BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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In the matter of the Proposed Title V
Operating Permit for

MARCAL PAPER MILLS, INC.
1 Market Street
Elmwood Park, New Jersey 07407
Permit ID: BOP990001

Proposed by the New Jersey Department of
Environmental Protection

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

This petition ("Petition") is submitted pursuant to § 505(b)(2) of the Clean Air Act and 40 C.F.R. § 70.8(d), on behalf of the Elmwood Park Environmental Committee ("EPEC"), GreenFaith, Sierra Club - New Jersey Chapter, and Laura Tracey-Coll (collectively, "Petitioners"). Petitioners are concerned about the health and well-being of community members who live, work, pay taxes, and breathe the air in the Elmwood Park, New Jersey area. Petitioners request that the Administrator ("the Administrator") of the United States Environmental Protection Agency ("EPA") object to the proposed title V Operating Permit issued by the New Jersey Department of Environmental Protection ("DEP") to Marcal Paper Mills, Inc. ("Marcal") facility located in Elmwood Park, New Jersey (the "Facility").

INTRODUCTION

The Permit has several deficiencies and does not adequately ensure that Elmwood Park and Paterson's air quality is not adversely impacted by the Facility. Petitioners charge that the Permit fails to satisfy the provisions of the Clean Air Act and should not be issued in its current form. Specifically, Petitioners maintain that DEP failed to include in the Permit a statement of basis, a compliance schedule, and sufficient opacity and emission monitoring requirements, and that the Permit fails to comply with State and Federal Environmental Justice Orders.

PROCEDURAL HISTORY

The Facility submitted its initial application for a title V Operating Permit in February of 1999. Due to an alleged backlog of applications at DEP, Marcal was required to submit a revised application over five years later, in October 2004. DEP prepared a draft permit and held public hearings on September 19, 2005. Members of EPEC, Sierra Club - New Jersey and other community organizations, as well as interested individuals living in the airshed affected by the Facility, testified at the public hearing and submitted written comments. The comment letters submitted to DEP by Petitioners are attached hereto as Exhibit A. On November 14, 2005, DEP issued a Hearing Report based on public comments on the draft permit. The Hearing Report is attached hereto as Exhibit B. However, because DEP in preparing the Hearing Report took the liberty of re-characterizing some of the questions asked by Laura-Tracey Coll during the public hearing, Petitioners also attach Ms. Tracey-Coll's testimony hereto as Exhibit C. On or about November 15, 2005, DEP submitted the proposed title V permit to EPA. The

transmittal letter sent by DEP to EPA is attached hereto as Exhibit D. EPA's 45-day review period ended on approximately December 30, 2005, after which DEP issued the final permit. This Petition is timely filed within 60 days following the end of EPA's review period, as required by § 505(b)(2) of the Clean Air Act.

If the Administrator determines that this permit does not comply with applicable requirements or the requirements of 40 C.F.R. Part 70, he must object to issuance of the permit. 40 C.F.R. § 70.8(c)(1) ("The 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."). Petitioners ask that EPA act expeditiously to respond to this Petition, and in any case, respond within the 60-day timeframe mandated in the Clean Air Act. The grounds for objection are set forth in the comment letters attached as Exhibit A and discussed in greater detail below.

MARCAL PAPER MILLS, INC. FACILITY

DEP issued the proposed title V permit to replace several preconstruction operating permits currently held or applied for by Marcal and to attempt to bring the Facility into compliance with Clean Air Act requirements. This is arguably a difficult task, as the Facility has a long history of air quality violations. Most recently, DEP fined Marcal $46,000 in 2001, $10,500 in 2003 and $193,984 in 2005 for failure to operate the Facility in compliance with the Clean Air Act and applicable state laws and regulations. In 2003 and again in 2004, Elmwood Park municipal officials and residents met with DEP to discuss the state's ongoing investigation of the Facility's questionable environmental compliance and the steps DEP was taking to ensure the Facility's

compliance with the state's environmental regulations. In March 2005, DEP discovered more violations at the Facility. DEP imposed yet another fine as a result of an agreement between Marcal and DEP. The Stipulation of Settlement ("Stipulation") entered into between Marcal and DEP is attached hereto as Exhibit E.

ARGUMENT

I. EPA Must Object to the Proposed Permit Because DEP Failed to Provide a Statement Of Basis.

DEP failed to provide a statement of basis as required by 40 C.F.R. §71.11(b). The applicable regulation at 40 C.F.R. § 70.7(a)(5), states that the permitting authority shall prepare a statement of basis for every draft permit, which provides both the factual and legal basis for the draft permit conditions. In the Matter of the New York Organic Fertilizer Co., Petition No. 11-2002-12, EPA Order at 14 (May 24, 2004). The requirement for a statement of basis provides that the permit must briefly describe the facility, the types and amounts of pollutants and the facility's potential to emit such pollutants, a derivation of the conditions of the draft permit, and the reasons for those conditions or, in the case of notices of intent to deny or terminate the permit, reasons supporting the decision. 40 C.F.R. § 71.11(b).

The statement of basis "should highlight elements that *EPA and the public* would find important to review… [and it] should support and clarify items such as any streamlined conditions, the permit shield and any monitoring required" under the title V program. In the Matter of the New York Organic Fertilizer Co. at 15 (emphasis added). In the present case, one of the elements that should have been highlighted for both the public and EPA is the Facility's past violations. There is no question that the Facility has

a poor compliance record, which has prompted a number of investigations into the Facility's compliance. In light of the numerous violations, DEP should state what corrective actions were taken by the Facility in conjunction with the latest Stipulation. In addition, since the violations covered by the Stipulation are still classified by DEP as "pending," DEP should provide an explanation of this pending status.

Another important element of public concern is the integration of several recently issued title I New Source Review (NSR) preconstruction permits into the Operating Permit. In particular, EPA and the public should be able to easily identify equipment and operations covered by the pre-construction permits, the terms of those permits, how they have been integrated into the Operating Permit, and to what degree any pieces of equipment covered by those permits have added to the Facility's overall emissions.

Accordingly, EPA should object to this title V permit and require DEP to draft a separate statement of basis which is understandable, available to the public and that describes the past history of this facility and the permitting decisions made by DEP.

II. The Proposed Permit Is Defective Because It Does Not Include a Compliance Schedule.

EPA should object to the Facility's Permit because DEP failed to include a compliance schedule as part of the Permit. A title V operating permit must include a compliance schedule when the permitted facility is not in compliance "with all applicable requirements at the time of permit issuance." 40 C.F.R. § 70.5(c)(8)(iii)(C). DEP has issued to Marcal multiple Administrative Orders, resulting in the assessment of penalties, for violations of the Clean Air Act. See DEP Enforcement Actions Issued to Marcal (listing violations addressed by Stipulation) attached as Exhibit F. Marcal and DEP entered into a Stipulation dated June 20, 2005 to settle the Administrative Orders and

"the long list of violations." See Letter from John Walsh of DEP of 1/26/2006, attached as Exhibit G. The Stipulation reduces the total penalties assessed against the Facility to less than $190,000, and requires Marcal to make installment payments for its violations over an 18-month period from June 20, 2005 through November 1, 2006.

The Stipulation further provides that in the event Marcal fails to make the payments in compliance with the terms of that agreement, DEP may proceed in a summary action to enforce payment of the full amount of penalties assessed for violations. Id. "Until the final payment [under the Stipulation] is received by [DEP], and a final determination has been made that the Facility has *in fact* complied with all of the Administrative Orders included in the settlement, the rest of the violations will remain as pending." Id. (emphasis added). As a result, the violations remain. Therefore, the Facility was not in compliance with the CAA at the time DEP issued the Permit. At a minimum, the Facility will not be in compliance until it makes *all* payments under the Stipulation. The Stipulation will not bring the Facility into compliance until November 2006. In addition, EPA should determine that, in fact, the Facility has remedied the various violations so that they do not occur in the future; the payment of fines does not ensure compliance with the Clean Air Act. Finally, other violations relating to the emission of HAPs from the kaofin dryers, which equipment has allegedly been deactivated, were not covered by the Stipulation.

When a facility is brought into compliance through a consent order or settlement agreement, *the terms of that agreement must be part of the permit.* In the Matter of Lovett Generating Station, EPA Order in Response to Petition No. II-2001-07, at 19 (emphasis added). By way of illustration, a state operating permit was issued to Lovett

Generating Station ("Lovett") by the New York State Department of Environmental Conservation ("DEC") in 2001. The New York Public Interest Research Group, Inc. ("NYPIRG") petitioned EPA to object to that permit on several grounds, including the failure to include a "compliance schedule designed to bring Lovett into compliance with PSD requirements." Id. at 1.

NYPIRG asserted that because DEC had issued a notice of violation ("NOV") to Lovett for operating in violation of PSD requirements, Lovett's operating permit must include a compliance schedule. Id. at 18. EPA responded that although DEC had issued the NOV, Lovett had not yet responded to the notice and the matter had not been settled. EPA stated that "[w]hen the matter is settled . . . the permit will be modified accordingly." Id.

EPA further stated that "[t]he issuance of a NOV and the subsequent correspondence and meeting between the agency and the facility are . . . the beginning stages of a process that could result in an Order of Consent, *or some other vehicle*, to resolve the violation(s)" (emphasis added). Id. at 19. "Once an Order on Consent has been issued, then the facility *must* comply with the schedule delineated therein, *and* a schedule that resembles or is at least as stringent as the schedule contained in the Order *must* also be incorporated into the facility's title V permit. See 40 C.F.R. §§ 70.5(c)(8)(iii)(C) and 70.6(c)(3)" (emphasis added). Id. In the present case, a schedule with terms at least as stringent as those set forth in the Stipulation evidencing the means by which the Facility will come into full compliance with the CAA must be part of the Facility's title V permit. The Facility's proposed permit does not include such a schedule. As such, EPA should object to the Permit.

In Lovett, EPA noted that the compliance schedule for opacity requirements set forth in an Order on Consent between DEC and Lovett dated August 18, 1998 was included in Lovett's title V permit. A portion of that compliance schedule, however, was inadvertently omitted from the Lovett permit. EPA stated that "upon re-opening of the title V permit, the DEC must incorporate *all* of the requisite requirements from the opacity compliance schedule as delineated in the August 18, 1998 Order on Consent." Id. at 27 (emphasis added). In the present case, all terms of the Stipulation required to satisfy the pending violations must be incorporated in the Facility's permit. However, none of the necessary terms are included in the permit.

The CAA allows "state and local governments to adopt and enforce their own air quality standards and limitations provided that the requirements are no less stringent than those prescribed by the federal government." 42 U.S.C. § 7416. EPA regulations require a permit to "include a schedule of remedial measures, including . . . milestones, leading to compliance" when a facility is not in compliance at the time the permit is issued. 40 C.F.R. § 70.5(c)(8)(iii)(C). In the case of the Facility, the Stipulation does not include any remedial measures or milestones leading to compliance. The Stipulation provides for a payment of penalties as full satisfaction of violations. The Stipulation does not set forth any measures to ensure the Facility's future compliance with the CAA pending payment of the penalties. The Stipulation does not provide a rationale to explain how the payment of less than $190,000 will ensure the Facility's future compliance with the CAA. "Such a rationale is required under part 70, and is particularly important where . . . there is prior evidence that suggests exceedances of permit limits." EPA Order in Response to Petition No. II-2005-01 at 10.

The Facility has exceeded permit limits numerous times in the past. See Exhibit F (listing most recent violations). As a result, it is safe to say that nothing in the Stipulation assures DEP or New Jersey residents that the payment of reduced penalties will deter future violations—penalties have not acted to deter violations in the past. A settlement providing for payment of a fine, without more, is not as stringent as requirements under EPA regulations. The Facility's permit must provide a rationale of how the Facility's future compliance is ensured by the Stipulation. The failure to include such a schedule is a violation of the Clean Air Act and grounds for EPA to object to the Permit.

III. The Proposed Permit Is Defective Because It Does Not Provide for Sufficient Opacity Monitoring.

Opacity at the Facility is not being adequately monitored by the Permit, and as such, provides another basis for EPA to object to the Permit. Opacity, or the amount of particulate matter in the air, is of particular importance to the residents in the surrounding neighborhood because asthma rates are very high. In Elmwood Park and neighboring Paterson, opacity violations are experienced as soot on cars, windows that cannot be opened and children who cannot play outdoors. In fact, Paterson, the city nearest to the Facility, was targeted by DEP in 2003 for an environmental compliance initiative, an effort carried out in partnership with EPA. See DEP Press Release 03/124, *High Number of Regulated Industries Situated Near Paterson Neighborhoods Triggers Concern: DEP to Launch Compliance and Enforcement Effort* (Sept. 5, 2003), available at http://www.nj.gov/dep/newsrel/releases/03_0124.htm.

Although several of the emission units in the Permit have an applicable opacity requirement, the related monitoring requirement is either non-existent or ineffective. EPA

regulations state that "Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring, [the permit shall contain] periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. §70.6(a)(3)(B). The Permit contains several items that do no meet this requirement. For example, subject items such as IS24**,** whose emissions "shall not exceed 20% opacity, exclusive of visible condensed water vapor, for more than 10 consecutive seconds," do not require any monitoring to ensure that the applicable requirement is met.

Similarly, the applicable requirement for boilers 12 & 13, which states that "No visible emissions except for a period of not longer than three minutes in any consecutive 30-minute period," requires monitoring only when operating on fuel oil, and then only by visual determination. Although DEP increased visual determination from each week to each day in response to comments, this determination can only be done during daylight hours and does not have to be made by a certified opacity reader. In the recent past, the Facility has had several emission violations from boilers 12 and 13, has consistently violated preconstruction permit conditions, and has operated equipment without first applying for a permit. Exhibit F. As a result, Petitioners remain concerned that daily opacity monitoring by visible inspection will not be accurately determined by Facility personnel and that particulate matter will continue to adversely impact the residents of the neighborhood.

Similarly, subject items such as U5 and U9**,** whose "emissions <= 20%, exclusive of condensed water vapor, except for a period no longer than three minutes in any consecutive thirty minute period," require monitoring by visual determination only. The

requirement is too vague with respect to how many observations must be made; although the visual determination must be done "each month during operation." There is no mention of the number of inspections or when, in the course of the operations, they must be done. In fact, Petitioners have no idea of when and for how long the paper machines are in operation. DEP must impose a monitoring requirement that is more specific in regard to frequency and duration to ensure that monitoring is in effect whenever the equipment is in operation.

In the case of a habitual violator like Marcal, the opacity of the Facility's emissions must be accurately and objectively determined, not estimated subjectively by visual determination. Since the objective of monitoring is to detect all emission exceedances, the proposed method must be replaced by one which accomplishes this goal. We ask that EPA object to the proposed Permit and remand it to DEP with instructions that DEP include a requirement that calls for Marcal to install Continuous Opacity Monitoring equipment at the Facility.

IV. The Proposed Permit Is Defective Because It Does Not Provide for Continuous Emissions Monitoring.

Bergen County is a nonattainment area for Ozone—both 1-hour (severe – 17) and 8-hour (moderate). EPA, Green Book (Sept. 29, 2005), available at http://www.epa.gov/air/oaqps/greenbk/anayo.html. Since both VOC and NOx emissions contribute to the increase of Ozone, these emissions need to be accurately monitored, especially in nonattainment areas. The Clean Air Act states that continuous emission monitoring is not required if alternative methods provide sufficiently reliable and timely information for determining compliance. 42 U.S.C. § 7661b. In the proposed

Permit, DEP declined to require continuous emissions monitoring systems for the Facility. However, the methods relied on in the proposed Permit for determining VOC emissions are either too infrequent or not sufficiently reliable to be effective. The problems associated with frequency and reliability are exacerbated by Marcal's history of violating the Clean Air Act by failing to obtain preconstruction permits, as well as committing other violations—such as using raw materials in its processes that are not listed in the permits. See Exhibit F at 1-3. In light of these factors, the provisions in the proposed Permit are not sufficiently reliable or timely and DEP's failure to include continuous emissions monitoring systems in the Permit provide another basis upon which EPA should object to the Permit.

For example, in the case of boilers 12 and 13, VOC and NOx emission determination is through stack testing. The Facility was supposed to complete a comprehensive stack test to demonstrate compliance with the VOC emission limits by December 3, 2005. Petitioners have not seen the results of that test and the date for completion is after the date DEP transmitted the Permit to EPA for approval. To allow the Facility to obtain a Permit that essentially gives it a "pass" for another three years is unconscionable. The Permit does not require the Facility to conduct the next test until June 2009—18 months before the proposed Permit expires. Other VOC and NOx requirements are only monitored by stack emission testing every five years. This schedule to determine compliance is neither reliable nor timely.

Given that the Facility has failed stack tests in the past, see Exhibit F, and that Petitioners have no knowledge of the results of the most recent test completed after the date of the proposed Permit, the long period without any VOC or NOx testing is

unacceptable. The Facility has a history of non-compliance: installing equipment without the required permits; emitting HAPs; violating reporting and monitoring requirements; and failing stack tests. DEP fined the Facility in 2001, 2003 and 2005. Since the proposed Permit contains no provision for monitoring between infrequent stack tests, and violations result in the equivalent to slaps on the wrist to a profitable company, there is little motivation for the Facility to maintain emissions within compliance levels at all times. EPA must object to this Permit as proposed and remand it back to DEP to modify the monitoring requirements to require Continuous Emission Monitoring equipment so that VOC and NOx emissions are detected and controlled on a continuing basis.

V. The Proposed Permit is Defective Because It Does Not Comply with the State and Federal Environmental Justice Executive Orders.

State and Federal laws prohibit environmental discrimination against low-income, minority communities. Title VI of the Civil Rights Act of 1964 and EPA's implementing regulations mandate that DEP consider the unequal burden already placed on these communities and take special measures to limit pollution. Presidential Executive Order 122898, signed in 1994, directs federal agencies to address disproportionately high and adverse human health effects of their policies on minority and low-income populations. ("Federal E.O."). Governor McGreevey's Order on Environmental Justice requires DEP to identify facilities in low-income communities and address their impacts on the community. ("NJ E.O."). In issuing an air permit under the federal Clean Air Act, DEP has an obligation to satisfy both the Federal E.O. and the NJ E.O.

The Facility is located in Elwood Park, which borders on Paterson. These areas are in close proximity to several industrial facilities that emit toxic pollutants. In

spite of the area's already high level of air pollution, DEP has allowed the Facility to increase its net air emissions with this operating permit. In 1995, the Facility reported emissions of 216 tons per year ("TPY") for criteria pollutants. The proposed Permit submitted to EPA allows more than double the pollutants emitted in 1995. With the addition of the Prime Energy plant, another 255 TPY of criteria pollutants are emitted into the area's environment. This is a shocking increase for an area already in non-attainment for ozone.

The Facility is located in an area that has a large low-income population, and many of the people working at the Facility live within one mile of the Facility. The number of area residents suffering from severe asthma is one of the highest in the country. The Bergen Record reported that Bergen County may have an asthma epidemic. See, J. Fields, *NJ Ozone Levels Rated Among Nation's Worst*, Bergen Record (May 23, 2000), available at: http://www.gsenet.org/library/11gsn/2000/gs00523-.php. Now, with the increased output allowed at the Facility, the higher level of air contaminants is affecting more residents, especially children and the elderly. This increase in pollution could be disastrous for an area already severely affected by high levels of air pollution.

Petitioners EPEC and Laura Tracey-Coll brought these environmental justice issues to the attention of DEP in their letters of September 2005. See Exhibit A. DEP did not directly comment on this issue in its Hearing Report. Instead, DEP commented on new PM2.5 standards that would have a sizeable impact on this community. Further evincing its disregard of public health and environmental justice issues, DEP intends to wait until 2008 to implement regulation of PM 2.5 even though it could implement measures today to reduce the harmful effects associated with PM 2.5. DEP admittedly

realizes that PM 2.5 is unsafe, yet still proposes to wait three or more years to reduce this type of harmful air pollution.

Petitioners demand that DEP heed the sense of urgency in the community and respond to the environmental justice orders currently in place by including strict conditions in the title V Permit to reduce the health and environmental impacts associated with this Facility.

VI. The Proposed Permit is Defective Because DEP Did Not Adequately Respond to Significant Issues Raised by Petitioners During Public Hearing.

DEP violated the public participation requirements of 40 C.F.R. § 70.7(h) by not providing an adequate responsiveness summary. DEP's hearing report fails to properly identify or characterize many of the concerns raised by members of the public and essentially responds to comments that were not made—and therefore fails to respond to the comments that were made. The comments go to the validity of DEP's underlying data about the area surrounding the Facility and the completeness of the application. Not only were these comments significant, they had the potential to change the outcome of the Permit. By recharacterizing the questions raised, which perhaps DEP was unable to answer, into questions that DEP could answer, DEP also affects the information presented to EPA when it reviews the Permit. As such, EPA should object to the Permit on this basis and remanded to DEP.

During the public hearing, Ms. Tracey-Coll pointed out several issues of concern to DEP relating to the accuracy of DEP data regarding the Facility. Exhibit C. In particular, Ms. Tracey-Coll noted that certain receptor sites, like the local high school, do not appear on DEP's maps. Ex. C at no. 15. Further, Ms. Tracey-Coll informed DEP

that the nearly 25% of the emission points identified by DEP in the area of the Facility are incorrect. Id.

In its hearing report, DEP states that "the Clean Air Act does not allow the Department to require air modeling as part of the procedure for issuing a Title V operating permit." Ex. B. at response 21. DEP went on to state that it performed the modeling as a courtesy to the residents. Id. The fundamental problem with DEP's response is that it does not address the concerns raised about the accuracy of DEP's underlying information and the modeling.

While DEP may not be "allowed" to require modeling as part of the title V permitting process, the information from the modeling finds its way into the preconstruction permits, which in turn have been incorporated into the title V Permit. DEP issued many new preconstruction permits to the Facility in the time leading up to the issuance of the draft title V permit. It is disingenuous for DEP to now ignore these comments on the basis of the fact that it believes the Clean Air Act somehow prohibits this type of modeling. These issues must be considered. DEP cannot administer this important program, establishing emissions limits and other applicable requirements that later become part of operating permits, if the foundational information is flawed. EPA should object to the Permit on this basis and remand it to DEP with further instructions.

CONCLUSION

The Facility has been and remains a habitual violator of the Clean Air Act, and has received numerous fines as a result of its violations. Yet EPA has seemingly approved the proposed operating Permit for the Facility without any comprehensive review of the comments by Petitioners. This is unacceptable not only to the citizens of

New Jersey, but specifically to the residents of Elmwood Park and Paterson who continue to suffer as a result of the Facility's callous disregard for the community members who are forced to live and breathe the dangerous pollutants due to the lack of resources required to move to a healthier community. Numerous health problems have been uncovered and linked directly to some of the dangerous levels of pollutants present in the area. EPA should object to the Facility's proposed title V Permit and remand the Permit to DEP for modification to ensure compliance with all applicable requirements.

Respectfully Submitted,

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