BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF BRISTOL-MYERS SQUIBB CO., INC.	)	
	)	ORDER RESPONDING TO
	)	PETITIONER'S REQUEST THAT
Permit ID: 7-3126-00016/00263	)	THE ADMINISTRATOR OBJECT
Facility DEC ID: 7312600016	)	TO ISSUANCE OF A
	)	STATE OPERATING PERMIT
Issued by the New York State Department of Environmental Conservation Region 7	)	Petition Number: II-2002-09

ORDER GRANTING IN PART AND DENYING IN PART
PETITION FOR OBJECTION TO PERMIT

The United States Environmental Protection Agency ("EPA") received a petition dated September 9, 2002, from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, to the Bristol-Myers Squibb Company, Inc. located at 6000 Thompson Road, Syracuse, New York 13221-4755. The permittee will be referred to as "BMS" for purposes of this Order. The BMS facility is engaged in the manufacture of pharmaceutical products. The BMS permit was issued by the New York State Department of Environmental Conservation, Region 7 ("DEC") on July 17, 2002, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR parts 200, 201, 621 and 624.

The petition alleges that the BMS permit does not comply with 40 CFR part 70 in that: (I) the permit illegally grants BMS broad authority to modify its plant without review by government regulators or the public; (II) the public participation requirements of CAA §502(b)(6) and 40 CFR §70.7(h) were violated by the permitting authority's inappropriate denial of NYPIRG's request for a public hearing; (III) the permit is based on an inadequate application; (IV) the permit does not include an adequate statement of basis as required by 40 CFR § 70.7(a)(5); (V) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (VI) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (VII) the

permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70; and (VIII) the permit lacks monitoring and practically enforceable conditions sufficient to assure the facility's compliance with all applicable requirements.[1] Petitioner has requested that EPA object to the issuance of the BMS permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

EPA has reviewed these allegations pursuant to the standard set forth by Section 505(b)(2) of the Act, which places the burden on the petitioner to "demonstrate to the Administrator that the permit is not in compliance" with the applicable requirements of the Act or the requirements of Part 70. See also 40 CFR § 70.8(c)(1); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2002).

In reviewing the merit of the various allegations made in the petition filed by NYPIRG, EPA considered information in the permit record including: the petition; pertinent sections of the permit application; BMS' Operational Flexibility Plan dated September 2001; NYPIRG's January 17, 2002 comments and BMS' comments on the December 13, 2001 draft permit; NYPIRG's May 2, 2002 comments and BMS' comments on the April 12, 2002 draft permit; DEC's response to each sets of comments submitted by NYPIRG (DEC's "Second and Third Responsiveness Summary"); Permit Review Reports dated May 21, 2002 and July 19, 2002; final permit dated July 17, 2002; semi-annual monitoring report summaries dated January 30, 2003 and July 30, 2003; annual compliance certification reports dated July 30, 2003; and relevant statutory and regulatory regulations and guidance. Based on a review of all the information before me, I deny in part and grant in part NYPIRG's request for an objection to the BMS title V permit for the reasons set forth in this Order.

A. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of New York effective December 9, 1996. 61 *Fed. Reg.* 57589 (Nov. 7, 1996); *see also* 61 *Fed. Reg*. 63928 (Dec. 2, 1996) (correction); 40 CFR part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to New York's title V operating permit program based, in part, on "emergency" rules promulgated by DEC. 66 *Fed. Reg*. 63180 (Dec. 5, 2001). Once DEC adopted final regulations to replace the emergency rules, EPA granted full approval to New York's title V operating permit program based on these final rules. 67 *Fed. Reg.* 5216 (Feb. 5, 2002). Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

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[1] The petition identifies a ninth issue, that "the final permit improperly limits the dates during which the permit conditions apply." Petition at 3. The petition, however, provides no further explanation of this issue. Since this statement standing alone does not demonstrate a deficiency in the permit, the petition is denied on this issue.

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements") but does require permits to contain monitoring, record keeping, reporting, and other compliance requirements when not adequately required by existing applicable requirements to assure compliance by sources with existing applicable emission control requirements. See 57 *Fed. Reg.* at 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, states, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under §§ 505(a) and (b)(1) of the Act and 40 CFR §§ 70.8(a) and (c)(1), States are required to submit all proposed title V operating permits to EPA for review. Section 505(b)(1) of the Act authorizes EPA to object if a title V permit contains provisions not in compliance with applicable requirements, including the requirements of the applicable SIP. *See also* 40 CFR § 70.8(c)(1).

Section 505(b)(2) of the Act states that if the EPA does not object to a permit, any member of the public may petition the EPA to take such action, and the petition shall be based on issues that were raised during the public comment period[2] unless the petitioner demonstrates that it was impracticable to do so or unless the grounds for objection arose after the close of the comment period. *See also* 40 CFR § 70.8(d). If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

B. ISSUES RAISED BY PETITIONER

(I) Operational Flexibility

Petitioner objects to the provisions in the permit allowing BMS, under certain conditions, to make changes to its emissions sources without seeking a modification of the permit. *See* Petition at 3-8; Permit Conditions 6-8. Conditions 6 and 7 reference an Operational Flexibility Plan (OFP) filed by BMS.[3] Under this plan, BMS has grouped its emission sources into 10 processes based on common applicable requirements. The OFP (through a table entitled "Emission Unit Matrix") identifies which process currently applies to the source (the "baseline

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[2] *See* CAA § 505(b)(2); 40 CFR § 70.8(d). Petitioner commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. *See* Letter from Lisa Garcia and Tracy A. Peel, Esq. of NYPIRG to DEC (August 9, 2001) ("NYPIRG Comment Letter").

[3] EPA notes that, given the importance of the OFP to implementation of this permit, the terms and conditions of the OFP should have been more clearly incorporated into the permit and made available to the public in the same manner as the permit.

scenario"), and also identifies a process that could, in the future, apply to the source (under the "alternative operating scenario"). For each process, Condition 6 identifies all applicable requirements that apply to sources associated with that process.

Condition 7 allows BMS to implement an alternative operating scenario (AOS) for sources identified with more than one process. The permit does not clearly specify terms and conditions for ensuring compliance with applicable requirements under the AOS. Rather, it identifies certain permit conditions that may apply under the AOS, without identifying the emission sources that would be subject to those terms and conditions. See Conditions 153, 156, 157, 158, and 160. Terms and conditions are not provided for emissions sources under the AOS at least in part because Condition 7 authorizes BMS in some circumstances to determine what terms and conditions apply under the AOS. Condition 7 incorporates a review process described in Figure 1 of the OFP allowing BMS, depending on its assessment of the nature of the change and the resulting emissions, to: (1) make the change without notifying DEC, but maintaining records to document the change pursuant to NYCRR § 201-6.5(f)(1); (2) select a control option that satisfies applicable requirements, establish a compliance demonstration approach, and submit documentation thereof to DEC 15 days in advance of implementation; or (3) seek a permit modification.

Condition 8 contains a separate protocol for "select unforeseen changes that would be considered 'modifications'" including: an increase in the emission rate of a pollutant that does not violate or change any applicable requirement; use of production materials that may result in the emission of a pollutant not previously authorized; relocation of emission sources; installation or alteration of pollution control devices; and installation of new emission sources. The permit states that the new source or modification "will comply with all applicable requirements and any Title V permit conditions," and "will not trigger major NSR applicability." Permit at 32 (Item 8.2). Condition 8 allows BMS to perform a "self assessment" to determine whether the new source or modification will comply with all applicable requirements, including New Source Review (NSR). BMS is required to document its conclusions from the assessment and notify DEC 30 days before beginning activity on the installation or modification.

Petitioner objects to these provisions on the ground that the permit as written fails to "ensure that the terms and conditions for each such alternative operating scenario meet all applicable requirements and the requirements of [40 CFR Part 70]" (Petition at 6 quoting 40 CFR § 70.6(a)(9)). Petitioner also maintains that a title V permit may not pre-approve future modifications to the permit, and that DEC may not preapprove a permit to construct.[4] Last, Petitioner suggests that DEC impermissibly "decided to discard a large number of federally enforceable emission limits contained in pre-existing permit that currently apply to the plant." Petition at 6.

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[4] DEC has "merged" the process of issuing operating permits under Title V and preconstruction permits under NSR. Thus, the BMS permit was intended to satisfy the requirements not only for a Title V operating permit, but also for a preconstruction permit, to the extent necessary for modifications authorized under the permit.

Both 40 CFR part 70 and 6 NYCRR part 201 authorize the inclusion of an alternative operating scenario (AOS) in a permit. As petitioner points out, 40 CFR § 70.6(a)(9)(iii) requires that any AOS must "ensure that the terms and conditions for each such alternative operating scenario meet all applicable requirements and the requirements of this part." Similarly, 6 NYCRR § 201-6.5(f)(1) provides that "alternate operating scenarios shall be specified by terms and conditions stated in the permit and shall not contravene any applicable requirement."

A central purpose of the title V program is to "enable the source, States, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). Accordingly, title V permits must identify with specificity all terms and conditions necessary to comply with applicable requirements, including monitoring requirements. A permit that includes an AOS must contain all of the terms and conditions for the AOS that would be required if the AOS were the only permitted operating scenario (*i.e.* if it were the "baseline scenario"). Thus, the permit must identify all of the applicable requirements and appropriate terms and conditions, including the necessary monitoring provisions, for any AOS.

In this case, the permit appears to identify each emission source that comprises the AOS, and its applicable requirements. However, the permit fails to sufficiently identify the specific permit terms and conditions that would apply to each emission source under the AOS. Instead, the permit merely included a statement in those terms and conditions that are part of the AOS indicating their possible applicability under the AOS. As such, the permit is vague in terms of establishing terms and conditions to assure compliance with applicable requirements. Condition 7 states that for alternative operating scenarios, all sources have a monitoring designation of "Record-keeping/Maintenance Procedures" and a "generic monitoring description" which provides that, if BMS wishes to switch to the AOS, it will submit any information required under the OFP. Figure 1 of the OFP, which is titled "AOS Review Process" and is incorporated by reference in Condition 7, provides that in some cases where BMS determines emissions controls are required under an AOS, BMS will "identify control options and select [the] control that satisfies applicable requirements" and will "establish [the] appropriate compliance demonstration approach." BMS may select a control device from the list provided in Table 1 of the OFP, which is titled "Control Device Compliance Monitoring Options" and is incorporated by reference in Conditions 7 and 8. Thus, the terms and conditions for emissions sources under the AOS were not determined by DEC, much less specified, at the time the permit was issued.

Under this approach, the permit as issued does not contain sufficient terms and conditions to ensure compliance with all applicable requirements under the AOS. 40 CFR § 70.6(a)(9)(iii) requires that the permit establish terms and conditions for each alternative operating scenario to meet all applicable requirements. Petitioner is correct that Conditions 6 and 7 as issued are not consistent with the requirements of Part 70 and Part 201, as approved by EPA, and need to be revised.

Contrary to Petitioner's claims, however, EPA finds that it is not inconsistent with title V for a permitting authority to approve an AOS that includes a new emissions unit. However, such a permit would need to satisfy all of the applicable requirements, including all requirements that arise under New Source Review.

It does not appear that Condition 8 was intended to authorize an alternative operating scenario.[5] Instead, it appears that Condition 8 may be intended to facilitate "off-permit" changes, pursuant to 40 CFR§ 70.4(b)(12) or § 70.4(b)(14).[6] Section 70.4(b)(12) allows, in certain circumstances, permittees to make changes without permit revisions, provided the permittee gives the Administrator and the permitting authority notice, and the permit shield does not apply to the changes. For example, permittees are allowed to make such "off-permit" changes under section 70.4(b)(12) where the changes constitute "Section 502(b)(10) changes" if the changes are not modifications under Title I, and the changes do not exceed the emissions allowable under the permit.

"Section 502(b)(10) changes" are defined in 40 CFR § 70.2 as changes that contravene an express permit term but do not violate applicable requirements or contravene federally enforceable monitoring, recordkeeping, reporting, or compliance certification requirements.[7]

Section 70.4(b)(14) provides that a State may allow "changes that are not addressed or prohibited by the permit . . . to be made without a permit revision" if the State ensures that each such change meets all applicable requirements and does not violate any existing term or condition.[8] In addition, the permittee must document the changes and provide notice to the permitting authority and EPA, and the changes are not eligible for the permit shield.

The preamble to the final Part 70 regulations highlights that section 70.4(b)(14) does not apply to activities that are "addressed" by the permit. "Therefore, off-permit changes cannot alter the permitted facility's obligation to comply with the compliance provisions of its title V permit,

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[5] If Condition 8 was intended to authorize an alternative operating scenario, it would be inconsistent with 40 CFR § 70.6(a)(9) and 6 NYCRR § 201-6.5(f)(1) because it authorizes changes with even less permit information on applicable requirements and terms and conditions than is available under Conditions 6 and 7.

[6] Part 70 does not require permits to contain provisions addressing changes under 40 CFR § 70.4(b)(12) or § 70.4(b)(14), but EPA recognizes that, under the provisions of NYCRR Part 201, DEC may provide guidelines in permits for making use of these provisions, and such guidelines may be useful to EPA, the permitting authority, and the source.

[7] EPA's Response to Comments on the final Part 70 regulations provides an example that section 70.4(b)(12) would apply if a permit specified use of a specific brand of coating, and the facility wishes to switch to a different brand of coating that complied with the emissions limit applicable to the original coating. *See* Response to Comments at 6-20.

[8] Changes that would be modifications under Title I, or subject to a requirement under Title IV, of the Act may not be made under this provision. *See* 40 CFR § 70.4(b)(15).

which under § 70.6 will be 'addressed' in each permit. Such requirements include monitoring (including test methods), recordkeeping, reporting, and compliance certification requirements." 57 *Fed. Reg.* 32269-70 (July 21, 1992).

It does not appear that Condition 8 is limited to changes that are not addressed by the permit. It also does not appear that Condition 8 is limited to changes allowed under section 70.4(b)(12), such as Section 502(b)(10) changes. Moreover, changes that are allowed under either section 70.4(b)(12) or section 70.4(b)(14) must be excluded from the scope of the permit shield, but the permit does not limit the applicability of the permit shield for changes made pursuant to Condition 8. In addition, notification[9] of changes made under these provisions must be sent to EPA but the permit does not require notice to EPA. For these reasons, Petitioner is correct in alleging that Condition 8 is not consistent with Part 70.

For the reasons explained above, DEC must reopen the permit and ensure that Conditions 6, 7, and 8 are consistent with the requirements of Part 70 and DEC's approved title V program. In addition, DEC must explain in the PRR the scope of Condition 8 and the part 70 provisions it implements.

Petitioner also alleges that DEC has "apparently decided to discard a large number of federally enforceable emission limits contained in pre-existing permits that apply to the plant." Petition at 6. EPA agrees all federally enforceable emission limits must be incorporated in a title V permit. However NYPIRG did not identify the specific permit conditions or emission limits from pre-existing permits that it believes should have been included in BMS' title V permit but were omitted. Accordingly, Petitioner has failed to demonstrate that the permit is deficient due to a failure to incorporate all emission limits, and EPA denies the petition on this point. *See* CAA Section 505(b)(2) (objection required "if the Petitioner demonstrates. . . that the permit is not in compliance with the requirements of [the Act], including the requirements of the applicable [SIP]."); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003)

(II) Public Hearing

NYPIRG asserts it was not given "an opportunity for a public hearing" provided under 40 CFR § 70.7(h). NYPIRG submitted written comments with a request for a public hearing to DEC during the public comment period. DEC denied NYPIRG's hearing request. NYPIRG contends that its submission of approximately 30 pages of written comments suggests that there is a significant degree of public interest in the permit. NYPIRG asserts that DEC's denial of the hearing request is a violation of the public participation requirements of §502(b)(6) of the CAA

[9] Notice should include a brief description of the change, the date on which the change will occur, the resultant emissions change, the pollutants emitted, any new requirement that becomes applicable as a result of the change, and any permit term or condition that is no longer applicable as a result of the change. *See* 40 CFR §§ 70.4(b)(12), (14).

and 40 CFR § 70.7(h). Therefore, NYPIRG requests EPA to object to the BMS permit and order DEC to hold a public hearing on the permit. Petition at 8.

EPA finds no merit in NYPIRG's claim that DEC's decision to deny a hearing request on the BMS permit is a violation of §502(b)(6) of the CAA and 40 CFR § 70.7(h). Neither the CAA or EPA's implementing regulations require a permitting authority to hold a hearing when one is requested. Rather, the CAA and applicable regulations require that States offer an opportunity for a public hearing. *See* CAA § 502(b)(6) and 40 CFR § 70.7(h)(2). In accordance with these requirements, the New York title V program provides that DEC has the discretion to hold either a legislative or an adjudicatory public hearing when one is requested during the public's review of a draft title V permit. *See* 6 NYCRR § 621.7. In this case, NYPIRG requested a public hearing but the DEC determined that a public hearing was not warranted.

Additionally, NYPIRG does not demonstrate or even allege that a public hearing on this permit would have garnered additional information such that it may have resulted in different terms and conditions in the permit. In fact, by its own admission, NYPIRG submitted approximately 30 pages of relevant comments to DEC on the draft permit. Accordingly, in this case, NYPIRG has not demonstrated that DEC's denial of NYPIRG's hearing request resulted in, or may have resulted in, a deficiency in the permit. As the DEC has the discretion to deny a public hearing and the Petitioner has not demonstrated that this discretion was not reasonably exercised, NYPIRG's request that EPA object to the permit on these grounds is denied.

(III) Permit Application

Petitioner alleges that the applicant did not submit a complete permit application in accordance with the requirements of the CAA § 114(a)(3)(C), 40 CFR §70.5(c) and 6 NYCRR §201-6.3. Petition at 9-10. Petitioner incorporates a petition that it filed with the Administrator on April 13, 1999, contending that the DEC's application form is legally deficient because it fails to include specific information required by both the EPA regulations and the DEC regulations. This earlier petition asks EPA to require corrections to the DEC program.

With regard to the BMS permit application, petitioner claims that the application lacks an initial compliance certification, a statement of the methods for determining initial compliance, a description of all applicable requirements, and a statement of the methods for determining compliance on an on-going basis. EPA's response to each of these allegations is delineated below.

(a) Initial Compliance Certification

NYPIRG claims the BMS application form lacked an initial compliance certification disclosing its compliance status with respect to all applicable requirements. NYPIRG asserts that, absent such certification, it is difficult for the government regulators as well as the public to determine whether the facility was in compliance with every applicable requirement at the time it submitted its application. *See* Petition at 9.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claim that BMS failed to submit a proper initial compliance certification with its application, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA Section 505(b)(2) (objection required "if the Petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); 40 CFR § 70.8(c)(1). As explained below, EPA believes that petitioner has failed to demonstrate that the lack of a proper initial compliance certification, certifying compliance with all applicable requirements at the time of application submission resulted in, or may have resulted in, a deficiency in the permit.

The application form used by DEC did not clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. Instead, BMS certified that it would be in compliance with all applicable requirements at the time of permit issuance. Nonetheless, this initial certification, submitted as part of the permit application, did not result in the issuance of a deficient permit. In its application, BMS certified that, for all units at the facility that were operating in compliance with all applicable requirements, the facility would continue to be operated and maintained to assure compliance for the duration of the permit, except for those units referenced in the "Compliance Plan" portion of the permit application. In this section of the application, BMS included a list of activities from two consent orders (Consent Order D7-0001-93-06 and Consent Order R7-1025-97-05) which BMS must undertake to bring the facility into compliance. Accordingly, the facility, in effect, certified that it was in compliance with all applicable requirements at the time it submitted its title V permit application except for those units subject to the referenced consent orders. In addition, petitioner fails to demonstrate that the permit fails to comply with applicable requirements as a result of the form of BMS' initial compliance certification. Accordingly, because the petitioner has failed to demonstrate that the lack of a proper initial compliance certification resulted in, or may have resulted in, a deficiency in the permit, EPA denies the petition on this point.

(b) Statement of Methods for Determining Initial Compliance

Petitioner alleges that the application form omits "a statement of methods used for determining compliance" as required by CAA §114(a)(3)(B), 40 CFR §70.5(c)(9)(ii), and 6 NYCRR §201-6.3(d)(10)(ii). Petition at 9.

The application form completed by BMS did not specifically require the facility to include a statement of methods used for determining compliance but the applicant nonetheless provided information on methods used for determining compliance by referring in the permit application, Section IV Emission Unit Information, "Emission Unit Compliance Certification (continuation)," to the applicable monitoring procedures. Such references include: (1) continuous monitoring of control device parameters (scrubber liquid flow rate, scrubbing liquid pH, vapor condenser outlet gas temperature, etc.) to attain prescribed control efficiencies; (2)

recordkeeping of solvent usage to determine compliance with an emissions cap for VOC; and (3) various record keeping requirements.

In addition, based on EPA's review of the BMS permit, DEC included the necessary methods for determining compliance when it issued the permit. *See*, *e.g.,* Conditions 48, 49, 50, 51, 52, 53, 63, 66. For instance, the permit requires BMS to conduct daily visible emission observations and a Method 9 test if visible emissions are seen for two consecutive days to determine compliance with the opacity standard of 6 NYCRR §227-1.3. *See* Condition 48.

The semi-annual monitoring reports submitted by BMS further demonstrate that the permit was properly written to provide clear statements of methods for determining compliance at the facility. These reports lists each of the source-specific permit conditions with a description of the monitoring strategy for demonstrating compliance with the applicable standard or limits. *See,* Semi-annual Monitoring reports dated January 30, 2003 and July 30, 2003.

In light of the information provided in the application, the terms of the permit itself, and the information provided in the semi-annual monitoring reports, Petitioner has not demonstrated that BMS' failure to submit a more complete statement of the methods for determining compliance, resulted in, or may have resulted in, a deficiency in the permit. Therefore, EPA denies the petition on this issue.

(c) Description of Applicable Requirements

Petitioner's next claim is that EPA's regulations require the applicable requirements contained in a title V permit be accompanied by a narrative description of the requirement. NYPIRG alleges that omission of such information from the permit application makes it difficult for a member of the public to determine whether a proposed permit includes all applicable requirements. Petition at 10.

EPA disagrees with Petitioner on this issue. Citations may be used to streamline how applicable requirements are described in an application, provided that the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. In addition, a permitting authority may allow an applicant to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject; provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public. Documents available to the public include regulations printed in the Code of Federal Regulations or its State equivalent. For further discussion, see *White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995) at 20-21.

Consistent with EPA guidance, in describing applicable requirements, the permit application refers to State and Federal regulations. For example, Section III - Facility

Information, "Facility Applicable Federal Requirements" of the application identifies several applicable requirements including, but not limited to 6 NYCRR §§ 201-6, 202, 211, 226, etc. These regulations are publicly available and are also available on the internet. In addition, the permit review report also provides a narrative description of each applicable requirement. See pages 27-43 of the permit review report. The Petitioner has not shown that any of the descriptions were in error or that the referenced material is not available to the public. While specific rule citations followed by a description of the applicable requirement would make the application more informative, the lack of it, in this case, did not result in the issuance of a defective permit. The petition is therefore denied on this issue.

(d) Statement of Methods for Determining Ongoing Compliance

The Petitioner further states that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. Petitioner alleges that the lack of information in the application also makes it more difficult for the public to evaluate the adequacy of monitoring in the proposed permit. Petition at 10.

EPA disagrees with Petitioner that the application form used by the BMS facility failed to include a description of, or reference to, any applicable method that the source intends to use for determining compliance with each applicable requirement. In the emission unit information part of the application form (Section IV), there is a block labeled "Monitoring Information" that requires applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. As listed in the BMS permit application, monitoring at the facility will include continuous vapor condenser outlet temperature monitors, continuous scrubber liquid flow rate monitors, and intermittent stack testing, among other activities. Therefore, EPA denies the petition on this issue.

(IV) Statement of Basis

Petitioner claims it was impossible for concerned citizens to evaluate and comment on DEC's monitoring decisions because DEC failed to include an adequate statement of basis or "rationale" with the draft permit explaining the legal and factual basis for the permit conditions. Therefore, NYPIRG requests that DEC develop an adequate statement of basis for the draft permit and re-release it for a new public comment period. Petition at 11.

Section 70.7(a)(5) of EPA's permit regulations states that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." The statement of basis is not part of the permit itself. It is a separate document which is to be sent to EPA and to interested persons upon request.[10]

[10] Unlike permits, statements of basis are not enforceable, do not set limits and do not create obligations. Thus,

(continued...)

A statement of basis ought to contain a brief description of the origin or basis for each permit condition or exemption. However, it is not a short form of the corresponding permit. Instead, the statement of basis should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, the permit shield, and any monitoring that is required under 40 CFR § 70.6(a)(3)(i)(B) or 6 NYCRR § 201-6.5 (b)(2). Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA with a record of the applicability and technical issues surrounding the issuance of the permit.[11] See e.g., *In the Matter of Port Hudson Operation Georgia Pacific ("*Georgia Pacific"*)*, Petition No. 6-03-01, at pages 37-40 (May 9, 2003); *In the Matter of Doe Run Company Buick Mill and Mine* ("Doe Run") Petition No. VII-1999-001, at pages 24-25 (July 31, 2002). Finally, in responding to a petition filed in regard to the Fort James Camas Mill title V permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for the selected monitoring method be documented in the permit record. *See In Re Fort James Camas Mill*, ("Fort James") Petition No. X-1999-1, at page 8 (December 22, 2000).

As noted previously, in reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. Thus, where the record as a whole supports the terms and conditions of the permit, flaws in the statement of

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[10](...continued)
certain elements of statements of basis, if integrated into a permit document, could create legal ambiguities.

[11] Additional guidance was provided in a letter dated December 20, 2001 from Region V to the State of Ohio on the content of an adequate statement of basis. See http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/sbguide.pdf. Region V's letter recommends the same five elements outlined in a Notice of Deficiency ("NOD") recently issued to the State of Texas for its title V program. 67 *Fed. Reg.* 732 (January 7, 2002). These five key elements of a statement of basis are (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. *Id.* at 735. In addition to the five elements identified in the Texas NOD, the Region V letter further recommends the inclusion of the following topical discussions in the statement of basis: (1) monitoring and operational restrictions requirements; (2) applicability and exemptions; (3) explanation of any conditions from previously issued permits that are not being transferred to the title V permit; (4) streamlining requirements; and (5) certain other factual information as necessary. In a letter dated February 19, 1999 to Mr. David Dixon, Chair of the CAPCOA Title V Subcommittee, the EPA Region IX Air Division provided a list of air quality requirements to serve as guidance to California permitting authorities that should be considered when developing a statement of basis for purposes of EPA Region IX's review. This guidance is consistent with the other guidance cited above. Each of the various guidance documents, including the Texas NOD and the Region V and IX letters, provide generalized recommendations fro developing an adequate statement of basis rather than "hard and fast" rules on what to include in any given statement of basis. Taken as a whole, they provide a good roadmap as to what should be included in a statement of basis on a permit-by-permit basis, considering the technical complexity of the permit, history of the facility, and the number of new provisions being added at the title V permitting stage, to name a few factors.

basis generally will not result in an objection. *See e.g., Doe Run* at 24-25. In contrast, where flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, EPA will object to the issuance of the permit. *See e.g., Fort James* at 8, *Georgia Pacific* at 37-40.

In this case, DEC prepared a Permit Review Report (PRR), dated May 21, 2002 (updated on July 19, 2002), which serves the same purpose as the statement of basis for the BMS permit. The PRR includes, among other things, a description of the permit, a brief discussion on the transfer of certain existing facility Special Conditions to the title V permit application, a description of the facility, the permit structure, a brief description of each operating process, a description of the regulations/permitting programs that apply to BMS for specific emission sources as well as for the facility as a whole, a summary of the facility HAP emissions, a list of regulatory requirements with the corresponding permit condition numbers identified, a brief discussion of each applicable requirement, a list of all of the monitoring provisions and the corresponding permit condition number, and a brief description of the monitoring requirement of each applicable rule/regulation.

NYPIRG's request for an objection to this permit is primarily based on the alleged lack of an adequate rationale being provided in the PRR to facilitate concerned citizens' evaluation of DEC's periodic monitoring decisions. EPA regulations require that all title V permits include monitoring to assure compliance with the terms of the permit. *See* 40 CFR §§ 70.6(a)(3)(i)(B) and 70.6(c)(1). This includes any monitoring required by applicable requirements under the Act and other additional, "gap-filling" monitoring in cases where the underlying regulation has no periodic monitoring or the monitoring required consists of only a one-time monitoring occurrence (e.g., one stack test over the life of the unit). 69 Fed. Reg. 3202, 3204 (Jan. 22, 2004); *see also, Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

DEC's PRRs include a section entitled, "Basis for Monitoring," where the law or regulation that is the basis for the emission unit's monitoring is listed and explained. For example, the BMS PRR lists the requirement to continuously monitor the outlet gas temperature in refrigerated condensers, the liquid flow rate or pressure drop through scrubbers and pressure drops across fabric filters pursuant to 6 NYCRR § 233.3(a), and the requirement to record daily fuel oil usage to determine compliance pursuant to 40 CFR Subpart Dc, among other explanations. While the Petitioner is correct that EPA requires statements of basis to provide the rationale for monitoring (*see Fort James* at 8), permitting authorities have discretion as to how this requirement is implemented. It should be noted that the requirement that permitting authorities must provide a rationale for the selected monitoring is only applicable if the permitting authority is "gap filling" under the periodic monitoring rule or if the underlying applicable requirement provides for alternative monitoring methods (i.e., the permitting authority should provide a brief explanation as to why one alternative was chosen over another if it is not already clear from the applicable requirement). In this case, Petitioner did not provide any specific instances of omissions or deficiencies with respect to this requirement, and therefore, the Petitioner has failed to demonstrate that had DEC provided the public with a different PRR, the

final BMS permit would have been any different. In addition, based on our review of the PRR, EPA finds Petitioner's general claim regarding DEC's failure to include an adequate rationale for its periodic monitoring decisions to be without merit. For these reasons, EPA denies the petition on this issue.

(V) Annual Compliance Certification Condition

Petitioner raises three issues with regard to the annual compliance certification requirement. First, Petitioner alleges that the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5) by not requiring the facility to certify compliance with all permit conditions. Petitioner claims the BMS permit requires only that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification," as stated in Condition 5. Specifically, petitioner is concerned with the language in the permit that labels certain permit terms as "compliance certification" conditions. NYPIRG notes requirements that are labeled "compliance certification" are those that identify a monitoring method for demonstrating compliance. NYPIRG interprets such compliance certification "designations" as a way of identifying which conditions are covered by the annual compliance certification requirement. NYPIRG further asserts that permit conditions that lack periodic monitoring are thus excluded from the annual compliance certification. Petitioner claims such "designation" is an incorrect application of state and federal regulations because facilities must certify compliance with every permit condition, not just those that are accompanied by a monitoring requirement. Therefore, NYPIRG requests EPA to object to the BMS permit on this basis. *See* Petition at 12-14.

The fact that certain terms of the BMS permit are labeled as "compliance certification" conditions does not mean the BMS facility is *only* required to certify compliance with those permit terms containing this language. "Compliance certification" is a data element in New York's computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions.

Condition 5.2(i) of the BMS permit delineates the requirements for annual compliance certification with the terms and conditions contained in the permit. This language follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, mirrors the language of 40 CFR §§ 70.6(c)(5) and (6). 6 NYCRR § 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Section 201-6.5(e) requires in annual certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the Administrator and shall contain such other provisions as the department may require to assure compliance with all applicable requirements. Therefore, the references to "compliance certification" do not negate the DEC's general requirement for

compliance certification of terms and conditions contained in the permit. Accordingly, because the permit and New York's regulations properly require the source to certify compliance or noncompliance annually for terms and conditions contained in the permit, EPA is denying the petition on this point. However, when the DEC revises the title V permit in response to other sections of this Order, it should add language to clarify the requirements relating to annual compliance certification reporting.[12]

The second compliance certification issue raised in the NYPIRG petition concerns certain facility level conditions listed on pages 7-16 of the permit that DEC exempts from the annual compliance certification requirement. NYPIRG asserts such exemption is an incorrect application of state and federal law.

As a general matter, EPA does not object to a permitting authority's inclusion of a list of general advisory items that do not require certification. However, the "Notification of General Permittee Obligations" section in this permit appears under the heading "Federally Enforceable Conditions." Federal regulations require annual certification for "terms and conditions" contained in the permit. 40 CFR § 70.6(c)(5). As such, the items in the "Notification of General Permittee Obligations" section are subject to certification. EPA, therefore, objects to this permit because it attempts to exclude what are represented to be "Federally Enforceable Conditions" from the certification requirement. EPA has worked with DEC to identify items on this list that may be excluded from the annual certification requirement based on whether these items are purely advisory in nature and are not obligations of the permittee and these understandings have been detailed in a letter from EPA to DEC.[13] EPA grants the petition on this issue.

The third compliance certification issue raised by petitioner concerns the submission dates for annual compliance certifications. The draft permit stated that annual certification reports are "due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department." *See* Condition 5. NYPIRG cites a number of problems with this language. First, NYPIRG claims it is possible that a facility would not be required to submit the first compliance certification until after the end of the first annual period following the date of permit issuance. Second, by adding "unless another quarter has been acceptable by the Department," NYPIRG believes that the permit is rendered unenforceable by the public because it is unclear how the Department will revise the date that the certification is due. Specifically, NYPIRG is concerned that the DEC can change

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[12] In its November 16, 2001 letter, the DEC committed to include additional clarifying language regarding the annual compliance certification in draft permits issued on or after January 1, 2002, and in all future renewals so as to preclude any confusion or misunderstanding, such as that argued by the Petitioner.

[13] Letter from Walter Mugdan, EPA Region 2, to Carl Johnson, DEC, dated September 22, 2004. See also DEC's Letter of Commitment outlining that DEC would "[o]n a case-by-case basis, . . . exclude from the certification terms that do not create an obligation on the permittee." Letter from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, EPA, Region 2, at 7 (November 16, 2001).

the due date through an oral conversation with the permittee, without the public knowing that the deadline has been changed. Also, NYPIRG finds the phrase "calendar quarter that occurs just prior to the permit anniversary date" vague because it is unclear when quarters begin and end. NYPIRG concludes that the annual compliance certification is unenforceable as a practical matter and requests EPA to object to this permit.

In this case, DEC decided to require the first compliance certification to be submitted less than annually, that is, by January 30, 2003 for the period from permit issuance, which occurred on July 17, 2003. Under the "Reporting Requirements" section of Condition 5, the permit states that "[t]he initial report is due 1/30/2003" and that "[s]ubsequent reports are due on the same day each year." Consistent with Condition 5, BMS submitted its initial compliance certification on January 30, 2003. As such, the permit clearly identifies an enforceable deadline for the initial compliance certification report as well as subsequent annual compliance reports. Therefore, EPA denies the petition on this point.

(VI) Prompt Reporting of Deviations

Petitioner claims the BMS permit does not require the permittee to submit prompt reports of any deviations from permit requirements as mandated under 40 CFR § 70.6(a)(3)(iii)(B). Petitioner notes that while the permit now contains a timetable for reporting of deviations of hazardous air pollutants or other regulated air pollutants under some circumstances, all other deviations are required to be reported only in the six-month monitoring report. NYPIRG asserts that this requirement in Condition 4 does not correctly apply the prompt reporting requirements because prompt reporting must be more frequent than the semi-annual reporting requirement. NYPIRG asks EPA to object to the BMS permit and order DEC to define "prompt" based on the degree and type of deviation likely to occur and the applicable requirements which should be more frequent than every six months for every type of deviation. NYPIRG also asks EPA to require less stringent deviation reporting requirements found in other conditions, to be removed and replaced by language noting that deviation reporting requirements are contained in Condition 4. Petition at 14.

Title V permits must include requirements for the prompt reporting of deviations from permit requirements. *See* 40 CFR § 70.6(a)(3)(iii)(B).[14] States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. Moreover, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable rules. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case determination under the rules applicable to the approved program, although a general

[14] 40 CFR § 70.6(a)(3)(B) states: "[t]he permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirement."

provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).[15]

In this case, DEC states in Condition 4 that BMS must report deviations in compliance with the time frame specified in the applicable requirements. However, if the applicable requirement does not establish a time frame for prompt reporting of deviations, BMS must report according to the procedures specified in Condition 4. This condition requires that when emissions of a hazardous air pollutant or a toxic air pollutant continue for more than an hour in excess of permit requirements, BMS must report the instance to DEC within 24 hours by telephone. When emissions of any regulated air pollutant that continue for more than 2 hours in excess of permit requirements, BMS must report to DEC within 48 hours by telephone. A written notice certified by a responsible official must be submitted within 10 working days of an occurrence of deviations and the incidence identified in the semi-annual report. All other deviations from permit requirements are reported in the semi-annual monitoring report.

EPA disagrees with the Petitioner that the permit needs to supplement the above prompt reporting requirements with additional conditions for prompt reporting of deviations as stipulated in 40 CFR § 70.6(a)(3)(iii)(B). Pollutant-emitting activities at the facility are monitored in a number of different ways. EPA believes semi-annual reporting is acceptable as prompt reporting of many deviations for this facility based on the degree and type of deviation likely to occur and the applicable requirements. For instance, the steam boiler for building heating and the utility boiler are capable of burning natural gas or fuel-oil. To demonstrate compliance with the applicable sulfur-in-fuel limits, BMS must maintain records of fuel sulfur content for each delivery of fuel oil. *See* Conditions 50, 56, 57, 58, 65 and 68 of the BMS title V permit. For the utility boiler, BMS must comply with the opacity requirements of 6 NYCRR § 227-1 (*see* Condition 48); 40 CFR part 52, Subpart HH, (see Condition 60); and NSPS subpart Dc (see Condition 67) of the title V permit. A facility representative must observe the boiler stack daily, record all observations, and retain such records for five years. If any non-steam visible emissions are observed for 2 consecutive days, then a Method 9 opacity analysis must be conducted within 2 business days of the second observation. If the Method 9 analysis indicates a contravention of the applicable opacity standard, then the DEC must be contacted within one business day of the Method 9 analysis with any corrective action and/or future compliance schedules.

Given that the pollutant emitting activities at BMS are not necessarily all monitored in terms of the quantity of emissions generated (e.g., non-emission type of monitoring may include sulfur-in-fuel, leaks, temperature, pH, pressure drop, etc.), a deviation does not necessarily

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[15] EPA's rules governing the administration of a federal operating permit program require, *inter alia*, that permits contain conditions providing for the prompt reporting of deviations from permit requirements. *See* 40 CFR § 71.(6)(a)(3)(iii)(B)(1)-(4). Under this rule deviation reporting is governed by the time frame specified in the underlying applicable requirement unless that requirement does not include a requirement for deviation reporting. In such a case, the part 71 regulations set forth the deviation reporting requirements that must be included in the permit. For example, emissions of a hazardous air pollutant or toxic air pollutant that continue for more than an hour in excess of permit requirements, must be reported to the permitting authority within 24 hours of the occurrence.

correspond to an increase in emissions. Because the Petitioner has not demonstrated that the reporting requirements contained in the BMS title V permit fail to meet the standard set forth in 40 CFR § 70.6(A)(3)(iii)(B), the petition is denied on this issue.

(VII) Startup/Shutdown, Malfunction, Maintenance, and Upset Provision

Petitioner asserts that the proposed permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70. Petition at 14. The petition provides a detailed, four part discussion of Condition 191 of the permit. NYPIRG alleges that the permit allows BMS to assert an affirmative defense under the "excuse provision" of Condition 191 for violations that occurs during equipment maintenance, startup/shutdown, malfunctions, or upsets as long as the violations are unavoidable.

First, NYPIRG claims that the excuse provision of Condition 191 has not been approved by the EPA as part of the New York SIP. The version of the excuse provision that was approved into the SIP is found under 6 NYCRR § 201.5 and that version does not cover violations that occur during "shutdown" or "upsets" so those words must be deleted from the draft permit.

Second, NYPIRG alleges the excuse provision as found in Condition 191 fails to specify the "reasonable available control technology" (RACT) that must be employed during maintenance, startup or malfunction conditions. The appropriate federally enforceable monitoring, recordkeeping and reporting requirements must also be specified. Petitioner notes DEC's attempt to minimize emissions resulting from a startup, shutdown and malfunction by requiring that BMS maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emission in Condition 30. NYPIRG notes this is inadequate and only addresses the issue partially since Condition 30 is based on NSPS standards.

Third, both the excuse provision and the SIP regulation fail to define what type of conditions would be considered unavoidable; thereby undermining the enforceability of this permit. An example cited by petitioner as a demonstration of the problem with the lack of a clear standard to guide the commissioner's determination on whether a violation is unavoidable is the language of Condition 28. NYPIRG alleges this condition will excuse the facility from any violation of the opacity standard during startup, shutdown, and malfunction, without any intervention by the commissioner because it states that "the opacity standards apply at all times except during periods of startup, shutdown, and malfunction."

Fourth, NYPIRG alleges deficiencies in both Conditions 25 and 76. According to petitioner, Condition 25 contains a loophole so that not every type of deviation need be reported promptly and Condition 76 does not require timely written reports of deviations due to startup, shutdown and maintenance with appropriate deadlines. Absent written reports of deviation, the public would be unable to review such violations. For violations due to malfunction, NYPIRG

suggests that both telephone and written notification be provided to DEC within two working days and a written report within 30 days. See Petition at 14-18.

In the final BMS permit, DEC incorporated the "excuse provision" that cites 6 NYCRR section 201-1.4 into the state-only side of the permit. *See* Permit Condition 191. This condition provides DEC with the discretion to excuse the facility from compliance with applicable state-only emission standards under certain circumstances, based on the State specific criteria set forth in 6 NYCRR § 201-1.4. In addition, DEC also included clarifying language in the final permit stating that violations of federal requirements may not be excused unless the specific federal regulation provides for an affirmative defense during start-ups, shutdowns, malfunctions or upsets.[16] Since this condition is on the state-only side of the permit, the allegations NYPIRG made regarding this condition are without merit.

With respect to Petitioner's other allegations regarding the startup, shutdown and malfunction provision (RACT, definition of terms, prompt reporting of deviations, "unavoidable" defense), the removal of the "excuse provision" from the federal side of the permit and the incorporation of the language clearly stating that the "excuse provision" is not available for violations of federal regulations makes moot these concerns. In addition, the allegations of deficiency in the prompt reporting of deviations of Conditions 25 and 76 are without merit since these two conditions are unrelated to deviation reporting. *See* Condition 4. Accordingly, NYPIRG has not demonstrated a deficiency in the permit, and the petition is denied on this issue.

(VIII) Periodic Monitoring & Practical Enforceability

Petitioner alleges the BMS permit does not assure compliance with all applicable requirements because many individual permit conditions lack adequate monitoring and/or are not practicably enforceable. Petition at 18-27.

Two provisions of part 70 require that title V permits contain monitoring requirements. The "periodic monitoring rule," 40 CFR § 70.6(a)(3)(i)(B), requires that "[w]here the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record keeping designed to serve as monitoring), [each title V permit must contain] periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit. . . Such monitoring requirements

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[16] The characterization of this provision as potentially "excusing" certain violation of federal requirements is somewhat misleading. The CAA does not allow for automatic exemptions from compliance with applicable SIP emission limits during periods of start-up, shutdown, malfunction or upsets. Further, improper operation and maintenance practices do not qualify as malfunctions under EPA policy. To the extent that a malfunction provision, or any provision giving a substantial discretion to the state agency broadly excuses sources from compliance with emission limitations during periods of malfunction or the like, it is the Agency's position that it should not be approved as part of the federally approved SIP. *See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1, at 23 (Nov. 16, 2000), available on the internet at: http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf.

shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Record keeping provisions may be sufficient to meet the requirements of [40 CFR § 70.6(a)(3)(i)(B)]." The "umbrella monitoring" rule, 40 CFR § 70.6(c)(1), requires that each title V permit contain, "[c]onsistent with [section 70.6(a)(3)], ...monitoring ... requirements sufficient to assure compliance with the terms and conditions of the permit." EPA has interpreted section 70.6(c)(1) as requiring that title V permits contain monitoring required by applicable requirements under the Act (e.g., monitoring required under federal rules such as MACT standards and monitoring required under SIP rules), and such monitoring as may be required under 40 CFR § 70.6(a)(3)(i)(B). 69 *Fed. Reg*. at 3202, 3204 (Jan. 22, 2004); *see also, Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

Petitioner addresses individual permit conditions that allegedly either lack monitoring or are not practicably enforceable. The specific allegations for each permit condition are discussed below.

1. Maintenance of Equipment

Petitioner alleges that the permit's recitation of 6 NYCRR § 200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer's specifications is too general and must be applied to BMS with specificity. Petitioner also wants monitoring, record keeping, and reporting requirements to be included in the revised permit to assure compliance with the maintenance requirements. Petitioner asserts that the statement of basis must also explain the adequacy of the monitoring requirements. Petition at 19.

Permitting authorities have discretion to develop general permit conditions that apply to all title V sources. The maintenance of equipment condition (Item C) is a general requirement which is incorporated into all New York title V permits even where no applicable requirement necessitates the use of control equipment. This type of general or generic requirement is commonly found in SIPs. For example, many SIPs contain generic requirements for facilities to maintain all equipment in proper condition and to carry out proper work practices. DEC includes these generic requirements in the general permit conditions section of its title V permits.

Where control equipment is installed pursuant to an applicable requirement or a source chooses to employ such equipment, appropriate permit conditions are included in the sections of the title V permit applicable to emission units. For example, a spray tower is used as a control device for controlling particulate matter emissions at the facility and Condition 153 requires continuous monitoring of the liquid flow rate to assure the minimum liquid flow rate is maintained. Where a condenser/scrubber is used as a control device, BMS is required to monitor the liquid flow rate, the pH of the scrubbing liquid, and the condenser outlet gas temperature to assure compliance with 6 NYCRR § 233.3(a). See Conditions 157 and 159. Where a fabric collector is used to control particulate emissions, the permit requires monitoring of the pressure drop to ensure that it achieves its designed collection efficiency which in this case is a pressure

drop of 1 inch of water. See Condition 184. Petitioner has failed to demonstrate why the inclusion of a general condition (Item C) in addition to equipment-specific conditions constitutes a deficiency in the permit. Accordingly, EPA denies the petition on this point.

2. Emergency Defense

Petitioner asserts that a definition for "emergency" should be incorporated into the permit for clarity. Petition at 19. As stated in previous Orders, commonly used regulatory terms or terms that are already defined in the regulations do not have to be defined in the permit. See e.g., *In the Matter of Motiva Enterprises ("Motiva")*, Petition No.: II-2002-05 (September 24, 2004). As NYPIRG correctly notes, "Emergency" is defined at 6 NYCRR § 201-2.1(b)(12). Thus, any reference to the term "emergency" in the BMS permit would be governed by the definition set forth in the New York regulations. NYPIRG does not demonstrate that the failure to include a definition of "emergency" constitutes a deficiency in the BMS permit. Therefore, EPA denies the petition on this point.

3. Air Contaminants Collected in Air Cleaning Devices

NYPIRG notes the existence of two general permit conditions that apply to the handling of air contaminants collected in an air cleaning device that lack specificity and monitoring requirements. NYPIRG asserts while these two permit conditions should continue to be included as general conditions, they must also be included as facility-specific conditions if the facility uses any air cleaning devices. Further, NYPIRG alleges, these facility-specific conditions must explain how these requirements apply to the facility and include sufficient monitoring to assure compliance. Petition at page 19.

As noted in section 1 above, permitting authorities have discretion to develop general permit conditions that apply to all title V sources. The general requirements regarding air contaminants collected in air cleaning devices (Items F and G) are incorporated into all New York title V permits even where no applicable requirement necessitates the use of control equipment. DEC includes these generic requirements in the general permit conditions section of its title V permits. This type of general or generic requirement is commonly found in SIPs. Incorporation of such general requirements into the BMS permit does not render the permit deficient.

As a general matter, where control equipment is installed under an applicable requirement, appropriate permit conditions are included in the sections of the title V permit applicable to emission units. *See* Item VIII.1, *supra*. Petitioner has failed to demonstrate a deficiency in the permit. Therefore, EPA denies the petition on this issue.

4. Risk Management Plans (Condition 44)

Petitioner states that the reference, in the permit, at Condition 44, to "risk management plans" must be clarified to explain whether Section 112(r) of the Clean Air Act applies to the facility and which requirements of the plan are enforceable by the public. Petition at 20.

Condition 44 of the final permit states: "If a chemical . . . listed in Tables 1, 2, 3 or 4 of 40 CFR § 68.130 is present in a process in quantities greater than the threshold quantity listed in Table 1, the following requirements will apply." The condition goes on to list these requirements. This condition is written in general terms because section 112(r) requirements are different from other applicable permit requirements in that (1) applicability is based on the presence of a listed chemical in a certain quantity, not based on the quantity of a pollutant being emitted as a by-product from a specific facility; and (2) a permit is not required if the facility is solely subject to §112(r) of the CAA (see §112(r)(7)(f) of the CAA). The affected facility is required to prepared the RMP, register with the EPA, and submit a copy of the RMP to the EPA, the state, and the local planning agency, among others. *See* 40 CFR § 68.215(a). The RMP is public information and shall be available to the public under §114(c) of the CAA. Since applicability is based on having on-site at the facility any substance listed in 40 CFR § 68.130, in an amount above the threshold quantity, applicability may fluctuate over the life of the permit. Although general section 112(r) permit conditions do not definitively state whether an individual source is subject to the risk management plan requirements, the permit is written generally to ensure that it covers any newly subject source, or any source whose applicability fluctuates to ensure that the section 112(r) permit obligations remain up to date. A source that is subject to section 112(r) must also certify its compliance status with respect to these requirements in the same manner it would certify with respect to other applicable requirements pursuant to 40 CFR § 70.6(c)(5). As such, the permit must require annual certifications from the source that it is fulfilling its obligations to assure compliance with section 112(r). *See* 40 CFR § 68.215. The risk management plans under section 112(r), however, are not required to be incorporated into title V permits.

BMS submitted its first RMP to EPA on June 21, 1999, as required by 40 CFR § 68.150. BMS also submitted an update to its plan on June 21, 2004, as required by 40 CFR § 68.190 which provides that an update must be submitted within five years of the source's initial submission. Since BMS is subject to 112(r) and Part 68, the requirements of condition 44 are applicable to the source. EPA denies the petition with respect to this issue.

5. Permit Shield

NYPIRG asserts that the permit shield does not cover changes made without a permit modification under the Operational Flexibility Program. Petitioner states that the permit must be clear that the shield does not apply to changes made pursuant to 6 NYCRR § 201-6.5(f)(6). Petition at 20.

The permit shield is a provision included in a part 70 permit providing that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance if certain conditions are met. The permit shield provision of the BMS permit is Item W in the general provision section. Petitioner correctly points out that the permit shield does not apply to any change made without a permit revision, pursuant to 40 CFR § 70.4(b)(12) or (b)(14) and corresponding provisions of New York's title V program. EPA finds it appropriate to clarify the inapplicability of the permit shield to changes made without a permit revision. Therefore, EPA grants the petition on this point.

6. Emergency Generators

NYPIRG alleges that emergency generators are not exempt from the SIP particulate matter (PM) limit of 6 NYCRR § 227.2(b)(1). Though not explicitly stated in the petition, the implication is that the limit is omitted from the BMS permit and that EPA must object and require DEC to include this limit in the BMS permit. Petition at 20.

6 NYCRR § 227.2(b)(1) limits the PM emissions from *any* oil-fired stationary combustion installation to no more than 0.10 lb/MMBtu heat input in a 2-hour average. All of the combustion units at BMS including the emergency generators are subject to this limit.

EPA therefore agrees with petitioner the PM limit of 0.10 lb/MMBtu heat input as stipulated in 6 NYCRR § 227.2(b)(1) is applicable to the combustion units at BMS since they are all oil-fired units. However, contrary to NYPIRG's claim, DEC already included this limit in the permit under Conditions 51, 54 and 63 for Processes 32, 34 and 36, respectively when the boilers are burning fuel oil. Although these conditions clearly identify Reference Test Method 5 as the testing method for determining compliance, the permit fails to establish the frequency of the stack test and when the stack test report must be submitted to DEC to establish monitoring that is periodic as required by 40 CFR § 70.6(a)(3). Therefore, EPA grants the petition on this issue. DEC must reopen the permit to include the frequency of the stack testing requirement and the stack test report submission timeframe. In addition to citing the federal regulation that codified the federal approval for the New York SIP (40 CFR § 52 Subpart HH), DEC may wish to cite the SIP rule (6 NYCRR § 227.2(b)(1)), as the basis for these permit conditions to avoid any confusion.

7. Facility-wide Opacity Monitoring (Item Z)

The petition alleges that the opacity requirement of 6 NYCRR § 211.3 must be "gap-filled" with adequate monitoring to assure compliance and the statement of basis should explain why the selected monitoring or lack of monitoring is adequate to assure compliance with this requirement. Petition at 20.

The opacity limit listed in Item Z is a general provision that applies to parts of a facility where no specific permit conditions on opacity have been established. In the case of BMS, 6

NYCRR § 211.3 would not be applicable since opacity is covered under other federal and state enforceable rules and regulations for all subject emissions sources. Emissions points subject to opacity limitations of equal or greater stringency are addressed in the Emission Unit Level section of the permit. See Conditions 60, 67, 78, 79, 80, 81, etc. Periodic monitoring provisions necessary to assure opacity compliance are required and are included in Conditions 48 and 77. With regard to NYPIRG's request that DEC include periodic monitoring to assure compliance with Item Z and an explanation in the PRR to justify why the selected monitoring is deemed sufficient, EPA finds no merit in either point. No periodic monitoring for Item Z is needed since it is a general provision that is not applied specifically to BMS and periodic monitoring is already included in the permit to assure compliance with opacity requirements that specifically apply to each affected emissions source in BMS. The PRR contains sufficient discussion of the opacity monitoring selected for assuring compliance with 6 NYCRR § 219-5.3(a), 6 NYCRR § 227-1.3(a), and 40 CFR § 60.43c(c). PRR at pages 46-48. Therefore, NYPIRG's petition is denied on this point.

8. VOC Control System (Cond 11-14, 17)

Petitioner requests clarification in the permit to clearly identify which requirements apply to each emission unit. NYPIRG states that "Condition 14 appears to allow a different type of control." Petition at 20. NYPIRG also claims the permit is unclear about the applicability of Condition 12 to the facility. Lastly, NYPIRG asserts the lack of adequate monitoring to assure compliance of the VOC control system with all applicable requirements is a deficiency in all of these conditions. Petitioner requests that DEC explain the adequacy of the monitoring requirements imposed thereunder. Petition at 20-21.

6 NYCRR part 226 is a SIP rule that regulates solvent metal cleaning processes. Conditions 11, 12, 13, and 14 basically repeat the regulatory requirements for solvent metal cleaning as stipulated in 6 NYCRR §§ 226.2, 226.3(a), 226.4(a), and 226.5, respectively. Page 39 of the PRR explains what each of these requirements are and pages 44 and 45 explain the monitoring necessary to assure compliance with § 226.(3)(a) and § 226.(4)(a). Condition 12 requires the solvents to be at a vapor pressure that is less than 33 mm Hg at 38 degrees Celsius. BMS is required to keep records of the solvent vapor pressure for all solvents used in the cleaning degreaser. EPA finds vapor pressure monitoring and the reporting to be appropriate for Condition 12. However, EPA finds Conditions 11, 13, and 14 lacking in these respects and they must be corrected.

Condition 11 contains, among other things, language requiring equipment used in solvent cleaning to display a summary of proper operating procedures and equipment maintenance to minimize leaks. It also requires the containers used for solvent storage to be covered when the cleaning unit is not in service. This condition requires BMS to record the amount of solvent used and maintain the record for one year. EPA believes a more direct way to be sure that the solvent storage containers are kept covered when not in use is to inspect these containers once per day

and record the result in a log book made available at the facility. A summary of this log should be included in the semi-annual monitoring report. EPA grants the petition on this point and requires DEC to add a requirement for daily inspection of the storage containers to Condition 11. Also, the requirement to keep records of solvent usage for one year is inconsistent with 40 CFR § 70.6(a)(3)(ii)(B). Condition 11 must require retention of the daily inspection log as well as the records of solvent usage for a period of at least five years. The monitoring for Condition 13 is the display of a sign near the solvent metal cold cleaning degreaser to inform operators that all cleaned parts must be drained at least 15 seconds or until dripping ceases. The semi-annual monitoring report should verify that the requisite sign is displayed without any obstruction. EPA believes the display of a sign is adequate to assure compliance with the 15-second drying procedure.

As written, Condition 14 allows for the possibility that the facility could utilize a form of VOC control that is different from that which is required by 6 NYCRR § 226. The discretion for a lesser degree of control allowed under Condition 14 is provided in 6 NYCRR § 226.5. Since the discretion language is a SIP provision, it is an applicable requirement that can be incorporated into a permit. As a substantive matter, it simply advises the source that it may seek a variance or exemption based on the given SIP criteria. Any exemption to a SIP limit, however, must be processed as a significant modification of the title V permit consistent with 6 NYCRR § 201-6.7(d). EPA denies the petition on this issue.

Condition 17 addresses leak repair at the BMS plant to minimize fugitive VOC emissions. This condition is based on New York's regulation at 6 NYCRR § 233.3(g) which requires that leaks be repaired within 15 days of detection or, if the process must be shut down, before the process is restarted. Page 43 of the PRR provides an explanation of this requirement. Condition 17 requires recordkeeping of all observed leaks and documentation of the repair. EPA finds the recordkeeping requirement under Condition 17 to be adequate monitoring for assuring compliance with 6 NYCRR § 233.3(g). Therefore, the petition is denied on this point.

9. NOx limits (Conditions 18, 19, 49, 52, 53, 59, 61, and 66)

NYPIRG does not believe that one stack test per permit term is sufficient to assure that the large boilers do not violate the NOx limits. Petitioner requests that DEC provide an explanation in the statement of basis as to why one stack test per permit term assures compliance with applicable NOx limits. In addition, petitioner asserts the NOx limits that apply to the large boilers must be added to the permit. NYPIRG also alleges that requiring mid-size boilers to perform an initial stack test with no subsequent periodic monitoring is a violation of title V periodic monitoring requirements. Petition at 21.

NYPIRG's assertion that the NOx limits applicable to large boilers are applicable to the BMS boilers is incorrect. DEC's regulations define a large boiler as one that has a maximum heat input capacity greater than 100 MMBtu/hr and equal to or less than 250 MMBtu/hr. A mid-size boiler is defined as one that has a maximum heat input capacity greater than 50 million Btu

per hour and equal to or less than 100 million Btu per hour. There are four boilers used for steam production at BMS. They are Boilers #4, 6, 8, and 9, all rated at less than 100 MMBtu/hr maximum heat input. Boiler 4 is rated at 29 MMBtu/hr, Boiler 6 is rated at 98 MMBtu/hr, Boiler 8 is rated at 91.18 MMBtu/hr, and Boiler 9 is rated at 97.64 MMBtu/hr. Since all of these boilers have a maximum heat input of less than 100 MMBtu/hr, they are *not* subject to requirements that apply to large boilers. The NOx RACT limits that apply to mid-sized boilers are stipulated in 6 NYCRR § 227-2.4(c). Under the provisions of this regulation in effect at permit issuance, owners or operators of mid-size boilers could choose to meet the requirements of either 6 NYCRR part 227-2.4(c)(1) or (2). The BMS permit imposes NOx RACT emissions limits on the boilers pursuant to then-applicable 6 NYCRR part 227-2.4(c)(2) in the following manner:

Boiler 6 is limited to 0.10 lb/MMBtu when burning natural gas (Condition 49);
Boiler 6 is limited to 0.3 lb/MMBtu when burning residual fuel oil (Condition 52);
Boiler 8 is limited to 0.10 lb/MMBtu when burning natural gas (Condition 53);
Boiler 8 is limited to 0.12 lb/MMBtu when burning distillate oil (Condition 59);
Boiler 9 is limited to 0.10 lb/MMBtu when burning natural gas (Condition 61); and
Boiler 9 is limited to 0.12 lb/MMBtu when burning distillate oil (Condition 66).

Contrary to Petitioner's claim that only an initial stack test is required for mid-sized boilers, the permit also requires one additional stack test per permit term. The requirement for an initial stack test for demonstrating compliance with the emissions limits noted above is part of New York's SIP, see 6 NYCRR part 227-2.6(a)(4). Incorporating SIP requirements into a source's title V permit is required under title V. Since part 227 does not impose periodic monitoring, DEC specifies a once per permit term stack testing requirement in the permit under Conditions 49, 52, 53, 59, 61, and 66, pursuant to 6 NYCRR § 201-6.5(b), to assure compliance with the NOx RACT requirements of part 227. As discussed in VIII.16 below, pursuant to 40 CFR § 70.6(a)(3)(i)(B), EPA is requiring that an annual boiler tune up be included in the permit for all boilers at BMS. Each of the BMS boilers is equipped with a low NOx burner which, by design, minimizes the formation of NOx during normal combustion. Considering the size of these boilers and the use of low NOx burners, EPA believes a once per permit term stack testing requirement supplemented by an annual boiler tune up will be adequate to assure compliance with the NOx RACT limits. Since EPA is requiring DEC to supplement the stack test with an annual tune up, EPA grants the petition on this issue.

10. Condition Regarding Permissible Emissions

Petitioner alleges that monitoring must be added to this permit to assure the facility's compliance with the NOx limit identified in this condition. Petition at 21. NYPIRG did not identify the permit condition it alleges deficient in monitoring the NOx emissions. Petitioner has failed to demonstrate a deficiency in the permit and therefore, EPA denies the petition on this issue.

11. Capping (Conditions 19, 62, 73, 74, 82, 150 and 157)

NYPIRG alleges the conditions that establish limits on BMS' potential to emit ("PTE") for SO_2 and NOx are unenforceable as a practical matter because only an annual limit has been imposed on each pollutant. NYPIRG cites EPA's June 13, 1989 guidance document entitled "Limiting Potential to Emit in New Source Permitting," which provides that a restriction on production or operation must be specified with a limit on emissions in order for the annual emissions limit to be considered practically enforceable (if the emissions limitation does not reflect the maximum emissions for the source operating at full design capacity without pollution control equipment). NYPIRG asserts that DEC must also include the emissions factors or the method for determining compliance with the emissions limits. Without these important parameters specified in the permit, NYPIRG claims the emissions limits are unenforceable. As such, petitioner requests an EPA objection to this permit. Petition at 21.

Conditions 19, 62, 73, 74 and 82 are emissions caps carried over from BMS' PSD permit. Condition 19 carries over a potential to emit limit that restricts the total NOx emissions from the entire facility to less than 133.4 tons per year ("TPY") *provided* that all required NOx RACT stack testing is completed and DEC approves the stack test reports. This permit condition clearly states "until that time, the facility is limited to less than 100 TPY of NOx emissions using currently approved emission factors and fuel use monitoring and the requirements for NOx RACT of 6 NYCRR § 227-2 shall not apply." Apparently, the permit was issued before all of the NOx RACT stack tests were completed; as such, it limits the facility emissions to less than 100 TPY of NOx. However, in the same permit condition, DEC sets the "Upper Permit Limit" for NOx emissions at 133.4 TPY instead of 100 TPY. This error creates an inconsistency in this permit condition where the permit condition conflicts with the upper permit limit. DEC must address this inconsistency upon re-opening this permit by establishing one emissions cap for the facility's NOx emissions. DEC must provide an explanation in the PRR to justify the inclusion of the 100 TPY or the 133.4 TPY NOx limit. With regard to monitoring, EPA agrees with petitioner that Condition 19 does not contain sufficient monitoring to assure compliance with this facility-wide NOx limit. Condition 19 must include a list of all of the emission sources that are subject to this facility-wide NOx limit, the method for determining compliance with this limit, and the monitoring and reporting requirements to demonstrate compliance with this emissions cap. To ensure that this limit is practically enforceable, Condition 19 must be revised to include a fuel use limit (rolled monthly), monitoring requirements for fuel consumption, the emission factors (or the basis of the calculation method), and the requirement to report the monitoring results in the semi-annual monitoring reports.

Condition 62 caps the SO_2 emissions from Boilers 8 and 9 at 40 TPY when using No. 2 fuel oil. Monitoring of SO_2 emissions consists of recording boiler fuel use and DEC approved emission factors. Condition 73 caps the NOx emissions from the wastewater treatment plant boiler and flare to less than 40 TPY. Condition 74 caps the SO_2 emissions from the WWTP boiler and flare to less than 40 TPY. Condition 82 caps the NOx emissions from Boiler 9 to less than 40 TPY for natural gas and fuel oil. Compliance with Conditions 62, 73, 74, and 82 is determined by calculating the emission rates for each pollutant on a monthly basis using the recorded fuel use

and DEC approved emissions factors. NYPIRG finds these permit conditions to be practically unenforceable because these emissions limits are listed without a limit on the production or operation of the boilers. EPA agrees that in order for the annual emissions rates to be enforceable as a practical matter, a fuel use limit (rolled monthly) must be established for the subject emissions sources. DEC must revise the permit and include the appropriate fuel use limit for each boiler subject to the SO2 and NOx emissions caps as listed above. In addition, EPA also finds Conditions 62, 73, 74, and 82 deficient in that they fail to specify the emissions factors to be used in the calculations that demonstrate compliance. It is inadequate to merely state that BMS will use DEC approved emissions factors. The method for determining compliance, which is the use of calculations in this case, must be clearly specified in the permit. The emissions factors or the basis of the calculation methods must be listed in the respective permit conditions. Therefore, EPA grants the petition on this issue. DEC is ordered to revise Conditions 19, 62, 73, 74, and 82 as discussed above.

Condition 150 is labeled as a condition for capping out of 6 NYCRR § 231-2 applicability and it establishes a VOC emissions limit of no more than 40 TPY (rolled monthly) for certain emissions points within the manufacturing unit (including all manufacturing emissions sources). As monitoring, this condition requires recordkeeping of the amount of solvent usage, solvent recovered for reuse, discarded as waste material, and the method for determining emissions from the emissions points. EPA finds the recordkeeping requirements stipulated in this condition inadequate without the method for determining emissions identified. EPA also finds the annual VOC emissions limit practically unenforceable without a limit on solvent usage being included in the permit. EPA grants the petition on this issue and orders DEC to revise Condition 150 to identify the method for determining VOC emissions and establish a limit on the solvent usage.

Condition 157 does not establish any emissions cap on VOC emissions or other pollutants. It may be that this condition has been included in the petition in error. NYPIRG's alleged flaws on emissions capping do not apply to this condition; therefore, EPA denies the petition on this point.

12. Conditions regarding NSPS Opacity Limit

NYPIRG alleges the permit conditions that impose the opacity limits from the NSPS fail to establish any kind of periodic monitoring sufficient to assure the facility's compliance with the NSPS limits. Petition at 22. NYPIRG did not identify any specific permit conditions as being deficient. As discussed in more detail in VIII.16 below, the periodic monitoring for opacity is established in Condition 48 which discusses how Method 9 (as stipulated in Conditions 60 and 67) is to be used to assure compliance with the NSPS opacity requirements. EPA finds Conditions 48, 60, and 67 together establish adequate periodic monitoring for opacity consistent with 6 NYCRR § 201-6.5(b)(2). The petition fails to demonstrate a deficiency in the permit, and EPA denies the petition on this issue.

13. NOx Emission Limits for Mid-size boilers (Conditions 49, 52, 53, 59, 61, and 66)

NYPIRG alleges these permit conditions are inadequate for assuring compliance with the NOx limits because they fail to require sufficient monitoring to assure compliance on an ongoing basis. These conditions only require a one-time test. Petitioner requests that DEC adds additional monitoring to assure compliance with the NOx emissions limits and explain the sufficiency of the selected monitoring in the statement of basis. Petition at 22.

As explained in more detail in VIII.9 above, the listed permit conditions require an initial stack test to determine compliance with the NOx RACT limits as required by 6 NYCRR part 227-2.6(a)(4). In accordance with 6 NYCRR § 201-6.5(b)(2), DEC added one stack test conducted once per permit term to Conditions 49, 52, 53, 59, 61, and 66 as periodic monitoring to assure compliance with those limits. EPA is requiring the addition of an annual tune up for each of the BMS boilers as monitoring under 40 CFR § 70.6(a)(3)(i)(B), as discussed in VIII.9. Given the size of the subject boilers, EPA believes a once per permit term stack testing requirement supplemented by an annual boiler tune up will be adequate to assure compliance with the NOx RACT limits. Since EPA is requiring DEC to supplement the stack test with an annual tune up, EPA grants the petition on this issue.

14. PM Limit from NY SIP (Conditions 51, 54, and 63)

NYPIRG alleges these permit conditions imply that the commissioner may exempt this facility from the applicable PM limit at any time without providing public notice. Petitioner asserts no such variance from a federally enforceable requirement may be granted without EPA approval and a source-specific modification to the SIP. Moreover, NYPIRG states, the PM limit is applicable to the facility until the title V permit is revised. NYPIRG requests that DEC clarify the applicability of the PM limits to the BMS facility. Petition at 22.

Conditions 51, 54, and 63 contain language suggesting the possibility of an exemption from the PM limit stipulated pursuant to 6 NYCRR § 227.2(b)(1) and 40 CFR § 52 Subpart HH. Specifically, these conditions state that "[u]pon written application, the commissioner may exempt a person from the provisions of this section, when in view of the properties of the emissions, isolated conditions, stack height and other factors, it is clearly demonstrated that the emissions thus permitted will not cause a contravention of established ambient air quality standards." This quoted SIP provision is an applicable requirement. As a substantive matter, it simply advises the source that it may seek a variance or exemption based on the given SIP criteria. Any exemption to a SIP limit must be processed as a significant modification of the title V permit consistent with 6 NYCRR § 201-6.7(d), and the public would have an opportunity to comment on any such modification. EPA denies the petition on this point.

15. Fuel Sulfur Limit (Condition 57)

NYPIRG alleges Condition 57 as written does not clearly require BMS to maintain vendor certifications to assure compliance with the fuel sulfur limit. The petition states that the existing language seems to apply to any facility in general and does not explicitly state how it applies to

BMS. Petition at 23. Condition 57 alone does not include all of the requirements of 40 CFR part 60 Subpart Dc which apply to small steam generating units. The Subpart Dc requirements for SO2 emissions are included in three conditions in the BMS permit; they are Conditions 55, 56 and 57. Condition 55 specifies the sulfur-in-fuel limit as no greater than 0.5% sulfur by weight pursuant to 40 CFR § 60.42c(d). Condition 56 specifies that BMS shall demonstrate compliance through vendor certification consistent with 40 CFR § 60.44c(h). Condition 57 specifies the information that must be included in the fuel supplier certification as required under 40 CFR § 60.48c(f)(1). The explicit language sought by petitioner requiring BMS to demonstrate compliance with the sulfur-in-fuel limit is included in Condition 56. EPA denies the petition on this issue.

16. Opacity (Condition 60)

Petitioner alleges the permit fails to impose periodic monitoring that is sufficient to assure the facility's ongoing compliance with 40 CFR part 60 subpart Dc, specifically 40 CFR § 60.43c(c). As a basis for its claim, Petitioner cites Condition 60 and others (not specifically identified). NYPIRG asserts the statement of basis should explain the correlation or link between opacity and the particulate emission limits as established by stack tests in order to use opacity as a surrogate monitoring for particulates. Petitioner requests DEC to include information in the statement of basis to indicate why the monitoring regime selected is sufficient to assure the facility's compliance with PM and opacity limits. Petition at 23.

Condition 60 requires BMS to limit the opacity from the steam boilers to less than 20 percent (averaged over a 6-minute period), except for one 6-minute period per hour of not more than 27% opacity as required by 40 CFR § 60.43c(c) (NSPS Subpart Dc). The method for determining compliance is Reference Test Method 9 of 40 CFR part 60. Besides limiting opacity, the BMS permit also limits PM emissions from the boilers to 0.1 lb/MMBtu as required by the NY SIP (6 NYCRR § 227.2(b)(1)) for the various processes. See Conditions 60 and 67 for limits on opacity and Conditions 51, 54 and 63 for limits on PM emissions for the boilers. Opacity emissions are often used as an indication of boiler performance, not as a direct measurement of or method for determining mass emissions. Usually, when opacity is observed, it is a signal that the boiler is not performing optimally, indicating the need for a boiler check-up. When a boiler is not operating properly, its emissions during this operating period may be higher than normal. However, EPA finds a correlation between opacity and mass emissions is not required to determine compliance with the mass emissions limits in this case since there are separately enforceable limitations for opacity and PM emissions. These limitations are monitored independently and the corresponding permit conditions are enforceable independent of each other.

While Conditions 60 and 67 establish a limit on opacity and Method 9 observation as the method for determining compliance, Condition 48 contains the provisions for the use of both visible emissions observation and Method 9 as the periodic monitoring to assure compliance with the opacity standard. If any visible emissions are observed for two consecutive days during the use of fuel oil in the boilers, a Method 9 reading will be conducted within two business days of

such occurrence. The Method 9 readings will be logged. The operator must notify DEC within one business day of performing the Method 9 if the opacity standard is contravened.

EPA finds it appropriate to require additional maintenance procedure, including an annual boiler tune up, of each of the BMS boilers for monitoring the combustion efficiency of the boilers to supplement the visible emissions observation and the once per permit term stack testing requirements. The annual tune up shall consist of preventative and corrective measures to maintain the combustion efficiency of the unit and shall include appropriate recordkeeping. EPA believes the additional maintenance procedure will help in assuring boiler compliance with both the opacity and PM emissions limits. In addition, because the emission of particulate matters is directly related to fuel quality and the completion of fuel combustion inside the boiler, the quality of fuel used at the BMS facility should also be monitored and recorded. This recordkeeping requirement is already addressed in Condition 50 where all fuel oils delivered to BMS are required to meet federal and state specifications. It also requires vendor's receipt for each fuel delivery to be kept for certification of fuel quality. EPA believes annual boiler tune ups and fuel quality monitoring will be sufficient to assure compliance with the opacity and PM emissions limits between stack tests. EPA grants the petition on the grounds that, under 40 CFR § 70.6(a)(3)(i)(B), additional periodic monitoring is needed to assure compliance with the opacity and PM limits. DEC is ordered to reopen the permit to include a requirement for annual boiler tune-ups and recordkeeping to monitor the combustion efficiency of the boilers.

In addition, the monitoring for PM is inadequate to assure compliance with the SIP limits. While Conditions 51, 54 and 63 specify the test method (Reference Test Method 5) for determining compliance with the 0.1 lb/MMBtu limit, these conditions fail to specify the frequency of the Method 5 test. Absent the testing frequency, these conditions impose no monitoring of a periodic nature. According to 6 NYCRR § 201-6.5(b)(2), the permit must contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit . . . . " Therefore, EPA grants the petition on this issue. DEC is ordered to revise these conditions to specify the frequency of the required Method 5 test.

17. PTE Limit on NOx Emissions from Boiler 9 (Condition 82)

NYPIRG alleges the NOx emissions limit for Boiler 9 is inadequate as an enforceable emissions cap. Petitioner also claims requiring recordkeeping of fuel consumption without an independent fuel use limit represents inadequate monitoring to assure compliance with the 40 TPY limit. NYPIRG asserts that according to EPA's June 13, 1989 Guidance titled, "Limiting Potential to Emit in New Source Permitting," a PTE limit must include both an annual emission limit and an independent production or operational limit of no longer than one month in order for it to be enforceable as a practical matter. Therefore, NYPIRG seeks an EPA objection on this PTE limit. Petition at 23.

The issue of unenforceable PTE limits was raised in VIII.11 above in which Condition 82 was also identified as one of the deficient permit conditions. In sum, NYPIRG alleges that Condition 82 contains inadequate monitoring to assure compliance with the NOx emissions limit stipulated thereunder and requests that it includes a limit on fuel consumption. EPA agrees with petitioner that a limit on fuel consumption, along with the requirement to record fuel usage, is needed to ensure the practical enforceability of an annual emissions limit. In addition, Condition 82 is deficient in that it does not specify the emissions factor to be used in the emissions calculations. EPA grants the petition on this issue. DEC is ordered to re-open the permit to include a fuel use limit for Boiler 9 and the emissions factor to be used in the emissions calculations that demonstrate compliance with the annual NOx emissions limit (rolled monthly).

18. PTE Limit on SO2 Emissions from WWTP Boiler and Flare (Condition 74)

NYPIRG alleges the SO2 emissions limit for the wastewater treatment plant boiler (WWTP Boiler) and Flare is inadequate as an enforceable emissions cap. Petitioner states its comments on Item 17 (PTE Limit on NOx Emissions from Boiler 9) above apply to the WWTP Boiler and Flare. Petition at 24. As discussed above under VIII.17, EPA agrees that a fuel use limit is needed to ensure practical enforceability of the annual SO2 emissions limit for the WWTP Boiler. In addition, the emissions factors to be used in calculating the SO2 emissions must be specified in Condition 74. Therefore, to demonstrate compliance with the SO2 limit established for the subject emissions sources, Condition 74 must include a fuel use limit, the requirement to record the fuel usage, and the emissions factor to be used in the calculations that demonstrate compliance with the annual SO2 emissions limit (rolled monthly) . Therefore, EPA grants the petition on this point.

19. Incinerator Opacity Limit (Conditions 72 and 77)

NYPIRG alleges Conditions 72 and 77 contain inadequate monitoring to assure compliance with the opacity limit at the incinerator. Petitioner claims the requirement for one Method 9 test prior to permit renewal is insufficient monitoring for opacity. Petitioner also finds the lack of an explanation in the statement of basis on the once per permit term Method 9 test to be unacceptable and requests EPA objection to this permit. Petition at 24.

Condition 72 establishes a once per permit term stack testing requirement to demonstrate compliance with the PM limit stipulated in 6 NYCRR § 219. This permit condition also specifies the test method to be Reference Test Method 5. Condition 72 which sets a limit on the PM emissions is independent of the opacity limit covered in Conditions 77 and 78. Condition 77 establishes the procedure that utilizes both visible emissions observation and Method 9 to assure compliance with the opacity limit stipulated in Condition 78. Condition 78 limits the opacity from the incinerator to no more than 20 percent during a six-minute average using Method 9. Condition 77 requires a daily visible emissions observation of the incinerator stack each day that the incinerator is in operation. If visible emissions are noted on two consecutive days, an EPA

Method 9 analysis would be conducted within two business days to determine compliance with the opacity limit of the state rule at 6 NYCRR § 219-5.3(a) which requires "[n]o incinerator, built or installed after January 26, 1967, regardless of size, will emit visible emissions having an average opacity during any six consecutive minutes of greater than 20 percent, under normal operating conditions" (the same limit in slightly different wording is stipulated in the SIP at 6 NYCRR § 219.5(a)).

Contrary to NYPIRG's claim, Condition 77 requires more than a Method 9 analysis once per permit term. EPA finds Condition 77 acceptable for monitoring opacity from the incinerator stack since it requires a daily visible emissions observation followed by a Method 9 analysis as appropriate. Since the incinerator is small (4.8 MMBtu/hr) and fired on natural gas, it is likely that opacity is minimal. The procedures established in Condition 77 are adequate in monitoring opacity emissions to assure compliance with 6 NYCRR § 219. Petitioner has failed to demonstrate that Condition 77 contains inadequate monitoring to assure compliance with the opacity limit at the incinerator. Therefore, EPA denies the petition on this issue.

20. Opacity (Conditions 48, 78-81, 83-86 and 154)

NYPIRG alleges Conditions 48, 78, 79, 80, 81, 83, 84, 85, 86, and 154 contain insufficient monitoring to assure compliance with the opacity limits. NYPIRG questions the adequacy of one opacity reading upon permit renewal or a daily visual inspection by an untrained observer as sufficient monitoring to assure compliance with the opacity limits and requests DEC to include an explanation in the statement of basis. Petitioner finds Condition 48 vague in that it does not list the emissions point, emission source, or unit to which this condition apply. Petition at 24.

Contrary to petitioner's claim, Condition 48 lists Emission Unit 1-CMBUS as the subject emissions unit. A list of the equipment that are included in this emission unit can be found in the "Permit Structure and Description of Operations" section of the PRR. A discussion of how Condition 48 is implemented is included in the "Basis for Monitoring" section of the PRR. As discussed in more detail in VIII.16 above, EPA finds the periodic monitoring procedures as established in Condition 48 to be adequate periodic monitoring for assuring compliance with the NSPS opacity limits. EPA believes the same monitoring strategy is also acceptable for assuring compliance with the opacity requirements of 6 NYCRR Part 227. With regard to Condition 78, it applies specifically to the incinerator stack. EPA finds compliance with the opacity limit of 6 NYCRR § 219-5.3(a) can be assured by Condition 77. EPA denies the petition on this point.

Conditions 79, 80, 81, 83, 84, 85, and 86 all cite 6 NYCRR § 227-1.3(a) as the basis for the opacity limits and all require the use of EPA Reference Test Method 9 to demonstrate compliance. However, the monitoring frequency specified in these conditions are unacceptable. For example, Conditions 79, 83, 85, and 86 do not specify a frequency for the Method 9 observation; and Conditions 80, 81, and 84 specifies a frequency of "Upon Permit Renewal." EPA finds both the lack of a monitoring frequency and one Method 9 observation upon permit renewal unacceptable periodic monitoring strategies for assuring compliance with the opacity

limit of 6 NYCRR § 227-1.3(a). EPA grants the petition on this issue. DEC may reference Condition 48 in the above identified permit conditions to satisfy the requirement for adequate periodic monitoring for assuring compliance with the opacity limit as stipulated in 6 NYCRR § 227-1.3(a) consistent with 6 NYCRR § 201-6.5(b)(2).

With regard to Condition 154, it cites 6 NYCRR § 212.6(a) as the underlying requirement for the opacity limit it establishes. It also fails to specify a monitoring frequency for conducting the Method 9 observation. Therefore, this condition must also be revised to address this deficiency. EPA grants the petition on this issue.

21. PTE Limits to Avoid Applicability of Nonattainment NSR (Conditions 150 and 151)

NYPIRG alleges Conditions 150 and 151 are insufficient to establish a PTE limit on the facility for purposes of avoiding nonattainment NSR requirements because these conditions are unenforceable as a practical matter. These conditions fail to specify the method for determining emissions from the emissions points leaving it to the facility to decide on such methods. Petitioner cites the June 1989 guidance as support for requiring a limit on production or operation to supplement the annual VOC emissions limit and requests that Conditions 150 and 151 require daily calculations to determine compliance. Petition at 24-25.

These conditions currently require BMS to demonstrate compliance with the annual VOC emissions limits using a rolling monthly average in its emissions calculations. EPA finds this acceptable. However, petitioner requests changing the monthly calculations to daily calculations. Since petitioner did not provide any reasons why it believes a daily average is important in assuring compliance with the VOC emissions limits in this case, the petition fails to demonstrate a deficiency and the request for daily calculations under Conditions 150 and 151 is denied.

EPA agrees that Condition 150 is deficient in certain ways as discussed in section VIII.11 above. Condition 151 is identical to Condition 150 except that the emissions points covered under these conditions are different.[17] Thus, EPA's conclusions with regard to deficiencies in Condition 150 also apply to Condition 151. *See* VIII.11 above. EPA grants the petition on the ground that Conditions 150 and 151 are deficient because the methods for determining VOC emissions from the listed emissions points are not clearly specified and the permit does not have a practically enforceable limit on solvent usage.

22. In-process Tank Requirements (Condition 152)

NYPIRG alleges Condition 152 is deficient because it does not include sufficient monitoring to assure compliance with 6 NYCRR § 233.3(f). Petitioner requests an explanation in the statement of basis if DEC determines that no monitoring is necessary to assure compliance. Petition at 25. DEC provided an explanation in the "Basis for Monitoring" section of the PRR

[17] Condition 151 limits the VOC emissions from Emissions Point 25N00 to 40 TPY rolled monthly.

why no periodic monitoring is necessary to assure compliance with 6 NYCRR § 233.3(f) in this case, namely that installing and using covers on in-process tank openings (unless access by operators is needed) is generally required as part of the manufacturing process at BMS. *See* PRR at 46. EPA finds the explanation provided in the PRR sufficient to understand why no periodic monitoring is needed to assure compliance with 6 NYCRR § 233.3(f). Petitioner has failed to demonstrate a deficiency in the permit and EPA denies the petition on this point.

23. Leak Requirements (Conditions 88-146)

NYPIRG alleges Conditions 88 to 146 are deficient because they do not include monitoring sufficient to assure BMS' compliance with 6 NYCRR § 233.5 and 40 CFR part 63 Subpart H. Petitioner requests an explanation in the statement of basis where no monitoring is necessary to assure compliance. NYPIRG notes that some conditions require monitoring and some do not. NYPIRG also notes some equipment has a certain designation and some does not. NYPIRG wants DEC to analyze the facility's emissions points, emissions sources, and equipment to determine where the requirements should be applied. Petition at 25.

Condition 88 stipulates requirements from 6 NYCRR § 233.5, which applies to leaks in equipment that are not repaired within one day of detection. 6 NYCRR § 233.5 requires the facility to keep a record of information pertaining to the leak and the subject equipment. Condition 88 includes all of the recordkeeping requirements called for in the rule; therefore, EPA finds that Petitioner has not demonstrated a deficiency. With regard to Conditions 89 through 146, NYPIRG did not identify deficiencies in any specific condition; instead NYPIRG generally alleges that all of these conditions are deficient because they do not include sufficient monitoring to ensure compliance (or an explanation of why monitoring is unnecessary). Conditions 89 through 146 incorporate the leak repair requirements of 40 CFR § 63 Subpart H. Not every condition in this category contains a monitoring requirement because some conditions merely describe information that must be recorded if a leak is not repaired within a certain period of time. 40 CFR § 63 Subpart H is a comprehensive rule that was promulgated specifically to address equipment leaks and repairs. It contains the necessary monitoring and recordkeeping requirements to ensure that equipment leaks are detected and repaired. NYPIRG has not demonstrated that any specific term or condition is deficient; therefore, EPA denies the petition on this point.

24. VOC Controls (Conditions 156-160)

NYPIRG requests DEC to include an explanation in the statement of basis explaining why the monitoring required under these conditions is sufficient to assure compliance with 6 NYCRR § 233.3. Specifically, petitioner asserts that DEC must explain the relationship between the applicable emission limit and the parameters monitored. Petition at 25. The explanation sought by NYPIRG is already included in the "Basis for Monitoring" section of the PRR. DEC explains what parameters need to be monitored for the various control devices at BMS as required by 6

NYCRR § 233.3. *See* PRR at 45. Since petitioner's request has already been addressed by DEC, EPA denies the petition on this point.

25. Continuous Monitors for Air Cleaning Devices (Conditions 162-165)

NYPIRG alleges Conditions 162, 163, 164, and 165 are deficient in that they fail to establish acceptable parametric ranges for each parameter monitored. Petitioner also finds it necessary for these conditions to require a continuous monitor to measure the listed parameters. Petition at 26. EPA finds no merit in NYPIRG's allegations. Conditions 162, 163, 164, and 165 do not contain emissions limits for which parametric monitoring must be in place to assure compliance. These conditions merely incorporate the general requirements for any continuous monitoring devices from 6 NYCRR § 233.4. This regulation requires that continuous monitors be equipped with a recording device, calibrated quarterly, operated whenever the associated control equipment is operating, and tested in accordance with procedures approved by the commissioner and consistent with 40 CFR part 60 Appendix A. NYPIRG's claim that parametric ranges are missing from these conditions has no merit; therefore, EPA denies the petition on this point.

26. Storage Tank Requirements (Condition 168)

NYPIRG alleges the permit must be modified to clarify whether this condition applies to the facility or if the facility has opted to use more effective control equipment. Petitioner asserts that if the facility uses more effective control equipment, it must be required to certify to the installation of such every six months. Petition at 26. Condition 168 stipulates the requirements of 6 NYCRR § 233.3(d) which requires that pressure/vacuum conservation vents or better control devices be installed for storage tanks that store VOC with a vapor pressure greater than 1.5 psia at 20° Celsius. EPA finds no merit in NYPIRG's claim. This condition only sets the minimum acceptable control option for the VOC storage tanks and allows the facility to install better control equipment as it becomes available. EPA finds this condition acceptable as written. However, the permit must specifically identify at permit renewal the control equipment BMS has installed for the storage tanks. Petitioner has failed to demonstrate a deficiency in the permit and EPA denies the petition on this issue.

27. NSPS Subpart Kb (Condition 171)

NYPIRG finds the requirement to retain records for at least 2 years to be problematic in Condition 171 because 40 CFR § 70.6(a)(3)(ii)(B) and 6 NYCRR § 201-6.5(c)(2) require record retention of at least five years. Petition at 26. Although DEC acknowledged in its Responses to Comments that the facilities records must be kept for 5 years and included an explanation to that affect in the PRR, it did not include the 5-year record retention requirement in the permit. EPA agrees with petitioner that Condition 171 needs to be revised to reflect a 5-year record retention period. EPA grants the petition on this issue. DEC is ordered to make this correction.

28. VOC Transfer Requirements (Condition 175)

NYPIRG alleges Condition 175 is deficient because it lacks monitoring requirements designed to assure compliance with the applicable control efficiency requirement. Petitioner requests a justification of the selected monitoring be included in the statement of basis. Petition at 26.

Pursuant to 6 NYCRR § 233.3(c), Condition 175 requires the use of a vapor balance system or equivalent control when transferring VOC with vapor pressures greater than 4.1 pounds per square inch (psi) at 20 degrees Celsius (c) from trucks or railcars to storage tanks with a capacity of greater than 2000 gallons. This condition does not include monitoring or recordkeeping requirements. The PRR explains that a vapor balance system is typically a series of pipes that connect the storage tank to a truck or railcar for the purposes of containing vapors during filling of BMS's storage tanks. *See* PRR at 45. The PRR states that no periodic monitoring of the installation of this system is needed because it is either installed and operating or not installed. *Id.* Although the underlying applicable requirement does not contain any monitoring for the filling of BMS' VOC storage tanks, EPA believes a visual inspection every six months to verify that the vapor balance system is intact and in proper working order is appropriate in this case. A statement regarding the condition of the vapor balance system should be included in the semi-annual monitoring report. Therefore, EPA grants the petition on this issue. DEC is ordered to reopen the permit to add the semi-annual visual inspection and reporting requirements to Condition 175 as discussed above.

29. Particulate Limit (Conditions 184 and 185)

NYPIRG alleges Condition 185 to be unenforceable as a practical matter and challenges DEC's failure to provide an explanation in the statement of basis for why maintenance of the control device is sufficient to assure compliance with the PM emissions limit of 0.05 grains of particulates per cubic foot of exhaust gas at standard conditions on a dry basis. Petition at 26.

EPA finds Condition 185 deficient in that it fails to clearly identify and describe what the control device is and the method for demonstrating compliance with the PM limit. If maintenance of equipment is the method to demonstrate compliance,[18] DEC must explain in the PRR how such procedures assure compliance with the PM limit of 0.05 grains/ft3, a mass emission rate that is normally determined through stack testing. If periodic equipment maintenance is to be used as a surrogate, appropriate operating parameters such as water flow rate must be established. DEC should also ensure that the condition is practically enforceable. EPA grants the petition on this point.

30. Hydrogen Sulfide (Condition 189)

[18] EPA notes that Item C of the "Facility Level" Section of the permit already included general equipment maintenance requirements.

NYPIRG alleges Condition 189 deficient in that it fails to specify the applicable removal efficiency requirement and the necessary monitoring to assure compliance with that limit. In addition, NYPIRG asserts that the stack testing required in this condition is not mandatory and no frequency is specified. NYPIRG also alleges that the testing is only required upon notification by DEC that such a test is necessary. NYPIRG finds such monitoring strategy inconsistent with title V periodic monitoring requirements. NYPIRG also finds the lack of a justification in the statement of basis for this monitoring unacceptable. Petition at 26.

EPA agrees with petitioner that Condition 189 is unenforceable without the removal efficiency being specified for the air cleaning device. This permit condition intends to set a removal efficiency without mentioning the type of air cleaning device to be used for removing hydrogen sulfide and the parameters to be monitored. Petitioner's claim that the permit does not include periodic monitoring has merit in light of the missing information regarding the air cleaning device. The once per permit term stack test may or may not be adequate contingent upon the air cleaning device to be used. Based on EPA's review, Condition 189 is inadequate to assure compliance with 6 NYCRR Part 212.9(b). EPA grants the petition for the deficiencies identified above. DEC is ordered to reopen the permit to identify the emissions source that is subject to 6 NYCRR Part 212.9(b), the air cleaning device to be used to remove hydrogen sulfide, the parameters of the air cleaning device that must be monitored, and the hydrogen sulfide removal efficiency of the air cleaning device.

EPA believes petitioner misinterpreted DEC's approval of a stack test protocol to be a notification to BMS that a stack test is to be conducted. As a standard procedure, this condition requires a stack test protocol to be submitted to DEC for approval prior to conducting the test. The protocol contains such information as how the test will be conducted, what operating conditions the equipment will be run during the test, etc. Once DEC approves the protocol, BMS will be notified. BMS has 60 days thereafter to conduct the test in accordance with the approved protocol. The requirement for prior DEC approval on the test protocol is acceptable practice. Therefore, EPA finds no merit in NYPIRG's claim that a stack test is only required upon DEC notification. Nonetheless, the stack test requirement alone in this case does not establish enforceable conditions to assure compliance with 6 NYCRR Part 212.9(b). DEC must revise Condition 189 as discussed above.

31. Continuous Monitors for Control Equipment (Conditions 162-164, 167, 176-178, 181)

NYPIRG claims that DEC included federally enforceable conditions requiring continuous monitoring of control devices only for Processes 10 and 03 of Emission Unit BMS01. It also claims that Conditions 162-164, 167, 176-178, and 181 are state-only conditions and should be moved to the federally enforceable section of the permit because the continuous monitoring requirements specified in them are federally enforceable. Petition at 27. EPA finds no merit in petitioner's claim. All of the above listed conditions are in the federally enforceable section of the permit. EPA denies the petition on this point.

32. State Air Toxics Program (Conditions 196-201)

NYPIRG claims Conditions 196, 197, 198, 199, 200, and 201 are deficient state air toxics requirements that do not assure compliance with the air toxics standards. Petitioner also claims that these conditions do not specify the permissible emission rate for each contaminant. Lastly, petitioner claims that the degree of air cleaning for contaminants not A-rated will be established by the commissioner. This is a problem for the petitioner because the permit does not explain what will be required for the B or C rated contaminants. Petition at 27.

Conditions 196, 197, 198, 199, 200, and 201 as well as Conditions 195 and 202 are placed in the State-only section of the permit. The underlying requirements cited in these conditions are 6 NYCRR § 212.4(a) and 11(b). 6 NYCRR § 212, in its entirety, was approved into the New York SIP, as of September 25, 2001 (see 66 FR 48961). DEC fails to provide any discussion in the PRR as to why these conditions are not federally enforceable. Absent an acceptable rationale for placing these conditions in the state-only section of the permit, EPA objects to the BMS permit for failing to assure compliance with all applicable requirements, specifically 6 NYCRR § 212. DEC must evaluate the above listed conditions to determine if they are federally enforceable, and thus should be placed in the federally enforceable section of the permit. If these conditions are federally enforceable, EPA agrees with petitioner that they should specify the permissible emission rates or required degree of control, as applicable, for all pollutants covered under these conditions.

C. CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I deny in part and grant in part the petition of NYPIRG requesting the Administrator to object to the issuance of the BMS title V permit.

_____/s/_____
Dated: February 18, 2005 Stephen L. Johnson
Acting Administrator