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New York State Department of Environmental Conservation

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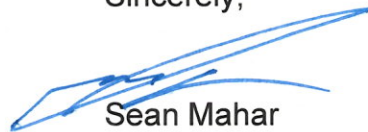
Ms. Lisa Garcia
Region 2 Administrator
United States Environmental Protection Agency
290 Broadway
New York, NY 10007-1866

Dear Ms. Garcia,

The New York State Department of Environmental Conservation (DEC) has reviewed the United States Environmental Protection Agency's Final Report: *Title V Operating Permit Program Evaluation*.

DEC's comments with respect to this report are contained in the enclosed document. Please contact Andrew Fischler, Director of Internal Audit, at (518) 402-9761 if you have any questions regarding our responses.

Sincerely,



Sean Mahar
Interim Commissioner



Department of
Environmental
Conservation

New York State Department of Environmental Conservation
2022 Title V Operating Permit Program Evaluation
Response to Final Report

The New York State Department of Environmental Conservation (DEC) has reviewed the final Title V Operating Permit Program (OPP) evaluation report dated June 24, 2024 containing the findings and recommendations of the United States Environmental Protection Agency (EPA) resulting from EPA's 2022 audit of DEC's OPP. The final report is broken into three sections. The first section provides a summary of the overall audit process and EPA's general findings. The second provides follow-up review of the items discussed in the final evaluation report for EPA's 2018 audit of DEC's OPP. The third section provides additional discussion and Action Items resulting from the 2022 audit.

DEC's response is similarly broken into three sections. The first section provides DEC's general comments regarding this report. The second section provides DEC's comments regarding the follow-up to the 2018 audit and any related 2022 findings. The third section contains DEC's specific comments on the new 2022 Action Items provided by EPA.

1. General Comments

DEC remains committed to implementing a comprehensive and effective Title V OPP. As set forth in Title 6 of the New York Codes, Rules and Regulations (6 NYCRR) Parts 201 and 621, DEC's federally approved Title V OPP meets the requirements of the Clean Air Act (Act) and EPA's implementing regulations at 40 CFR Part 70. While DEC's permitting program is effective and results in the issuance of comprehensive permits, DEC agrees that collaboration with EPA Region 2 staff can help to improve the program.

DEC appreciates EPA's efforts, through the Title V OPP audit and otherwise, to identify issues and recommend improvements to DEC's Title V OPP. DEC looks forward to continuing to collaborate with EPA Region 2 to address these items and implement the requirements of the Act.

2. Comments on the 2018 Program Review Follow-up

This section discusses DEC's comments on EPA's findings relating to the implementation of the Action Items recommended in the 2018 program audit.

A. Permit Review Report Content – Rationale for Gap Filling Monitoring

DEC appreciates EPA's acknowledgement of our efforts to address the 2018 Action Items related to discussing gap filling monitoring in Permit Review Reports (PRR). DEC agrees that it is important to provide an accurate and complete rationale for the decisions made during permit development, particularly where those decisions are intended to fill a regulatory gap.

However, DEC disagrees that it is necessary to change our long-standing practice of citing gap filling permit conditions to 6 NYCRR 201-6. While it is true that 201-6.4(b)(2) explicitly provides DEC with the authority to include gap-filling conditions in the Title V permits it issues, DEC believes citing such conditions at a higher level (i.e., at the subpart level as opposed to the paragraph level) does not diminish or obfuscate our authority to include them in permits. Further, this practice does not limit the enforceability of such conditions when necessary.

B. Capping Limits

DEC appreciates EPA's acknowledgement of the improvement in the documentation of capping conditions in PRRs and agrees that additional improvements can be made. DEC is committed to ensuring staff receive appropriate training and are provided with the necessary guidance to effectively document the basis for permitting decisions, including emission caps.

DEC also agrees that ensuring emission caps are federally and practically enforceable is critical to the Title V permitting process and both DEC and EPA's ability to determine compliance. DEC will continue to ensure permit writers follow written guidance when developing capping conditions.

C. Permit Review Report Content – Applicability and Non-Applicability of Federal Standards

As discussed in DEC's August 8, 2019 response (DEC's response) to the 2018 final audit report, DEC disagrees that it is necessary or appropriate to discuss the applicability or non-applicability of all federal emission standards in the PRR for a given facility. Instead, DEC follows the procedure discussed in the EPA memorandum *"Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits"* dated April 30, 2014. Accordingly, DEC will continue to discuss complex non-applicability determinations in the PRRs for the Title V permits it issues. DEC recognizes that there may be differences in the level of detail provided by different permit writers when implementing this approach and will continue to work toward consistency among regional staff.

D. Federal Enforceability – Non-Delegated Federal Standards (Title V Permit Content – Inclusion of Applicable Requirements Such as Federal Emission Standards)

As discussed in DEC's response to the 2018 final audit report and at several meetings between DEC and EPA staff, DEC understands its obligation to include all applicable requirements in the Title V permits it issues pursuant to 40 CFR Section 70.6. However, with respect to delegation, Section 111(c)(1) of the Clean Air Act (Act) states that upon acceptance of a state's proposed implementation procedure, the Administrator (i.e. EPA) shall delegate *"any authority he has under this Act to*

implement and enforce such standards" to the state. Accordingly, until and unless delegation is received from EPA and New York has incorporated the standard(s) by reference into state regulation, DEC has no legal authority to implement or enforce such standard(s). Further, since DEC lacks such authority, DEC cannot determine compliance with non-delegated standards, nor can DEC pursue enforcement action for any suspected violations. Rather, these tasks would remain EPA's responsibility.

To aid EPA in its efforts to implement and enforce these non-delegated standards, DEC has offered to include the terms and conditions identified in writing by EPA in the Title V permit for subject facilities. Absent such identification, DEC lacks the legal authority to implement the regulation, and therefore cannot legally determine which portion(s) of the standard(s) apply to a given emission source. DEC also notes that EPA has suggested several alternatives to this approach in the past. While DEC remains willing to reach a compromise on this topic and the related action items identified in the final audit report, DEC cannot and will not accept a solution that would require the agency to act outside its legal authority.

Finally, DEC reiterates that the agency has no interest in pursuing the delegation of 40 CFR 60 Subparts IIII and JJJJ or 40 CFR 63 Subparts ZZZZ and JJJJJJ at this time.

E. Compliance Assurance Monitoring (CAM Rule or Part 64)

DEC appreciates EPA's acknowledgement of the improvement in the documentation of CAM plans in PRRs and agrees that additional improvements can be made. DEC is committed to ensuring staff receive appropriate training and are provided with the necessary guidance to effectively document the basis for permitting decisions, including the review and approval of CAM plans. DEC also recognizes that a consistent approach across the regional offices is essential and will continue to work toward this goal.

F. Insignificant Activities (Emission Sources) Subject to Federal Emission Standards

DEC understands its obligation to submit Title V OPP revisions to EPA for review and appreciates EPA's acknowledgement that such revisions were submitted as required in April 2021. As EPA is undoubtedly aware from its own rulemaking activities, once a final rule has been promulgated its requirements are in full effect. Accordingly, DEC is unable to include terms and conditions based on a prior version of a regulation in the permits it issues. To the extent EPA believes some portion of the Title V OPP submitted in April 2021 is not approvable, DEC would appreciate prompt notification of such from EPA so that both agencies can work to resolve the situation as soon as possible.

Regarding insignificant activities, DEC continues to disagree that it is necessary or appropriate to include such activities in Title V permits simply because they are subject to one or more applicable requirements (e.g. New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants

(NESHAP)). As discussed in DEC's response to the 2018 Title V OPP audit, most NSPS and NESHAP rules do not require a Title V permit for minor or area sources that are subject to them. Accordingly, simply being subject to such a regulation does not necessitate the issuance of a Title V permit.

Further, the requirements described at 6 NYCRR 201-3.1(b), (c), and (d) effectively ensure that listed insignificant activities that exceed, or cause an existing permitted facility to exceed, one or more major source or new source review thresholds are appropriately captured and permitted. DEC staff routinely review calculations and other information submitted by applicants and remain vigilant for such situations so that they can be appropriately addressed.

Finally, DEC continues to disagree that permit applications do not contain sufficient information to determine the applicability of various requirements. As previously discussed, the applicant is required to list the insignificant activities operated at the facility. Further, the applicant must include any air contaminant emissions in Potential to Emit (PTE) calculations and provide the relevant data to DEC for review. Combined, this information is sufficient to determine the applicability of most applicable requirements. To the extent DEC needs additional information, DEC staff routinely request it from applicants pursuant to the Uniform Procedures Act (i.e. 6 NYCRR Part 621) and the procedures described therein for incomplete applications. This procedure is identical to that which is used for sources that are not listed as insignificant.

G. Title V Permit Renewals – Application Content

DEC disagrees that the Title V permit renewal applications it reviews contain insufficient emissions information. As required by both 6 NYCRR 201-6.2(d)(3)(i) and 40 CFR 70.5(c)(3)(i), Title V facilities routinely include "*[a]ll emissions of pollutants for which the facility is major, all emissions of regulated air pollutants, and all emissions of high toxicity air contaminants listed in Table 1 of Subpart 201-9 of this Part*" as part of their renewal applications. While both regulatory citations go on to clarify that such information should include "*all emissions of regulated air pollutants emitted from any emissions unit, emission point and process,*" this text is not a requirement to enumerate these emissions at the emission unit, process, or emission source level in the application.

However, DEC agrees that it is necessary and appropriate to do so in certain situations, such as for projects seeking to utilize the netting provisions of 6 NYCRR Part 231 or when other emission unit level decisions are needed. To the extent such detail is appropriate, DEC notes that its application forms provide the necessary space for the applicant to provide such information. Further, the application instructions discuss how the information should be provided. To the extent that what the applicant provides is still insufficient, both regulations indicate that "*[t]he applicant shall submit additional information related to the emissions of regulated air pollutants sufficient to verify which Federal requirements are applicable to the facility.*" As

discussed above, DEC routinely sends notices of incomplete application whenever appropriate as described in the Uniform Procedures Act (i.e. 6 NYCRR Part 621).

DEC also disagrees that it is necessary to add “CAM Plans” to the list of supporting documentation on the Title V application form. In DEC’s experience, the number of facilities subject to CAM is small when compared to the universe of Title V facilities. To the extent a facility is subject to CAM and needs to provide an updated CAM Plan, the list of attachments provides several blank lines where additional documents can be listed.

H. Title V Fee Program

Title V Fees

As mentioned in EPA’s findings, the NYS Legislature included an increase to Title V fees in the State Fiscal Year 2024/25 budget. These new Title V fees will take effect on January 1, 2027, and include a new base fee of \$8,500, as well as an increase to the per ton emissions fees:

- \$300 per ton for 5,000 total tons or more of annual emissions
- \$250 per ton for 2,000 but less than 5,000 total tons of annual emissions
- \$225 per ton for 1,000 but less than 2,000 total tons of annual emissions
- \$200 per ton for less than 1,000 total tons of annual emissions

This new fee structure will increase revenue but is not expected to cover the complete cost of the program and will not be sufficient to offset the negative balance of the Clean Air Fund – Operating Permit Program Account.

Prior to this, the NYS Legislature’s last increase to the annual Title V fees was in the State Fiscal Year 2015/16 budget. This revision included a base fee \$2,500 plus an increase to the sliding scale for per ton emissions fees. This fee structure will remain in place until 2027 when the new fee structure takes effect.

DEC also notes EPA’s request for periodic updates regarding the implementation of these fee increases and would be happy to provide them as needed during regularly scheduled quarterly meetings. However, given that the fee schedule and effective date have been finalized, there is little additional information expected to become available until such time the schedule takes effect.

Permit Issuance Rate

DEC acknowledges that a significant portion of Title V permit renewals remain outstanding. The current backlog is approximately 174 permit renewals in total. Of those, 7 have been released for public notice and 1 is undergoing EPA review. Notably, 120 of these applications were received more than 18 months ago. DEC also notes that 23 of these applications were received after our response to the 2022 Questionnaire at the start of the audit process. DEC will continue to prioritize these applications based on staff workloads and other factors.

DEC is also continuing to make progress onboarding and training new staff. Recent changes to the State's hiring policies have made it easier to recruit and hire qualified staff. DEC is hopeful that the additional staff will augment our continuing efforts to issue Title V permits in a timely manner.

I. Document Changes Made in Permit Modifications

DEC agrees that public participation is critical to the effective implementation of the Title V operating permit program. DEC will continue to ensure a description of the changes being proposed with permit modifications is consistently included in the public notice and PRR associated with those permit actions.

J. Public Participation

Web Version of Draft Title V Permits:

As discussed in DEC's response to a similar comment in the 2018 Title V Operating Permit Program Audit, the 'changes only' version of draft Title V permit modifications includes only the terms and conditions of the permit that have been added, removed, or altered by the draft modification. This specifically highlights the portions of the permit that are being changed and therefore directs interested parties to those changes as they consider providing comments on them. If DEC were to post the entire permit instead, an interested party may erroneously conclude that portions of that permit which are not proposed to change are also subject to comment and spend time and resources preparing comments outside the scope of the permit action that DEC will not consider.

DEC also notes that, while EPA continues to raise this issue in their periodic audit reports, we are not aware of any feedback received from interested parties expressing confusion over what is being proposed in the public notices we issue for proposed modifications or other permit actions. Further, should an interested party wish to view the entire permit, a copy could be provided upon request. DEC routinely receives and responds to comments on all types of permit actions, including modifications, as required by both state and federal law and regulation.

Availability of Permit Related Documents During Public Review:

DEC remains committed to transparency and easy access to the permit record during the public review process. To that end, DEC will continue to provide access to permit application materials and other related documents to the extent practicable.

K. NYSDEC's Title V Rule Changes

DEC appreciates EPA's acknowledgment that a submission has been filed and awaits the prompt approval of these changes.

L. Quality Assurance Process for Reviewing Draft Permits and Permit Review Reports Prior to Public Review

DEC appreciates EPA's acknowledgment of our efforts in this area and will continue to develop and implement the quality assurance process as workloads allow.

3. Comments on EPA 2022 Action Items

This section discusses DEC's comments on the additional findings and Action Items identified by EPA during the 2022 audit.

A. Streamlining Requirements in Title V Permits

DEC agrees that streamlining is an essential part of the Title V permitting process. It ensures that each major facility is held to the most stringent applicable requirements while simultaneously simplifying the permit and providing utmost clarity. However, DEC disagrees with many of the statements EPA makes in this portion of the audit report.

First, EPA points out that the March 5, 1996 "White Paper #2" recommends that streamlined conditions should reference any less stringent requirements that were subsumed in the streamlining process. EPA further indicates that "[b]y including the origin of authority of the subsumed applicable requirement in a Title V permit, the respective less restrictive requirement, which was not separately included in the permit, remains an applicable requirement to the source." While DEC generally agrees that referencing subsumed requirements in streamlined conditions is useful for informational purposes, it is important to note that such a reference is not necessary for the facility to remain subject to a given applicable requirement. The process of streamlining does not change the applicability of a given requirement, nor is it necessary for a specific permit condition or reference to be included in the permit for the regulation to apply to the facility.

EPA further discusses the need for a 'streamlining demonstration' in the PRR that provides a side-by-side comparison of all applicable requirements involved in the development of DEC's streamlined permit condition(s). While DEC agrees that it is appropriate to describe the basis of the decisions made during the application review process in the PRR, it is not always necessary to compare requirements side-by-side. For example, it is not difficult for a reader to understand that a permit condition limiting emissions to 9 parts per million by volume (ppmv) is more stringent than an applicable requirement establishing a 25 ppmv emission standard. DEC concedes that regulatory limits are often based on different averaging times and that these differences can create confusion for a reader unfamiliar with the technical aspects of facility operations, or the methods used to assure compliance. Accordingly, DEC will remind permit writers of the need to clearly explain such situations in the PRR whenever they arise.

Finally, EPA states that it is incorrect to cite streamlined conditions to 6 NYCRR Subpart 201-6 because "6 NYCRR 201-6 does not provide the authority to create new requirements except for monitoring, recordkeeping, and reporting." DEC disagrees with EPA's assessment of this regulatory authority. Subdivision 201-6.4(a)(1) states that Title V permits shall include (emphasis added) "[a]ll Federal emission limitations and standards, **including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.**" As discussed above, a streamlined permit condition containing a more stringent emission limitation than that required by an applicable requirement would necessarily assure compliance with the applicable requirement. Further, DEC is not aware of any state or federal prohibition on facilities agreeing to accept more stringent emission limits than those contained in applicable requirements. In fact, DEC encourages this practice whenever possible to further its mission to reduce emissions and protect the air resources of the State. In terms of the regulatory citation itself, as discussed above, DEC believes citing such conditions at a higher level (i.e., at the subpart level as opposed to the subdivision level) does not diminish or obfuscate our authority to include them in permits. Further, this practice does not limit the enforceability of such conditions when necessary.

DEC agrees that it may be beneficial to provide additional training and guidance to permitting staff with respect to streamlining. These materials will be developed and presented as staff workloads allow.

B. 2022 Additional CAM Rule Action Items

DEC disagrees that it is necessary or appropriate to discuss the pre-control PTE in the PRR and notes that the facility's PTE (i.e. post-control) is already listed. As EPA is aware, there are several exemptions to the CAM rule described in 40 CFR 64.2(b). Importantly, these exemptions include emission limits and standards proposed by the Administrator (i.e. EPA) under Section 111 or Section 112 of the Act after November 15, 1990. In DEC's experience, most major sources are subject to one or more such standards and are therefore exempt from CAM requirements. The listed exemptions also include sources that are subject to continuous monitoring requirements for relevant parameters in their Title V permits, which also make up a significant number of the major sources DEC permits.

Further, as discussed in DEC's response to the questionnaire EPA provided at the start of this audit, there are approximately 52 Title V permits that currently contain CAM requirements. This represents approximately 15 percent of Title V permits issued in the State. Accordingly, DEC does not see a need to revise application forms, PRRs, or guidance to specifically address a program that does not apply to the vast majority of major facilities.

However, DEC recognizes that the limited applicability of CAM to major facilities in the State could cause permit writers to apply it incorrectly. Accordingly, DEC has included a discussion of CAM in training materials that were provided to permit writers. A recording of this training is posted on DEC's internal website and new staff

are encouraged to view it as they work to gain familiarity with the air permitting process in general. DEC permitting staff are also encouraged to attend training on CAM that is periodically provided by third parties whenever it is available. Furthermore, DEC's quality assurance process assists in assessing whether CAM is applicable, on the rare occasion, to a particular emission unit.

C. Public Notification Process

DEC appreciates EPA's acknowledgment of our public notice process and will continue to ensure the public has every opportunity to be involved in permit actions as required by state and federal law and regulations.

D. Environmental Justice

DEC agrees that considering impacts on historically disadvantaged communities from proposed permit actions is a critical component of the application review process. DEC remains committed to continuing this practice by working to implement the requirements of the Climate Leadership and Community Protection Act and other recent State laws related to disadvantaged communities. DEC will continue to involve these essential stakeholders in our permitting process whenever appropriate.

E. Affected States and Indian Tribes Review

DEC appreciates EPA's acknowledgement of our efforts to involve affected states and Tribal Nations in the permitting process. DEC will continue to seek input from these important stakeholders whenever appropriate.