BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF ELMHURST HOSPITAL Permit ID: 2-6301-00065/00002 Facility DEC ID: 2630100065 Issued by the New York State Department of Environmental Conservation Region 2	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition Number: II-2000-09

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

On October 10, 2000, the Environmental Protection Agency ("EPA") received a petition 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 Elmhurst Hospital ("Elmhurst Hospital") located at 79-01 Broadway, Elmhurst, NY 11373. The Elmhurst Hospital permit was issued by the New York State Department of Environmental Conservation, Region 2 ("DEC") on August 24, 2000, 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 Elmhurst Hospital permit does not comply with 40 CFR part 70 in that: (A) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing; (B) the permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c); (C) the permit lacks an adequate statement of basis as required by 40 CFR § 70.7(a)(5); (D) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (E) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions; (F) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); and (G) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit

conditions lack adequate monitoring and are not practically enforceable. The Petitioner has requested that EPA object to the issuance of the Elmhurst Hospital Permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

Subsequent to the receipt of NYPIRG's petition, the EPA performed an independent and in-depth review of the Elmhurst Hospital title V permit. Based on a review of all the information before me, including the petition; the permit application; a June 23, 2000 letter from Elizabeth Clarke of DEC to Steven C. Riva of EPA regarding Responsiveness Summary/Proposed Final Permit [hereinafter, "Responsiveness Summary" or "response to comments document"]; the original Elmhurst Hospital permit of August 24, 2000 and the modified final permit of January 8, 2001; and two letters dated July 18, 2000 and July 19, 2000 from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC, I deny in part and grant in part the Petitioner's request that I object to this permit. The reasons for my decisions are set forth in this Order. Petitioner has raised valid issues on the Elmhurst Hospital permit, which has resulted in my granting portions of the petition. This petition also raised programmatic issues, some of which DEC has already addressed and others which DEC is in the process of addressing. *See* letter dated November 16, 2001 from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 ("commitment letter" or "November 16 letter").

I. 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).

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, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 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 operating permits proposed pursuant to title V to EPA for review and EPA will object to permits determined by the Agency not to be in compliance with applicable requirements or the requirements of 40 CFR part 70. If EPA does not object to a permit on its own initiative, § 505(b)(2) of the Act and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. To justify exercise of an objection by EPA to a title V permit pursuant to § 505(b)(2), a Petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of part 70. Petitions must, in general, be based on objections to the permit that were raised with reasonable specificity during the public comment period.[1] A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA 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.

II. ISSUES RAISED BY THE PETITIONER[2]

On April 13, 1999, NYPIRG sent a petition to EPA which brought programmatic problems concerning DEC's application form and instructions to our attention. NYPIRG raised those issues and additional program implementation issues in individual permit petitions, including the instant petition, and in a citizen comment letter, dated, March 11, 2001 that was submitted as part of the settlement of litigation arising from EPA's action extending title V program interim approvals. Sierra Club and the New York Public Interest Research Group v.

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[1] *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 Keri Powell, Esq. and Larry Shapiro, Esq., of NYPIRG to DEC (September 2, 1999) ("NYPIRG Comment Letter").

[2] Issues A-F and portions of issue G have been raised previously by Petitioner and addressed by the Administrator in six Orders responding to the petitions: In the Matter of North Shore Towers Apartments, Inc., Petition Number II-2000-06, July 3, 2002 ("North Shore Towers"); In the Matter of Tanagraphics Inc., Petition Number II-2000-05, July 3, 2002 ("Tanagraphics"); In the Matter of Rochdale Village Inc., Petition Number II-2000-04, July 3, 2002 ("Rochdale Village"); In the Matter of Kings Plaza Total Energy Plant, Petition Number II-2000-03, Jan. 16, 2002 ("Kings Plaza"); In the Matter of Action Packaging Corp., Petition Number II-2000-02, Jan. 16, 2002 ("Action Packaging"); and In the Matter of Albert Einstein College of Medicine of Yeshiva University, Petition Number II-2000-01, Jan. 16, 2002 ("Yeshiva"). Each of these Orders is available on the internet at: http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2000.htm.

EPA, No. 00-1262 (D.C.Cir.).[3] EPA has conferred with NYPIRG and DEC relative to these program implementation concerns.

EPA received a letter dated November 16, 2001, from DEC Deputy Commissioner Carl Johnson, committing to address various program implementation issues by January 1, 2002, and to ensure that the permit issuance procedures are in accord with state and federal requirements. DEC's fulfillment of the commitments set forth in the November 16, 2001 letter will resolve some administration problems. EPA is monitoring New York's title V program to ensure that the permitting authority is implementing the program consistent with its approved program, the Act, and EPA's regulations. According to a recent review, DEC has made many of the necessary changes, and is substantially meeting its commitments.[4] As a result, EPA has not issued a notice of deficiency at this time. Failure to properly administer or enforce the program will result in issuance of a Notice of Deficiency pursuant to § 502(i) of the Act and 40 CFR § 70.10(b) and (c).

A. Public Hearing

Petitioner alleges that DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying its request for a public hearing. Petition at page 3. Specifically, Petitioner asserts that the Notice of Complete Application dated February 9, 2000 which initiated the 30-day public notice did not announce that a public hearing was scheduled, nor did it inform the public how to request a hearing. Petitioner further contends that the DEC applied the wrong standard in reaching the decision to deny the Petitioner's request for a public hearing. Petition at page 4[5].

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[3] EPA responded to NYPIRG's March 11, 2001 comment letter by letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc. The response letter is available on the internet at http://www.epa.gov/air/oaqps/permits/respons/.

[4] *See* letter dated March 7, 2002, from Steven C. Riva, Chief, Permitting Section, USEPA Region 2, to John Higgins, Chief, Bureau of Stationary Sources, DEC. This letter summarizes an EPA review of draft permits issued by the DEC between December 1, 2001 and February 28, 2002. Through June 2002, EPA provided DEC with monthly updates to supplement the information provided in the March 7, 2002 letter. The purpose of this EPA review was to determine whether the DEC is making changes to public notices and to select permit provisions as it committed in its November 16, 2001 letter.

[5] The Petitioner points out that 6 NYCRR § 621.7 defines two types of hearings: adjudicatory and legislative. Under 6 NYCRR § 621.7(b), DEC determines to hold an adjudicatory public hearing when "substantive and significant issues relating to any findings or determinations the [DEC] is required to make" or where "any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon." Under 6 NYCRR § 621.7(c), DEC shall hold a legislative public hearing if a significant degree of public interest exists.

This issue has been addressed in previous Orders[6]. *See* note 2, *supra*. The case-specific review of NYPIRG's petition on Elmhurst Hospital indicates there are no substantive differences in fact between the subject petition and the previously-issued Orders referenced in note 6, regarding the public hearing issue. Specifically, Elmhurst Hospital's Notice of Complete Application contained similar information to the notices in the other cases, there were no commenters other than Petitioner, as was the case before, and DEC applied the same standard in each case, in determining whether to hold a hearing. Because Petitioner raises no issues in this petition that are unique to Elmhurst Hospital, the petition is denied on this issue as it was in the above-referenced Orders. The rationale of those determinations is hereby re-affirmed in this Order.

B. Permit Application

Petitioner's second claim alleges that the applicant did not submit a complete permit application in accordance with the requirements of the Clean Air Act, 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d), especially as these provisions incorporate provisions of CAA § 114(a)(3)(C). Petition at page 5. In making this claim, Petitioner incorporates a petition that it filed with the Administrator on April 13, 1999, contending that the DEC's application form is deficient because even a properly completed form would not 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.

Petitioner's concerns regarding the DEC's application form are summarized as follows:

1. The application form lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether Elmhurst Hospital was out of compliance and, therefore, whether DEC was required to include a compliance schedule in the title V permit;

2. The application form lacks a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based;

3. The application form lacks a description of all applicable requirements that apply to the facility; and

4. The application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

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[6] The issue of denying a public hearing has been raised previously by the Petitioner and addressed by the Administrator in six Orders responding to the following petitions: North Shore Towers; Tanagraphics; Rochdale Village; Kings Plaza; Action Packaging Corp.; Yeshiva. Each of these Orders is available on the internet at: http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2000.htm.

1. Initial Certification

EPA agrees with Petitioner that the compliance certification process in the application form utilized by the facility in this case, may have enabled the applicant to avoid revealing noncompliance in some circumstances. The DEC form used allows an applicant to certify that it expects to be in compliance with requirements when the permit is issued rather than to make a certification as to its compliance status at the time of permit application submission. As provided in 40 CFR § 70.5(c)(9)(i), permit applicants are required to submit "a certification of compliance with all applicable requirements by a responsible official consistent with...section 114(a)(3) of the Act." EPA interprets this language as requiring that sources certify their compliance status as of the time of application submission. Where certifications do not address compliance status as of the time of permit application, the State, EPA and the public have been deprived of meaningful information on compliance status which may have a negative effect on source compliance and could impair permit development. Compliance certifications are public documents. Thus, one purpose of the initial compliance certification is to provide an incentive for sources to come into compliance with applicable requirements before they complete their applications. Another purpose is to alert the permitting authority to compliance issues in advance so that it can work with the source on such problems and develop an appropriate schedule of compliance in the title V permit. *See* 40 CFR §§ 70.5(c)(8) and 70.6(c)(3) and (4).

Defects in the application process can provide a basis for objecting to a title V permit if flaws in the application could result in a deficient permit. There is no evidence in this case that problems with the application form caused such defects so as to warrant an objection. Petitioner neither showed that the lack of a compliance certification was the cause of a defective permit for Elmhurst Hospital nor that a compliance schedule should have been but was omitted from the permit. A standard application form shall include "a compliance plan that contains . . . a description of the compliance status of the source with respect to all applicable requirements." Section 70.5(c)(8)(i). Part 70 also requires that the plan contain a compliance schedule to bring the source into compliance with requirements that it was not meeting and "a statement that the source will continue to comply" with those applicable requirements that it was meeting. Sections 70.5(c)(8)(ii)(A) and (iii). DEC's rules at § 201-6.3(d)(9) track these part 70 requirements. Thus, in the absence of a statement certifying compliance at the time of application submission, the consequence in the final permit is the omission of a compliance schedule to address noncompliance that occurred as of the date of application submission. In the case of Elmhurst Hospital, a relatively small and straightforward source of air emissions, the source certified that it would be in compliance with all applicable requirements at the time of permit issuance (which occurred on August 24, 2000). Moreover, a review of the state files shows that an inspection performed after application submission did not reveal any violations. Therefore, in this particular case, the omission of an initial compliance certification as of the date of application submission is a harmless error. EPA does not believe that submission by Elmhurst Hospital of a different application (that is, one which would have required compliance certification as of the time of application submission) would have resulted in a title V permit any different from the one ultimately issued. Because the Petitioner failed to demonstrate that the lack of either an initial

compliance certification or a compliance schedule led to the issuance of a defective permit, EPA denies the petition with respect to this issue.

Although in this case EPA finds no basis for objection on this issue, the State and EPA agree that the application form used by applicants in New York prior to January 1, 2002 did not properly implement the EPA or the State regulations. Therefore, as detailed in the November 16, 2001 commitment letter, the State changed its forms and instructions accordingly.[7]

2. Statement of Methods for Determining Initial Compliance

Petitioner cites the regulations at 40 CFR § 70.5(c)(9)(ii), which require the statements in the permit application regarding the compliance status of the facility to include "a statement of methods used for determining compliance." Although the application form completed by Elmhurst Hospital did not specifically require the facility to include a statement of methods used to determine initial compliance, in this case, the applicant did provide this information for all of the listed applicable requirements. On pages 4 through 22 of the Elmhurst Hospital application, the applicant describes monitoring that is in place and is being used to determine compliance with regulations for opacity, NO_x RACT, sulfur content in fuel, particulate matter, and VOC. This monitoring includes daily visible emission reading for opacity, annual tune up for NO_x, supplier certifications of sulfur content in fuel, a stack test for particulate matter once per permit term, and surrogate temperature monitoring for ethylene oxide (EtO). Petitioner's claims that Elmhurst Hospital's application lacked a statement of methods used for determining initial compliance are without merit; therefore, EPA denies the petition on this point.

3. Description of Applicable Requirements

The Petitioner's next point is that EPA regulations call for the legal citation to the applicable requirement to be accompanied by the applicable requirement expressed in descriptive terms. In "White Paper for Streamlined Development of Part 70 Permit Applications" dated July 10, 1995 ("White Paper 1"), EPA clarified that citations may be used to streamline how applicable requirements are described in an application, provided the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. The permitting authority may allow the 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

[7] In summary, in accordance with the DEC's November 16, 2001 commitment letter, the DEC permit application form was changed to clearly require the applicant to certify as to compliance with all applicable requirements at the time of application submission. The application form and instructions were changed to clearly require the applicant to describe the methods used to determine initial compliance status. With respect to the citation issue, the application instructions were revised to require the applicant to attach to the application copies of all documents (other than published statutes, rules and regulations) that contain applicable requirements.

and available to the public (e.g., publically available documents include regulations printed in the Code of Federal Regulations or its State equivalent).

The Elmhurst Hospital permit application contains codes or citations associated with applicable requirements that are readily available. That is, these codes refer to federal and state regulations that are printed in rule compilations and also are available on-line. This includes the NO_x reasonably available control technology (RACT) requirement of 6 NYCRR § 227-2.4(d), which, for the size of these small boilers, is an annual tune-up. Therefore, EPA finds the Elmhurst Hospital application to be in accord with EPA guidance. While specific citations followed by a description of the applicable requirement would make the application more informative, the lack of it, in this case, does not warrant an objection by EPA. Therefore, EPA denies the petition on this point.

This issue regarding citations also was addressed in detail in the July 18, 2000, letter from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection to Robert Warland, Director, Division of Air Resources, DEC. ("July 18, 2000 letter") The letter explained that the DEC application form and/or instructions for its operating permits program should be clarified with respect to the "non-codified" documents that include applicable requirements, such as NO_X RACT plans, pre-construction and operating permits, etc. EPA pointed out that the application and instructions should make it clear that all supporting information is required in the application with clear cross-referencing to the emission point and applicable requirement cited in the printed form. Accordingly, in its November 16 commitment letter the DEC agreed to amend the application instructions to ensure that applicants include all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing.[8] The DEC is aware that the documentation necessary to insure the adequate public participation called for in 40 CFR § 70.7(h) must be available with the application during the public comment period.

4. Statement of Methods for Determining Ongoing Compliance

Petitioner alleges that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. In Section IV - Emission Unit Information of DEC's application form, there is a block labeled "Monitoring Information" that asks applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. Elmhurst Hospital completed this section for all applicable requirements (pages 4 through 22). As described above, the application lists monitoring being used to determine compliance with regulations for opacity, NO_x RACT, sulfur content in fuel, and ethylene oxide. Because the application included a description of or reference to applicable test methods and was correctly completed, EPA denies the petition on this

[8] As previously discussed, DEC amended its application form and instructions in accordance with the November 16 commitment letter.

point.

C. Statement of Basis

Petitioner alleges that the proposed permit is accompanied by an insufficient statement of basis, as required by 40 CFR § 70.7(a)(5), that sets forth the legal and factual basis for the draft permit conditions. Petition at page 7. Petitioner notes that, subsequent to the public comment period for the Elmhurst Hospital permit, the permitting authority commenced incorporating a "Permit Description" in all draft permits being issued.

The requirement for the "statement of basis" is found in 40 CFR § 70.7(a)(5) which states:

> 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 permitting authority shall send this statement to EPA and to any other person who requests it.

The statement of basis is not a part of the permit itself. It is a separate document[9] which is to be sent to EPA and to interested persons upon request. This requirement for the statement of basis is not contained in 40 CFR § 70.6 which sets forth the required contents of the permit. In fact, 40 CFR § 70.6(a) requires that the permit contain all the explanation that ordinarily would be necessary to determine whether the permit conditions have been accurately expressed. For example, the permit must contain the references to the applicable statutory or regulatory provisions forming the legal basis of the applicable requirements on which the conditions are based. 40 CFR § 70.6(a)(1)(i).

A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. It should highlight elements that EPA and the public would find important to review. The statement should highlight anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, any source-specific monitoring requirements, and the permit shield.

EPA has recently provided guidance to permitting authorities that addresses the contents of a "statement of basis" in terms that aid both EPA and the public.[10] As a result, the DEC has

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[9] Unlike permits, statements of basis are not enforceable, do not set limits and do not otherwise create obligations as to the permit holder.

[10] *See* letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc., responding to NYPIRG's March 11, 2001; November 16, 2001 DEC commitment letter; letter dated December 20, 2001, from EPA Region V to the Ohio EPA (available on the internet at http://www.epa.gov/region07/programs/artd/air/title5/t5memos/sbguide.pdf);

(continued...)

incorporated certain elements into its "permit review reports."[11] In the cited letters, EPA explains the "statement of basis" is to be used to highlight significant decisions or interpretations that were necessary to issuing the permit. These reports are not intended to be redundant to the permit but to assist in reviewing what is in the permit. Additionally, in a December 22, 2000 Order responding to petition for objection to the Fort James Camas Mill permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring method(s) be documented in the permit record. In re In the Matter of Fort James Camas Mill, ("Fort James"), Petition No. X-1999-1, at page 8 (December 22, 2000).

The regulation at 40 CFR § 70.8(c)(3)(ii) requires that the permitting authority submit any information necessary to review adequately the proposed permit. Accordingly, EPA may object to the issuance of a permit simply because of the lack of necessary information. The missing information could be a statement of basis or any other information deemed necessary to review adequately the permit in question. Since the statement of basis can serve a valuable purpose in directing EPA's and the public's attention to important elements of the permit and since it is important that EPA perform any reviews as quickly as possible, it is a required element of an approved program that EPA receive an adequate statement of basis with each proposed permit.

EPA notes that a "Permit Description" was incorporated as part of the Elmhurst Hospital draft permit, final permit issued on August 24, 2000, as well as the modified final permit issued on January 8, 2001.[12] While this discussion does not satisfy the requirements of § 70.7(a)(5) in a robust fashion, it does provide the needed information on Elmhurst Hospital's permit. EPA has concluded that in spite of the recognized faults regarding this description, this issue as raised by Petitioner does not, in this case, warrant objection to the permit, for the reasons described below.

In this case, it is possible to achieve a sufficient understanding of the source using other available documents in the permit record. Some very simple sources such as Elmhurst Hospital are easily understood through reading the permit or the application, especially when they are not subject to applicable requirements or monitoring provisions that rely on source-specific

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(...continued)
see also Notice of Deficiency for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2000).

[11] In order to comply with the requirements of 40 CFR § 70.7(a)(5), DEC has committed to prepare and make available at time of issuance of draft permits, a "permit review report," which will serve as DEC's statement of basis. The contents of this permit review report are described in DEC's November 16, 2001 commitment letter.

[12] This description includes the nature of the "business" (four fossil fuel-fired boilers each rated at 25.4 million British thermal units per hour (mmBtu/hr), primarily firing natural gas and/or No. 6 fuel oil, to supply energy needs at the hospital. This description also includes a discussion of the equipment and operations at the facility; air permit applicability; and a discussion of the compliance methods utilized at the facility.

determinations or engineering judgement.[13] In this case, the additional information provided in Elmhurst Hospital's application helped meet the statement of basis requirements. For example, the application provides the date of construction of all four boilers, a full description of how opacity will be monitored and a detailed description on how emissions of ethylene oxide are monitored. Therefore, EPA believes a more detailed explanatory document as sought by Petitioner in the form of a statement of basis is not necessary to understand the legal and factual basis for the draft permit conditions.

Additionally, there is no evidence that the Petitioner was harmed by the absence of a statement of basis. In fact, NYPIRG provided detailed and thoughtful comments on this draft permit establishing that it had a basic understanding of the terms and conditions of this permit. Furthermore, NYPIRG was the only member of the public who showed an interest in this project or filed comments on this draft permit. Accordingly, we do not believe that the circumstances of this case warrant an objection to this permit.

Nonetheless, as discussed in Section G, NYPIRG's petition on this permit is being granted on other grounds. DEC's permit issuance process now provides that a permit may not be issued unless it is accompanied by a statement of basis. Therefore, when the DEC revises the permit in response to the objection, it should also submit a complete statement of basis (permit review report) that meets the requirements of 40 CFR § 70.7(a)(5).

D. Annual Compliance Certification

The Petitioner alleges that the proposed permit distorts the annual compliance certification requirement of the Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5). The Petitioner's allegation is that the proposed permit does not require the facility to certify compliance with all permit conditions, but rather just requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." *See* petition at page 9. Specifically, the Petitioner is concerned with the language in the permit that labels certain permit terms as "compliance certification" conditions. NYPIRG notes that requirements that are labeled "compliance certification" are those that identify a monitoring method for demonstrating compliance. NYPIRG asserts that the only way of interpreting this compliance certification designation is as a way of identifying which conditions are covered by the annual compliance certification. NYPIRG asserts that permit conditions that lack periodic monitoring are excluded

[13] The applicable requirements listed in this permit as applying to the boilers include several regulations contained in the New York State Implementation Plan (SIP) as follows: (1) the NO_X RACT requirements of 6 NYCRR § 227-2; (2) the opacity requirements of 6 NYCRR § 227-1; and (3) the limit of the sulfur content of the fuel oil to 0.30 percent by weight pursuant to the requirements of 6 NYCRR part 225. As monitoring, Elmhurst Hospital's final effective permit includes a requirement for stack testing each permit term to determine compliance with the particulate matter limit of 0.1 lb/MMBtu, and record keeping of logs of fuel sulfur content. The additional monitoring that is needed to assure compliance with requirements applicable to the sterilization facility is discussed below in Section G.

from the annual compliance certification. The Petitioner claims that this 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.

EPA notes, first, that the language in the Elmhurst Hospital permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, follows the language of 40 CFR §§ 70.6(c)(5) and (6). Section 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)(3) requires the following 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 ensure compliance with all applicable requirements. The Elmhurst Hospital title V permit includes this language at Conditions 1-2 and 26.

EPA disagrees with the Petitioner that "the basis of the certification" should be interpreted to mean that facilities are *only* required to certify compliance with the permit terms labeled as "compliance certification." "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. Conditions 1-2 and 26 delineate the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

The references to "compliance certification" found in the permit terms do not appear to negate the DEC's general requirement for compliance certification of terms and conditions contained in the permit. Because the permit and New York's regulations 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.

Nonetheless, in its November 16, 2001 letter, the DEC has 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 that the permit includes all the compliance certifications necessary to avoid any misunderstanding such as that Petitioner pointed out might occur.

Although this issue does not present grounds for objecting to the Elmhurst Hospital permit, the DEC has nonetheless elected to take the appropriate steps to improve the administration of its program in this regard. As discussed in Section F, below, EPA is granting in part NYPIRG's petition on this permit. Therefore, when the DEC revises the Elmhurst Hospital permit in response to this Order, it will also add language to clarify the requirements relating to annual compliance certification reporting.

E. Startup, Shutdown, Malfunction

Petitioner claims that the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it sanctions the systematic violations of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. Petition at page 9. Petitioner asserts that 6 NYCRR § 201-1.4 conflicts with EPA guidance and must be removed from the SIP and federally enforceable permits as soon as possible. In addition, Petitioner asserts that the permit lacks proper limitations on when a violation may be excused and lacks sufficient public notice of when a violation is excused.

Permit Condition 5, states, in part, "At the discretion of the commissioner a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable." Petitioner argues that Condition 5 is so expansive that it makes emission limits very difficult to enforce and departs from EPA guidance that requires facilities to make every reasonable effort to comply with emission limitations even during startup/shutdown, maintenance and malfunction conditions.[14] Accordingly, Petitioner asserts, the Administrator must object to the proposed permit because it does not include conditions to assure compliance with all applicable requirements as required by 40 CFR § 70.6(a)(1).

EPA is not aware of, and the Petitioner has provided no evidence of, any instances where the DEC relied on these rules to provide blanket exceptions for non-compliance merely because the incidents were reported. Moreover, DEC's response to comment letter to EPA and NYPIRG on the draft title V permit for the Elmhurst Hospital facility[15] demonstrates to EPA that the DEC's

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[14] *See* Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," (Bennett Memo September 1982); memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," dated February 15, 1983 (Bennett Memo February 1983); Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation to Regional Administrators, Regions I - X, titled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated September 20, 1999 ("September 1999 Guidance"); and Memorandum from Eric Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards to Regional Administrators, titled "Re-Issuance of Clarification - State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,"dated December 5, 2001 ("December 2001 Clarification").

[15] Letter from Elizabeth Clarke, Environmental Analyst, DEC, Region 2, to Steven C. Riva, Chief, Permitting Section, EPA Region 2, dated June 23, 2000, Responses to NYPIRG Comments re: General Permit Conditions, number 10, Unavoidable Noncompliance and Violations, page 4 of 7. The response reads, "This condition is as explicit as necessary and does not excuse or diminish, in any way, the accountability of a source for pollution exceedances. It sets forth a practical procedure for notifying the agency....[T]he agency uses engineering judgment

(continued...)

interpretation and application of section 201-1.4 is not inconsistent with the Act, as interpreted by EPA in its guidance.

With respect to enforcement discretion, EPA recognizes and approves such provisions in State SIPs in accordance with EPA guidance, and Condition 5 is modeled upon a provision in the New York SIP. It sets forth the notification requirements that a facility owner and/or operator must follow in the case of excess emissions caused by start-up, shutdown, malfunctions, or upsets. The conditions provide a detailed and thorough procedure to report and correct such violations. These notice requirements are included in the approved SIP and must be adhered to. Moreover, failure to notify the DEC of the emission violation on a timely basis precludes consideration of the reason for the emission violation in order to mitigate the enforcement response. This procedure is required for occurrences where a source hopes to avail itself of enforcement discretion, but does not establish any right to be excused for the excess emission occurrence.

It is EPA's view that the Act, as interpreted in EPA policy, does not allow for automatic exemptions from compliance with all applicable SIP emissions limits during start-up, shut-down, malfunctions or upsets. Further, improper operation and maintenance practices do not qualify as malfunctions under EPA policy. *See* note 22. To the extent that a malfunction provision, or any provision giving substantial discretion to the state agency broadly excuses sources from compliance with emission limitations during periods of malfunction, EPA believes 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, ("Pacificorp"), at page 23 (November 16, 2000), available on the internet at http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf.

In any event, as explained in the Pacificorp decision, "even if the provision were found not to satisfy the Act, EPA could not properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the 'applicable requirement' as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions." *See* Pacificorp at 23-24.

The position set forth in Pacificorp was reiterated in the November 2001 Clarification which confirms that the September 1999 Guidance provides guidance to States and EPA regarding SIP provisions related to excess emissions during malfunctions, startups, and shutdowns. It was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA. Similarly the September 1999 Guidance was not intended to affect existing permit terms or conditions regarding malfunctions, startups and

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[15](...continued)
on a case-by-case basis to make a determination as to the unavoidable status of an exceedance. The department also cannot exercise more discretion than federal requirements allow."

shutdowns that reflect approved SIP provisions including opacity provisions, or to alter the emergency defense provisions at 40 CFR § 70.6(g). Existing SIP rules and 40 CFR § 70.6(g) may only be changed through established rulemaking procedures and existing permit terms may only be changed through established permitting processes. Thus, EPA did not intend the September 1999 Guidance to be legally dispositive with respect to any particular proceedings in which a violation is alleged to have occurred. Rather, it is in the context of future rulemaking actions, such as the SIP approval process, that EPA will consider the September 1999 Guidance and the statutory principles on which this Guidance is based. *See* November 2001 Clarification at p. 1.

In sum, Condition 5 relates to SIP provisions governing the exercise of enforcement discretion regarding excess emissions and does not, itself, reduce the effectiveness of any applicable requirements derived from the SIP. The DEC's unavoidable non-compliance and emergency requirements are part of the approved SIP. Whether the SIP meets EPA's guidance is not an appropriate subject for an objection to a specific permit and is not a reason to object to the permit. Accordingly, the petition is denied on this point.

NYPIRG further asserts that the requirement of 40 CFR § 70.6(a)(1), that permits contain monitoring sufficient to assure compliance, also applies to the excuse provision of 6 NYCRR § 201-1.4 to assure that the provision is not abused. EPA agrees with this general proposition. However, since the DEC Commissioner has discretion to excuse certain violations, any abuse of the excuse provision would be by DEC and not by the source for simply asking for the excuse. In accordance with the provisions of the title V permit, the source is required to monitor compliance. Any violation for which an excuse is sought will be included in the facility's deviation reports, semi-annual reports and annual reports. Petitioner has not demonstrated that any additional monitoring of the source is required to assure proper exercise of the excuse provision by DEC.

As previously discussed, 6 NYCRR §§ 201-1.4 and 201-1.5(e) provide the Commissioner with a discretionary authority to excuse unavoidable non-compliance and violations when certain conditions are met. Moreover, 6 NYCRR § 201-6.5(c)(3)(ii), as amended, clarifies that the DEC's own rules do not authorize expansion of the Commissioner's discretion. The DEC's rules, as amended, provide that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). In DEC's Response to Comments Document, DEC acknowledges that it "cannot exercise more discretion than federal requirements allow." Responsiveness Summary re: General Permit Conditions, No. 10, Page 4 of 7.

EPA believes that the Commissioner is aware of the limits on the authority to excuse emission exceedances existing under the DEC's own regulations, and believes that it is unlikely that the Commissioner will exceed the discretion allowed under the State regulations. While the DEC may recognize the limits of its discretion, the permit term should be revised to be consistent with the requirements of the Act and the applicable scope of 6 NYCRR § 201-1.4. Accordingly,

for permits issued after January 1, 2002, DEC has committed to move this condition to the State side of the permit.[16] The petition is denied with respect to this issue.

Petitioner raised several additional points on the issue of start-up, shutdown and malfunction which warrant further discussion.

1. Petitioner states that New York's regulation 6 NYCRR § 201-1.4 and the corresponding language in the permit do not conform to EPA's September 20, 1999 guidance entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" ("September 1999 Guidance"). The Petitioner generally alleges that the New York regulation has created a loophole for facilities complying with emission limits because facilities routinely use the excuse provision without proving the violation was unavoidable. The Petitioner, however, does not provide any specific examples of sources relying on the excuse provision improperly nor does Petitioner allege that any abuses of the excuse provision or commissioner discretion provision occurred in this case. Rather, the Petitioner suggests that terms addressed in the September 1999 Guidance should be added to the permit. We conclude that it is not necessary for the DEC to restate the September 1999 Guidance in the permit as the guidance is policy and does not constitute an applicable requirement. *See* November 2001 Clarification. In addition, in its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, the provision of 6 NYCRR § 201-1.4 would be included on the State side of all permits. *See* note 16.

2. Petitioner asserts the permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation "unavoidable." As discussed above and in section F, below, the commissioner discretion conditions apply only to State requirements and cannot apply to federally promulgated requirements. In DEC's Response to Comments Document, DEC acknowledges that it "cannot exercise more discretion than federal requirements allow." Responsiveness Summary re: General Permit Conditions, No. 10, Page 4 of 7. In its November 16, 2001 commitment letter, DEC agreed that effective January 1, 2002, it would include the revised provisions of 6 NYCRR § 201-6.5(c)(3)(ii) on the federal side of all permits. DEC is substantially meeting this commitment. *See* note 4, *supra*.

3. Petitioner states that all significant terms must be defined in the permit. The Petitioner alleges that the permit is not practically enforceable because the permit lacks definitions for "malfunction," "upset," and "unavoidable." EPA disagrees with the Petitioner on this issue. The purpose of the permit is to ensure that a source operates in compliance with all applicable requirements. To the extent Petitioner argues that this requirement extends to compliance with

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[16] DEC is substantially meeting this commitment. *See* note 4. As discussed in detail in Section G, below, EPA is granting NYPIRG's petition on this permit on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also remove the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of the permit, and incorporate the condition into the state side of the permit.

the SIP-based commissioner discretion provision, EPA agrees. However, the lack of definitions for the terms "malfunction," "upset" or "unavoidable" does not, on its face, render the permit unenforceable. These are commonly used regulatory terms, and are not so inherently vague as to render a permit using these terms practically unenforceable. In the case of the term malfunction, the SIP rule excludes "failures that are caused entirely or partially by poor maintenance, careless operation, or other preventable condition." 6 NYCRR 201.5(e)(2). Moreover, Petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. In addition, in its November 16, 2001 Commitment letter, DEC agreed that effective January 1, 2002, it will include the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, on the State side of all permits issued after January 1, 2002. *See* note 16. This assures that the excuse provision is not expanded beyond its proper bounds.

4. Petitioner also states that the permit must define reasonably available control technology (RACT). 6 NYCRR § 201-1.4(d) and 6 NYCRR § 201-5 require facilities to use RACT during any maintenance, startup/shutdown, or malfunction condition. The Petitioner claims that the proposed permit does not define what constitutes RACT or how the government or public knows whether RACT is being utilized at those times.

RACT is a defined term in the New York SIP. The SIP specifically defines RACT as the "[l]owest emission limit that a particular source is capable of meeting by application of control technology that is reasonably available, considering technological and economic feasibility." 6 NYCRR § 200.1(bp). There is an identical definition in the current New York regulations that are not part of the approved SIP. 6 NYCRR § 200.1(bs). As explained above, EPA cannot reopen the issue of whether the SIP provision should have required a more specific definition of RACT in the context of deciding whether to object to a Title V permit. As a practical matter, it is not possible to set forth in advance a detailed definition of RACT that will address all possible startup, shutdown or malfunction events throughout the life of the permit. The specific technology that will constitute RACT during such a period of excess emissions will depend on both the nature of the violation and the technology available when the violation occurs. The SIP provision allows that determination to be made on a case-by-case basis by the Commissioner if and when she chooses to exercise her authority to excuse a violation. As explained above, EPA cannot properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the "applicable requirement" as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions. Pacificorp at 23-24; *see also* November 2001 Guidance at p.1. In any event, NYPIRG has failed to demonstrate that the RACT provision is deficient in this case. Therefore, EPA denies the petition on this issue.

5. Petitioner next asserts that any title V permit issued to Elmhurst Hospital must require prompt written reporting of all deviations from permit requirements including those due to startup, shutdown, malfunction, and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B). Petitioner states that the permit must require written reports of all deviations. As written, it

appears that Condition 5 only requires the permittee to inform DEC of an exceedance when seeking to exercise the excuse provision of 6 NYCRR § 201-1.4. Otherwise, the permit provides that written notifications be provided when requested by the Commissioner. Prompt reporting of deviations is required by 40 CFR § 70.6(a)(3)(iii)(B) which states,

> Prompt reporting of deviation from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.

Reporting in order to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See* Discussion in Part F *infra.* For a violation to be properly excused, the DEC must properly apply the regulation authorizing such discretion and must properly document its findings to ensure the rule was reasonably applied and interpreted. As further discussed below, EPA denies the petition on this point.

F. Prompt Reporting of Deviations

Petitioner claims that the proposed permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). Petition at page 15. The Petitioner states that the only prompt reporting of deviations is that required by 6 NYCRR § 201-1.4, which governs unavoidable noncompliance and violations during necessary scheduled equipment maintenance, start-up/shutdown conditions and upsets or malfunctions. Petitioner argues that any other deviations, including situations where the permittee could have avoided a violation but failed to do so, will not be reported until the six-month monitoring report. The Petitioner alleges that six months cannot be considered "prompt reporting" in all cases. See Condition 5.

EPA agrees with Petitioner's comment. EPA raised this issue with DEC in the July 18, 2000 letter at Attachment III, item 2. The DEC may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. In any case, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. As discussed above, EPA does not consider reports submitted for the purpose of preserving potential claims of an excuse to meet prompt reporting requirements because these reports are optional. In addition, they may not include all deviations, instead only those potentially unavoidable violations that the source seeks to have excused. All deviations must be reported regardless of whether the source qualifies for the excuse. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case concern under the rules applicable to the approved program, although a general 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).[17] EPA's regulations provide in 40 CFR § 71.6 (a)(3)(iii)(B)(*2*) that sources report to the permitting authority within 48 hours, all instances of excess emissions of pollutants that are not hazardous air pollutants, which continue for more than two hours. With respect to the other applicable requirements of the permit, reporting deviations more frequently than every six months, or the frequency specified in the underlying applicable requirement, whichever is more frequent, is not necessary.

EPA has addressed generally the prompt reporting requirement with the DEC in order to clarify how the DEC will properly exercise this discretion. In the November 16 commitment letter, DEC agreed that for all permits issued on and after January 1, 2002, it will include a requirement for reporting deviations consistent with 6 NYCRR § 201-6.5(c)(3)(ii). DEC is substantially meeting this commitment. *See* note 4, *supra*. While this regulation requires inter alia that deviations be reported at least every six months, DEC stated that it will specify less than six months for "prompt" reporting of certain deviations that result in emissions of, for example, a hazardous or toxic air pollutant that continues for more than an hour above permit limits. DEC has stated that it finds the procedures for prompt reporting contained in DEC regulations to be reasonable and compatible with what is provided for in 40 CFR § 71.6(a)(3)(iii)(B). Therefore, DEC included these provisions to define "prompt" reporting in permits issued on and after January 1, 2002. Whether or not the State has adopted a general policy on prompt reporting, the specific application of the prompt reporting requirement is a matter of discretion and is subject to review and objection by EPA.

EPA's review of the Elmhurst Hospital permit reveals that the permit already contains prompt reporting of opacity deviations in Condition 43. Condition 43 defines "prompt" as reporting to DEC within 1 business day of conducting a Method 9 test that shows an exceedance of the opacity standard stipulated in 6 NYCRR § 227-1.3. The results of the Method 9 analysis are required to be recorded and the Regional Air Pollution Control Engineer (RAPCE) must be notified of the exceedance within one business day of the Method 9 test. Elmhurst Hospital is required to present any corrective actions or future compliance schedules to the DEC for acceptance upon notification. EPA finds the prompt reporting of deviation provisions of Condition 43 to be sufficient to assure compliance with 6 NYCRR § 227-1.3.

However, EPA finds merit in Petitioner's claims as it applies to Condition 49. This condition is both misplaced and lacks requirements for prompt reporting of deviations. First, Condition 49 should be placed on the federally enforceable side of the permit, not the State-only side of the permit. Secondly, Condition 49 contains periodic monitoring to assure compliance

[17] These provisions detail the prompt reporting requirement applicable to sources under the federal operating permit program.

with 6 NYCRR § 212.4(a), the SIP regulation for "A rated" contaminants.[18] As explained in Condition 49, ethylene oxide (EtO), which is a volatile organic compound as well as a hazardous air pollutant, is used for sterilizing surgical equipment. The EtO emissions from the sterilizer units are controlled by the abatement system that converts EtO into carbon dioxide and water vapor via a catalytic reaction in the abatement system. The conversion achieves 99.9% efficiency when the temperature of the catalyst bed is between 320 degrees Fahrenheit and 500 degrees Fahrenheit. However, the EtO abatement system would need to be shut down and serviced if the temperature of the catalyst bed falls out of range. It is therefore prudent to monitor the temperature of the catalyst bed when the abatement system is in operation. As such, DEC requires Elmhurst Hospital to monitor the temperature of the catalyst bed daily. In this particular case, monitoring the operating temperature of the catalyst bed is a surrogate for directly monitoring the EtO emissions. When the operating temperature is out of range, it indicates the efficiency of the abatement system is less than 99.9%, resulting in a greater amount of EtO being emitted.

Given that the EtO emissions are affected by the temperature of the catalyst bed, EPA finds it necessary for DEC to be promptly notified of any temperature excursion that lasts for one hour or more. This mirrors the requirements DEC has established for prompt reporting of excess emissions of hazardous or toxic air pollutants. Since the permit does not require Elmhurst Hospital to notify DEC in a timely manner when the catalyst bed operates out of its proper temperature range, EPA finds this to be a defect in the Elmhurst Hospital permit. Therefore, EPA grants the petition for the lack of prompt reporting of temperature excursions under Condition 49.

In the revised permit, DEC must require prompt reporting of deviations of the abatement system as indicated by the temperature of the catalyst bed being out of range for an hour or more. Elmhurst Hospital must notify the DEC within one business day of becoming aware of the temperature excursion. Within 30 days thereafter, Elmhurst Hospital shall submit to the DEC, certified by a responsible official, a written report describing the malfunction, the corrective action taken, and the estimated emission rates. In addition, when DEC revises Condition 49 as ordered above, DEC must change the monitoring frequency of the operating temperature for the catalyst bed from "daily" to "continuous." EPA believes this was a typographical error made in the permit given that the averaging method stated in the permit is "not to fall outside of stated range at any time." In order to be sure that the temperature does not fall out of range at any time, the temperature must be monitored continuously. Therefore, DEC should correct this mistake in the revised permit. Lastly, DEC must move the revised Condition 49 from the state-only side of the permit to the federally enforceable side of the permit since 6 NYCRR § 212.4(a) is a SIP requirement.

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[18] According to 6 NYCRR § 212.9, an "A" rated contaminant is, "An air contaminant whose discharge results, or may result, in serious adverse effects on receptors or the environment. These effects may be of a health, economic or aesthetic nature or any combination of these." Also according to 6 NYCRR § 212.9, DEC has the discretion to consider the emission rate potential in addition to several other factors when considering how to rate a contaminant.

G. Monitoring

Petitioner asserts that the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable. Petition at page 16. The Petitioner addresses individual permit conditions that allegedly either lack periodic monitoring or are not practically enforceable.[19] The specific allegations for each permit condition are discussed below. EPA is denying Petitioner's request that the Administrator object to issuance of the permit for any of the allegations.

Section 504 (a) and (c) of the Act makes it clear that each title V permit must include "conditions as are necessary to assure compliance with applicable requirements of [the Act], including the requirements of the applicable implementation plan" and "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." In addition, Section 114(a) of the Act requires "enhanced monitoring" at major stationary sources, and authorizes EPA to establish periodic monitoring, recordkeeping, and reporting requirements at such sources. *See also* CAA section 504(b) (EPA may promulgate regulations under Title V prescribing procedures and methods for monitoring that are sufficient for determining compliance).

The regulations at 40 CFR § 70.6(a)(3) specifically require that each permit contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring). In addition, 40 CFR § 70.6(c)(1) requires that all part 70 permits contain,"compliance certification, testing, monitoring, reporting, and

[19] With respect to lack of what the Petitioner refers to as adequate "periodic" monitoring, NYPIRG cites two separate regulatory requirements: 40 CFR § 70.6 (a)(3) which requires monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance; and § 70.6 (c)(1) which requires permits to contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. In all the monitoring issues presented here, where we have concluded that additional monitoring is needed, either the underlying applicable requirement imposes no monitoring of a periodic nature or the applicable rule contains sufficient periodic monitoring but it was not properly carried over into the permit. Therefore, we are addressing them exclusively under 40 CFR § 70.6(a)(3) and need not address 40 CFR § 70.6(c)(1). The scope of applicability of § 70.6(a)(3) was addressed by the US Court of Appeals for the DC Circuit in Appalachian Power v. EPA, 208 F.3d 1015 (D.C. Cir. 2000). The court concluded that, under section 40 C.F.R. §70.6(a)(3)(i)(B), the periodic monitoring rule applies only when the underlying applicable rule requires "no periodic testing, specifies no frequency, or requires only a one-time test." Id. at 1020. The Appalachian Power court did not address the content of the periodic monitoring rule where it does apply, i.e., the question of what monitoring would be sufficient to "yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as is required by 40 C.F.R. §70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2). It is this issue that is raised by the petition at bar. With respect to practical enforceability, the Petitioner cites the U.S. EPA's Periodic Monitoring Guidance, September 15, 1998, at 16 which has since been vacated by Appalachian Power.

recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." These requirements are also incorporated into New York's regulations at 6 NYCRR § 201-6.5(b).

Decisions by the U.S. Court of Appeals for the District of Columbia Circuit shed light on the proper interpretation of these requirements. Specifically, the court addressed EPA's compliance assurance monitoring ("CAM") rulemaking (62 Fed. Reg. 54940 (1997) (promulgating, inter alia, 40 CFR part 64) in Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Cir. 1999), and reviewed EPA's periodic monitoring guidance under title V in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

EPA first summarized the relationship between Natural Resources Defense Council and Appalachian Power and described their impact on monitoring provisions under the Clean Air Act in two orders responding to petitions under title V requesting that the Administrator object to certain permits. *See* In re Pacificorp and In re Fort James Camas Mill. Please see pages 16-19 of the Pacificorp order for EPA's complete discussion of these issues. In brief, given the clear, multiple statutory directives for adequate monitoring in permits, and in accordance with the D.C. Circuit decisions, EPA concluded that where the applicable requirement does not mandate any periodic testing or monitoring, the requirement of § 70.6(c)(1) that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 CFR § 70.6(a)(3)(i)(B). EPA also pointed out that where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such circumstances, EPA found, the separate regulatory standard at § 70.6(c)(1) applies instead. Furthermore, where 70.6(a)(3)(i)(B) applies, it satisfies the general sufficiency requirement of 70.6(c)(1). The factual circumstances of Pacificorp and Fort James Camas Mill are analogous to this case. Accordingly, the reasoning of those decisions is being followed in this case as well.

Facility-Specific Petition Issues [20]

1. Effective Dates on Conditions

The Petitioner describes a general concern with the way in which the Elmhurst Hospital permit was written. That is, in addition to the provision in the front page of the permit stating that the permit, will expire on August 23, 2005, a clause has been added to each specific condition in the permit stating that the permit term is: "effective between the dates of 08/24/2000

[20] Issues G.2. through G.5. were addressed previously in the Orders responding to the Yeshiva, Action Packaging, and Kings Plaza petitions (see Footnote 3). In the Yeshiva decision, see issues H.1. to H.5. and H.7.a., on pages 25-31. In the Action Packaging decision, see issues H.1. to H.6., on pages 24-28. In the Kings Plaza decision, see issues H.1. to H.6., on pages 25-29.

and 08/23/2005" for the original conditions and "effective between the dates of 01/08/2001 and 08/23/2005" for the conditions added to the modified permit on January 8, 2001. NYPIRG asserts that including the aforementioned clause with each permit term is not the correct way to limit the overall permit term. The Petitioner contends that by adding this clause, if a renewal permit is not issued prior to expiration of the current permit, then each permit term will expire on 8/23/2005, even if the permittee submits a complete and timely application (that is, there would be a "hollow" permit, without most applicable requirements). Alternately, if permit expiration is only referenced on the front page of the permit, then the terms would remain in effect if a complete renewal application is timely submitted, but a renewal permit is not issued before the current one expires, and all terms will remain enforceable. *See* petition at page 17.

EPA disagrees with the Petitioner that the Elmhurst Hospital permit will become a "hollow" permit if the renewal permit is not issued before the original permit expires. In accordance with the CAA and Part 70, the DEC regulations at 6 NYCRR § 201-6.7(a)(5) clearly state that *all terms and conditions* of a permit shall automatically continue while DEC reviews the renewal application. The Petitioner's interpretation of New York's operating permit rule is not correct. All terms and conditions of a title V operating permit will remain effective as long as a timely and complete renewal application has been submitted in accordance with the deadline established in 6 NYCRR § 201-6. We understand this labeling to be the DEC's way of establishing the initial effective date of a permit term rather than a termination date for the term. EPA interprets the later date, since it always coincides with the end date of the term of the permit itself, to be simply a reiteration of the term of the permit. Because the Petitioner's assertion is without basis, EPA denies the petition on this issue.

2. Condition 4 (Unpermitted Emission Sources)

Petitioner also raises concern about Condition 4, Item 4.1, relating to unpermitted emission sources. The condition, restating 6 NYCRR § 201-1.2 (adopted March 20, 1996), provides that if an existing emission source was subject to the new source review "NSR" permitting requirements of 6 NYCRR part 201 at the time of construction or modification and the owner or operator failed to apply for a preconstruction permit at that time, then the owner or operator must now apply for an NSR permit. The condition further states that the emission source or facility is subject to all regulations that were applicable to it at the time of construction or modification and any subsequent requirements applicable to existing sources or facilities. Petitioner asserts that the condition is confusing because if the facility is subject to NSR or PSD, permit conditions pertaining to those programs should be in the permit. Petitioner argues that it is unclear from the permit or the application whether the facility is subject to a pre-existing permit. Petitioner is also concerned that the only penalty the source would face if it lacked a permit would be the requirement to obtain a permit, as required by Condition 4, Item 4.1(a). Petition at page 18.

EPA notes that this provision does not relieve the permitting authority or permittee from including construction permit conditions in the permit. In addition, if the facility is in violation

for not having the required construction permits, the operating permit must include a compliance schedule. 40 CFR § 70.6(c)(3). Condition 4 merely expands on what is required by the SIP at 6 NYCRR § 201.2(a), that no person shall commence construction or proceed with a modification of an air contamination source without having a valid permit by naming some additional terms for those who violate permitting requirements.

NYPIRG's specific concern that the permit shield could preclude the imposition of penalties is unfounded. The permit shield provides that compliance with the conditions of the permit is deemed to be compliance with those applicable requirements specifically identified in the permit and/or those requirements that the State specifically identifies as not applicable. 40 CFR § 70.6(f). A permit shield can not exonerate or protect from enforcement a facility that lacks proper construction permits. Furthermore, there is no determination in the permit that NSR is either applicable or not applicable to Elmhurst Hospital. Therefore, if a violation were later discovered, the permittee would need to apply for the proper construction permits, the title V permit would be reopened, and the facility may be subject to related enforcement actions. Condition 4 directs what the permittee must do to achieve compliance; it does not address the penalties that may result from non-compliance. Therefore, the condition does not preclude the public, DEC or EPA from bringing an enforcement action and seeking penalties from the facility. Accordingly, EPA denies the petition on this point.

3. Conditions 7 and 8 (Air Contaminants in Control Devices)

Petitioner alleges that the permit must specifically explain how Conditions 7 and 8 addressing the handling of air contaminants collected in air cleaning devices, applies to Elmhurst Hospital. Petitioner further asserts that the permit must include recordkeeping requirements to assure that the facility complies with these requirements. Petition at page18.

EPA denies the petition on this point. The boilers at Elmhurst do not have control devices that collect air contaminants. As such, there are no collected materials that require recycling or disposal, or which require special handling to avoid reintroduction to the atmosphere. Further, EPA acknowledges that States have discretion to include language from the general provisions of the SIP as general permit conditions in title V permits. Where an applicable requirement specifies use of, or a source chooses to employ a control device that collects contaminants, then appropriate monitoring requirements must be included under the emissions unit section of the title V permit.

4. Condition 12 (Operation in Accordance With Applicable Plans)

Petitioner asserts that facility level Condition 12, Item 12.1 (i), which says the facility shall operate in accordance with any accidental release plan, response plan or compliance plan, is problematic because the requirements in these documents should be incorporated into the permit as permit terms. Petition at page 19. If not incorporated, the Petitioner asserts that such documents should be clearly cross-referenced in the permit. Petitioner also suggests that this

general condition should be deleted from the permit altogether since it adds nothing to the permit.

EPA disagrees with Petitioner that all types of plans must be part of a title V permit. In certain cases a facility must comply with a plan that is not part of the title V permit. For instance, risk management plans under 112(r) are not required to be incorporated into a title V permit. Thus DEC's general condition is useful to the title V permit since it also serves to remind the source and the public of those plans that are not part of the title V permit. The general condition can serve as a reminder to the permittee to comply with and apply for requisite permit amendments on a timely basis. Therefore, this facility-level condition does serve a purpose.

However, EPA does agree that certain documents should be properly cross-referenced in title V permits. For example, where a facility is subject to plans such as a NO_x RACT plan or a start-up, shutdown and malfunction plan under a maximum achievable control technology (MACT) standard, the permit must specifically say so, and properly incorporate that plan by reference. In this case, the Petitioner did not allege any specific plans that should have been, but were not included in the permit as an applicable requirement. Because the Petitioner does not allege any specific plans that should have been, but were not, included in the permit as an applicable requirement, EPA denies the petition on this issue.

5. Condition 14 (Risk Management Plans)

The Petitioner alleges that the general permit condition, Condition 14, Item 14.2, which states "[r]isk management plans must be submitted to the Administrator if required by Section 112(r)" should state whether the facility is or is not subject to 112(r). Petition at page 20.

While EPA agrees with Petitioner that this provision is very general and does not provide information regarding the applicability of § 112(r) to this particular source, we do not believe that the absence of such a determination provides a basis for EPA to object to this particular permit. Elmhurst Hospital did not submit a Risk Management Plan (RMP) to EPA under § 112(r) of the Act and 40 CFR part 68,[21] because, based on the information provided in Elmhurst Hospital's application, Elmhurst Hospital is not subject to these statutory and regulatory requirements. The amount of ethylene oxide listed on the application is less than the threshold quantity listed under Table 1 of 40 CFR part 68, subpart F; therefore, the risk management plan was not needed. Not providing information on the applicability of §112 (r) and part 68 to the facility is harmless error in this case. EPA does not find this to be a basis for objection. Therefore, EPA denies the petition on this point.

[21] All Risk Management Plans are filed with EPA and EPA can verify the submission of an RMP by contacting the RMP Reporting Center at (703) 816-4434.

Furthermore, DEC did not take delegation of § 112(r); therefore, EPA is responsible for implementing such requirements in New York. Because all applicable requirements must be included in title V permits, during the early stages of implementation of New York's title V program, EPA asked DEC to include a general requirement regarding § 112(r) in all permits (based on language prepared by EPA). New York has included such general language on § 112(r) in all title V permits as requested by the EPA. Although we agree with Petitioner that this condition is not optimal, as discussed above, the circumstances of this case do not warrant objecting to the permit on this issue. Therefore, EPA denies the petition on this point.

6. Condition 27 (Required Emissions Tests)

Petitioner alleges that Condition 27 of Elmhurst Hospital's permit which cites the requirements under 6 NYCRR § 202-1.1 is incomplete. It does not reflect the provisions of 6 NYCRR § 202-1.1 in its entirety. The clause requiring the permittee to bear the cost of measurement and preparing emissions reports is omitted. Petition at page 20. Petitioner cites EPA's White Paper Number 2 titled, "Improved Implementation of the Part 70 Operating Permits Program" ("White Paper 2") which states that "it is generally not acceptable to use a combination of referencing certain provisions of an applicable requirement while paraphrasing other provisions of that same applicable requirement. Such a practice, particularly if coupled with a permit shield, could create dual requirements and potential confusion." White Paper 2, section II.E.

EPA disagrees with Petitioner that the omitted clause from 6 NYCRR § 202-1.1 needs to be added to Condition 27. The permit unambiguously states that 6 NYCRR § 202-1.1 is an applicable requirement. In addition, 6 NYCRR 202-1.1 places the burden of conducting and reporting any required emissions testing on the permittee. EPA does not find the omitted clause to have resulted in a defect in Elmhurst Hospital's permit since omitting who shall bear the cost of conducting and reporting mandatory emissions tests does not relieve the permittee from the requirement to perform and report such tests. Furthermore, EPA does not believe a reasonable interpretation of the permit would lead a reader to conclude anyone other than the permittee should bear the costs of measuring and testing emissions. Section II.E.3 of White Paper 2 addresses incorporation by reference in applications and permits, and emphasizes the importance of maintaining clarity with respect to applicability and compliance obligations. EPA finds both elements to have been addressed in Condition 27. For this reason, EPA finds it unnecessary to change Condition 27 as requested by Petitioner. EPA denies the petition on this issue.

7. Condition 30 (Visible Emissions Limit)

Petitioner alleges that the permit lacks any kind of periodic monitoring to assure compliance with the applicable opacity standards found in the SIP at 6 NYCRR § 211.3. Petition at page 20. Petitioner claims that Condition 30 regarding opacity limitations is inadequate for assuring compliance with the opacity requirements. Petitioner made this same comment on the draft permit. DEC counters that this condition is in the SIP and applies to all sources and

generally to the entire facility. DEC asserts the monitoring requirements in Condition 30 would be more obvious to the reviewer if it were separated into two permit conditions. However, Petitioner is not satisfied with DEC's response. Despite DEC's effort to repeat the requirements of Condition 30 in the "Emission Unit Level" section of the permit in two separate conditions (Conditions 40 and 41) as it had stated in the response to comments, Petitioner still finds the permit to lack adequate periodic monitoring that assures compliance with the opacity standards. Petitioner asserts that the permit does not say what kind of monitoring is to be performed, how often it should be performed, and what kind of reporting requirement is appropriate.

EPA disagrees with the Petitioner that the Elmhurst Hospital permit lacks sufficient periodic monitoring for opacity. Condition 30 is a requirement that applies to the facility as a whole (a "facility-wide" requirement); it is meant to be a generally applicable requirement for all source types. As long as other conditions in the permit contain adequate monitoring provisions for opacity, EPA finds it acceptable to leave Condition 30 unchanged. Because different emissions units can create opacity through different processes (combustion, material storage, etc.) and reach the atmosphere in different ways (stacked, fugitive), permittees may not know how to comply with a facility-wide monitoring condition. Indeed, an operator may be unable to conduct the same kind of monitoring at each opacity-emitting emissions unit at a facility. Therefore, it is more appropriate to include monitoring requirements in the Emission Unit Level section of the permit to meet opacity requirements as DEC did in the Elmhurst Hospital permit in Condition 43 which requires Elmhurst Hospital to conduct daily visible emission observations while the boilers are burning fuel oil. The condition also requires the facility to follow a process if visible emissions other than steam are observed for two consecutive days firing oil. Therefore, EPA denies the petition on this issue.

It should be noted that the opacity provisions of both 6 NYCRR § 211.3 and 6 NYCRR § 227-1.3 apply to Elmhurst Hospital. Therefore, when DEC revises the permit as ordered by the Administrator under Section F, Condition 43 should be revised to also cite the opacity standards of 6 NYCRR § 211.3. As currently written, Condition 43 monitors compliance with the opacity standards of 6 NYCRR § 227-1.3 only. Based on EPA's review, the monitoring provisions of Condition 43 are adequate in assuring compliance with the opacity limits of 6 NYCRR § 211.3. In addition, EPA notes that Condition 45 is derived from 6 NYCRR § 227-1.3. The daily Method 9 requirements of Condition 45, as discussed below, apply to Elmhurst Hospital in addition to the requirements of Condition 43.

8. Condition 32 (Sulfur Limitation)

Petitioner asserts that (1) the explanation of why supplier certifications are sufficient to demonstrate compliance with the sulfur-in-fuel limit should be in the statement of basis and (2) the permit should be amended to require the facility to conduct its own regular, periodic sampling and testing of fuel deliveries to assure compliance with the sulfur-in-fuel requirement.

EPA disagrees with Petitioner that the statement of basis needs to discuss why the

supplier's certification of the sulfur-in-fuel content for each fuel delivery should be accepted as sufficient to assure compliance with the state limit of 0.3% sulfur by weight which applies to suppliers, purchasers, and users. A number of regulations rely on certifications, a responsibility that sources and suppliers must take seriously to avoid liability for substantial penalties. EPA itself relies on fuel certification as the method for determining compliance in certain instances (e.g., certain NSPS rules and PSD permit provisions). Petitioner has presented no facts to suggest, let alone demonstrate, that the supplier's certification is not adequate to assure Elmhurst's own compliance with the fuel sulfur limitation. Given that the rule is explicit in requiring submittal of sulfur-in-fuel certifications from suppliers in demonstrating compliance with the sulfur content limit for the supplier as well as the purchaser, EPA finds no need to provide any further explanation of this requirement in the statement of basis. Therefore, EPA denies the petition on this point.

EPA also disagrees with Petitioner that the permit fails to hold Elmhurst Hospital responsible for violations of the sulfur-in-fuel limit unless the supplier discloses that the sulfur content is above the allowed limit. EPA also finds Petitioner's assertion that Elmhurst Hospital be required to perform its own sampling to be without basis. Condition 32 prohibits any person from selling or offering for sale, purchase, or use any residual fuel oil that contains more than 0.3% sulfur by weight. The sulfur-in-fuel limit applies not only to the suppliers but the purchasers as well as the users of residual fuel oil. As a purchaser and user of residual fuel oil, Elmhurst Hospital is required to comply with the 0.3% sulfur-in-fuel limit specified in Condition 32. Therefore, Petitioner's allegation that Elmhurst Hospital is not liable to comply with the 0.3% sulfur limit is without merit. Further, EPA disagrees with Petitioner that Elmhurst Hospital should be required to repeat the same sulfur-in-fuel analysis its supplier already performed for the sole purpose of retaining another set of records of the sulfur content of the fuel delivered by its supplier. The sulfur limit in 6 NYCRR § 225 applies equally to the seller, purchaser and user, all parties are responsible to demonstrate compliance in their own operations. A certification from the seller of its delivery of a compliant fuel oil to Elmhurst Hospital does not abrogate Elmhurst Hospital's responsibility to ensure that it burns a compliant fuel oil in its boilers. EPA finds Petitioner's concerns to be without merit and denies the petition on this issue.

9. Conditions 43 and 45 (Opacity Requirements)

Petitioner alleges that Conditions 43 and 45 are inadequate in assuring compliance with the opacity requirements of 6 NYCRR § 227-1.3. Petitioner asserts that the periodic monitoring imposed under Condition 43 is inadequate in assuring compliance with the opacity limits because it potentially could allow visible emissions to occur for four days before a Method 9 test is conducted. Petitioner questions why Elmhurst Hospital is not required to perform continuous monitoring for opacity.

EPA disagrees with Petitioner that a Method 9 test may not be conducted until the fourth day of observation of visible emissions. Condition 45, which is a more stringent requirement than Condition 43, requires Elmhurst Hospital to conduct a Method 9 on a daily basis to assure

compliance with the opacity limits stipulated in 6 NYCRR § 227-1.3. Method 9 is the EPA reference test method for determining opacity from stacks. Petitioner's claims are without merit; therefore EPA denies the petition on this point.

With regard to the absence of a requirement to demonstrate compliance by using a continuous opacity monitor, the SIP rule at 6 NYCRR § 227-1.3(b) provides the subject facility three options from which it may choose to comply with the opacity limits stipulated in 6 NYCRR § 227-1.3(a). These options include a Method 9 test, continuous opacity monitoring, or credible evidence. A continuous opacity monitor would have been required under the rule if the sum of the maximum heat input capacity of all four boilers at Elmhurst Hospital exceeded 250 million Btu per hour (MMBtu/hr). In the case of Elmhurst Hospital, the sum of the maximum heat input capacity of all four boilers is 101.6 MMBtu/hr; therefore, no continuous opacity monitor is required by the SIP rule. Moreover, as explained above, the monitoring required under the permit is adequate in this case to assure compliance, and Petitioner has not demonstrated otherwise.

Petitioner also submitted detailed comments on how the periodic monitoring should be conducted under Condition 43. Although the daily Method 9 test as required under Condition 45 fully addresses Petitioner's concerns, EPA will entertain each comment submitted on Condition 43 in the order in which it was presented in the petition:

i) Petitioner asserts that the permit must require that the observer check for visible emissions at a specific time each day. This comment is already addressed in Condition 43. It requires observations to take place when the boiler is firing fuel oil during daylight hours except during adverse weather conditions. In addition, EPA does not agree with Petitioner that the facility observer should make his or her observations at the same time each day. Such a constraint would not provide flexibility needed to take into account weather conditions or the operational status of the facility (i.e., whether the facility was operating in whole or in part).

ii) Petitioner asserts that the observer needs to be educated on the general procedures for determining the presence of visible emissions, and be trained and knowledgeable regarding the effects on the visibility of emissions caused by background contrast, the position of the sun and amount of ambient lighting, observer position relative to source and sun, and the presence of uncombined water. EPA found the note under Condition 43 to have provided sufficient information to aid the observer in recognizing the presence of a steam plume. EPA agrees that background contrast and the lighting associated with the position of the sun, etc., may affect the plume opacity observed; as such, an observer performing any opacity readings must first be certified in accordance with the procedures of 40 CFR Part 60, Method 9. Such certification, however, is not required of an observer who is only trying to determine the presence of visible emissions. A certified observer will be called to perform the Method 9 test when visible emissions are observed for two consecutive days.

iii) Petitioner claims that each stack or emission point should be observed for a

minimum cumulative duration of 15 seconds during the survey. The Petitioner also states that the permit should also require any visible emission other than uncombined water be recorded as a positive reading associated with the emission point or stack. This comment is without merit. Since each stack or emission point must be observed for a sufficient amount of time in order for the observer to determine whether steam or visible emissions are observed as instructed in the note of Condition 43, it is not necessary to stipulate a minimum observation time in the permit. As written, any visible emissions observed within any amount of time (e.g., less than 15 seconds) would be required to be recorded as having visible emissions observed for that day. Condition 43 already requires all visible emission observations to be recorded in a bound logbook or other format acceptable to DEC.

iv) Petitioner argues that Method 9 testing should be initiated within 1 hour after the requirement for it is triggered, performed by a currently certified personnel, performed when the boilers are operating, and performed in 3 attempts within 24 hours of improved weather conditions if inclement weather conditions prevented the test. Petitioner also opined that the Method 9 testing should be conducted within one hour of resuming operation after a shut down and a record of all attempts to conduct Method 9 testing should be maintained in a permanently bound log book. This comment is also without merit given that 40 CFR Part 60, Appendix A which applies in this instance already provides detailed information with regard to the timing, procedure and qualification of the observer conducting the Method 9 test.

v) Petitioner asserts that a record must be kept of the daily observation, of all Method 9 measurements including date and time of test, and of any remedial measures taken resolve opacity problems. This comment is unnecessary since these are already required either by Condition 43 or Method 9.

vi) Petitioner requires that prompt reporting of exceedances must be defined as one business day by telephone and followed with a written report which must be submitted to DEC once every six months. This comment is also unnecessary since these are already required under Condition 43.

10. Condition 45 (Credible Evidence)

Petitioner alleges that Condition 45 contains "credible evidence-buster" language which is illegal and is inconsistent with 6 NYCRR § 227-1.3(b) which provides that compliance may be determined by considering credible evidence. This allegation is based on the language in Condition 45 which states that compliance will be "based upon the six minute average in reference test method 9 in Appendix A of 40 CFR 60." Petition at page 24. The Petitioner alleges that this language precludes the use of other credible evidence to demonstrate compliance.

EPA disagrees with Petitioner that the language in Condition 45 is "credible evidence-buster language." Nothing in the permit limits EPA, DEC or citizens from using any credible

evidence to bring an enforcement action on opacity violations. The permit accurately recites that Method 9 is the official "reference test" method provided in the SIP opacity limit for the purpose of determining compliance. As EPA explained in adopting its credible evidence rules, this means that reference tests, such as the Method 9 test in this case, performed as specified under EPA and State regulations are the benchmark against which to compare other emissions or parametric data, or engineering analyses, regarding source compliance. *See* 62 Fed. Reg. 8314 (Feb. 24, 1997).The permit does not, however, say that Method 9 is the sole or exclusive method used in demonstrating compliance or non-compliance. Rather, the permit condition states that "Compliance Certification shall include the following monitoring" and thus, does not preclude the use of any other method for determining compliance. Therefore, EPA denies the petition regarding the alleged use of credible evidence limiting language.

11. Condition 48 (Particulate Emission Limit)

Petitioner alleges that DEC omitted the federally approved SIP limit of 0.1 pound per million BTU (lb/MMBtu) for particulate matter of 6 NYCRR § 227.2(b)(1), from the permit. Instead, the less stringent state rule limit of 0.2 lb/MMBtu at 6 NYCRR § 227-1.2(a)(2) was included under Condition 48. Petitioner claims that since the 1972 SIP-approved limit has not been removed from the SIP, it must be included in the Part 70 permit as an applicable federal requirement. Petitioner had commented to DEC on the lack of a federally enforceable particulate matter limit in Elmhurst Hospital's draft permit. Petitioner also asserts that Elmhurst Hospital's permit must include monitoring, recordkeeping, and reporting that is sufficient to assure compliance with the particulate matter limit of 0.1 lb/MMBtu. Petitioner contends that EPA must object to the permit if it does not contain sufficient monitoring, recordkeeping, and reporting requirements.

EPA agrees with Petitioner that the federally approved SIP limit at 6 NYCRR § 227.2(b)(1) is the applicable particulate matter limit that must be included in Elmhurst hospital. The particulate limit of 6 NYCRR § 227-1.2(a)(2) is a state limit that may only appear on the state side of the Part 70 permit. The final effective permit issued to Elmhurst Hospital on January 8, 2001, included the particulate matter limit of 6 NYCRR § 227.2(b)(1) as a federally enforceable limit as Condition 1-3. Since Petitioner's concern has already been resolved, EPA denies the petition on the issue of the lack of a federally-enforceable particulate matter limit.

With regard to the monitoring, recordkeeping, and reporting requirements to assure compliance with the particulate limit, EPA disagrees with Petitioner that the permit is deficient in this respect. Condition 1-3 requires a stack test once per term of the permit and reporting of the stack test results "as required" by DEC. Condition 1-3 does not specify the number of boilers operating when the stack test is conducted. One could interpret the condition to require one stack test on all four boilers operating simultaneously every five years, one stack test on each boiler conducted any time during the term of the permit, or one stack test performed once per permit term with each boiler operating independently during the test. EPA finds such vague language could lead to ambiguity in the enforcement of the particulate matter standard. Therefore, when DEC revises the Elmhurst Hospital permit as ordered by the Administrator under Section F, DEC

must revise Condition 1-3 to clarify that a stack test is required per permit term, which is adequate for these small boilers, with each of the four boilers running separately when the test is conducted. Separate operation of each boiler during stack testing is needed to determine the compliance status of each boiler. Although EPA suggests clarification to Condition 1-3 on how the boilers should be operated during the stack test, such clarification does not rise to the level of an objection. Therefore, EPA denies the petition on the issue of insufficient monitoring, recordkeeping, and reporting for assuring compliance with the particulate matter limit.

III. CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I grant in part and object in part the title V permit issued to Elmhurst Hospital.

12/16/02
Dated:

Christine Todd Whitman
Administrator