BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF MARCAL PAPER MILLS, INC. Permit Activity No.: BOP990001 Program Interest No.: 02102 Issued by the New Jersey Department of Environmental Protection	)	ORDER RESPONDING TO PETITIONERS' REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition No.: II-2006-01

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

On March 1, 2006, the Environmental Protection Agency ("EPA") received a petition from the Rutgers Environmental Law Clinic ("RELC") on behalf of Elmwood Park Environmental Committee, Sierra Club – New Jersey Chapter, GreenFaith, and Laura Tracey Coll (collectively, the Petitioners), 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"), CAA " 501-507, 42 U.S.C. " 7661-7661f, to the Marcal Paper Mills, Inc., located in Elmwood Park, New Jersey.[1]

The Marcal permit was issued by the New Jersey Department of Environmental Protection ("DEP" or "NJDEP") on December 30, 2005, pursuant to title V of the Act, the federal implementing regulations at 40 C.F.R. part 70, and the New Jersey State implementing regulations at N.J.A.C. 7:27-22.

Marcal Paper Mills, Inc., located at 1 Market Street in Elmwood Park, New Jersey, is a facility that processes recycled paper waste (primarily magazines and junk mail) and uses it to produce toilet paper, napkins, and paper towels. Marcal Paper Mills, Inc. is owned by Nicholas Marcalus and is operated by Marcal Paper Mills, Inc.

The facility is classified as a major facility based on its potential to emit 66.5 tons per year of volatile organic compounds (VOC), 246 tons per year of nitrogen oxides (NOx), 196 tons per year of carbon monoxide, and 131 tons per year of sulfur dioxide to the atmosphere.

[1] The deadline for filing a petition with EPA to object to the Marcal permit was March 1, 2006. Therefore, EPA considers this petition to be timely.

The equipment that emits air contaminants from this facility includes four paper machines, two with combustion units firing natural gas and/or No. 2 fuel oil; manufacturing equipment used to process paper slush feedstock, pulp, fibers, and by-products; and converting lines used to process dry paper into finished products (toilet paper, paper towels, and napkins). The facility also has two medium sized boilers used for heating that are permitted to operate on natural gas and/or fuel oil.

Petitioners request that EPA object to the Marcal permit on the following grounds: 1) the permit is not accompanied by a statement of basis that is understandable, available to the public and describes the past history of the facility and permitting decisions by DEP; 2) the permit fails to include a compliance schedule containing the terms of the settlement agreement between Marcal and DEP dated June 20, 2005 (the "Stipulation") that are required to satisfy pending violations; 3) the permit fails to impose sufficient opacity monitoring, such as continuous opacity monitoring (COM), to assure compliance with particulate matter limits; 4) the permit fails to require continuous emissions monitoring (CEM) or more frequent stack testing to monitor VOC and NOx; 5) the DEP did not adequately address the environmental justice issue raised by Petitioners as is required by state and federal environmental justice executive orders; and 6) the DEP did not adequately address issues raised by Petitioners during the public hearing. The Petitioners have requested that EPA object to the issuance of the Marcal permit, pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), for any or all of the above reasons.

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

Based on a review of all the information before me, including the revised title V permit application dated October 14, 2004, the Facility Fact Sheet dated December 17, 2004, the draft permit dated June 2, 2005, the Hearing Report and Response to Comments dated November 14, 2005, the final operating permit dated December 30, 2005, and the petition, including Exhibits A through F, dated March 1, 2006, I deny in part and grant in part this petition for the reasons set forth in this Order.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1), 42 U.S.C. § 7661d(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 of the CAA. EPA granted interim approval, effective June 17, 1996, to the title V operating permit program submitted by the State of New Jersey. 61 *Fed. Reg.* 24715 (May 16, 1996); 40 C.F.R. part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to New Jersey's title V operating permit program. 66 *Fed. Reg.* 63168 (Dec. 5, 2001). 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), 42 U.S.C. §§ 7661a(a) and 7661c(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. *See* 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 them. Thus, the title V operating permit 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 CAA § 505(a), 42 U.S.C. § 7661d(a), and 40 C.F.R. § 70.8(a), states are required to submit all proposed title V operating permits to EPA for review. Section 505(b)(1) of the Act, 42 U.S.C. § 7661d(b)(1), authorizes EPA to object if a title V permit does not contain provisions that assure compliance with all applicable requirements, including the requirements of the applicable State Implementation Plan (SIP). *See also* 40 C.F.R. § 70.8(c)(1).

Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), states that if the EPA does not object to a permit, any member of the public may petition the EPA to take such action, and the petition shall be based on objections that were raised during the public comment period unless it was impracticable to do so. *See also* § 70.8(d). In determining whether the Petitioners have properly raised an issue in a petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), EPA first evaluates whether the petition was based on comments that were raised with reasonable specificity by any parties during the public comment period. Next, EPA evaluates whether the grounds for an objection arose after the close of the public comment period. If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 C.F.R. §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

ISSUES RAISED BY THE PETITIONERS

I. Statement of Basis

Petitioners allege that the Marcal draft permit was not accompanied by a statement of basis that is understandable, available to the public, and describes the past history of this facility and the permitting decisions made by DEP. Petitioners assert that the lack of an adequate statement of basis is a violation of the title V regulations and forms the basis for an EPA objection. Petition at pages 4-5.

Petitioners assert that the statement of basis should highlight Marcal's past violations and describe the corrective actions taken by the facility in conjunction with the latest Stipulation of Settlement to bring the facility into compliance. Petition at page 5. *See* Exhibit D to the Petition, Stipulation of Settlement, signed by NJDEP on June 20, 2005 ("Stipulation"). Petitioners argue that the statement of basis should also explain the DEP's classification of

violations addressed by the Stipulation as "pending." Further, Petitioners assert that the permit should explain the integration of several recently issued preconstruction permits into the Title V permit, including whether equipment covered by such preconstruction permits has affected the facility's overall emissions.

EPA's title V regulations state, "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." 40 C.F.R. § 70.7(a)(5). Commonly referred to as a "statement of basis," this provision is not part of the permit itself, but rather a separate document which is to be sent to EPA and to interested parties upon request.

A statement of basis establishes the legal and factual basis for the draft permit conditions or exemptions. It is not a short form of the permit; it should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from a straight recitation of the applicable requirements. The statement of basis should highlight items such as the permit shield, streamlined conditions, and any monitoring that is required under 40 C.F.R.§ 70.6(a)(3)(i)(B). Thus, its primary purpose is to include a discussion of the decision-making that went into the development of the title V permit. It ought to provide the permitting authority, the public, and EPA a record of the applicability and technical issues surrounding the issuance of the permit. *See, e.g., In Re Port Hudson Operations, Georgia Pacific*, Petition No. 6-03-01, at pages 37-40 (May 9, 2003) ("*Georgia Pacific*"); *In Re Fort James Camas Mill*, Petition No. X-1999-1, at page 8 (December 22, 2000) ("*Ft. James*").

The Petitioners requested an explanation of the DEP's classification of violations as "pending" and a description of corrective actions taken by the facility in conjunction with the Stipulation. During the public comment period, Petitioners asserted that a compliance schedule should be included in the permit because information on a New Jersey DEP website suggested that Marcal was in violation of several state and federal requirements.

In its response to this comment, DEP explained that, before the draft permit was issued, the Bureau of Operating Permits consulted with the DEP Regional Enforcement Office and was advised that "there were no continuing instances of non-compliance at the time of permit issuance which would need to be addressed in the operating permit. Although settlements of some of the violations are still pending at this time, the actual instances of non-compliance have been corrected. This is why no compliance schedule has been included in the permit." *See* Response to Comment #17 of the Hearing Report.

DEP's response does not explain the apparent inconsistency between the statement that "violations are still pending" and the statement that "instances of noncompliance have been corrected." In addition, DEP did not explain why the violations were still classified on its website as "pending" after the Stipulation was signed and the facility was operating in compliance. Petitioners allege that even after the final permit was issued on December 30, 2005, the DEP continued to characterize the status of violations as pending. It was not until the Petitioners inquired via e-mail on January 17, 2006 that DEP provided further explanation concerning this apparent discrepancy. In its response to Petitioners' e-mail inquiry, DEP

indicated that "on all recent compliance checks of Marcal, including a site inspection on January 25, 2006, it appears the facility was operating in compliance with all of the Department's air pollution rules and permits, and therefore, the pending status for the violations is only for the settlement of the outstanding penalties." Petition Exhibit F, e-mail response from John Walsh, DEP to Karen Hughes, dated January 25, 2006. Until the January 25th e-mail response, which is not in the permit record and occurred after the permit was issued, publicly available information concerning the compliance status of the facility is unclear as is the DEP's rationale for not including a compliance schedule despite its characterization of violations as "pending."

The permit record should explain why the characterization of violations as "pending" does not trigger the need for a compliance schedule. EPA generally does not require the statement of basis to include a discussion on compliance history. *See e.g., In re Seminole Road Municipal Solid Waste Landfill*, Petition Number IV-2001-03, (June 5, 2002), at page 10. Here, under the circumstances surrounding issuance of the Marcal permit, the public made repeated and specific inquiries concerning the DEP's characterization of violations as pending, asking why a compliance schedule was not warranted. Under these circumstances, therefore, EPA agrees with the Petitioners that the statement of basis is deficient in establishing the legal and factual basis for the Marcal permit. See 40 C.F.R. § 70.7(a)(5). The statement of basis should be amended to explain why no compliance schedule is required despite the characterization of violations as pending. Therefore, EPA grants the petition on this issue.

Petitioners also argue that the statement of basis should discuss how several preconstruction permits issued before the draft title V permit were integrated into the title V permit. The Petitioners suggest that the statement of basis identify equipment and operations covered by the preconstruction permits and discuss to what degree they have added to the facility's overall emissions.

In the case of Marcal, the preconstruction permits were issued prior to the draft title V permit and subsequently all of Marcal's preconstruction permit conditions were incorporated into the draft title V permit for public review pursuant to 40 C.F.R. § 70.6(a)(1). Hearing Report, Response to Comment #1. As a general matter, in such a case, there is no need for DEP to provide a discussion of the conditions that derived from these existing preconstruction permits in the statement of basis if they were not changed during the title V process. With regard to this aspect of its argument, Petitioners have not demonstrated that the statement of basis is inadequate or that it fails to provide the legal and factual basis for the permit. Therefore, EPA denies the petition on this issue.

II. Compliance Schedule

Petitioners claim that the Marcal permit failed to include a compliance schedule addressing payment of penalties required under a DEP Stipulation of Settlement dated June 20, 2005. Petitioners provided as Exhibit D, the Stipulation of Settlement dated June 20, 2005, that Marcal entered into with DEP to settle the violations, and Exhibit E, a list of the violations that were made available on DEP's website on October 23, 2005. The Stipulation provides Marcal 18 months to pay the penalties and provides that upon timely satisfaction of the Stipulation,

Marcal may request a compliance determination from DEP confirming that it is in compliance with all administrative orders. The 18-month period ends on November 1, 2006, 10 months after permit issuance. Petitioners assert that the provisions of the Stipulation must be made part of the Marcal permit in a compliance schedule, consistent with 40 C.F.R. § 70.5(c)(8)(iii)(C). Petitioners assert, "the facility will not be in compliance until it makes all payments under the Stipulation." Petition at pages 6-9.

The Part 70 regulations at 40 C.F.R. §§ 70.5(c)(8)(iii)(C) and 70.6(c)(3) require that if a facility is in violation of an applicable requirement and will not be in compliance at the time of permit issuance, its permit must include a schedule of compliance that meets certain criteria. Specifically, the permit must include "a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in non-compliance at the time of permit issuance." 40 C.F.R. § 70.5(c)(8)(iii)(C). In the case of Marcal, the violations identified in Exhibit E of the petition were for not having obtained the necessary preconstruction permit prior to installation of equipment or for use of raw materials not specifically permitted. These types of violations are remedied by the filing of an application for a preconstruction permit or a modification thereof to allow such activities, and according to DEP, Marcal has done so. *See* Facility Fact Sheet at pages 7-10. Nonetheless, the Petitioners argue that "the Facility will not be in compliance until it makes *all* payments under the Stipulation." Petition at page 6.

EPA does not interpret the relevant provisions of part 70 discussed above to require a schedule of compliance when a facility is in compliance with all applicable requirements, but has not yet made all penalty payments for past violations. As discussed above, under the terms of the Stipulation, Marcal has until November 1, 2006 to complete payment of its penalty. In addition, DEP has determined that the facility is in compliance with all applicable requirements and thus a schedule of compliance is not required. Hearing Report, Response to Comments #17. Absent a showing to the contrary, EPA finds no grounds for an objection based on the lack of a schedule of compliance.

Petitioners also complain that the Stipulation is flawed because it does not include "measures to ensure the Facility's future compliance with the CAA." Petition at page 8. Petitioners argue that the lack of an adequate compliance schedule that ensures Marcal's future compliance with the CAA constitutes grounds for EPA to object to the permit. Petitioners have not identified any part 70 requirement that requires such measures in the Stipulation. The criteria for EPA to object to a permit are specified in 40 C.F.R. § 70.8(c)(1): "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part." Petitioners have not demonstrated that the permit is not in compliance with applicable requirements or requirements of part 70. EPA finds no grounds for an objection based on alleged deficiencies in the Stipulation with respect to deterrence of future violations. The petition is denied on this point.

Finally, Petitioners also claim violations relating to HAP emissions from the kaofin dryers were omitted from the Stipulation. Petition at page 6. EPA finds no merit in Petitioners' claim that violations relating to HAP emissions from the kaofin dryers were not covered by the Stipulation and have not been remedied. As explained in the Hearing Report, the kaofin dryers

were shut down on January 19, 2004 and their preconstruction permit was withdrawn by DEP prior to the submittal of the updated title V permit application. Therefore, any noncompliance did not continue beyond shut down of the dryers. Since the kaofin dryers were not required to be included in the application, they need not be addressed in the permit. *See* Hearing Report, Response to Comments #11 and #20; Facility Fact Sheet at page 1.

III. Inadequate Opacity Monitoring

Petitioners allege the Marcal permit does not meet the requirements of 40 C.F.R. § 70.6(a)(3)(i)(B) which provides, "Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." Petition at page 10. Petitioners argue that, given Marcal's compliance history, and in order to ensure that opacity readings are accurately and objectively determined, demonstration of opacity compliance should be measured using COM rather than by visual evaluation conducted by the facility. Petitioners assert that inaccurate opacity monitoring would allow particulate matter to "continue to adversely impact the residents of the neighborhood." Petition at page 11. Petitioners also raise specific issues regarding insufficient opacity monitoring for emission units IS 24, U5, and U 9, and Boilers 12 and 13. Petition at pages 9-11. Each of these issues is addressed below.

Periodic monitoring is essential in assuring compliance with applicable requirements. In order to determine the appropriate level of periodic monitoring, factors such as type of emission unit, type of fuel, history of emission exceedances, and other monitoring/recordkeeping requirements are generally considered. 40 C.F.R. § 70.6(a)(3)(i)(B) provides, "Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section." Periodic monitoring must be evaluated on a case-by-case basis and may be accomplished in a variety of ways including testing, calculations, or recordkeeping.

a. Emission Unit IS 24

Emission unit IS 24 is a fire pump that is used only during emergency situations. The permit conditions that apply to IS 24 can be found on page 10 of the permit. Ref. 1 of page 10 limits the opacity to no more than 20%, as required by the SIP at N.J.A.C. 7:27-3. The permit does not specify the monitoring that is required to demonstrate compliance with this standard. Petitioners find it unacceptable that the permit imposes no monitoring on emission unit IS 24 to assure compliance with the 20% opacity standard. Therefore, Petitioners ask EPA to object to the Marcal permit "and remand it to DEP with instructions that DEP include a requirement that calls for Marcal to install COM at the Facility." Petition at page 11.

Based on EPA's review, the emergency use nature of the fire pump makes it an inappropriate source on which to impose monitoring of a continuous nature. In addition, because the emergency fire pump has a heat input of less than 1 MMBtu/hr, burns a clean fuel such as low sulfur No. 2 fuel oil, and because compliance with the opacity standard is not dependant on

proper operation and maintenance of a control device, no monitoring requirements for opacity from this unit are necessary in order to provide a reasonable assurance of compliance. See *In the Matter of Kerr McGee Chemical LLC*, Petition No. IV-2000-1 (Feb. 1, 2002) page 7. The annual compliance certification to be submitted by Marcal will include the compliance status of the fire pump with applicable requirements. This is acceptable for monitoring the compliance status of this emergency equipment. EPA finds no grounds for an objection to the permit based on the issues presented. Therefore, the petition is denied with respect to this claim.

b. Emission Units U5 and U9

Emission unit U5 is a paper machine and emission unit U9 includes process equipment in the Fiber Division. The permit conditions for U5 and U9 are listed on pages 78-81 and pages 84-91, respectively.

Petitioners assert that the periodic opacity monitoring for Emission Units U5 and U9 is inadequate. The required monitoring is a monthly visual determination of opacity during operation to demonstrate compliance with the SIP opacity limit of 20%. Petitioners find such monitoring too vague because it fails to specify the number of visual observations required. Petitioners request that DEP establish monitoring that is more specific with regard to frequency and duration.

Based on EPA's review, the permit does address Petitioners' concerns. The frequency of the visual evaluation for U5 and U9 is specified as monthly when the equipment is operating and the duration of the monitoring is 30 minutes. *See* Permit at page 78 (U5, OS Summary, Ref.2) and page 86 (U9, OS Summary, Ref.11). If visual inspection finds any visible emissions other than condensed water vapor, Marcal is required to check the equipment and control device for proper operation. Any problem discovered must be corrected by taking all necessary actions. If the opacity problem is not corrected within 24 hours, Marcal is required to have a certified opacity reader perform the visual reading until the problem is corrected. Permit at page 78 (U5, OS Summary, Ref.2) and page 86 (U9, OS Summary, Ref.11). EPA agrees that the permit requirements for steps to be taken following the detection of visible emissions are adequate for U5 and U9. It should be noted that both U5 and U9 are involved in wet material handling processes where the particulate matters are not airborne. This further supports the finding that a monthly visual determination of opacity during unit operation is sufficient. Petitioners' request for COM for U5 and U9 is without basis. EPA denies the petition on this point.

c. Boilers 12 and 13

Petitioners allege that periodic opacity monitoring for Boilers 12 and 13 is inadequate. The Marcal permit lists requirements that are applicable to Boilers 12 and 13 on pages 17-33 of the permit. Petitioners find problematic the monitoring provisions to assure compliance with conditions requiring "no visible emissions except for a period not longer than 3 minutes in any consecutive 30-minute period," as required by N.J.A.C. 7:27-3.2(a) and 3.2(c). This "no visible emission" requirement is found in the Marcal permit at U1, Ref. 1, on pages 24, 26, 29, and 31. The monitoring provisions in question require daily visual determination, with no requirement for a certified opacity reader, when either boiler is burning fuel oil.

Petitioners take issue with the daily visual opacity determination. Petitioners allege that daytime opacity readings are not reliable indicator of compliance at this facility. Petitioners note Marcal's compliance history and express concerns that daily opacity monitoring by visual inspection will not be accurately determined by Marcal. Petitioners conclude that COM must be required. Petition at pages 10-11.

Boilers 12 and 13 are medium sized boilers with a heat input of 114 MMBtu/hr and 147 MMBtu/hr, respectively. Both burn natural gas as the primary fuel and are allowed to operate on No. 2 distillate fuel oil no more than 500 hours in a year. Petitioners' request for COM to monitor opacity from the boilers is without merit. COM is more widely used in coal-fired applications or where higher sulfur fuel oil is burned and where control equipment such as fabric filters (baghouses) or electrostatic precipitators are employed. Monitoring less frequently than "continuous" is appropriate under specific circumstances and should be determined on a case-by-case basis. It is unnecessary to monitor opacity when the combustion equipment uses natural gas because natural gas combustion is a clean process. See *In the Matter of Kerr McGee Chemical LLC*, Petition No. IV-2000-1 (Feb. 1, 2002), at page 7 ("no additional monitoring is necessary for particulate matter from the boiler due to the clean burning nature of natural gas."); *In the Matter of Conoco Phillips Company, Petition No. IX-2004-09 (March 15, 2005)*, page 13 ("for gaseous-fueled combustion equipment (except flares), the recommended periodic monitoring for generally applicable opacity standards is 'none when the unit is firing on gaseous fuel."). Therefore, EPA finds daily visual emission determination only when the boilers burn fuel oil to be adequate opacity monitoring in this case.

The Marcal permit not only requires a daily visual determination of opacity, it requires an initial stack test, annual boiler tune up, and additional stack testing every five years. An annual tune up is a necessary maintenance requirement that assures proper boiler operation and a preventive measure that minimizes boiler malfunction. At Boilers 12 and 13, opacity is being monitored as a surrogate for particulate matter emissions. Any visible emissions detected at the boiler stack are an indication of improper boiler operation requiring Marcal to take corrective actions immediately to eliminate the excess emissions and report the violations to DEP. If the problem is not corrected within 24 hours, a Method 9 reading is performed daily by a certified reader until the opacity problem is eliminated by proper corrective actions. *See* Ref.1 on pages 24, 26, 29, and 31 of the permit.

EPA finds the monitoring provisions already in place adequate and appropriate to monitor opacity from Boilers 12 and 13. If, however, the monitoring strategy as discussed above proves to be deficient, then EPA agrees that COM may be an appropriate option. DEP's position on this issue coincides with EPA's as reflected in its response to public comments. "If violations or number of complaints warrant it, the DEP may decide that a continuous opacity monitor would be installed on one or more stacks of the facility." Hearing Report, Response to Comment #14. In conclusion, EPA finds no grounds for an objection on the issue of inadequate opacity monitoring.[2] The petition is denied.

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[2] EPA believes that the lack of an explanation in the statement of basis may have resulted in questions concerning the frequency of monitoring for opacity at these units. Therefore, when NJDEP revises the statement of basis as

IV. Continuous Emissions Monitoring

Petitioners made a general allegation that continuous emissions monitoring (CEM) should be required for the entire facility because the methods for determining VOC emissions are either too infrequent or not sufficiently reliable to be effective. Petitioners further assert that since Bergen County is a non-attainment area for Ozone, its precursors, VOC and NOx emissions, should be accurately monitored by the use of CEM. Petitioners claim that stack testing frequency for the boilers and other equipment is not reliable or timely. The permit requires stack testing to be performed on Boilers 12 and 13 by December 3, 2005, to demonstrate compliance with VOC and NOx emissions limits yet the actual testing took place on January 25, 2006. Results of the stack test performed on January 25, 2006 were not available by March 1, 2006 when the petition was submitted. Petitioners find this unacceptable given that the facility has a history of non-compliance such as installing equipment without the required permits, emitting HAPs, violating reporting and monitoring requirements and failing stack tests. Petitioners want CEM between stack tests. Petition at pages 11-13.

With respect to monitoring, the part 70 regulations at 40 C.F.R. §70.6(a)(3)(i)(B) state, "Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" should be included in the permit. Section 70.6(a)(3)(i)(B) further states, "Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section." Part 70 does not mandate CEM but does require periodic monitoring sufficient to yield reliable data to demonstrate compliance.

In its Response to Comment document, DEP explains the rationale behind imposing various periodic monitoring on different types of sources. *See* Hearing Report, Response to Comment #6. EPA agrees with DEP that the determination of the appropriateness of requiring CEM should be based on the type and size of the emission unit and the type and quantity of emissions involved.

CEM is a preferred type of monitoring because it provides continuous monitoring of stack emissions, resulting in better compliance, but it is not mandatory. Indirect monitoring of surrogate parameters, such as records of solvent usage or control device operational parameters, may be equally effective monitoring tools. In addition, the Act provides, "continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance." CAA 504(b). See also Petition at page 12. Accordingly, unless a CEM is required by the underlying applicable requirement, DEP has discretion to require periodic monitoring other than a CEM, such as stack tests, material usage records, or emissions calculations.

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ordered above, NJDEP may wish to include an explanation to support the monthly monitoring it has determined to be adequate for U5 and U9.

Marcal is required to conduct an initial stack test to establish the proper emission limits for various pollutants including VOC and NOx. Additional stack testing is required once per permit term (every five years) to monitor and assure compliance with each emission limit, including VOC and NOx. Stack testing (with proper procedures and oversight) can be the most accurate method of determining the amount of pollutants being emitted when the equipment is in full operation and the permit includes enforceable operational parameters and limits reflecting test conditions. In addition to stack testing, Marcal is required to conduct an annual tune up on each combustion unit. The purpose of the annual tune up is to maintain these units at their optimal operating conditions, thereby maintaining the emissions of NOx, CO, and particulate matters at the same level as initially determined. Marcal is required to conduct the annual tune up in accordance with N.J.A.C. 7:27-19.16(a) and record each adjustment manually in a log book to be kept for at least 5 years and made available for NJDEP inspection upon request. Further, electronic submission of annual adjustment combustion process reports will be required within 45 days of the adjustment beginning 2009. See N.J.A.C. 7:27-19.16(d). Marcal is also required to certify compliance with terms and conditions contained in the permit annually. Thus compliance with these requirements will be addressed by such certification. Permit, Section F, Item 13; 40 C.F.R. § 70.6(c)(5).

For process units, VOC emissions are monitored by recordkeeping of daily solvent usage and monthly calculations based on solvent usage records and data provided by solvent suppliers. See, for example, Permit at pages 49, 51, 53, 57, 60, and 63 (VOC monitoring requirements). Since NOx emissions are not emitted from the process units, no such calculation is needed to monitor NOx from the manufacturing processes. EPA finds the periodic monitoring for NOx which includes an initial stack test, annual tune up, and once per permit term stack test to be sufficient to assure compliance with the emission limits for NOx. The same is true for VOC, but calculations are added to also monitor emissions from the process units. Based on EPA's review, Petitioners have not demonstrated that, absent the use of CEM, the permit would not assure compliance with the applicable requirements of the Act or requirements of part 70. Therefore, EPA denies the petition on this issue.

V. Environmental Justice - Executive Order 12898

The Petitioners raised the issue of violation of Executive Orders[3] of former New Jersey Governor McGreevy and former President Clinton that protect certain areas from further environmental degradation. Petitioners assert that the area in which Marcal is located is one such area, a low income minority community that has a disproportionately high percentage of asthma. The Petitioners ask EPA to object to the Marcal permit and to require DEP to respond to the environmental justice orders currently in place by imposing stricter conditions in the title V permit to reduce the health and environmental impacts associated with this facility. The Petitioners also allege the permit allows Marcal to more than double its emissions compared to

[3] The following discussion focuses on the federal Executive Order, though the analysis also applies to the state order. *See* CAA § 504(c) (permits must assure compliance with applicable requirements of the Clean Air Act); CAA 505(b)(2) (objection required where Petitioners demonstrate the permit is not in compliance with the requirements of the Clean Air Act); 40 C.F.R. § 70.2 (defining "applicable requirement" to include specified standards or requirements promulgated pursuant to the Clean Air Act).

those of 1995. Petitioners find unacceptable DEP's plan to wait until 2008 to implement regulation of PM 2.5 emissions. Petition at pages 13-15.

Executive Order 12898, signed by President Clinton on February 11, 1994, focuses federal attention on the environmental and human health conditions of minority populations and low-income populations with the goal of achieving environmental protection for all communities. The Executive Order is also intended to promote non-discrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities' access to public information on, and an opportunity for public participation in, matters relating to human health or the environment. It generally directs federal agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental affects of their programs, policies, and activities on minority and low-income populations.

Environmental justice issues can be raised and considered in a variety of actions carried out under the CAA, as for example when EPA or a delegated state issues a NSR permit.[4] Unlike NSR permits, however, title V generally does not impose new, substantive emission control requirements, but rather requires that all underlying applicable requirements be included in the operating permit. Title V also includes important public participation provisions as well as monitoring, compliance certification and reporting obligations intended to assure compliance with the applicable requirements. In this particular case, the Petitioners' environmental justice concerns do not demonstrate that the Marcal title V permit fails to properly identify and comply with the applicable requirements of the CAA. Thus, the petition to object to the permit on this particular issue must be denied.

However, as a recipient of EPA financial assistance, the programs and activities of NJDEP, including its issuance of the Marcal permit, are subject to the requirements of title VI of the Civil Rights Act of 1964, as amended, and EPA's implementing regulations, which prohibit discrimination by recipients of EPA assistance on the basis of race, color, or national origin. 42 U.S.C. 2000d et seq., 40 C.F.R. part 7. The Petitioners may file a complaint under title VI and EPA's title VI regulations if they believe that the state discriminated against them in violation of those laws by issuing the permit to Marcal. The complaint, however, must meet the jurisdictional criteria that are described in EPA's title VI regulations in order for EPA to accept it for investigation.[5] *See In the matter of Camden County Energy Recovery Associates Facility,* Petition No. II-2005-01 dated January 20, 2006.

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[4] Indeed, as indicated in the response to another title V permit petition, section 173(a)(5) of the Act, 42 U.S.C. § 7503(a)(5) requires that a permit for a "major source" subject to the NSR program may be issued only if an analysis of alternative sites concludes that "the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification." *See* Borden Chemical, Inc., title V petition No. 6-01-01 (Dec. 22, 2000), pp. 34-44, available at http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/borden_response1999.pdf.

[5] Under title VI, a recipient of federal financial assistance may not discriminate on the basis of race, color, or national origin. Pursuant to EPA's title VI administrative regulations, EPA's Office of Civil Rights conducts a preliminary review of title VI complaints for acceptance, rejection or referral. 40 C.F.R. § 7.120(d)(1). A complaint should meet jurisdictional requirements as described in EPA's title VI regulations. First, it must be in writing. Second, it must describe alleged discriminatory acts that may violate EPA's title VI regulations. Title VI does not cover discrimination on the grounds of income or economic status. Third, it must be timely filed. Under EPA's title

With respect to the Petitioners' claim that the permit allows Marcal to increase its emissions of criteria pollutants, EPA finds such allegation without substantiation. EPA finds DEP's explanation of the permitting requirements applicable to Marcal as presented in the Hearing Report appropriate. *See* Hearing Report Response to Comments # 1, 3, and 7. EPA finds no grounds for an objection relative to this point.

EPA finds DEP's plan to act in accordance with federal requirements regarding PM 2.5 acceptable. EPA establishes national ambient air quality standard ("NAAQS") for certain pollutants, pursuant to section 109 of the CAA, 42 U.S.C. § 7409, and States are required to attain those standards. The SIP is the means by which States comply with CAA requirements to attain the NAAQS, pursuant to section 110(a) of the CAA, 42 U.S,C, § 7410(a). The national designations for the PM2.5 NAAQS were published in the *Federal Register* on January 5, 2005. 70 *Fed. Reg.* 943-1019 (Jan. 5, 2005). Under the Clean Air Act, New Jersey is required to submit its SIP for any area designated by EPA as non-attainment showing how it will attain the new PM 2.5 standard no later than three years from the effective date of the non-attainment designation (i.e. by April 5, 2008).

The new PM 2.5 standard does not by itself impose any obligation on sources. A source is not obligated to reduce emissions as a result of the standard until the State identifies a specific emission reduction measure needed for attainment (and applicable to the source), and that measure is incorporated into a SIP approved by EPA. Accordingly, since Petitioners have not identified a current requirement of the Clean Air Act, including a current SIP requirement, that is applicable to this source and not included in the permit, the petition is denied on this issue.

VI. Inadequate Responses to Public Hearing Issues

Petitioners allege that DEP did not adequately respond to public comments made during the public hearing relating to modeling data and the completeness of the permit application. Specifically, Petitioners allege that DEP did not respond to Ms. Tracey Coll's claim that DEP's modeling analyses and the associated underlying information are inaccurate because 25% of the emission points identified by DEP in the area of Marcal are incorrect. Petitioners provide no further explanation of the allegation that DEP's response to comments concerning completeness of the application was inadequate. Petitioners claim DEP's actions violated the public participation requirements of 40 C.F.R. § 70.7(h) and request an EPA objection to this permit. Petition at pages 15-16.

Part 70 regulations at 40 C.F.R. § 70.7(h) require that all permit proceedings shall provide adequate procedures for public notice, including an opportunity for public comment for a period of at least 30 days and a hearing on the draft permit. So that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, the permitting authority shall keep a record of the commenters and also of the issues

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VI regulations, a complaint must be filed within 180 calendar days of the alleged discriminatory act. 40 C.F.R. § 7.120(b)(2). Fourth, because EPA's title VI regulations only apply to recipients of EPA financial assistance, it must identify an EPA recipient that allegedly committed a discriminatory act. 40 C.F.R. § 7.15.

raised during the public participation process, and such records shall be available to the public. *See* 40 C.F.R. § 70.7(h)(5). The Hearing Transcript as well as the Hearing Report recorded the comments and issues raised by commenters who participated at the public hearing or submitted by mail.

With respect to the allegations of inadequate response to comments concerning DEP's modeling analysis, DEP correctly responded that modeling analyses are not required by title V of the CAA, or its implementing regulations, for title V permit issuance. The air quality analysis performed by DEP was done at the discretion of DEP to verify the air quality impacts in the area. Petitioners provide no support for the allegation that DEP relied on or incorporated its modeling results into the preconstruction permits and title V permit. DEP staff informed EPA staff that the preconstruction permit conditions were not based on the modeling results. Petitioners have not demonstrated that DEP failed to adequately respond to its comments concerning modeling results or provided sufficient information for EPA to evaluate the claim of inadequate response to comments on completeness of the application and thus the petition is denied on these issues.

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), I deny in part and grant in part the petition requesting an objection to the issuance of the Marcal title V permit.

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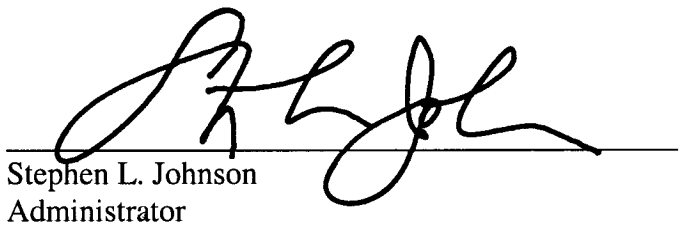

Stephen L. Johnson
Administrator

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