

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

-----X

In the Matter of the Proposed Operating Permit for

NYC TRANSIT AUTHORITY

Permit ID: 2-6105-00262/00009

to operate the NYC-TA East NY Bus Depot and Shops
located in Brooklyn, New York

Proposed by the New York State
Department of Environmental Conservation

-----X

PETITION REQUESTING THE ADMINISTRATOR TO OBJECT TO ISSUANCE OF THE
PROPOSED TITLE V OPERATING PERMIT
FOR THE TRANSIT AUTHORITY'S EAST NEW YORK BUS DEPOT

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. (“NYPIRG”) hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to proposed Title V Operating Permit for the New York City Transit Authority’s East New York Bus Depot (“the facility”). NYPIRG expects a response from EPA within sixty days of its receipt of this petition as required by Clean Air Act § 505(b)(2).

NYPIRG is a not-for-profit research and advocacy organization that specializes in environmental issues. NYPIRG has more than 20 offices located in every region of New York State. NYPIRG has members who live, work, pay taxes, and breathe the air near where the depot is located.

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

NYPIRG’s grounds for objection to the permit are as follows:

I. DEC Violated the Public Participation Requirements of Clean Air Act § 502(b)(6) and 40 CFR § 70.7(h) by Inappropriately Denying NYPIRG's Request for a Public Hearing

Under 40 CFR § 70.7(h), “all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit.” NYPIRG requested a public hearing in written comments submitted to DEC during the applicable public comment period. DEC denied NYPIRG's request for a public hearing. See Cover letter to DEC Responsiveness Summary, NYCTA East New York Facility, dated Jan. 28, 2002. NYPIRG requested a hearing so that its members could participate in the permit proceeding by submitting oral comments on the draft permit. Certainly, NYPIRG's submission of thirty pages of written comments suggests that there is a significant degree of public interest in the permit. Certainly, then, NYPIRG was not given “an opportunity for a public hearing” as required under 40 C.F.R. § 70.7(h).

DEC's refusal to hold a public hearing on the draft permit for this facility is a violation of the public participation requirements of Clean Air Act § 502(b)(6) and 40 CFR § 70.7(h). The Administrator must object to this proposed permit and direct DEC to hold a public hearing in accordance with federal law.

II. The Permit is Based Upon an Inadequate Permit Application

The Administrator must object to this Title V permit because it is based upon an incomplete permit application that does not satisfy the requirements of CAA § 114(a)(3)(C), 40 CFR §70.5(c), and 6 NYCRR § 201-6.3(d).

First, the permit application lacks an initial compliance certification. Each applicant is legally required to submit an initial compliance certification that includes:

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

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

Because the applicant failed to submit an initial compliance certification, neither government regulators nor the public can truly determine whether the facility is currently in compliance with every applicable requirement.

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

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

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

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

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

The omission of this information makes it significantly more difficult for a member of the public to determine whether a permit includes all applicable requirements. For example, an existing facility that is subject to major New Source Review ("NSR") requirements should possess a pre-construction permit issued pursuant to 6 NYCRR Part 201. Minor NSR permits, Title V permits, and state-only permits are also issued pursuant to Part 201. In the Title V permit application, a facility that is subject to any type of pre-existing permit simply cites to 6 NYCRR Part 201. Because DEC does not require the applicant to describe each underlying requirement, it is virtually impossible to identify existing NSR requirements that must be incorporated into the applicant's Title V permit. The permit fails to clear up the confusion, especially since requirements in pre-existing permits are often omitted from an applicant's Title V permit without explanation.

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

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

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

II. DEC Failed to Include an Adequate Statement of Basis With the Draft Permit

The Administrator must object to this Title V permit because DEC failed to include an adequate “statement of basis” or “rationale” with the permit explaining the legal and factual basis for permit conditions. Without an adequate statement of basis, it is virtually impossible for concerned citizens to evaluate DEC’s periodic monitoring decisions and to prepare effective comments during the 30-day public comment period. The only remedy for this problem is for DEC to develop a statement of basis for the draft permit and re-release it for a new public comment period. In its responsiveness summary for this permit, DEC states that the “permit application and draft permit provide the legal and factual background and explanation for the draft permit conditions.” See, Cover letter to DEC Responsiveness Summary, NYCTA East New York Facility, dated Jan. 28, 2002. Unfortunately, these documents do not set out the facts and legal background to demonstrate the basis for the conditions of this permit.

40 CFR §70.7(a)(5) provides that “the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it. For the purpose of this discussion and the remainder of our comments, we refer to the permit description as the “statement of basis.” According to U.S. EPA Region 10:

The statement of basis should include:

- i. Detailed descriptions of the facility, emission units and control devices, and manufacturing processes including identifying information like serial numbers that may not be appropriate for inclusion in the enforceable permit.
- ii. Justification for streamlining any applicable requirements including a detailed comparison of stringency as described in White Paper 2.
- iii. Explanations for actions including documentation of compliance with one time NSPS and NOC requirements (e.g. initial source test requirements), emission caps,

superseded or obsolete NOCs, and bases for determining that units are insignificant IEUs.

iv. Basis for periodic monitoring, including appropriate calculations, especially when periodic monitoring is less stringent than would be expected (e.g., only quarterly inspections of the baghouse are required because the unit operates less than 40 hours a quarter.)

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

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

Region 10 Permit Review at 4.

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

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

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

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

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

The absence of an adequate statement of basis is a substantive and significant issue that could result in denial of the permit application, or the imposition of significant conditions thereon. 40 CFR Part 70 is clear on the requirement that every permit must be accompanied by an adequate rationale for permit conditions. See 40 CFR § 70.7(a)(5). Absent a complete statement of basis, the public cannot effectively evaluate and comment upon the adequacy of draft permit requirements.

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

The Administrator must object to issuance of this permit because it distorts the annual compliance certification requirements of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5). Under 6 NYCRR § 201-6.5(e), a permittee must “certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices,” at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirements included in the draft permit at Condition 24 (inexplicably placed after Condition 25) do not require the facility to certify compliance with all permit conditions. Rather, the permit only requires that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” DEC then proceeds to identify certain conditions in the draft permit as “Compliance Certification” conditions. Requirements that are labeled “Compliance Certification” are those that identify a monitoring method for demonstrating compliance. The permit conditions that lack monitoring (often a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal law. The permittee must certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

The compliance certification condition further states: “[t]he 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.” *See* Condition 24.2) (Emphasis added.) This additional language does nothing to remedy the compliance certification designation problem NYPIRG noted in its earlier comments, and appears to clarify that this designation in the permit is a way of identifying which conditions are covered by the annual compliance certification.

Condition 24.2 also states that “the provisions labeled herein as “Compliance Certification” are not the only provisions of this permit for which an annual certification are required.” Annual certification is required for all terms and conditions of the permit.

NYPIRG is also concerned that Condition 24 of the draft permit is confusing with respect to when the annual compliance certification must be submitted. It states that the annual certification is “due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department.” This language of this condition creates a number of problems. First, it is possible that a facility would not be required to submit the first compliance certification until after the end of the first annual period following the date of permit issuance. This violates 40 CFR § 70.6. Second, by adding “unless another quarter has been acceptable by the Department,” DEC

makes it so that this requirement is unenforceable by the public, since it is unclear how the Department will go about revising the date that the certification is due. If the Department can change the due date through an oral conversation with the permittee, a member of the public could never prove that the deadline had not been changed. Also, the phrase “calendar quarter that occurs just prior to the permit anniversary date” is vague, since it is unclear when quarters begin and end, and the permit does not specify whether a quarter “occurs” by beginning or by ending. Given the importance of the annual compliance certification requirement, it is essential that the deadline for submission of the certification be clear and enforceable.

IV. The Permit Does Not Require Prompt Reporting of All Deviations From Permit Requirements as Mandated by 40 CFR § 70.6(a)(3)(iii)(B)

The Administrator must object to this permit because it does not require the permittee to submit prompt reports of any deviations from permit requirements as mandated under 40 CFR § 70.6(a)(3)(iii)(B). As NYPIRG noted in its comments on the draft permit for this facility, Part 70 gives DEC discretion over how to define “prompt,” but the definition that DEC selects must be reasonable.

DEC responded to NYPIRG’s comment regarding this deficiency in the draft permit comment by adding language at Condition 25, which sets out a schedule for reporting of deviations. NYPIRG appreciates DEC’s attempt to assure more timely reporting of deviations, but Condition 25 still does not correctly apply the requirements of “prompt reporting.” Prompt reporting must be more frequent than the semiannual reporting requirement, since prompt reporting is a distinct reporting obligation under 40 CFR § 70.6(a)(3)(iii)(A).

Condition 25 still allows the facility to report deviations other than excess emissions of HAPs or other regulated air pollutants semi-annually, which is not “prompt.” Thus, if the facility “deviated” from its permit by failing to undertake required monitoring of a pollutant, and the facility had no knowledge of an emission exceedance, the permit would not require this deviation from a monitoring requirement to be reported until the six-month compliance report was due, unless the underlying monitoring requirement specified a more stringent reporting requirement. If the facility used parametric monitoring, and the parameter was beyond permitted values, the facility could argue that this deviation from permitted values was not itself an emission exceedance and thus did not need to be reported until the six-month compliance report. The prompt reporting condition needs to provide prompt reporting for every type of deviation. Other conditions which currently contain conflicting less stringent deviation reporting requirements need to have the conflicting language removed and replaced by language noting that deviation reporting requirements are contained in Condition 25.

The Administrator must object to this proposed permit and order DEC to require the applicant facility to submit prompt written reports of all deviations from permit conditions. “Prompt” must be defined based on “the degree and type of deviation likely to occur and the applicable requirements.” See 40 CFR § 70.6(a)(3)(iii)(B).

V. The Permit’s Startup/Shutdown, Malfunction, Maintenance, and Upset Provision Violates 40 CFR Part 70

The Administrator must object to issuance of the permit for this facility because its Startup/Shutdown, Malfunction, Maintenance, and Upset Provision Violates 40 CFR Part 70. Condition 76 in this permit states in part that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable.” The condition goes on to describe the actions and recordkeeping and reporting requirements to which the facility must adhere in order for the Commissioner to excuse a violation as unavoidable. In these comments, we refer to this condition as the “excuse provision.” As detailed below, the excuse provision included in this draft permit violates 40 CFR Part 70 in a number of ways.

A. The Excuse Provision Included in the Permit is Not the Excuse Provision that is in New York’s SIP

The excuse provision included in this permit reflects the requirements of a New York State regulation, 6 NYCRR § 201-1.4. This regulation states in part that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable.” The version of Part 201 approved by U.S. EPA as part of New York’s SIP contains the same language, except that it does not cover violations that occur during “shutdown” or during “upsets.” See 6 NYCRR § 201.5(e), state effective date 4/4/93, U.S. EPA approval date 12/23/97¹ (stating that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up conditions and malfunctions may be excused if such violations are unavoidable.”). Since the SIP rule is the federally enforceable requirement, DEC must delete the words “shutdown” and “upsets” from the draft permit.

B. The Permit Does Not Describe What Constitutes “Reasonably Available Control Technology” During Conditions that Are Covered by the Excuse Provision

The excuse provision included in the draft permit and in New York’s SIP mandates that “[r]easonably available control technology, as determined by the commissioner, shall be applied during any maintenance, start-up, or malfunction condition.” See 6 NYCRR § 201.5(e); see also 6 NYCRR § 201-1.4. Under 40 CFR § 70.6(a)(1), each Title V permit must include “operational requirements and limitations that assure compliance with all applicable requirements.” Since the requirement to apply RACT during maintenance, startup, or malfunction conditions is included in New York’s SIP, it is an

¹ 40 CFR 52.1679 (2001).

applicable requirement. To assure each facility's compliance with this requirement, DEC should have included terms and conditions in each permit that clarify what constitutes RACT for this facility during maintenance, startup, and malfunction conditions. The final permit issued for this facility does not include monitoring, recordkeeping, and reporting requirements that will assure that RACT is employed during maintenance, startup, and malfunction conditions. See 40 CFR § 70.6(c)(1) (requiring each Title V permit to include "monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit").

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

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

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

² New York's excuse provision actually goes farther than those provisions adopted in other states that give facilities an "affirmative defense" against enforcement actions resulting from unavoidable violations. This is because under an affirmative defense provision, the facility is required to maintain clear documentation that the excuse provision applies, and bears the burden of proof in establishing that a violation was unavoidable. Here, there are no standards governing when a violation can be deemed unavoidable. Also, in all likelihood, once the Commissioner agrees to excuse a violation, EPA and members of the public are not able to bring their own enforcement action because the violation no longer exists.

applicable requirements under 40 CFR § 70.6(a)(1).

D. The Permit Does Not Require Prompt Written Reports of Deviations From Permit Requirements Due to Startup, Shutdown, Malfunction and Maintenance as Required Under 40 CFR § 70.6(a)(3)(iii)(B).

As noted above, the permit's general reporting requirements at Condition 25 contain a loophole so that not every type of deviation need be reported promptly. In addition, a separate condition, Condition 76 contains the same inadequate reporting of deviations for which the facility intends to assert an affirmative defense under the excuse provision. The Administrator must object to this permit because it does not require the facility to submit timely written reports of any deviation from permit requirements in accordance with 40 CFR § 70.6(a)(3)(iii)(B). 40 CFR § 70.6(a)(3)(iii)(B) demands:

Prompt reporting of deviations from permit requirements, *including those attributable to upset conditions as defined in the permit*, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.

Emphasis added. As currently written, the permit violates the above requirement because the permittee is allowed to submit reports of some "unavoidable" violations by telephone rather than in writing. Thus, a violation can be excused without creating a paper trail that would allow U.S. EPA and the public to monitor whether the facility is abusing the excuse provision by improperly claiming that violations qualify to be excused. Since a primary purpose of the Title V program is to allow the public to determine whether polluters are complying with all applicable requirements on an ongoing basis, reports of deviations from permit requirements must be in writing so that they can be reviewed by the public. An excuse provision that keeps the public ignorant of violations cannot possibly satisfy the Part 70 mandate that each permit assure compliance with applicable requirements.

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

- (1) *Violations due to Startup, Shutdown and Maintenance.*³ The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (Condition 76 only requires reports of violations due to startup, shutdown, or maintenance "when requested to do so in writing").⁴ The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report explaining why the violation

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

⁴ See Condition 76 in the permit.

was unavoidable. (The permit does not require submittal of a report “if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements”). Finally, a deadline for submission of these reports must be included in the permit.

- (2) *Violations due to Malfunction.* The facility must provide both telephone and written notification and to DEC within two working days of an excess emission that is allegedly unavoidable due to “malfunction.” (Permit condition 76 only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement.) The facility must submit a detailed written report within thirty days after the facility exceeds emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (Permit condition 76 only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”.)

VI. The Permit Fails to Include Federally Enforceable Conditions that Govern the Procedures for Permit Renewal

The Administrator must object to this permit because it does not comply with federal regulations since it lacks a federally enforceable condition that sets forth the facility’s permit renewal obligations. Under 40 CFR § 70.7(c)(ii), “Permit expiration terminates the source’s right to operate unless a timely and complete renewal application has been submitted consistent with paragraph (b) of this section and § 70.5(a)(1)(iii) of this part.” 40 CFR § 70.5(a) provides that “[f]or each Part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this section.” § 70.5(a)(1)(iii) provides that “[f]or purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time as may be approved by the Administrator that ensures that the term of the permit will not expire before the permit is renewed.” Thus, the requirement that a facility submit a timely permit application is a federal requirement.

A Title V permit may not be issued unless “the conditions of the permit provide for compliance with all applicable requirements and requirements of this part.” 40 CFR § 70.7(a)(iv). U.S. EPA must require DEC to modify this permit to include the federally enforceable requirements that the facility apply for a renewal permit within six months of permit expiration within the federally enforceable section of the permit.

H. The Permit Lacks Monitoring that is Sufficient to Assure the Facility’s Compliance With All Applicable Requirements

A basic tenet of Title V permit development is that the permit must require sufficient monitoring and recordkeeping to provide a reasonable assurance that the permitted facility is in compliance with legal requirements. As EPA has noted:

[W]here the applicable requirement does not require any periodic testing or monitoring, section 70.6(c)(1)'s requirement that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit 'periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.' See 40 C.F.R. § 70.6(a)(3)(I)(B). Where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, however, as noted above the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such cases the separate regulatory standard at § 70.6(c)(1) applies instead. By its terms, § 70.6(c)(1) - like the statutory provisions it implements - calls for sufficiency reviews of periodic testing and monitoring in applicable requirements, and enhancement of that testing or monitoring through the permit necessary to be sufficient to assure compliance with the terms and conditions of the permit.

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

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

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

Analysis of specific draft permit conditions

Inadequate Citations:

Large numbers of conditions in the draft permit simply refer to 6 NYCRR § 201-6 as the citation for the underlying requirement. It is difficult to locate the underlying requirement with only a generic reference to the entire subpart.

Maintenance of equipment:

The permit recites the general requirement under 6 NYCRR § 200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer's specifications. This requirement must not be stated generally, but must be applied specifically to this

facility. The permit must explain exactly what is considered to be reasonable maintenance practices, and spell out the manufacturer's specifications. Furthermore, the permit must provide for monitoring, recordkeeping, and reporting to assure the facility's compliance with the maintenance requirements. The statement of basis must explain why the monitoring (or lack thereof) that is included in the permit is sufficient to assure the facility's compliance with this requirement.

Emergency Defense:

For clarity, a definition for "emergency" should be incorporated directly into the permit. This applicable definition is found at 6 NYCRR § 201-2.1(b)(12), which provides that:

An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which require immediate corrective action to restore normal operation, and that cause the source to exceed a technology-based permit emission limit. An emergency shall not include non-compliance caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error.

Air Contaminants Collected in Air Cleaning Devices:

The permit includes two separate conditions that apply to the handling of air contaminants collected in an air cleaning device. The first, "Recycling and Salvage," is based on 6 NYCRR § 201-1.7. The second, "Prohibition of Reintroduction of Collected Contaminants to the Air," is based on 6 NYCRR § 1-8. While NYPIRG agrees that these conditions should continue to be included as a general conditions in the permit, they must also be included as facility-specific conditions if the facility actually uses an air cleaning device. Those facility-specific conditions must explain how these requirements apply to the facility and include sufficient monitoring and recordkeeping requirements to assure the facility's compliance. Moreover, the statement of basis must explain the factual basis for each condition, i.e., whether the facility actually operates an air cleaning device that collects air contaminants.

Applicable Criteria, Limits, Terms, Conditions, and Standards:

This condition is based generically on 6 NYCRR § 201-6 and provides that the facility must comply with "approved criteria, emission limits, terms, conditions, and standards in the permit." It then goes on to state that applicable requirements include reporting requirements and operations under an accidental release plan, response plan, and compliance plan, as well as support documents submitted as a part of the permit application. A vague reference to "support documents" is insufficient to create legally enforceable permit requirements. The requirements of any accidental release plan, response plan, or compliance plan must be incorporated into the draft permit. If such documents exist, they are applicable requirements and must be included as permit terms. Furthermore, any requirements contained in "support documents submitted as part of the permit application for this facility" must be

incorporated directly into the permit. As currently written, this condition will unnecessarily confuse the public by implying that there are applicable requirements that are not included in the permit.

Compliance Requirements:

This condition, also generically based on 6 NYCRR § 201-6, states that the facility must submit “risk management plans . . . if required by Section 112(r) of the Clean Air Act for this facility.” NYPIRG understands that U.S. EPA has not delegated authority to DEC to administer the 112(r) program. This does not, however, excuse DEC from including 112(r) requirements in this permit. Section 112(r) is an applicable requirement and must be covered by this Title V permit. The permit must state whether CAA § 112(r) applies to this facility and must indicate which requirements in the facility’s 112(r) plan are enforceable by the public. The requirements in the plan must be included in the permit.

Six Month Monitoring Reports:

Under 40 CFR Part 70, reports of any required monitoring must be submitted to DEC and made available to the public at least once every six months. Though many monitoring conditions in this draft permit include a space for “reporting requirements,” DEC chose not to mention the six month reporting requirement. Instead, DEC chose to include the following general condition in the draft permit:

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.

Though NYPIRG appreciates DEC’s effort to address NYPIRG’s concern about the six month monitoring requirement, DEC’s solution does not solve the problem.

First, “reports of any required monitoring” must include more information than simply whether monitoring was performed and whether any deviations were measured. Rather, the reports need to provide a summary of all monitoring results, regardless of whether deviations were recorded. That way, it would be possible to determine whether the facility is operating very close to the limits (in which case more frequent monitoring may be warranted), or whether the facility is periodically failing to perform the monitoring (which could be disguising a compliance problem).

Second, DEC is certainly already aware that many monitoring conditions in the permit do not say that reports are due “upon request by regulatory agency,” but instead say “Reporting Requirements: As required – See monitoring description.” The monitoring description then fails to state that reports are due at least once every six months. U.S. EPA should compel DEC to correct this problem by reviewing each permit condition individually to determine whether it conflicts with the six month reporting requirement.

Permit Exclusion Provisions:

This condition must be modified to make it clear that enforcement actions against the facility brought by U.S. EPA or members of the public pursuant to the federal citizen suit provision (CAA § 304) are unaffected by issuance of this permit.

Required Emissions Tests:

This condition includes everything that is required under 6 NYCRR §202-1.1 except the requirement that the permittee “shall bear the cost of measurement and preparing the report of measured emissions.” This requirement is clearly applicable to the facility and must be included in the draft permit. It is inappropriate to paraphrase a requirement and leave out one or more conditions. This practice results in confusion over what conditions are applicable to the source. In fact, EPA’s *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* states explicitly that “it is generally not acceptable to use a combination of referencing certain provisions of an applicable requirement while paraphrasing other provisions of that same applicable requirement. Such a practice, particularly if coupled with a permit shield, could create dual requirements and potential confusion.” *White Paper #2* at 40. The difference here is that the draft permit paraphrases most of the requirement, while entirely omitting part of the requirement.

Compliance with Opacity Limitations

Conditions Z and 30 set forth the opacity limitation that applies generally to the entire plant under 6 NYCRR § 211. Conditions 45 and 67 set out the opacity limitation under 6 NYCRR § 227-1.3(a) that applies to particular emission units. The opacity monitoring requirements in Condition 31 and 37 are deficient, however, because the monitoring scheme will not actually identify and resolve non-compliance with opacity limits and therefore does not assure compliance with applicable requirements as required under 40 CFR Part 70. The facility is not required to perform a Method 9 test until visible emissions are observed for *two days*. After the two day trigger has *two additional days* to perform the Method 9 test. Thus, the facility can be out of compliance with the one-hour average limit for *four* days before a test is performed. This is unacceptable and does not assure compliance with the opacity limit.

To assure compliance with opacity limits, the permit must require prompt Method 9 testing following the observation of visible emissions. While it may not be necessary for the person performing the daily check be trained in Method 9, it is essential that there be someone at the facility at all times who is trained in Method 9. It is NYPIRG’s understanding that it is not difficult to become trained in Method 9. It is necessary to have someone at the facility trained in Method 9 so that a Method 9 test can be performed when the daily check triggers the requirement for a Method 9 test. *If visible emissions are observed, a person trained in Method 9 must perform the Method 9 test within one hour after visible emissions are observed.* The permit should also require the facility to employ these monitoring and recordkeeping procedures to measure opacity of emissions from the boilers whenever the

continuous opacity monitors are down for more than 24 hours. Finally, DEC must include its rationale for why the selected monitoring is adequate in the statement of basis.

Sulfur in Fuel (Condition 34):

DEC must modify this permit to make it clear what method the facility will use to test the sulfur content of fuel. If the facility plans to simply rely on fuel supplier certifications, this is inadequate to assure compliance. NYPIRG is aware that for many years, DEC inspectors were required to take samples of fuel being burned at a facility and have them tested for sulfur content. Our review of facility files reveals that a significant percentage of DEC's sulfur tests revealed violations of the sulfur standard. More recent inspection records do not seem to mention sulfur tests, so we can only assume that DEC ceased to take oil samples when it performs facility inspections. While we do not know why DEC stopped its practice of taking fuel samples during inspections, now that the Title V program is in place the facility can take responsibility for periodically performing sulfur-in-fuel testing and certifying the results of those tests. If the facility is not required to undertake this kind of testing, it is unlikely that the sulfur-in-fuel standard will be adequately enforced because the only documentation that will be available will be the certification of a fuel supplier who isn't identified and who isn't accountable under the terms of this permit for making a false certification. Under the Title V program, it would be insufficient for a permit to simply require a facility to certify compliance with a standard without indicating how the facility will ascertain the facility's compliance status (by stating a monitoring method that must be performed and by indicating the frequency of required testing). A logical corollary to this concept is that a Title V permit does not assure a facility's compliance simply by allowing the facility to rely on fuel supplier certifications.

Regardless of the type of monitoring that DEC selects to assure the facility's compliance with the sulfur-in-fuel standard, a justification for the selected monitoring requirements must be included in the statement of basis. Such justification must explain how the selected monitoring method assures the facility's compliance with the standard on an ongoing basis.

Condition 35, 36 (Equipment Specifications for Cold Cleaning Batch Degreasing):

The statement of basis must include an explanation as to whether the facility is already equipped with the covers and control devices specified in this condition. The statement of basis must include DEC's rationale for why the monitoring scheme selected will assure the facility's compliance with the requirements.

Condition 39 (Gasoline Tanks):

The statement of basis must include an explanation as to whether this condition actually applies to any tank at the facility. If it does apply, the permit must assure the facility's compliance by requiring periodic inspections and testing to ensure that the vapor collection system is functioning properly.

Condition 52 and 54 (Particulates):

These conditions are inadequate to assure the facility's compliance with the applicable particulate limit. To assure the facility's compliance, the permit must require regular inspections at specified times, and must indicate exactly what must be included in the inspection. The person inspecting the filter must document that the inspection was performed as required, and must indicate the results of each inspection.

Conditions 58, 59, 60, 61 (Tanks):

Condition 58 must clarify whether there are any tanks at the facility that have been constructed, replaced, or substantially modified after June 27, 1987. Condition 58 is inadequate to assure that the vapor collection systems are maintained and operated properly. The condition must explain exactly what aspects of the vapor collection systems are to be inspected. Conditions 59, 60 and 61 are deficient because there is no indication of when the last test was performed, or why a dynamic pressure test every five years is sufficient to assure the facility's compliance. This information must be included in the statement of basis. The permit must indicate how the dynamic back pressure will be measured. The statement of basis must also explain how these conditions are related.

Condition 71 (Variance):

The permit must explain whether this facility has been granted a variance from any particular VOC limit. If a variance has been granted, the statement of basis must include the legal and factual basis for such variance.

Condition 67 (opacity limit under 228.4):

This condition does not assure the facility's compliance with 228.4 because it does not require any kind of regular monitoring. DEC must add monitoring to support this condition and provide a rationale for the selected monitoring in the statement of basis.

VOC Content of Coatings (Conditions 72, 73, 74, 75):

None of these conditions are sufficient to assure the facility's compliance with VOC limits because the monitoring is only "single occurrence." The permit must assure that the facility complies with VOC limits throughout the permit term on an ongoing basis. Here, the permit fails to even specify whether these "single occurrence" tests have already been done, or whether they will be done some time in the future. DEC must establish monitoring requirements that are sufficient to assure the facility's compliance and must include a rationale in the statement of basis explaining why the selected monitoring is sufficient.

Backup Diesel Generator

The permit description indicates that the facility operates at least one backup diesel generator. These generators are subject to the 0.1 lbs/mmBtu particulate matter limit in New York's SIP. This

limit must be included in the permit as a requirement that applies to any diesel generator at the facility. An emissions unit is not exempt from Title V permitting if it subject to an applicable requirement, even if it otherwise qualifies for exempt status. See 6 NYCRR § 201-3.1(b) (stating that “[o]wners and/or operators of stationary sources subject to Subpart 201-6 may consider the activities listed under Section 201-3.2 to be exempt activities unless such activities are subject to an applicable requirement.”). Thus, any backup diesel generator must be included in the Title V permit and the permit must require the facility to perform monitoring, recordkeeping, and reporting that is sufficient to assure that the diesel generator operates in compliance with the particulate matter limit.

Permissible Emission Rates and other requirements in pre-existing permits

If previously issued SIP-based permits issued to this facility include overall “permissible” emission rates, these emission limitations must be included in the Title V permit. When such permissible emission rates are established in a SIP-based permit, they are federally enforceable and must be included in the Title V permit issued to the facility.

Though NYPIRG is aware of DEC’s position that these “permissible” limits from prior permits were not intended to be enforceable, this position runs contrary to the explicit language in New York’s SIP. In particular, 6 NYCRR § 200.1(bj) defines “permissible emission rate” as “[t]he maximum rate at which air contaminants are allowed to be emitted to the outdoor atmosphere. This includes . . . (3) any emission limitation specified by the commissioner as a condition of a permit to construct and/or certificate to operate.” Similarly, the SIP-approved version of 6 NYCRR § 201 states that “a certificate to operate will cease to be valid under the following circumstances . . . (3) the permissible emission rate of the air contamination source changes.” 6 NYCRR § 201.5(d)(3) (effective 4/4/93). Thus, the SIP makes it clear that the “permissible emission rate” included in SIP-based Part 201 permits is an enforceable requirement. The permissible emission rates included in the Part 201 permits previously issued to this facility must therefore be included in this Title V permit.

Conclusion

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

Respectfully submitted,

Dated: May 16, 2002

New York, New York

Lisa Garcia, Esq.

Tracy A. Peel.

New York Public Interest Research Group, Inc.

9 Murray Street

New York, New York 10007

(212) 349-6460