

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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In the Matter of the Proposed Operating Permit for

WASTE MANAGEMENT OF NEW YORK, LLC
to operate the Chaffee Landfill
located in the Town of Sardinia, New York

Permit No. 9-1462-00001/00013

Proposed by the New York State Department of
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE
OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE
CHAFFEE LANDFILL**

I. INTRODUCTION

Pursuant to the Clean Air Act § 505(b)(2) and 40 C.F.R. § 70.8(d), Lana and Ronald Sheridan and Tess Cullis (“Petitioners”) hereby petition the Administrator of the United States Environmental Protection Agency (“EPA”) to object to the proposed Title V Operating Permit for the Chaffee Landfill (“the landfill”).

In December, 1998, Waste Management of New York (“WMNY”) submitted a Title V permit application to the New York State Department of Environmental Conservation (“NYSDEC,” “the Department”). NYSDEC granted a public comment period on a draft Title V permit for the landfill which ended October 12, 2001, and Petitioners submitted comments and attachments on the last day of the comment period. These comments and attachments are attached and incorporated herein as Exhibit A. NYSDEC responded to Petitioners’ comments on March 5, 2002. See Exhibit B. A proposed permit was received by EPA on April 15, 2002, and this petition

is timely submitted within 60 days after EPA's 45-day review following receipt of the proposed permit. See Exhibit C. The proposed permit was issued by NYSDEC on June 4, 2002. (Available at http://www.dec.state.ny.us/website/dar/boss/afs/issued_atv_c.html). Petitioners are informed and believed that the proposed permit referred by NYSDEC to EPA is substantially unchanged from the draft permit on which Petitioners commented.

II. PARTIES

Lana and Ronald Sheridan and Tess Cullis are, and for at least twelve years have been, residents of Chaffee, New York, residing at 100 Hand Rd., on the north side of the road, approximately 350 yards from the landfill.

III. SUMMARY OF THE ARGUMENT

Pursuant to the applicable NSPS regulation, 40 c.f.r. Part 60, Subpart WWW, on June 4, 1996, the landfill submitted to EPA an initial design capacity report and NMOC emission report showing the landfill was subject at that time to NSPS regulations, because the landfill's size and calculated NMOC emissions exceeded NSPS applicability thresholds, and because the landfill reported beginning work on a modification expanding the landfill on July 9, 1993. These reports showed the landfill's design capacity in 1996 was 5.1 million Mg. By a series of communications with the landfill in 1997, on December 8, 1997, EPA found that two parts of the landfill's modification thought to trigger NSPS applicability, constructed in 1991 and 1993, were parts of a continuous program of construction on the 1991 modification. EPA determined that the landfill began construction of the modification on May 29, 1991, thereby avoiding NSPS applicability. EPA determined that the landfill is, instead, subject to the EG standards of 40 C.F.R. Part 60,

Subpart Cc. See Ex. A(E).¹

In February, 1999, the landfill reported to NYSDEC a design capacity of 5.9 cubic meters and an NMOC emission rate of 527 Mg/yr., pursuant to New York's landfill gas program. 6 N.Y.C.R.R. Part 360-2.21 et seq. On September 17, 1999, these regulations were approved by EPA and effective as New York's EG regulation for MSW landfills. Because the landfill had already reported size and emission rate levels beyond EG thresholds, that date commenced a 30-month deadline for installation of controls under the EG regulation. This deadline passed on March 17, 2002, after WMNY elected noncompliance for business reasons. Today the landfill is still many months, perhaps years, from reaching compliance with currently applicable law governing control of landfill gas.

On October 18, 1999 a permit renewal, attached hereto as Exhibit D, was issued by NYSDEC increasing the landfill's design capacity from approximately 5.1 million Mg to approximately 6.9 Mg, and imposing planning, testing and control requirements under the state's approved EG regulation for MSW landfills. See also Exhibit A(K) (WMNY report to EPA on design capacity increase). In October, 2000, surface concentrations of methane at the landfill exceeded 10,000 ppm at some areas at the landfill perimeter, and some areas exceeding the EG limit of 500 ppm remained unremediated for nine months. Exhibits E and F.

As its February, 1999, emission rate report shows, the landfill was at that time a major source of VOC. The landfill's October 18, 1999, permit renewal increased the landfill's design capacity from approximately 5.1 million Mg to approximately 6.9 Mg, (see Ex. A-K), triggering New Source Review ("NSR") requirements. However, the landfill never applied for an attainment

¹Petitioners' October 12, 2001 Comments on the draft Title V permit for the landfill appended eighteen attachments, A through S. The attachments will be referenced herein by indicating their letter in parentheses after "Exhibit A."

preconstruction permit or a PSD preconstruction permit. Today the landfill still has not applied for these permits.

Despite the failure to obtain required preconstruction permits, and despite clearly inadequate controls for landfill gas, NYSDEC has asserted in its response to Petitioners' Comments that, while the landfill was subject to the New York EG regulation prior to October 18, 1999, once a permit modification was issued on that date compliance times imposed under the EG regulation became inapplicable and a new 30-month deadline for installation of controls applies under the EPA's NSPS regulation, accruing from July 1, 2000, the date the landfill commenced construction on the modification. Moreover, NYSDEC denies the landfill was a major source on October, 18, 1999, and accordingly considers New Source Review requirements to also be inapplicable to the landfill.

Petitioners argue that the landfill was out of compliance with applicable Clean Air Act requirements when the landfill's proposed Title V permit was received by EPA, on April 15, 2002, because controls had been installed in compliance with EG compliance times; because the landfill circumvented NSR requirements; and because WMNY had an obligation to supplement its Title V application once its modification was granted, but it failed to comply with that obligation. Failing to reflect these fundamental compliance issues in the proposed permit short-circuited the Title V review process and denied the public an opportunity to participate in a deeper level of review of air impacts than actually occurred. The Administrator should therefore revoke the permit after an opportunity for public comment on, among other things, a compliance schedule and the full range of impacts ordinarily considered under NSR, and appropriate conditions reflecting applicable requirements that emerge from the NSR process.

III. STATUTORY AND REGULATORY BACKGROUND

The goal of the Clean Air Act is to protect and enhance the quality of the nation's air in order to promote the public health and welfare. 42 U.S.C. § 7401(b)(1). To achieve this goal the Act establishes technology- and health-based performance standards for existing and new or modified sources of air pollutants, a preconstruction permit program for new and reconstructed sources of air pollutants, and an operating permit program mandated by Title V of the Act.

Landfill pollutants of concern are methane and non-methane organic compounds (NMOC), a fraction of landfill gas containing approximately 100 compounds that can adversely affect public health and welfare. 61 Fed.Reg. 9905, 9906 (March 12, 1996). Approximately 30 hazardous air pollutants (HAP) regulated under the Clean Air Act can be found in landfill gas. "The majority of emissions of HAP at MSW landfills come from the natural anaerobic (without air) decomposition of municipal solid waste. Typical municipal solid waste contains household and commercial rubbish, paints, solvents, pesticides, and adhesives, which contain numerous organic compounds. During the decomposition process, landfill gas is generated. This gas is primarily composed of methane and carbon dioxide. The organic compounds in the decomposing waste are stripped from the waste by these gases and transported to the surface, or the organic compounds travel underground to other locations prior to their release." 65 Fed.Reg. 66672, 66675 (Nov. 7, 2000).

New Source Review Programs

The general purpose of the New Source Review (NSR) programs is to protect public health and welfare (including air quality) while "insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470. To achieve this purpose, pursuant to Parts C and D of subchapter 1 the Clean Air Act, 42 U.S.C. §§

7470-7515, existing sources of air pollutants are grandfathered, but new major sources and existing major sources undertaking major modifications must undergo preconstruction review and must obtain a preconstruction permit prior to construction, thereby phasing out grandfathered sources and achieving over time a level playing field for regulated sources across the country. Operation of an air pollution source without a required preconstruction permit is a violation of the Clean Air Act. 42 U.S.C. §§ 7475, 7503.

There are two preconstruction NSR programs. Both are designed to protect national ambient air quality standards (“NAAQS”) for six “criteria” air pollutants, including ozone, sulphur oxides (“SO₂”), nitrogen dioxide (“NO₂”), carbon monoxide (“CO”), lead and particulate matter (“PM”). Both impose emission standards or limitations and control technology for a new or reconstructed source. Major stationary sources of pollutants located in an area that has attained the NAAQS are subject to the “prevention of significant deterioration” (PSD) program for the attainment pollutant. 42 U.S.C. § 7475; 40 C.F.R. §§ 51.166 and 52.21(Part C). Major stationary sources of pollutants located in an area that has not attained the NAAQS are subject to nonattainment NSR provisions for the nonattainment pollutant. 42 U.S.C. § 7503; 40 C.F.R. §§ 51.165, 52.24 and Part 51, App. S (Part D).

In 1990, in amending the Clean Air Act, Congress determined that nearly all of New York, including all of western New York, should be designated a nonattainment area for ozone. 42 U.S.C. § 7511c(a). See 6 N.Y.C.R.R. § 231-2.1(b)(24). Accordingly, the entire state is regulated under the Act as nonattainment for VOC and NO_x, chemical precursors to ozone.

Each state is mandated by the Clean Air Act to prepare a State Implementation Plan (SIP) to attain or maintain the NAAQS for each of the criteria pollutants. 42 U.S.C. § 7410. New York prepared its own SIP which EPA approved in 1972, with subsequent revisions. 40 C.F.R.

§52.1670. The approved New York SIP includes general provisions, 6 N.Y.C.R.R. Part 200, the PSD program, 6 N.Y.C.R.R. Part 201, and the nonattainment NSR program, 6 N.Y.C.R.R. Part 231. New York's NSR programs contain the requirements set forth by the EPA for plan approval in 40 C.F.R. § 51.165 (PSD) and 40 C.F.R. § 51.166 (nonattainment NSR).

For purposes of the NSR programs, a "major" stationary source is one which emits, or has the potential to emit, 100 tons per year (tpy) or more of any regulated pollutant. 40 C.F.R. § 51.166(b)(1)(i); 40 C.F.R. § 51.165(a)(1)(iv)(A). A stationary source that has the potential to emit 100 tpy of VOC is considered major for ozone. 40 C.F.R. §§ 51.166(b)(1)(ii), 40 C.F.R. § 51.165(a)(1)(iv)(B). Fugitive emissions, those that cannot be reasonably collected, are included in determining whether MSW landfills are major. 40 C.F.R. §§ 51.166(b)(1)(iii), 51.165(a)(1)(iv)(C); 6 N.Y.C.R.R. §§231-2.2(c)(27), 200.10(b) (Table 2).

EPA has said that NMOC emissions must be considered in determining major source status for landfills, and landfills with a design size above 2.5 million Mg. "will most often be major sources" based on their NMOC emission rate. 61 Fed.Reg. 9905, 9912 (March 12, 1996).

A modification of an existing major stationary source will subject the source to preconstruction permitting if the modification results in a significant net emissions increase of any pollutant. 40 C.F.R. §§ 51.166(b)(2), 51.165(a)(1)(v), 52.21(b)(2)(i). "Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone." 40 C.F.R. §§ 51.166(b)(2)(ii), 51.165(a)(1)(v)(B), 52.21(b)(2)(ii). The significance level for VOC is 40 tpy, the significance level for NMOC is 50 tpy. 40 C.F.R. §§ 52.21(b)(23)(i), 51.166(b)(23)(i). Accordingly, a modification that increases the potential of a landfill to emit NMOC by 50 tpy subjects the landfill to preconstruction permitting. *Id.*

To obtain a Part C preconstruction permit, the PSD permitting program requires new

and modified major sources to install the best available control technology (BACT) for each regulated pollutant it will have the potential to emit in significant amounts, undertake an air impacts analysis before and after the modification for attainment pollutants, and perform ongoing post-construction monitoring of air quality. 42 U.S.C. § 7475(a); 40 C.F.R. §§ 52.21(j), 51.166(j), (k), (m).

To obtain a Part D preconstruction permit, major sources must install pollution control technology that meets a more stringent and costly standard, the lowest achievable emission rate (LAER) for nonattainment pollutants. 42 U.S.C. §§ 7503(a)(2), (c); 40 C.F.R. §§ 51.165(a)(2). In addition, in nonattainment cases construction may not begin until the source purchases emissions reductions from other sources in the region in an amount that will exceed the allowable nonattainment air pollutant or pollutants to be emitted by the new or modified process (“offsets”), “such that total allowable emissions from existing sources in the region . . . and from the proposed source will be sufficiently less than total emissions from existing sources . . . so as to represent . . . reasonable further progress” toward meeting the NAAQS.” 42 U.S.C. § 7503(a)(1)(A). In addition, in nonattainment cases the preconstruction permit may not be issued unless the applicant demonstrates that all major sources owned or operated in the State by the applicant are in compliance with all applicable requirements under the Act. 42 U.S.C. § 7503(a)(3). In addition, in nonattainment cases the source must determine that an “an analysis of alternative sites, sizes, production processes, and environmental control techniques” demonstrates that the benefits of the new facility or modification significantly outweigh the environmental and social costs imposed by it. 42 U.S.C. § 7503(a)(5).

According to EPA, failure to undergo major NSR permitting often results in hundred of tons of excess emissions. Eric V. Schaeffer, Director, Office of Regulatory Enforcement, EPA,

“Guidance on the Appropriate Injunctive Relief for Violations of Major New Source Review Requirements(Memorandum),” dated Nov. 18, 1998.

New Source Performance Standards and Emission Guidelines for Existing Sources

Pursuant to Section 111 of the Clean Air Act, the EPA has promulgated regulations establishing standards of performance for new and existing sources of any air pollutant. 42 U.S.C. § 7411. These regulations generally require “new source performance standards” (NSPS) for new or modified major sources of regulated air pollutants, and require states to develop and implement equivalent emission guidelines (EG) for existing unmodified sources, subject to EPA approval. 42 U.S.C. §§ 7411(a)(1), (d).

Pursuant to NSPS and EG regulations, the NMOC fraction of landfill gas is regulated indirectly by requiring large landfills to collect and combust landfill gas, by measuring performance in maintaining the landfill’s surface methane concentration to below 500 ppm on a quarterly basis, and by continuously monitoring specified operating parameters of the landfill gas collection and control system. 40 C.F.R. Part 60, Subparts WWW (§§ 60.750-59) (NSPS) and Cc (§§ 60.30c-35c) (EG).

The NSPS regulations apply to MSW landfills that meet or exceed 2.5 million megagrams by mass (approximately 2.76 tons) and 2.5 million cubic meters by volume (approximately 2,025 acre-feet) and that commenced construction, reconstruction or modification, or began accepting waste, on or after May 30, 1991. 61 Fed.Reg. at 9907, promulgating NSPS/EG for MSW landfills as 40 C.F.R. Part 60, Subparts WWW and Cc. The regulations also created a significance level of 50 tpy or more of NMOC for an increase in the potential to emit which subjects a landfill to NSR rules. 61 Fed.Reg. at 9912; cf. 40 C.F.R. § 60.754(c). Thus, a modification that increases the potential to emit NMOC by 50 tpy or more

commencing on or after May 30, 1991, subjects an existing landfill to NSPS and NSR requirements. Revisions to the regulations have been promulgated but without changing the substantive requirements of the 1996 EG/NSPS rules. See 63 Fed.Reg. 32743, 32749 (June 16, 1998); 64 Fed.Reg. 9257 (Feb. 24, 1999).

The EG regulations apply to existing landfills within states that have promulgated such regulations and require performance standards equivalent to NSPS upon exceeding the same size and NMOC emission thresholds. Existing landfills are defined as those landfills that have accepted waste since November 8, 1987 and whose construction, modification or reconstruction occurred before May 30, 1991. 40 C.F.R. § 60.32c(a); 61 Fed.Reg. at 9907. New York promulgated such regulations that became effective on November 21, 1998. 6 N.Y.C.R.R. § 360-2.21. Under New York's landfill gas regulations, an initial design capacity and emission rate report must be submitted by existing landfills in the state "no later than" 90 days after the effective date of the regulations. 6 N.Y.C.R.R. § 360-2.21(h)(1)(i). Cf. 40 CFR § 60.35c(b).

EPA approved New York's landfill EG regulations, making the regulations federally enforceable, effective September 17, 1999. 64 Fed.Reg. 38582 (July 19, 1999).

The NSPS and EG regulations require MSW landfills that exceed the size and NMOC emission thresholds to install a "well-designed and well-operated" landfill gas collection and control system able to collect gas effectively from all areas of the landfill that are at least five years old for active areas or two years old for areas that are finally covered or at final grade. 61 Fed.Reg. at 9907; 40 C.F.R. § 60.755(b). Thereafter, the landfill must measure methane concentrations across the surface of the landfill quarterly and remediate areas where surface methane concentrations exceed 500 ppm. 40 C.F.R. § 60.753(d). Required remediation includes addition of cover materials to seal the landfill surface and additions to the system of gas collecting

wells drilled into the landfill's waste mass. 40 C.F.R. § 60.755(c). See 61 Fed.Reg. at 9912. In addition, the landfill gas collection and control system must be designed and maintained to meet strictly specified operating parameters, including maintaining negative pressure at each gas well in the system, minimizing the infiltration of atmospheric oxygen or nitrogen into the collected gas, and maintaining a continuous flame in systems using flares to combust the gas. 40 C.F.R. §§ 60.753 et seq; 60.18(c)(2). Proper combustion of the collected landfill gas will destroy 98 percent of the NMOC in the gas. 40 C.F.R. §§ 60.752 (b)(2)(iii)(B), 60.33c(c)(2).

MSW landfills subject to the NSPS regulations must comply with the compliance times for the NSPS planning and control requirements or calculate an NMOC emission rate for the landfill. 40 C.F.R § 60.752(b). If the calculated NMOC emission rate is 50 Mg/yr. or more, the following compliance times apply: the landfill must submit a design plan for a control system meeting the required performance standards within 12 months and must install the system “within 30 months after the first annual report in which the emission rate equals or exceeds 50 megagrams per year.” 40 C.F.R §§ 60.752(b)(2)(i), (ii). For MSW landfills that commenced construction, reconstruction or modification on or after May 30, 1991 but before March 12, 1996, an initial NMOC emission rate report must be submitted to the EPA Administrator “no later than” June 10, 1996. 40 C.F.R. § 60.757(b)(1)(i)(A). For newer landfills or those undertaking a later modification, an initial NMOC emission rate report must be submitted to the EPA Administrator “no later than” 90 days after the landfill commences construction, modification, or reconstruction. 40 C.F.R. § 60.757(b)(1)(i)(B).

Under New York's landfill EG regulations, landfills subject to the regulations must comply with compliance times for planning and control requirements or calculate an NMOC emission rate for the landfill. 6 N.Y.C.R.R. § 360-2.21(c)(2). Once the calculated NMOC

emission rate of an existing landfill meeting the size threshold exceeds 50 Mg/yr., the landfill must submit to NYSDEC a Title V operating permit application and a design plan for a landfill gas collection and control system with NSPS equivalent operating parameters “within one year,” 6 N.Y.C.R.R. § 360-2.21(c)(2)(ii)(a), and must install the system “within 30 months after the first annual report in which the emission rate equals or exceeds 50 megagrams per year.” 6 N.Y.C.R.R. § 360-2.21(c)(2)(ii)(b).

MACT Standards

In addition to the NAAQS requirements for the six criteria air pollutants regulated under the NSR programs, 188 “hazardous air pollutants” (“HAP,” also termed “air toxics”) are regulated pursuant to Section 112 of the Act. See 42 U.S.C § 7412(b). EPA has found that about 30 HAP are included in NMOC emissions from landfills, including benzene, toluene, vinyl chloride and ethyl benzene. See 65 Fed.Reg. 66672, 66674-66675 (Nov. 7, 2000); EPA, OAQPS and OAR, Emission Factor Documentation for AP-42 Section 2.4 Municipal Solid Waste Landfills, p. 4-18 (Research Triangle Park, North Carolina; revised August, 1997) (available at <http://www.epa.gov/ttn/chief/ap42/ch02/bgdocs/b02s04.pdf>).

Section 112 imposes maximum achievable control technology (“MACT”) on major sources of HAP in source categories established by the EPA pursuant to Section 112(c)(1) of the Act. 42 U.S.C § 7412(c)(1). Municipal landfills were included in the EPA’s list of major sources in 1992. 57 Fed.Reg. 31576, 31591 (July 16, 1992). MACT standards for control of air toxics are more stringent than “best demonstrated technology” (“BDT”) standards under EG/NSPS and “best available control technology” (“BACT”) standards under the PSD program. In contrast to BDT or BACT, Section 112(d)(3)(A) of the Act imposes a minimum “MACT floor” level of control on existing major sources, defined as the “average emission limitation achieved by the best

performing 12 percent of the existing sources (for which the Administrator has information).” 42 U.S.C § 7412(d)(3)(A).

Under Section 112, a major source includes all “stationary sources located within a contiguous area and under common control” that emit 10 or more tons per year of any one HAP or 25 or more tons per year of a combination of HAP. 42 U.S.C § 7412(a)(1).

Under Section 112(j) if a MACT standard has not yet been promulgated at the time a major source undergoes review pursuant to the Title V operating permit program, a MACT determination must be incorporated on a case-by-case basis into the source’s Title V permit. 42 U.S.C § 7412(j)(5). A proposed but not yet final MACT standard serves as the presumptive MACT for purposes of Section 112(j). 40 C.F.R. §63.55(b)(4).

On November 7, 2000, EPA proposed a MACT standard for MSW landfills. 65 Fed.Reg. 66672 (Nov. 7, 2000). The proposed MACT applies to those landfills that are major air emission sources under Section 112 and emit 50 megagrams of NMOC or more per year. *Id.*

The proposed MACT specifies NMOC as a surrogate for HAP emissions and incorporates the EG/NSPS performance standards. 65 Fed.Reg. at 66678. However, under the proposed MACT, landfills subject to MACT standards are also subject to additional startup, shutdown, and malfunction (“SSM”) requirements, limits on operating condition deviations for out-of-bounds monitoring parameters, and an enhanced frequency for compliance reporting, compared to the annual report required under NSPS. An SSM plan must be proposed, subjected to public review, and the final SSM plan must be included in the Title V permit. *Id.* The frequency of compliance reporting must also be stepped up to six months, compared to the EG/NSPS 12-month requirement. *Id.*

Title V Operating Permit Program

Major stationary sources of air pollution are required by Title V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f, to obtain an operating permit that includes emission limitations. 42 U.S.C. §§ 7661 a(a), 7661 c(a). In addition, landfills with a design capacity of at least 2.5 million Mg and 2.5 million cubic meters must obtain a Title V operating permit. 40 C.F.R. §§ 60.32c(c), 60.752(b). The purpose of the Title V permit is to collect in one permit all applicable requirements under the Act, together with permit conditions that assure practical compliance with those requirements. 57 Fed.Reg. 32250, 32251 (July 21, 1992); 40 C.F.R. § 70.6(c)(1). Thus, if NSR, MACT and NSPS/EG rules are applicable requirements, all such requirements must be incorporated accurately in a landfill's Title V operating permit to assure compliance.

For Title V permitting purposes, a landfill is a major source if it could be classified as a major source under one or more of three major source definitions in Title V: (1) Section 112, (2) Section 302, or (3) the nonattainment NSR program. 42 U.S.C. § 7661(2); 40 C.F.R. §70.2. It is important to note that a landfill can be a major source for one or more pollutants, of which NMOC is but one. Under the Section 112 major source definition, the pollutants of concern are listed in section 112(b) of the Act. 42 U.S.C. § 7412(b)(1). Under Section 302 a landfill is a major source when it has the potential to emit 100 tpy of the non-HAP criteria pollutants (NO_x, SO₂, PM, VOC, CO and lead). 42 U.S.C. § 7602(j). Under the nonattainment NSR program, a landfill located in an ozone nonattainment area is a major source when it has the potential to emit 100 tpy of NO_x or VOC. Under these two Title V major source definitions, emissions from landfill gas combustion devices such as flares must be counted in major source determinations, and added to the landfill's reasonably collectable emissions of NMOC to determine major source status. See 40 C.F.R. § 70.2. Under the Section 112 major source definition, all sources of

hazardous air pollutants in a contiguous area and under common control, whether the emissions are considered collectable or not, must be counted toward determining whether a source is a major source. 42 U.S.C. § 7412(a)(1). See Memorandum from EPA Region III, to Terry Godar, Virginia Dept. Env'tl. Quality, dated Feb. 11, 1998, Response to "Statement #5" (available at <http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/lndflr3.pdf>).

The Clean Air Act requires each State to administer a Title V operating permit program, to be developed and approved by EPA. 42 U.S.C. § 7661a(d). EPA granted interim approval to New York's Title V program effective December 9, 1996, 61 Fed.Reg. 57589 (Nov. 7, 1996), and full approval effective November 30, 2001. 66 Fed.Reg. 63180 (Dec. 5, 2001).

In an application for a Title V operating permit, a responsible official must certify to the truth, accuracy, and completeness of all information referenced, 40 C.F.R. § 70.5(d), must identify all requirements that apply to the facility, 40 C.F.R. § 70.5(c)(4), and must certify that the source is in compliance with all applicable requirements under the Clean Air Act. 40 C.F.R. § 70.5(c)(9); cf. 57 Fed.Reg. 32250, 32274 (July 21, 1992). The applicant also has an ongoing duty to correct information in the application and to supplement its application in light of requirements that become applicable. 40 C.F.R. § 70.5(b). Generally, compliance with the terms and conditions of a facility's Title V permit is deemed compliance with the Act, 40 C.F.R. § 70.6(f), but obtaining a Title V permit does not shield a facility from prior and ongoing violations of the Act. 40 C.F.R. § 70.6(f)(3)(ii).

Flare Devices

Flare devices used to control combustible emissions are often substantial sources of two NAAQS pollutants, NO_x and carbon monoxide (CO).

According to the EPA, in order to comply with standards of performance and national

emission standards required under the Clean Air Act, “[f]lares are commonly used in industry to safely combust VOC and volatile HAP. . . . The EPA determined the destruction efficiency of flares combusting organic emissions in the early 1980’s . . . was above 98 percent when operated within the conditions of the flare specifications.” 63 Fed.Reg. 24436, 24437 (May 4, 1998), amending 40 C.F.R. § 60.18. Accordingly, in 1986 EPA promulgated regulations applicable to flare devices incorporating flare specifications, including the requirement that flares be operated at all times with a pilot flame present. 51 Fed.Reg. 2701 (Jan. 21, 1986), promulgating 40 C.F.R. § 60.18; see 40 C.F.R. § 60.18(c)(2). Operation of a flare without meeting these requirements is a violation of the Clean Air Act.

The 98 percent destruction efficiency for landfill gas flares, determined in part by continuous monitoring for the presence of a flame at all times, are requirements incorporated into the NSPS/EG regulations for landfills. See 40 C.F.R. §§ 60.754(d), 60.756(c).

IV. FACTS

The Landfill at Present

The landfill’s disposal area comprises approximately 50 acres and has been in continuous operation since 1958. The landfill is constructed over a former pond and in close proximity or directly over a federally designated aquifer that is the sole or principal drinking water source for the area. See 52 Fed.Reg. 36100 (September 25, 1987). The landfill is constructed without modern landfill cells or subcells, without a modern protective double composite liner system, and without a modern leachate collection system engineered beneath the landfill’s entire waste mass. A leachate collection system is in place around the perimeter of the landfill. Daily and intermediate landfill cover is intended to minimize the production of leachate.

The landfill presently reaches a height of approximately 185 feet above ground level and

an indeterminate number of feet below ground level, containing approximately seven million cubic yards (or 5.4 million cubic meters) of waste. Using approximately 8,820 truck trips per year, the landfill currently disposes approximately 600,000 cubic yards or one-half million tons of waste per year, including municipal waste, construction and demolition debris, municipal solid waste incinerator ash, and industrial wastes, including hazardous wastes excluded from regulation under RCRA Subtitle C such as friable asbestos waste, contaminated soils, sludges, tank bottoms, foundry sand, and PCB wastes not exceeding 50 parts per million PCB. Special industrial waste streams not from small quantity generators are disposed at the landfill on a case by case basis, under special permits to do so granted by NYSDEC.

Petitioners are informed and believe, and therefore allege, that in the past the landfill disposed hazardous wastes that today would be regulated under RCRA Subtitle C. Believing such hazardous wastes were disposed at the landfill prior to 1965, NYSDEC listed the landfill on its registry of Inactive Hazardous Waste Disposal Sites. Together with the substantial amounts of non-MSW waste authorized currently to be disposed in the landfill, clearly the landfill should be considered a co-disposal landfill for purposes of estimating emissions.

Petitioners are informed and believe, and therefore allege, that notwithstanding its age and size, the landfill is incompletely capped, having many areas where waste is no longer disposed but no final cover or cap has been installed. In fact, only about eight acres of the landfill's 50 acre surface has been finally covered, according to NYSDEC.

At the time EPA approved New York's EG regulation, NYSDEC reported the landfill emitted 792 tpy of NMOC, which corresponds to approximately 18,480 tpy of methane emissions. 64 Fed.Reg. at 38584. The landfill also emits HAP from volatilization of HAP contained in petroleum contaminated soils (PCS) used as landfill cover material, (see Exhibit D),

and from volatilization of HAP contained in landfill leachate and emitted during its collection, storage and transport at the landfill.

The landfill operates a landfill gas flare under a separate source permit governing combustion sources. The flare is approximately 40 feet tall and eleven feet around and emits NOx and other regulated pollutants in indeterminate amounts. The landfill estimates the flare combusts 1,261 million cubic feet of landfill gas per year.

The landfill operates a paint coating facility on site under an air permit issued by NYSDEC under the New York SIP, and has operated this facility on site since at least 1994. By voluntarily limiting its use to 2,500 gallons of paint, in its Title V application the landfill calculated its potential to emit the following pollutants from the coating facility: particulates (PM-10), 37.5 tpy; sulfur dioxide, 10.6 tpy; oxides of nitrogen, 8.3 tpy; carbon monoxide, 116.6 tpy; lead, 0 tpy; VOC, 34.4 tpy; and HAP, 18.7 tpy. See WMNY Title V permit application, Section III, attached hereto as Exhibit G.

Petitioners are informed and believe, and therefore allege, that the landfill does not and has not performed any emission testing, sampling of ambient air quality, or other analytical determinations of the landfill's impacts on area air quality.

The Landfill's Compliance History

In 1990, by a judgment of the Appellate Division of New York State Supreme Court, a NYSDEC permit condition imposed on the landfill was affirmed, requiring the landfill to pay the costs of a NYSDEC on-site monitor. This condition was imposed on the landfill's operating permit in important part because of repeated and persistent complaints to NYSDEC by neighbors of off-site odors, in violation of applicable environmental regulations requiring landfill operators to effectively control off-site odor. Cf. 6 N.Y.C.R.R. Part 360-1.14(m) and 40 C.F.R. § 258.21.

In 1993, residents living on Hand Road adjacent to the landfill began to direct odor complaints to the New York State Department of Health (“DOH”), complaining that odors from the landfill caused health impacts including headaches, nausea and respiratory problems. During 1993 a public health specialist from DOH performed several inspections during which he experienced strong odors off site and concluded there is evidence that there may be a link between health concerns and exposure to landfill gas emissions. In response to complaints concerning off site odors, the landfill agreed to install a system of nine landfill gas extraction wells drilled into the landfill waste with small individual “candlestick” (or “stick”) flares installed on each well to combust the gas. After the landfill began operating the gas well system, NYSDEC continued to receive off-site odor complaints by residents along Hand Road.

In June, 1994, or earlier in 1994, a number of NYSDEC inspections of the landfill showed that stick flares on the landfill’s gas wells were on occasion not ignited and leachate breakouts from the landfill were not consistently controlled, prompting NYSDEC to initiate an enforcement action.

On or about July 18, 1994 NYSDEC entered into an Order on Consent with the landfill alleging violations of environmental regulations regarding control of landfill leachate, mining operations, and control of off-site odors, and requiring the landfill to pay a \$40,000 civil penalty and implement a schedule of compliance for the installation of an “interim gas removal/recovery system.” Pursuant to this order the landfill installed additional gas wells, bring the total number of functioning landfill gas extraction wells up to fifteen by November, 1994.

In contrast to the then existing passive landfill gas collection system, the interim gas removal/recovery system required under the 1994 Consent Order contemplated further construction of an active system whereby additional gas wells would be installed and all or most

gas wells at the landfill would be connected by pipes to a common header pipe and a blower to a large central flare in order to combust the gas. The landfill was required to submit within one month of the Order an approvable engineering plan for the interim gas removal/recovery system.

Pursuant to the 1994 Consent Order the landfill applied for and, on April 10, 1995, was issued a permit to construct a ground flare at the landfill, considered at the time a new source of emissions, and that the landfill commenced construction and installation of the flare later that month. Additional horizontal collection pipes leading to a common header flowing to the main flare were installed in 1997.

By a series of communications with EPA in 1996 and 1997, described in the following paragraphs, the landfill successfully avoided becoming subject to NSPS regulations.

Pursuant to the NSPS regulation, on June 4, 1996, the landfill submitted to EPA an initial design capacity report and NMOC emission report showing the landfill was subject at that time to NSPS regulations, because the landfill's size and calculated NMOC emissions exceeded NSPS applicability thresholds, and because the landfill reported beginning work on a modification expanding the landfill on July 9, 1993. These reports showed the landfill's design capacity in 1996 was 5.1 million Mg.

Acknowledging that modifications expanding the landfill were constructed during the summer of 1991 and 1992, the landfill requested from EPA by a letter dated March 17, 1997, a determination as to whether NSPS or EG regulations apply to the landfill. In response to the landfill's March 17, 1997 request, EPA responded to the landfill by a letter dated June 5, 1997, requesting additional information because the information provided by the landfill was inconsistent regarding whether the modification was commenced before May 30, 1991, the initial date a modification triggers NSPS applicability.

To EPA's June 5, 1997 communication, the landfill responded by a letter dated June 9, 1997, asserting that the modification was constructed in two parts, construction on the first part began on May 29, 1991, and construction on the second part began on June 9, 1993.

On June 3, 1997, the landfill made a request by letter to EPA for an extension of time by which to submit the design plan for a landfill gas collection and control system under the NSPS regulation.

On June 16, 1997, EPA granted the landfill's June 3, 1997 request for an extension of time, noting that a request for an extension of the time to install controls at the landfill was not requested or considered.

On December 8, 1997, finding that the two parts of the landfill's modification were parts of a continuous program of construction on the modification, EPA determined that the landfill began construction of the modification on May 29, 1991, thereby avoiding NSPS applicability. EPA determined that the landfill is, instead, subject to the EG standards of 40 C.F.R. Subpart Cc, §§ 60.30c-36c.

In December, 1998, the landfill submitted to NYSDEC an application for a Title V Clean Air Act operating permit, attached hereto as Exhibit G. The application appears to be prompted by the landfill's calculation that its paint coating facility is a major source for carbon monoxide. See id., p. 1. In the application the landfill also acknowledged it is subject to the EG regulation applicable to landfills, and asserted the landfill's existing landfill gas collection and control system will most likely meet these requirements. Id., pp. 12 and 13. The application also calculated NMOC emissions from landfill to be 47.7 tpy, or 43.27 Mg/yr., and the landfill's potential to emit NMOC to be 69.2 tpy, or 76.3 Mg./yr. These calculations did not apply EG regulatory default values for estimating NMOC. Id., p. 7. Cf. 6 N.Y.C.R.R. Parts 360-2.21(e)(1)(i), 208.5(a)(1), and

Petitioners' Title V Comments, Exhibit A, pp. 10-11 (items 8 and 23).

On February 16, 1999, the landfill submitted an initial design capacity report and NMOC emission rate calculation to NYSDEC, pursuant to New York's landfill gas regulation. The report calculated the landfill had at that time a design capacity of 5.9 cubic meters and an NMOC emission rate of 527 Mg/yr. These calculations applied the EG regulatory default values for estimating NMOC. See id.

On October 18, 1999, effective immediately, the landfill was granted a renewal permit, modifying and substantially expanding the landfill's design capacity. The renewal permit added 39 special conditions to the landfill's operating permit, including Special Permit Conditions 35 and 36, which requires the landfill to show its active landfill gas collection and control system meets the "operational standards" of 6 N.Y.C.R.R. Part 360-2.21, provisions of New York's then approved federal EG regulations, or submit a design plan for a system that will meet those operational standards "[w]ithin 75 days of the effective date of this permit," or demonstrate its NMOC emission rate is below 50 Mg/yr. If submitted, once the design plan is approved by NYSDEC, Special Permit Condition 38 requires the landfill to install the designed system. Special Permit Conditions 33 and 39 requires the landfill to "submit a landfill gas surface gas monitoring program that meets the requirements of 6 N.Y.C.R.R. Part 360-2.21(f)(3)" within 30 days of the effective date of the permit, and "monitor the active gas collection and control system in accordance with 6 N.Y.C.R.R. Part 360-2.21(g)," and report to the NYSDEC "in accordance with 6 N.Y.C.R.R. Part 360-2.21(h)." The 1999 permit renewal and modification is attached hereto as Exhibit D.

WMNY submitted the surface gas monitoring plan pursuant to Special Condition 33 of its renewal permit on January 26, 2000, and NYSDEC approved the plan on July 5, 2000.

WMNY submitted the design plan for the enhanced landfill gas collection and control system required by Special Permit Conditions 35 and 36 of its renewal permit on or about February 19, 2001, and NYSDEC approved the plan on September 25, 2001. On July, 5, 2000, the Department approved the monitoring plan required under Special Condition No. 33 and Part 360-2.21, and advised the landfill, “All future surface gas monitoring at the site shall follow the requirements of this plan and 6 NYCRR Part 360-2.21.” Exhibit H. On November 6, 2000, NYSDEC notified WMNY to proceed with the design of the final gas collection and control system and to provide the agency with a project date for submission of the design plan. Exhibit A(C).

On or about December 18, 2000, EPA sent the landfill an information request pursuant to the Clean Air Act requesting responses to a series of questions regarding compliance with the EG/NSPS requirements applicable to MSW landfills. The landfill responded on January 25, 2001, asking EPA for a determination whether the landfill is subject to 40 C.F.R. Part 60, Subpart WWW (NSPS) or Subpart Cc (EG).²

On February 14, 2001, pursuant to the NSPS regulation, WMNY submitted to EPA an annual report on the landfill’s compliance with NSPS performance standards. In its cover letter to the report, WMNY acknowledged that the landfill’s existing landfill gas collection and control system does not comply with the NSPS performance standards, and a design plan for a compliant system had not yet been submitted to NYSDEC.³

WMNY submitted the design plan for the EG/NSPS compliant landfill gas collection and

²WMNY’s response to EPA’s information request, made pursuant to Section 114 of the Clean Air Act, included twelve attachments, including WMNY’s 1998 Title V application and flare logs from the landfill showing persistent intermittent outages. The attachments have been drawn on in part for information in this Petition but, due to their length, are not attached hereto.

³This submission by WMNY was nearly as voluminous as its January 25, 2001 submission referred to in the previous note. It also is not attached hereto.

control system (“GCCS”) required by Special Permit Conditions 35 and 36 of its renewal permit on or about February 19, 2001. On April 16, 2001, having received the landfill’s design plan for an GCCS over one year, NYSDEC notified WMNY that its calculation of the landfill’s gas flow rate in the plan was deficient in that, among other reasons, WMNY had departed from regulatory default values for such calculations required under 6 N.Y.C.R.R. Part 360-2.21(f)(1). Exhibit I. NYSDEC approved WMNY’s GCCS plan on or about September 25, 2001.

On April 19, 2001, NYSDEC notified WMNY that the landfill was out of compliance with several requirements under its solid waste management operating permit,⁴ including failure to remediate off site odors; failure to remediate uncontrolled landfill gas emissions inside and outside the landfill perimeter following surface scans showing methane concentrations exceeding 500 ppm in violation of Part 360-2.21; violations of landfill cover requirements, which the agency said were linked to areas in which exceedences of the 500 ppm methane surface concentration limit were detected; documented nuisances due to unremediated erosion of areas requiring intermediate and interim final cover; and mixing whole tires with the landfill’s alternate daily cover. See Exhibit A(B).

On July 10, 2001, NYSDEC notified WMNY that no remediation had been implemented for approximately 300 days despite a surface methane scan on October 12, 2000 that showed the 500 ppm concentration was exceeded in that area. WMNY did not re-scan the area until January 10, 2001, May 1, 2001, and May 16, 2001, which re-scans all showed 500 ppm was exceeded. On January 10, 2001, WMNY’s surface scans showed 500 ppm surface methane concentrations

⁴New York’s solid waste management permit program and RCRA require that landfills, including landfill gas collection systems, comply with all applicable requirements developed pursuant to Sections 110 and 111 of the Clean Air Act. 6 N.Y.C.R.R. Parts 360-1.3(a)(1)(iii), 360-2.16(e) and 42 U.S.C. § 258.24.

exceeded at four areas of the landfill, including, in the vicinity of leachate tank #1 near the landfill perimeter, but no re-scans were performed ten days later, and these areas were not remediated until March 16, 2001. Exhibits E, F.

Throughout the year 2000, the Sardinia Town Board reported at a number of regular monthly meetings of the Board that off site odor problems near the landfill were bad and worsening, at least three Board members had personally experienced such odors, a number of complaints from residents near the landfill concerning such odors were received by the Town, the Board reported the problems to NYSDEC officials who attended at least one Board meeting, the Board directed a request to WMNY to report to the Town what steps were being taken to abate off site landfill odors, and the Board directed a request to the EPA to enforce applicable requirements for abating off site emissions of landfill gas under the Clean Air Act.

V. ARGUMENT

A continuous history of odor complaints from residents, including Petitioners, from before the landfill's initial 1996 emission rate report, up to today and continuing, shows there has long been a serious problem with landfill gas control at the landfill. The landfill's history of compliance is poor at best, at worse it shows backsliding and willful avoidance of applicable requirements. Because the landfill is clearly creating hazardous conditions for its host community, and has failed to abate such conditions after repeated notice to do so, the 30 month compliance time for installation of EG/NSPS controls that accrued from the date the landfill became subject to the New York EG regulation, and NSR requirements, should be enforced.⁵

⁵These circumstances warrant a referral to EPA's enforcement office for further investigation. See EPA Memorandum from John A. Seitz, OAQPS, to Robert Hodanbosi (untitled), Enclosure A, p. 3, dated May 20, 1999 (available at <http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/hodan7.pdf>).

Chaffee Landfill is a sub-standard facility by modern standards. It successfully avoided control requirements in 1997 by arguing that modifications it undertook in 1991 and 1993 were integrally connected to a plan for modification construction on which commenced May 29, 1991, one day before the applicability date for NSPS. It enjoyed a regulatory gap thereafter until New York's landfill gas program became effective as state law in 1998, and again until the effective date of EPA approval of the program as the state's EG regulation, September 17, 1999. The landfill submitted two "initial" design capacity reports and emission estimations, in 1996 and on February 16, 1999. Both times the reports showed the landfill substantially exceeded the volume and emission thresholds making it subject to controls under the Clean Air Act, and both times it avoided control requirements.

NYSDEC's response to Petitioners' comments on the draft Title V permit allows the landfill to start the compliance time clock over by simply applying for and obtaining a modification, increasing its potential to emit. This is a clear circumvention of the purposes and policy of the EG/NSPS regulation the Administrator should not allow. Allowing such an interpretation of the EG/NSPS requirements in this case would invite other landfills already subject to EG to avoid the 30-month compliance time for installation of controls by applying for and obtaining modifications.

In addition, NYSDEC's position in its response, that the landfill was not a major source for purposes of New Source Review at the time of its October 18, 1999, permit modification, has no support in law or fact. By February, 1999, the landfill was emitting at least 529 Mg/yr. of NMOC by its own admission, and had not provided any alternative NMOC emission calculation. The modification by any reasonable calculation increased the landfill's potential to emit more than 50 tpy of NMOC and more than 40 tpy of VOC in an ozone nonattainment area. Requirements

for both nonattainment review and PSD review were therefore applicable after October 18, 1999, and the landfill's failure to comply means it was out of compliance with applicable requirements to obtain preconstruction permits when its Title V permit was issued on June 4, 2002. The failure of a major stationary source to obtain a preconstruction permit prior to construction of a modification that increases the source's potential to emit NMOC above 50 tpy in an ozone nonattainment area violates the permitting requirements of Part D of subchapter 1 the Clean Air Act, 42 U.S.C. §§ 7501 et seq. and the New York SIP. The failure of a major stationary source to obtain a PSD preconstruction permit prior to construction of a modification subject to New Source Review violates the permitting requirements of Part C of subchapter 1 the Clean Air Act, 42 U.S.C. §§ 77470 et seq. and the New York SIP. By operating without required preconstruction permits, WMNY today enjoys a substantial commercial advantage in the regional market for waste at the cost of Petitioners' health and the environment.

The landfill also violated its continuing obligation to correct information in its Title V permit application and to supplement its application in light of requirements that became applicable during the review period. 40 C.F.R. § 70.5(b). In addition to failing to include New Source Review requirements applicable to major source landfills that undergo modification, EPA proposed a MACT standard for MSW landfills on November 7, 2000, applicable to MSW landfills undergoing Title V permit review under Section 112(j) of the Clean Air Act, 42 U.S.C § 7412(j)(5). WMNY failed to amend its Title V application or to notify NYSDEC in any way that NSR or MACT requirements became applicable to the Chaffee Landfill in the course of the Title V review. Inasmuch as WMNY is entitled to make a request to amend its Title V permit administratively and may implement the changes immediately upon submittal of the request, 40

C.F.R. § 70.7(d), the failure to amend is continuing and ongoing.⁶

The EG/NSPS requirements contemplate a close functional relationship between the maintenance of adequate landfill cover and success in achieving a sufficient landfill gas collection efficiency. Unless intermediate and final cover materials create a relatively impermeable barrier for migration of landfill gas, a landfill will emit excessive amounts of landfill gas from the landfill surface, or excessive infiltration of oxygen and nitrogen will permeate cover materials, presenting a risk of explosion in the collection system.

Petitioners are informed and believe, and therefore allege, that the landfill has been willfully recalcitrant in installing final cover on the landfill, and has specifically delayed installation of final cover materials to facilitate a proposed future expansion.⁷ As of the date of this Petition, Petitioners are informed and believe WMNY has installed final cover on only eight acres of the 50 acre landfill. On numerous occasions the landfill improperly installed or maintained intermediate

⁶Although failure to incorporate applicable MACT requirements in the title V permit was not an issue raised with specificity in Petitioner's Comments, (Exhibit A), because MACT requirements must be considered in any NSR process, and failure to comply with NSR requirements was raised with specificity in Petitioner's Comments, Petitioners argue that MACT must be considered in an expedited NSR process for this facility. Alternatively, the public must have an opportunity to comment on the applicability of MACT in an NSR process, which must commence as soon as possible. Indeed, NSR and MACT applicability should be considered in the context of an enforcement action, as discussed in the previous footnote.

⁷On April 17, 2001, NYSDEC by letter sent notice to the Town Supervisor that WMNY made an application to NYSDEC for a permit to construct a 71 acre landfill expansion adjacent to the existing 50 acre landfill. On May 15, 2002, NYSDEC provided public notice that it has accepted as complete an application from WMNY to expand the landfill disposal area approximately 77 acres, or 139 percent, thereby extending the landfill's permitted life another 10 to 20 years. See NYSDEC, Environmental Notice Bulletin, Region 9 notices (May 15, 2002) (available at <http://www.dec.state.ny.us/website/enb/20020515/not9.html>). The proposal to expand the existing landfill would overfill substantial areas of the existing landfill and create a continuous extension of the existing landfill. Implementing this proposal would be made more difficult were the existing landfill to be finally capped or covered in those areas where current regulations require final cover.

landfill cover materials, in each instance allowing waste to protrude through these cover materials. In particular, such failures were reported as observed by NYSDEC in daily inspection forms on February 23, 24, 25 and 26, 1999; May 22, 2000; September 12, 2001; October 12, 2001; in at least three areas throughout the months of March and April, 2001; May 1 and 126, 2001; August 9 and 16, 2001; and December 4, 2001.⁸ On information and belief, each incident was promptly reported to WMNY as observed by NYSDEC, and in each case WMNY failed to remediate the failures promptly.

Petitioners are informed and believe, and therefore allege, on numerous occasions WMNY caused or allowed the landfill to improperly install or maintain interim final landfill cover materials, allowing waste to protrude through these cover materials. In particular, such incidents were reported as observed by NYSDEC in daily inspection forms on April 9, 2001; every day from April 25 to May 31, 2001; and October 5 and 20, 2001. On information and belief, each incident was promptly reported to WMNY as observed by NYSDEC, and in each case WMNY failed to remediate the failures promptly.

These failures to install or maintain landfill cover should be considered closely connected to the landfill's failure to control landfill gas emissions.

WMNY operates a flare device at the landfill known as the main flare, and maintains a continuous recording of the presence of a pilot flame. The flare ignition and flame failed for extended periods on numerous occasions. In particular, such flare failures were recorded by WMNY's flare logs as occurring from December 31, 1999 to January 3, 2000, for approximately 80 hours; from January 10 to 11, 2000, for approximately 23 hours; from January 22 to 23, 2000,

⁸These daily inspection reports, also referred to again below, are not attached hereto on account of their length. However, Petitioners request an opportunity to supplement the record should the absence of these reports in the record be deemed by the Administrator significant.

for approximately 21 hours; on January 25, 2000, for approximately four hours; from January 21 to 22, 2000, for approximately 10 hours; on February 22, 2000, for approximately three hours; on March 31, 2000, for approximately 2.5 hours; from April 7 to 9, 2000, for approximately 78 hours; on April 20, 2000, for approximately 11 hours; on May 3, 2000, for approximately six hours; from May 18 to 20, 2000, for approximately 20 hours; from July 28 to August 1, 2000, for approximately 80 hours; on August 2, 2000, for approximately two hours; on August 6, 2000, for approximately two hours; on August 7, 2000, for approximately three hours; from September 11 to 14, 2000, for approximately 71 hours; from October 22 to 23, 2000, for approximately 23 hours; on December 8, 2000, for approximately two hours; on December 19, 2000, for approximately five hours; on December 26, 2000, for approximately seven hours; on January 2, 2001, for approximately three-quarters of an hour; and on January 4, 2001, for approximately nine hours.⁹ On information and belief, this pattern of flare failure continued throughout 2001 and 2002 up to the present. Failure to operate a flare with a flame present at all times violates 40 C.F.R. § 60.18(c)(2), and the New York SIP. WMNY's inability to maintain its flare device in compliance with applicable requirements at the time of the Title V permit requires a compliance for upgrading the flare.

VI. CONCLUSION

Because WMNY's Chaffee Landfill was not in compliance with EG/NSPS compliance times for the installation of emission controls, failed to obtain required preconstruction permits, has shown an inability to bring its landfill gas flare into compliance, and has allowed its Title V application to

⁹These logs were submitted to EPA Region II with WMNY's January 25, 2001, response to EPA's information request, discussed in footnote 2, above.

remain incomplete even after it became clear that applicable requirements were required to be addressed or listed in the application, the Administrator must object to the landfill's Title V permit. Immediate modification of the Title V permit must include a compliance schedule for NSR review, installing controls and implementing monitoring, recordkeeping and reporting requirements under the standards that are applicable today, not those that were applicable at the time the landfill avoided NSR. See EPA, Office of Regulatory Enforcement Memo, "Guidance on the Appropriate Injunctive Relief for Violations of Major New Source Review Requirements," p. 3, note 7 (November 17, 1998) ("if a source violates NSR in 1995 (e.g., by constructing a major source without a major NSR permit) and finally applies for a permit in 1998, whatever technology is BACT or LAER in 1998 should be required in the NSR permit").¹⁰

Dated: July 30, 2002

Respectfully Submitted,

/s _____

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¹⁰Applicable standards include default values for estimating HAP in landfill gas emissions at co-disposal landfills. See EPA, OAQPS and OAR, Emission Factor Documentation for AP-42 Section 2.4 Municipal Solid Waste Landfills, p. 4-18.