UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
LOUISIANIA PACIFIC CORPORATION	)	Docket No. CAA-120-V-84-A-2
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	)	
Respondent	)	
	)	
	)	

Clean Air Act (Act), Section 120: Concluded that: (1) Stack tests are accurate and reliable to establish violation of emission limits; (2) Mathematical error in Notice of Noncompliance did not deny respondent due process; (3) Evidentiary standard is preponderance of evidence. Respondent held to be subject to noncompliance penalty for violation of emission limits, and for constructing a major modification to an existing major facility without obtaining a prevention of significant determination approval to construct and operate such facility.

APPEARANCES:

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INITIAL DECISION

Introduction:

On September 26, 1984, the U. S. Environmental Protection Agency (sometimes complainant or EPA) through its Regional Administrator of Region V, and pursuant to Section 120 of the Clean Air Act, 42 U.S.C. 7420 (Act), issued a Notice of Noncomplaince (NON) to Louisiana Pacific Corporation (Respondent).1/ The NON charged respondent with violating the emission limitations found in the Approval to Construct (permit) issued to respondent pursuant to the regulations promulgated under the Act, 40 C.F.R. §52.21, for the Prevention of Significant Deterioration of Air Quality (PSD). The permit concerned construction of respondent's waferboard processing plant in Hayward, Wisconsin. The NON alleges that the portion of respondent's operations known as Hayward I is a major source of particulate emissions. Wisconsin does not have authority to issue permits under the PSD regulations. (TR. 87, 102). Its State Implementation Plan (SIP) does not include approvable procedures for PSD of air quality. 40 C.F.R. §52.2581(a). Another charge addresses respondent's operations known as Hayward II. It is alleged that Haywood II is a major modification to a major source which significantly increased the emission of particulate matter and volatile organic compounds (VOC) from respondent's facility; that Hayward II

1/ In that some of the language of the NON is in contention, and for convenience and clarity, the document is set out verbatim as an Appendix.

is subject to the requirement of a permit prior to its construction, and that respondent did not obtain such a permit. The Administrator contends that respondent is operating a major stationary source in violation of PSD regulations. The NON cited the regulations pertaining to PSD advising respondent that these were applicable to the construction of major stationary sources of air pollution, and to major modifications of major stationary sources. 40 C.F.R. §§52.21(b)(1), (b)(2)(i). As a result of the alleged violations, respondent was charged by the Administrator to be responsible for penalties. By order of June 18, 1985, the Regional Administrator granted an administrative hearing to respondent pursuant to 40 C.F.R. §66.41. In accordance with 40 C.F.R. Part 66, a bifurcated hearing was held in this matter. This initial decision concerns the first phase of the hearing, that of liability, and deals solely with the issue of whether or not respondent is liable under Section 120 of the Act for violating emission limits of the permit concerning Hayward I and for constructing Hayward II without a permit.

At this juncture, it is apposite to observe that the Consolidated Rules of Practice, 40 C.F.R. §22.24. provide that:

> The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint . . . . Following the establishment of

> a prima facie case a respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

A "prima facie case" is one that prevails to the absence of evidence invalidating it. Words and Phrases, "Prima Facie Case." The supplemental rules for Formal Adjudicatory Hearings under the Act provide that such rules, in conjunction with the Consolidated Rules, shall govern all hearings held under Subpart J. These Supplemental Rules echo the Consolidated Rules which, in pertinent part, state: "[E]ach matter in controversy shall be determined by the Presiding Officer upon the preponderance of the evidence." 40 C.F.R. §§66.91, 66.94(d). "Preponderance of evidence" is that evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows the fact sought to be proved is more probable than not. Blacks Law Dictionary, 5th Ed., 1979. Stated similarly, preponderance of the evidence is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely true than not. The preponderance of evidence standard is the criterion to be applied at the hearing or trial stage. Both parties speak of "substantial evidence" in their briefs. However, the "reliable, probative and substantial evidence" standard

goes to the scope of judicial review rather than the degree of proof required at the hearing level. 45 Fed. Reg. 24360, 24361 (April 9, 1980).

All issues have been considered by the Administrative Law Judge (ALJ). Those questions not discussed specifically herein are either rejected or considered not of sufficient import for the resolution of the principal issues presented.

ANALYSIS AND FINDINGS OF FACT

The permit for the construction of respondent's waferboard plant in Hayward, Wisconsin, was issued on December 20, 1979. (Ex. G 7; Tr. 50). Prior to its issuance, there were oral and written negotiations between complainant, respondent and the latter's engineering firm concerning the conditions of the permit. (Exs. G 2, 3, 4, 5, 6; Tr. 40-43, 47-50) In part, the permit states that respondent planned to produce an average of 240 tons per day of waferboard and that the plant is a major source of particulate emissions. Certain conditions were stated in the permit. Among these were that respondent's plant shall not operate in excess of 8000 hours per year. (Ex. G 7, pars. 6, 7, 10). In great contention are paragraphs 11 and 12 of the permit, which are set out verbatim here:

11. Wafer Dryers

(a) Particulate emissions from the wafer dryers shall not exceed 0.248 pounds per ton of waferboard produced.

(b) The amount of total waferboard from the plant shall not exceed 10.00 tons per hour on an annual basis.

12. Hot Oil Heaters

(a) Particulate emissions from the hot oil heater shall not exceed 0.34 pounds per million BTU of actual heat imput.

(b) Heat output from the hot oil heaters shall not exceed 13.11 million BTU per hour on an annual basis.

Paragraph 17(b) of the permit provides in part, that reference methods contained in 40 C.F.R. Part 60, Appendix A, shall be used to determine compliance with "emission rate limitations" contained in paragraphs 11(a) and 12(a) mentioned above. Paragraph 17(c) states, in part, that "[p]erformance tests shall be conducted upon representative performance of the affected facility. . . . Operations during startup, shutdown, and malfunction shall not constitute representative conditions." For concentrations of particulate matter a stack test procedure is to be used. Stated broadly, a stack test is conducted by the placing of a probe into the stack wall for a specified period of time. Under standardized procedures, using various mechanisms, stack samples are obtained from which the emission rate of the particulate matter is determined. (40 C.F.R. Part 60, Appendix A, Method 5; Tr. 142-144, 146-150). The stack test results show that the tests were conducted three times, or runs, in one instance four times, with each testing time exceeding an hour and in some instances almost two hours. It is common practice in the industry (about 90 percent of the time) to measure emission limitation compliance by the stack test methods

contained in 40 C.F.R. Part 60, Appendix A. (Tr. 469-473). Paragraph 11(a) of the permit is the emission limitation stated in per tons of waferboard produced. Paragraph 11(b) is not an emission limitation; rather it limits the total tons of waferboard respondent may produce on an annual average. Paragraph 12(a) also places a limit on respondent's emissions. Paragraph 12(b) is not an emission limitation. (Tr. 358). It is related to production in that it controls the heat output of the hot oil heaters to the prescribed amount of British Thermal Units (BTUs) per hour on an annual average basis.

Concerning respondent's operations, and by way of background, the plant operates two waferboard production lines, Hayward I and Hayward II, with each line having the potential to produce 240 tons per day of waferboard. Production line 1 pertains to Hayward I, and production line 2 relates to Hayward II. Tree logs are brought to the facility where they are placed into conditioning ponds. The bark is removed and the waste part of the trees is used in the heaters, which serve as the basis for the plant's energy system. After the log is debarked it is fed to wafer reservoirs where it is cut into smaller chips or slices that are called surface and core wafers. These have a moisture content of about 50 percent and they must be dried before production can proceed. To accomplish this, the wafers are placed into wafer dryers. These dryers are heated by burners which burn dry wood products, saw dust or smaller wood material from the cyclones. This drying

process reduces the moisture content considerably. The dried chips are then conveyed to a blender where resin and wax are added. Then large mats are formed of this mixture, which is compressed with a hydraulic press. Following this pressing, the boards are trimmed and sanded. The trim and sand material are used for fuel in the burners associated with the dryers. (Tr. 152-158). The sources of particulate and VOC emissions at Hayward I and Hayward II are the heaters, surface and core wafer dryers, and the press vents. (Tr. 152-159). 2/

The NON summarized the violations. It stated that the allowed emissions for the wafer dryers (core and surface) to be "2.48 lbs./hr." In the next column, examples were given of "actual emissions" which were higher amounts. This was specifically referenced by a double asterisk which advised the reader that the emission limit in paragraph 11 of the permit was converted from pounds per ton in the permit to pounds per hour. This conversion was done in order to conform the emissions to the stack test reports which showed the emission rate in pounds per hour. The 2.48 pounds per hour figure is arrived at by multiplying the emission rate .248 in paragarph 11(a) of the permit by the annual average rate of production of 10 tons of waferboard per hour set out in paragraph 11(b). (Tr. 188-189). If one wanted to calculate the annual emissions expressed in tons per year the emission rate per hour from the

2/ This evidence concerning respondent's operations was provided by complainant's witness Brent Marable. Respondent did not produce witnesses to describe the operations of the two facilities.

stack tests is multiplied by 8,000 (potential operating hours), divided by 2,000. (Tr. 195-196). For compliance purposes, it was proper to use the 2.48 pounds per hour limit for the .248 tons of waferboard produce shown in the permit. Respondent was not misled or harmed by this.

The NON stated the "allowed emissions" for the heaters to be "4.46 lbs./hr." Next to this were examples given of the "actual emissions" which were larger figures. The allowed emission figures bore an asterick which stated the emission limit in paragraph 12 of the permit was converted to pounds per hour from pounds per million BTU. This was accomplished by multiplying paragraph 12(a) by paragraph 12(b) in the permit. (Tr. 395). This 4.46 figure in the NON was in error, and in conflict with the emission rate of .34 pounds per million of BTU of actual heat <u>input</u> stated in the permit. The NON was erroneous to the extent that it incorporated the heat <u>output</u> pertaining to production limitations with the emission rate. Notwithstanding this error as an example of heater violations, the correct emission limitation was stated in the permit, which document respondent had since 1979. Additionally, Dr. Perry Lonnes (Lonnes), respondent's witness, acknowledged .34 pounds per millon BTU of heat input was a valid emission limit which could be measured against the stack test results. (Tr. 467-470). Respondent had the stack test results from which the examples were taken. Also at its disposal was the documentation to alert respondent to 4.46 error. The NON

advised that the information upon which the Regional Administrator based his findings of noncompliance may be inspected at the complainant's Regional Office in Chicago, Illinois. The record does not show that respondent took advantage of this offer.

Complainant states in its brief that construction of the Hayward II lines commenced in November 1981 and operation of the line began on December 1, 1982. (Comp. Op. Br. at 15). However, complainant does not provide a source in the record to support this. From the stack test results, however, it can be established that at least the Hayward II line was operational at the time of the tests. Respondent contends that there was not a physical or operational change in the existing plant which would be "major modification" as maintained by complainant. (Resp. Op. Br. at 13-14, Resp. Reply Br. at 16-17). In part, respondent relies on the statement of Brent Marable (Marable), complainant's witness, that Hayward II did not involve a change in the operation of Hayward I. ". . . it's one entity." (Tr. 334). A fair reading of Marable's testimony, however, is that while there was no change in Hayward I's operations, it does not follow that the additional line at Hayward II did not increase the emissions over those emanating from Hayward I. A review of the stack test results, more of which will be said below, shows that the operations of Hayward II increases the particulate emissions, at the least, by more than 25 tons per year (TPY) and the VOC emissions by more than 40 TPY at respondent's Hayward facility. (Tr. 203 - 204, 231 - 232).

Exhibits G 9 to G 22 represent the stack tests upon which respondent's violations are based. The tests were conducted by Interpoll, Inc. (Interpoll), a commercial laboratory and independent testing firm. 3/ The tests were done at the request of respondent. They were taken at various times ranging from August 1981 to November, 1984. Respondent's sole witness was Lonnes, the President of Interpoll, who personally reviewed and signed each stack test result. (Tr. 432, 471). An examination of the test results showed that they were witnessed by either one or more of the following persons: James Ross, Bill Smith or Joe Perez of the State of Wisconsin Department of National Resources (DNR). The test results also state that a "compliance test" or "compliance tests" were conducted on the equipment. All the results, save one, 4/ state that the "Evaluations were performed in accordance with EPA Methods . . . CFR Title 40, Part 60, Appendix A . . . ." The test results speak further of "representative particulate samples" (Exs. G 9, 10, 11, 12, 14, 15, 17, 18, 20, 21). Another (Ex. G 16), states "representative flyash samples." Some of the test results (Exs. G 11, G 14, G 15, G 16 and G 22) state that they were performed by a team "under the direction of Dr. P. Lonnes."

3/ One of the test reports, G 19, stated that it was prepared by Environmental Technology and Engineering Corporation. It was conducted on May 9, 1984, and concerns one of the four tests done on Hayward I core dryer.

4/ Exhibit G 22 speaks just of "EPA Method 25." It is found that this has reference to Method 25, 40 C.F.R. Part A, Appendix A, which is a testing method that applies to the measurement of VOC.

Marable reviewed the stack test results and compared their emission rates with the limits set forth in the permit. With regard to Hayward I, and the particulate emissions from heaters 1 and 2, tests were taken on five occasions from September 23, 1981 to December 8-9, 1983. The test results showed that the heaters exceeded the 0.34 pounds per million BTU of heat input on four of the five tests. (Exs. G 9 - G 13).

Seven stack tests were also performed by Interpoll concerning the particulate emission rate of the core and surface dryer at Hayward I. 5/ All these tests, taken over the period from August 19, 1981 to December 9, 1983, showed the actual emissions vastly in excess of 2.48 pounds of particulate. (Exs. G 18, 10, 11, 12, 20, 21). In that respondent did not apply for or receive a permit concerning its Hayward II operation there is perforce no emission limitation concerning it that would represent the best available control technology (BACT). (Tr. 192).

There were four stack tests performed by Interpoll on the Hayward II heaters in 1983. These tests showed an annual particulate emission rate of 79.1 TPY. The core and surface dryer tests in 1983 showed an additional 123.3 TPY for a total of 202 TPY of particulate emissions. The tests on the press vent at Hayward II in 1983 accounted for another 85.6 TPY, for a total of 288 TPY of emissions at Hayward II. (Exs. G 14, 16, 17; Tr. 231- 232). The

5/There was an eighth test not performed by Interpoll, Exhibit G T9, mentioned in footnote three.

tests on the Hayward II equipment occurred in spring and fall of 1983.

Much controversy swirls about the reliability of the stack test results, including Marable's competence to interpret them and reach conclusions. Challenges to Marable's abilities by respondent were that he lacked previous experience in evaluating wood product plants with regard to particulate emissions or VOC; that he had no experience evaluating wood product plants with regard to compliance of any applicable legal requirements, that he had no previous experience in determining whether or not a wood plant was meeting the terms and conditions of an applicable permit; that since Marable's employment with EPA he only had visited five manufacturing plants; (the record, however, shows that he visited some of them several times); that none was a wood processing plant; that Marable did not visit respondent's plant; and that he could not relate anything about the structure of the plant. (Tr. 244 - 254; Resp. Op. Br. at 17-18). The principal question, however, is whether or not the witness possessed a sufficient degree of competence to know what the emission limitations were as expressed in the permit, to analyze the stack tests results, and be able to reach valid conclusions concerning whether or not respondent exceeded the limitations concerning Hayward I, in addition to being able to determine any increase in the total Hayward emissions resulting from the Hayward II operation. Regarding Marable's qualifications, he received a Master's Degree

in Environmental Engineering from the Illinois Institute of Technology in 1983, and he has been an Environmental Engineer with EPA for three years. He has taken about five EPA training courses, some relating to particulate sampling, and he has attended conferences at which papers were presented on particulate and VOC emissions. Marable has witnessed about 10 stack tests. During his EPA particulate training course he personally, in connection with two other people, performed an actual stack test. In training for his Master's Degree, during a course dealing with particulate sampling, he performed another stack test. Marable has reviewed about 100 stack test results, with such review encompassing whether or not EPA methods were followed in the testing. In the past year he reviewed about 30 tests, more than half of which were stack tests for particulate matter. He reviewed the stack test results in this proceeding to determine if the testing methods prescribed in 40 C.F.R. Part 60 were used. (Tr. 138 - 139, 146 - 148, 402-403). It is found that Marable was qualified by training and experience to make a judgment concerning the validity of the stack test results and whether or not they showed that respondent's Hayward I operations were exceeding emission limits and to what extent the Hayward II operations contributed to excess emissions. (Marable's credibility is discussed below under the Conclusions of Law.)

Respondent also assails the reliability of the stack test results. (Resp. Op. Br. at 22-33; Resp. Reply Br. at 2-6). Regarding the chain of custody challenge, the black and white of

the results state that they were done by Interpoll; that some of the tests were conducted by a team under the direction of Lonnes; that they were conducted for compliance purposes; and that the tests were witnessed by DNR. Lonnes did not receive permission from respondent to release the stack test results to EPA. (Tr. 183, 440, 484). Marable was asked the question: "Did you receive the stack test reports from either Louisiana-Pacific or the Wisconsin Department of Natural Resources for the Hayward plant?" The answer was in one word "yes." (Tr. 170). It is not absolutely clear from the response whether or not all stack test results were received from the respondent or DNR. Clarification followed. Marable is the engineer assigned by EPA to work cases, among others, in the State of Wisconsin; that he has received stack test results from that State; that DNR is the major source of stack test results; that it is a regular practice to obtain stack tests from DNR; that he received some of the stack test results at issue from Joe Perez and Joe Brehm of DNR; that these two individuals reviewed the stack test results; that the rest of the test results were mailed to him by Candy Strank or Howard Hoffmeister of DNR; and that Marable reviewed the stack test results. (Tr. 178, 214, 408 - 409). The finding that DNR reviewed the stack test results is buttressed by the fact that handprinted changes on some of the stack test results, more of which will be said below, bore the inscription "DNR" in the same style of handprinting as the changes. The record is devoid of any convincing evidence which would show a reason why Marable would fabricate his testimony or that DNR would tamper falsely with the

test results. Additionally, respondent's witness, Lonnes, other than his testimony concerning not receiving permission to release the test data to EPA, was unenlightening on the chain of custody question. Respondent did not come forward with evidence to rebut complainant's contention. The preponderance of the evidence establishes that Exhibits G 9 - G 22 represent stack test results from respondent's facility; that they were conducted for compliance purposes; that the results were sent by respondent to DNR where they were reviewed; and that these reviewed results were obtained by EPA from DNR. It would have bolstered complainant's position if it had produced witnesses from DNR, who were located in the same building where the hearing was held. However, the failure of complainant to produce such evidence is not fatal and does not make the test results unreliable when laid alongside all other evidence tending to show the chain of custody from Interpoll to EPA.

Respondent also attacks the reliability of the test results because they contained handprinted alterations, which changes, or additions, were not on the copies of the same stack test results in respondent's possession at the hearing. (Resp. Op. Br. at 31-32; Tr. 306-332). As found above, the handprinted changes that appeared on the copies of complainant's copies of the stack test results were made by DNR. These changes were miniscule in number when compared with the total data in the results. Respondent had the test results in its possession at the hearing

which did not contain the handprinted additions and changes. These were not offered into evidence by respondent as a challenge to the emission rates set forth in Exhibits G 9 - G 22. The handprinted changes or additions improved the precision and understanding of the test results submitted by Interpoll. (Tr. 400 - 402). It is found that Exhibits G 9 - G 22 are reliable and accurately reflect the results of emission tests conducted at respondent's facility.

DISCUSSION AND CONCLUSIONS OF LAW

Notice of Noncompliance

Section 120(a)(2)(A) of the Act, 42 U.S.C. § 7420(a)(2)(A), provides that the Administrator shall assess and collect a noncompliance penalty against every person who operates a "major stationary source" not in compliance with any emission limitation. A "major stationary source" or "major emitting facility" is defined to mean any facility or source of air pollutants which directly emits, or has the potential to emit one hundred TPY or more of any air pollutant. Section 302(j), 42 U.S.C. §7602(j); 40 C.F.R. §52.21(b)(1)(i). As found above, Hayward I meets this emission level, and paragraph seven of the permit also states the facility to be a "major source". Section 120(b)(3), 42 U.S.C. §7420(b)(3), requires, concerning the assessment and collection of a noncompliance penalty, that the Administrator ". . . give a brief but reasonably specific notice of noncompliance. . . ." to a source

not in compliance. This is amplified in the regulations, 40 C.F.R. §66.12, which, in pertinent part, provides that:

> (a) Each notice of noncompliance shall be in writing and shall include:
>
> (1) A specific reference to each applicable legal requirement of which the source is in violation;
>
> (2) A brief statement of the factual basis for the finding of violation, together with a reference to any supporting materials and a statement of when and where they may be inspected. (emphasis supplied).

The regulations, 40 C.F.R. §66.3(c), define "applicable legal requrements" to mean:

> (1) In the case of any major source, any emission limitation, emission standard, or compliance schedule under any EPA-approved State implementation plan. 6/

With regard to Hayward I, the emission limitations alleged to be violated are those set out in the permit, which were issued pursuant to 40 C.F.R. §52.21 and to which the NON makes reference. This section of the regulations provides that its provisions are applicable to any SIP which has been disapproved with respect to PSD of air quality in any portion of any state where the air quality is better than the national ambient air quality standards. Wisconsin did not develop an approved SIP. Whether or not Wisconsin failed to develop its own SIP for PSD or one that was disapproved by EPA, the result is the same in that there is no approved SIP for PSD. Therefore, the PSD regulations embraced with-

6/An NON may still be issued to a source that the Administrator determines is in violation of an applicable legal requirement and which is located in a state without an approved Section 120 program. 40 C.F.R. §66.11(a).

in "[t]he provisions of §52.21(b) through (w) are hereby incorporated and made part of the applicable state plan for the State of Wisconsin." 40 C.F.R. §52.2581(b). Respondent, a major source, is entitled to receive a brief but reasonably specific notice, as supplemented by the regulations, of any emission limitation that the Administrator alleges has been violated.

The mathematical error in the NON concerning the emission limitation for the heaters did not deprive respondent of adequate notice of the legal requirements concerning this equipment. The NON set forth examples of allowed emission rates. In so doing there were asterisk references to the "emission limit" in paragraphs 11 and 12 of the permit and the mathematical conversion made by complainant. Respondent had the permit in its possession since December 1979 and it could have referred to it concerning the emission limitations in paragraphs 11 and 12 which set out the applicable legal requirements. Respondent is charged with knowledge of the limits set forth in the permit. Diligence would have put respondent on notice immediately that something was awry with the examples set forth concerning the emission limit for the heaters. Additionally, the NON specifically advised respondent where and when the information could be inspected upon which the Administrator based the NON. Further, respondent had in its possession the stack test results sent to it by Interpoll. Additionally, the mathematical conversion error in the NON was not of sufficient gravity to be a deprivation to the respondent. The error was mathematical, not of substance, and pertained to the heater violations only. The rest of the NON was adequate to give notice to

respondent of the violations charged. On the facts of this case, where there is an inconsistency in an emission limit stated in a NON, pertaining to one of the violations, and those limits stated in the permit, the latter controls. The NON gave respondent the opportunity to inspect documents before the matter was litigated. Respondent knew, or should have known, from the NON, and other data available to it, those emission limits which were the basis of the heater violations. Further, the NON is analogous in many ways to service of process. Fed. R. Civ. P. 4 provides for the service of process in federal courts and it may be used as a benchmark. Rule 4 should be liberally construed in the interest of doing substantial justice and each case should turn on its own facts. United Food and Commercial Workers Union v. Alpha Beta Union v. Alpha Beta Company, 736 F. 2d 1371, 1382 (9th Cir. 1984). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48 (1957). The hearing stage is too late in the day for respondent to assert that it has been prejudiced by lack of, or improper notice. Procedural due process is not a fixed star in the constitutional constellation. It varies with the facts of the individual case. For the reasons raised on brief, complainant submits that respondent manufactured the due process notice argument. (Comp. Reply Br. at 12-15) The ALJ does not concur that respondent's position was contrived. However, consi-

dering the totality of circumstances here, respondent had adequate notice of the alleged violations; it was able to make a defense; it should have been aware of the mathematical error, but in any event it was not harmed by same; and due process was satisfied.

Stack Test Results

The mere allegation by respondent that offered evidence may be hearsay is not a basis for its exclusion. The test is found in the Consolidated Rules of Practice which provide; in pertinent part, that the Presiding Officer shall admit all evidence which is not "otherwise unreliable or of little probative value." 40 C.F.R. §22.22. Concerning Marable's testimony and the stack test results, respondent urges that Marable is not a credible witness. It is alleged that Marable was aware of certain reports being "riddled with errors" and he did not withdraw an affidavit or disclose the purported error. (Resp. Op. Br. at 21) Marable's testimony was that he was aware of "problems with the Mogul tests." (Tr. 304-305). The test reports at issue are those of Interpoll, not Mogul. Respondent continues to argue that the portion of Marable's testimony which most clearly demonstrates "his untruthfulness and inherent unreliability" was his mathematical error concerning the emission limit in the NON (4.46 pounds per hour instead of 0.34 pounds per million BTU of heat in-

put), his subsequent knowledge of this error, and failure to take steps to disclose the mistake. Respondent cites the principle that where a witness has testified falsely to some material matter his testimony in other respects should be disregarded unless corroborated by some other proof. (Resp. Op. Br. at 21-22). Marable's mathematical error was in the NON, and for reasons stated above it was not of such moment to have the adverse impact respondent would attribute to it. Stated broadly, those factors to be considered in determining the credibility of a witness are: (1) his appearance, manner and demeanor of the witness while testifying; (2) his apparent frankness and intelligence; (3) his capacity for consecutive narration of the acts or events; (4) the advantages he appears to have had for gaining accurate information on the subject; (5) the accuracy or retentiveness of his memory as well as the lapse of time affecting it; and (6) even the intonation of his voice and his positiveness or uncertainty in testifying. 81 Am. Jur. 2d, Witnesses, §662. Even assuming, without concluding, that Marable testified falsely on a material issue, it is permissive, not mandatory, for the jury to reject the rest of the witness' testimony. 7/ 81 Am. Jur. 2d, Witnesses, §§659, 669. At times Marable may have appeared to be nervous or

7/ The ALJ acts in the same capacity as a jury and makes the findings or fact in addition to the conclusions of law.

uncertain. However, this was due to the nature of the cross examination. A blemish here or an imperfection there does not destroy the credibility of a witness. The ALJ found Marable to be overall a credible witness, particularly on the core issue of the stack test results.

The stack tests were conducted by Interpoll in accordance with 40 C.F.R. Part 60, Appendix A, as required by paragraph 17(b) of the permit, which provides that such test methods shall be used to determine compliance among others, with paragraphs 11(a) and 12(a) of that document. The stack test results themselves state that they were compliance tests, many of which performed under the direction of Lonnes. Paragraph 17(c) of the permit required the performance tests to be based upon "representative performance" and that operations during startups, malfunctions and the like shall not constitute "representative conditions." It is logical, proper and fair to assume, for compliance purposes, that the tests were conducted under the "representative conditions" or the production limitation of 10 tons of waferboard production per hour during the course of the test. This is in accordance with paragraph 11(b) of the permit which allows a 10 ton per hour waferboard production on an <u>average</u> annual basis. A long term average may be obtained from short term indicia in the form of valid periodic stack testing.

The ideal situation, of course, would be to monitor emissions continually. This is implied by Lonnes, who contended that his own tests, apparently with reference to the various types of respondent's equipment tested, were only representative of emissions for the time when such tests were being conducted. (Tr. 453-454). Continuous testing, however, would be a burdensome and almost impossible task. A reliable substitute is periodic sampling or stack testing, and in the absence of convincing rebuttable evidence it is sufficient to establish a violation as it is based upon data for average annual conditions. Where as here, when complainant has made a prima facie case that the stack tests were conducted under representative performance, and show a violation of the emission limits, it is fair and reasonable to shift the burden to respondent to come forward with rebutting evidence to show that the conditions under which the tests were conducted were not representative. Respondent maintains production records are essential to determine compliance. (Resp. Reply Br. at 7). Assuming arguendo this to be correct, where a respondent does not produce evidence which may cast serious doubt on the validity of the test results it should be estopped to deny that test results. The party in the best position to present the requisite evidence should bear the

burden of proof. United States v. Continential Insurance Co., 776 F. 2d 962, 964 (11th Cir. 1985); Environmental Defense Fund Inc. v. EPA, 548 F. 2d 998, 1004 (D.C. Cir. 1976); Commonwealth of Puerto Rico v. Federal Maritime Commission, 468 F. 2d 872, 881 (D. C. Cir. 1972). Not to accept the representative nature of the test conditions and the validity of test results, in the absence of persuasive evidence to the contrary, would place insuperable barriers in the path of EPA in enforcement of the Act, which is remedial legislation concerned directly with the public interest.

With regard to the heaters, it has been concluded above that respondent was not misled by the mathematical error in the NON. It was aware of the emission limitation expressed in paragraph 12(a) of the permit; that particulate emissions should not exceed .34 pounds per million BTU of actual heat input. The test results established that respondent's equipment exceeded the emissions limitation which was a violation. Lonnes, respondent's expert witness, conceded that the paragraph 12(a) limitation is a valid emission limitation of particulate matter. (Tr. 368-370). Many of the stack tests, upon which the violations were premised, were conducted under his direction. The tests extended over a period of time to account for any seasonal variations. The respondent had adequate notice of the emission limitations concerning the heaters and an opportunity to defend against the violation.

With reference to Hayward II, a "stationary source" means "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." 40 C.F.R. §52.21(b)(5). "Building, structure, facility or installation" means "all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person . . . . " 40 C.F.R. §52.21(b)(6). The Act also provides, in pertinent part, that no major emitting facility, in which "construction" is commenced after August 7, 1977, may be constructed unless a permit has been issued for the proposed facility setting forth emission limitations for the facility. The facility is also subject to the best available control technology for each pollutant subject to regulation. Section 165(a)(1)(4), 42 U.S.C. §7475(a)(1)(4). The regulations also provide that the owner or operator of a proposed source or modification shall submit all information to make any determination under Section 52.21. 40 C.F.R. §52.21(n).

"Construction" when used in connection with any source or facility includes "modification." Section 169(2)(C), 42 U.S.C. §7479(2)(C). "Modification" means "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." Section 111(a)(4), 42 U.S.C. §7411(a)(4). A

"major modification" is defined by the regulations, 40 C.F.R. §52.21(b) (2)(i) to mean:

> Any physical change in or change in the operation of a major stationary source which would result in a significant net emissions increase in any pollutant. . . .

The word "significant" means in reference "to a net emissions increase or the potential of a source to emit" a rate of emissions that would equal or exceed the rate of emissions for specified pollutants. One of these is ozone: 40 TPY of volatile organic compound. Another is particulate matter at 25 TPY. 40 C.F.R. §50.21(b)(23)(i). Any net emissions increase that is significant for VOC shall be considered significant for ozone. 40 C.F.R. §52.21(b)(2)(ii). Hayward II comes within these definitions. It is a major modification to a major source subject to preconstruction review and permit requirements.

Hayward II emissions consist of both particulate matter and VOC. The evidence shows that the annual particulate emissions at Hayward II were 202 TPY, and for VOC they were 85.6 TPY. Such emissions were "significant" because they exceeded the minimum requirement of 25 TPY for particulate and 40 TPY for VOC. For the

reasons stated on brief respondent argues that Hayward II ". . . would be a separate source, not a modification to an existing source." (Resp. Reply Br. at 16-17). Assuming, without concluding, that Hayward II is a "separate source" respondent would still be in violation of the Act, as the evidence shows the Hayward II operation, standing alone, to be a major source in that it has the potential to emit 100 TPY or more of any air pollutant. (It emitted 288 tons in 1983.) Respondent also urges that complainant did not produce evidence to show when the Hayward II facility began operation; and that it has not been established that this portion of the operation resulted in a significant net emissions increase. (Resp. Reply Br. at 17-18). The complainant's evidence shows the Hayward II to be operating at least when the stack tests were conducted in 1983, and that these test results disclosed a certain quantity of emissions from the operations. Complainant has established a prima facie case of when the Hayward II operations began and that its emissions were significant net increases over the annual emissions of Hayward I. Respondent did come forward with rebuttal evidence in the form of construction or production data, which would show that Hayward II did not result in a significant net emissions increase. On the facts of this case, respondent

stands mute at its peril. Failure to produce relevant and important evidence within respondent's peculiar control raises the presumption that if produced the evidence would be unfavorable to its cause. United States v. Johnson, 288 F. 2d 40, 45 (5th Cir. 1961); Morgan v. Gardner, 264 F. Supp. 576, 577 n. 3 (S.D. Miss. 1967). Whether or not Hayward II is viewed as a distinct production unit or as a major modification it would still require a preconstruction permit.

Based upon the preponderance of the evidence it is concluded that:

1. The stack tests conducted by Interpoll are accurate and reliable and establish that respondent violated the applicable legal requirements set forth in a document, issued in 1979, concerning respondent's approval to construct the Hayward I facility.

2. Notwithstanding the mathematical error in examples of violations found in the Notice of Noncompliance, respondent was not denied due process.

3. Hayward II comes within the purview of the Prevention of Significant Deterioration Program because its construction was a major modification to an existing major source.

4. Hayward II was constructed without an approval to construct, and accordingly lacks an emission standard which reflects the Best Available Control Technology, as required by 40 C.F.R. §52.21(j)(3).

ULTIMATE CONCLUSION

Respondent, Louisiana-Pacific Corporation, is subject to a noncompliance penalty under Section 120 of the Act, 42 U.S.C. §7420, for: (1) Violations of emission limits found in the approval to construct Hayward I with regard to the heaters and the core and surface dryers; and (2) for constructing Hayward II without obtaining a Prevention of Significant Deterioration approval to build and operate the facility.

Frank W. Vanderheyden
Administrative Law Judge

Dated:

March 24, 1987

APPENDIX

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION V

In the Matter of:	)	
	)	
	)	
LOUISIANA PACIFIC CORPORATION	)	
HAYWARD, WISCONSIN	)	NOTICE OF NONCOMPLIANCE
	)	EPA-5-84-A-2
	)	
	)	
Proceeding Pursuant to Section	)	
120 of the Clean Air Act, as	)	
amended [42 U.S.C. 7420]	)	
	)	

STATUTORY AUTHORITY

This Notice of Noncompliance is issued pursuant to Section 120 of the Clean Air Act, as amended, 42 U.S.C. 7420.

FINDING OF NONCOMPLIANCE

The Administrator of the United States Environmental Protection Agency (U.S. EPA) by the authority duly delegated to the undersigned, finds that:

1. The regulations for the Prevention of Significant Deterioration of Air Quality (PSD) 40 CFR 52.21 were promulgated by the Administrator on June 9, 1978, at 43 Fed. Reg. 26403.

2. These regulations are applicable to the construction of major stationary sources of air pollution as defined at 40 CFR 52.21(b)(1) and to major modifications of major stationary sources as defined at 40 CFR 52.21(b)(2)(i).

3. On December 20, 1979, U. S. EPA, Region V issued an approval to construct pursuant to the PSD regulations, to Louisiana Pacific Corporation. The approval was for the construction of a waferboard processing plant in Hayward, Wisconsin. This plant is known as Hayward I.

4. Hayward I is a major source of particulate matter.

5. Hayward II, an additional waferboard processing plant, was constructed and is operated by Louisiana Pacific Corporation in Hayward, Wisconsin.

6. Hayward II is a major modification to a major source which significantly increases the emission of particulate matter and volatile organic compounds from the Louisiana Pacific Corporation's Hayward facility.

7. Hayward II is subject to the requirements of PSD including the requirement to obtain an approval to construct prior to the commencement of construction.

8. Louisiana Pacific Corporation has not obtained a PSD approval to construct from U.S. EPA, Region V for Hayward II.

9. The approval to construct for Hayward I limits the emission of particulate matter from the waferboard processing operation. Louisiana Pacific is in violation of the particulate matter limitations as summarized below:

Source of Emissions	Allowed Emissions	Actual Emissions
Konus I Heater	4.46 lbs./hr.*	8.98 lbs./hr.
Konus II Heater	4.46 lbs./hr.*	6.72 lbs./hr.
Core Wafer Dryer	2.48 lbs./hr.**	14.80 lbs./hr.
Surface Wafer Dyer	2.48 lbs./hr.**	12.42 lbs./hr.

* The emission limit in paragraph 12 of the approval to construct converted to pounds per hour, from pounds per million BTU.

** The emission limit in paragraph 11 of the approval to construct converted from pounds per ton to pounds per hour.

NOTICE OF NONCOMPLIANCE

The Administrator of the U.S. EPA, by the authority duly delegated to the undersigned, notifies Louisiana-Pacific Corporation, that he finds the captioned party to be operating a major stationary source in violation of the PSD regulations as detailed in the Finding of Noncompliance. The information upon which the Administrator's delegate based his finding of noncompliance, may be inspected during normal business hours at U.S. EPA, Office of Regional Counsel, 230 South Dearborn, Chicago, Illinois 60604. The Administrator's delegate further notifies Louisiana Pacific that the penalty owed and the schedule for payment are to be determined according to the noncompliance penalty regulations at 45 Fed. Reg. 50122-50240 (July 28, 1980). The penalty shall be calculated from the date of the receipt of this Notice, and the first payment installment made on the date six months after such receipt. Louisiana Pacific Corporation is also notified that if it disagrees with the finding of noncompliance or wishes to claim an exemption, it must file a petition for reconsideration under 40 CFR §66.13 within forty-five (45) days after receipt of this Notice. Even if a hearing is granted on such petition, however, the penalty continues to accrue during the pendency of the hearing and all related appeals.

Date September 26, 1984

Regional Administrator