



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

DEC 4 2006

Denise M. Sheehan, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-1011

Re: EPA's Evaluation of New York State's Operating Permits Program

Dear Commissioner Sheehan:

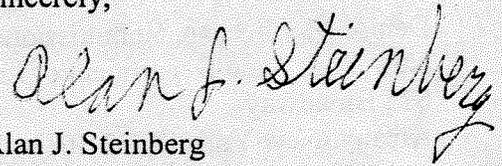
The purpose of this letter is to transmit the results of the United States Environmental Protection Agency's (EPA's) evaluation of New York State's Operating Permits Program which was conducted this past June. By way of background, New York's program received full approval from EPA on February 5, 2002, pursuant to title V of the Clean Air Act and its implementing regulations codified at 40 CFR part 70. As part of its oversight responsibility, EPA periodically evaluates state operating permit programs to ensure conformance with the requirements in these laws.

The details of EPA Region 2's evaluation and its findings are included in the enclosed report. I am pleased to inform you that the New York State Department of Environmental Conservation has performed well in the implementation of its operating permit program, including adding monitoring requirements where appropriate, providing assistance to small businesses, and developing an electronic computer system and other training materials to promote consistency in permit writing. I am also pleased that the Department has issued all 493 of the operating permits initially identified. This was a daunting task, and I thank the Department for making this a high priority.

As part of our review we identified issues in Section IV that need your attention. These issues relate to delegation of federal standards, the Compliance Assurance Monitoring requirements, the permits program fee schedule, public and EPA notification for permit modifications, and the Department's response to comments procedures. EPA has made recommendations on addressing these and other issues in Section IV of the report and we believe following these recommendations will improve the implementation of the permit program, and will result in the issuance of better permits, consistent with both federal and state regulations. To ensure that each of the identified issues is resolved in a timely manner, please provide a response to EPA's recommendations and, where necessary, an action plan of rectification within 90 days of your receipt of this letter and the enclosed report.

I would like to take this opportunity to thank Mr. Rob Sliwinski and his staff for the cooperation extended to us in completing this evaluation. In particular, Ms. Elizabeth Bartlett has provided much assistance in this effort. If you have any questions regarding this letter or the enclosed report, please have your staff contact Mr. Steven C. Riva, Chief, Permitting Section, Air Programs Branch, at (212) 637-4074.

Sincerely,

A handwritten signature in cursive script that reads "Alan J. Steinberg". The signature is written in dark ink and is positioned above the typed name and title.

Alan J. Steinberg
Regional Administrator

Enclosure

cc: Rob Sliwinski, NYSDEC - DAR

**Title V Program Evaluation for the
New York State Department of Environmental Conservation**

United States Environmental Protection Agency

September 30, 2006

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I. Introduction

The State of New York was granted interim approval for its Operating Permit Program (permit program) on December 9, 1996, and full approval on February 5, 2002, pursuant to title V of the Clean Air Act (CAA) and its implementing regulations at 40 CFR part 70. A title V operating permit consolidates into a single document all federally applicable requirements to which a source is subject. Although title V of the CAA does not impose additional requirements, it does authorize permitting authorities to add periodic monitoring, where necessary, to assure compliance with all applicable requirements.

The permit program is administered by the New York State Department of Environmental Conservation (DEC). As of June 30, 2006, there were 493 facilities subject to the permit program covering a wide variety of source categories. On June 5, 2006, as part of its oversight responsibility and pursuant to an agreement with EPA headquarters, EPA Region 2 performed an evaluation of DEC's implementation of its permit program. An in-depth evaluation of the fee component of the New York permit program was performed separately on June 23 and 24, 1999. As part of this review, an abbreviated fee review was conducted. The June 2006 evaluation was conducted to determine whether DEC successfully implements its permit program to meet the objectives of title V of the CAA and the requirements of 40 CFR part 70.

Information considered in this evaluation included DEC's responses to a comprehensive questionnaire, knowledge gained during Region 2's on-site visit to the DEC Central Office in Albany, New York to interview personnel of the Division of Air Resources, and EPA-requested¹ files and documents provided by the DEC. The questionnaire was a compilation of questions that pertain to the implementation of a title V program, and was developed by EPA headquarters. The on-site visit included discussions with DEC managers, as well as regional engineers, who are responsible for overseeing the quality of operating permits that are developed by staff permit writers. The files and documents provided include, but are not limited to: (1) a permit with Maximum Achievable Control Technology (MACT) conditions issued to E.I DuPont de Nemours & Co.; (2) a renewal permit with Prevention of Significant Deterioration (PSD) and Compliance Assurance Monitoring (CAM) conditions issued to Indeck Energy Services Inc.; (3) a Permit Manual (on CD-ROM) used to train staff on operating permits; (4) an annual compliance certification submitted by AES Somerset LLC; (5) the 2004 New York State Operating Permit Program Annual Report; (6) a Permit Review Report developed for the Con Ed East River Generating Station; and (7) a copy of DEC's Environmental Justice and Permitting

¹ EPA requested documents by category or subject (e.g. permits with MACT requirements, renewal permits), and did not name any specific facilities. DEC selected those specific permits it believed would satisfy EPA's general requests.

policy document dated March 19, 2003. The DEC was extremely helpful in providing all information needed to complete this evaluation.

II. Summary of Findings

In this report, EPA Region 2 notes both the successes associated with New York's permit program, and issues that need to be addressed to enhance the program. However, no issues were identified that were serious enough to require the issuance of a Notice of Deficiency.

A. Areas of Success

- All initial permits have been issued.
- Title V permit preparation is done in a very organized fashion. Permit content is developed using a New York State computer database, the Air Facility System (AFS), which includes a library of standard permit conditions to ensure consistency among permit writers. DEC has developed a Permit Manual, which also assists in the preparation of title V permits. The permits reviewed by EPA conform to the standard permit requirements of EPA's regulations at 40 CFR §§ 70.6(a-c).
- DEC has implemented procedures for assuring the submission of high quality and timely renewal applications. Permit modification and renewal procedures are established to assure that such permit actions are completed within the statutory limit of 18 months from receipt of a complete application. See CAA § 503(c) and 6 NYCRR § 201-6.7(a)(4).
- Public participation and affected State reviews are consistent with the public notice and participation requirements of EPA's regulations at 40 CFR § 70.7(h) and § 70.8.
- DEC has developed a comprehensive Permit Review Report to act as the statement of basis required under 40 CFR § 70.7(a)(5). Such a report is issued with every draft title V permit.
- Monitoring provisions of the permits reviewed are consistently written to strengthen the enforceability of and help assure compliance with applicable requirements.
- Federal performance and emission standards for new sources emitting criteria and hazardous air pollutants at 40 CFR parts 60, 61 and 63 are incorporated into permits with an appropriate level of detail, in an understandable manner.
- DEC has implemented a format change in title V permits that delineates which permit conditions need to be annually certified for compliance. This ground-breaking work involved creating two new sections: one for permit terms that never need to be certified, and one for terms that need to be certified only if they were effectuated during the

reporting period; the remaining permit terms must always be annually certified. The multi-year effort to bring about this change is expected to yield higher quality annual certifications, and may be a model for other permitting authorities.

- DEC reports that it routinely reviews 100% of deviation reports, semi-annual monitoring reports and annual compliance certifications submitted by sources.
- The Small Business Environmental Assistance Program is being administered successfully and is providing much needed guidance and information on compliance with regulatory requirements to the small business community
- Resources and internal management support are well structured. The operating permits program is managed by the DEC Central Office in Albany, and permits are written at each of the nine Regional Offices throughout the State.
- Benefits of the title V program as noted by DEC include improved functioning of other programs under the CAA, such as netting, trading and capping. The improved enforceability and clarity of permit conditions have enabled permittees to use the permits more easily to track compliance.

B. Areas of Concern

- There is some delay on the part of DEC in accepting delegation of recently promulgated federal standards regulating hazardous air pollutants, commonly referred to as "MACT" standards.
- Renewal permits for facilities subject to Compliance Assurance Monitoring are being issued without proper CAM provisions, or without a schedule for including CAM provisions.
- DEC's joint permit issuance process for modifications is not sufficiently transparent regarding minor NSR revisions.
- Responsiveness Summaries typically state the date on which (DEC believes) the EPA 45-day review period ends, rather than referring to EPA, who determines this deadline.
- EPA is interested in learning more about whether DEC's current fee schedule is sufficient to cover projected program costs.
- EPA is interested in working with DEC to develop a strategy to address permit conditions for sulfur-in-fuel provisions that are not in the State Implementation Plan.

III. Details of Review

A. Permit Application

Section 503(c) of the CAA requires subject sources to submit to their respective states an application for an operating permit pursuant to the state's operating permit program, as approved by EPA pursuant to 40 CFR part 70, no later than 12 months from program approval. The minimum contents of the application are listed in 40 CFR § 70.5.

In accordance with the New York State rules promulgated for its permit program, affected sources were required to submit an initial title V application within either six-months, one-year, or two-years after EPA approval of the permit program (New York's initial "Transition Plan," reference 6 NYCRR § 201-6.3). In November of 1996, DEC developed its title V permit application form and instructions. At the time of program approval, there were over 990 title V-affected facilities in New York State (the current number is approximately 493). All subject sources met the timely application submittal deadline as required by the CAA and the corresponding New York State regulations.

Although there was a time lag between application submission and permit issuance for some of the initial permits, DEC did not have a process in place requiring sources to update their applications if changes occurred during this period, or if incorrect information was initially submitted. However, as part of the requirements to gain full program approval, in November of 2001, DEC committed to sending to most of the applicants that had not as yet been issued a final permit a reminder of the above requirements. Additionally, DEC continued its practice of verifying the source's compliance status as reported on the application before permit issuance. This is accomplished through facility inspections, review of enforcement records and via prior knowledge of the facility by DEC personnel.

Affected facilities in New York are encouraged by DEC to submit applications electronically, although submission of hard copies is acceptable. In those cases where an electronic application is filed, submission of a hard copy of Section I of the application is required; this section contains the certification by the facility's responsible official (via his or her signature) that the information contained in the application is true, accurate and complete.

Prior to EPA granting full program approval, DEC committed in a letter in November of 2001 to make certain programmatic changes, including several changes to the permit application form relative to compliance certification, compliance plans, and the methods used to determine compliance.

Revised instructions/forms were issued in December of 2001, for use after January 1, 2002. The revised application form and instructions comply with the requirements of 40 CFR part 70 and the CAA, and is an important component of New York's permit program.

B. Permit Issuance

1. Permit Issuance Rate

From the initial universe of over 990 Title V-affected sources at time of program approval (December of 1996), New York now has a universe of 493 subject sources. The decrease is a result of sources capping out of the permit program (that is, reducing emissions to below the applicability threshold level), or sources no longer in operation. The title V sources cover a wide array of source categories.

The federal operating permit program regulations required state and local permitting authorities to issue permits for all affected sources within three years from program approval or, in the case of New York, by December 1999. Like most other State and local permitting authorities, DEC experienced delays in implementing the title V operating permits program. Some of the reasons for the delays include: (1) the fact that this was a totally new, national program and permitting authorities had little to no experience in running such programs (i.e., the time needed to issue the initial permits represented a new endeavor in and of itself since there was no prior experience from which to borrow); (2) States needed to ramp-up and develop a system to collect the necessary program fees; (3) the need to hire and train staff; (4) holding permit applications in abeyance to reflect all facility changes; (5) enforcement and/or court delays; (6) delays associated with the State Implementation Plan (SIP) approval process; and (7) delays associated with DEC having to wait for EPA policy or interpretations (e.g., definition of "single source"); among other reasons. Additionally, DEC developed a completely new computer database, the Air Facility System (AFS), used to implement the title V program, including electronic application submission and permit development, tracking and reporting, etc.

In December of 1999, the New York Public Interest Research Group (NYPIRG) filed suit against DEC for failure to issue all State of New York title V permits within the federally required three-year time period. In May of 2000, the Supreme Court of the State of New York ordered that the DEC take final action on the remaining permits by May, 2002. Most of the remaining permits were issued by the court-ordered date, and all affected sources have at present been issued their initial title V permits.

In October of 2003, the DEC developed a "Permit Manual" to assist in the writing and issuing of operating permits. In addition, AFS contains a permit condition library that includes many of the rule citations and requirements needed to develop title V permits. Both of these help to streamline the permit process in New York. For example, in New York State Fiscal Year (SFY) 2004, the average permit review time (time from receipt of application through final permit issuance) was 3.8 months, which was a significant decrease in time from previous years.

EPA finds that although there were some delays in issuing the initial title V permits, DEC has improved and adjusted its permit program and processes to ensure the timely issuance of permits.

2. Permit Modifications

The three types of permit revisions allowed under title V and the New York State implementing regulations are: (1) significant modifications; (2) minor permit modifications; and (3) administrative amendments. The first category requires the same processes as that of a new or renewal permit, including all requisite public, affected State and EPA review. Category #2 only requires that the permitting authority afford the EPA and affected States the opportunity for review; and administrative amendments can be processed without any "outside" review at all.

Within the first few years after program approval, DEC began processing all three types of permit revisions. The DEC has reported that 310 permit modifications have been made since June 30, 1998, including 88 significant modifications, 217 minor permit modifications, and five administrative amendments.

One issue that has been raised by DEC (as well as being raised by Region 2 to EPA headquarters) is the need for further elaboration, vis-à-vis EPA guidance, regarding which types of changes at a facility fall into each of the three permit revision categories. This request for guidance has been heard by EPA from many parties, as demonstrated through the Clean Air Act Advisory Committee Task Force on the Title V Implementation Experience (a final report was issued in April of 2006). As part of EPA's response to this Task Force, EPA is considering issuing such guidance in the near future.

Through its regular oversight, EPA has learned that DEC routinely processes modifications to preconstruction permits jointly with title V permit issuance. For purposes of this discussion, preconstruction permits include minor New Source Review (NSR) permits issued under 6 NYCRR § 201-5 of the NY SIP, as well as major nonattainment NSR permits issued under part 231 of the NY SIP, and are referred to simply as "title I" changes. According to 6 NYCRR § 201-6.1(b), this joint processing is allowed but not mandated. The two key points are that the

terms and conditions established in preconstruction permits are federally applicable requirements that must be incorporated into title V permits, and title V does not authorize the creation of or revision to applicable requirements. When DEC undertakes a joint permitting action, the administrative identification of those permit terms originating in or changed by the title I portion of the permit action can sometimes be lost. When this happens, it may appear to the public or EPA that all the changes are authorized by title V. Many minor NSR changes would not require public or EPA notice if a separate preconstruction permit were issued. However, when such changes are carried within a joint title V permit, it is important that DEC communicate clearly to the public and EPA that title V authority is not employed to make title I changes.

EPA finds that DEC, for the most part, is appropriately administering its permit modification processes in accordance with federal and New York State regulations. However, DEC must establish additional administrative procedures to assure EPA and the public that title V authority is not broadened in joint permitting actions, to improperly allow revisions to applicable requirements or creation of new requirements.

3. Permit Renewals

Title V permits issued by the DEC have a permit term of not more than five years from date of issuance, as stipulated in 6 NYCRR § 201-6.5(h). Further, 6 NYCRR § 201-6.3(a)(4) requires that all renewal applications be submitted between six and 18-months prior to the permit expiration date, and 6 NYCRR § 201-6.7(a)(4) requires a final action on the renewal application within 18 months of receipt of an administratively complete application. DEC's title V permit renewal application is processed in the same manner as that of an initial permit application; that is, the facility is required to submit all of the information requested on the permit application form, including all changes and modifications at the facility. The administrative procedures are also identical to the initial permitting process.

DEC has implemented an excellent practice for assuring high quality and timely renewal applications. Approximately 18 months prior to permit expiration, DEC mails a paper copy of a renewal application to the permittee. This application is computer-generated, using the current permit in AFS as a template. Applicants need only note changes, and sign and return the form to DEC for processing. With this practice, DEC has minimized the receipt of late renewal applications.

EPA's program review reveals that numerous permits are administratively extended under the New York State Administrative Procedures Act (SAPA). Such extensions are allowed provided the application shield has been obtained by the permittee; that is, that the permittee has submitted

a timely and complete renewal application. The DEC database currently lists permits as expired in two circumstances: if the renewal application is late, or if the source has shut down.

EPA finds that there are sufficient procedures in place to provide for a smooth and efficient renewal process. As of July 2006, the DEC has issued 167 renewal permits.

C. Public Participation

The public participation requirements of the title V permits program, which are listed in 40 CFR § 70.7(h), call for public review, neighboring states review, EPA review, and the opportunity for the public to petition EPA. In New York State, all draft title V permits are issued for a 30-day public review period. A notice announcing the issuance of the draft permit and the opportunity to comment and request a public hearing is published in a newspaper of major circulation in the area where the permittee is located, as well as in the New York State publication, the Environmental Notice Bulletin (ENB). New York's public participation requirements are delineated primarily in the State's Uniform Procedures regulations at 6 NYCRR part 621.

The public may review the draft permit and supporting documents at the local DEC Regional Office in which the facility is located, as well as at public locations nearby to the facility. The public can also request copies, either by telephone or by mail, of the draft permit, the application, or other documents that are part of the record. In general, requests for information are responded to either in one to two days, or up to two weeks, depending upon the information requested. Anyone who requests copies of any public documents is charged 25 cents per page in accordance with New York State law. The one exception is where a document is provided electronically, in which case there is no fee assessed.

A public hearing is held if a request is made, and DEC determines that the request has raised a significant issue or issues. In other cases, where the local community is actively involved with facility issues or significant public interest is anticipated, DEC may schedule a hearing regardless of whether one is requested by the public. DEC also provides affected states and Indian tribes an opportunity to comment on draft permits. The affected state and Indian tribe review period occurs concurrently with the 30-day public comment period.

DEC has reported that approximately 10% of the issued draft permits received public comments as a result of the newspaper and ENB publications, and that approximately five percent of the draft permits that received public comments were subsequently revised as a result. DEC has also held a number of public hearings, some of its own volition and others where requests were made.

In addition, a number of requests for public hearings were denied because, in the opinion of DEC, significant issues were not raised.

After the close of the public review period, DEC evaluates all comments and makes appropriate permit revisions. Subsequently, a "proposed" permit is submitted to EPA for a 45-day review; if comments were received, a "Responsiveness Summary" is also submitted to EPA at this time, delineating DEC's decision to accept or reject the comments.

Following the EPA review period is a period of not more than 60 days during which the public may petition EPA to object to the issuance of the final permit, consistent with 40 CFR § 70.8. To eliminate any ambiguity regarding when the respective 45-day EPA review period and the 60-day petition period begin and end, EPA Region 2 posts these dates on its website as each proposed permit is received. To date (commencing in March of 2000), EPA has received 73 petitions for objection to permits issued by the DEC. Of these, 39 were received for one facility proposed for construction, and 29 were submitted by NYPIRG for individual facility permits. Regarding public participation in New York State, the facility, the public, affected states and EPA are afforded opportunities to review and comment on all draft permits as required by 40 CFR § 70.7(h).

Some initial concerns were addressed after commencement of the New York permit program. In a November, 2001 letter, DEC agreed to change certain administrative procedures, as follows: (1) ensure that the public has access, during the public comment period, to all materials considered in issuing the draft permit, and indicate such in the public notice; and (2) include appropriate language in public notices regarding the opportunity to request and the granting of public hearings.

While public hearings have been requested and a number have been held, most of the requests were denied by DEC. In accordance with New York's implementing regulations ("Uniform Procedures," promulgated at 6 NYCRR part 621), the reasons for conducting public hearings include whether substantive and significant issues were raised, or whether a significant degree of public interest exists. These regulations afford the DEC discretion in making a decision whether or not to hold a hearing.

With respect to the EPA public petition process, EPA recommends that DEC revise its standard Responsiveness Summary letter to clarify the submission deadlines mandated by the federal regulations at 40 CFR § 70.8(b). This can be accomplished by adding a link to the EPA Region 2 web-site that tracks the title V petition deadlines, and also by adding the EPA Region 2 contact's telephone number and address for petition deadline inquiries.

One final public participation issue relates to mailing lists. Both the federal and State rules provide that public notice shall be given to persons on a mailing list developed by the permitting authority, including those who request in writing to be on such a list. DEC has indicated that although there is no official State policy or guidance on developing mailing lists, such lists are nonetheless developed and maintained at each of the nine DEC regional offices. Any person who makes a request will be included on the regional mailing list for a particular facility, and will typically be notified of issuance of the draft title V permit.

EPA finds that DEC is incorporating in its permit program procedures that conform to the public participation requirements of the CAA and the federal regulations codified at 40 CFR part 70.

D. Statement of Basis

The federal regulations at 40 CFR § 70.7(a)(5) require that permitting authorities 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). It further requires the permitting authority to make this "statement of basis" available to EPA and any other person who requests a copy.

At the outset of its permit program, DEC did not prepare for each draft permit a separate, stand-alone statement of basis document. When this issue was raised (by petitioner's, at the outset), it was believed by both EPA and the State that the required information was already contained in the permit, including information provided under the "Description" section, at the beginning of the permit. In Orders issued in response to public petitions, EPA denied petitioner's requests to re-open the permit because of a lack of a statement of basis, if information that sets forth the legal and factual basis for the draft permit conditions could be found elsewhere in the public permit file.

In a November, 2001 letter to EPA, DEC agreed to create a separate document, called a Permit Review Report, to serve as the statement of basis; such reports are now created and issued with all draft permits. Permit review reports include, but are not limited to: (1) a facility description; (2) a discussion of any operational flexibility that will be used at the facility; (3) the basis for applying the permit shield; (4) any federal applicability determinations; and, most importantly in EPA's opinion, (5) the rationale for the monitoring methods selected (especially in those cases where "gap-filling" monitoring is made a permit requirement).

EPA believes that DEC's Permit Review Report complies with the requirements of 40 CFR § 70.7(a)(5). On a related note, one of the recommendations of the Clean Air Act Advisory Committee Task Force on the Title V Implementation Experience is to issue guidance on what statements of basis should include. Should such EPA guidance be issued, the DEC will be notified and the guidance will be forwarded.

E. Permit Content

1. Monitoring

(a) Periodic Monitoring

Title V of the CAA mandates that operating permits include requirements to assure compliance with all permit terms, including requirements for monitoring, testing, recordkeeping, and reporting. The federal regulations at 40 CFR §§ 70.6(a-c) specify the minimum contents of an operating permit. According to 40 CFR § 70.6(a)(3)(i)(A), the monitoring provisions as prescribed in applicable rules and regulations are required to be incorporated into title V permits. Monitoring provisions are crucial to the success of a permit program because they require the permittee to monitor the operation of its emissions generating units on a regular basis, allowing early detection of problems that may lead to the occurrence of a violation of the permit terms and conditions. However, some rules and regulations, especially those that were promulgated years ago, do not include any ongoing monitoring obligations. Absent the requirement to monitor source compliance, enforcement of such permit conditions is difficult.

To address this, 40 CFR § 70.6(a)(3)(i)(B) authorizes permitting authorities to fill these "gaps" by adding periodic monitoring requirements in title V permits. DEC has employed the gap-filling authority of 40 CFR § 70.6(a)(3)(i)(B) to strengthen the enforceability of permit conditions transferred from existing air permits issued under the authorities of 6 NYCRR parts 201 and 231, and 40 CFR § 52.21. DEC has also created periodic monitoring for major sources that were subject to various State and federal requirements, yet had not been required to obtain an air use permit prior to title V.

One common difficulty associated with gap-filling periodic monitoring has been the challenge for permitting authorities to maintain programmatic consistency, while permit writers make emission-unit-specific determinations on the level of monitoring that is appropriate for various applicable requirements. DEC has successfully overcome this difficulty by developing a computer database for its permit conditions. Permit writers may search a standard library of monitoring conditions and retrieve conditions relevant to each applicable requirement. In

addition, permit writers have the ability to retrieve monitoring conditions created by other DEC personnel. In this way, permit writers can meet the needs of individual sources, benefit from the experiences of others, and maintain a reasonable level of programmatic consistency.

(b) Compliance Assurance Monitoring

Beyond gap-filling, title V requires certain sources to comply with Compliance Assurance Monitoring (CAM) regulations, codified at 40 CFR part 64. *See* 40 CFR § 70.6(a)(3)(i)(A); *see also* 6 NYCRR § 201-6.5(b)(1). DEC stated during EPA's site visit that most of the implementation questions raised by its regional offices regarding CAM have related to applicability. New York State regulations at 6 NYCRR part 212, for General Process Emission Sources, imposes pollutant specific emission limits on a number of large emission units, potentially bringing them into the CAM program. DEC also stated during EPA's site visit that in some cases where the DEC has asked EPA headquarters for CAM guidance, the responses have not always been clear and understandable. EPA recognizes that streamlining analyses may be complex when a source is subject to CAM in addition to being subject to MACT and/or PSD requirements. EPA will consider how it may provide guidance or other assistance, to help DEC achieve a clearer understanding of the relationship between MACT/PSD and CAM.

EPA has reviewed a number of permits addressing CAM in New York, including the renewal permit for the Indeck Corinth Energy Center which was provided to EPA during our site visit. *See* Appendix D. EPA believes that DEC may be experiencing difficulties obtaining monitoring plans from sources in a timely manner, as required under section 64.4. The Indeck Corinth permit was issued in February 2004, with a placeholder CAM condition that did not include any enforceable milestones. That is, Condition 15 of this permit requires the facility to submit a CAM plan and outlines the basic elements of such a plan, but specifies no deadline for submission of the necessary information. As of August of 2006, the permit has not yet been revised to include any CAM monitoring provisions. Sections 64.5(a)(3) and (b) specify that the information required under section 64.4 must be part of an application for renewal of a title V permit. EPA recommends that DEC refrain from declaring a renewal application administratively or technically complete until a permittee submits the required CAM plan. If circumstances require the DEC to issue a permit prior to receipt and approval of a CAM plan, EPA recommends that any placeholder condition include all necessary elements of a compliance schedule, as described in 40 CFR § 70.5(c)(8)(iii)(c) and 6 NYCRR § 201-6.3(d)(9)(iii)(b).

Besides the timing issues, EPA believes that DEC may benefit from additional effort to bring a better level of working knowledge of the CAM rule to its permit writers. In the case of Indeck Corinth, EPA is uncertain whether CAM applicability has been properly evaluated. According

to section 64.2, only certain pollutant-specific emissions units (PSEU) that use a control device to achieve compliance with an emission limit are subject to CAM. While condition 15 merely states that the facility is subject to CAM, the reader can learn additional details from reviewing the Emission Unit Definition (Condition 19) and the Permit Review Report dated July 12, 2005, page 26. These indicate that there is only one emission unit at the Indeck Corinth Energy Center and the facility is subject to CAM for both oxides of nitrogen (NO_x) and carbon monoxide (CO). However, neither the permit nor the Permit Review Report describe Indeck's use of an active control device for CO. EPA recognizes that implementation of CAM is in its infancy, with the number of permit renewals for large sources steadily increasing. EPA recommends that DEC consider how it may disseminate existing guidance and provide oversight, to help its staff achieve a clearer understanding of CAM.

In conclusion, EPA finds that DEC must take steps to improve the way it incorporates the CAM requirements into New York title V permits. Steps should include: (1) requiring sources to include in their renewal applications the requisite CAM plans or, if the required plan cannot be included, a placeholder with a compliance schedule for submitting the CAM plan; and (2) providing additional guidance and assistance to DEC permit writers on CAM requirements, and increasing DEC Central Office oversight on draft permits to assure that the requisite CAM requirements are included in title V permits.

2. MACT

For many permitting authorities, incorporating applicable maximum achievable control technology (MACT) requirements promulgated pursuant to 40 CFR part 63 into title V permits can be a challenge, given the length and complexity of these MACT regulations. DEC has been doing an excellent job of incorporating applicable MACT requirements into permits for sources subject to one or more subparts of 40 CFR part 63. During EPA's site visit in June 2006, DEC explained that sources subject to multiple MACT standards present a challenge in terms of streamlining.² Some sources prefer to have each requirement defined rather than allow streamlining. Also, the equivalency determinations needed to streamline various monitoring provisions can be highly complex. EPA understands that permit issuance can be delayed in situations where a great amount of up-front work is needed to develop appropriate permit conditions for multiple or overlapping MACT standards. Overall, DEC consistently achieves a balance between including details necessary to define an emission unit's applicability and

² In EPA's March 5, 1996 memorandum entitled, "White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program," EPA describes how a source may propose streamlining to distill multiple overlapping requirements into one set that will assure compliance with all requirements.

compliance requirements to the MACT standards, while paraphrasing and abbreviating the requirements to achieve a readable permit.

While EPA has no concerns at this time regarding permit content related to MACT standards, EPA has some concerns related to DEC's delay in accepting delegation of recently promulgated MACT standards. New York State has chosen to implement the federal MACT program through a process known as incorporation by reference. This involves incorporating the citations into State regulations through a formal rulemaking process. New York State has been slow in taking this formal rulemaking action. As a result, in June of 2005, EPA wrote to DEC¹ to request that it provide a schedule for incorporating additional MACT standards in its tables at 6 NYCRR part 200. Table 1 in section 200.9 lists Referenced Material; that is, documents, federal regulations and other materials that are referenced in other State of New York requirements, including the State's operating permit program rules. Tables 2, 3 and 4 of section 200.10 list individual subparts of 40 CFR parts 60, 61 and 63, respectively, which are incorporated by reference. Each of these tables describes July 1, 2003 as the date of the Code of Federal Regulations from which references to the above-noted federal regulations are taken.

When DEC accepts delegation of a MACT standard, it obtains full authority to implement and enforce the underlying regulation, independent of any permit. For the purposes of the DEC's title V program, DEC can incorporate recently promulgated (or otherwise not yet delegated) MACT regulations into its program, by listing such in the tables at 6 NYCRR part 200. This would give DEC full authority to enforce the incorporated requirements.

When DEC submitted its permit program to EPA for approval, it demonstrated that it has the authority to implement and enforce those provisions of MACT standards that are incorporated into title V permits, even if the standard has not yet been incorporated by reference into the State regulations. While DEC routinely incorporates applicable MACT standards into title V permits, DEC must continue to do so, including those standards promulgated since July 2003. This is a necessary vehicle to assure continued effectiveness of the MACT program. However, DEC exhibits a significant enforcement vulnerability by relying on permits - or in some cases, EPA - for the enforcement of at least 17 federal standards. Therefore, EPA is asking that DEC incorporate the remaining MACT standards into 6 NYCRR part 200 and accept delegation within 90 days of the date of issuance of this report.

¹ Letter dated June 8, 2005, from W. Mugdan of EPA to D. Shaw of DEC.

3. Compliance Certification

In the summer of 2002, DEC began to segregate 29 general, facility-wide permit terms in a new section of its title V permits. This section, entitled "Notification of General Permittee Obligations," indicated that these 29 conditions were not subject to annual compliance certification requirements. On September 22, 2004, EPA wrote to the DEC requesting certain format changes regarding these 29 permit terms.

In May of 2005, DEC began implementing the EPA-directed format changes in title V permits. This involved creating two new sections after the aforementioned "Notification" section: one for permit terms that must always be certified, and one for terms that need only be certified if they were effectuated during the reporting period. Additionally, DEC chose to include other permit conditions in these two latter sections, which were not in the original group of 29. This format change is the first in the nation to distinguish how and whether title V permit terms must be annually certified. EPA believes that the multi-year effort to bring about this change will see a payoff in higher quality certifications.

During the period from May through August, 2005, EPA conducted intense permit auditing with respect to this issue. In September of 2005, EPA wrote to DEC² to provide some feedback and comments on the implementation of this large-scale change. EPA found that the biggest challenge in implementing this format change was programming the DEC's AFS computer database with the appropriate checks and balances. Both programmers and permit writers were receptive to EPA's comments during this period, in which EPA reported an achievement rate by DEC of 86% with the EPA-directed changes. During a second auditing period from September 1 through October 31, EPA found that DEC regional offices conformed to the changes with an achievement rate of 91%. And as of the end of 2005, EPA found that DEC was issuing draft permits that achieved near 100% conformance with this new format.

In the early stages of this auditing process, a problem was uncovered relating to EPA Region 2's direct access of the New York State AFS. EPA found that it was apparently not reviewing the most recently revised permit; that is, EPA was downloading from the New York AFS an "older" version of a permit than the one that the DEC staff person was working on. Because of this technical glitch, initial conformance achievement rates appeared very low (30 to 40 percent), so EPA followed up with phone calls to DEC staff. It was determined that EPA's periodic update of AFS (on a monthly basis, at best) resulted in EPA not being able to view real-time permit changes. Once EPA synchronized its AFS with DEC's latest updates, permits were again seen as

² Letter dated September 21, 2005, from S. Riva of EPA to R. Sliwinski of DEC

they should be, and the high achievement rates reported above were calculated. Regular AFS synchronization was identified as an area in which our staff could work towards improvement.

As of August 2006, only one final permit had been issued that did not conform to this format. According to a response from DEC in November of 2005, any permits that had been issued with one or more conditions out of conformance with the new format will be corrected during the permit renewal process. In the case of the permit issued to the Novelis Corporation on September 6, 2005, EPA notes that several permit conditions are entirely missing, not simply placed under an improper heading. If Novelis were to request a permit revision prior to renewal in April 2007, EPA recommends that this error be corrected at the time of the revision.

In conclusion, EPA commends DEC on revising the annual compliance certification requirements, and believes that this revision can serve as a model for other State and local permitting authorities.

4. New York State Implementation Plan

DEC has worked with EPA extensively over the last few years to properly distinguish permit conditions that are enforceable by both EPA and DEC (those conditions delineated in the EPA approved New York SIP) from those that are enforceable only by DEC. Those state rules and regulations that establish emission limitations and work practices necessary to assure the attainment of National Ambient Air Quality Standards are approved by EPA as part of the SIP and, as such, are federally enforceable applicable requirements pursuant to 40 CFR § 70.2. DEC also has the discretion to include in title V permits conditions that are not enforceable by EPA and citizens. See 40 CFR § 70.6(b)(2). SIP rules that have been revised since EPA approval and newly adopted rules awaiting EPA approval are not considered federally enforceable by the EPA. DEC has agreed with EPA that, for the most part, SIP rules will be placed in the federal and State enforceable section of title V permits, even in circumstances where those rules are no longer valid New York State regulations. DEC understands that it has the authority to enforce all applicable requirements within its title V permits (see 40 CFR § 70.4(b)(3)(i)), even though an "old" SIP rule may no longer be on the State books. Further, DEC understands that it may choose to only enforce the (updated) State rule, which may be placed in the State-only enforceable section of the permit.

Two of the actions that the DEC has taken to resolve the confusion surrounding State regulations that are updated but are not federally approved are removing the "Excuse Provision" from the SIP (formerly promulgated at 6 NYCRR § 201.5(e)), and temporarily relocating capping provisions under part 201-7 to the State-only sections of permits, until this section was approved

by EPA.³ However, EPA is aware that DEC is not addressing the situation where the State's sulfur-in-fuel requirements of 6 NYCRR part 225 have changed but the federally approved regulations contained in the SIP continue to reflect the old version. EPA understands that there may be extenuating circumstances in this situation. EPA believes it is important for the DEC and EPA to agree on a strategy and schedule to resolve the sulfur-in-fuel permitting discrepancy.

F. Enforcement/Compliance

According to FY 2004 data from EPA's recent enforcement and compliance audit, DEC received approximately 97% of the 464 annual compliance certification reports that were due. DEC staff routinely review 100% of all reports received, including deviation reports, semiannual monitoring reports and the annual compliance certification reports. DEC tracks reporting due dates in the AFS and notifies permittees if reports are not received on-time, allowing a brief opportunity to rectify the situation before any enforcement action is pursued. In reviewing deviation reports, if any inexcusable deviations are found, they are recorded in AFS and appropriate enforcement action is then pursued.

DEC is developing the capability to accept electronic submission of annual compliance certification reports. Three options are being developed for permittees. One option will provide for electronic certification by keying in permit-condition-specific data on a secured internet web site. Another option will allow an electronic file to be completed off-line and uploaded to the DEC database. And a third option will be the current low-tech practice of mailing hardcopy certifications, although the format will be revised to be compatible with the other options.

DEC is also developing the capacity to receive supporting documentation as attachments to the required reports and converting them using a "central data exchange." This will hopefully allow these data to be fed electronically to EPA. According to DEC, electronic signatures will be handled similarly to EPA's Acid Rain program. For now, this capability is being developed just for the annual compliance certification reports. In the future, DEC envisions this being expanded to include semiannual monitoring reports and capping certifications as well. DEC sees the benefits of electronic certifications as a welcome payoff for the investment it made in developing its permit database.

DEC's permit program relating to compliance reporting and review is working quite well, and provides the DEC with the capability of better facility compliance oversight.

³ EPA approved 6 NYCRR § 201-7 into the SIP on October 3, 2005. See 70 Fed. Reg. 57511. Capping provisions in DEC's title V permits have since been placed in the federal and State enforceable section.

G. Outreach to Small Businesses

Section 507(a) of the CAA required permitting authorities to establish small business stationary source technical and environmental compliance assistance programs to ensure that small businesses were well informed and well prepared for the implementation of the 1990 CAA Amendments. These amendments created environmental obligations that, for the first time, were directly applicable to many small businesses. Recognizing this, section 507(a)(3) of the CAA required permitting authorities to assist small businesses by, among other ways, creating: (1) an Ombudsman for small business stationary sources in connection with the implementation of title V; (2) a compliance assistance program; and (3) a Compliance Advisory Panel (CAP) to monitor the effectiveness of the small business stationary source technical and environmental compliance assistance program. These activities, collectively referred to as the Program, are fully funded in New York by title V fee revenue.

In accordance with CAA section 507 mandates, DEC contracted with the New York State Environmental Facilities Corporation to administer its Small Business Assistance Program. New York's Environmental Facilities Corporation renamed the Small Business Environmental Assistance Program (SBEAP) in 2006. New York's CAP was established to oversee the implementation of the SBEAP and review its effectiveness. DEC also established an independent Ombudsman at Empire State Development through its Environmental Services Unit. The Ombudsman handles complaints about regulations and is the small business advocate. He works closely with the SBEAP to learn about air issues that concern the small business community in the State of New York. The Ombudsman also works very closely with the CAP, local officials and other agencies to ensure that the small business community is well represented during discussions of air pollution issues.

The SBEAP in New York provides free and confidential advice to the small business community, on issues such as pollution prevention measures, permitting requirements, material substitutions and process modifications. The SBEAP is a partner with the Ombudsman and also works closely with the CAP to discuss the effectiveness of any technical and environmental compliance assistance programs that are in place. DEC's Bureau of Technical Services is the program liaison with the SBEAP.

New York's SBEAP has performed superbly in providing the types of assistance in the capacity envisioned in the CAA. It fully complies with all of the requirements of section 507(a). The eligibility criteria for businesses in New York to utilize this program are: (1) one hundred or fewer employees; (2) not a major source of air pollution; and (3) a source that emits less than 100 tons of air pollution each year. Since 1992, the SBEAP in New York has assisted thousands of small businesses to understand and comply with State and federal air pollution control

requirements. In SFY 2003/2004, the SBEAP provided assistance to small businesses such as printers, dry cleaners, metal finishing shops, gas stations, foundries and chrome plating operations. SBEAP also provided assistance to citizens interested in business startup information.

New York's SBEAP provides assistance in numerous ways, including use of the internet, a telephone hotline, newsletters, direct mailings, guidance documents, seminars and on-site visits. In addition to services provided directly, SBEAP also partners with trade associations to facilitate the sharing of information on compliance methods and control technologies. In SFY 2003/2004, SBEAP partnered with USEPA Region 3 and DEC to develop outreach on vapor recovery in an urban air toxics program to reduce benzene emissions. New York's SBEAP demonstrates that providing comprehensive technical assistance increases the compliance rate of small businesses with environmental regulations and improves the overall air quality of the State.

H. Fees

In 1999, EPA Region 2 performed an in-depth review of the New York permit program fee schedule as part of its ongoing oversight role. Besides the in-depth review, EPA's oversight role includes periodic program reviews, including review of the permit program's Annual Reports, which provide programmatic and fiscal data to the Governor, Legislature and Office of the State Comptroller. EPA's 2006 program evaluation included a review of the permit program's Annual Report dated April 2005. According to the conclusions and recommendations in that report, EPA has observed that there are some questions regarding the sufficiency of DEC's current fee schedule to cover projected program costs.

DEC's Fee Rule at 6 NYCRR § 482-2.4 specifies that fees are based on actual emissions for the prior calendar year, as demonstrated to DEC's satisfaction. In the absence of an actual emissions demonstration, fees would be based on permitted emissions or, where there is no permit, on potential emissions. The emissions-based fee is capped at 6,000 tons annually of each reportable criteria pollutant emitted by a title V-affected facility, with the exception of carbon monoxide for which no fees are assessed. Other DEC revenue comes from fines and penalties, as well as interest. The DEC per-ton fee was initially set at \$25 in 1994 (adjusted annually in accordance with the Consumer Price Index). In 1999 the per-ton fee was set at \$45, where it has remained to the present.

This fee rate is slightly higher than the federal presumptive minimum fee rate of \$41.02 published by EPA on September 20, 2006. EPA adjusts this federal presumptive minimum fee annually, using the Consumer Price Index. In its 1996 interim approval, EPA determined that

DEC's fee schedule was equivalent to the presumptive minimum, and was sufficient to support the title V program.

Because EPA's 2006 program evaluation did not include an in-depth fee audit, EPA describes here DEC's permit program accounting practices as they were when last audited by EPA in 1999. Direct and indirect personnel costs are appropriately segregated by the use of specific activity codes for title V and non-title V related duties. Title V fees are properly deposited into the permit program Account of the Clean Air Fund within the State Treasury to prevent the mixing of funds. Title V program costs are tracked using a "Time and Activity Manual," which is reconciled periodically. According to the April 2005 Permit Program Report, title V fee revenue supported approximately 101 persons in the Air program. There are four other funding sources for the DEC's Air Program, and each person's salary is paid from only one funding source, regardless of the amount of time spent on various activities.

EPA found in the previous fee audit that the DEC permit program was self-supporting, as required pursuant to section 502(b)(3) of the CAA. That is, for SFY 1999/2000, projected revenue plus cash balances were sufficient to cover all reasonable direct and indirect costs required to develop, administer and enforce the permit program. These costs are incurred for activities including but not limited to, permitting, compliance and enforcement, revisions to related rules and regulations and the SBEAP.

According to the Permit Program Annual Report dated April 2005, new legislation was passed in SFY 1998/1999, which established a ceiling on emissions-based fees of \$45 per ton (See ECL 72-0303(3)). However, the methodology at 6 NYCRR § 482-2.4 for calculating each year's fees is based on values that fluctuate with time. For example, the fee calculated according to 6 NYCRR § 482-2.4(b)(4) which would fully sustain the permit program through SFY 2004/2005 was \$68.86 per ton. In the April 2005 Report, DEC projected the permit program would experience a fiscal shortfall beginning in the spring of 2006. EPA notes that revenues appear to be decreasing with lower billable emissions, while costs associated with salaries and fringe benefits are increasing. DEC's April 2005 Report includes a recommendation for a fee increase of \$13 per ton to cover the projected shortfall through March 31, 2008.

EPA recognizes a need for some level of action to address the apparently widening gap between actual revenue and revenue needed to fully support the program. In order to determine whether DEC's program is adequately funded or if changes are needed, EPA requests of DEC, pursuant to 40 CFR § 70.9(b)(5)(ii), to prepare and submit to EPA for further analysis, a detailed accounting that its fee schedule meets the requirements of 40 CFR § 70.9(b)(1). This accounting

report will assist both DEC and EPA to focus future discussions on whether and how the fee schedule may need to be revised.

IV. EPA Conclusions and Recommendations

As a result of this program review and Region 2's continuing permit program oversight, EPA finds that DEC has developed and is implementing a solid title V operating permits program. DEC also continually reviews its permit program and procedures, and makes needed changes and improvements.

During this subject evaluation, EPA has identified issues where immediate attention is needed, issues on which we would like to engage the DEC in future discussions, and issues where EPA assistance would be beneficial to the New York State permit program.

A. Issues That Must be Addressed by New York

The following issues must be addressed by DEC so that its permit program conforms to both federal and New York State regulations.

- **MACT**
Within 90 days of issuance of this report, DEC must submit to EPA a schedule for accepting delegation of federal standards promulgated since July 2003.
- **Compliance Assurance Monitoring**
DEC must: (1) make use of its authority at 6 NYCRR § 201-6.3(b)(3) to temporarily revoke application shields for applicants who fail to timely submit monitoring plans required under CAM; (2) for any final permits issued to permittees who have not timely submitted CAM plans, include a schedule under which the applicant will achieve compliance with applicable CAM provisions; and (3) take steps to assure that staff are adequately trained in implementing CAM.
- **Permit Modifications**
When issuing title V permits that authorize title I permit actions in a joint title V permit, DEC must clarify in the permit record (such as its Permit Review Report and/or the public notice, whether any new permit conditions or revisions are being authorized pursuant to title I of the CAA rather than title V.
- **Public Participation**
DEC must revise its standard Responsiveness Summary letter to add: a link to the EPA Region 2 web-site that tracks the title V petition deadlines, and the Region 2 contact's telephone number and address for petition deadline inquiries.

B. Issues for Further Discussion

The following issues may not represent problems at this point, but are areas in which EPA believes both agencies would benefit from a dialogue and information exchange. To this end, EPA proposes that staff arrange periodic conference calls and/or meetings. Although topics will vary, EPA suggests initial topics include:

- DEC's permit fee schedule and whether it satisfies 40 CFR § 70.9(b)(1), which requires a demonstration that the costs of the title V permitting program be fully funded by title V permit fees;
- The development of permit conditions that reflect the SIP status of part 225 sulfur-in-fuel requirements;
- The use of SAPA extensions to avoid permit expiration;
- The requirement for applicants to supplement/update applications that are already complete;
- The development of public mailing lists;
- The decision by the DEC of when to grant or deny a public hearing; and
- The adequacy of the "Basis for Monitoring" section of Permit Review Reports.

C. EPA Assistance

The following list identifies issues on which EPA's assistance would likely be valuable to the DEC:

- EPA will consider how it may provide guidance or other assistance to DEC regarding further delineation of the three permit modification categories.
- EPA will consider how it may provide guidance or other assistance, to help DEC staff achieve a clearer understanding of the relationship between MACT and CAM.
- EPA Region 2 will investigate its AFS access. It appears that EPA may not be getting AFS program updates as frequently as is required to keep up with frequent database changes. Resolving this issue will involve actions by both the DEC and EPA.