BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF MOTIVA ENTERPRISES, LLC Permit ID:2-6101-0015/0017 Facility DEC ID: 2610100105 Issued by the New York State Department of Environmental Conservation Region 2	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition No.: II-2002-05

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

On May 23, 2002, the Environmental Protection Agency ("EPA"or "Agency") received a petition from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, to the Motiva Enterprises, LLC, ("Motiva") located in Brooklyn, New York. The Motiva permit was originally issued by the New York State Department of Environmental Conservation, Region 2 ("DEC"), and took effect on April 26, 2002, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR parts 200, 201, 621, and 624. A modified permit was reissued on November 7, 2003, to allow for discontinuing the use of Methyl Tertiary Butyl Ether as a gasoline oxygenate additive, per New York ECL 19-031(3)(b). This reissued permit, herein referred to as the "final permit," is the permit that EPA reviewed in responding to the instant petition.

Motiva Enterprises, LLC, is a Petroleum Bulk Station and Terminal, consisting of storage tanks and a vapor recovery device that collects vapors displaced from gasoline transfer operations. Motiva supplies gasoline to retail, commercial, and industrial customers. The petition alleges that the Motiva permit, proposed by the DEC, does not comply with 40 CFR part 70 in that: (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing and making significant changes to the permit without allowing for public comment; (2) the proposed permit is based on an inadequate permit application in violation of 40 CFR § 70.5(c); (3) the proposed permit is not supported by a Statement of Basis as required by 40 CFR § 70.7(a)(5); (4) the proposed permit fails to include credible evidence language that satisfies EPA's Credible Evidence Rule of 62 Fed. Reg. 8314 (Feb. 24, 1997); (5) the proposed permit fails to include appropriate language regarding Permittee's duty to supplement and correct erroneous information as stipulated by 40 CFR 70.5; (6) the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (7) the proposed permit does not assure compliance

with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable. The Petitioner has requested that EPA object to the issuance of the Motiva permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

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

Based on a review of all the information before me, including the petition; the facility's permit application, dated June 6, 1997; the administrative record supporting the permit; NYPIRG's July 14, 1999 comments to the DEC on the Draft title V Operating Permit; DEC's Responsiveness Summary to NYPIRG's comments, dated January 31, 2002 (hereinafter "Responsiveness Summary"); the final effective permit issued April 26, 2002; the revised final effective permit issued November 7, 2003; the Annual Compliance Report for April 26, 2002 - March 31, 2003, I deny the Petitioner's request in part and grant it in part for the reasons set forth in this Order.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted full approval to New York's title V operating permit program on February 5, 2002. 67 Fed. Reg. 5216. Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

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

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

including the requirements of the applicable state implementation plan ("SIP"). This petition objection requirement is also reflected in the corresponding implementing regulations at 40 CFR § 70.8(c)(1).

Section 505(b)(2) of the Act states that if the EPA does not object to a permit, any member of the public may petition the EPA to take such action, and the petition shall be based on objections that were raised during the public comment[1] period unless it was impracticable to do so. This provision of the CAA is reiterated in the implementing regulations at 40 CFR § 70.8(d). If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

II. ISSUES RAISED BY THE PETITIONER

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claims below that DEC improperly denied NYPIRG's request for a public hearing, and that the application form submitted by Motiva was not in compliance with the requirements of the CAA, Part 70 and 6 NYCRR Part 201, EPA considers whether the Petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA § 505(b)(2) (objection required "if the Petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]); 40 CFR § 70.8(c)(1). As explained below, EPA believes that the Petitioner has failed to demonstrate that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit.

General Comments

A. Public Participation

The Petitioner alleges that DEC violated the public participation requirements of CAA § 502(b)(6) and 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing and by making significant changes to the permit without allowing for public comment. Petition at 2 of cover letter. Also, Petitioner notes that the proposed final permit includes a "non-applicability statement" at Condition 27, which was not present in the draft permit. As a result, Petitioner asserts, the public has not had an opportunity to comment on the permit conditions regarding non-applicability.

1. Public Hearing

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[1] *See* CAA § 505(b)(2) and 40 CFR § 70.8(d). The Petitioner commented during the public comment period by raising concerns with the draft operating permit that are the basis for this petition. *See* comments from Keri N. Powell, Esq., Attorney for NYPIRG to DEC (July 14, 1999) ("NYPIRG comment letter").

NYPIRG submitted written comments to DEC during the public comment period and requested a public hearing. DEC denied the hearing request in its January 31, 2002, letter responding to NYPIRG's comments. NYPIRG asserts that DEC does not have discretion to refuse to hold a hearing when one is requested. Petition at 2. NYPIRG further contends that a significant degree of public interest in the permit should have been evident from its submission of 30 pages of written comments. NYPIRG requests EPA's objection to the permit on the basis that it did not undergo the proper public participation procedure before the final permit was issued and requests that DEC hold a public hearing on the permit. Petition at 2.

In its petition, NYPIRG does not demonstrate or even allege that a public hearing on this permit would have garnered additional information such that it may have resulted in different terms and conditions in the permit. As noted in its petition, NYPIRG submitted 30 pages of relevant comments to DEC on the draft permit. DEC responded in writing to these comments in its January 31, 2002 Responsiveness Summary, and also modified certain permit conditions based on comments. Accordingly, in this case, NYPIRG does not demonstrate that DEC's failure to grant a hearing on the permit resulted in, or may have resulted in, a deficiency in the permit.

Additionally, neither the CAA nor EPA's implementing regulations require a permitting authority to hold a hearing when one is requested. Rather, the CAA and applicable regulations require only that States offer an opportunity for a public hearing. *See* CAA § 502(b)(6) and 40 CFR § 70.7(h). In accordance with these requirements, the federally approved New York title V program provides that DEC has the discretion to hold either a legislative or an adjudicatory public hearing. *See* 6 NYCRR § 621.7 (b) and (c). In this case, the DEC explained that "[a] public hearing would be appropriate if the Department determines that there are substantive and significant issues because the project, as proposed, may not meet statutory or regulatory standards." After carefully reviewing the source's application and public comments received, the DEC determined "that a public hearing concerning this permit is not warranted." Cover Letter to the Responsiveness Summary. In addition, the April 26, 2002 permit, which is the subject of the instant complaint, has been superceded by the November 7, 2003 final permit. The final Motiva permit was reopened and reissued in accordance with the public participation requirements of 40 CFR § 70.7(h) and 6 NYCRR § 621.6. DEC did not receive any public comments or hearing requests during the 30-day public comment period, beginning on September 24, 2003 and ending on October 24, 2003. Accordingly, NYPIRG's request that EPA object to the permit on these grounds is denied.

2. Opportunity to Comment

NYPIRG also alleges that DEC violated the public participation requirements of title V by submitting a proposed permit to EPA for its 45 day review without first providing for opportunity for public comment on significant changes made to the permit proposed to be issued as the final permit. In particular, NYPIRG alleges that the proposed permit includes a non-applicability statement, at Condition 27, which was not included in the draft permit. NYPIRG

asserts that the non-applicability statement specifies regulations that DEC has determined are not applicable to the facility and thus creates a permit shield.

Condition 1-4 (Condition 27 of the proposed permit) of the final permit contains a list of federal regulations, which DEC cites as being non-applicable to the facility. Although NYPIRG is correct that the inclusion of this condition in the final permit may have improperly limited the public's ability to comment on a significant change to the Motiva permit, the April 26, 2002 Motiva permit, which is the subject of the instant complaint, was superceded by the issuance of a revised permit on November 7, 2003. This revised final permit was reopened and reissued in accordance with the public participation requirements of 40 CFR § 70.7(h) and 6 NYCRR § 621.6. The inclusion of Condition 1-4 in the re-issued final permit elicited no comments during the 30-day public comment period, beginning on September 24, 2003 and ending on October 24, 2003. For this reason, the petition is denied on this issue.

B. Inadequate Permit Application

Petitioner argues that Motiva's application for a title V permit must be denied because applicant did not submit 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). Petition at 2. Petitioner's specific concerns regarding Motiva's permit application state that it failed to satisfy legal requirements because it omitted:

1. Certain background information required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4), including:
   (a). a description of all applicable requirements that apply to the facility; and
   (b). a description of or reference to any applicable test method for determining compliance with each applicable requirement.

2. An initial compliance certification that includes:
   (a). 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 CAA § 114(a)(3)(C), 40 CFR § 70.5(c)(9)(i), and 6 NYCRR § 201-6.3(d)(10)(i).
   (b). a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based, as required by CAA § 114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201- 6.3 (d)(10)(ii).

NYPIRG also alleges that the lack of information in the application makes it more difficult for the public to evaluate the adequacy of the draft permit during the 30-day public comment period. Petitioner states that Motiva's failure to submit a complete permit application is a substantive and significant issue that should require DEC to hold an adjudicatory public hearing. Petition at 3.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claims with respect to Motiva's permit application, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA Section 505(b)(2). An objection is required "if the Petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]." *Id*.; 40 CFR § 70.8(c)(1). As explained below, Petitioner has not demonstrated that the lack of certain background information required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4), and the lack of an initial compliance certification statement in the permit application, resulted in, or may have resulted in, a deficiency in the permit. We respond to these issues below.

B(1). Omission of a description of applicable requirements that apply to the facility.

The Petitioner claims that Motiva's title V application was flawed in that the source failed to include a narrative description of applicable requirements that apply to the facility in accordance with 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4).

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

Consistent with EPA guidance, in describing applicable requirements, the permit application references applicable State and Federal regulations. For example, pages 2, 6, and 7 of the application identify several applicable requirements including, but not limited to 6 NYCRR §§ 201.6.2, 201.6.3 and 6 NYCRR §§ 229.3, 229.4. These regulations are publicly available and are also available on the internet. In addition, the application also provides a narrative description of certain requirements. For example, pages 2, 3, 6, and 7, Continuation Sheet 1 of 1 of section III, and Continuation Sheets 1 of 1 and 1 of 2 of section IV of the permit application, dated June 6, 1997, contain a description of applicable requirements that apply to the facility. The Petitioner has not shown that any of the descriptions were in error or that the referenced material is not available to the public. The petition is therefore denied on this issue.

B(2). Omission of a description of applicable test methods for determining compliance with each applicable requirement.

The Petitioner's second allegation is that the application form lacks a description of, or reference to, any applicable test method for determining compliance with each applicable requirement in accordance with 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4). EPA disagrees with Petitioner's allegation.

Motiva is a gasoline loading facility which receives, and then supplies, gasoline to retailers, commercial, and industrial customers. In this type of operation, one of the primary methods of determining emission compliance consists of limiting and monitoring gasoline throughput at the facility. At pages 3, 7, and Continuation sheet 1 of 1 of sections III and IV of the permit application, the applicant specifies the monitoring of the facility's gasoline throughput as a monitoring means for ensuring compliance with annual emission limits. Throughput monitoring, coupled with emissions calculations[2] presented in the application, serve as the applicable test method for verifying compliance with annual emission limits. Therefore, the permit application provided information by which emissions compliance, as expressed through applicable requirements, can be monitored. While EPA notes that the final permit contains specific test methods which were not referenced in the permit application, (i.e., Item 1-11.2, page 34, references Method 25B for measuring VOC concentration) the Petitioner has not shown that this omission resulted in a deficient permit. For this reason, the petition is denied on this issue.

B(3).Omission of a statement certifying that the applicant's facility is currently in compliance with all applicable requirements.

Petition also alleges that Motiva failed to submit a statement certifying its initial compliance status in accordance with CAA § 114(a)(3)(C), 40 CFR § 70.5(c)(9)(i), and 6 NYCRR § 201-6.3(d)(10)(i). The Petitioner is correct that the application form used by DEC did not clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. The applicant certified that it would be in compliance with all applicable requirements at the time of permit issuance and certified that for all units at the facility that are operating in compliance with all applicable requirements, the facility will continue to be operated and maintained to assure compliance for the duration of the permit, except for those units referenced in Section IV, the compliance plan portion of the permit. There were no compliance plans listed in the compliance plan portion of the permit. Therefore, it is evident from the information submitted in the application that Motiva effectively certified that it was in compliance with all applicable requirements at the time it submitted its application and that a compliance schedule was not necessary. Accordingly, the Petitioner has not adequately demonstrated that the submission of a different initial compliance certification may have resulted in different terms and conditions in the permit (i.e., a compliance schedule). As such, the

[2] Calculations sheets are included in the permit application, titled "Fugitive VOC Emissions from Loading Rack and Vapor Recovery Unit," "VOC Emissions from Truck Loading Vapor Recovery Unit," "VOC capture Efficiency of the Loading Rack," "VOC Emissions from Additive Storage tanks," "VOC Emissions from Gasoline/Distillate Storage tanks," "HAP Emissions from Additive Storage tanks," "HAP Emissions from Gasoline/Distillate Storage tanks," and "HAP Emissions from Truck Loading Vapor Recovery Units."

petition is denied with respect to this issue.

B(4).Omission of a statement of the methods for determining compliance with each applicable requirement.

Petitioner alleges that the application form submitted by Motiva was inadequate because it did not specifically require the facility to include a statement of methods used for determining compliance in accordance with CAA § 114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201-6.3(d)(10)(ii). Although the applicant specifies that compliance with annual emission limits is achieved through monitoring of the facility's gasoline throughput, several other compliance methods, which were later stated in the final permit (e.g., Method 27, referenced at Item 1-29.2, for testing tank truck vapor tightness, Method 40 CFR 60.503 XX referenced at Item 1-23.2 and Methods 18, 25, 25 A, and 25 B, referenced at Item 96.2 for testingVOC emissions from the VRU, ASTM D323-99a test method for measuring gasoline vapor pressure, at Item 1-48.2), were not stated in the permit application. Notwithstanding these omissions, as explained above in Section 1(b), Petitioner has not demonstrated that Motiva's failure to include, in its application, a statement of methods for determining compliance with each applicable requirement, resulted in a deficient permit. For this reason, the petition is denied on this issue.

C. Failure to Include a Statement of Basis

Petitioner alleges that Motiva's proposed title V permit is defective because DEC failed to include any sort of "statement of basis" or "rationale" with the permit explaining the legal and factual basis for draft permit conditions. Petition at 4. Petitioner notes that information provided in the draft permit's cover sheet "does not provide any sort of a rationale for DEC's decisions as to what type of monitoring to require, or what requirements to apply." Petition at 6. Further, Petitioner states that there can be no credible claim that this brief statement satisfies the requirement found in 40 CFR Part 70, stipulating that the draft permit be accompanied by a statement that sets out "the legal and factual basis for the draft permit conditions." 40 CFR § 70.7(a)(5).

Section 70.7(a)(5) states that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." The statement of basis is not a part of the permit itself. It is a separate document[3] which is to be sent to EPA and to interested persons upon request.[4]

A statement of basis ought to contain a brief description of the origin or basis for each

[3] Unlike permits, statements of basis are not enforceable, do not set limits and do not create obligations. Thus, certain elements of statements of basis, if integrated into a permit document, could create legal ambiguities.

[4] EPA notes that a statement of basis, or "Permit Description," was made available with Motiva's final effective permit issued on November 7, 2003.

permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should highlight items such as the permit shield, streamlined conditions, or any monitoring that is required under 40 CFR § 70.6(a)(3)(i)(B) or 6 NYCRR § 201-6.5(b)(2).

A statement of basis should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA a record of the applicability and technical issues surrounding the issuance of the permit.[5] *See e.g., In the Matter of Port Hudson Operation Georgia Pacific*, Petition No. 6-03-01, at pages 37-40 (May 9, 2003); *In the Matter of Doe Run Company Buick Mill and Mine*, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002). Finally, in responding to a petition filed in regard to the Fort James Camas Mill title V permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for the selected monitoring methods be documented in the permit record. *See In Re Fort James Camas Mill*, Petition No. X-1999-1, at page 8 (December 22, 2000) (*"Ft. James"*).

EPA's regulations provide that the permitting authority must provide EPA with a statement of basis. 40 CFR § 70.7(a)(5). The failure of a permitting authority to meet this requirement, however, does not necessarily demonstrate that the title V permit is substantively flawed. As noted previously, in reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the Petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. Thus, where the record as a whole supports the terms and conditions of the permit, flaws in the statement of

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

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

In this case, the draft permit was accompanied by a permit description, and a more detailed permit review report was issued with the final permit. We have reviewed the permit and the supporting documentation before us. The final effective permit, issued on November 7, 2003, together with the attendant Permit Review Report, remedied the lack of information that Petitioner identifies with respect to the draft permit. EPA notes that the referenced documentsprovide a detailed description of the facility, its emission units, and control devices. These documents:

- Define the operation at Motiva, as a petroleum bulk terminal receiving products via pipeline, truck and barge, and distributing products to retail, commercial, and industrial customers via trucks.

- List Motiva's three (3) emission units with their associated hardware and operations: Nineteen (19) storage tanks, broken down into their specific categories; gasoline loading and off-loading operations.

- Identify the facility's main control device, a vapor recovery unit (VRU) made up of two activated carbon adsorption beds, and a vacuum system employed for desorption.

- Provide an explanation for exempting the facility from major new source review (NSR) requirements.

- Provide specific operational restrictions on the facility's control device (i.e., VRU emissions are continuously monitored not to exceed an imposed permit emissions limit of 7 mg of volatile organic compounds (VOC) per liter of gasoline loaded.)

- Define the primary monitoring methods on which the facility relies to monitor emissions, namely, a continuous emission monitor which is supplemented by intermittent stack testing.

- Provide a list of the rules and regulations to which the facility is subject.

- Provide an explanation of the regulatory exemptions that apply to the facility.

In all, the discussions presented in the Permit Description and Permit Review Report include all of the necessary and suggested components to support the Motiva title V permit. In addition, as discussed previously in Section II.A.1., the April 26, 2002 permit was superceded by the issuance of the November 7, 2003 final permit. A revised statement of basis was made

available during the public comment period when the Motiva permit was reopened and reissued in accordance with the public participation requirements 40 CFR § 70.7(h) and 6 NYCRR § 621.6. For this reason, we deny the petition on this issue.

D. Overall Lack of Periodic Monitoring

Petitioner states that permits are required, under 40 CFR Part 70, to contain periodic monitoring that is sufficient to demonstrate compliance with permit requirements. Petition at 6. Petitioner alleges to have identified, throughout Motiva's permit, conditions for which periodic monitoring is either absent or insufficient to assure compliance with permit requirements. Petition at 8. The specific allegations raised by Petitioner are addressed in this Order, at the section titled "Comments on Specific Draft Permit Conditions," *infra.*

E. Compliance Method Requirements

Petitioner notes that the CAA allows citizens, DEC, EPA, and the source itself to rely upon any credible evidence to demonstrate violations of or compliance with permit terms and conditions. Petition at 8. As such, Petitioner recommends that DEC include credible evidence language in Motiva's permit that satisfies EPA's Credible Evidence Rule at 62 Fed. Reg. 8314 (Feb. 24, 1997).

As emphasized by EPA's Credible Evidence Rule, the CAA allows the public, DEC, EPA and the regulated facility to rely upon credible evidence to demonstrate violations of or compliance with the terms and conditions of a title V permit. *Id.* The absence of language regarding the use of credible evidence in the title V permit does not preclude its use in demonstrating non-compliance. Therefore, EPA denies the petition on this point.

F. Duty to Supplement and Correct

Petitioner notes that 40 CFR § 70.5 (b) and 6 NYCRR § 201-6.3(b)(2) provide that "[a]ny applicant who fails to submit any relevant facts or has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information." Petition at 9. Petitioner proposes that DEC include a condition in the final permit reflecting this requirement.

As Petitioner noted in its comments, it is within DEC's discretion to include the "duty to supplement and correct" language in the permit. Unlike the applicable requirements, DEC is not required to include regulatory requirements or definitions that apply to the state's approved title V program in the permit. These requirements have the same legal force and effect whether they are stated in the permit or not. Therefore, EPA denies the petition on this issue.

G. Compliance Certification and Monitoring Reports

Petitioner alleges that the draft permit fails to identify the information that must be

included in the semi-annual monitoring reports and the annual compliance certification reports, as well as those draft permit conditions that are subject to the "compliance certification activity." Petition at 9. Petitioner argues that 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." Hence, Petitioner states, Motiva must certify compliance with every substantive condition in its annual compliance report, not just with conditions that are accompanied by specific monitoring requirements. Petitioner alleges that the permit's lack of adequate information about the required contents of the annual compliance certification and the six-month monitoring reports, as well as the permit's incorrect application of compliance certification requirements, raises substantive and significant issues that could result in denial of the permit or the imposition of significant conditions thereon. Petitioner further states that each monitoring and recordkeeping requirement identified in the draft permit is followed by the statement "Reporting Requirements: Upon Request by Regulatory Agency," while failing to mention the required six-month monitoring report in relation to specific monitoring requirements. For these reasons, Petitioner asserts, DEC must deny the permit or hold an adjudicatory public hearing on these issues.

The language in the permit that labels certain terms as "compliance certification" conditions does not mean that Motiva is *only* required to certify compliance with the permit terms containing this language. The label "compliance certification" is a data element in New York's computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. Condition 1-3 of the permit delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

Further, section ii of Item 1-3.2 states: "The responsible official must include in the annual certification report all terms and conditions contained in this permit which are identified as being subject to certification, including emission limitations, standards, or work practices. That is, the provisions labeled herein as "compliance certification" are not the only provisions of this permit for which an annual certification is required."

Therefore, the "compliance certification" language contained in the Motiva permit does not negate the general requirement that sources certify compliance with the terms and conditions contained in their permit. Because Motiva's November 7, 2003 permit and New York's regulations properly require the source to certify compliance or noncompliance annually with the terms and conditions contained in the permit, the petition is denied on this point.

With respect to the six-month monitoring report, EPA concurs with Petitioner that, where there are terms and conditions that create an obligation on the permittee, the permit must clearly specify that reporting is required "every six months." While permit conditions may stipulate that reporting is required "Upon Request by Regulatory Agency," the permit must also include a requirement that, at a minimum, reporting of the monitoring is due every six months for those terms and conditions that create an obligation on the permittee. Item 24.2 (page 16) of the final

permit clarifies this point. It states:

> In the case of any condition contained in this permit with a reporting requirement of "Upon request by regulatory agency" the permittee shall include in the semiannual report, a statement for each such condition that the monitoring or recordkeeping was performed as required or requested and a listing of all instances of deviations from these requirements.
>
> In the case of any emission testing performed during the previous six month reporting period, either due to a request by the Department, EPA, or a regulatory requirement, the permittee shall include in the semiannual report a summary of the testing results and shall indicate whether or not the Department or EPA has approved the results.

Therefore, the final permit affirms that the permittee is required to identify in its six month monitoring report each term or condition of the permit that is the basis of the certification, and include a listing of all instances of deviations from these requirements. Additionally, the language "Upon Request by Regulatory Agency" that was originally present in certain draft permit conditions has been removed from the final permit. Therefore, this issue has been addressed in the final permit, and is now moot.

Comments on Specific Draft Permit Conditions

Petitioner identifies numerous individual permit conditions that allegedly either lack periodic monitoring or are not practically enforceable. A full discussion of these issues and EPA's response follows.

Background – Title V Monitoring

Two provisions of part 70 require that title V permits contain monitoring requirements. The "periodic monitoring rule," 40 CFR § 70.6(a)(3)(i)(B), requires that "[w]here the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record keeping designed to serve as monitoring), [each title V permit must contain] periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit .... Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Record keeping provisions may be sufficient to meet the requirements of [40 CFR § 70.6(a)(3)(i)(B)]." The "umbrella monitoring" rule, 40 CFR § 70.6(c)(1), requires that each title V permit contain, "[c]onsistent with [section 70.6(a)(3)], ...monitoring ... requirements sufficient to assure compliance with the terms and conditions of the permit." EPA has interpreted section 70.6(c)(1) as requiring that title V permits contain monitoring required by applicable requirements under the Act (e.g., monitoring required under federal rules such as MACT standards and monitoring required under SIP rules), and such

monitoring as may be required under 40 CFR § 70.6(a)(3)(i)(B). 69 Fed. Reg. 3202, 3204 (Jan. 22, 2004); *see also*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). Petitioners' allegations about the monitoring required in the Motiva title V permit concern both monitoring required as part of the applicable requirements and monitoring added to the permit by DEC pursuant to the periodic monitoring rule.

A. Condition 3, Item 3.1 (Maintenance of Equipment)

Petitioner alleges that general permit Condition 3, Item 3.1, which reiterates the requirement under 6 NYCRR § 200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer specifications, must be supplemented with specific periodic monitoring. Petition at 11. Petitioner notes that Motiva relies upon pollution control equipment, and therefore Petitioner argues, the permit must explain exactly what is considered to be reasonable maintenance practices, and spell out the manufacturer's specifications. Petition at 11.

Motiva is subject to the requirements of Part 60, Subpart XX – Standards of Performance for Bulk Gasoline Terminals. 40 CFR § 60.500 *et. seq*. In accordance with these requirements, Motiva's final permit specifies, in its Permit Description, that the facility relies on a vapor recovery unit (VRU) to limit its VOC emissions. Further, under the DEC's title V permit format, where control equipment is installed pursuant to an applicable requirement, the corresponding permit condition is included in the emission units section of the permit, rather than in the general permit condition section. In line with this format, Motiva's final permit includes the maintenance procedures for the VRU at Condition 84 and Item 1-32.2. These maintenance procedures track the requirements of 40 CFR § 60.502(j) and 6 NYCRR § 229.3(d), which are applicable requirements. Condition 84 requires the owner or operator to conduct monthly inspections for liquid or vapor leaks and to repair any detected leaks within 15 calendar days. *See* 40 CFR § 60.502(j). Item 1-32.2 reiterates the language of 6 NYCRR § 229.3(d), that the vapor control systems be maintained in "good working order." Motiva accomplishes this by monitoring the performance of the VRU continuously via a continuous emission monitor ("CEM") to ensure the source maintains compliance with the VOC emissions limit of 7 milligram of VOC emissions per liter of gasoline loaded at all times during operation. For this reason, EPA denies the petition on this issue.

B. Condition 5, Item 5.1 (Unpermitted Emission Sources)

Petitioner raises two issues with respect to Condition 5. First, Petitioner states that if Motiva currently has a New Source Review (NSR) permit, then the terms of the NSR permit should be described in the title V permit. On the other hand, Petitioner argues, if Motiva does not have such permit, a reasonable investigation is warranted into whether such a permit is required. Second, Petitioner disputes the language of 6 NYCRR § 201-1.2, stated at Condition 5, which stipulates that if an owner/operator failed to apply for a permit for an emission source, then such owner/operator would be required to follow the regulations of 6 NYCRR § 201-1.2 to

get into compliance. Petition at 11. It is Petitioner's view that these regulations should impose penalties on the source in the event that it is discovered that the facility lacks the required permit. Thus, Petitioner alleges, as the permit is currently written, a source would not be subjected to penalties if it is late applying for a permit. Petitioner asserts that a clause should be added to the permit stating that if it is discovered that Motiva failed to obtain a required permit, then it would be subjected to all penalties authorized by state and federal law.

Condition 5 appears as Item D of the final permit. Regarding Petitioner's first issue relating to NSR, the "Permit Description" accompanying the final permit states that NSR is not applicable to the project because there will be no increase in potential VOC emissions as a result of the process modification at the facility. Therefore, the issue has been addressed in connection with issuance of the final permit.

Regarding Petitioner's second claim, Item D (relating to unpermitted emission sources) tracks the language of state regulation 6 NYCRR § 201-1.2, (adopted March 20, 1996), which provides that if an existing emission source was subject to the permitting requirements of 6 NYCRR part 201 at the time of construction or modification and the owner or operator failed to apply for a permit, then the owner or operator must now apply for a permit. The condition further states that the emission source or facility is subject to all regulations that were applicable to it at the time of construction or modification and any subsequent requirements applicable to existing sources or facilities. EPA notes that this provision does not relieve the permitting authority or permittee from including applicable construction permit conditions in the permit. In addition, if the facility is in violation for not having proper construction permits, the permit must include a compliance schedule. 40 CFR § 70.6(c)(3).

The SIP at 6 NYCRR § 201.2(a), and stated at Item D of the final permit, provides that no person shall commence construction or proceed with a modification of an air contamination source without having a valid permit. Petitioner's specific concern that the permit shield could preclude the imposition of penalties is unfounded. The permit shield stipulates that compliance with the conditions of the permit is deemed to be compliance with those applicable requirements that are *specifically identified* in the permit or those requirements that the State *specifically identifies* as not applicable. 40 CFR § 70.6(f) (emphasis added). *See* 6 NYCRR § 201-6.5(g). Therefore, the permit shield does not exonerate a facility that fails to have any required construction permits. If an unpermitted source was later discovered, the permittee would have to apply for the proper construction permits, and the title V permit would be reopened to include the necessary applicable requirements. *See* 40 CFR § 70.7(f)(iv); 6 NYCRR § 201-6.5(i); 6 NYCRR § 201-6.7(d) and (e). Additionally, the facility would be subject to any other appropriate enforcement actions and/or penalties. *See* 6 NYCRR § 201-6.5 (g)(2). Item D directs what the permittee must do to achieve compliance. It does not address the penalties that may result from non-compliance. Therefore, Item D does not preclude the public, DEC or EPA from bringing an enforcement action and seeking penalties from the facility. Accordingly, the petition is denied on this point.

C. Condition 6, Item 6.1 (Unavoidable Noncompliance and Violations) and Condition 18, Item 18.2 (Monitoring and related Recordkeeping, Reporting Requirements)

According to Petitioner, several changes must be made to the permit to ensure that the startup/shutdown, maintenance/malfunction/upset condition and related record keeping and reporting requirements are not abused. Petition at 12 -16. Petitioner makes the following seven claims:

(1). Petitioner asserts that the permit should state that a violation of a federal requirement is only excused if the federal rule, itself, provides for such an exception. Petitioner requests that Item 6.1 of Condition 6 be revised to include the language of 6 NYCRR § 201-6.5(c)(3)(ii) stating: "In order to have a violation of a federal regulation excused, the specific federal regulation must provide for an affirmative defense during start-up, shutdowns, malfunctions or upsets."

(2). Petitioner alleges that the permit should provide definitions for the terms "malfunction," "upset," and "unavoidable." Petitioner notes that those terms are not defined in the most current version of 6 NYCRR Part 201, the applicable requirement listed in the permit. Petitioner asserts that a definition of each of these terms should be given in the permit to make the startup/shutdown, maintenance/malfunction/upset provision enforceable.

(3). Petitioner contends that the permit must specify the circumstances under which a violation may be excused by the Commissioner as "unavoidable." Petitioner asserts that the permit's statement of basis must include a thorough explanation of how DEC reached its conclusions that it is impossible for Motiva to comply with applicable emission limitations under specified conditions.

(4). Petitioner alleges that the permit must define Reasonably Available Control Technology ("RACT"). Also, Petitioner argues that "monitoring, recordkeeping, and reporting requirements" must be described in the permit to provide a reasonable assurance of compliance with RACT requirements.

(5). Petitioner contends that the permit must require that a written report be submitted to DEC whenever the facility exceeds emission limitations due to startup/shutdown/maintenance, not just "when required to do so in writing." According to Petitioner, the 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, Petitioner contends that it should have an obligation to submit a written report explaining why the violation was unavoidable. Finally, Petitioner asserts that a deadline for submission of these reports must be included in the permit.

(6). Petitioner argues that Item 6.1(b) must be changed to require the facility to provide

both written notification and a telephone call to DEC within two working days of an excess emission that is due to "malfunction."

(7). Also, Petitioner asserts that Item 6.1(b) must be changed to require the facility to submit a written report within thirty days after he facility exceeds an emission limitation due to a malfunction. Petition at 15. According to Petitioner 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.

(8). Petitioner alleges that Item 18.2 of the draft permit is in clear violation of federal requirements because it does not require prompt reporting of all deviations from permit limits.

Petitioner's claims pertain to Conditions 6 and 18 of the draft permit. Condition 6 titled, "Unavoidable Noncompliance and Violations" has been replaced by Condition 103 in the final permit, and placed on the state-only side of the permit. Condition 18 has been replaced by Condition 24 in the final permit. The issues raised by Petitioner are addressed below in the order stated above.

Response

(1). In the final permit, DEC removed the "Unavoidable Noncompliance and Violations" or "excuse provision" that cites 6 NYCRR § 201-1.4 from the federal side of the title V permit and incorporated it into the state-only side of the permit (Condition 103). 6 NYCRR § 201-1.4 is a State regulation that has not been approved into the SIP and is therefore appropriately placed on the State side of the permit. This condition provides DEC with the discretion to excuse the facility from compliance with applicable state-only emission standards under certain circumstances, based on the specific criteria set forth in 6 NYCRR § 201-1.4. In addition, DEC included clarifying language in the final permit stating that a violation of a federal regulation cannot be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets.[6] Therefore, this issue has been addressed in the final permit.

(2) - (7). With respect to Petitioner's other allegations regarding the startup, shutdown and malfunction provision (definition of terms, "unavoidable" defense, prompt reporting of

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

deviations including the requirement that reports be "in writing" and submitted within thirty days after the facility exceeds an emission limitation due to a malfunction, definition of RACT, and associated monitoring, recordkeeping and reporting requirements to assure compliance with RACT), the removal of the "excuse provision" from the federal side of the permit and the incorporation of the language clearly stating that the "excuse" provision is not available for violations of federal regulations makes moot these concerns. *See* Condition 103.

(8). Prompt Reporting Requirements: Title V permits must include requirements for the prompt reporting of deviations from permit requirements. *See* 40 CFR § 70.6(a)(3)(iii)(B).[7] States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. Moreover, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case determination under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).[8]

The final permit includes such a general provision at Conditions 24, 103, and Item E. These conditions state that if an applicable requirement includes a definition of prompt, or otherwise specifies a time frame for reporting deviations, that definition or time frame governs. Where the underlying applicable requirement fails to address the time frame for reporting deviations, Condition 24 requires that the report be made within 24 hours for emissions of hazardous air pollutants (HAPs) or toxic air pollutants (TAPs) that continue for more than one hour in excess of permit limits, and within 48 hours for emissions of any regulated air pollutant, other than HAPs or TAPs, that continue for more than two hours in excess of permit requirements. Thus, the prompt reporting requirements contained in the Motiva final permit distinguish between the prompt reporting required for potentially dangerous excess emissions and other types of deviations. These criteria reflect a reasoned judgment regarding the circumstances in which an expeditious notification is warranted. For any other deviations, the report must be submitted every six months. Thus, the prompt reporting requirements contained in this permit are consistent with EPA's own interpretation of the prompt reporting requirements, adopted after public notice and comment, in the Part 71 federal title V program.

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[7] 40 CFR § 70.6(a)(3)(iii)(B) states: "[t]he permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirement."

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

Therefore, all of Petitioner's concerns raised with respect to Conditions 6 and 18 of the draft permit have been addressed in the final permit. EPA denies the petition on these issues.

D. Condition 7, Item 7.1 (Emergency Defense)

Petitioner argues that, for clarity, a definition of the word "emergency" should be incorporated into the permit. Petitioner suggests using the definition at 6 NYCRR § 201-2.1(b)(12). Petition at 16.

NYPIRG does not attempt to demonstrate, or even allege, that the failure to include a definition of "emergency" in the permit renders it substantively deficient or unenforceable. Moreover, as stated in previous Orders, commonly used regulatory terms, or terms that are already defined in the regulations, do not have to be defined in the permit. *See* e.g., *In the Matter of New York Organic Fertilizer Company ("NYOFCO"),* Petition No. II-2002-12, at 30 (May 24, 2004). As NYPIRG correctly notes, "emergency" is defined at 6 NYCRR § 201-2.1(b)(12). Thus, any reference to the term "emergency" in the permit is governed by the definition set forth in the New York regulations. Therefore, EPA denies the petition on this point.

E. Condition 13, Item 13.1(i) (Applicable Criteria)

Petitioner asserts that requirements pertaining to an accidental release plan, response plan, or compliance plan, all of which are referenced at that condition, might be applicable to Motiva yet are not incorporated into the permit. Petition at 17. Petitioner argues that if those documents exist, they are applicable requirements and must be included as permit terms.

EPA disagrees with the Petitioner that all types of plans must be a part of a title V permit. In certain cases, a facility must comply with a plan that is not part of the title V permit. For instance, risk management plans under CAA § 112(r) need not be incorporated into title V permits. However, EPA does agree that certain documents should be properly cross-referenced in title V permits. For example, where a facility is subject to plans such as a NO_x RACT plan or a startup, shutdown and malfunction plan under a maximum achievable control technology ("MACT") standard, the permit must specifically say so and properly incorporate that plan by reference. In this case, there is no allegation that this facility is subject to such plan(s).

Because the Petitioner does not allege any specific plans that should have been, but were not, included in the permit as an applicable requirement, EPA denies the petition on this issue.

F. Condition 15, Item 15.3 (Risk Management Plan)

Petitioner states that the reference, in the draft permit, at Condition 15, to "risk management plans" must be clarified to explain whether Section 112(r) of the Clean Air Act applies to the facility. Petition at 17. Petitioner requests that DEC affirm, in the Statement of Basis, the applicability of such plan to the facility.

The reference to Risk Management Plans ("RMP") is stated at Condition 1-21 of the final permit and states: "If a chemical . . . listed in Tables 1, 2, 3 or 4 of 40 CFR § 68.130 is present in a process in quantities greater than the threshold quantity listed in Table 1, the following requirements will apply." The condition goes on to list these requirements. This condition is written generally because of the nature of the section 112(r) requirements, which are different from other applicable permit requirements. Since applicability is based on having a listed 40 CFR § 68.130 substance over the threshold quantity located at the facility, applicability may fluctuate over the life of the permit. Therefore, although general section 112(r) permit conditions do not definitively state whether an individual source is subject to the risk management plan requirements, the permit structure ensures that the permit covers any newly subject source, or any source whose applicability fluctuates, thereby ensuring that the section 112(r) permit obligations remain up to date.

Motiva did not include section 112(r) requirements in its application, nor has it submitted a Risk Management Plan (RMP) to EPA, the agency responsible for implementing section 112(r) requirements in New York. In addition, Petitioner has presented no evidence to suggest that Motiva is subject to section 112(r) requirements. Therefore, based on the information provided, and absent any information to the contrary, it is reasonable to conclude that section 112(r) does not apply to this source. Additionally, as explained above, if Motiva were to trigger the section 112(r) and Part 68 requirements, the requirements of Condition 1-21 would become applicable to the source. Accordingly, we find no basis for objecting to the permit on these grounds.

Although we find no basis for objecting to the permit on this issue, we do believe that DEC must meet its accidental release prevention program obligations under 40 CFR § 68.215(e).[9] This will ensure that DEC, EPA, and the public will be able to track a source's compliance with section 112(r) requirements even if the source's applicability fluctuates. Therefore, EPA Region 2 will work with DEC on the appropriate changes to its application and annual compliance certification requirements to ensure sources are aware of the section 112(r) requirements, and to ensure compliance with these requirements, if applicable.

G. Condition 17, Item 17.1

Petitioner states that, for the permittee to know what fee is applicable to the facility, the permit should employ the following specific language, derived from 6 NYCRR § 201-6.5(a)(7): "The owner and/or operator of a stationary source shall pay fees to the Department consistent with the fee schedule authorized by Subpart 482-2 of this Title." Petition at 17. Item R of the

[9] DEC has several general section 112(r) obligations, which are found in 40 CFR § 68.215(e), and are further discussed in an April 20, 1999, memorandum from Steven J. Hitte (OAQPS) and Kathleen M. Jones (OSWER) entitled: "Title V Program Responsibilities concerning the Accidental Release Prevention Program." These responsibilities include: (1) verifying that sources register and submit a risk management plan, (2) verifying that sources certify compliance with the requirement to submit a risk management plan, and (3) general enforcement responsibilities.

final permit incorporates the specific language of 6 NYCRR § 201-6.5(a)(7). Therefore, this issue has been addressed in the final permit and is accordingly moot.

H. Condition 25 (Severability)

Petitioner notes that this condition misstates the severability clause (*see* 6 NYCRR § 201-6.5(a)(9) and 40 CFR § 70.6(a)(5)) by declaring that if any "federally-enforceable" provisions are found to be invalid, the rest of the permit remains valid. Petition at 17. According to Petitioner, this condition is a misstatement which leads to the conclusion that if a section of the permit, that is only enforceable by the State, becomes invalid, the entire permit will be invalid.

Condition 25 of the draft permit was revised and no longer includes the term "federally enforceable." It is now identified as Item T of the final permit and states: "If any provisions, parts or conditions of this permit are found to be invalid or are the subject of a challenge, the remainder of this permit shall continue to be valid." Therefore, the issue raised by Petitioner is moot.

I. Condition 28 (Emission statements)

Petitioner contends that the permit must list the required elements of the emission statement, or at least indicate that the emission statement must contain the information required under 6 NYCRR § 202-2.3. Petition at 17. Further, Petitioner states that the permit must specify how the emissions will be calculated, or at least indicate that the methods specified in 6 NYCRR § 202-2 will be relied upon.

The reference to "emission statements" appears at Item 29.2 of the final permit. An emissions statement may serve as a form of periodic monitoring, by providing information pertaining to the way source emissions are estimated. It often contains emission calculations that are the basis of a compliance demonstration. Thus, an emission statement can be an important periodic monitoring tool. In this light, EPA concurs with Petitioner that specifying the applicable requirements that generally relate to emissions statements is necessary in defining those elements that are required of emissions statements. For this reason, EPA is granting the petition on this issue and is requiring DEC to reopen the permit to reference both 6 NYCRR § 202-2.3 (pertaining to required contents of an emissions statement) and 6 NYCRR § 202-2.4 (pertaining to methods and procedures used in an emissions statement) as applicable requirements of an emission statement.

J. Condition 30 (Visible emissions[10] limited)

[10] This issue has been raised by the Petitioner and addressed by the Administrator in several Orders. *See, e.g.*, *In the Matter of Suffolk County Bergen Point Sewage Treatment Plant*, Petition Number II-2001-03, December 16, 2002 ("Bergen Point") at p. 19; *In the Matter of North Shore Towers Apartments, Inc.,* Petition Number II-2000-06, July 3, 2002 ("North Shore Towers") at page 28; *In the Matter of Consolidated Edison Co. of New York, Inc., 74th St. Station* at page 14, Petition Number II-2001-02, February 19, 2003.

Petitioner states that if 6 NYCRR § 211.3, which prescribes opacity limits to emission sources, applies to this facility, the permit must explain how it applies and how compliance will be determined. Petition at 17. Petitioner argues that if this requirement is not relevant to the facility, but instead is in the permit because DEC is placing it in all title V permits, then some clarification must be provided in the statement of basis.

The Final Permit includes this clause at Item Z. This condition references the general SIP opacity provisions listed at 6 NYCRR § 211.3. As listed, this condition is a facility-wide level condition that applies to all emission units which are not covered by a specific rule. It limits visible emissions for general category sources and sets emissions restrictions in situations where there are no specific rules requiring the source to do so. In Motiva's case, the VRU's operation falls under the opacity provision of 6 NYCRR § 211.3. However, at the Emission Unit section of the permit, where specific periodic monitoring is prescribed for each emission unit, the permitting authority failed to reference any opacity monitoring in connection with the VRU and the requirements of 6 NYCRR § 211.3. Thus, the permit does not include the requisite periodic monitoring for demonstrating compliance with this applicable requirement. For this reason, EPA grants the petition on this issue. DEC must reopen the permit to supplement the VRU's operation requirements with periodic monitoring that ensures the source's compliance with the opacity provision of 6 NYCRR § 211.3. The rationale for the selected monitoring must be provided in the statement of basis.

K. Condition 32 (Gasoline RVP Limit), Condition 34 (recordkeeping), Items 34.2(1), 34.2(2)[11]

Petitioner asserts that there is no periodic monitoring associated with the requirement to restrict gasoline sales to a Reid Vapor Pressure (RVP) of 9.0 psi during the summertime period, as specified at that condition. Petition at 18. Petitioner argues that DEC must incorporate into the permit monitoring, recordkeeping and reporting that are sufficient to provide a reasonable assurance that Motiva is complying with this requirement, including a requirement that specifies reporting "at least every six months."

[11] These conditions are actually stated as Conditions 33 and 35 in the draft permit, and Condition 1-48 (page 89) in the final permit. At the outset we note that condition 1-48 should be moved from the state-only side to the federal/state side of the permit. Additionally, EPA notes that Condition 1-48 states that all records and documentation, pursuant to 6 NYCRR § 225-3, shall be maintained for at least two years from the date of delivery. As required for all records pertaining to the title V program, a 5-year retention period must be specified. Thus, when the permit is reopened in accordance with this order, Condition 1-48 must be revised to require that those records and documentation pertaining to gasoline delivery at Motiva shall be maintained for at least five years from the date of delivery.

The final permit, at Condition 1-48, specifies a reference test method, ASTM D323-99a[12] for testing the gasoline's RVP, and a monitoring frequency which stipulates testing the gasoline "per batch of product/raw material change." These conditions satisfy the requirements of the "periodic monitoring rule" at 40 CFR § 70.6(a)(3)(i)(B). Further, this condition specifies that the test records should identify who performed the test, when the fuel was delivered, when the test was performed, and the results of the test. Also, the final permit specifies a semi-annual reporting requirement. For this reason, EPA denies the petition on this issue.

L. Condition 33 (oxygen content of fuel)

Petitioner raises several issues with respect to condition 33 which has been re-drafted and now appears at Condition 1- 48 (page 89) of the final permit. First, Petitioner wants an explanation as to why the control period for dispensing oxygenated gasoline is from November 1, through February 29, as stated in the draft permit, rather than October 1 through April 30, as stipulated under 6 NYCRR § 225-3.4(a)(1). Petition at 18.

Response: The final permit, at Condition 1-48 (page 89), asserts that the oxygen limits, once enforced as a carbon monoxide control measure in the Syracuse and New York City metropolitan areas, have been removed from the regulations. This rule became effective May 19, 2000. 65 Fed. Reg. 20909 (May 19, 2000). Accordingly, the corresponding conditions were also removed from the final permit rendering this issue moot. NYPIRG's petition on this issue is therefore denied.

Next, Petitioner states that the regulation outlined at 6 NYCRR § 225-3.5, which stipulates several methods in use for determining gasoline oxygen content, is altogether missing from the permit. Petition at 18. Further, Petitioner claims that the permit is vague regarding testing and reporting procedures associated with the fuel's oxygen content and wants a specific method identified in the permit along with any equation that is used in determining gasoline oxygen content.

Response: As explained above, the rule to remove gasoline oxygen limits from the regulations became effective May 19, 2000. As such, the final permit does not prescribe any test for determining gasoline oxygen content. Therefore, as already noted above, this issue is now moot.

Lastly, Petitioner states that the permit must call for reporting requirements for the gasoline's RVP that specify "every six months, " in addition to the permit's present reporting requirement stating "Upon Request by Regulatory Agency."

Response: The "Reporting Requirements," at Condition 1-48 of the final permit state that

[12] This test method covers procedures for the determination of vapor pressure of petroleum products (Reid Method.)

reporting is due semi-annually, with respect to the gasoline's RVP. Thus, this issue is addressed in the final permit. However, while the oxygen limits have been removed from the SIP, the gasoline RVP limit of 9.0 psi is still part of the federally approved SIP. For this reason, the limit pertaining to the gasoline's RVP, and presently stated at Condition 1-48, must be moved to the federal side of the permit.

M. Missing Permit Conditions

Petitioner states that several applicable requirements are missing from the permit. Petition at 19. Specifically, Petitioner states that the permit skips from the requirements of 6 NYCRR § 225-3.6(a), at Condition 35, to the requirements of § 225-3.6(d), thus failing to include sections (b) and (c) of § 225-3.6.

Response: Indeed, the recordkeeping and reporting requirements of 6 NYCRR § 225-3.6(b) and (c) are missing from the final permit. Although, as noted above, the requirements relating to oxygenated fuels have been removed from the federally approved SIP regulations, there are recordkeeping and reporting requirements pertaining to the gasoline's RVP and shipping documentation, which are mandated at 6 NYCRR § 225-3.6. For this reason, EPA grants the petition on this issue. The permit must be reopened to include the recordkeeping and reporting requirements of 6 NYCRR § 225-3.6(b) and (c), exclusive of oxygenated fuel requirements.

Next, Petitioner notes that regulations pertaining to gasoline loading terminals and expressed at 6 NYCRR § 229.3(d)(1) and 6 NYCRR § 229.3(d)(2) are missing from the permit.

Response: The final permit references 6 NYCRR § 229.3(d)(1) at Conditions 44 (page 28), 70 (page 52), and 1-31 (page 66). However, those conditions do not include the regulatory emission limit of 0.67 pounds of gasoline vapors per 1,000 gallons of gasoline loaded or unloaded that is stipulated at 6 NYCRR § 229.3(d)(1). That regulatory limit must be included in the permit, under the provisions of 6 NYCRR § 229.3(d)(1). In this case, the source's actual emissions are numerically smaller because, pursuant to its permit, Motiva operates under an emission limit of 7 milligrams of VOC per liter of gasoline processed. When a more stringent emission limit has been approved for enforcement by DEC, as is the case for Motiva, the permit must incorporate the more stringent limit and also explain either in the permit, or in the statement of basis, that the regulatory limit at 6 NYCRR § 229.3(d)(1) has been superseded by a new, more stringent limit.

With respect to the requirements of 6 NYCRR § 229.3(d)(2), only the requirements of section 229.3(d)(2)(i) are stated in the permit, at Item 1-26.2 (page 61), whereas other applicable requirements of section 229.3(d)(2), namely sections 229.3(d)(2)(iii) and 229.3(d)(2)(iv), should also be included in the permit. Therefore, EPA grants the petition on these issues.

In summary, DEC is required to reopen the permit to include: (1) the regulatory emission limit of 0.67 pounds of gasoline vapors per 1,000 gallons of gasoline loaded or unloaded, under

the requirements of 6 NYCRR § 229.3(d)(1); and (2) the complete list of requirements under 6 NYCRR § 229.3(d)(2) that are applicable to Motiva. If DEC believes that the source is exempted from the other requirements of 6 NYCRR § 229.3(d)(2), then it must provide the rationale for exempting the source from these requirements in the statement of basis accompanying the final permit.

Next, Petitioner argues that the statement in the permit that the VRU be maintained "in good working order" is vague. Petition at 20. Petitioner contends that a definition of that term should be included in the permit. In addition, Petitioner asserts that the permit must include inspection and maintenance activities to ensure compliance with the requirements of 6 NYCRR § 229.3(d) and to demonstrate periodic monitoring of the facility's emission limit of 0.67 pounds per 1,000 gallons of gasoline during both loading and unloading.

Response: The final Motiva permit defines the term "in good working order" at Items 1-32.2 , 1-33.1 (pages 68, 70). This term is defined as "capturing the gasoline vapors during loading of gasoline transport vehicles, and must condense, absorb, adsorb or combust the gasoline vapors so the emissions do not exceed 7 mg/liter of gasoline loaded." This definition mirrors the monitoring requirement of 6 NYCRR § 229.3(d). However, Motiva's VRU prescribed emission limit of 7 mg of VOC per liter of gasoline loaded or unloaded is more stringent than the 0.67 pounds of VOC per 1000 gallons of gasoline loaded or unloaded, specified at that rule. Thereby, the permit sets a strict VOC emission standard of 7 mg per liter of gasoline loaded, against which performance of the VRU can be assessed. Further, the VOC emissions standard in this case is continuously monitored through the use of a continuous emission monitor ("CEM") which was approved by DEC through a continuous emission monitoring plan. The CEM is not required by the applicable requirement (6 NYCRR § 229.3(d)), but it is necessary in this case to assure the source maintains compliance with the VOC emissions standard, and therefore, appropriately caps out of the MACT requirements. Monitoring the VRU emissions via a CEM ensures that any malfunction that might cause an exceedance of the limit would be promptly detected and recorded.

Also, Items 1-25. 2 and 1-28.2, collectively prescribe additional monitoring for detecting organic liquid or vapor leaks associated with the VRU and its related system, as required at 40 CFR 60.502(j) and 6 NYCRR 230.4(e). These leak detection monitoring requirements consist of a monthly vapor tightness test certificate, sight, sound and smell inspections, along with provisions for leak repairs and record retention. Taken together, these measures adequately satisfy the requirement to include "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" and the requirement that title V permits contain monitoring required by the applicable standards under the Act. 40 CFR §§ 70.6(a)(3)(i)(B) and 70.6(c)(1).

Finally, Petitioner notes that while the permit application included the requirements of 6 NYCRR § 229.4, these requirements are absent in the draft permit. Petitioner asserts that DEC must provide a rationale for the removal of these requirements from the permit.

Response: The final permit includes these requirements at Condition 96 (page 74). Therefore, this issue is addressed in the final permit, and the petition is denied with respect to this issue.

N. Condition 36 (daily gasoline throughput)

Petitioner asserts that records pertaining to daily gasoline throughput at the facility, relating to 6 NYCRR § 229.5(c), must be reported semi-annually rather than per the draft permit's stipulation of "upon request by the agency." Petition at 22.

The reference to "upon request by the agency" regarding reporting, has been removed altogether from the final permit. The final permit, at Item 1-9.2 (page 29) specifies an annual reporting requirement of the average daily gasoline throughput at the facility. However, this operation is still subject to the minimum semi-annual reporting requirements of 40 CFR § 70.6(a)(3)(iii)(A). Therefore, EPA grants the petition on this issue. The permit must be reopened and a semi-annual reporting requirement must be stated with respect to the facility's average daily gasoline throughput (6 NYCRR § 229.5(c)).

O. Conditions 43 and 44 (Recordkeeping of tank capacity: § 229.5(d))

Petitioner commented that the capacity of the petroleum storage tanks are to be specified in gallons, as stipulated by recordkeeping requirements at 6 NYCRR § 229.5(d). Further, Petitioner asserts that the permit must state that all records relating to the storage tanks are to be kept at the facility for five years. Lastly, in lieu of "annually" Petitioner claims that the monitoring frequency relating to tank capacity should state "ongoing." Petition at 22.

This issue is addressed in the final permit at Item 1-35.2 (page 75) which states that capacity records of volatile organic liquid storage tanks are to be specified in "gallons." The issue regarding records retention is addressed at Item 1-36.2 (page 76) which stipulates that: "Inspection records must be maintained on site for a period of five (5) years . . .." Finally, Petitioner's request that the monitoring frequency of tank capacities be stated as "ongoing" instead of "annually" is denied because in accordance with the "periodic monitoring rule" DEC incorporated into the permit the requirement that capacity records of volatile organic liquid storage tanks be monitored annually. Monitoring the capacity of the tanks is sufficient in this case because monitoring of tank size (i.e., capacity) has no direct bearing on air emissions. Emissions from Motiva's storage tanks are regulated and monitored by the type of control device associated with each tank. Item 1-36.2 of the final permit prescribes quarterly inspections of the tanks' conservation vents, which regulates tank emissions. Hence, the permit correctly prescribes monitoring for the tanks' control devices. The petition is therefore denied with respect to these issues.

P. Condition 45 (VOL storage tanks less than 10,000 gallons)

Petitioner states that it is not known whether the requirement that volatile organic liquid

tanks with a capacity of less than 10,000 gallons be equipped with a conservation vent, as required by 6 NYCRR § 229.3(e)(2)(v), is satisfied for all the tanks in that category because this information is not provided. Petition at 22. Additionally, Petitioner suggests that periodic monitoring in the form of weekly inspections be made part of the compliance requirement for satisfying this condition.

This issue is addressed at Condition 1-36 (page 76) of the final permit. Condition 1-36 identifies four tanks (Tank No. 7, 8, 9, and10) as being fixed-roof tanks, and another five tanks (Tank No. 51, 52, 54, 55, and 56) as being horizontal tanks, all subject to the requirements of 6 NYCRR § 229.3(e)(2)(v). These requirements prescribe a conservation vent for each volatile organic liquid tank of a capacity under10,000 gallons. Thus, the final permit correctly prescribes the control device that is required for operating these tanks. With respect to periodic monitoring, the final permit prescribes a quarterly visual inspection of the tanks' conservation vent and a five-year record retention of inspection findings and related repairs. By comparison, this prescribed monitoring frequency is more stringent (quarterly versus annual visual inspection) than comparable VOL storage operations prescribed at 40 CFR § 60.113b(a)(2), outlining standards of performance for volatile organic liquid storage tanks and petroleum liquid storage vessels.[13] In this case, the applicable requirement does not require monitoring of a periodic nature, and therefore, the prescribed monitoring satisfies the periodic monitoring rule at 40 CFR § 70.6(a)(3)(i)(B). For this reason, EPA denies the petition on this issue.

Q. Condition 46 (Internal floating roof tanks)

Petitioner states that the permit must affirm, in the statement of basis, that the eligible tanks at the facility have been retrofitted with an internal floating roof or equivalent control which satisfies the requirements of 6 NYCRR § 229.3(a). Petition at 23. Also, Petitioner asserts that periodic monitoring must be prescribed for those tanks, in the form of weekly inspections. In addition, Petitioner requests that the permit define what it means for the vapor collection and vapor control systems to be "maintained and operated in such a way as to ensure the integrity and efficiency of the system," and include periodic monitoring to provide a reasonable assurance that Motiva is complying with this requirement.

This issue is addressed at Condition 47 of the draft permit and Condition 1-39 (page 79) of the final permit. The regulations at 6 NYCRR § 229.3(a)(1) stipulate that no person may store petroleum liquid in a fixed roof tank unless the tank has been retrofitted with an internal floating roof or equivalent. Condition 1-39 clearly states that storage tanks # 41, # 42, # 45 and # 46 are fixed roof tanks, fitted with internal floating roofs. Thus, this issue regarding the requirement that the facility's eligible tanks be retrofitted with an internal floating roof, has been addressed in the final permit and is accordingly moot.

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[13] Motiva is exempt from the requirements at 40 CFR § 60.113b *et.seq.* because these provisions apply to vessels for which construction, reconstruction, or modification commenced after July 23, 1984. Also, the specific requirements of 40 CFR § 60.113b apply to larger capacity tanks, 40,000 gallons or more, versus the 10,000 gallon tank size specified at section 229.3(e)(2)(v).

With regard to the tanks' vapor collection and control systems, the final permit at Item 1-37.2 prescribes a visual inspection, annually, per the requirements of 40 CFR § 60.113b(a)(1-4). However, the existing language of Item 1-37.2. is confusing, as it states: "The permittee must visually inspect the vapor collection and control systems annually per [40 CFR § 60.113b(a)(1-4)] every calendar quarter . . .." The requirement that inspections be performed annually on the one hand, and every calendar quarter on the other hand, is conflicting. For this reason, when DEC reopens the permit in accordance with this Order, it should clarify the inspection frequency required by this condition.

With regard to Petitioner's last comment, that the term "the vapor collection and vapor control systems are maintained and operated in such a way as to ensure the integrity and efficiency of the system," is ambiguous, Item 1-37.2 prescribes that the permittee visually inspect the vapor collection and control systems, annually. This inspection schedule mirrors the requirements of 40 CFR § 60.113 b. As previously explained, Motiva is exempt from the requirements of 40 CFR § 60.113 b, but this does not mean it may not rely on the monitoring provisions provided by these rules to ensure the VRU control system is properly maintained. Thus, in accordance with the requirements at 40 CFR § 70.6(a)(3)(i)(B) that title V permits contain adequate periodic monitoring when no monitoring is required by the applicable rule, DEC incorporated periodic monitoring requirements into the permit. Because this added monitoring is identical to the requirements at 40 CFR § 60.113 b for regulating petroleum liquid storage vessels of the same types found at Motiva, EPA finds this monitoring to be adequate. For this reason, EPA denies the petition on this issue.

R. Condition 47 (VOL fixed roof storage tank requirements)

This condition states: "For a fixed roof storage tank storing volatile organic liquids, the tank must be equipped with an internal floating roof with a liquid-mounted primary seal and gasket fittings or equivalent control. Replacement of other than liquid-mounted seals is to be performed when the tank is cleaned and gas-free for other purposes." These requirements are actually stated at Condition 1-40 (page 80) of the final permit. As at Condition 46 above, Petitioner asserts that the permit must be accompanied by an affirmation in the statement of basis specifying whether Motiva is in compliance with the VOL fixed roof storage tank requirements. Petition at 23. Next, Petitioner claims that periodic monitoring must be implemented, in the form of weekly tank inspections. Also, Petitioner claims that Motiva must be required to keep records of when "other than liquid-mounted seals" are replaced, to confirm that the replacement occurred while the tank was cleaned and gas-free.

The applicable SIP requirement, 6 NYCRR § 229.3(e)(1), expressed at Condition 1-40, stipulates that "for a fixed roof storage tank storing volatile organic liquids, the tank must be equipped with an internal floating roof with a liquid-mounted primary seal and gasket fittings or equivalent control." In this instance, the regulations allow for alternative controls in regulating internal floating roof storage tanks and, also, prescribe specific maintenance procedures that are contingent on the type of control that is in place. Yet, the permit does not specify the type of

control that is in place at those tanks. For this reason, DEC must reopen the permit to specify the type of control (i.e., a liquid-mounted primary seal and gasket fittings or equivalent control) that is installed in each of the fixed-roof storage tanks. Therefore, EPA grants the petition on this issue. DEC is hereby ordered to reopen the permit to specify the type of control that is in place at those fixed roof storage tanks. Additionally, where such control consists of other than liquid-mounted seals, this condition must stipulate that seal replacement is to be performed only when the tank is cleaned and gas-free for other purposes. 6 NYCRR § 229.3(e)(1).

With regard to Petitioner's request that the permit include a weekly tank inspection requirement, permit Condition 1-40, indirectly references Condition 1-37 by including the following statement with respect to monitoring frequency: "Monitoring Frequency: As Required - See Monitoring Description." It is not clear which "Monitoring Description" this permit condition is referring to, nor is it obvious which inspection frequency applies. For consistency, when the permit is reopened, DEC must specify, at a minimum, an annual inspection frequency as previously specified at Item 1-37.2. DEC may approve a less frequent inspection schedule, that mirrors the requirements of 40 CFR § 60.113b, if Motiva's tanks are retrofitted with other than liquid-mounted or mechanical shoe primary seal.

Finally, Petitioner claims that Motiva must be required to keep records of when "other than liquid mounted seals are replaced, confirming that the replacement occurred while the tank was cleaned and gas-free." Indeed, the regulations at 6 NYCRR § 229.3(e)(1) require that "[r]eplacement of other than liquid mounted seals is to be performed when the tank is cleaned and gas-freed for other purposes." Therefore, when such occurrences take place, a record should be generated to certify compliance with that rule. Thus, EPA grants the petition on this issue. DEC must reopen the permit to state, at Condition 1-40, that whenever activities pertaining to the replacement of any liquid mounted seal are performed, a record detailing those activities pertaining to 6 NYCRR § 229.3(e)(1) will be generated and kept for 5 years.

S. Condition 39, Items 39.1, 39.2, 39.3 (Throughput Limits on Tanks and Vapor Recovery Unit (VRU))

Petitioner raises several issues with respect to Condition 39. Petition at 24. They are addressed below in sequential order.

Issue 1: Petitioner states that Condition 39 is simply supposed to contain a definition of processes that take place at each individual emission unit, as is implied by the term "Process Description." However, this permit condition also contains the following statement: "The facility is willing to accept a federally enforceable permit limit of [X] gallons/yr throughput." Petitioner questions the meaning of that sentence.

The final permit, at Item 68.2, imposes an overall gasoline facility throughput limit of 526,900,000 gallons/year. Specifically, the final permit repeats the above statement this time specifying just one number, as follows: "The facility is willing to accept a federally enforceable limit of 526,900,000 gallons/year of gasoline throughput." However, the term "willing to

accept" does not establish an enforceable permit requirement limiting the gasoline throughput. For this reason, EPA grants the petition on this request. DEC must reopen the permit to change the language at Item 68.2 to read: "The facility is subject to and will operate in compliance with a gasoline throughput limit of 526,900,000 gallons/year."

Issue 2: Petitioner points out that despite the fact that the permit application states that 6 NYCRR §§ 229.3(e)(2)(v) and 229.5(d) apply to each tank, the draft permit eliminates these requirements.

The final permit cites these applicable requirements, that is 6 NYCRR §§ 229.3(e)(2)(v) and 229.5(d), respectively at Conditions 1-36 and 1-35. Therefore, this issue is addressed in the final permit and is now moot.

Issue 3: Petitioner notes that Motiva is "capping out of MACT standards,"[14] expressed at 40 CFR § 63.420, by limiting its HAPs emissions through capping of its gasoline throughput. Petitioner alleges the following flaw with that approach.

a. The draft permit failed to establish a relationship between gasoline throughput and potential to emit. Specifically, Petitioner asserts that any calculations supporting Motiva's MACT standards exemption claim must be presented either in the permit or in the statement of basis.

In this case, the Motiva permit contains a federally enforceable permit condition (the gasoline throughput limit) limiting its emissions below the "major source" threshold of 10 tons per year for each individual HAP and 25 tons per year of any combination of HAP. Thus, Motiva is capping out of an otherwise applicable requirement, the Gasoline Distribution MACT standard. EPA agrees that DEC must establish a relationship between the gasoline throughput limit and the HAPs emission limit**s** established in the Motiva permit and that the calculations and technical basis pertaining to these limits must be included in the statement of basis, or presented elsewhere in the permit record. Also, although DEC has elected to reference, in the Motiva permit, certain emission calculations supporting the PTE limit, these references are nonetheless incomplete. For instance, Item 1-18.2 (page 41) of the final permit presents some of these calculations, with respect to the 15.8 tons/year of VOC emissions from the VRU. However, the permit does not account for the balance of those calculations that presumably establish the facility's total potential emissions of 56.43 tons/year of VOC. Unless DEC opts to show those calculations in the permit itself, as it has done for the VRU at Item 1-18.2, those other records pertaining to emission calculations should be referenced in the statement of basis, or elsewhere in the permit record. Therefore, EPA grants the petition on this issue. DEC must reopen the permit to reference the facility's emission calculations and provide a technical basis for the relationship between the gasoline throughput limit (the PTE limit) and the 10 ton individual HAP and 25 ton total HAPs emission threshold.

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[14] The final Motiva permit contains a condition limiting the facility's potential to emit ("PTE") to below the major source threshold for MACT requirements.

b. Petitioner alleges that the draft permit failed to make the throughput limit enforceable by not stating how throughput is measured. Any throughput limit, Petitioner argues, must be accompanied by monitoring and reporting requirements that are sufficient to demonstrate compliance. Petitioner further argues that if the limit on potential to emit is legitimate, then, the limit needs to be made an actual, enforceable limitation on the permit, because simply stating that "the facility is willing to accept a limit," as is presently done, is not the same as establishing a limit. Also, Petitioner finds the permit's requirement of yearly averaging and reporting of the gasoline throughput limitation to be inappropriate because, according to Petitioner, yearly averaging and reporting of that limit is insufficient to provide a reasonable assurance that the facility is complying with the limit. In that same context, Petitioner argues that, at the very least, the relevant time period for monitoring cannot exceed 30 days because the parameters used in the equations that would exempt the facility from the MACT standards, as expressed at 40 CFR §§§ 63.420(a)(1), 63.420(c), and 63.420(d), are based on a rolling 30-day period.

Condition 1-10 establishes an actual annual gasoline throughput limit of 526,900,000 gallons[15]. It also states that Motiva will use tank gauging and loading rack meters to monitor shipments of gasoline in and out of the facility in order to demonstrate compliance with the throughput limitation. Further, it states that Motiva must monitor compliance with the limit on a monthly basis, using a monthly rolling average, and submit reports quarterly to DEC. Therefore, these issues have been addressed in the final permit. Petitioner's contention regarding the term "the facility is willing to accept a limit," was addressed above under Issue 1, where it was granted.

c. Petitioner argues that the concept of limiting "potential to emit" by limiting "actual emissions" is absurd because the two concepts are different. Petitioner alleges that if the regulations intended for "actual emissions" to be used instead of "potential to emit" then, those regulations would explicitly state so.

EPA believes that Petitioner is referring to the use of Motiva's VRU, a control equipment that reduces the facility's overall emissions, and was installed to comply with 40 CFR § 60.502 (New Source Performance Standard for Bulk Gasoline Terminals). The permit credits the emissions reduction attributed to the VRU as a contemporaneous credit on the facility's potential to emit. As previously explained, the Motiva permit includes a gasoline throughput limit of 526,900,000 gallons/year which effectively limits the source's potential to emit to below the major source threshold for MACT requirements. Petitioner seems to disagree that the VRU's actual emissions reduction can be credited toward the facility's potential emissions.

Petitioner is incorrect in interpreting the regulations. Regulations implementing the

[15] This limit is also referenced in several other permit conditions. *See e.g.*, Conditions 1-11, 1-12, and 1-13.

requirements of section 112 of the CAA relating to major sources of hazardous air pollutant are contained in 40 CFR Part 63. The General Provisions at Part 63, subpart A, define "Potential to Emit" as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design." 40 CFR § 63.2. The regulations go on to state that any limitation on the capacity of a stationary source to emit a pollutant, including any limitation that is obtained through the use of air pollution control equipment, would be considered a limitation on the facility's potential to emit, if such limitation is federally enforceable. The term "federally enforceable" refers to all limitations and conditions which are enforceable by the Administrator, including requirements developed pursuant to any new source performance standards (NSPS). In Motiva's case, operation of the VRU is governed by federally enforceable requirements stated in the NSPS for Bulk Gasoline Terminals at 40 CFR § 60.502. (*See* Condition 78). EPA interprets this to mean that for any limit or condition to be a legitimate restriction on PTE, that limit must be federally enforceable, which in turn requires practical enforceability. Practical enforceability means the source must be able to show continual compliance with the limitation. *See Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit*, (January 22, 1996). In other words, adequate testing, monitoring, and record-keeping procedures must be included in the source's title V permit. The operation of the VRU is monitored via a continuous emissions monitor ("CEM") which samples, analyzes and records the VOC concentration of the VRU exhaust continuously. Thus, the VRU's emission limitations are federally enforceable. Therefore, Motiva's crediting of the VRU's emissions reduction to the facility's potential emissions is in accord with the definition of potential emissions, stated at 40 CFR § 63.2. EPA accordingly denies the petition on this issue.

d. Petitioner states that, although the title V permit application cites 40 CFR § 63.420 (or Subpart R) as an applicable requirement, this provision is nevertheless absent from the draft permit. Petitioner requests that an explanation be included in the statement of basis of how exactly Motiva is able to cap out of this requirement. Petitioner goes on to state that the proposed gasoline throughput limitation is expressed in gallons per year. Petitioner points out that the regulations that are expressed at 40 CFR § 63.420(a)(1) and utilized to exempt the facility from the MACT standards, explicitly describes a certain parameter designated the "Q parameter" as a "liters/day" limitation and not a "gallons/year" limitation. Thus, Petitioner argues, if Motiva wants to cap out of the MACT requirements, the facility must demonstrate that it complies with the throughput limitation that is used in the applicability determination [i.e. the "Q parameter" of 40 CFR § 63.420(a)(1)] on a daily basis, rather than on an annual basis.

The final permit outlines at Conditions 1-4, 1-20, and 1-24 that 40 CFR 63 Subpart R is not applicable to the Motiva terminal as long as the facility demonstrates that this regulation is not applicable by operating under 526.9 million gallons of gasoline annual throughput limit and a VOC emission limit of 7 mg per liter of gasoline process (6 hour rolling average), imposed on

the VRU, to meet emission limit requirements of 40 CFR § 63.420(a)(2).[16] This latter provision references 40 CFR § 63.2 which defines a major source as a facility with threshold limits of 10 tons/year or more for any single HAP and 25 tons/year or more for total HAPs. Therefore, the final permit provides the rationale for how Motiva caps out of 40 CFR Subpart R requirements, that is, based on 40 CFR § 63.420(a)(2) applicability and not per the provisions of 40 CFR § 63.420(a)(1) as stipulated by Petitioner. Therefore, the assertion that the permit must include a liters/day limitation based on the provisions of 40 CFR § 63.420(a)(1) is without merit since the facility's exemption from 40 CFR Subpart R requirements is based upon 40 CFR § 63.420(a)(2).

Issue 4: Petitioner evokes two scenarios, stated at sections A and B below.:

A. If Motiva is capping out of MACT standards under 40 CFR § 63.420(c), the permit must contain the requirements outlined in 40 CFR § 63.428(i), including:

i. a requirement that Motiva maintain required monitoring records,
ii. a requirement that Motiva report annually to the Administrator that the facility parameters have not been exceeded, and
iii. a requirement that Motiva submit a formal request and report to the Administrator for any modification of facility parameters.

B. If Motiva is capping out of MACT standards under 40 CFR § 63.420(d), the permit must contain the requirements outlined in 40 CFR § 63.428(j), including:

i. a requirement that Motiva "maintain a record of the calculations in § 63.420(a)(1) or (b)(1), including methods, procedures, and assumptions supporting the calculations for determining criteria under § 63.420(d)," and
ii. a requirement that Motiva report any modification of parameters to the Administrator before an exceedance takes place.

As stated in the response to Issue 3, section "d" above, Motiva is subject to a practically and legally enforceable limit which limits its potential emissions below the major source threshold for MACT requirements, and therefore, is not a major source in accordance with the provisions of 40 CFR § 63.420(a)(2). Therefore, the issues presented by Petitioner, pertaining to the specific provisions under 40 CFR § 63.420(c) and 40 CFR § 63.420(d), are not relevant to Motiva. Further, permit Conditions 1-4 and 1-20 do require that the Subpart R exemption be demonstrated on a continuous basis by prescribing recordkeeping requirements in accordance with the provisions of subdivision 40 CFR § 63.428(a) through (j). Therefore, the permit provides for Subpart R exemption verification, on a continuous basis, through the provisions of 40 CFR § 63.428. Thus, this issue raised by Petitioner, that the permit must mention the applicability of 40 CFR Part 63, has been addressed in the final permit and is accordingly moot.

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[16] 40 CFR § 63.420(a)(2) provides in pertinent part, "The affected source to which the provisions of this subpart apply is each bulk gasoline terminal, except those bulk gasoline terminals: (2) For which the owner or operator has documented and recorded to the Administrator's satisfaction that the facility is not a major source... as defined in § 63.2 of subpart A of this part."

Issue 5: Petitioner states that 40 CFR § 63.420(c) requires that the facility must maintain records and provide reports in accordance with the provisions of 40 CFR § 63.428(i). Further, Petitioner states that since 40 CFR § 63.428(j) requires that record of calculations, etc., be available for public inspection, the title V permit must require those calculations to be submitted to DEC and made available to the public.

As stated above, at Issue 4, the permit's affirmation of the Subpart R exemption provides for Subpart R exemption verification, on a continuous basis, by maintaining records and providing reports in accordance with the provisions of 40 CFR § 63.428 (a) through (j). Therefore, this issue has been addressed in the final permit and is now moot.

Issue 6: Petitioner argues that under no circumstances is it acceptable for Motiva to receive a title V permit that does not mention the applicability of 40 CFR Part 63 because, even if Motiva caps out of the operational requirements of the rule, it must comply with rules relating to non-applicability demonstrations, reporting, and parameter modification.

Under 40 CFR § 63.420(a)(2), facilities are exempted from Subpart R requirements, if they do not meet the "major source" criteria defined at 40 CFR § 63.2. The requirements of Subpart R are not applicable to this source. The final Motiva permit contains a legally and practically enforceable permit condition limiting the facility's gasoline annual throughput to 526.9 millions gallons and also contains a VRU requirement limiting VOC emissions to 7 mg/liter of gasoline processed. Barring any changes in operation that would cause a net emission increase and cause Motiva to be subject to Subpart R, it is appropriate for permittee to rely on the permit's existing monitoring and recordkeeping as a means of demonstrating compliance with these limits. As stated earlier, permit Conditions 1-4 and 1-20 do require that Subpart R exemption be demonstrated on a continuous basis by prescribing recordkeeping requirements in accordance with the provisions of subdivision 40 CFR § 63.428(a) through (j). Therefore, the permit includes the monitoring requirements contained in 40 CFR Part 63, as noted by Petitioner. Thus, this issue raised by Petitioner, that the permit mention the applicability of 40 CFR Part 63, has been properly addressed in the final permit and is accordingly moot.

T. Condition 37 (New Source Performance Standards for Bulk Gasoline Terminals)

Petitioner alleges that this condition contains a blanket statement that the facility must comply with the requirements of 40 CFR 60 Subpart XX. Petitioner asserts that this generic citation is confusing because, while some of the requirements of 40 CFR 60 Subpart XX are spelled out in the draft permit, others are never mentioned. Petition at 27. Petitioner states that, upon close examination of the rule, it was concluded that additional periodic monitoring is necessary to assure compliance with the rule. Specifically, Petitioner asserts that the following requirements are to be included in the permit: 40 CFR § 60.502(f), § 60.502(g), § 60.502(h), § 60.502(i), § 60.502(j), and § 60.505(d).

The final permit includes the various requirements noted by Petitioner at Conditions 80,

81, 82, 83, 84 and 88, respectively. Therefore this issue has been addressed in the final permit.

U. Condition 40

Petitioner states that this condition fails to require periodic monitoring to ensure compliance with the 35 milligrams emission limit of total organic compounds per liter of (gasoline) loaded, specified under 40 CFR § 60.502(b). Petitioner argues that the recommended initial performance test, stated at that condition, is insufficient to ensure compliance with the 35 milligrams emission limit of total organic compounds per liter of gasoline loaded. Hence, Petitioner states, unless this requirement is supplemented with periodic monitoring, sufficient to provide a reasonable assurance that Motiva is complying with this legal requirement, Motiva's title V permit would have failed to meet the periodic monitoring requirements of Part 70. Petition at 28.

This applicable requirement is stated at Condition 78 (page 56) of the final permit. Indeed, at that specific condition, the permit only refers to a once per permit term stack test for complying with the 35 milligrams emission limit of total organic compounds per liter of gasoline loaded (S*ee* stack test reference at Item 1-23.2, page 55). The facility is, nonetheless, operating under a more stringent requirement (7 milligrams emission limit of total organic compounds per liter of gasoline loaded), which is met through continuous emission monitoring of Motiva's vapor collection system. (*See* Items 1-19.2, 1-32.2, 1-33.2, and 1-34.2). Therefore, in addition to the once per permit term stack test that is prescribed for complying with the 35 milligrams of VOC emission limit per liter of gasoline loaded, the facility is also operating under a stricter emission limit for which the prescribed periodic monitoring is in accord with the requirements of 40 CFR § 70.6(a)(3)(i)(B) (the "periodic monitoring rule"). Therefore, this issue raised by Petitioner has been addressed in the final permit and is moot.

V. Condition 52 (Sulfur Limitation)

Petitioner states that Condition 52, which cites 6 NYCRR § 225-1.2(a)(2), limiting the sulfur quantity in oil transacted or used at Motiva, is erroneously placed on the State side of the permit and should instead be placed on the federal side of the permit. Petitioner at 28. Petitioner explains that while 6 NYCRR § 225-1.2(a)(2) lists the applicable sulfur-in-fuel limit at three tables identified in that section as Tables 1, 2, and 3, that regulation conflicts with the approved SIP because, in the DEC's draft program policy "State Implementation Status of New York Regulations," only Table 1 of 6 NYCRR § 225-1.2(a)(2) is in New York's approved SIP, whereas Table 2 and 3 are not. Petitioner further explains that, because of date stipulations that are made in the current version of 6 NYCRR Subpart 225-1, Table 1's current version of 6 NYCRR § 225-1.2(a)(2) has become obsolete. In effect, Petitioner argues, DEC would be permitted to bring enforcement action only under Table 2, since the citation is placed on the State-enforceable section of the permit, while the SIP approved Table 1 would remain obsolete. Therefore, Petitioner concludes, to remove any obstacle on the part of DEC from enforcing the limits stated in Table 1, condition 6 NYCRR § 225-1.2(a)(2) must be placed in the federally enforceable section of the permit.

The final permit remedied Petitioner's concerns by locating the three tables referenced at 6 NYCRR § 225-1.2(a)(2) in the federally enforceable section of the permit, at Items 1-6.2 and 1-7.2. Therefore, this issue raised by Petitioner has been addressed in the final permit and is moot.

III. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2), I deny in part and grant in part NYPIRG's administrative petition requesting that the Administrator object to the issuance of the Motiva title V permit. This decision is based on a thorough review of the November 7, 2003 permit, and other documents contained in the permit record.

Dated: September 24, 2004

_____/S/_____
Michael O. Leavitt
Administrator