Chronology, Items 47 and

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[20] Section 60.754 (d) goes on to provide that, if using Method 18 of Appendix A of this part, the minimum list of compounds to be tested shall be those published in the most recent Compilation of Air Pollutant Emission Factors (AP-42).There is no indication or allegation that Method 18 is a realistic or practical method of testing the engines at issue here.

48). On August 15, 2000, Mostardi Platt received verbal approval from IEPA to use alternative test methods for testing emissions from the engines at both CDT and Macon County and on August 17, 2000, KMS submitted an Emission Test Protocol and a 30-day notification (required by § 60.8) of proposed testing for the engines at CDT using the alternative emission test protocol (Chronology, Item 50). These tests were conducted on September 26 and 27, 2000 and the results submitted to EPA on October 26, 2000, were acceptable (finding 27). Section 60.754(d) has been amended to allow use of Method 25 for determining control device efficiency when combusting landfill gas (65 Fed. Reg. 61744, 61778, October 17, 2000).

30. Criteria which the Administrator is to consider in assessing a penalty are set forth in CAA § 113 (e)(1), 42 U.S.C. § 7413(e))1).[21] Complainant calculated the proposed penalty in accordance with the Clean Air Act Stationary Source Penalty Policy (October 25, 1991) and the Clarification thereof, dated January 17, 1992 (C's Exhs 15 and 16). Complainant's Explanation of Penalty [Calculation] Recalculations is in the record (Exhibit 14). In accordance with the Penalty Policy, the first step in the penalty calculation is the determination of a "preliminary deterrence amount"which is composed of an "economic benefit" component and a seriousness of the violation or "gravity"component. Complainant considered that the only economic benefit potentially obtained by CDT was that arising from the delayed testing of the gas collection and control system. This was determined to be insignificant and the proposed penalty did not include any amount for economic benefit. Complainant determined that the gravity component of the penalty was $152,900, composed of three major factors: Actual/Possible harm, Importance to Regulatory Scheme, and Size of the Violator (Exh. 14). Even though there was no assessment for Level of Violation, i.e., for each increment or fraction over an emission limitation, no assessment for Toxicity of Pollutant, and no assessment for Sensitivity of Environment, Complainant concluded that the Actual/Possible Harm warranted a penalty of $97,000. This consisted of $32,000 for the Duration of Violation, that is $20,000 for the failure to submit an 1997 annual emission rate report and $12,000 for the five month late submission of the annual for 1998; $15,000 for what was considered a 12-month delay in submission of a GCCS design plan, $30,000 for a

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[21] Section 113)e), entitled "Penalty assessment criteria", 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....

28-month delay in submission of a Title V operating permit application and $20,000 for a 14-month delay in conducting performance testing (Exh 14 at 1-3). Although it is clear that the Part 70 operating permit does not impose new or additional requirements (§ 70.2(b)), one of its purposes appears to be to facilitate implementation and enforcement of the standard (Preamble, 61 Fed. Reg.9912; IEPA letter, R's Exh 6 at 3). Ms. Michele Laur, identified finding 13, testified that the Title V (Part 70) permitting process was the one site regulated entities, the regulators and the public could access to find out what a specific source must do to be in compliance (Tr.87, 88). She stressed that this was important, because, inter alia, it allowed the public to comment before a site was allowed to operate.

31. Complainant determined that the Importance [of the requirements violated] to Regulatory Scheme warranted a penalty of of $40,000, consisting of $15,000 for failure to submit 1997 NMOC report, $5,000 for late submission of 1998 NMOC report; $15,000 for failure to submit GCCS design plan and $5,000 for late performance testing (Id.at 4). On cross-examination, Ms. Graham, who calculated the proposed penalty, testified that CDT's violations did not result in any harm to the environment from emissions (Tr.70). Mr. Noble testified that he was unaware of any damage to the environment from CDT's late filings (Tr.118-19). Even though Complainant determined from a Dun & Bradstreet report, which is not in evidence, that CDT had a negative net worth of $49,847, it, nevertheless, added $2,000 to the proposed penalty for size of business to arrive at a figure of $139,000. This figure was adjusted upwards by 10% in accordance with the Civil Monetary Penalty Inflation Adjustment Rule (40 C.F.R. Part 19) to reach the gravity component of $152,900. The Explanation of the Penalty Calculations states that CDT provided minimal financial documentation concerning its ability to pay a penalty before the complaint was filed and acknowledges that "....., those documents do not contain sufficient information to evaluate CDT's ability to pay the penalty proposed...." (Id 5). The Explanation notes that although CDT has been requested to provide appropriate financial documents, no such documents have been provided to date and that, accordingly, there has not been any mitigating adjustment based on ability to pay. Complainant, however, reduced the proposed penalty by 30% or $45,870 in recognition of the fact that CDT had contracted with KMS for installation and operation of the GCCS and lacked control over the system. This resulted in what is referred to as a" Bottom Line" amount of $107,030 (Id.6). Complainant, however, appears to have found additional reasons to mitigate the penalty and at the hearing represented that it would not seek a penalty greater than that proposed in the complaint, $72,380 (Tr 26).

32. As indicated at the outset of this decision, CDT's Combined Balance Sheet as of September 30, 2000, prepared by the CPA firm of McGladrey & Pullen at an undetermined date, which was submitted by a letter from counsel, dated January 8, 2001, was admitted into evidence over Complainant's objection (R's Exh 25). The balance sheet shows total current assets of $748,431 after subtraction of a deficit

cash position of $24,794. Current assets include $527,860 in a money market account which is stated to be reserved for landfill closure costs. Current liabilities total $1,628,616 which includes trade accounts payable, a line of credit, current maturities of long term debt, accrued real estate taxes and city fees and other unspecified liabilities. Other assets total $3,940,307 of which $3,737,780 is pledged to the IEPA for landfill closure. Total assets are $5,590,974. Long term debt includes $6,500,000 for landfill closure and stockholder's equity shows a deficit of $4,048,214. The letter emphasizes the closure cost liability of $6,500,000 and points out that there is now a $2.8 million shortfall [excluding the money market account of $527,860] between the amount in escrow for closure and actual closure costs. The Combined Balance Sheet has not been supported by testimony from any officer of CDT or of any representative of McGladrey & Pullen, the CPA firm which prepared it. Moreover, there is no explanation for the very large closure cost liability.[22]

33. The 12-month statute of limitations set forth in CAA § 113(d) is not a bar to this action or any part thereof, because the Administrator and the U.S. Attorney General have jointly determined that the matter is appropriate for administrative penalty action, notwithstanding that a period greater than 12 months elapsed between the first alleged date of violation and the initiation of this administrative action (C's Exhs 2 and 3].

Conclusions

1. Although CDT's landfill is composed of two sites or units, IEPA Nos.1978170005 and 1978170006, the former of which was closed in1993, prior to the issuance of the Subpart WWW regulations, the sites or units are contiguous and thus considered one landfill for the purpose of [New source] Performance Standards for Municipal Solid Waste Landfills (MSWLs), 40 C.F.R. Part 60, Subpart WWW (1996). CDT commenced construction, reconstruction, or modification of Site No. 1978170006 after May 30, 1991, and, therefore, is subject to Subpart WWW.

2. Because combining the sites referred to in the preceding paragraph resulted in a landfill design capacity totaling 3.47 million Mg and the landfill had NMOC emissions in 1996 of 542 Mg/yr, CDT was required by § 60.752(b) to either comply with paragraph (b)(2), i.e., if the calculated NMOC emission rate is equal to or greater than 50 megagrams per year, submit a collection and control system design (GCCS) plan prepared by a professional engineer to the Administrator within one year, or calculate an NMOC emission rate for the landfill using the procedures

[22] Although not in evidence, it is noted that Schedule 2 attached to CDT counsel's letter, dated September 25, 1999, contains an estimate of $3,613,055 as the cost of closing sites 0005 and 0006.

specified in § 60.754. For a landfill of CDT's capacity and NMOC emission rate, the procedures specified in § 60.754 are not an alternative to the requirement for submission of a collection and control system design plan and the subsequent installation of such a system.

3. Because the reported design capacity of its landfill exceeded 2.5 million megagrams and 2.5 million cubic meters, CDT was required by § 60.752(b) to apply for and obtain an operating permit in accordance with Part 70 [State] or Part 71 [Federal] permitting requirements, Part 70, in this instance, otherwise known as Title V, CAA § 501 et seq.

4. The regulation, § 60.754(d) prior to the 2000 amendment, provided that Test Method 25C or Method 18 of Appendix A shall be used in conducting the performance test to determine compliance with the 98% efficiency level or the 20 ppmv outlet concentration required by § 60.752(b)(2)(iii)(b). Test Method 25C, however, was inappropriate in that it did not result in tests on samples representative of actual engine emissions and use of an alternate method required the approval of the Administrator. In view thereof, Count 4 alleging delayed testing of CDT's gas collection and control system will be dismissed.

5. Complainant's determination of the proposed penalty, which appears to be based on rigid adherence to the Stationary Source Civil Penalty Policy, does not adequately consider CDT's good faith efforts to comply, fails to consider permits issued by the IEPA, is not based on any realistic assessment of the seriousness of the violations, and, therefore, is grossly excessive. Accordingly, the Penalty Policy will be disregarded and an appropriate penalty determined utilizing the statutory factors set forth in CAA § 113(e)(1).

6. While the "duration and seriousness" of the violations would justify a penalty of $22,500, no penalty is assessed because Complainant has totally failed to carry its burden of persuasion that any penalty is appropriate considering "the size of the business and the economic impact of the penalty on the business",i.e., CDT's "ability to pay".

Discussion

1. CDT Is Subject To The [New Source] Standards of Performance For Municipal Solid Waste Landfills, 40 C.F.R. Part 60, Subpart WWW (1996).

Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 40 C.F.R. Part 60, Subpart Cc and [New Source] Standards of Performance for Municipal Solid Waste Landfills, Part 60, Subpart WWW, were promulgated on March 12, 1996 (61 Fed. Reg. 9919, March 12, 1996). In accordance with §

111(b)(1)(B) of the Act, these regulations were effective upon promulgation. The regulations define municipal solid waste or MSW land fill as meaning an entire disposal facility in a contiguous geographical space where household waste is placed in or on land (§§ 60.31(c); 60.751). The designated facility to which the Guidelines apply is each existing MSW landfill for which construction, reconstruction, or modification was commenced before May 30, 1991 (§ 60.32c(a)). On the other hand, Subpart WWW applies to each municipal solid waste landfill that commenced construction, reconstruction or modification on or after May 30, 1991 (§ 60.750(a)). Modification means an increase in the permitted volume design capacity by either vertical or horizontal expansion based on its design capacity as of May 30, 1991.

The CDT landfill, designated Site No. 1978170005 by the IEPA, opened in March of 1984 and began accepting waste in August, 1984 (finding 2). This landfill site was closed in 1993 and IEPA determined that the closure was complete and in accordance with CDT's closure plan in March of 1997 (Id.). In June of 1991, CDT applied to the IEPA for a permit for a new solid waste management facility for the disposal of municipal and non-hazardous special waste which was described, inter alia, as "adjacent to an existing facility" (finding 3). IEPA approved this application by a letter, dated January 19, 1993, which designated the site as "LPC #. 1978170006 .... Expansion Site"(Id.) Notwithstanding that Site No. 1978170005 was closed in 1993, prior to the issuance of the Guidelines and NSPS, Complainant contends that Site No. 1978170006 was a modification of Site No. 1987170005 and that, consequently, the two sites are one landfill for the purpose of Subpart WWW.

Apropos the foregoing, Complainant emphasizes that part of the definition of an MSW landfill providing that portions of an MSW landfill may be separated by access roads (§ 60.751; finding 9). This provision is eminently reasonable for an active landfill accepting waste, because it is obvious that a means of access must be provided to enable trash trucks to dump their loads. Less clear is its application to a site such as CDT Site No.0005 which had been permanently closed prior to the promulgation of the regulations at issue. In this regard, Complainant cites the answer to Question No. 10 in the Municipal Solid Waste and Landfill New Source Performance Standards and Emission Guidelines-Questions and Answers, which provides that a landfill is considered a single landfill if the cells are contiguous and under common ownership or control, even if a road or golf course separates the cells (finding 13). The factual predicate for this answer, however, is that the original site was only in the process of closing and is still accepting waste when construction began on the second site, and it is clear that this is not CDT's factual situation. Moreover, the example assumes the fact in issue by characterizing the second site as an "expansion" of the existing landfill and uses the term "cell", which is not normally used to describe an entire landfill that is composed of cells (Id).

The foregoing notwithstanding, it is concluded that Site Nos. 0005 and 0006 must be regarded as a single landfill for the purposes of Emission Guidelines (Subpart

Cc) and [New Source] Standards of Performance (Subpart WWW). Firstly, regarding the two sites as one landfill most nearly accords with the definition of an " MSW landfill" as "an entire disposal facility in a contiguous geographical space where household waste is place in or land" (§ 60.751). Secondly, it is clear that the intent was to regulate contiguous areas [under common ownership or control] as a single unit, because the total emission potential and associated environmental impacts are determined by the entire landfill. See Preamble to Proposed Rule, 56 Fed. Reg. 24468, 24485-86 (May 30, 1991). The cited preamble makes it clear that a landfill would be either new and subject to NSPS or existing and subject to the guidelines and that a single landfill would not have portions subject to the NSPS and portions subject to the guidelines. An affected facility under NSPS is each new MSW landfill and a new MSW landfill is a landfill for which construction, modification, or reconstruction commences on or after the proposal date of May 30,1991 (preamble to the final regulation at 61 Fed .Reg. 9907). It is therefore concluded that CDT's opening of Site No. 0006 in 1993 constituted a modification of the closed Site No. 0005 within the meaning of the regulation and thus, CDT's landfill is a new source subject to Subpart WWW.

2. <u>For the purpose of the regulations, Site Nos. 0005 and 0006 must be combined. Therefore, CDT is the owner of one landfill having emissions greater than 50 megagrams per year and it was required by § 60.752(b) to either comply with paragraph (b)(2) of that section, i.e., install controls, or calculate an NMOC emission rate for the landfill using the procedures specified in § 60.754. For a landfill of CDT's design capacity and emission rate, the procedures specified in § 60.754 are not an alternative to the requirement for the submission of collection and control system design plan to the Administrator and for the subsequent installation of such a system.</u>

Because Site Nos. 0005 and 0006 are contiguous and must be combined, CDT's landfill is subject to Subpart WWW. CDT's initial Emission Rate and Design Capacity Report submitted to IEPA on March 5, 1997, reflected a combined design capacity of 3.47 Mg and NMOC emissions in 1966 of 542 Mg/yr. Therefore, CDT was required by § 60.752(b) to either comply with paragraph (b)(2), i.e., submit a collection and control system design plan prepared by a professional engineer to the Administrator within one year, or to calculate an NMOC emission rate for the landfill using the procedures specified in § 60.754. The procedures in § 60.754 are not an alternative to the requirement for the submission of a collection and control system design plan and the subsequent installation of such a system by CDT, because its reported NMOC emission rate was greater than 50 megagrams and, in such instances, § 60.754 requires compliance with § 60.752(b) or calculation of a site specific mass NMOC emission rate using specified equations and the average NMOC concentration from collected samples and [if warranted] to recalculate the specific NMOC emission rate using the site specific methane generation rate constant (Tier 2), determined in accordance with paragraph (a)(4) (Tier 3).

3. The reported design capacity of CDT's landfill, 3.47 million Mg, exceeded 2.5 million megagrams in mass and 2.5 million cubic meters in volume and CDT was required by §60.752(b) to apply for and obtain an operating permit in accordance with Part 70 [State] or Part 71 [Federal] permitting requirements, Part 70 in this instance, otherwise known as TitleV, CAA § 501 et seq.

There is no dispute as to this requirement and the primary responsibility for the implementation and enforcement of, inter alia, New Source Performance Standards (NSPS) having been delegated to the IEPA, Part 70 was applicable and it is clear that CDT was required to file its application with IEPA. Under the regulation, 40 C.F.R. § 70.5, CDT was 0required to file its application within 12 months after it became subject to the permit program or by March 12, 1997. CDT filed its application for a permit on June 30,1999 (finding 24). As noted hereinafter, however, a Part 70 permit does not impose any new or additional requirements and under the circumstances present here late submission of the application does not warrant a penalty of the magnitude sought by Complainant.

4. The regulation, § 60.754(d), prior to the 2000 amendment, required that Test Method 25C or Method 18 of Appendix A be used in conducting the performance test to determine compliance with the 98% efficiency level or the 20 ppmv outlet concentration required by § 60.752(b)(2)(iii)(B). Test Method 25C was, however, inappropriate in that it did not result in tests on samples representative of actual enclosed combustion device (engine) emissions and use of an alternate method required the approval of the Administrator. Accordingly, Count 4, alleging delayed performance testing of CDT's gas collection and control system will be dismissed.

Under the regulation, § 60.752(b)(2)(iii)(B), the initial performance test to demonstrate compliance with the 98% efficiency level or the 20 ppm by volume outlet concentration was to be completed no later than 180 days after the initial startup. Complainant asserts that it does not know the date of initial startup, but contends that performance testing should have been completed no later than August 8, 1999, because it notes that one of the engines was in operation on the date of the inspection, February 8, 1999, and counts 180 days from that date. Be that as it may, there is no indication that Method 18 was a realistic or practical method of testing the engines involved here and the regulation has been amended to allow the use of Method 25 for determining control device efficiency when combusting landfill gas (finding 29). The regulation formerly requiring use of an inappropriate test method and alternate methods requiring the approval of the Administrator, there is not much to be said for Complainant's case on this count. Count 4 will be dismissed.

5. Complainant's determination of the proposed penalty appears to be based on rigid adherence to the Penalty Policy, fails to consider the several permits issued by IEPA to CDT and to KMS, gives no consideration to CDT's good faith efforts to comply and overstates the seriousness of the violations. The Penalty Policy is disregarded and

an appropriate penalty will be determined utilizing the statutory factors.

Complainant proposes to assess CDT a penalty of $20,000 for the failure to submit the NMOC emission rate report for 1997, which, in accordance with § 60.757(b), was to be submitted annually after the submission of the initial design capacity and NMOC emission rate report or by March 5,1998 (finding 10). Complainant tolled the accumulation of the penalty for this failure as of July 8, 1999, the date the NMOC emission rate report for 1998 was submitted. Complainant proposes to assess a penalty of $12,000 for the late submission of the NMOC emission rate report for 1998. These proposed assessments are made under the rubric of the "duration of violation" and without any analysis of the significance of the failure to receive a subsequent NMOC emission rate report after receipt of the initial such report or the late submission of a third such a report by CDT on the either the environment or the enforcement of the regulation. While the "duration of the violation" is one of the factors which § 113(e)(1) of the Act requires be considered in determining the amount of any penalty (supra note 21), it is inappropriate to consider such factor apart from the seriousness of the violation at least under the circumstances present here.

Complainant does, however, propose to assess CDT an additional sum of $15,000 for failure to submit the NMOC emission rate report for 1997 and an additional $5,000 for the late submission of the 1998 NMOC emission rate report because of the alleged importance of the reports to the regulatory scheme. Inasmuch as the initial design capacity report, if it shows capacity greater than 2.5 million megagrams by mass or 2.5 million cubic meters by volume, triggers the requirement for a Part 70 permit and the requirement for the calculation or recalculation of an NMOC emission rate and the installation of a collection and control system, if the NMOC emission rate is equal to or greater than 50 megagrams per year (§ 60.752(b)), there can be no doubt as to the significance of the initial design capacity and NMOC emission rate reports to the regulatory program. However, no additional requirements are triggered by the submission of subsequent reports showing NMOC emissions equal to or greater than 50 megagrams once the capacity threshold of 2.5 million megagrams by mass or 2.5 million cubic meters by volume and the NMOC emission rate threshold of equal to or in excess of 50 megagrams have been met or surpassed and duly reported as is the case with CDT. The purpose of the requirement to submit subsequent NMOC emission rate reports under such circumstances appears to be to show whether the source is subject to requirement for controls pursuant §60.752(b)(2). In this regard, CDT's NMOC emission rate reports for the years 1998 and 1999 do not show emissions approaching the 50 megagram threshold (finding 15) and it is clear that, if this situation was estimated to continue for five consecutive years, submission of NMOC reports could be dispensed with in accordance with § 60.757(b)(1)(ii). Because site 0005 at the landfill has previously been closed and CDT alleges that site 0006 has now been closed, this is a situation very likely to occur. Reduced to essentials, the large penalties sought by Complainant are based upon alleged damage to the regulatory program as no harm to the environment has been alleged or shown

(finding 31).

The initial design capacity and NMOC emission rate report, submitted by CDT on March 5, 1997, having shown an NMOC emission rate in excess of 50 megagrams a year, CDT was subject to the requirement to submit a collection and control system design plan prepared by a professional engineer within one year (March 5, 1998) and to install such a system within 30 months (August 5, 1999). Complainant proposes the assessment of a $15,000 duration of the violation penalty for the failure to submit a collection and control system design plan on or before March 5, 1998, and an additional $15,000 for the significance of this requirement to the regulatory scheme, even though it recognizes that the system was in operation at the time of the inspection on February 8, 1999, and that CDT could not install such a system without a design plan. Complainant did toll the accumulation of the penalty for the duration of the violation on the date of the inspection.

The importance of the plan is, of course, so that the plan may be reviewed and approved by IEPA and that the GCCS, when installed, will comply with the design and operational requirements of § 60.752.(b)(2). CDT's collection and control systems for both of its landfill sites were approved by IEPA (findings 2, 3, and 7) and there is no evidence or allegation that the systems did not comply with the regulation, § 60.752(b)(2). Under these circumstances, imposition of a large penalty for failure to submit a GCCS plan is simply not warranted. Moreover, it is at least arguable that if, as appears to be the case, the collection and control systems complied with the regulation, the failure to submit a collection and control system design plan is a type of dependant violation which does not warrant a separate penalty. See, e.g., Polychlorinated Biphenyls (PCB) Penalty Policy (April 1990) at 13 (lack of inspections and lack of records of inspections warrant one violation, failure to inspect).

Complainant proposes the assessment of $30,000 for the late submission of CDT's Title V permit application. This is based on the assertion that, in accordance with 40 C.F.R. § 70.5 (a)(1), the application should have been submitted no later than 12 months after CDT became subject to the permit program or March 12, 1997, when in fact the application was not submitted until June 30, 1999. According to Complainant, this was a delay of 28 months, for which the Penalty Policy specifies a penalty of $30,000. No additional penalty for the importance of this requirement to the regulatory scheme is proposed, perhaps for the good reason that Part 70 does not impose new or additional requirements. Rather, the purpose of Part 70 permitting appears to be to facilitate enforcement and compliance by having a site where all requirements applicable to an affected source may be readily accessed by regulators as well as the public (finding 30).

As we have seen, CDT's initial landfill site designated 0005 was opened and closed prior to the effective date of the Emission Guidelines and Subpart WWW.

(finding 2). Permits for the installation and operation of a "gas collection and management system"and a "landfill gas recovery and flare system" at this site were issued to CDT by IEPA in November 1990 and December 1991 (Id.). In January 1993, IEPA issued a permit for the construction and operation of a new solid waste management facility for the disposal of general municipal and non-hazardous special waste designated 0006 (finding 3). Operating authorization for a gas extraction/ collection system at this site was conditionally approved on October 29,1999 (Id.). These permits support CDT's contention that its activities at the landfill were approved and permitted by IEPA. Although no officer or employee of CDT testified at the hearing, the EPA inspectors concluded, and Mr. Noble testified, that CDT was surprised that the NMOC reporting requirements included a closed landfill (findings 20 and 25).

In April 1995, CDT entered into a Gas Rights Agreement with KMS Joliet Power Partners (KMS) for the purpose of authorizing KMS to extract landfill gas from the landfill premises (findings 4 through 6). Under the Agreement, KMS was responsible for securing all permits and authorizations necessary for the extraction of landfill gas from the landfill premises, the generation of electricity from that gas and the transmission of electricity to the purchaser (finding 6). In addition, KMS was responsible for compliance with all laws including environmental laws concerning land, air, water and noise in the performance of its obligations under the Agreement, not only with respect to the Project Facility and the existing Gas Management System, but also with respect to the gas management system to be installed by CDT on site 0006 (Id.). Because the Agreement was entered into prior to the promulgation of the Emission Guidelines and Subpart WWW, no question of contracting away or attempting to contract away liability for compliance with a federal statute or regulation arises. Subpart WWW is generally applicable to the owners or operators of municipal solid waste landfills rather than owners or operators of gas collection and control systems, however, and the Agreement does not relieve CDT of its obligation to comply with NSPS. By reducing the proposed penalty because of the Agreement with KMS, Complainant has conceded that mitigation for this reason is proper.

Further evidence of CDT's good faith efforts to comply is the fact that in May 1998, it contracted with an environmental firm to review the permitting status/operational practices of the gas management system operated by KMS at the landfill (finding 18). These may be the consultants referred to in the letter to EPA, dated September 22, 1999 (finding 22), upon which it allegedly relied in concluding that no further reporting or testing would be necessary.

It is true that on November 17, 1998, the IEPA, based on a record review, issued a Non-Compliance Advisory to CDT pointing out that, based on the initial NMOC emissions report, it was required to install a gas collection and control system and to apply for a CAPP permit (finding 16). Neither the Non-Compliance Advisory

nor the IEPA letter forwarding the Advisory contained any recognition of the fact that site 0005 had been permanently closed, that a permitted gas collection system had been in operation at that site since at least April, 1998, that a construction permit for the installation of a GCCS at site 0006 had been issued, and that KMS had been issued a construction as well as an operating permit for the gas combustors and a construction permit for the reciprocating engines (findings 2, 3, 7 and 23). These were among facts pointed out to IEPA in a letter from CDT by counsel, dated January 29, 1999 (finding 17), which, for all that appears, elicited no response from IEPA.

It is concluded that whether considered as evidence of CDT's "good faith efforts to comply" and/or "other factors as justice may require" the permits issued to CDT and KMS by the IEPA must be considered in determining an appropriate penalty. After all, the purpose of Subpart WWW is to control landfill emissions and CDT and/or KMS appear to have been accomplishing that objective in whole or in part under permits from IEPA . Under all the circumstances, it is concluded that a penalty of $10,000 adequately accounts for the duration and seriousness of CDT's failure to submit a NMOC emissions rate report for 1997, the delayed submission of such a report for 1998; that $2,500 adequately accounts for the seriousness of CDT's failure to submit a GCCS design plan and that $10,000 adequately accounts for the duration and seriousness of CDT's delay in filing an application for a Title V permit. There is no evidence that CDT enjoyed any economic benefit from the violations, no evidence of prior violations and, of course, no evidence of the payment of penalties for the same violations as shown here.

Two matters warranting brief mention here are: (1), the delegation authorizing IEPA to implement and enforce NSPS and (2), CDT's argument that the regulations are too confusing and difficult to understand to be enforceable.

Regarding (1), the IEPA letter, dated May 21, 1996, does state that the IEPA will be implementing the NSPS pursuant to the existing delegation agreement between IEPA and USEPA. The agreement, however, specifically provides that EPA's concurrent authority [to enforce the statute and regulation] is in no way limited and this reservation is authorized by the Act (finding 26). Moreover, this is not a grossly unfair case of dual enforcement, where IEPA and USEPA are each seeking penalties for the identical or similar violations. Although the IEPA letter may be somewhat misleading and certainly strengthens CDT's argument that it had a right to rely on advice, non-advice from IEPA [23], it is clear that Complainant's authority to prosecute this action is not limited by the delegation to IEPA.

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[23] CDT's prehearing letter, dated June 2, 2000 (R's Exh 24). There is, however, no evidence to support the assertion that CDT and KMS were assured by IEPA that they had satisfied all applicable regulations.

Regarding (2), there can be no doubt that the regulations at issue are complex. Mr. Noble so testified and the fact that EPA found it necessary to issue an amendment in 1998 correcting and clarifying the regulatory language would seem to settle the matter (findings 8 and 26). Moreover, it is not apparent that the statement in the amendment to the effect that, if a landfill design capacity is less than either 2.5 million Mg or 2.5 million cubic meters, it is exempt from all requirements except the design capacity report is strictly accurate (notes 11 and 12, supra). Rather, it appears that as written such a landfill may be exempted from the submission of annual NMOC emissions reports only in accordance with § 60.757(b)(1)(ii), i.e., if the estimated emission rate is less than 50 megagrams per year in each of the next 5 consecutive years. Apparently an exemption beyond that in § 60.757(b)(1)(ii) was intended to be included in § 60.752(a), but was omitted. Be that as it may, it is concluded that the regulations are comprehensible and not so confusing as to be unenforceable.

Regarding CDT's financial condition, the Dun & Bradstreet report cited in the Penalty Calculation is not in evidence and Complainant has acknowledged that it did not have sufficient data to evaluate CDT's ability to pay [the penalty proposed] (finding 31). Under Rule 22.24 of the Rules of Practice (40 C.F.R. Part 22), Complainant has the burden of persuasion that the violation occurred as alleged in the complaint and that the penalty proposed is appropriate. Where as here the statute specifying the factors to be considered in determining a penalty includes matters such as "the size of the business and the economic impact of the penalty on the business", sometimes referred to simply as "ability to pay", Complainant's burden includes some minimal showing from which it may be inferred that respondent has the ability to pay the penalty proposed. See, e.g., New Waterbury, Ltd, TSCA Appeal No. 93-2, 5 E.A.D.529 (EAB. October 20, 1994). Only after Complainant has made that initial showing, may it be said that the burden of going forward with evidence on that issue shifts to respondent.

Here, the only inference that can be made is that CDT lacks the ability to pay any penalty and Complainant has treated "ability to pay" as solely a matter of mitigation, the burden of which is on CDT This it may not do.

Under CAA § 113(d)(2)(A), administrative civil penalty proceedings under § 113(d)(1)(A) are clearly subject to the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and under the APA (5 U.S.C. § 556(d)) "(e)xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."Complainant is the proponent of an order, there is nothing in the statute of concern here which otherwise provides and burden of proof in the quoted phrase means" burden of persuasion".[24]

[24] Director Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S 267, 114 S.Ct. 2251 (1994).

A multitude of cases decided prior to Greenwich Collieries, supra, which construed statutes indistinguishable from CAA § 113(e)(1) in that "ability to pay"is among factors required to be considered in determining the amount of any penalty, have held that the agency or director as the proponent of an order must come forward with evidence as to respondent's financial condition.. See, e.g., Merritt v United States, 960 F.2d 15 (2nd Cir 1992) ability to pay, section 13(c) of Shipping Act); Dazzio v. F.D.I.C, 970 F.2d 71(5th Cir. 1992) (appropriateness of penalty with respect to size of financial resources of member bank or person charged, 12 U.S.C.§ 1828(j)(4)(B)); Hutto Stocktard v. U.S. Department of Agriculture, 903 F.2d 299 (4th Cir. 1990) (Packers and Stockyards Act, 7 U.S.C. § 213(a), effect of penalty on persons's ability to continue in business) and Bosma v. U.S. Department of Agriculture, 754 F.2d 804 (9th Cir. 1984) (Packers and Stockyards Act , ibid). If this is the rule when "burden of proof" as used in the APA is interpreted to mean only the burden of production, a fortiori is it the rule when that phrase is construed more broadly to mean "burden of persuasion." See also United States v.Dell'Aquilla, 150 F.3d.329 (3rd. Cir 1998) (district court abused its discretion in imposing fine under CAA § 113(e)(1) without considering defendants' financial condition).

Because there is no evidence of CDT's income, this is not a case where there is any basis for applying a penalty policy rule of 4% of gross income as the EAB found was appropriate in New Waterbury. Neither the Dun & Bradstreet report referred to in the Penalty Recalculation, which allegedly shows that CDT has a negative net worth, or counsel's letter, dated September 25, 1999, setting forth estimates of landfill closure costs, is in evidence (finding 32). The Combined Balance Sheet, which was admitted into evidence over Complainant's strenuous objection, is the only evidence in the record of CDT's financial condition. The Combined Balance Sheet does reflect substantial assets (as well, it might be added, substantial liabilities), over $3,730,000 of which are pledged to IEPA for landfill closure and presumably not available for the payment of penalties or other obligations, and a money market account in excess of $527,000, which is allegedly also reserved for landfill closure costs. While no evidence supports asserted landfill closure costs of $6.5 million, it is mere speculation to assume that any portion of the mentioned sums will be available for the payment of penalties. Although a penalty of $22,500 might otherwise be appropriate, Complainant has totally failed to carry its burden of persuasion as to CDT's ability to pay. Therefore, no penalty is assessed.

Order

Count 4 of the complaint is dismissed. CDT Landfill Corporation is found to have violated the Act and regulations as alleged in Counts 1, 2, and 3 of the complaint. For the reasons set forth above, however, no penalty is assessed for these violations.[25]

Dated this _____day of April 2002.

_____
Spencer T. Nissen
Administrative Law Judge

[25] 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 order of the EAB and of the Agency in accordance with Rule 22.27 (c).

In the Matter of CDT Landfill Corporation, Respondent
Docket No. CAA-5-99-047

CERTIFICATE OF SERVICE

I certify that the foregoing Initial Decision, dated April 3, 2002 was sent this day in the following manner to the addressees listed below:

Original + 1 copy by Pouch Mail to

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Dated: April 5, 2002