BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF THE NEW YORK ORGANIC FERTILIZER COMPANY Permit ID: 2-6007-00140/00011 Facility DEC ID: 2600700140 Issued by the New York State Department of Environmental Conservation Region 2	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition Number: II-2002-12

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

On October 4, 2002, the Environmental Protection Agency ("EPA" or "Agency") received a petition from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, for the New York Organic Fertilizer Company's ("NYOFCO") Sludge Pelletization Facility. The NYOFCO permit was issued by the New York State Department of Environmental Conservation's ("DEC") Region 2 Office, and took effect on August 30, 2002, pursuant to title V of the Act, the federal implementing regulations at 40 CFR part 70, and the New York State implementing regulations at 6 NYCRR parts 200, 201, 621, and 624.

The NYOFCO facility takes in digested sewage treatment plant sludge, from various New York City Department of Environmental Protection-operated sewage treatment plants. The

sludge is dried and pelletized to produce commercial fertilizer. The facility consists of 6 sludge drying trains and pelletization processes, with heat provided to the dryers by 25 million British thermal unit per hour heaters. Emissions are controlled by cyclones, wet scrubbers, and a regenerative thermal oxidizer. Dust from product storage (in 8 silos) and conveying the product to trucks or rail cars, is controlled using a baghouse and other dust suppression systems, such as oil spraying.

The NYPIRG petition alleges that the NYOFCO permit proposed by the DEC on June 18, 2002, and the final permit issued to NYOFCO, effective on August 30, 2002, does not comply with the Clean Air Act or 40 CFR part 70 in that: (1) DEC violated the public participation and record requirements of 40 CFR § 70.7(h); (2) the permit is based upon an inadequate permit application; (3) the draft and final permits lack an adequate statement of basis; (4) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (5) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (6) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR § 70.1(b) and 40 CFR § 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup, shutdown, malfunction, maintenance and upset conditions; (7) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR § 70.1(b) and 40 CFR § 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable; (8) the permit incorrectly states that the facility is not subject to new source review; (9) the permit fails to include an adequate compliance schedule; (10) the final permit improperly

limits the dates during which the permit conditions apply; and (11) the final permit contains errors noted in a document presented by NYPIRG and local community groups to DEC Region 2. The Petitioner has requested that EPA object to the issuance of the NYOFCO permit pursuant to CAA § 502(b)(2) and 40 CFR § 70.8(d).

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

Based on a review of all the information before me, including the NYPIRG petition; the NYOFCO permit application; the administrative record supporting the permit; a June 18, 2002 letter from Elizabeth A. Clarke of DEC to Steven C. Riva of EPA Region 2 regarding the Responsiveness Summary/Proposed Final Permit ("Responsiveness Summary"); the NYOFCO title V permit effective on August 30, 2002 ("title V permit"); and relevant statutory and regulatory authorities and guidance; I deny the Petitioner's request in part and grant it in part for the reasons set forth in this Order.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted full approval to New

York's title V operating permit program on February 5, 2002. 67 *Fed. Reg.* 5216. Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

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

Under § 505(a) of the Act and 40 CFR §§ 70.8(a), States are required to submit all proposed operating permits to EPA for review. Section 505(b)(1) of the Act authorizes EPA to object if a title V permit contains provisions not in compliance with applicable requirements, including the requirements of the applicable SIP. This petition objection requirement is also reflected in the corresponding regulations at 40 CFR § 70.8(c)(1).

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

II. ISSUES RAISED BY THE PETITIONER

On April 13, 1999, NYPIRG sent a petition to EPA asserting programmatic problems with DEC's application form and instructions. NYPIRG raised those issues and additional program implementation issues in individual permit petitions, including this petition, and in a citizen comment letter dated March 11, 2001 that was submitted as part of the settlement of litigation arising from EPA's action extending title V program interim approvals. *Sierra Club and the New York Public Interest Research Group v. EPA*, No. 00-1262 (D.C.Cir.).[2]

In a November 16, 2001 letter from Carl Johnson, DEC to George Pavlou, EPA Region

[1] *See* CAA § 505(b)(2); 40 CFR § 70.8(d). Petitioner commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. *See* Letter from Keri N. Powell, Esq. of NYPIRG to DEC (August 9, 2001) ("NYPIRG Comment Letter").

[2] EPA responded to NYPIRG's March 11, 2001 comment letter by letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 to Keri N. Powell, Esq., New York Public Interest Research Group, Inc. The response letter is available on the internet at: http://www.epa.gov/air/ oaqps/permits/response/.

2, the DEC committed to address various program implementation issues by January 1, 2002, and to ensure that permit issuance procedures are performed in accordance with state and federal requirements. Subsequently, EPA monitored New York's title V program to ensure that the permitting authority is implementing the program consistent with its November 16, 2001 "commitment letter," New York's approved program, the Act, and EPA's regulations. Based on EPA's program review, the DEC is substantially meeting the commitments made in its November 16, 2001 letter.[3] As a result, EPA has not at this time issued a notice of program deficiency ("NOD") pursuant to CAA § 502(i) and 40 CFR §§ 70.10(b) and (c). Anytime EPA determines that a permitting authority is not properly administering or enforcing its operating permit program, EPA may publish an NOD in the *Federal Register*.

A. Public Participation and Record Requirements

The Petitioner's first claim is that DEC violated the public participation requirements of 40 CFR § 70.7(h) by not providing an adequate responsiveness summary. *See* Petition at 3. NYPIRG states that DEC's responsiveness summary fails to indicate the receipt of relevant comments from an independent engineering consultant, the Office of the Bronx Borough President, Adolfo Carrion, the Office of the New York City Comptroller, Carl McCall, and local

[3] The purpose of this EPA program review was to determine whether the DEC made changes to public notices and to select permit provisions as it committed in its November 16, 2001 letter. *See* letter dated March 7, 2002, from Steven C. Riva, Chief, Permitting Section, USEPA Region 2, to John Higgins, Chief, Bureau of Stationary Sources, DEC, which summarizes EPA's review of draft permits issued by the DEC from December 1, 2001 through February 28, 2002. In addition, EPA provided DEC with monthly and/or bi-monthly updates, over a 6-month period, to supplement the information provided in the March 7, 2002 letter. *See also*, EPA's final audit results, transmitted to the DEC via a letter dated January 13, 2003 from Steven C. Riva to John Higgins, which indicate that the DEC is substantially meeting the commitments made in its November 16, 2001 letter.

school teacher Marion Feinberg. NYPIRG concluded that because the DEC responsiveness summary did not acknowledge and respond to several substantive and relevant comments, the State did not comply with the public participation provisions of 40 CFR § 70.7(h)(5) and 6 NYCRR § 621.9(e).

It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for public comment is a response by the regulatory authority to significant comments. *Home Box Office v. FCC*, 567 F.2d 9, 35 (DC Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."); *see also, Action on Smoking & Health v. CAB*, 699 F.2d 1209 (DC Cir. 1983), citing *Alabama Power*, 636 F.2d 323, 384 (DC Cir. 1980). DEC's regulations at 6 NYCRR § 621.9(e) implement this principle. Accordingly, DEC has an obligation to respond to significant public comments and adequately explain the basis of its decision.[4] In this case, NYPIRG alleges that DEC failed to respond to certain relevant and substantive comments submitted by an independent engineering consultant and others who participated in a public hearing on the draft permit. NYPIRG contends that the independent engineer commented on the need for the permit to require special testing of some types of VOCs. (*see* Exhibit D at 44-54).

However, it is unclear whether a response by DEC to these comments would have made a

[4] *See In re In the Matter of Hudson Avenue Generating Station*, Petition No. II-2002-10, at 7-8 (Sept. 30, 2003) (EPA objection for DEC's failure to respond to significant public comments and adequately explain the basis of its permitting decisions); *see also In re In the Matter of Engage Plant Modification Dow Chemical Company,* Petition No. 6-02-03, at 20-21 (Oct. 30, 2002) (EPA concluding that LDEQ's failure to respond to certain comments does not warrant an objection).

difference in the substantive outcome of the permit. It is not enough to merely allege that a mistake was made (i.e., failure to respond to certain comments). Rather, the petitioner must show why DEC's failure to respond to these comments was significant such that it may have resulted in different terms and conditions in the final permit. *See generally Portland Cement Assoc v. Ruckelshaus*, 486 F.2d 375, 393 (DC Cir. 1973). NYPIRG's general allegations that the responsiveness summary does not address certain comments does not demonstrate that the State's failure to respond to certain comments resulted in, or may have resulted in, a deficiency in the NYOFCO permit. *See* CAA § 505(b)(2); 40 CFR § 70.8(c)(1). Therefore, EPA finds that the circumstances presented here do not warrant reopening the permit for further proceedings.

B. Inadequate Permit Application

The Petitioner's second claim is that the applicant did not submit a complete permit application in accordance with the requirements of CAA § 114(a)(3)(c), 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d). *See* petition at 3.

The Petitioner's concerns regarding the DEC's application form are summarized as follows:

(1) The application form lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether the NYOFCO facility was in compliance with all applicable requirements. The Petitioner asserted that a

permit that is developed in ignorance of a facility's current compliance status cannot possibly assure compliance as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1);

(2) The application form lacks a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based;

(3) The application form lacks a description of all applicable requirements that apply to the facility; and

(4) The application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

NYPIRG alleges that omission of the information described above makes it difficult for a member of the public to determine whether a draft permit includes all applicable requirements. The Petitioner goes on to state that the lack of information in the application also makes it more difficult for the public to evaluate the adequacy of the monitoring in the proposed permit.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as the Petitioner's claims here that NYOFCO failed to submit a complete permit application, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA Section 505(b)(2) (objection required "if the petitioner demonstrates ... that the permit is not in

compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); 40 C.F.R. § 70.8(c)(1). As explained below, EPA believes that in this case, the Petitioner has failed to demonstrate that the lack of a proper initial compliance certification or a more detailed statement of methods for determining initial compliance, resulted in, or may have resulted in, a deficiency in the permit. The remaining issues related to the application form are without merit.

(1) Initial Compliance Certification

The Petitioner is correct that the application form the used by DEC did not clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. Nonetheless, this initial certification, did not result in the issuance of a deficient permit. NYOFCO certified that it would be in compliance with all applicable requirements at the time of permit issuance. In its application form, NYOFCO certified that for all units at the facility that are operating in compliance with all applicable requirements, the facility will continue to be operated and maintained to assure compliance for the duration of the permit, except for those units referenced in the compliance plan portion of the permit. There were no compliance plans listed in Section IV, the compliance plan portion of the permit. This certification is supported by addition information in the permit record. For example, stack testing of 2 units (unit 2 and unit 5) during June of 2000 indicated that the facility was in compliance with applicable emissions requirements. Therefore, it is evident from the information submitted in the application that a compliance schedule was not necessary.

Accordingly, EPA believes that the Petitioner has not adequately demonstrated that the submission of a proper initial compliance certification may have resulted in different terms and conditions in the permit (i.e., a compliance schedule). As such, the petition is denied with respect to this issue.

(2) Statement of Methods for Determining Initial Compliance

The next issue raised by the Petitioner relates to an omission in the application form of "a statement of methods used for determining compliance" as required by 40 CFR § 70.5(c)(9)(ii). The application submitted by NYOFCO did not specifically require the facility to include a statement of methods used for determining compliance. Nonetheless, the applicant provided information on certain methods used for determining compliance by referring in the permit application, in Section IV, to "special conditions" included with a previously-issued DEC certificate to operate, attached to the application. Such special conditions include: (1) stack test requirements for the dryers; (2) temperature monitoring of the regenerative thermal oxidizer; (3) gas flow pressure drop monitoring, and water flow at the wet venturi scrubber; and (4) monitoring of opacity, volatile organic compounds, and carbon monoxide emissions. Additional documentation was also appended to the application, including facility emissions summaries and the facility's NO_x and VOC RACT submission. These materials provided DEC with sufficient information to discern how this facility determined its compliance, and will continue to comply with applicable requirements. In light of the information provided, EPA believes that the Petitioner's general allegations do not adequately demonstrated that, in this case, had the

application submitted by NYOFCO required the facility to include a separate statement of the methods for determining compliance, the terms and conditions in the final permit would have been any different. Therefore, EPA denies the petition on this issue.

(3) Description of Applicable Requirements

The Petitioner's next claim is that EPA's regulations require the applicable requirements contained in a title V permit to be accompanied by a narrative description of the requirement. See 40 CFR § 70.5(c)(4)(i). Citations may be used to streamline how applicable requirements are described in an application, provided that the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. *See White Paper for Streamlined Development of Part 70 Permit Applications* at 20 - 21 (July 10, 1995). In addition, a permitting authority may allow an applicant to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject; provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public. Documents available to the public include regulations printed in the Code of Federal Regulations or its State equivalent. *See id.*

Consistent with EPA guidance, in describing applicable requirements, the NYOFCO permit application refers to State and Federal regulations. For example, the application cites to the State SIP regulations at 6 NYCRR part 212 and the federal NESHAP requirements at 40 CFR

§ 61.50, Subpart E. These regulations are publicly available and are also available on the internet. *See e.g., New York regulations at www.dec.state.ny.us/website/regs/; see also, federal regulations at www.epa.gov/epahome/cfr40.htm.* The NYOFCO permit also contains references to applicable requirements that as a general matter are not as readily available, such as the facility's previously-issued permits to construct (PCs) and certificates to operate (COs). In this case, a CO with "special conditions" was attached to the permit application. The NYOFCO permit accordingly contained a description of the applicable requirements that apply to the facility. The Petitioner has not shown that any of the descriptions were in error or that the referenced material is not available to the public. The petition is therefore denied on this issue.

(4) Description of or Reference to any Applicable Test Method for Determining Ongoing Compliance With Each Applicable Requirement.

The Petitioner's fourth allegation is that the application form lacks a description of, or reference to, any applicable test method for determining compliance with each applicable requirement. *See* 40 CFR § 70.5(c)(4)(ii). EPA disagrees with Petitioner that the application form used by the NYOFCO facility failed to include a description of, or reference to, any applicable test method that the source intends to use for determining compliance with each applicable requirement. In the emission unit information part of the application form (Section IV), there is a block labeled "Monitoring Information" that requires applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. As listed in the NYOFCO permit application, monitoring at the facility will

include continuous emissions monitors ("CEMS") and intermittent stack testing, among other activities. Therefore, EPA denies the petition on this issue.

C. Inadequate Statement of Basis

The Petitioner's third claim is that the draft permit was not accompanied by an adequate statement of basis or "rationale." Petition at 5. While NYPIRG acknowledges that DEC did issue "permit review reports" ("PRR," the State's version of the required statement of basis) for the draft and final NYOFCO permits, the Petitioner alleges that these documents are missing certain key elements. Specifically, NYPIRG contends that these PRRs did not provide explanations for applicability determinations, the basis for periodic monitoring, explanations of any conditions from previously-issued permits not being transferred into the title V permit, whether a New York City Department of Conservation consent decree has been effective to bring the facility into compliance, and why sludge at the facility was not required to comply with NSR and PSD requirements in the New York State Implementation Plan (SIP).

The statement of basis requirement is set forth at 40 CFR § 70.7(a)(5), which states that "the permitting authority shall provide a statement of basis that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions)." The statement of basis is not a part of the permit itself. It is a separate

document which is to be sent to EPA and to interested persons upon request.[5] A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. However, it is not a short form of the corresponding permit. Instead, the statement of basis should highlight elements that EPA and the public would find important to review.[6] Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, the permit shield, and any monitoring that is required under 40 CFR § 70.6(a)(3)(i)(B) or 6 NYCRR § 201-6.5(b)(2). Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA with a record of the applicability and technical issue surrounding the issuance of the permit. *See e.g., In Re Port Hudson Operation Georgia Pacific ("Georgia*

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[5] Unlike permits, statements of basis are not enforceable, do not set limits and do not otherwise create obligations as to the permit holder.

[6] *See* letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc., responding to NYPIRG's letter of March 11, 2001; November 16, 2001 DEC commitment letter, from Carl Johnson, Deputy Commissioner, DEC; letter dated December 20, 2001, from EPA Region V to the Ohio EPA (available on the internet at http://www.epa.gov/region07/programs/artd/air/title5/t5memos/sbguide.pdf); *see also* Notice of Deficiency ("NOD") for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2000). Region V's letter recommends the same five elements outlined in the Texas NOD. That is, the five key elements of a statement of basis are (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. Id. at 735. In addition to the five elements identified in the Texas NOD, the Region V letter further recommends the inclusion of the following topical discussions in the statement of basis: (1) monitoring and operational restrictions requirements; (2) applicability and exemptions; (3) explanation of any conditions from previously issued permits that are not being transferred to the title V permit; (4) streamlining requirements; and (5) certain other factual information as necessary. In a letter dated February 19, 1999 to Mr. David Dixon, Chair of the CAPCOA Title V Subcommittee, the EPA Region IX Air Division provided a list of air quality requirements to serve as guidance to California permitting authorities that should be considered when developing a statement of basis for purposes of EPA Region IX's review. This guidance is consistent with the other guidance cited above. Each of the various guidance documents, including the Texas NOD and the Region V and IX letters, provide generalized recommendations for developing an adequate statement of basis rather than "hard and fast" rules on what to include in any given statement of basis. Taken as a whole, they provide a good roadmap as to what should be included in a statement of basis on a permit-by-permit basis, considering the technical complexity of the permit, history of the facility, and the number of new provisions being added at the title V permitting stage, to name a few factors.

Pacific"), Petition No. 6-03-01, at pages 37-40 (May 9, 2003); *In Re Doe Run Company Buick Mill and Mine ("Doe Run")*, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002). Finally, in responding to a petition filed in regard to the Fort James Camas Mill title V permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for the selected monitoring method be documented in the permit record. *See In Re Fort James Camas Mill ("Ft. James")*, Petition No. X-1999-1, at page 8 (December 22, 2000).

The failure of a permitting authority to meet the requirement to provide a statement of basis, however, does not necessarily demonstrate that the title V permit is substantively flawed. As noted previously, in reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. Thus, where the record as a whole supports the terms and conditions of the permit, flaws in the statement of basis generally will not result in an objection. *See e.g., Doe Run* at 24-25. In contrast, where flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, EPA will object to the issuance of the permit. *See e.g., Ft. James* at 8; *Georgia Pacific* at 37-40.

In this case, the Permit Review Reports issued with the draft and final permits, the application, the Responsiveness Summary, and other available documents in the permit record, including the previously issued SIP permit, stack test reports and continuous emission monitoring system reports, contain adequate information to support significant elements of the

permit. For example, the PRR accompanying the final permit includes a discussion on NSR non-attainment applicability and the basis for periodic monitoring contained in the permit. In addition, although a discussion of PSD applicability was not included in the PRR, there were discussions elsewhere in the permit record indicating that because the NYOFCO facility emits less than 100 tons per year of each criteria pollutant (and thus, is not a "major" source), PSD does not apply. With respect to previously-issued permits, there is only one pre-existing SIP permit applicable to this facility, and it was attached to the facility's permit application. In this case, the SIP permit was part of the permit record, yet NYPIRG did not provide any specific information on what conditions if any, were not explained, or not properly incorporated into the NYOFCO permit. A general allegation that the statement of basis must include an "explanation of any conditions from previously issued permits that are not being transferred to the title V permit," does not demonstrate that the State's failure to include an explanation, resulted in, or may have resulted in, a deficiency in the NYOFCO permit. Finally, the New York City Consent Decree is not relevant to the title V permitting process because it is based on violations of state and local regulations, and not federally applicable requirements. Accordingly, the circumstances in this case do not warrant an objection to the permit, and the petition is therefore denied on this issue.

D. Prompt Reporting of Deviations

The Petitioner's forth claim is that the proposed permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B).

NYPIRG notes that the NYOFCO permit requires the facility to report some deviations promptly, while others can be deferred until the facility submits its 6-month monitoring report. *See* Petition at 7.

The Petitioner make several other assertions. First, that in permit condition 25.2, deferral of prompt reporting to an underlying regulatory requirement, if applicable, is illegal under the federal rules. Second, that DEC's specific prompt reporting requirements of 24-hours (for toxic emissions), 48-hours (for other regulated air pollutants) and 6-months (for all other deviations) violate the federal requirements of 40 CFR part 70 (NYPIRG contends that defining 'prompt' reporting as every 6-months is no different than stating that prompt reporting does not apply to such conditions). Lastly, that it is difficult to determine whether the permit contains more frequent prompt reporting requirements because, if such requirements exist, they are typically buried in individual permit conditions.

Title V permits must include requirements for the prompt reporting of deviations from permit requirements. *See* 40 CFR § 70.6(a)(3)(iii)(B).[7] States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. Moreover, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. Whether the DEC has sufficiently addressed prompt reporting in a specific permit

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

is a case-by-case determination under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).[8]

The NYOFCO title V permit includes 6-month reporting for: (1) monitoring of kerosene use, and (2) the continuous emissions monitoring of VOC, carbon monoxide, and opacity. In addition, the permit includes provisions for one-time reporting relative to stack testing of VOC, NO_x, and mercury emissions. These conditions incorporate appropriate reporting requirements with respect to these specific emissions monitoring requirements and report submissions. Although none of these permit conditions specifically include a provision for more frequent reporting of violations, Condition 25 requires that a report be made within 24-hours for toxic emission violations and within 48-hours for emission violations of other regulated air pollutants. For any other deviation of an applicable requirement, the report must be submitted every six months. Thus, the "generic" prompt reporting requirements contained in the final permit distinguish between the prompt reporting required for potentially dangerous excess emissions and other types of deviations. This criteria reflects a reasoned judgment regarding the circumstances in which an expeditious notification is warranted. The prompt reporting requirements contained in the NYOFCO permit are also consistent with EPA's own

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

interpretation of the prompt reporting requirements, adopted after public notice and comment, in the Part 71 federal title V program. Accordingly, the condition in the NYOFCO permit relating to such reporting is appropriate.

The Petitioner also contends that deferring prompt reporting to the applicable underlying regulations is illegal, and that prompt reporting provisions are typically buried in individual permit conditions which make them difficult to find. As explained above, the prompt reporting requirements contained in this permit reflect a reasoned judgment and are consistent with EPA's rules governing the administration of the federal operating permit program. EPA also disagrees with NYPIRG's allegation that prompt reporting provisions are typically buried in individual permit conditions. The NYOFCO permit includes only one condition, Condition 25, that delineates prompt reporting of violations. Other permit conditions require reporting of emissions over specific time periods (regardless of whether emissions were in violation of standards), or one-time, individual reporting, e.g., stack test results. The petition is therefore denied on this issue.

E. Reporting Requirements When Requesting Excuse of a Violation

The Petitioner's fifth claim is that the NYOFCO permit does not properly incorporate the reporting requirements that apply when the facility owner requests that the DEC excuse a violation. *See* Petition at 10.

NYPIRG notes that the State-enforceable excuse provision at 6 NYCRR § 201-1.4 is included in the State-Only side of the NYOFCO title V permit, but the federally approved (SIP) excuse provision (formerly) at 6 NYCRR § 201.5(e) is not, but should be, on the federal side of the permit as it is an applicable requirement. The Petitioner contends that DEC should add provisions to the NYOFCO permit, as follows:

(1) The SIP-approved excuse provision is more restrictive than the provision in the currently-effective New York regulation, and it is the SIP provision that must be included in the federal side of the title V permit. In addition, because 6 NYCRR § 201.5(e) is part of the New York SIP, is the only excuse provision that can be used to excuse violations of SIP requirements.

(2) The SIP excuse provision requires that during any maintenance, start-up or malfunction conditions, reasonably available control technology ("RACT") shall be applied. Because the application of RACT in these instances is an applicable requirement, terms and conditions as to what constitutes RACT for NYOFCO should be included in the title V permit, together with associated monitoring, record-keeping and reporting requirements ("MRR").

(3) The permit must require prompt written reports of deviations from permit requirements due to start-up, shutdown, malfunction and maintenance.

EPA grants on the Petitioner's first issue that the SIP "excuse" provision of 6 NYCRR § 201.5(e) should be included on the federal side of the permit, and will work with the DEC to include appropriate language in the NYOFCO title V permit. The current language of the permit requires that any reporting necessary to effectuate a request that a violation be excused is in addition to all other reports, including the deviation reports, semiannual reports and annual compliance certification reports. Therefore, no additional reports from the permit holder are required other than those necessary to seek the excuse as specified in the rule.

EPA disagrees with the Petitioner's second point that the permit must define RACT as it applies during maintenance, startup, or malfunction conditions. The SIP-approved regulations of 6 NYCRR § 201.5 require facilities to use RACT during any maintenance, startup, or malfunction condition. The term "RACT" is defined in the New York SIP at 6 NYCRR § 200.1(bp) as the: "lowest emission limit that a particular source is capable of meeting by application of control technology that is reasonably available, considering technological and economical feasibility." In those instances where a facility has requested that the DEC Commissioner excuse an exceedance during times of startup, malfunction or maintenance, RACT is determined by the DEC on a case-specific basis.

As a practical matter, it is not possible to set forth in advance a detailed definition of RACT that will address all possible startup, shutdown or malfunction events throughout the life of the permit. The specific technology that will constitute RACT will depend on both the nature of the violation and the technology available when the violation occurs. The "excuse" provision

allows that determination to be made on a case-by-case basis, by the DEC Commissioner, if and when she chooses to exercise her authority to excuse such a violation. The applicable requirement associated with the emission unit at which the deviation occurred is incorporated elsewhere in the permit, and this requirement would apply at all times. The purpose of this case-by-case RACT determination is to mitigate the violation or exceedance of the applicable requirement until such time as compliance can once again be achieved. Therefore, EPA denies the petition on this issue.

With respect to the Petitioner's third issue, reporting in order to preserve a claim that the deviation should be excused is not a required report. These "excuse" reports are in addition to all the other deviation reports required by the title V permit. Any deviation for which an excuse is sought will also be reported as a deviation or violation in the six-month monitoring report and, if required, in the prompt reporting of deviation requirements delineated at Condition 25 (refer to Section II. D, above). Thus, EPA denies the petition on this issue.

F. Annual Compliance Certification

The Petitioner's sixth allegation is that the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5) by not requiring the facility to certify compliance with all permit conditions. The Petitioner claims rather that the NYOFCO permit requires only that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." *See* Petition at 8.

Specifically, the Petitioner is concerned with the language in the permit that labels certain permit terms as "compliance certification" conditions. NYPIRG notes that requirements that are labeled "compliance certification" are those that identify a monitoring method for demonstrating compliance. The Petitioner asserts that the only way of interpreting this compliance certification designation is as a way of identifying which conditions are covered by the annual compliance certification. NYPIRG further asserts that permit conditions that lack periodic monitoring are excluded from the annual compliance certification. The Petitioner claims that this is an incorrect application of state and federal regulations because facilities must certify compliance with every permit condition, not just those that are accompanied by a monitoring requirement.

The language in the permit that labels certain terms as "compliance certification" conditions does not mean that the NYOFCO facility is *only* required to certify compliance with the permit terms containing this language. "Compliance certification" is a data element in New York's computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. Condition 26 of the permit delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

The language in the NYOFCO permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, mirrors the language of 40 CFR §§ 70.6(c)(5) and (6). Section 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Section 201-6.5(e)(3) requires the following in annual

certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the administrator and shall contain such other provisions as the department may require to ensure compliance with all applicable requirements. The NYOFCO title V permit includes this language at condition 26.2. The references in the NYOFCO permit to "compliance certification" do not negate the DEC's general requirement for compliance certification of terms and conditions contained in the permit and, therefore, New York's regulations properly require the source to certify compliance or noncompliance annually for terms and conditions contained in the permit. The petition is therefore denied with respect to this issue.[9]

In its petition NYPIRG also contends that: (1) NYOFCO's title V permit contains a section entitled, "General Permittee Obligations" which lists state-only enforceable requirements that would therefore not be required to be included in the annual certification (*see* Petition at 12), and (2) the permit does not clarify the deadline by which the compliance certifications are due (*see* Petition at 13).

[9] To preclude any confusion or misunderstanding on this point, the DEC committed by letter on November 16, 2001, to include language in its permits clarifying the requirements related to annual certification reporting. Thus, when the DEC revises or renews the NYOFCO title V permit, it will add this additional clarifying language to the permit.

With respect to the "General Permittee Obligations," the NYOFCO permit includes sections that are not subject to, nor do they relate to the title V operating permits program. Such sections include "state-only enforceable conditions, facility level" (see pages 30 - 43 of the final permit), and "DEC general conditions, general provisions" (a separate 4-page document preceding the title V portion of the permit). In this latter section, the permit notes that: "For the purpose of your Title V permit, the following section contains state-only enforceable terms and conditions," and that these are: "General Conditions - apply to all authorized permits." The conditions listed in this section are not federally applicable requirements and are not part of the title V permit, and therefore, need not be included in the facility's annual compliance certification. The Petitioner's claim on this issue is without merit, and therefore is denied.

With respect to the final issue, the facility's annual compliance certification reports are 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....The initial report is due 7/30/2003 " (*see* condition 26.2 of the NYOFCO permit). Although this condition is confusing, it clearly specifies that the first annual certification is due on 7/30/2003. Therefore, the Petitioner's claim is without merit and is denied.

G. Monitoring

The Petitioner's seventh claim is that the proposed NYOFCO permit does not assure compliance with all applicable requirements because many individual permit conditions lack

adequate monitoring and are not practicably enforceable. *See* Petition at 17. The Petitioner addresses individual permit conditions that allegedly either lack monitoring or are not practicably enforceable. The specific allegations for each permit condition are discussed below.

Facility-Specific Petition Issues

1. Inadequate Citation (Various Conditions)

The Petitioner contends that a significant number of conditions simply refer to 6 NYCRR § 201-6 as the citation for the underlying requirement (for example, conditions 12 through 24). NYPIRG asserts that it is difficult to locate the underlying requirement with only a generic reference to the entire subpart. *See* Petition at 14.

The federal operating permit program regulations require title V permits to specify and reference the origin of and authority for each term or condition in the permit. *See* 40 CFR § 70.6(a)(1)(i). Thus, EPA agrees that generic citations to an entire subpart can make it difficult for the public to locate the underlying applicable requirement. A review of the final NYOFCO permit, however, reveals that in those instances where DEC references the entire subpart as the federally applicable requirement, the conditions contain additional specific information clearly identifying the specific applicable requirement. For example, although Conditions 12 through 24 simply reference 6 NYCRR § 201-6 as the federally applicable requirement, it is possible to discern the specific applicable requirement from the Condition title (*see e.g.*, Condition 17

entitled "Monitoring, Related Recordkeeping and Reporting Requirements") and the narrative description of the particular applicable requirements. In fact, in most instances, the narrative description contained in these permit conditions is quoted directly from the underlying applicable requirement. The petition is therefore denied on this issue.

2. Maintenance of Equipment

The Petitioner alleges that the condition relating to maintaining pollution control equipment must not be stated generally, but must be applied specifically to the NYOFCO facility. NYPIRG further states that this condition, which requires such equipment to be maintained according to ordinary and necessary practices, including manufacturer's specifications, must explain with specificity what NYOFCO must do to comply and, additionally, must include monitoring, recordkeeping and reporting to assure compliance with the maintenance requirements. *See* Petition at 15.

Permitting authorities have discretion to develop general permit conditions that apply to all title V sources. The maintenance of equipment condition (Condition 3) is a general requirement which is incorporated into all New York title V permits, even where no applicable requirement necessitates the use of control equipment. This type of general or generic requirement is commonly found in SIPs. For example, many SIPs contain generic requirements for facilities to maintain all equipment in proper condition and to carry out proper work practices. DEC includes these generic requirements in the "general permit conditions" section of its title V

permits.

As a general matter, where control equipment is installed pursuant to an applicable requirement or a source chooses to employ such equipment, appropriate permit conditions are included in the "emission units" section of the title V permit. As such, EPA denies the petition on this point.

Further, it is appropriate to include monitoring, recordkeeping and reporting with the conditions that specifically delineate the facility's emission limitations or other operational or process restrictions. For example, monitoring requirements within a condition that lists particulate matter emission limits for a coal-fired boiler controlled by an electrostatic precipitator will also be sufficient monitoring relative to the "maintenance of equipment" provision; that is, the boiler/ESP monitoring requirements would also act as "surrogate" monitoring with respect to monitoring for the maintenance of the subject control equipment. It must also be noted that "improper" equipment maintenance does not necessarily equate to violations of applicable requirements. Lastly, it is to the benefit of the facility owner to ensure that all pollution control equipment is properly maintained so as to ensure as long a life as possible of such equipment, given the fact that control equipment is extremely costly. Therefore, EPA disagrees with Petitioner that monitoring, recordkeeping and reporting must be added to this provision.

3. Emergency Defense

The Petitioner asserts that a definition for "emergency" should be incorporated into the permit for clarity. *See* Petition at 15. NYPIRG does not attempt to demonstrate, or even allege, that the failure to include a definition of "emergency" in the NYOFCO permit renders it substantively deficient or unenforceable. Moreover, as stated in previous Orders, commonly used regulatory terms, or terms that are already defined in the regulations, do not have to be defined in the permit. *See* e.g., *In the Matter of Suffolk County Bergen Point Sewage Treatment Plant ("Bergen Point"),* Petition No. II-2001-03, at 12 (December 16, 2002)*; In the Matter of Maimonides Medical Center ("Maimonides"),* Petition No. II-2001-04, at 12 (December 16, 2002)*; In the Matter of Elmhurst Hospital ("Elmhurst Hospital")*, Petition No. II-2000-09, at 16 (December 16, 2002). As NYPIRG correctly notes, "emergency" is defined at 6 NYCRR § 201-2.1(b)(12). Thus, any reference to the term "emergency" in the NYOFCO permit would be governed by the definition set forth in the New York regulations. Therefore, EPA denies the petition on this point.

4. Air Contaminants Collected in Air Cleaning Devices

NYPIRG alleges that while 2 separate permit conditions (one entitled "Recycling and Salvage," and the other entitled "Prohibition of Reintroduction of Collected Contaminants to the Air") should continue to be included as general conditions, they must also be included as facility-specific conditions if the facility uses an air cleaning device. Further, the Petitioner alleges that these facility-specific conditions must explain how these requirements apply to the facility and must include sufficient monitoring to assure compliance; in addition, the statement of basis must

explain the factual basis for each condition. *See* Petition at 15.

As discussed above in Section II.G.2 ("Maintenance of Equipment"), permitting authorities have discretion to develop general permit conditions that apply to all title V sources. The 2 subject conditions (Conditions 7 and 8) are general requirements which are incorporated into all New York title V permits, even where no applicable requirement necessitates the use of air cleaning devices. This type of general or generic requirement is commonly found in SIPs. For example, many SIPs contain generic requirements for facilities to properly handle and otherwise process materials collected in such air cleaning devices. DEC includes these generic requirements in the general permit conditions section of its title V permits.

As a general matter, where air cleaning devices are installed pursuant to an applicable requirement, or a source chooses to employ such equipment, appropriate permit conditions are included in the emission units section of the title V permit. As such, EPA denies the petition on this point.

5. Applicable Criteria, Limits, Terms, Conditions, and Standards

The Petitioner next asserts that the condition entitled, "Applicable Criteria, Limits, Terms, Conditions and Standards," which stipulates that the facility shall operate in accordance with any accidental release plan, response plan, or compliance plans, as well as support documents submitted as part of the permit application, is problematic because those referenced

documents are not incorporated into the permit, if such documents exist. *See* Petition at 15 and 16.

EPA disagrees with the Petitioner that all types of plans must be a part of a title V permit. In certain cases, a facility must comply with a plan that is not part of the title V permit. For instance, risk management plans under CAA § 112(r) need not be incorporated into title V permits. However, EPA does agree that certain documents should be properly cross-referenced in title V permits. For example, where a facility is subject to plans such as a NO_x RACT plan or a startup, shutdown and malfunction plan under a maximum achievable control technology ("MACT") standard, the permit must specifically say so and properly incorporate that plan by reference. In this case, the facility has incorporated all appropriate provisions; for example NYOFCO is required to operate in accordance with the VOC and NO_x RACT plan (*see* conditions 32 and 33, respectively). Therefore, EPA denies the petition on this issue.

6. Risk Management Plans (Condition 12)

The Petitioner notes that the permit (at Condition 14) states that the facility must submit risk management plans if so required by CAA § 112(r). NYPIRG therefore contends that the NYOFCO title V permit must list whether or not this requirement applies to the facility. *See* Petition at 16.

Prior to the promulgation of the Risk Management Program Rule, *61 Fed. Reg. 31667*

(June 20, 1996), and early in the implementation of New York's title V program, EPA asked the DEC to include a general requirement regarding section 112(r) in all permits. The language in Condition 14 reflects DEC's implementation of this request. While EPA agrees that the provision is very general and does not affirmatively state whether the referenced applicable requirement applies to this particular source, we do not believe that the absence of such an applicability determination provides a basis for EPA to object to this particular permit. NYOFCO did not include 112(r) requirements in its application, nor has it submitted a Risk Management Plan (RMP) to EPA under CAA § 112(r) and 40 CFR part 68. Additionally, the Petitioner has presented no evidence to suggest that NYOFCO is subject to section 112(r) requirements. If a source is subject to these requirements, its permit must include certain conditions necessary to implement and assure compliance with such requirements. Therefore, based on information provided in the permit application, and given what we know about this source with respect to the type of emission activities at the facility, it is reasonable to assume that NYOFCO is not subject to these statutory and regulatory requirements. For these reasons, EPA denies the petition with respect to this issue.

7. Required Emissions Tests (Condition 28)

The Petitioner alleges that Condition 28 of the permit, "Required Emissions Tests," includes everything required under 6 NYCRR § 202-1.1, except the requirement that the permittee "bear the cost of measurement and preparing the report of measured emissions." NYPIRG goes on to cite EPA's *White Paper Number 2 for Improved Implementation of the part*

70 Operating Permits Program ("White Paper 2") (March 5, 1996), which states 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." *White Paper 2*, Section II.E.3. Finally, the Petitioner contends that such a practice, particularly if coupled with a permit shield, could create dual requirements and potential confusion. *See* Petition at 16.

The permit unambiguously states that 6 NYCRR § 202-1.1 is an applicable requirement. Further, 6 NYCRR § 202-1.1 places the burden of conducting and reporting any required emissions testing on the permittee. Omitting who shall bear the cost of conducting and reporting mandatory emissions tests from the permit does not relieve the permittee from performing and reporting such tests. EPA does not believe a reasonable interpretation of the permit would lead a reader to conclude that anyone other than the permittee should bear the costs of measuring and testing emissions. For this reason, EPA denies the petition with respect to this issue.

8. Visible Emissions (Condition 31)

The Petitioner next asserts that Condition 31 fails to include sufficient monitoring to assure compliance with the opacity regulations of 6 NYCRR § 211.3. NYPIRG contends that the permit must be revised to specify which emission units are subject to section 211.3 and other opacity requirements, and must be revised to include appropriate monitoring, recordkeeping, and reporting. *See* Petition at 16 and 17.

Certain emission units at the facility (the sludge drying trains and pelletization processes) appear to be subject to the opacity provisions of 6 NYCRR § 212.6 and not the general opacity limitation at 6 NYCRR § 211.3 (these latter SIP regulations at 6 NYCRR § 211.3 state that: "except as permitted by a specific part of this Subchapter...no person shall cause or allow...opacity equal to or greater than 20 percent..."). However, the NYOFCO permit does not include a specific provision for opacity applicable to these processes . Therefore, a permit condition relative to the applicable opacity requirement of 6 NYCRR § 212.6 must be added, or DEC must explain why the NYOFCO facility is not subject to this requirement. If Part 212 is not applicable to the drying trains/pelletization processes , then the general opacity requirement at 6 NYCRR § 211.3 would apply.

In either case, the permit's opacity provision should indicate that opacity is continuously monitored (as required by Condition 34). The opacity condition should also include monitor manufacturer information, the applicable limit(s), reference test method, frequency of monitoring, averaging method of the unit, and reporting requirements including, if appropriate, more frequent reporting of deviations. Therefore, the petition is granted in part with respect to this issue.

9. HAP Emissions from the Dryers (Condition 51)

The Petitioner asserts that Condition 51, which relates to HAP emissions from the dryers is improperly on the "state-only" side of the permit, and should be moved to the federal-side of

the title V permit because it is based on 6 NYCRR § 212.4(b), a SIP regulation. In addition, NYPIRG contends that DEC must add adequate monitoring to this provision to assure compliance with the cited requirement. *See* Petition at 17.

Condition 51 is based on state regulation 6 NYCRR § 212.4(b), and therefore, is properly incorporated on the state-only side of the permit. This regulation primarily addresses odors and air toxics emissions. However, NYPIRG's allegation that 6 NYCRR § 212.4(b) is based on a SIP regulation is not entirely without merit. The federally approved SIP, also at § 212.4(b), regulates total particulate matter ("PM") emissions.

The final NYOFCO permit does not include a condition to address total PM emissions. Accordingly, the permit must be reopened to incorporate the federally applicable SIP requirement, 6 NYCRR § 212.4(b), as well as the necessary monitoring, recordkeeping and reporting. In this case, the underlying SIP requirement does not specify any periodic monitoring, recordkeeping or reporting to assure compliance with the applicable PM limits. Accordingly, the title V permit must include such requirements in accordance with 40 CFR §§ 70.6(a)(3)(i)(B), 70.6(a)(3)(ii), and 70.6(a)(3)(iii). DEC must either re-open the NYOFCO permit to incorporate the applicable PM emission limits including adequate periodic monitoring, recordkeeping and reporting to assure compliance with the SIP regulation, or explain why the NYOFCO facility is not subject to this requirement. Therefore, the petition is granted in part on this issue.

10. $\underline{NO_x}$ Emissions from the Entire Facility (Condition 33)

The Petitioner contends that the monitoring included in Condition 33, which relates to NO_x emissions from the facility, is inadequate, and that monitoring in addition to annual tune-ups and one stack test should be considered. *See* Petition at 17.

EPA disagrees that the monitoring included in Condition 33 is inadequate to assure compliance with the applicable requirement. EPA has previously determined that for similarly-sized natural gas-fired units, annual tune-ups and one stack test per permit term satisfy the requirement contained in 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) that the permit must contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit . . . ." *See e.g.*, *In the Matter of the Albert Einstein College of Medicine of Yeshiva University ("Yeshiva"),* Petition No. II-2000-01, at 29 (January 16, 2002)*; In the Matter of Kings Plaza Total Energy Plant ("Kings Plaza"),* Petition No. II-2000-03, at 31 (January 16, 2002)*; In the Matter of Starrett City, Inc. ("Starrett City")*, Petition No. II-2001-01, at 28 through 29 (December 16, 2002). Therefore, the petition is denied with respect to this issue.

11. <u>VOC Emissions from the Entire Facility (Condition 32)</u>

The Petitioner next contends that Condition 32, that relates to the facility's VOC emissions, is insufficient and must be revised to describe how the control equipment will assure 81 percent VOC destruction, and incorporate appropriate equipment maintenance and monitoring requirements. In addition, NYPIRG argues that Condition 32 is confusing because, although it

supposedly relates solely to VOC requirements, it also requires testing of NO_x, CO and particulate matter. *See* Petition at 17.

With respect to the Petitioner's second assertion, Condition 32 in the final title V permit issued to NYOFCO does not have testing requirements for any pollutant other than VOCs. NYPIRG's allegation is therefore no longer applicable to this permit, and the issue is accordingly moot.

Relative to NYPIRG's first issue, EPA disagrees that Condition 32 must be revised to describe how the control equipment will assure 81 percent VOC destruction, and to incorporate appropriate equipment maintenance and monitoring requirements. The purpose of the once per permit term stack test required in this condition is precisely to indicate the VOC removal efficiency. That is, the stack testing procedures would include the measurements of VOC emissions at both the inlet and outlet locations of the control equipment, the regenerative thermal oxidizer, to calculate the VOC removal efficiency. The NYOFCO permit includes a second condition, Condition 34, that requires continuous emission monitoring of VOCs to assure compliance with the applicable SIP limitations. Because these 2 permit conditions are in accordance with 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) , EPA denies the NYPIRG petition with respect to this issue.

12. RACT Requirements Under 6 NYCRR Part 212 (Various Conditions)

The next issue raised by the Petitioner is that while the DEC cites 6 NYCRR part 212, "RACT Requirements," for many conditions in the permit, the regulations themselves do not include specific emission limits. NYPIRG asserts, therefore, that DEC must provide clear identification of the legal basis for these permit conditions, such as whether the limits were from previously-issued construction permits or were established for the first time in the title V permit. *See* Petition at 17 and 18.

EPA does not agree with the Petitioner on this issue. First of all, the title V permit contains a general provision, at Condition 35, that notes that the NYOFCO facility is subject to the reasonably available control technology requirements of 6 NYCRR § 212.10(a)(1). The only other conditions that cite the RACT requirements are the conditions for VOC (Conditions 32 and 34) and the one for NO_x (Condition 33), all of which cite 6 NYCRR § 212.10. This SIP regulation requires affected facilities to submit a RACT plan that addresses emission control of these pollutants. This plan was submitted in October of 1997 and established the requirements upon which Conditions 32 and 33 were based. There does, however, appear to be a typographical error with respect to the citation for Condition 34, which relates to continuous emissions monitoring requirements. The citation should be 6 NYCRR § 212.11. DEC should correct this citation error when this permit is reopened in accordance with other sections of this order. Therefore, EPA denies the NYPIRG petition on this issue.

13. Sulfur Dioxide (Condition 37)

The Petitioner contends that the permit does not adequately explain the legal basis for the terms of Condition 37, relating to sulfur dioxide. Specifically, NYPIRG asserts that the cited regulation does not explain the 'gallons per hour' limits listed in the permit, and there is inadequate monitoring, recordkeeping and reporting to assure compliance with the fuel-usage requirements. Finally, the petition notes that DEC must provide the SIP citation as the basis for this permit condition. *See* Petition at 18.

The Petitioner is correct regarding the citation listed for this condition; that is, the citation corresponds to the "State-Only" sulfur-in-fuel regulation, rather than the SIP-approved regulation. The rule pertaining to "Fuel Consumption and Use" at 6 NYCRR § 225.1(a)(3), although no longer a current New York State regulation, remains in the SIP and is therefore federally enforceable. The SIP-approved regulation is the applicable requirement that must be included in the Title V permit. Therefore, DEC must revise Condition 37 of the NYOFCO title V permit to cite the correct applicable requirement, the SIP provision at 6 NYCRR § 225-1.1(a)(3). It is inappropriate to cite the current State requirement, at 6 NYCRR § 225-1.2(a)(2), on the federal side of the permit because this rule has not been federally-approved into the New York SIP.

However, because the substance of these two versions of Part 225 is equivalent, DEC may wish to streamline these requirements. In EPA's *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* at 6-9, EPA explained that States and sources can determine the set of permit terms and conditions that will assure compliance with all

applicable requirements for an emission point, or group of emission points, so as to eliminate redundant or conflicting requirements. *Id.* Accordingly, DEC may choose to subsume the State-only enforceable provision into the SIP provision. If such a streamlining option is chosen, both the permit (at Condition 37) and the PRR should explain that compliance with the SIP-approved rule assures compliance with the State rule, and that both the federally-approved rule and the State rule continue to apply. In addition, the DEC must ensure that the permit shield applies to the subsumed requirement. *See e.g.*, *In the Matter of North Shore Towers Apartments, Inc. ("North Shore Towers"),* Petition No. II-2000-06, at 35 - 36 (July 3, 2002).

In addition, both the PRR and Condition 37 must explain that while the facility is subject to the provisions of 6 NYCRR § 225-1.1(a)(3), additional limitations were imposed by the DEC in the permit to construct and certificate to operate issued to NYOFCO on May 11, 1992 and March 7, 1995, respectively (that is, limits on the sulfur content of the kerosene, and hourly, daily and yearly limits on the amount of kerosene used).

With respect to the monitoring associated with the sulfur-in-fuel regulations, two separate requirements must be included in this provision. The first relates to the fuel-use limits. As indicated in the State SIP permit ("Special Conditions"), NYOFCO shall continuously monitor and record the quantity of kerosene consumed; the semi-annual reporting requirement that is currently included in the title V permit is appropriate. With respect to the sulfur content of the kerosene, monitoring requirements consistent with those delineated at 6 NYCRR § 225-1.7 (of the SIP regulations, and 6 NYCRR § 225-1.8 of the State rules) should be incorporated into

Condition 37 of the NYOFCO permit. That is, the DEC should incorporate monitoring that requires the facility to maintain documentation on the sulfur content of the kerosene on a "per delivery" basis. The facility should retain these records for a 5-year period, and submit this information (or a summary thereof) semi-annually. 40 CFR §§ 70.6(a)(3)(ii)(B) & 70.6(a)(3)(iii)(A). Because of the low likelihood of kerosene outside of these specifications being delivered, there is no need for prompt reporting of deviations in a time-frame less than the 6-month reporting period. The petition is therefore granted on this issue.

14. Mercury Emissions (Condition 39)

The Petitioner next notes that Condition 39, relating to mercury emissions, is inadequate to assure compliance with the applicable federal NESHAP requirements, in that specific monitoring is not included, but rather, options are listed. NYPIRG also asserts that a one-time stack test would not be adequate monitoring, nor would annual tests, unless there were supplemental parametric monitoring between tests. *See* Petition at 18.

EPA agrees with the Petitioner that specific monitoring of mercury emissions is not included in the NYOFCO permit. Rather Condition 39 of the title V permit lists, in an abbreviated manner, the requirements of Subpart E, the National Emission Standard for Mercury ("Mercury NESHAP) codified at 40 CFR § 61.50, Subpart E. It is not appropriate to include discretionary or optional provisions from an applicable requirement. Instead, the permit should include the applicable method used for determining compliance (i.e., sludge sampling pursuant to

§ 61.54), the applicable mercury emission limitation (that is, 3,200 grams of mercury per 24-hour period), and periodic monitoring as required under 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2).

The monitoring required by the Mercury NESHAP is not of a periodic nature, and is not sufficient to yield reliable data from the relevant time period that is representative of the source's compliance with the emission limitation; that is, with certain exceptions, only a one-time test or one-time sludge analysis is required. (The exception is for sludge drying facilities where mercury emissions exceed 1,600 grams per 24-hour period, in which case annual sludge sampling is required. Because previous stack sampling indicated mercury emissions were well below this value,[10] annual analyses would not be required.) Therefore, Condition 39 should incorporate monitoring of mercury emissions, of a periodic timeframe to assure compliance with the emission limitation. EPA does not agree with the Petitioner on the frequency of testing needed for this pollutant. EPA believes that one stack test per permit term is appropriate periodic monitoring given the type of facility and the data from the previously-conducted stack test programs. Therefore, EPA is granting in part the petition on this issue.

15. Odor Control (Condition 48)

[10] The applicable NESHAP regulations limits emissions of mercury to 3,200 grams of mercury per 24-hour period, or 7.1 pounds per 24-hour period. Emission results from the June, 2000 stack testing program resulted in the following emissions, in terms of pounds of mercury per day: 3.5×10^{-3} for Unit #1, 1.6×10^{-6} for Unit #2, and 3.3×10^{-3} for Unit #6. Emission results from the December, 2003 through January, 2004 stack testing program resulted in the following emissions, in terms of pounds of mercury per day: 1.1×10^{-3} for Unit #1, 9.5×10^{-4} for Unit #2, 9.0×10^{-4} for Unit #3, 1.1×10^{-3} for Unit #4, 1.5×10^{-3} for Unit #5, and 1.4×10^{-3} for Unit #6.

The Petition next raises a concern with the odors emanating from the facility, which relates to Condition 48 of the permit. NYPIRG requests that monitoring be improved, and if the facility is not complying with State rules governing odor, then a compliance schedule should be included in the permit. Finally, the Petitioner notes that Condition 46, which requires continuous monitoring of opacity, VOC and CO, should be on the federal side of the permit as these contaminants are regulated under the Clean Air Act and, thus, are federally enforceable requirements.

Condition 46, listed on the "State-Only" enforceable side of the permit, is a contaminant list and contains no applicable requirements; also, the regulatory citation, 6 NYCRR § 201-5.3(b), is a state-only, non-federally applicable requirement. Condition 48 is also listed on the "State-Only" enforceable side of the permit. This condition addresses emissions of hydrogen sulfide (and odors) and cites 6 NYCRR § 211.2. This regulation is also not a federally applicable requirement and, therefore, is appropriately listed on the state-only side of the permit. Accordingly, the petition is denied on this issue.

H. New Source Review

The Petitioner's eighth allegation is that the NYOFCO permit incorrectly states that the facility is not subject to new source review ("NSR"), because it does not meet the applicability criteria of 6 NYCRR § 231-1.2(a)(4). *See* Petition at 19. NYPIRG contends that DEC's statement in the permit description that the facility is not subject to NSR because emissions of

any one pollutant are less than 100 tons per year is incorrect; under the rules that became effective in 1980, it appears that NSR would apply if the facility emitted more than 50 tons per year of a regulated pollutant. Finally, the Petitioner asserts that even if NSR does not apply, the facility would have been required to comply with the "minor NSR" requirements of 6 NYCRR § 201.4. *See* Petition at 19 and 20.

EPA disagrees with the Petitioner's assertion that NSR applies to the NYOFCO facility. New Source Review is comprised of two separate requirements - Prevention of Significant Deterioration of Air Quality, or PSD for facilities located in areas attaining the national ambient air quality standards ("NAAQS"), and non-attainment review for facilities located in areas not attaining NAAQS. *See* CAA Parts C & D.

The DEC has delegation of the federal PSD program codified at 40 CFR § 52.21. In order to be subject to PSD, a new facility would have to emit, or have the potential to emit, 100 (for certain source categories) or 250 tons per year or more of any regulated NSR pollutant. Because emissions of each NSR-regulated pollutant is less than 100 tons per year, PSD does not apply.

With respect to non-attainment NSR, New York's regulations to implement this program are codified at 6 NYCRR part 231, entitled "Major Facilities." However, the NSR requirements were in flux during the early 1990's, the time at which the NYOFCO facility was applying to the DEC for a permit to construct a new plant. That is, the Clean Air Act Amendments of 1990

made significant changes to Title I of the Act (relating to attainment and maintenance of NAAQS and NSR permitting). Subsequent to passage of the Act, EPA proposed rulemaking[11] to implement the requirements of the CAA Amendments, and later issued guidance with respect to transitional issues resulting from these proposed rules.[12]

These proposed rules and guidance documents state that for NSR permitting purposes in non-attainment areas, the new NSR requirements of the CAA Amendments of 1990 are not in effect until States adopt appropriate requirements. For ozone non-attainment areas, States were to submit NSR permit program rules by November 15, 1992. Such rules must specify, among other requirements, the presumptive treatment of NO_x as an ozone precursor. Until such time, the existing requirements would apply; that is, facilities which have submitted complete permit applications by that date would receive permits processed under the State's existing NSR (and/or other) rules.

NYOFCO submitted a complete permit application to the DEC prior to November 15, 1992. As such, the regulations and designations in existence at the time of permit application submission would be used. Emissions of VOCs, a non-attainment pollutant, were projected to be

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[11] *See* "40 CFR Part 52 - State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990; Proposed Rule," 57 FR 13498 (April 16, 1992); and "40 CFR Part 52 - State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule," 57 FR 55620 (November 25, 1992).

[12] *See* March 11, 1991 memorandum from John S. Seitz, EPA's OAQPS to Regional Air Directors, entitled "New Source Review (NSR) Program Transitional Guidance," and September 3, 1992 memorandum from John S. Seitz, EPA's OAQPS to Regional Air Directors, entitled "New Source Review (NSR) Program Supplemental Transitional Guidance on Applicability of New Part D NSR Permit Requirements."

less than 50 tons per year. Because these emissions would be less than the non-attainment NSR threshold of New York's SIP-approved regulations of 6 NYCRR part 231, these regulations did not apply to VOC. With respect to NO_x, where the projected emissions were stated as approximately 84 tons per year, this pollutant was at such time designated as "Cannot be Classified" or "Better than National Standards;" thus, New York's non-attainment NSR regulations also did not apply to this pollutant (and, as stated above, PSD would also not apply to the NYOFCO facility).

With respect to the Petitioner's last issue, relating to minor NSR review, the SIP regulations of 6 NYCRR § 201.4 that are cited by NYPIRG state, in part, that the DEC will not issue to a facility a permit to construct or certificate to operate unless, "the operation of the source will not prevent the attainment or maintenance of any applicable ambient air quality standard." It must be noted that the primary purpose of State Implementation Plans is to ensure that States attain and maintain air quality to comply with the NAAQS. One of the provisions of the New York SIP is to issue permits that include all applicable SIP (and other) requirements. The DEC met this obligation by issuing, first, the permit to construct and certificate to operate under 6 NYCRR part 201 and, second, the title V operating permit. Therefore, EPA denies the petition on this matter.

I. Compliance Schedule

The Petitioner's ninth allegation is that the proposed permit lacks a compliance schedule

designed to bring the NYOFCO plant into compliance with CAA requirements, in accordance with 40 CFR § 70.5(c)(8)(iii)(c). Specifically, NYPIRG asserts that because the NYOFCO facility was operating in ongoing violation of the SIP opacity requirements of 6 NYCRR § 227-1.3 at the time of receipt of a title V permit, the title V permit should have included a compliance schedule with milestones leading to compliance. *See* Petition at 20.

To support this assertion, NYPIRG attached to its petition documentation on opacity exceedances (from NYOFCO quarterly reports) and state and local notice of violation lists (*see* Exhibit E of the NYPIRG petition). With respect to the opacity exceedances, each of these occurrences were temporary in nature, lasting a short period of time, and the problems were corrected prior to submission of the quarterly report. (For example, a quarterly report submitted by NYOFCO to DEC on January 2, 2002 indicated that on December 28, 2001 the opacity limit was exceeded (that is, one 6-minute excursion) due to high outlet temperature on drum 217-F, but that the dryer outlet temperature came under control and opacity returned to zero within minutes.) Under 40 CFR §§ 70.5(c)(8)(iii)(C) and 70.6(3), if a facility is in violation of an applicable requirement and it will not be in compliance at the time of permit issuance, it's permit must include a compliance schedule that includes certain criteria. If the reported violation has been corrected prior to permit issuance, a compliance schedule is no longer necessary. The permit record in this case supports the conclusion that these opacity violations were intermittent, and not, as NYPIRG alleges, ongoing violations; and that the source was in compliance at the time of permit issuance. With respect to the listing of state and local NOVs, the violations cited by the DEC and the City of New York are not violations of federally-applicable requirements (for

example, many are violations of New York City odor standards). Therefore, EPA denies the petition on this matter.

J. Dates During Which Permit Conditions Apply

The Petitioner's tenth allegation is that the final permit improperly limits the effective dates of many permit conditions. That is, NYPIRG is concerned that although the front page of the permit states that the permit will expire on August 12, 2007, a clause has been added to most permit conditions, that the permit term is "[e]ffective between the dates of 8/30/2002 and 8/29/2007." The Petitioner contends that by adding this clause, if a renewal permit is not issued prior to the expiration of the current permit, then each permit term will expire on August 29, 2007, even if the permittee submits a complete and timely application (according to 40 CFR § 70.7(c)(ii) and 6 NYCRR § 201-6.7(a)(5), terms and conditions of a permit will continue automatically provided that a timely and complete renewal application has been submitted). *See* Petition at 20.

EPA disagrees with the Petitioner that terms and conditions in the NYOFCO permit will expire if a renewal permit is not issued before the expiration date of the title V permit. The DEC regulations at 6 NYCRR § 201-6.7(a)(5) clearly state that all terms and conditions of a permit shall automatically continue while DEC reviews the renewal application. All terms and conditions of a title V operating permit will remain effective as long as a timely and complete renewal application has been submitted in accordance with the deadline established in 6 NYCRR

§ 201-6. We understand the permit "labeling" to be DEC's way of establishing the initial effective date of a permit term rather than a termination for the term (in cases where permit revisions are made, different terms would have different "start" dates). EPA interprets the later date, since it always coincides with the end date of the term of the permit itself, to be simply a reiteration of the term of the permit. EPA, therefore, denies the petition on this issue.

K. Errors Noted in a Document Presented by NYPIRG and Local Community Groups

The Petitioner's eleventh issue relates to a meeting that NYPIRG and other local community groups had with DEC Region 2 on August 7, 2002, wherein concerns with the final NYOFCO title V permit were discussed. Such concerns were incorporated into the subject NYPIRG petition as Exhibit F. *See* Petition at 20 and 21.

Section 505(b)(2) of the CAA specifically limits the scope of title V objection petitions to issues "that were raised with reasonable specificity during the public comment period...(unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period)." *See also* 40 CFR § 70.8(d). The August 7, 2002, meeting was held nearly four months after the end of the comment period on the draft title V permit. Consequently, for EPA to consider these issues as grounds for an objection under CAA § 505(b)(2), such issues must have arisen after the end of the comment period, or the petitioner must demonstrate, in its petition, that it was impracticable to raise the issues during the comment period on the draft permit. In this

case, Petitioner merely alleges that the "permit contains the errors set forth in great detail in Exhibit F." The petitioner does not demonstrate, or even allege, that it was impracticable to raise the issues contained in Exhibit F during the public comment period. Accordingly, unless the issues presented arose after the close of the comment period on this permit, they are not addressed in this response.

The following section includes those comments which were appropriately raised in this petition because the alleged deficiencies arose after the close of the public comment period.

DEC Condition 47 - Odor Remediation - Page 9

This condition is not a federally applicable requirement, and therefore, EPA has no authority to require DEC to implement the proposed changes.

DEC Condition 48.2 - Hydrogen Sulfide - Page 10

This condition is not a federally applicable requirement, and therefore, EPA has no authority to require DEC to implement the proposed changes.

DEC Condition 50 - HAPs Testing - Page 11

This condition is not a federally applicable requirement, and therefore, EPA has no

authority to require DEC to implement the proposed changes.

DEC Condition 51 - Alleged Inapplicability of NSR - Page 12

This issue has been addressed above in Section H of this Order.

EPA Response to Other Comments – Exhibit F of NYPIRG Petition

1. DEC "Special" Condition 6 - Page 1

NYPIRG has requested changes to Condition 6 included in the first section of the permit, entitled "DEC General Conditions," which relates to sludge analyses.

Although this condition was added to the final permit after the end of the comment period, it is not a federally applicable requirement, and therefore, EPA has no authority to require DEC to revise this condition. The objection request is therefore denied on this issue.

3. DEC Condition 4.2 - Page 2

NYPIRG asserts that the monitoring frequency required by Condition 4.2 is less than the reporting frequency.

Condition 4 of the NYOFCO title V permit relates to the coordination between DEC's solid waste and air divisions with respect to nitrogen oxides. Condition 4.2 requires that each time that the facility applies for a process change with DEC's Division of Solid Waste, that it also apply for the same process change with DEC's Division of Air. The "Monitoring Frequency" refers back to the "Monitoring Description," stated above, and the "Reporting Requirements" are "Once / Batch or Monitoring Occurrence." Accordingly, there is no inconsistency between the monitoring and reporting frequencies, and therefore, the petition is denied with respect to this issue.

4. DEC Condition 25 - Reporting - Page 2

NYPIRG asserts that reporting violations of hazardous air pollutants of *any duration* should be reported. The Petitioner also contends that it is inappropriate to use an averaging method to determine whether reporting is timely.

The Agency can consider this comment because Condition 25 was revised from the draft to the final permit. However, EPA disagrees with NYPIRG's assertions. As discussed above in Section D of this Order, the prompt reporting requirements contained in this permit are reasonable, and are consistent with EPA's regulations at Part 71. In addition, there is no discussion of averaging methodology in this provision. As such, these issues are denied.

9. DEC Condition 34 - CEMS - Page 6

The Petition asserts that although the condition relates to CEMS requirements, the monitoring specifics are solely for VOC, and conditions should be included for other pollutants.

The Agency can consider this comment because Condition 34 was revised from the draft to the final permit. However, EPA disagrees with this contention. The condition, which cites 6 NYCRR § 212.10 relates only to VOC emission requirements. Because it contains appropriate monitoring provisions relating specifically to this pollutant, this issue is denied.

CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2), I deny in part and grant in part the petition of NYPIRG requesting the Administrator to object to the issuance of the NYOFCO title V permit. This decision is based on a thorough review of the August 30, 2002 permit, and other documents that pertain to the issuance of this permit.

Dated: May 24, 2004

_____/S/_____

Michael O. Leavitt

Administrator