

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

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In the Matter of the Proposed Operating Permit for

SUFFOLK COUNTY

Permit ID: 1-4720-00355/00043

to operate the Bergen Point Sewage Treatment Plant
located in West Babylon, New York

Proposed by the New York State Department of
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF
THE PROPOSED TITLE V OPERATING PERMIT FOR
THE SUFFOLK COUNTY BERGEN POINT SEWAGE TREATMENT PLANT**

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. (“NYPIRG”) hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to proposed Title V Operating Permit for the Suffolk County Bergen Point Sewage Treatment Plant (hereinafter, “Bergen Point” or “the Plant”). The permit was proposed to U.S. EPA by the New York State Department of Environmental Conservation (“DEC”) on June 28, 2001. EPA’s 45-day review period ended on August 13, 2001. This petition is filed within sixty days following the end of U.S. EPA’s 45-day review period as required by Clean Air Act § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. Id.

NYPIRG is a not-for-profit research and advocacy organization that specializes in environmental issues. NYPIRG has more than 20 offices located in every region of New York State. Many of NYPIRG’s members live, work, pay taxes, and breathe the air in Suffolk County, where the Bergen Point STP is located.

Below, we discuss numerous and significant violations of 40 CFR Part 70 that occur in the permit proposed for Bergen Point. If the U.S. EPA Administrator determines that this permit does not comply with legal requirements, she must object to issuance of the permit. See 40 CFR § 70.8(c)(1) (“The [U.S. EPA] Administrator will object to the issuance of any permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part.”). We hope that U.S. EPA will act expeditiously, and in any case, within the 60-day timeframe mandated in the Clean Air Act, to respond to NYPIRG’s petition.

I. General Comments

A. The Proposed Permit is Based Upon an Inadequate Permit Application

Suffolk County's application for a Title V permit for Bergen Point must be denied because the county has not submitted a complete permit application in accordance with the requirements of CAA § 114(a)(3)(C), 40 CFR §70.5(c), and 6 NYCRR § 201-6.3(d).

First, Suffolk County's permit application lacks an initial compliance certification. Suffolk County is legally required to submit an initial compliance certification that includes:

- (1) a statement certifying that the applicant's facility is currently in compliance with all applicable requirements (except for emission units that the applicant admits are out of compliance) as required by Clean Air Act § 114(a)(3)(C), 40 CFR §70.5(c)(9)(i), and 6 NYCRR § 201-6.3(d)(10)(i);
- (2) a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based as required by Clean Air Act §114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201-6.3(d)(10)(ii).

The initial compliance certification is one of the most important components of a Title V permit application. This is because the initial compliance certification indicates whether the permit applicant is currently in compliance with applicable requirements.

Because Suffolk County failed to submit an initial compliance certification, neither government regulators nor the public can truly determine whether Bergen Point STP is currently in compliance with every applicable requirement.

In the preamble to the final 40 CFR part 70 rulemaking, U.S. EPA emphasized the importance of the initial compliance certification, stating that:

[I]n § 70.5(c)(9), every application for a permit must contain a certification of the source's compliance status with all applicable requirements, including any applicable enhanced monitoring and compliance certification requirements promulgated pursuant to section 114 and 504(b) of the Act. This certification must indicate the methods used by the source to determine compliance. This requirement is critical because the content of the compliance plan and the schedule of compliance required under § 70.5(a)(8) is dependent on the source's compliance status at the time of permit issuance.

57 FR 32250, 32274 (July 21, 1992). A permit that is developed in ignorance of a facility's current compliance status cannot possibly assure compliance with applicable requirements as mandated by 40 CFR § 70.1(b) and § 70.6(a)(1).

In addition to omitting an initial compliance certification, Bergen Point STP's permit application lacks certain information required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4), including:

- (1) a description of all applicable requirements that apply to the facility, and
- (2) a description of or reference to any applicable test method for determining compliance with each applicable requirement.

The omission of this information makes it significantly more difficult for a member of the public to determine whether a draft permit includes all applicable requirements. For example, an existing facility that is subject to major New Source Review ("NSR") requirements should possess a pre-construction permit issued pursuant to 6 NYCRR Part 201. Minor NSR permits, Title V permits, and state-only permits are also issued pursuant to Part 201. In the Title V permit application, a facility that is subject to any type of pre-existing permit simply cites to 6 NYCRR Part 201. Because DEC does not require the applicant to describe each underlying requirement, it is virtually impossible to identify existing NSR requirements that must be incorporated into the applicant's Title V permit. The permit fails to clear up the confusion. According to DEC, "Part 70 does not require a mention of the previous permits, nor does it require all conditions from previous permits be included in the Title V permit since many may be repetitive or obsolete." *DEC Responsiveness Summary*, Draft Title V Permit for Suffolk County Bergen Point Sewage Treatment Plant, June 28, 2001. Without clear documentation in the permit application of the requirements of pre-existing permits, it is difficult for members of the public to ascertain when permit requirements have been erroneously left out of a Title V permit.

The lack of information in the permit application also makes it far more difficult for the public to evaluate the adequacy of monitoring included in a draft permit, since the public permit reviewer must investigate far beyond the permit application to identify applicable test methods.

On April 13, 1999, NYPIRG petitioned the U.S. EPA Administrator, requesting a determination pursuant to 40 CFR § 70.10(b)(1) that DEC is inadequately administering the Title V program because the agency relies upon a legally deficient standard permit application form. The petition is still pending. Because Suffolk County relied upon this legally deficient Title V permit application form, the legal arguments made in the petition are relevant to this permit proceeding. Thus, the entire petition is incorporated by reference into this petition.

The Administrator must object to the proposed permit for Bergen Point because the permit is based on a legally deficient permit application and therefore does not comply with 40 CFR Part 70.

B. The Proposed Permit is Accompanied by an Insufficient Statement of Basis

This proposed Title V permit is defective because DEC failed to include an adequate "statement of basis" or "rationale" with the draft permit explaining the legal and factual basis for draft permit conditions. The sparse "permit description" fails to satisfy this federal requirement. Without an

adequate statement of basis, it is virtually impossible for concerned citizens to evaluate DEC's periodic monitoring decisions and to prepare effective comments during the 30-day public comment period. The only remedy for this problem is for DEC to develop a statement of basis for the draft permit and re-release it for a new public comment period.

40 CFR §70.7(a)(5) provides that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it." It is NYPIRG's understanding that no such document exists with respect to this permit.

For the purpose of this discussion and the remainder of our comments, we refer to the permit description as the "statement of basis." According to U.S. EPA Region 10:

The statement of basis should include:

- i. Detailed descriptions of the facility, emission units and control devices, and manufacturing processes including identifying information like serial numbers that may not be appropriate for inclusion in the enforceable permit.
- ii. Justification for streamlining any applicable requirements including a detailed comparison of stringency as described in White Paper 2.
- iii. Explanations for actions including documentation of compliance with one time NSPS and NOC requirements (e.g. initial source test requirements), emission caps, superseded or obsolete NOCs, and bases for determining that units are insignificant IEUs.
- iv. Basis for periodic monitoring, including appropriate calculations, especially when periodic monitoring is less stringent than would be expected (e.g., only quarterly inspections of the baghouse are required because the unit operates less than 40 hours a quarter.)

Elizabeth Waddell, Region 10 Permit Review, May 27, 1998 ("Region 10 Permit Review"), at 4. Region 10 states that:

The statement of basis may also be used to notify the source or the public about issues of concern. For example, the permitting authority may want to discuss the likelihood that a future MACT standard will apply to the source. This is also a place where the permitting authority can highlight other requirements that are not applicable at the time of permit issuance but which could become issues in the future.

Region 10 Permit Review at 4.

In the case of this draft permit, the information described above is never provided.

NYPIRG is not alone in asserting that the statement of basis is an indispensable part of Title V proceedings. According to Joan Cabreza, EPA Region 10 Air Permits Team Leader:

In essence, [the statement of basis] is an explanation of why the permit contains the provisions that it does and why it does not contain other provision that might otherwise appear to be applicable. The purpose of the statement is to enable EPA and other interested parties to effectively review the permit by providing information regarding decisions made by the permitting authority in drafting the permit.

Joan Cabreza, Memorandum to Region 10 State and Local Air Pollution Agencies, Region 10 Questions & Answers #2: Title V Permit Development, March 19, 1996.

On December 22, 2000, U.S. EPA granted a petition for objection to a Title V permit based in part upon the fact that the permit and accompanying statement of basis failed to provide a sufficient basis for assuring compliance with several permit conditions. See U.S. EPA, *In re Fort James Camas Mill, Order Denying in Part and Granting in Part Petition for Objection to Permit*, December 22, 2000 (the “Order”). According to the Order, “the rationale for the selected monitoring method must be clear and documented in the permit record.” Id. at 8. Thus, the Order affirms the fact that this draft permit fails to comply with legal requirements because the statement of basis developed by DEC includes insufficient justification for DEC’s choice of monitoring requirements.

40 CFR Part 70 is clear on the requirement that every permit must be accompanied with a rationale for permit conditions. See 40 CFR § 70.7(a)(5). Absent a complete statement of basis, the public cannot effectively evaluate and comment upon the adequacy of draft permit requirements. The Administrator must object to the issuance of the permit and insist that DEC draft a new permit that includes a statement of basis.

C. The Proposed Permit Distorts the Annual Compliance Certification Requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5)

Under 6 NYCRR § 201-6.5(e), a permittee must “certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices,” at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirements included in Bergen Point STP’s draft permit (Condition 26) do not require Bergen Point STP to certify compliance with all permit conditions. Rather, the draft permit only requires that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” DEC then proceeds to identify certain conditions in the draft permit as “Compliance Certification” conditions. Requirements that are labeled “Compliance Certification” are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. The permit conditions

that lack monitoring (often a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal law. Bergen Point STP must certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

In response to NYPIRG's comments on the inadequate compliance certification conditions, DEC stated:

The format of the annual compliance report is being discussed internally and with EPA. The Department is dealing with this issue as are other States in light of the uncertainty regarding the implementation of the Part 70 requirements. The States and EPA are currently in discussions on this issue but no policy statements have been forthcoming from EPA. The Department does not see any reason to believe that it distorts the annual compliance certification requirement of § 114(a)(3) and 40 CFR 70.6(c)(5).

DEC Responsiveness Summary, Draft Title V Permit for Suffolk County Bergen Point Sewage Treatment Plant, June 28, 2001, p. 4. While NYPIRG agrees that U.S. EPA has been negligent by not providing state permitting authorities with guidance on how to properly implement the Part 70 program, U.S. EPA's failure to provide guidance does not excuse DEC from complying with Part 70 requirements. The annual compliance certification requirement is the most important aspect of the Title V program. The Administrator must object to any permit that fails to require the permittee to certify compliance (or noncompliance) with all permit conditions on at least an annual basis.

D. 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)

The Administrator must object to this proposed permit because it does not require the permittee to submit prompt reports of any deviations from permit requirements as mandated under 40 CFR § 70.6(a)(3)(iii)(B). Currently, no prompt reporting condition is included in the proposed permit.

With respect to the prompt reporting requirement, DEC may either (1) include a general condition that defines what constitutes "prompt" under all possible circumstances, or (2) develop facility-specific conditions that define what constitutes "prompt" for each individual permit requirement. While Part 70 gives DEC discretion over how to define "prompt," the definition that DEC selects must be reasonable. U.S. EPA has already issued statements in dozens of Federal Register notices setting out what it believes to be a reasonable definition of "prompt." For example, when proposing interim approval of Arizona's Title V program U.S. EPA stated:

The EPA believes that prompt should generally be defined as requiring reporting within two to ten days of the deviation. Two to ten days is sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems. For sources with a low level of excess emissions, a longer time period may be acceptable.

However, prompt reporting must be more frequent than the semiannual reporting requirement, given this is a distinct reporting obligation under Sec. 70.6(a)(3)(iii)(A).

60 Fed. Reg. 36083 (July 13, 1995). The proposed permit for Bergen Point fails to specify either a general prompt reporting requirement or requirement-specific prompt reporting requirements. The Administrator must require DEC to include prompt reporting requirements in the permit for Bergen Point that are consistent with U.S. EPA's past interpretations of what qualifies as "prompt."

In addition to requiring DEC to include a prompt reporting requirement in this proposed permit, U.S. EPA must require that these reports be made in writing. Under 40 CFR § 70.5(d), "[a]ny application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness." U.S. EPA's White Paper #1 interprets this provision of Part 70 as requiring "responsible officials to certify monitoring reports, which must be submitted every 6 months, and 'prompt' reports of any deviations from permit requirements whenever they occur." U.S. EPA, *White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995) at 24. A deviation report that is submitted orally rather than in writing cannot be "certified" by a responsible official as required by Part 70.

E. The Proposed Permit's Startup/Shutdown, Malfunction, Maintenance, and Upset Provision Violates 40 CFR Part 70

Condition 5 in this draft permit states in part that "[a]t 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." The condition goes on to describe the actions and recordkeeping and reporting requirements that the facility must adhere to in order for the Commissioner to excuse a violation as unavoidable. In this petition, we refer to this condition as the "excuse provision." As detailed below, the excuse provision included in this proposed permit violates 40 CFR Part 70 in a number of ways.

1. The Excuse Provision Included in the Proposed Permit is Not the Excuse Provision that is in New York's SIP

The excuse provision included in this proposed permit reflects the requirements of a New York State regulation, 6 NYCRR § 201-1.4. This regulation states in part that "[a]t 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." The version of Part 201 approved by U.S. EPA as part of New York's SIP contains the same language, except that it does not cover violations that occur during "shutdown" or during "upsets." See 6 NYCRR § 201.5(e), state effective date 4/4/93, U.S. EPA approval date 12/23/97¹ (stating that "[a]t the discretion of the commissioner, a violation of any applicable emission

¹ 40 CFR 52.1679 (2001).

standard for necessary scheduled equipment maintenance, start-up conditions and malfunctions may be excused if such violations are unavoidable.”). Since the SIP rule is the federally enforceable requirement, DEC must delete the words “shutdown” and “upsets” from the draft permit.

2. The Draft Permit Must Describe What Constitutes “Reasonably Available Control Technology” During Conditions that Are Covered by the Excuse Provision

The excuse provision included in the draft permit and in New York’s SIP mandates that “[r]easonably available control technology, as determined by the commissioner, shall be applied during any maintenance, start-up, or malfunction condition.” See 6 NYCRR § 201.5(e); see also 6 NYCRR § 201-1.4. Under 40 CFR § 70.6(a)(1), each Title V permit must include “operational requirements and limitations that assure compliance with all applicable requirements.” Since the requirement to apply RACT during maintenance, startup, or malfunction conditions is included in New York’s SIP, it is an applicable requirement. To assure each facility’s compliance with this requirement, DEC must include terms and conditions in each permit that clarify what constitutes RACT for this facility during maintenance, startup, and malfunction conditions. The final permit issued for this facility must also include monitoring, recordkeeping, and reporting requirements that will assure that RACT is employed during maintenance, startup, and malfunction conditions. See 40 CFR § 70.6(c)(1) (requiring each Title V permit to include “monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit”). In situations where RACT is no different during these periods from what is required under other operating conditions, DEC must explain and justify this determination in the statement of basis. The permit must be clear that compliance with the requirement to employ RACT during startup, maintenance, and malfunction conditions does not excuse the facility from compliance with applicable emission limitations.

3. The Excuse Provision Does Not Assure the Facility’s Compliance Because it is Contains Vague, Undefined Terms that are Not Enforceable as a Practical Matter

New York’s SIP-approved excuse provision gives the Commissioner the authority to excuse a violation of an applicable requirement during startup, maintenance, and malfunction conditions if they qualify as “unavoidable.” The standard by which the Commissioner is to determine whether a violation is unavoidable is not included in either the regulation or the draft permit. Without a clear standard to guide the Commissioner’s determination as to whether a violation is unavoidable, there is no basis on which a member of the public or U.S. EPA may challenge a Commissioner’s decision to excuse a violation. Since New York’s SIP provision allows the Commissioner to entirely excuse a violation, rather than simply exercising her discretion by not bringing an enforcement action, the lack of a practicably enforceable standard by which the excuse provision will be applied seriously undermines the enforceability of this permit.² The permit must explicitly define the circumstances under which a facility

² New York’s excuse provision actually goes farther than those provisions adopted in other states that give facilities an “affirmative defense” against enforcement actions resulting from unavoidable violations. This is because under an affirmative defense provision, the facility is required to maintain clear documentation that the excuse provision

can apply for a violation to be excused.

Though New York's SIP-approved excuse provision lacks an explicit definition as to what qualifies for an excuse, the Commissioner must exercise her discretion in accordance with Clean Air Act requirements. In other words, the Commissioner must define "unavoidable" as it is defined by EPA in its Startup/Shutdown/Malfunction Policy, as set forth in EPA's 9/28/82, 2/15/83, and 9/20/99 memorandums. In order to clarify the standard that applies to the Commissioner's determinations regarding whether a violation is unavoidable and therefore assure the public that permitted facilities are not allowed to operate in violation of applicable requirements, the permit must be modified to state that the Commissioner shall determine whether a violation is unavoidable based on the criteria in U.S. EPA's memorandum dated September 20, 1999 entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." In addition, the permit must include specific criteria regarding when this permittee's emission exceedances may qualify for an excuse. Specifically, what constitutes "startup," "malfunction," and "maintenance" must be explicitly defined in the permit. This clarifying language is necessary in order to assure each facility's compliance with all applicable requirements under 40 CFR § 70.6(a)(1).

4. The Proposed Permit Fails to Require Prompt Written Reports of Deviations From Permit Requirements Due to Startup, Shutdown, Malfunction and Maintenance as Required Under 40 CFR § 70.6(a)(3)(iii)(B).

The Administrator must object to this proposed permit because it does not require the facility to submit timely written reports of any deviation from permit requirements in accordance with 40 CFR § 70.6(a)(3)(iii)(B). 40 CFR § 70.6(a)(3)(iii)(B) demands:

Prompt reporting of deviations 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.

(Emphasis added). As currently written, the permit violates the above requirement because the permittee is allowed to submit reports of "unavoidable" violations by telephone rather than in writing. Thus, a violation can be excused without creating a paper trail that would allow U.S. EPA and the public to monitor whether the facility is abusing the excuse provision by improperly claiming that violations qualify to be excused. Since a primary purpose of the Title V program is to allow the public to determine whether polluters are complying with all applicable requirements on an ongoing basis, reports of deviations from permit requirements must be in writing so that they can be reviewed by the public. An excuse provision that keeps the public ignorant of violations cannot possibly satisfy the Part

applies, and bears the burden of proof in establishing that a violation was unavoidable. Here, there are no standards governing when a violation can be deemed unavoidable. Also, in all likelihood, once the Commissioner agrees to excuse a violation, EPA and members of the public are not able to bring their own enforcement action because the violation no longer exists.

70 mandate that each permit assure compliance with applicable requirements.

U.S. EPA must require DEC to add the following reporting obligations to the proposed permit:

- (1) *Violations due to Startup, Shutdown and Maintenance.*³ The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (The draft permit condition 5 only requires reports of violations due to startup, shutdown, or maintenance “when requested to do so in writing”).⁴ The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report explaining why the violation was unavoidable. (The draft permit does not require submittal of a report “if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements”). Finally, a deadline for submission of these reports must be included in the permit.
- (2) *Violations due to Malfunction.* The facility must provide both telephone and written notification and to DEC within two working days of an excess emission that is allegedly unavoidable due to “malfunction.” (The draft permit condition 5 only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement.)⁵ The facility must submit a detailed written report within thirty days after the facility exceeds emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The draft permit only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”).⁶

5. The Proposed Permit Fails to Clarify That a Violation of a Federal Requirement Cannot be Excused Unless the Underlying Federal Requirement Specifically Provides for an Excuse.

The proposed permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation “unavoidable,” regardless of whether an “unavoidable” defense is allowed under the requirement that is violated. U.S. EPA was concerned about this issue

³ NYPIRG interprets U.S. EPA’s 1999 memorandum as prohibiting excuses due to maintenance.

⁴ See Condition 5(a) in the draft permit.

⁵ See Condition 5(b) in the draft permit.

⁶ *Id.*

when it granted interim approval to New York's Title V program. In the Federal Register notice granting program approval, 61 Fed. Reg. 57589 (1996), U.S. EPA noted that before New York's program can receive full approval, 6 NYCRR §201-6.5(c)(3)(ii) must be revised "to clarify that the discretion to excuse a violation under 6 NYCRR Part [sic] 201-1.4 will not extend to federal requirements, unless the specific federal requirement provides for affirmative defenses during start-ups, shutdowns, malfunctions, or upsets." 61 Fed. Reg. at 57592. Though New York incorporated clarifying language into state regulations, the proposed permit lacks this language. U.S. EPA must require DEC to make it clear that a violation of a federal requirement that does not provide for an affirmative defense will not be excused.

F. The Proposed Permit Lacks Federally Enforceable Conditions that Govern the Procedures for Permit Renewal

Currently, the only condition governing permit renewal is condition 3 under "DEC General Conditions." Since this condition is not in the "Federally Enforceable Conditions" section of the Title V permit but is instead included in an attachment that does not appear to create federally enforceable obligations, this condition is insufficient to satisfy Part 70 requirements. Under 40 CFR § 70.7(c)(ii), "Permit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with paragraph (b) of this section and § 70.5(a)(1)(iii) of this part." 40 CFR § 70.5(a) provides that "For each Part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this section." § 70.5(a)(1)(iii) provides that "For purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time as may be approved by the Administrator that ensures that the term of the permit will not expire before the permit is renewed." Thus, the requirement that a facility submit a timely permit application is a federal requirement.

A Title V permit may not be issued unless "the conditions of the permit provide for compliance with all applicable requirements and requirements of this part." 40 CFR § 70.7(a)(iv). Thus, this Title V permit violates 40 CFR Part 70 because it lacks the federally enforceable requirement that the facility apply for a renewal permit within six months of permit expiration.

H. The Draft Permit Does Not Assure Compliance With All Applicable Requirements Because Many Individual Permit Conditions Lack Adequate Monitoring and are not Practicably Enforceable

A basic tenet of Title V permit development is that the permit must require sufficient monitoring and recordkeeping to provide a reasonable assurance that the permitted facility is in compliance with legal requirements. As U.S. EPA explained in its recent response to a Title V permit petition filed by the Wyoming Outdoor Council:

[W]here the applicable requirement does not require any periodic testing or monitoring, section 70.6(c)(1)'s requirement 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.' See 40 C.F.R. § 70.6(a)(3)(I)(B). Where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, however, as noted above 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 cases the separate regulatory standard at § 70.6(c)(1) applies instead. By its terms, § 70.6(c)(1) - like the statutory provisions it implements - calls for sufficiency reviews of periodic testing and monitoring in applicable requirements, and enhancement of that testing or monitoring through the permit necessary to be sufficient to assure compliance with the terms and conditions of the permit.

U.S. EPA, *In re PacifiCorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Order Partially Granting and Partially Denying Petition for Objection to Permits*, November 16, 2000, pp. 18-19.

In addition to containing adequate monitoring, each permit condition must be "enforceable as a practical matter" in order to assure the facility's compliance with applicable requirements. To be enforceable as a practical matter, a condition must (1) provide a clear explanation of how the actual limitation or requirement applies to the facility; and (2) make it possible to determine whether the facility is complying with the condition.

Apparently, DEC is unwilling to accept its responsibility to include monitoring, recordkeeping, and reporting conditions in each Title V permit that are sufficient to assure compliance with applicable requirements. Throughout the agency's response to NYPIRG's comments, DEC insists that it lack the legal authority to require additional monitoring where it is not specified in the underlying regulations. For example, with respect to monitoring that would assure the facility's compliance with 40 CFR Part 60, Subpart O, DEC explains that:

Title V permits are required to contain all of the requirements necessary to assure compliance with applicable requirements. The permit does this by setting appropriate limits per Subpart O, and by requiring monitoring and reporting of all parameters contained in Subpart O. Including criteria beyond this is prohibited by the NYS Clean Air Compliance Act.

DEC Responsiveness Summary, Draft Title V Permit for Suffolk County Bergen Point Sewage Treatment Plant, June 28, 2001, p. 18. Specifically with respect to the opacity limit in Subpart O, DEC states:

Although continuous opacity monitors can be used in lieu of method 9, Subpart

O does not require it and thus it cannot be required under this permit. If the facility chooses to install a Continuous Opacity Monitor (COM), a QA/QC program for the COM must be submitted to the Department for approval.

DEC Responsiveness Summary, p. 17. Further, in this permit and in dozens of other Title V permits, DEC refuses to include conditions in the permit that require the facility to operate pollution control equipment that is used to comply with emission limits. See, e.g., *DEC Responsiveness Summary*, p. 14 (Responding to NYPIRG's comment that information in emission unit descriptions that indicates what kind of pollution control equipment is used at the facility should be converted into enforceable permit conditions, DEC states that "it is unnecessary to specifically classify or restructure emission unit definitions, process definitions, etc. as enforceable conditions.") Moreover, DEC refuses to include monitoring and maintenance requirements in permits to assure that pollution control equipment is functioning properly. See, e.g., *DEC Responsiveness Summary*, p. 8 ("Based on engineering judgement [sic], the Department believes that incorporating this information as enforceable permit conditions would be both onerous and unnecessary. If required control equipment fails to operate properly and permit limits are exceeded, an enforcement action would be initiated.")

DEC's refusal to require facilities to include supplemental monitoring conditions in Title V permits when the monitoring described in an underlying applicable requirement is insufficient violates 40 CFR Part 70. As explained above, U.S. EPA interprets 40 CFR Part 70 as requiring permitting authorities to perform "sufficiency reviews of periodic testing and monitoring in applicable requirements" and include enhanced testing and monitoring in Title V permits that is "sufficient to assure compliance with the terms and conditions of the permit." *In re PacifiCorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants* at 19. If operation of specified pollution control equipment is necessary to assure a facility's compliance with an applicable emission limitation, the facility's permit must include a condition that mandates operation of that equipment, as well as monitoring designed to assure that the equipment is functioning properly. See, e.g., letter from Steven C. Riva, U.S. EPA Region 2 to Robert J. Stanton, DEC, dated September 26, 2001 (with respect to the Title V permit proposed for the Danskammer Generating Station, commenting that "if proper operation of the baghouses is required to assure compliance with either opacity or particulate requirements for any of the coal handling processes, then such a requirement should be specified in the permit for each of these processes. For authority to impose this requirement, we suggest you look at 6 NYCRR 201-6.5(d)(3), 201-6.5(b)(2), or the permit that authorized construction of the baghouses"). The lack of adequate monitoring in Title V permits is a persistent problem in New York. The Administrator must address this chronic problem by objecting to permits such as the proposed permit for Bergen Point. If DEC is truly prevented by state law from including sufficient monitoring in Title V permits, U.S. EPA must withdraw its approval of New York's Title V program.

The following analysis of specific proposed permit conditions identifies requirements for which monitoring is either absent or insufficient and permit conditions that are not practicably enforceable.

Analysis of specific proposed permit conditions

Condition 3 (Maintenance of Equipment):

The proposed permit recites the general requirement under 6 NYCRR § 200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer's specifications. As currently written, this condition is unenforceable because it does not explain what Bergen Point must do to comply with the condition. For a permit condition to be practically enforceable, it must define exactly what the facility must do to comply with the requirement, and must require the facility to monitor its own compliance. This proposed permit condition must be modified to apply to Bergen Point with specificity, and to include monitoring that is sufficient to assure the facility's compliance.

DEC responded to NYPIRG's comments on this condition by stating that general conditions such as this one are included in the permit because, while the condition might not be applicable at the time of permit issuance, "it might become applicable to a source during the course of its Title V permit." *DEC Responsiveness Summary*, p. 8 NYPIRG agrees that there is no problem with including an additional general condition such as this in a Title V permit, so long as the requirement is applied with specificity to equipment that is already in use at the facility. In response to this assertion, DEC argues that "Department staff have inserted monitoring and recordkeeping requirements Staff believe will provide an adequate degree of assurance that compliance with standards will be achieved, where standards exist and are consistent with good professional/engineering judgment." *Id.* On this point, NYPIRG strongly disagrees with DEC's assertion that there is sufficient monitoring in this proposed permit to assure the facility's compliance with the equipment maintenance requirements. According to the proposed permit, an assortment of pollution control equipment is installed at this facility. For example, the facility uses catalytic afterburners, a spray tower, an impingement plate scrubber, a "pump station for scavenger waste treatment," cyclone de-gritters, a variety of tanks for aeration and settling, gravity belts, a scum handling system, an air flotation sludge thickener, a silo where ash is centrifugally separated from the air, and a number of gas scrubbers and packed bed Heil scrubbers. Despite the large number of pollution control devices used at this facility, NYPIRG is unable to locate conditions in this proposed permit that require regular monitoring to assure that this equipment is functioning properly.

It is notable that in its response DEC fails to describe any monitoring conditions in this proposed permit to assure compliance with § 200.7. If DEC determined that monitoring of control equipment is unnecessary at this facility, DEC must provide the public with an explanation of the legal and factual basis for such a determination. A blanket statement that DEC staff believes monitoring to be adequate does not suffice as a statement of basis. The Administrator must object to the proposed permit because it lacks monitoring sufficient to assure the facility's compliance with the equipment maintenance requirement, and DEC fails to provide a reasonable justification for why the proposed permit assures the facility's compliance despite the lack of such monitoring.

Conditions No. 7 and No. 8 (air contaminants collected in air cleaning devices):

Conditions 7 and 8 both apply to the handling of air contaminants collected in an air cleaning device. The proposed permit violates 40 CFR Part 70's monitoring requirements because it lacks any kind of monitoring to assure the facility's compliance with these conditions. As discussed above, NYPIRG agrees that general conditions should be included in Title V permits, but such general conditions must be supplemented with facility-specific conditions that cover equipment that is in use at the facility at the time of permit issuance. Though DEC claims that sufficient monitoring is included in this proposed permit, DEC provides no explanation as to what this monitoring consists of and NYPIRG is unable to locate such monitoring in the proposed permit.

Condition 12 (Applicable Criteria):

This condition provides that the facility must comply with "approved criteria, emission limits, terms, conditions, and standards in the permit." It then goes on to state that applicable requirements include reporting requirements and operations under an accidental release plan, response plan, and compliance plan, as well as support documents submitted as a part of the permit application. In commenting on the draft permit, NYPIRG told DEC that a vague reference to "support documents" is insufficient to create legally enforceable permit requirements. The requirements of any accidental release plan, response plan, or compliance plan must be incorporated into the draft permit. If such documents exist, they are applicable requirements and must be included as permit terms. Furthermore, any requirements contained in "support documents submitted as part of the permit application for this facility" must be incorporated directly into the permit. In response, DEC told NYPIRG that all of the relevant requirements of any supporting documents have been fully incorporated into the draft permit. Specifically, "by reference, the requirements that may be contained in any of these plans are included in the permit." *DEC Responsiveness Summary*, p. 10.

DEC's assertion that Condition 12 is sufficient to incorporate all applicable requirements into the permit by reference is incorrect. As U.S. EPA's White Paper #2 explains:

Referenced documents must also be specifically identified. Descriptive information such as the title or number of the document and the date of the document must be included so that there is no ambiguity as to which version of which document is being referenced. Citations, cross references, and incorporations by reference must be detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation. Where only a portion of the referenced document applies, applications and permits must specify the relevant section of the document. Any information cited, cross referenced, or incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced.

U.S. EPA, *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program*, March 5, 1996, at 37. This proposed permit's vague reference to "[a]ny reporting requirements and operations under an accidental release plan, response plan and compliance plans as approved as of the date of the permit issuance" (documents that may or may not exist) cannot possibly

satisfy the White Paper #2 requirement that referenced documents be specifically identified and detailed enough that the manner in which the material applies to Bergen Point is clear. If U.S. EPA allows DEC to proceed with this approach to incorporating requirements into New York Title V permits, government officials and members of the public are bound to be confronted with enforcement difficulties in the future.

Condition 14 (Compliance Requirements):

NYPIRG submitted the following comment to DEC regarding Condition 14 of the draft permit:

Item 14.2 makes reference to “risk management plans” if they apply to the facility. The permit must state whether CAA § 112(r) applies to this facility. A Title V permit must identify the requirements that apply to the permitted facility, not simply indicate what requirements might apply. If DEC does not know whether the rule applies, it must say so in the statement of basis.

DEC responded by stating that “The Department has agreed to incorporate in Title V permits a requirement that facilities comply with CAA Section 112r. The Department notes that it does not have any delegation agreement with EPA to actually enforce this requirement.” *DEC Responsiveness Summary*, p. 11. NYPIRG’s review of condition 14 in the proposed permit, however, reveals that no change has been made. Regardless of whether DEC has a delegation agreement with EPA to enforce any given applicable requirement, the requirement must be included in Title V permits. If CAA § 112(r) does not apply to this facility at this time, DEC must, at a minimum, provide the legal and factual basis for Condition 14 in a statement of basis accompanying the permit. A Title V permit is supposed to give the public and the facility a degree of certainty regarding which requirements apply to the facility. As written, Condition 14 is ambiguous regarding the applicability of § 112(r).

Condition 24 and Condition 40 (Emission Unit Definitions):

NYPIRG commented to DEC that various requirements included in the emission unit definition need to be incorporated in the Title V permit as enforceable permit conditions. DEC seems to have deleted those requirements from the permit altogether, but added different requirements to the emission unit definition. Thus, NYPIRG again asserts that requirements placed in the “emission unit definition” section of the permit are not enforceable as a practical matter. DEC’s position that even requirements in the emission unit definitions are enforceable because “it is not possible for a source owner to make changes without a formal amendment of the permit” (*DEC Responsiveness Summary*, p. 14) lacks merit. Including a requirement as an enforceable condition is quite different from placing it in the emission unit description. Requirements that are in the description lack monitoring, so there is no way to know whether the facility is complying with the requirement. Furthermore, bringing an enforcement action against a facility for changing operations without obtaining a permit revision is quite different from bringing an enforcement action for violating a specific permit requirement. If a facility violates an enforceable permit condition, there can be no argument over whether the facility was required to comply with that condition. By contrast, there are a number of legal arguments that a facility could raise to

defend itself in an enforcement action over the facility's failure to apply for a permit modification. Any requirement that is meant to be mandatory must be placed in the permit as a freestanding permit condition. Otherwise, the permit is not enforceable as a practical matter.

As discussed above on page 14 of this petition, the emission unit descriptions inform us that a large number of pollution control devices are employed at this facility. The proposed permit does not assure the facility's compliance with emissions standards because it does not include conditions that require the operation of this equipment. Nor does the proposed permit include monitoring conditions to ensure that the pollution control equipment is working satisfactorily. Simply mentioning the existence of this equipment in the emission unit descriptions is inadequate to assure the facility's compliance.

Condition 29 (Required Emissions Tests):

Condition 29 includes everything that is required under 6 NYCRR §202-1.1 except the requirement that the permittee "shall bear the cost of measurement and preparing the report of measured emissions." This condition is clearly applicable to Bergen Point and must be included in the draft permit. It is inappropriate to paraphrase a requirement and leave out one or more conditions. This practice results in confusion over what conditions are applicable to the source. In fact, EPA's *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* states explicitly 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* at 40. The difference here is that the draft permit paraphrases most of the requirement, while entirely omitting part of the requirement.

Condition 26 (Compliance Certification):

DEC modified the draft permit following the public comment period to revise the annual compliance certification condition. The draft permit stated that the annual compliance certification was due "30 days after the end of the calendar year." The proposed permit states that the annual certification is "due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department." This revision creates a number of problems. First, it is possible that a facility would not be required to submit the first compliance certification until after the end of the first annual period following the date of permit issuance. This violates 40 CFR § 70.6. Second, by adding "unless another quarter has been acceptable by the Department," DEC makes it so that this requirement is unenforceable by the public, since it is unclear how the Department will go about revising the date that the certification is due. If the Department can change the due date through an oral conversation with the permittee, a member of the public could never prove that the deadline had not been changed. Also, the phrase "calendar quarter that occurs just prior to the permit anniversary date" is vague, since it is unclear when quarters begin and end, and the permit does not specify whether a quarter "occurs" by beginning or by ending.

Given the importance of the annual compliance certification requirement, it is essential that the deadline for submission of the certification be clear and enforceable. The Administrator must object to this proposed permit because the annual compliance certification is unenforceable as a practical matter.

Conditions 41 and 53 (Sludge Incinerator Stack Test):

NYPIRG commented extensively on the stack test requirement that was included in the draft permit. Though DEC made changes in response to NYPIRG's comments, the proposed permit remains inadequate to assure the facility's compliance.

First, the proposed permit requires the facility to perform a stack test on one of the incinerators within 180 days after the facility restarts, and on the other incinerator within 360 days after the facility restarts. The proposed permit states that the incinerators "will resume operation sometime in 2001." For the public to be able to keep track of the facility's compliance with this condition, the facility must be required to send a timely written notification to DEC of the date that the facility will restart.

Second, NYPIRG is concerned that this proposed permit will not assure the facility's compliance with applicable requirements until after the stack tests are performed. Under 40 CFR § 70.6(a)(1), a Title V permit must include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." NYPIRG's review of DEC's records on this facility indicates that the upcoming stack tests are needed in order to establish parameters that can be used to assure the facility's ongoing compliance in between stack tests. According to an EPA memorandum from Donald Wright to Don Ciobanu of DEC dated May 26, 1999, Bergen Point officials stated in a response to an EPA § 114 letter that the facility's oxygen monitor had been moved at various times. According to the memorandum, the oxygen value determined by the 1995 stack test is not valid for the monitor at the current location. Facility operators told EPA inspectors that the oxygen monitor is currently located at the only place where it works satisfactorily. Thus, the facility must perform a new stack test to establish a reporting criterion value for oxygen monitoring.

DEC provides no explanation as to how the proposed permit assures the facility's compliance as of the date of permit issuance despite the fact that no stack test will be performed for at least six months. DEC does explain that "the facility has been installing new oxygen meters at an appropriate location prior to resuming the incinerator's operation. In addition, they are also installing continuous emission monitors, which comprise a better monitoring method."

DEC Responsiveness Summary, p. 13. However, the permit does not include an enforceable condition requiring that the facility operate continuous emission monitors or ensure that the oxygen monitors function properly after they are installed. Later in the responsiveness summary, DEC states that "the continuous emission monitors are being designed and installed by the facility at this time. Unless we get all information pertaining to the operation of the CEM, it cannot be included in the Title V permit. These will be used in the upcoming performance test and once successfully used, it can be incorporated into the Permit." *DEC Responsiveness Summary*, p. 19. DEC is incorrect in its belief that a CEM cannot be required in a Title V permit until testing of the CEM is complete. DEC must

include whatever monitoring conditions are necessary to ensure that the facility complies with all applicable requirements. If CEMS are needed to assure the facility's compliance but are not ready, the facility must not be allowed to operate. At a minimum, the permit must include a schedule by which CEMS will be installed and calibrated, along with extensive surrogate monitoring in the interim period that will provide a reasonable assurance of compliance.

The Administrator must object to this proposed permit because it fails to include terms and conditions that are sufficient to assure the facility's compliance prior to the completion of stack tests. It is unacceptable for a Title V permit to give a permittee a year long grace period before it will be subject to monitoring requirements that are sufficient to assure the facility's compliance with applicable requirements.

Conditions 32, 33 and 34 (Visible emissions limited):

NYPIRG's comments on the draft permit with respect to this pointed out that the draft permit lacked any kind of periodic monitoring to assure the facility's compliance with the applicable opacity limitation. (6 NYCRR § 211.3).

DEC responded to NYPIRG's comment by providing the following information:

This requirement is part of the SIP and applies to all sources. The conditions specify the limit that is not to be exceeded at any time together with an averaging time, monitoring frequency and reporting requirement. To date, EPA has not provided guidance as to the method and frequency of monitoring opacity for general category sources that do not require continuous opacity monitors (COMS). This is a nationwide issue that is being dealt with on a source category-by-source category basis. At this point in time the Department has established a periodic monitoring strategy for oil-fired boilers that are not otherwise required to have COMs. The rest of the emission point universe is divided between those emission points where there is no expectation of visible emissions and those where there are some visible emissions. This category is further subdivided into those source categories where opacity violations are probable and those where opacity violations are not likely. The Department is currently working to establish engineering parameters that will result in an appropriate visible emission periodic monitoring policy which will be applicable to all facilities for which visible emissions monitoring is required.

DEC Responsiveness Summary, p. 13. While NYPIRG is encouraged by the fact that DEC plans to develop an appropriate visible emission periodic monitoring policy, the periodic monitoring required to demonstrate Bergen Point's compliance with 6 NYCRR § 211.3 remains inadequate. Under conditions 33 and 34, plant operators are only required to perform an official Method 9 test after visible emissions are observed for *two days*. After the two day trigger has *two additional days* to perform the Method 9 test. Thus, the facility can be out of compliance with the one-hour average limit for *four* days before a test is performed. This is unacceptable and does not assure compliance with the opacity

limit. Not only does the permit not assure that there will be a record of when the plant violates opacity standards, but it does not even require that plant operators take corrective action immediately after visible emissions are observed. This monitoring regime is a complete sham and does nothing to protect air quality or hold plant operators accountable for violations of the Clean Air Act.

DEC made no attempt to provide a factual basis for why the opacity monitoring conditions in this proposed permit are sufficient to assure Bergen Point's ongoing compliance. U.S. EPA must not allow such weak monitoring conditions to stand without a clear and documented rational basis. NYPIRG urges the Administrator to require this facility to employ a COMS to monitor compliance at the stacks. If opacity violations are possible from any emission point other than the stacks, the facility must be required to perform regular Method 9 tests to assure compliance at those locations.

The Administrator must object to this permit because it lacks sufficient monitoring to assure compliance with opacity limitations as required by the Clean Air Act and 40 CFR Part 70.

Conditions 36 and 37 (40 CFR 61.50, NESHAP Subpart E):

According to Condition 36, emissions from the sludge incinerator plants shall not exceed 3200 grams of mercury per 24-hour period.

Condition 36 also states that new sources must be tested within 90 days of the effective date of 40 CFR 61, Subpart E. Unfortunately, nothing in the permit or in the statement of basis explains whether such a stack test was performed on the Bergen Point sludge incinerators. In the responsiveness summary, DEC informed NYPIRG that the test had been performed on March 30, 1995. This information must be included in the statement of basis supporting the proposed permit.

After either a stack test or a sludge sampling is performed that demonstrates compliance with the mercury limit, the permit forbids the facility from making changes in operation which would potentially increase emissions above the level determined by the most recent stack test until a new emission level has been estimated by calculation and the results reported to the Administrator. This condition is not enforceable as a practical matter because nothing in the permit identifies the level of emissions recorded during the most recent stack or sludge test. DEC responded to NYPIRG that "the calculated mercury limit is not required to be listed in the permit." *Responsiveness Summary*, p. 14. Unless the permit includes the emissions level determined by the most recent stack test, however, this condition is unenforceable as a practical matter. In addition, the proposed permit is deficient because no recordkeeping is required to assure that the facility does not make changes that would affect mercury emissions. Such recordkeeping must be required to assure the facility's compliance in between annual stack tests or sludge samples.

According to Condition 36, the facility is required to maintain records of emission test or sludge sampling results and other data needed to determine total emissions for a minimum of 2 years. Again, this condition is partially unenforceable as a practical matter because the permit provides no indication of what kinds of "other data" needs to be maintained by the facility to demonstrate mercury emissions.

DEC responded to NYPIRG by stating that “other data” refers to “any documentation, test protocol, test log and reports, sampling log, analysis results, etc.” *Responsiveness Summary*, p. 14. DEC’s response simply confirms that “other data” is a vague phrase that needs to be defined in the permit. To make this condition enforceable as a practical matter, DEC must be required to specify what kind of “other data” needs to be maintained for purposes of assuring compliance with this condition.

Part D of Condition 35 explains that if Bergen Point STD determined either by stack testing or sludge sampling that mercury emissions exceed 1,600 grams per 24-hour period, the facility shall monitor mercury emissions at intervals of at least once per year using specified methods. NYPIRG commented to DEC that because the permit fails to report the results of any stack or sludge test, members of the public have no way of knowing whether Bergen Point is subject to this requirement. DEC responded by stating that the 1995 stack test showed that mercury emissions at Bergen Point fall well below the threshold and this requirement therefore does not apply. DEC did not, however, incorporate this information into a statement of basis. Thus, it remains unclear from a reading of this permit whether the additional mercury monitoring requirement applies.

Condition 42 (hydrocarbon emissions):

Condition 42 was added to the permit after the public comment period. While NYPIRG supports the addition of this condition to the permit, the condition must be supported by recordkeeping requirements to assure the facility’s compliance. In addition, the facility must be required to operate the hydrocarbon measurement instrument at all times that the incinerator is operating.. Without such language in the permit, Condition 42 does not assure that the facility is properly controlling hydrocarbon emissions.

Condition 44 (Sulfur Limit):

The draft permit placed a sulfur-in-fuel limit on this facility of 0.30% sulfur. After the draft permit was released for public comment, DEC modified the permit to weaken the sulfur limit to 0.37%. According to DEC, this is allowed because the 0.37% limit is allowed in Suffolk County. *Responsiveness summary*, p. 15. NYPIRG is concerned that while the 0.37% standard may be generally allowed in Suffolk County, they 0.30 limit that was originally included in the draft permit may be enforceable against this facility under a pre-existing permit. Unfortunately, uncovering the true source of the underlying requirement is complicated because DEC does not include citations to underlying permits in Title V permits. According to DEC, “Part 70 does not require a mention of the previous permits, nor does it require all conditions from previous permits be included in the Title V permit since many may be repetitive or obsolete.” *Responsiveness Summary*, p. 19. NYPIRG believes that DEC’s reading of Part 70 is flawed. Under 40 CFR § 70.6(a)(1)(i), “the permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.” If a pre-existing

permit is the basis for a requirement, DEC must identify the underlying permit. If, in fact, the 0.30% sulfur limit that was included in Bergen Point's draft permit is contained in a pre-existing SIP-based permit, DEC cannot change the requirement in the Title V permit.

In commenting on the draft permit, NYPIRG commented that DEC must include a justification in the statement of basis for why simply maintaining "customer certifications" is sufficient to assure the facility's compliance with the sulfur-in-fuel limit. NYPIRG urged DEC to require Bergen Point to perform its own periodic tests to determine the sulfur content of oil upon delivery and to certify the amounts of sulfur and compliance with the permit condition. DEC responded by saying that "random sampling of fuel oil suppliers has been shown to be an effective means of utilizing limited resources to enforce sulfur-in-fuel requirements. Such sampling is justified by the fact that the sulfur characteristics of the fuel oil do not change between the supplier and end user." Responsiveness summary, p. 15. This rationale is insufficient. First, Title V makes it so that the permitted facility is required to perform monitoring in addition to whatever monitoring is performed by government inspectors. While DEC's decision to only test oil when it is in the possession of suppliers may have been a rationale choice prior to Title V, the justification of "limited resources" no longer makes sense. Second, DEC does not provide any evidence as to why random sampling has been shown to be effective. And, similarly, the fact that fuel characteristics do not change between supplier and user does not assure NYPIRG that suppliers are not providing illegal oil to users. In sum, DEC's rationale for the required sulfur-in-fuel monitoring is entirely unsubstantiated. Moreover, this justification is still not included in any sort of statement of basis.

Title V is supposed to assure a facility's compliance by requiring the facility to perform regular monitoring and then certify the results of that monitoring on a regular basis. Under the sulfur-in-fuel monitoring regime in this permit, it is not the permittee that performs the monitoring, but an unidentified supplier. The supplier cannot be held accountable under the terms of this permit if he or she falsifies data. Moreover, it appears from DEC's explanation that the supplier isn't the one required to perform the monitoring -- government inspectors perform the monitoring by taking random samples. Thus, many suppliers can certify compliance with the standard without actually testing the sulfur content of their fuel. Title V offers an opportunity to gain a better understanding of whether facilities are violating sulfur in fuel limits by requiring each facility to perform periodic sulfur-in-fuel tests. The only justification for not requiring the facility to perform monitoring is that there is virtually no chance that the sulfur-in-fuel standard will be violated. DEC has not made this demonstration.

The Administrator must object to this proposed permit because there is no support for DEC's assertion that simply requiring the facility to retain certifications from its fuel oil supplier is sufficient to assure the facility's compliance with the sulfur-in-fuel limitation.

Conditions 53 (Particulates):

The draft permit released by DEC for public comment cited to 6 NYCRR § 227-1 as the basis for a particulate matter limit of 1.3 pounds per ton. NYPIRG pointed out that all particulate limits in the current version of 6 NYCRR § 227-1 are in terms of lbs/mmBtu. In response, DEC eliminated the

condition pertaining to § 227-1 because “since a specific particulate emission limit is established under Subpart O, Part 227-1 does not have to be mentioned in the permit.” Responsiveness Summary, p. 15. DEC also removed former draft permit condition 56 from the permit, which had limited particulate matter emissions to 0.56 pounds per hour pursuant to § 227-1.

Even if the Subpart O standard is stronger than the § 227-1 standard, DEC must include both standards in the permit since they are both applicable requirements. Moreover, if the 0.56 pounds per hour standard was established in a pre-existing permit, DEC lacks discretion to eliminate this requirement from the Title V permit.

Conditions 44-54 (40 CFR 60, NSPS Subpart O):

Generally, much of the detail included in NSPS Subpart O is not included in this draft permit. To ensure that all requirements included in NSPS Subpart O are enforceable against this facility, all requirements in NSPS Subpart O that are applicable to this facility must be included in this Title V permit.

NYPIRG commented to DEC that Condition 42 must provide more detail with respect to how the facility must monitor maximum wet sludge feet rate. DEC responded that “since there is no specific procedure for measuring this, it cannot be detailed in the Permit. The facility has standard operating procedures to follow in these and similar situations.” *Responsiveness summary*, p. 16. It appears that DEC is saying that the procedures cannot be specified simply because they are not specified in the underlying requirement. This is not true. Under Part 70, monitoring must be sufficient to assure the facility’s compliance. If details that are necessary to assure the facility’s compliance are not included in the underlying requirement, these details must be added to the Title V permit. It is insufficient to simply state that the facility will rely on its own standard operating procedures.

NYPIRG also pointed out that while the draft permit condition only required annual reporting, Part 70 requires semi-annual reporting. DEC claimed that it was correcting that problem, but it appears from the proposed permit that it still requires only annual reporting. It is difficult for us to be sure of this, however, because the margins on the proposed permit provided to us by DEC are off and some of the words ran off the page.

In response to NYPIRG’s comments, DEC stated that new condition 54 will not include requirements that the facility calibrate and maintain the various meters being used to monitor compliance because “calibration and maintenance are specific to these meters.” *Responsiveness Summary*, p. 16. DEC goes on to say that maintenance and calibration conditions “are not required to be provided in the Title V permit.” *Id.* As already mentioned in this petition, DEC is required to include conditions in a Title V permit that pertain to calibration and maintenance if such conditions are needed to assure the facility’s compliance with the underlying applicable requirement. In this case, NYPIRG believes that such conditions are needed, because the facility has a history of at least some of its monitors not functioning correctly (specifically, the oxygen monitor). The fact that calibration and maintenance

procedures are specific to the equipment being used at the facility does not justify leaving these procedures out of the permit.

Finally, the only way that new condition 54 can assure the facility's compliance is if the permit includes parameter ranges that will be used to indicate the compliance status of the facility. These parameters include sludge mass, pressure drop through the wet scrubber, oxygen content of the incinerator gas, temperature of the incinerator hearth, and fuel flow. Without these parameters, the public cannot use the results of the monitoring in Condition 54 to assure the facility's compliance. The Administrator must object to this proposed permit because it fails to specify the parameter ranges that will be used to monitor the facility's compliance with applicable requirements.

Condition 45 suffers from the same defect as Condition 54 in that while the facility is required to measure the temperature of the hearths, the permit fails to establish temperature parameters. Similarly, condition 46 fails to specify parameters for the rate of sludge charged to the incinerator.

Condition 47 fails to provide adequate monitoring methods to assure the facility's compliance with the opacity limitation contained in NSPS Subpart O. Instead, this condition refers back to the weak monitoring conditions that purportedly assure compliance with 6 NYCRR § 211.3. The same comments that NYPIRG made on those conditions also apply here. In addition, NYPIRG takes issue with DEC's position that "although continuous opacity monitors can be used in lieu of method 9, subpart O does not require it and thus it cannot be required under this permit." *Responsiveness Summary*, p. 17. DEC must include monitoring in this permit that is sufficient to assure the facility's compliance, regardless of whether such monitoring is required by Subpart O. DEC has provided no justification to date for why one opacity reading each day made by an untrained observer is sufficient to assure this facility's compliance with the opacity limitation. NYPIRG believes that continuous opacity monitoring is needed to assure this facility's compliance. Even if COMS are not required, however, even DEC apparently believes that the opacity readings at the facility need to be performed by a person trained in Method 9. *See* May 3, 1999 Letter from Ajay R. Shah, DEC to Robert Falk (Recommending that at least one person who is trained in Method 9 be at the facility at all times).

NYPIRG commented to DEC that Condition 48 must include more detail with respect to how the grab sample must be taken and the type of records that must be maintained. DEC responded that "no more detail as to how to collect the sample is required to be included in the permit as per 40 CFR Subpart O." *Responsiveness Summary*, p. 17. Without specifying what method must be used to test the sample, however, this condition is unenforceable as a practical matter.

Condition 51 in the draft permit originally stated there is a "minimum" dry sludge content and volatile solids content that is "not to fall below stated value at any time." NYPIRG commented to DEC that the draft permit condition failed to state a minimum value or to explain whether the minimum applies to the dry sludge content, the volatile solids content, or both. In reply, DEC dropped the language about compliance with the minimum altogether. As discussed above, the various monitoring conditions included in this permit do not assure the facility's compliance if there are no parameters by which to measure the facility's compliance.

NYPIRG also commented that Condition 51 must provide detail with respect to the type of records that must be maintained. DEC appears to reply that “no other information is required to be added in the permit condition as per the regulation.” Responsiveness Summary, p. 17. Again, NYPIRG asserts that the permit must include monitoring, recordkeeping, and reporting conditions that are sufficient to assure compliance.

NYPIRG commented to DEC that Condition 53 of the draft permit, which included no monitoring, must be modified to explain how particulate emissions are to be monitored and to require such monitoring on a frequent enough basis to ensure the facility’s ongoing compliance with the limit. In reply, DEC merged that draft permit condition with the stack test requirement. Since the stack test will only take place once, however, it does not satisfy the Part 70 requirement that the permit include sufficient monitoring to assure the facility’s ongoing compliance. According to DEC’s responsiveness summary, ongoing compliance is measured by Condition 47, which in turn relies on the conditions designed to assure compliance with 6 NYCRR § 211.3. The deficiencies of those monitoring conditions are described above. In addition, however, DEC makes no attempt to correlate compliance with the opacity limitation with compliance with the particulate matter limitation in Condition 53. There is no reason to believe that a once daily smoke check by an untrained observer is sufficient to assure the facility’s compliance with the particulate matter standard.

Condition 55 states that the facility must report “a record of average scrubber pressure drop measurements for each period of 15 minutes duration or more during which pressure drop of the scrubber was less than, by a percentage specified below, the average scrubber pressure drop measured during the most recent performance test.” NYPIRG commented to DEC that this condition must identify the average scrubber pressure drop measured during the most recent performance test. DEC responded that it would incorporate the average pressure drop of the scrubber measured during the most recent performance test, but that information does not appear to have made it into the proposed permit. Without this information, this condition is unenforceable as a practical matter.

Condition 60 (opacity):

Condition 60 fails to require monitoring sufficient to assure the facility’s compliance because no monitoring frequency is specified.

Former Draft Permit Condition 59 (Particulates from ash silos):

Former Draft Permit Condition 59 restricted particulate emissions from the ash silo to less than 0.0004 lb/hr. NYPIRG commented that this condition needed to be clarified. In reply, DEC stated that “Subpart O or 6 NYCRR Part 227-1 does not require monitoring of the particulate emissions from the ash silo. Since this is not required under the State or Federal regulation, this entire condition will be deleted from the permit.” *Responsiveness Summary*, p. 19.

Needless to say, NYPIRG is skeptical of DEC's decision to eliminate this requirement from the permit. We assume that there must have been some basis for the inclusion of the 0.0004 lb/hr limit in the draft permit, and we suspect that it was based on a federally enforceable emission limit in a pre-existing permit. Many New York facilities are subject to "permissible emission limits" in pre-existing permits. It is NYPIRG's understanding that DEC believes these "permissible" limits from prior permits were not intended to be enforceable. This position runs contrary to the explicit language in New York's SIP. In particular, 6 NYCRR § 200.1(bj) defines "permissible emission rate" as "[t]he maximum rate at which air contaminants are allowed to be emitted to the outdoor atmosphere. This includes . . . (3) any emission limitation specified by the commissioner as a condition of a permit to construct and/or certificate to operate." Similarly, the SIP-approved version of 6 NYCRR § 201 states that "a certificate to operate will cease to be valid under the following circumstances . . . (3) the permissible emission rate of the air contamination source changes." 6 NYCRR § 201.5(d)(3) (effective 4/4/93). Thus, the SIP makes it clear that the "permissible emission rate" included in SIP-based Part 201 permits is an enforceable requirement. The permissible emission rates included in the Part 201 permits previously issued to this facility must therefore be included in this Title V permit. If the 0.0004 lb/hr limit from the draft permit is in a federally enforceable pre-existing permit, DEC lacks discretion to eliminate it from the Title V permit. Moreover, any other conditions in federally enforceable pre-existing permits must be added to this Title V permit.

Conclusion

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the proposed Title V permit for the Bergen Point Sewage Treatment Plant.

Respectfully submitted,

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