BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF THE ALBERT EINSTEIN COLLEGE OF MEDICINE OF YESHIVA UNIVERSITY Permit ID: 2-6005-00133/00002 Facility DEC ID: 2600500133 Issued by the New York State Department of Environmental Conservation Region 2	)	ORDER RESPONDING TO REMAND Petition Number: II-2000-01 Petition Number: II-2000-02 Petition Number: II-2000-03
IN THE MATTER OF ACTION PACKAGING CORP. To operate a flexographic printing facility Plant located in Brooklyn, New York Permit ID: 2-6105-00168/00002 Issued by the New York State Department of Environmental Conservation Region 2	)	
IN THE MATTER OF KINGS PLAZA TOTAL ENERGY PLANT Permit ID: 2-6105-00301/00010 Facility DEC ID: 2610500301 Issued by the New York State Department of Environmental Conservation Region 2	)	

ORDER GRANTING IN PART AND DENYING IN PART PETITIONS FOR OBJECTION TO PERMITS IN RESPONSE TO REMAND

I. Background

On March 15, April 7, and May 5, 2000, respectively, the Environmental Protection Agency ("EPA") received petitions from the New York Public Interest Research Group, Inc.

("NYPIRG" or "Petitioner") requesting that the Administrator object to the issuance of state operating permits pursuant to title V of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, to the Albert Einstein College of Medicine of Yeshiva University ("Yeshiva"), the Action Packaging Corporation (a flexographic printing facility) ("Action Packaging"), and the Kings Plaza Total Energy Plant ("Kings Plaza"). These permits were issued by the New York State Department of Environmental Conservation, Region 2 ("DEC"), under title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR part 200, 201, 616, 621, and 624. On January 16, 2002, the Administrator issued final orders granting in part and denying in part NYPIRG's petitions to object to the Action Packaging and Kings Plaza permits, and denying its petition to object to the Yeshiva permit.[1]

In responding to a number of issues raised by the petitions EPA used a "harmless error rule" to deny NYPIRG's request for an objection.[2] EPA concluded that even though DEC had failed to comply with certain requirements of title V and part 70 in issuing the permits, the error was harmless and therefore did not require EPA to object to the permits. Pursuant to CAA § 502(b), NYPIRG then challenged EPA's reliance on the "harmless error rule" to deny its petitions in the United States Court of Appeals for the Second Circuit.

II. Remand of the Action Packaging, Kings Plaza, and Yeshiva permits in New York Public Interest Research Group v. Whitman.

By decision dated February 27, 2003, the United States Court of Appeals for the Second Circuit granted a petition for review brought by NYPIRG challenging the EPA's final Orders denying its administrative petitions seeking objections to the Action Packaging, Kings Plaza, and Yeshiva permits. New York Public Interest Research Group, Inc. v. Whitman, 321 F.3d 316 (2nd Cir.) (hereinafter "NYPIRG"). The court found that EPA's use of the "harmless error rule" to dismiss certain issues raised by NYPIRG's petitions was erroneous because the doctrine does

---

[1] In the Matter of the Albert Einstein College of Medicine of Yeshiva University ("Yeshiva"), Petition No. II-2000-01, January 16, 2002; In the Matter of Action Packaging Corp., Petition Number II-2000-02, January 16, 2002 ("Action Packaging"); In the Matter of Kings Plaza Total Energy Plant, Petition Number II-2000-03, January 16, 2002 ("Kings Plaza") (collectively "the Orders").

[2] EPA relied on the application of this rule in response to allegations that: (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for public hearings on the draft permits; (2) the permits are based on an incomplete permit application in violation of 40 CFR § 70.5(c); (3) the permits lack a statement of basis as required by 40 CFR § 70.7(a)(5); and the permits do not assure compliance with all applicable requirements as required by 40 CFR §§ 70.1(b) and 70.6(a)(1).

not exist as applied by EPA.[3] The court held that "once NYPIRG demonstrated to the EPA that the draft permits were not in compliance with the CAA, the EPA was required to object to them." Id at 334. The court recognized that the act of determining whether the petitioner has demonstrated noncompliance is discretionary, however, "if such a demonstration is made, an objection must follow." Id at 333. According to the court, this case did not present a challenge to EPA's determination, rather, since the Agency "conceded that the draft permits were deficient, it is instead a challenge to the EPA's failure to take actions resulting from the judgment it made." Id. The court concluded that those actions are non-discretionary since CAA § 505(b)(2) mandates that "'the Administrator shall issue an objection' if a demonstration of noncompliance is made." Id.

The court declined NYPIRG's request that it issue detailed instructions regarding the specific objections EPA must, on remand, make to the three permits by stating: "We are reluctant, however, to give specific instructions to the EPA in technical areas near the center of the agency's expertise. The more prudent course is to leave this issue at this time to the sound discretion of the EPA." NYPIRG at 333. Finally, the court noted, "[i]ndeed, any efforts in this case to do more could well be futile as many, if not all, of the individual, technical issues presented by the draft permits have either evolved or been resolved altogether during the course of this appeal." Id.

In light of the court's decision, NYPIRG's request that we object to the Yeshiva and Kings Plaza permits will be reexamined on each aspect where, as noted by the court, "EPA conceded that the draft permits were deficient" but erroneously relied on the "harmless error rule" as the basis for denying the petition. Id. The facility operated by Action Packaging ceased operations as of September 31, 2002, surrendered its permit, and will not be seeking a renewal permit. Accordingly, this Order does not address the petition issues related to this facility.

Based on a careful review of the Administrator's orders responding to NYPIRG's petitions to object to the Yeshiva and Kings Plaza draft permits and the court's analysis and conclusions in the NYPIRG decision, EPA has concluded that the following issues must be addressed on remand.

1. The adequacy of DEC's public notices of draft title V permits;
2. The standard used by DEC in denying NYPIRG's request for a hearing on the draft permits;
3. The alleged shortcomings in the initial compliance certifications required as part of the title V permit application process;
4. The absence of a statement of basis supporting the permits; and

---

[3] The court rejected EPA's contention that section 505(b) of the CAA affords discretion to consider the practical consequences of objecting to a permit based on a deficiency that was essentially harmless. NYPIRG at 332.

5. The applicability of the accidental release prevention requirements in CAA § 112(r) and 40 CFR Part 68.

A. Public Notice

In its petitions, NYPIRG alleged that the DEC violated the public participation requirements of 40 CFR § 70.7(h)(2) by failing to indicate in its public notices of the draft permits the "time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled)." See also CAA § 502(b)(6) (the minimum elements of a permit program must include procedures for public notice). DEC's public notices did state that the draft permits were available for review but did not provide any information regarding the DEC's procedures for hearing requests. Notwithstanding this apparent procedural flaw, EPA concluded that NYPIRG had failed to show that it was harmed by DEC's omission of this information.[4] Because NYPIRG had not demonstrated harm, EPA determined that DEC's omission was harmless error and so did not require EPA to object to the permits. See Kings Plaza and Yeshiva at page 4.

(1) Kings Plaza

In response to the Administrator's January 2002 Order, the DEC reopened and revised the Kings Plaza permit. EPA's regulations specify that "all permit proceedings, [except for minor permit modifications], shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." 40 CFR § 70.7(h). As noted previously, part 70 also requires such notifications to include "a statement of procedures to request a hearing." 40 CFR § 70.7(h)(2). In accordance with these requirements, on May 1, 2002, the DEC provided the public with notice of the Kings Plaza permit modification.[5] See Environmental Notice Bulletin, DEC Region 2 Completed Applications (May 1, 2002), available on the internet at http://www.dec.state.ny.us/website/enb2002/20020501/index.html. This notice stated: "If a legislative public hearing is to be held, a Notice of Hearing will be published which will include the time and place of the hearing . . . . The applicant and all persons who have filed comments on the permit will be notified by mail of the public hearing. Comments and requests for a legislative hearing should be in writing and addressed to the Department representative listed

---

[4] EPA noted that despite the DEC's failure to indicate the procedures that must be followed to request a hearing, NYPIRG requested a hearing and submitted comments on these permits. See Yeshiva and Kings Plaza at page 4.

[5] The permit modification provided for the revision of certain streamlined permit conditions to ensure compliance with applicable requirements, a requirement that the permittee use the results from the most recent stack test when calculating NOx emissions from the diesel generator, the incorporation of the facility's NOx RACT plan into the permit, and the incorporation of the applicable particulate emission limit for oil burning combustion units into the permit.

below." Unlike the DEC's notice on the initial draft permit, this notice did correctly provide information to the public regarding the time and place of any hearing that may be held and DEC's procedures for hearing requests. Thus, EPA has determined that this issue has been resolved, and in accordance with the court's decision, EPA denies NYPIRG's petition on this issue.

(2) Yeshiva

The DEC issued a revised permit to Yeshiva with an effective date of July 26, 2000, and a second revised permit (amending the July 26 permit) with an effective date of January 8, 2001. These revisions were processed pursuant to the administrative modification procedures of 40 CFR § 70.7(d) and 6 NYCRR § 201-6.7(b), and therefore, the DEC concluded that the public participation procedures of § 70.7(h) did not apply. Likewise, EPA's January 16, 2002 Order did not object to the Yeshiva permit on any grounds. For this reason, the DEC have not corrected or resolved this apparent flaw with respect to the Yeshiva permit.

Noting EPA's failure to object to the Kings Plaza permit on this issue, the Second Circuit observed that "the CAA does not require a showing of harm and any showing of noncompliance triggers a nondiscretionary duty to object." NYPIRG at 332**.** Therefore, "[s]ince the EPA . . . conceded that the draft [Yeshiva] permit[] [was] deficient," consistent with court's opinion, it is obligated to grant the petition on this basis. Id at 333. The DEC must re-notice the Yeshiva permit consistent with the requirements set forth in 40 CFR § 70.7(h)(2).[6]

B. Application of Improper Standard

Petitioner also contended that the DEC applied the wrong standard in denying their request for a public hearing on the draft permits. New York's regulations require the DEC to make a determination as to whether a public hearing – either adjudicative or legislative – should be held. 6 NYCRR § 621.7(b). The regulations specify the standards to be used in making these determinations.[7] A legislative hearing must be held when the DEC determines that "a significant degree of public interest exists." 6 NYCRR § 621.7(c)(1). Petitioner asserted that in denying the

[6] The DEC is in the process of renewing the Yeshiva title V permit, and therefore, it may comply with the terms of this Order as part of that process.

[7] "The determination to hold an adjudicatory public hearing shall be based on whether the department's review raises substantive and significant issues relating to any findings or determinations the department is required to make . . . , including the reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project because the project, as proposed, may not meet statutory or regulatory criteria. In addition, where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of such issues may result in denial of the permit application, or the imposition of significant conditions thereon." 6 NYCRR § 621.7(b).

public hearing request, DEC applied the standard that is to be used when the DEC makes the determination on its own (the adjudicatory standard), rather than the standard which applies when it is considering public comments requesting a hearing (the legislative standard). In responding to NYPIRG's petitions, EPA did not purport to resolve the question of whether DEC properly applied state law; rather, the Orders addressed whether DEC's decision not to hold a hearing on the draft permits prejudiced NYPIRG and was inconsistent with the requirements of title V and part 70. See Kings Plaza and Yeshiva at page 6. EPA concluded that given the nature of the source and that petitioner was the only member of the public to submit comments, the DEC could have reasonably concluded that there was not sufficient public interest to hold a hearing on the draft Yeshiva or Kings Plaza permits. Id. On this basis, EPA concluded that the DEC's failure to provide a legislative hearing was harmless error, and therefore, an objection was not warranted.

The regulations governing New York's public participation procedures are part of the State's fully approved title V program. See 6 NYCRR §§ 621.6 and 7. EPA has previously determined[8] these regulations to be consistent with the requirements of 40 CFR § 70.7(h) which provides that "all permit proceedings, including initial permit issuance . . . shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." See also CAA § 502(b)(6). Neither the Act nor part 70 specifies what standard a permitting authority must apply when a member of the public requests a hearing. Accordingly, consistent with applicable state law, the DEC has considerable discretion to decide whether to hold a public hearing. New York's regulations set forth reasonable standards to this end, and are in accord with the statutory and regulatory requirements.

Although EPA continues to believe, that based on the facts before it, the DEC could have reasonably concluded the degree of public interest in these permits was not sufficient to hold a public hearing, we take due notice of the court's direction here that an attempt to locate the "harmless error rule" in section 505(b) of the CAA and section 706 of the Administrative Procedures Act is futile because "it does not exist." 321 F.3d at 332 (internal quotations omitted). Accordingly, in light of this direction, EPA will reassess NYPIRG's request for an objection on these grounds.

(1) Kings Plaza

As discussed in section I. A. above, on May 1, 2002, the DEC reopened and modified the Kings Plaza permit in response to EPA's objection. In commenting on the proposed changes to the permit, NYPIRG requested a public hearing claiming that their comments raise substantive

---

[8] See e.g., In the Matter of North Shore Towers Apartments, Inc., Petition Number II-2000-06, July 3, 2002; In the Matter of Tanagraphics, Inc., Petition Number II-2000-05, July 3, 2002; In the Matter of Rochdale Village, Inc., Petition Number II-2000-04, July 3, 2002; In the Matter of Starrett City, Inc., Petition Number II-2001-01, Dec. 16, 2002. See also, 67 Fed. Reg. 5216 (February 5, 2002) (full approval of New York's title V operating permits program).

and significant issues, and demonstrate that there is significant public interest in the draft permit. See Comments on Proposed Changes to the Kings Plaza Permit, submitted by NYPIRG to NYSDEC, at page 1 (May 31, 2002).

The DEC responded to NYPIRG's comments in writing on July 19, 2002. See DEC's Responsiveness Summary. In response to NYPIRG's request for a hearing on the revised permit, DEC concluded that a public hearing was not warranted. See Cover Letter to Responsiveness Summary. DEC noted: "A public hearing would be appropriate if the Department determines that there are substantive and significant issues because the project, as proposed, may not meet statutory or regulatory standards. Based on a careful review of the subject application and comments received thus far, the Department has determined that a public hearing concerning this permit is not warranted." Id.

Although it is evident that the DEC considered NYPIRG's comments in determining not to hold a hearing on the modified Kings Plaza permit, it is less clear what regulatory standard the DEC applied to Petitioner's hearing request. However, as we have previously concluded, the DEC has considerable discretion to determine whether a public hearing is warranted, and there is no evidence that this discretion was not reasonably exercised in this case. Accordingly, Petitioner's claim that DEC applied the wrong standard to its hearing request on the draft Kings Plaza permit is now moot because the previously issued Kings Plaza permit has been superseded by the issuance of the revised Kings Plaza permit.

(2) Yeshiva

As discussed in section I. B. above, the Yeshiva permit has never been modified in accordance with the public participation procedures of 40 CFR § 70.7(h), and therefore, consistent with the court's opinion that EPA "conceded that the draft permits were deficient" it must object to the permit on this issue. NYPIRG at 333. For this reason, the DEC must re-notice the Yeshiva permit, and unambiguously apply the appropriate standard under state law to any hearing request.[9]

C. The Initial Compliance Certification

NYPIRG's petitions also alleged that the applicants did not submit a complete title V application in accordance with the requirements of the Act, 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(f), particularly as these provisions incorporate the requirements of CAA § 114(a)(3)(C) (requiring the submission of compliance certifications including information regarding the compliance status of major sources). The application form submitted by Kings Plaza and Yeshiva did not require the applicant to certify its compliance status at the time of submission, rather the applicant certified whether it would be in compliance with all applicable requirements at the time

[9] The DEC is in the process of renewing the Yeshiva title V permit, and therefore, it may comply with the terms of this Order as part of that process.

of permit issuance. As provided in 40 CFR § 70.5(c)(9)(i), permit applicants are required to submit "a certification of compliance with all applicable requirements by a responsible official consistent with paragraph (d) of this section and section 114(a)(3) of the Act." EPA interprets this provision to mean that sources must certify their compliance status as of the time of application submittal. One purpose of the initial compliance certification is to glean certain information from the source in advance of issuing the permit. Most importantly, if the source is not in compliance with an applicable requirement, the permit must include a compliance schedule designed to bring the source back into compliance. See 40 CFR §§ 70.6(c)(3) and 70.5(c)(8)(iii)(C).

(1) Kings Plaza

As previously noted, the DEC reopened, revised and reissued the Kings Plaza permit in response to the Administrator's January 2002 Order; however, this process did not require the facility to resubmit an initial compliance certification with respect to all applicable requirements. Thus, this issue has not "evolved or been resolved" for this facility. See NYPIRG at 334 (denying Petitioner's request that the court issue detailed instructions regarding the specific objection the EPA must, on remand, make to the permits and acknowledging that "many, if not all, of the individual technical issues presented . . . have either evolved or been resolved altogether . . . ."). For this reason, and because the EPA "conceded that the draft [Kings Plaza] permit[] [was] deficient," the DEC must require the permittee to submit a new compliance certification in accordance with 40 CFR § 70.5(c)(9)(i). If the submission of this compliance certification necessitates a permit reopening to incorporate a compliance schedule, the DEC must reopen, revise and reissue the Kings Plaza permit accordingly.

(2) Yeshiva

In this case, the DEC is in the process of renewing the Yeshiva title V permit. The regulations at 40 CFR 70.7(c)(i) and 6 NYCRR § 201-6.7(a)(1) specify that "[p]ermits being renewed are subject to the same procedural requirements, . . . , that apply to initial permit issuance." In accordance with these requirements, the DEC received a renewal application for the Yeshiva facility on March 28, 2004. Unlike the application form previously submitted by this facility, the renewal application form requires that the applicant provide a compliance certification indicating the source's compliance status as of the date of the application.[10] The Yeshiva renewal

[10] On December 11, 2000, EPA provided to citizens a 90-day public comment period to identify perceived deficiencies in State and Local operating permit programs (see 65 Fed. Reg. 77376). Based on comments provided by the New York Public Interest Research Group on March 11, 2001, on the New York State program, the New York State Department of Environmental Conservation committed to make a number of implementation changes to its program (see the DEC's commitment letter to EPA Region 2 (November 16, 2001)). One of these commitments was to revise the State's standard Title V permit application form to require that applicants provide a compliance certification indicating compliance status as of the date of

application supersedes the applicant's original submission. Therefore, the Petitioner's claim that the EPA must object to the Yeshiva permit because the application lacked an unequivocal initial compliance certification with respect to all applicable requirements as of the date of the permit application is now moot.

D. The Statement of Basis

NYPIRG's petitions also claimed that EPA must object to the Yeshiva and Kings Plaza permits because they lacked a statement of basis as required by 40 CFR § 70.7(a)(5), which states that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." The statement of basis is not part of the permit itself. It is a separate document which is to be sent to EPA and to interested persons upon request.[11] Id. EPA has described the necessary and suggested components of a statement of basis in numerous previously issued title V orders responding to citizens' veto petitions. See, e.g., In the Matter of Consolidated Edison Co. Of NY, Inc. Ravenswood Steam Plant, Petition No. II-2001-08, at pages 39-45 (Sept. 30, 2003); In the Matter of Port Hudson Operation Georgia Pacific, Petition No. 6-03-01, at pages 37-40 (May 9, 2003); In the Matter of Doe Run Company Buick Mill and Mine, Petition Number VII-1999-001, at pages 24-26 (July 31, 2002); In the Matter of Los Medanos Energy Center, at pages 9-13(May 24, 2004). These discussions are hereby incorporated by reference into this response.

(1) Kings Plaza

When the DEC modified and reissued for comment the draft Kings Plaza permit in response to the Administrator's January 2002 Order it also prepared and issued an updated statement of basis. The statement of basis accompanying the revised Kings Plaza permit includes a discussion on several of the necessary and suggested components, including the proposed permit modification, a project and facility description, the attainment status of the area, information on program applicability, the facility's compliance status, an emissions summary, general permittee obligations, a regulatory analysis, a regulatory applicability determination, and the compliance certification requirements of the permitted facility. The issuance of a statement of basis with the revised Kings Plaza permit renders this issue moot, and therefore, in accordance with the court's opinion, EPA denies the petition on this issue.

---

the application. New York revised its application form in December, 2001, and required that this new form be used for all new and renewal permit applications submitted after January 1, 2002. The Yeshiva facility submitted its renewal application utilizing the new standard application form.

[11] Unlike permits, statements of basis are not enforceable, do not set limits and do not create obligations. See e.g., In the Matter of Los Medanos Energy Center, fn 15 at page 10 (May 24, 2004).

(2) Yeshiva

Regarding the Yeshiva facility, the DEC has never provided "a statement that sets forth the legal and factual basis for the draft permit conditions" as required by 40 CFR § 70.7(a)(5), and therefore, this issue has not "evolved or been resolved" since NYPIRG's March 2000 petition requesting that the Administrator object to the permit on this ground. See NYPIRG at 334 (denying NYPIRG's request that the court issue detailed instructions regarding the specific objection the EPA must, on remand, make to the permits and acknowledging that "many, if not all, of the individual technical issues presented . . . have either evolved or been resolved altogether . . . ."). For this reason, and because the EPA "conceded that the draft [Yeshiva] permit[] [was] deficient," the DEC must reopen and reissue the Yeshiva permit accompanied by an adequate statement of basis.[12] Id at 333.

E. The applicability of CAA § 112(r) and 40 CFR Part 68

The petitioner alleged that the general permit condition included in the draft Yeshiva and Kings Plaza permits stating "[r]isk management plans must be submitted to the Administrator if required by Section 112(r)" should state whether the facility is or is not subject to section 112(r) requirements. In responding to this contention, EPA agreed that this provision is very general and does not affirmatively state the applicability of section 112(r) requirements. However, we posited that based on what we know about these facilities, and because they did not submit a Risk Management Plan ("RMP") to EPA under CAA § 112(r) and 40 CFR part 68, it was reasonable to assume that section112(r) does not apply. Accordingly, we concluded that in these cases, the DEC's failure to specify the applicability of these requirements was at most harmless error. See Kings Plaza and Yeshiva at page 28.

The DEC has not taken delegation of the accidental release prevention program, and therefore, EPA is the implementing agency for purposes of 40 CFR part 68. Nonetheless, as the title V permitting authority, DEC has several general section 112(r) responsibilities, which are found in 40 CFR § 68.215(e), and are further discussed in an April 20, 1999 memorandum from Steven J. Hitte (OAQPS) and Kathleen M. Jones (OSWER) entitled: "Title V Program Responsibilities Concerning the Accidental Release Prevention Program." These responsibilities include: (1) verifying that sources register and submit a risk management plan, (2) verifying that sources certify compliance with the requirement to submit a risk management plan, and (3) general enforcement responsibilities.

To meet its accidental release prevention program obligations under 40 CFR part 68, DEC may require sources as part of the title V application form to identify whether they are subject to section 112(r), and whether they have submitted a risk management plan to EPA. The DEC may

[12] The DEC is in the process of renewing the Yeshiva title V permit, and therefore, it may comply with the terms of this Order as part of that process.

also note in its statement of basis the applicability of section 112(r) and part 68 requirements. Since applicability is based on having a listed 40 CFR § 68.130 substance over the threshold quantity located at the facility, applicability may fluctuate over the life of the permit. Therefore, although general section 112(r) permit conditions do not definitively state whether an individual source is subject to the risk management plan requirements, the permit structure ensures that the permit covers any newly subject source, or any source whose applicability fluctuates, thereby ensuring that the section 112(r) permit obligations remain up to date.

(1) Kings Plaza

If a source is subject to section 112(r) requirements, its permit must include certain conditions necessary to implement and assure compliance with these requirements. In response to the Administrator's January 2002 Order, the DEC revised and reissued the Kings Plaza permit including a revised statement of basis. The statement of basis accompanying the Kings Plaza permit explains that this facility "has been determined to be subject to . . . 40 CFR [part] 68." The permit, at Condition 2-6 contains a general condition which states: "If a chemical . . . listed in Tables 1, 2, 3 or 4 of 40 CFR § 68.130 is present in a process in quantities greater than the threshold quantity listed in Table 1, the following requirements will apply." The condition goes on to list these requirements. This condition is written generally because of the nature of the section 112(r) requirements, which, as explained more fully in the introductory section above, is different from other applicable permit requirements.

In this case, the statement of basis accompanying the modified Kings Plaza permit, specifies the applicability of section 112(r), and the final permit includes Condition 2-6 which requires the source to meet the accidental release prevention requirements. The issuance of a revised Kings Plaza permit has accordingly rendered this issue moot, and NYPIRG's request for an objection on this ground is denied.

(2) Yeshiva

Condition 14.3 in the revised Yeshiva permit states: "Risk management plans must be submitted to the Administrator if required by Section 112(r)." This general condition is insufficient in that it fails to set forth the applicability threshold and requirements if 40 CFR part 68 applies.[13] Additionally, the permit does not have an accompanying statement of basis that explains the applicability of these requirements. For this reason, and because "EPA . . . conceded that the draft [Yeshiva] permit [was] deficient," the DEC is hereby ordered to reopen the Yeshiva permit. General condition 14.3 should be revised too more clearly set forth the requirements of 40 CFR part 68 (see, e.g., Condition 2-6 of the revised Kings Plaza permit), and the statement of

[13] In recently issued permits such as for the Kings Plaza facility the DEC has included a more detailed general condition that clearly sets forth the requirements of 40 CFR part 68 (assuming applicability).

basis should note the applicability of these requirements.[14] Alternatively, if the DEC determines that section 112(r) and 40 CFR part 68 do not apply to this source, Condition 14.3 may be removed from the permit.[15]

For the reasons set forth above, I deny in part and grant in part NYPIRG's petitions requesting that the Administrator object to the Yeshiva and Kings Plaza permits. This decision is based on a re analysis of certain issues in light of the court's decision in NYPIRG vacating EPA's denial of NYPIRG's petitions to object to the Yeshiva and Kings Plaza permits, and remanding them for further proceedings consistent with the court's opinion.

August 26, 2004 / s /

Date Michael O. Leavitt
Administrator

[14] DEC can verify that sources subject to 40 CFR part 68 have submitted a RMP by contacting U.S. EPA, Region 2. If a source has not submitted a RMP to the EPA in accordance with part 68, DEC should note this in the statement of basis.

[15] As discussed above, to meet its accidental release prevention program obligations under part 68, DEC may require sources as part of the title V application form to identify whether they are subject to section 112(r), and whether they have submitted a risk management plan to EPA.