

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
COLUMBIA UNIVERSITY)	ORDER RESPONDING TO
)	PETITIONER'S REQUEST THAT
Permit ID: 2-6202-00167/00005)	THE ADMINISTRATOR OBJECT
Facility DEC ID: 2620200167)	TO ISSUANCE OF A
)	STATE OPERATING PERMIT
Issued by the New York State)	
Department of Environmental Conservation)	Petition No.: II-2000-08
Region 2)	
_____)	

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

On October 2, 2000, the Environmental Protection Agency ("EPA") 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, to Columbia University ("Columbia Permit"). The Columbia Permit was issued by the New York State Department of Environmental Conservation, Region 2 ("DEC"), and took effect on August 3, 2000, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, consisting of portions of 6 NYCRR parts 200, 201, 616, 621, and 624.

The petition alleges that the Columbia Permit does not comply with 40 CFR Part 70 in that: (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing; (2) the permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c); (3) the permit entirely lacks a statement of basis as required by 40 CFR § 70.7(a)(5); (4) the permit distorts the annual compliance certification requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5); (5) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions; (6) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); and (7) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack adequate monitoring and are not practically enforceable. The Petitioner has requested that EPA object to the issuance of the Columbia Permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

Subsequent to receipt of the NYPIRG petition, the EPA performed an independent and in-depth review of the Columbia Permit. Based on a review of all the information before me, including the petition; the permit application; a June 16, 2000 letter from Elizabeth Clarke of DEC to Steven C. Riva of EPA transmitting the “Responsiveness Summary” or “response to comments document”; and the Columbia Permit dated August 3, 2000, I deny in part and grant in part the Petitioner’s request that I object to this permit, for the reasons set forth in this Order. Petitioner has raised valid issues on the Columbia Permit, resulting in our granting portions of the petition. This petition also raised programmatic issues, some of which DEC has already addressed and others which DEC is in the process of addressing. *See* letter dated November 16, 2001 from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 (“commitment letter” or “November 16 letter”).

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 interim approval to the title V operating permit program submitted by the State of New York effective December 9, 1996. 61 Fed. Reg. 57589 (Nov. 7, 1996); *see also* 61 Fed. Reg. 63928 (Dec. 2, 1996) (correction); 40 CFR part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to New York’s title V operating permit program based, in part, on “emergency” rules promulgated by DEC. 66 Fed. Reg. 63180 (Dec. 5, 2001). Once DEC adopted final regulations to replace the emergency rules, EPA granted full approval to New York’s title V operating permit program based on these final rules. 67 Fed. Reg. 5216 (Feb. 5, 2002). 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, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable 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) and (b)(1) of the Act and 40 CFR §§ 70.8(a) and (c)(1), States are required to submit all operating permits proposed pursuant to title V to EPA for review and EPA will object to permits determined by the Agency not to be in compliance with applicable requirements or the requirements of 40 CFR part 70. If EPA does not object to a permit on its own initiative, § 505(b)(2) of the Act and 40 CFR § 70.8(d) provide that any person may petition

the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. To justify exercise of an objection by EPA to a title V permit pursuant to § 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of part 70. Petitions must, in general, be based on objections to the permit that were raised with reasonable specificity during the public comment period.¹ A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA 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 which brought programmatic problems concerning DEC's application form and instructions to our attention. NYPIRG raised those issues and additional program implementation issues in individual permit petitions, including the instant 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 EPA has conferred with NYPIRG and DEC relative to these program implementation concerns.

EPA received a letter dated November 16, 2001, from DEC Deputy Commissioner Carl Johnson, committing to address various program implementation issues by January 1, 2002, and to ensure that the permit issuance procedures are in accord with state and federal requirements. DEC's fulfillment of the commitments set forth in the November 16, 2001 letter will resolve some administration problems. EPA is monitoring New York's title V program to ensure that the permitting authority is implementing the program consistent with its approved program, the Act, and EPA's regulations. According to a recent review, DEC has made many of the necessary changes, and is substantially meeting its commitments.³ As a result, EPA has not issued a notice

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 Powell, Esq. and Larry Shapiro, Esq., of NYPIRG to DEC (November 5, 1999) ("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 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/>.

³ 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. This letter summarizes an EPA review of draft perm its

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of deficiency at this time. Failure to properly administer or enforce the program will result in issuance of a Notice of Deficiency pursuant to § 502(i) of the Act and 40 CFR § 70.10(b) and (c).

A. Public Hearing

Petitioner alleges that DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying its request for a public hearing. Petition at page 3. Specifically, Petitioner asserts that the Notice of Complete Application dated September 29, 1999, which initiated the 30-day public notice, did not announce that a public hearing was scheduled, nor did it inform the public how to request a hearing. Petitioner further contends that the DEC applied the wrong standard in reaching the decision to deny the Petitioner's request for a public hearing. Specifically, Petitioner asserts that DEC applied the standard that governs when it can hold a hearing on its own initiative, rather than the standard that governs when DEC receives a request from a member of the public for a hearing. Petition at page 4.⁴

This issue has been addressed in previous Orders.⁵ The case-specific review of NYPIRG's petition on Columbia's permit indicates there are no substantive differences in fact between this petition and the petitions that were the subject of the previously-issued Orders referenced in note 5, regarding the public hearing issue. Specifically, Columbia's Notice of Complete Application contained similar information to the notices in the other cases, there were no commenters other than Petitioner, as was the case before, and DEC applied the same standard

³(...continued)

issued by the DEC from December 1, 2001 through February 28, 2002. Through June 2002, EPA provided DEC with monthly updates to supplement the information provided in the March 7, 2002 letter. The purpose of this EPA review was to determine whether the DEC is making changes to public notices and to select permit provisions as it committed in its November 16, 2001 letter.

⁴ The Petitioner points out that 6 NYCRR § 621.7 defines two types of hearings: adjudicatory and legislative. Under 6 NYCRR § 621.7(b), DEC determines to hold an adjudicatory public hearing when "substantive and significant issues relating to any findings or determinations the [DEC] is required to make" or 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 any such issue may result in denial of the permit application, or the imposition of significant conditions thereon." Under 6 NYCRR § 621.7(c), DEC shall hold a legislative public hearing if a significant degree of public interest exists.

⁵ The issue of denying a public hearing has been raised previously by the Petitioner and addressed by the Administrator in six Orders responding to the petitions: In the Matter of North Shore Towers Apartments, Inc., Petition Number II-2000-06, July 3, 2002 ("North Shore Towers"); In the Matter of Tanagraphics Inc., Petition Number II-2000-05, July 3, 2002 ("Tanagraphics"); In the Matter of Rochdale Village Inc., Petition Number II-2000-04, July 3, 2002 ("Rochdale Village"); In the Matter of Kings Plaza Total Energy Plant, Petition Number II-2000-03, Jan. 16, 2002 ("Kings Plaza"); In the Matter of Action Packaging Corp., Petition Number II-2000-02, Jan. 16, 2002 ("Action Packaging"); and In the Matter of Albert Einstein College of Medicine of Yeshiva University, Petition Number II-2000-01, Jan. 16, 2002 ("Yeshiva"). Each of these Orders is available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2000.htm>. Additionally, Issues B-F of this Order were also raised previously by Petitioner and addressed by the Administrator in these same six Orders.

in each case, in determining whether to hold a hearing. Because Petitioner raises no issues in this petition that are unique to Columbia, the petition is denied on this issue as it was in the above-referenced Orders. The rationale of those determinations is hereby re-affirmed in this Order.

This determination does not mean that DEC may be inconsistent in the application of its own regulations. As previously discussed, New York's regulations provide that when a member of the public requests a hearing on a draft title V permit, the determination to hold such hearing shall be based on whether "a significant degree of public interest exists." 6 NYCRR § 621.7(c)(1). Thus, to ensure a consistent approach and to prevent further confusion as to what standard applies to title V public hearing requests, DEC has agreed to express in its public notices the standard of whether a significant degree of public interest exists (that is, the standard for holding a legislative hearing under 6 NYCRR § 621.7(c)), and to use such a standard to determine whether to hold a hearing on a draft title V permit. See November 16, 2001 letter at page 5. Failure to consistently express this standard and attendant procedures in public notices may result in a finding of program deficiency pursuant to 40 CFR § 70.10(b). According to EPA's program review, the DEC is substantially meeting this commitment. See note 3, *supra*. In fact, such hearings have been held for a number of draft title V permits.⁶ Furthermore, where EPA concludes that there is a basis for objecting to a permit due to improper denial of a public hearing, EPA may order a timely objection to any permit pursuant to 40 CFR § 70.8(c)(3)(iii).

B. Permit Application

Petitioner's second claim alleges that the applicant did not submit a complete permit application in accordance with the requirements of the Clean Air Act, 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d), especially as these provisions incorporate provisions of CAA § 114(a)(3)(C). Petition at page 5. In making this claim, Petitioner incorporates a petition that it filed with the Administrator on April 13, 1999, contending that the DEC's application form is deficient because even a properly completed form would not include specific information required by both the EPA regulations and the DEC regulations. This earlier petition asks EPA to require corrections to the DEC program.

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 Columbia

⁶ E.g., Village of Freeport (DEC Permit No. 1-2820-00358/00002); Orange Recycling and Ethanol Production Facility, Pencor Masada Oxynol, LLC (DEC Permit No. 3-3309-00101/00003); Poletti Power Project (DEC Permit No. 2-6301-00084/00015); New York Organic Fertilizer Company (DEC Permit No. 2-6007-00140/00011); Keyspan Energy's Spagnoli Road Energy Center (DEC Permit No. 1-4726-01500/00011); Con Edison's Hudson Avenue Station (DEC Permit No. 2-6101-00042/00011); NYCDEP's North River Waste Water Pollution Control Plant (DEC Permit No. 2-6202-00007/00015); and the Al Turi Landfill (DEC Permit No. 3-3330-00002/00039).

was out of compliance and, therefore, whether DEC was required to include a compliance schedule in the title V permit;

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. That is, the form only requires applicants to supply numerical citations to regulations, unaccompanied by any description; and
4. The application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

1. Initial Certification

EPA agrees with Petitioner that the compliance certification process in the application form utilized by Columbia University could enable applicants to avoid revealing noncompliance in some circumstances. The DEC form allowed an applicant to certify that it expects to be in compliance with all applicable requirements at the time of permit issuance, rather than to make a certification as to the facility's compliance status at the time of permit application submission. As provided for 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...section 114(a)(3) of the Act." EPA interprets this language as requiring that sources certify their compliance status as of the time of permit application submission. The State and EPA agree that the application form submitted by applicants in New York prior to January 1, 2002, including Columbia University, did not properly implement the EPA or the State regulations. Therefore, as detailed in the November 16, 2001 commitment letter, the State changed its forms and instructions accordingly.⁷

EPA disagrees with Petitioner that we must object to this permit based on the use of a flawed certification form. In this case, Columbia certified on December 7, 1998 that it would be in compliance with all applicable requirements at the time of permit issuance, which occurred on August 3, 2000.

The publically available data from inspection and compliance records indicate that Columbia was in compliance at the time of permit application. Therefore, EPA does not believe

⁷ In accordance with the DEC's November 16, 2001 commitment letter, the DEC permit application form was changed to clearly require the applicant to certify as to compliance with all applicable requirements at the time of application submission. The application form and instructions were changed to clearly require the applicant to describe the methods used to determine initial compliance status. With respect to the citation issue, the application instructions were revised to require the applicant to attach to the application copies of all documents (other than published statutes, rules and regulations) that contain applicable requirements.

that DEC would have issued a title V permit any different from the one ultimately issued (*ie* include a compliance schedule) had the facility properly certified compliance at the time of application.

During the time between submission of the application and permit issuance, Columbia continued to submit monitoring reports as required by existing permits. As a result of these reports, NYSDEC identified some instances of alleged violations approximately four months prior to permit issuance, and issued Notices of Violation (NOV) to Columbia for certain alleged NO_x violations on January 4 and April 4, 2001.⁸ The DEC is continuing to investigate these alleged violations. The regulations at 40 CFR § 70.5(c)(8) address the situation where a facility proposes a compliance schedule in its application for a title V permit, to resolve admitted violations. Columbia did not admit to any violations in its application, nor has it agreed with DEC that the NOVs have merit. Thus, Columbia did not propose a compliance schedule, nor did DEC unilaterally create such a schedule. Until such time that resolution is reached on the nature and extent of the alleged violations, EPA is not required to object to Columbia's permit due to a lack of a compliance schedule.⁹ Furthermore, the permit shield does not protect Columbia from enforcement action relating to these alleged violations. Nothing in the permit shield in Columbia's permit made any specific finding of compliance as to the NO_x emission limits that were the subject of the NOVs issued by DEC. Thus, Columbia is not shielded from any NO_x requirements that may be the subject of a future consent agreement or other administrative or judicial enforcement proceeding. Accordingly, EPA denies the petition with respect to the initial certification issue.

In any event, the permit provides adequate means of assuring that the permittee does in fact comply with applicable requirements. The issuance of the permit triggers various attendant compliance requirements including the six-month report [70.6(a)(3)(iii)(A)], the annual report [70.6(c)(5)], and the requirement to promptly report permit deviations [70.6(a)(3)(iii)(B)]. Whether the permittee has complied with all these requirements -- which are enforceable by petitioner through citizen suit under Section 304 of the Act -- is not a basis for objection to the permit itself.

2. Statement of Methods for Determining Initial Compliance

Petitioner cites the regulations at 40 CFR § 70.5(c)(9)(ii), which require the statements in the permit application regarding the compliance status of the facility to include "a statement of

⁸ Issuance of a NOV is not a final judgement of a facility's compliance status. It is the beginning of a process where the facility may submit information or evidence relevant to its compliance record, the nature of the violations, and any mitigating circumstances.

⁹ When a final agreement is reached, the DEC must revise the permit to include any requirements arising from any administrative order on consent or similar enforcement document. These may be incorporated as part of a compliance schedule.

methods used for determining compliance.” Although the application form completed by Columbia University did not specifically require the facility to include a statement of methods used to determine initial compliance, in this case, the applicant did provide this information for all but one of the listed applicable requirements. On pages 8 through 13 of the application, the applicant describes monitoring that is in place and is being used to determine compliance with regulations for opacity, reasonably available control technology for nitrogen oxides (NO_x RACT), sulfur content in fuel, and potential to emit limits on NO_x and SO₂. This monitoring includes continuous monitors for opacity and NO_x, supplier certifications of sulfur content in fuel, and calculations of SO₂ emissions using an automated data system and continuous fuel flow monitors. Although the facility did not specifically mention in the application how it determined it was in compliance with the NSPS subpart Dc, the monitoring for opacity and sulfur content that is conducted for other purposes also serves as monitoring for the NSPS. EPA has concluded that the Petitioner was not harmed by the omission of these initial compliance methods from Columbia University’s application. The petition is therefore denied on this point.

3. Description of Applicable Requirements

Petitioner’s next point is that EPA regulations call for the legal citation to the applicable requirement to be accompanied by the applicable requirement expressed in descriptive terms. EPA has developed guidance, in the form of “White Papers” which were issued in order to enable States to take immediate steps to reduce the costs of preparing and reviewing initial part 70 permit applications. In “White Paper for Streamlined Development of Part 70 Permit Applications” dated July 10, 1995 (“White Paper 1”), EPA clarified that citations may be used to streamline how applicable requirements are described in an application, provided the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. The permitting authority may allow the 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 (e.g., publically available documents include regulations printed in the Code of Federal Regulations or its State equivalent).

Columbia’s permit application contains codes or citations associated with applicable requirements that are readily available; that is, these codes refer to federal and state regulations that are printed in rule compilations and also are available on-line. Because not all of the applicable requirements derived from Columbia’s existing preconstruction permits are in rule compilations or available on-line, Columbia attached these permits to its application. Another applicable requirement that is not clearly described in the regulations is the provision corresponding to the NO_x RACT requirements of 6 NYCRR § 227-2.4(c), because Columbia has a choice of compliance options according to that regulation. In this case, however, the information submitted by Columbia on pages 12 and 13 of its application form adequately describes its chosen compliance option. The application in this case included a complete citation

of the applicable requirement, including a description of the applicable emissions limit. Thus, EPA believes that there was no need for a more elaborate narrative description. Therefore, the petition is denied on this issue.

This issue regarding citations also was addressed in detail in the July 18, 2000, letter from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection to Robert Warland, Director, Division of Air Resources, DEC. (“July 18, 2000 letter”) The letter explained that the DEC application form and/or instructions for its operating permits program should be clarified with respect to the “non-codified” documents that include applicable requirements, such as NO_x RACT plans, pre-construction and operating permits, etc. EPA pointed out that the application and instructions should make it clear that all supporting information is required in the application with clear cross-referencing to the emission point and applicable requirement cited in the printed form. Accordingly, in its November 16 commitment letter the DEC agreed to amend the application instructions to ensure that applicants include all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing.¹⁰ The DEC is aware that the documentation necessary to insure the adequate public participation called for in 40 CFR § 70.7(h) must be available with the application during the public comment period.

4. Statement of Methods for Determining Ongoing Compliance

Petitioner’s final point is that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. In Section IV - Emission Unit Information of DEC’s application form, there is a block labeled “Monitoring Information” that asks applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. Columbia completed this section for all but one of the listed applicable requirements. As described above, the application (pages 8 to 12) lists monitoring that is being used to determine compliance with regulations for opacity, NO_x RACT, sulfur content in fuel, and potential to emit limits on NO_x and SO₂. Although the facility did not specifically mention in the application how it will monitor its compliance with the NSPS Dc, the monitoring for opacity and sulfur content that is conducted for other purposes may also serve as monitoring for the NSPS. Because the application included a description of or reference to applicable test methods and was correctly completed, Petitioner’s fourth issue regarding the application form is without merit and accordingly is denied.

C. Statement of Basis

Petitioner’s third claim alleges that the proposed permit is accompanied by an insufficient statement of basis. According to 40 CFR § 70.7(a)(5), each draft permit should include a

¹⁰ As previously discussed, DEC amended its application form and instructions in accordance with the November 16 commitment letter.

statement that sets forth the legal and factual basis for the draft permit conditions. Petition at page 7. Petitioner refers to the “Permit Description” included with Columbia’s draft permit as the statement of basis in this case.

The requirement for the “statement of basis” is found in 40 CFR § 70.7(a)(5) which states:

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 permitting authority shall send this statement to EPA and to any other person who requests it.

The statement of basis is not a part of the permit itself. It is a separate document¹¹ which is to be sent to EPA and to interested persons upon request. This requirement for the statement of basis is not contained in 40 CFR § 70.6 which sets forth the required contents of the permit. In fact, 40 CFR § 70.6(a) requires that the permit contain all the explanation that ordinarily would be necessary to determine whether the permit conditions have been accurately expressed. For example, the permit must contain the references to the applicable statutory or regulatory provisions forming the legal basis of the applicable requirements on which the conditions are based. 40 CFR § 70.6(a)(1)(i).

A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. It should highlight elements that EPA and the public would find important to review. The statement should highlight anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, any source-specific monitoring requirements, and the permit shield.

EPA has recently provided guidance to permitting authorities that addresses the contents of a “statement of basis” in terms that aid both EPA and the public.¹² As a result, the DEC has incorporated certain elements into its “permit review reports.”¹³ In the cited documents, EPA

¹¹ Unlike permits, statements of basis are not enforceable, do not set limits and do not otherwise create obligations as to the permit holder.

¹² 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 March 11, 2001; November 16, 2001 DEC commitment letter; 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 for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2002).

¹³ In order to comply with the requirements of 40 CFR § 70.7(a)(5), DEC has committed to prepare and
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explains the “statement of basis” is to be used to highlight significant decisions or interpretations that were necessary to issuing the permit. These reports are not intended to be redundant to the permit but to assist in reviewing what is in the permit. Additionally, in a December 22, 2000 Order responding to petition for objection to the Fort James Camas Mill permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring method(s) be documented in the permit record. In re In the Matter of Fort James Camas Mill, (“Fort James”), Petition No. X-1999-1, at page 8 (December 22, 2000) (available on the internet at: http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions/fort_james_decision1999.pdf).

The regulation at 40 CFR § 70.8(c)(3)(ii) requires that the permitting authority submit any information necessary to review adequately the proposed permit. Accordingly, EPA may object to the issuance of a permit simply because of the lack of necessary information. The missing information could be a statement of basis or any other information deemed necessary to review adequately the draft permit in question. Since the statement of basis can serve a valuable purpose in directing EPA’s and the public’s attention to important elements of the permit and since it is important that EPA perform any reviews as quickly as possible, it is a required element of an approved program that EPA receive an adequate statement of basis with each proposed permit.

Both the draft permit of September 29, 1999 and the final permit of August 3, 2000 contained a Permit Description. Although this description does not provide all needed information on the permit,¹⁴ EPA has concluded, in this case, that Petitioner’s claims regarding the Permit Description do not warrant objection to the permit, for the reasons described below.

In this case, it is possible to achieve a sufficient understanding of a source using other available documents in the permit record, including the permit application, the permit descriptions contained in the draft and final permits, and DEC’s Responsiveness Summary. Although Columbia is subject to applicable requirements that rely on source-specific determinations,¹⁵ the permit record contained sufficient information describing these

¹³(...continued)

make available at time of issuance of draft permits, a “permit review report,” which will serve as DEC’s statement of basis. The contents of this permit review report are described in DEC’s November 16, 2001 commitment letter.

¹⁴ The permit description includes the nature of the “business” (central steam plant at a large university, consisting of four fossil fuel-fired boilers each rated at 99.5 million British thermal units per hour (mmBtu/hr), firing natural gas and residual fuel oil to generate steam for heating and cooling campus buildings); a discussion of the equipment and operations at the facility; air permit applicability; and a discussion of some compliance methods utilized at the facility.

¹⁵ The straightforward applicable requirements listed in this permit as applying to the boilers include: (1) the opacity requirements of 6 NYCRR § 227-1; (2) the limit of the sulfur content of the fuel oil to 0.30 percent by
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requirements. Accordingly, in this instance a more detailed explanatory document was not necessary to understand the legal and factual basis for the draft permit conditions. Furthermore, there is no evidence that the Petitioner was harmed by the flaws in Columbia's statement of basis. In fact, NYPIRG provided detailed and thoughtful comments on Columbia's draft permit establishing that it had a basic understanding of its terms and conditions.

While failure to include a comprehensive statement of basis with the draft permit does not, in this case, constitute a reason to object to this permit, EPA can object to a permit on such grounds. In this instance, the substantive purposes of the statement of basis requirements were met through other available documents in the permit record. Accordingly, EPA does not believe that the circumstances of this case warrant an objection to the Columbia permit and, therefore, denies the petition on this issue.

Nonetheless, DEC's permit issuance process now provides that a permit may not be issued in draft unless a permit review report has been prepared for the draft permit. This requirement also applies to issuance of draft permits for renewed, revised or modified permits. As discussed in detail in Section G, EPA is granting the NYPIRG petition to object to the Columbia permit on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also prepare a permit review report that meets the requirements of 40 CFR § 70.7(a)(5).

D. Annual Compliance Certification

Petitioner's fourth claim alleges that the proposed permit distorts the annual compliance certification requirement of the Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5). Petitioner alleges that the proposed permit does not require the facility to certify compliance with all permit conditions, but rather just requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." Petition at page 9. Specifically, 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. NYPIRG asserts that the only way of interpreting the compliance certification designation is as a way of identifying which conditions are covered by the annual compliance certification. Thus, NYPIRG asserts, permit conditions that lack periodic monitoring are

¹⁵(...continued)

weight pursuant to the requirements of 6 NYCRR part 225; and (3) New Source Performance Standards (NSPS) from 40 CFR part 60. The requirements that rely on source-specific determinations are (4) "Capping" emissions limits per 6 NYCRR § 201-7 and (5) the NO_x RACT requirements of 6 NYCRR § 227-2. As monitoring, Columbia's permit includes continuous emissions monitors (CEM) to determine compliance with the NO_x RACT requirement, continuous opacity monitors (COM), fuel meters and CEM for the capping, and record keeping of logs of fuel sulfur content. The additional monitoring that is needed to assure compliance is discussed below in sections G.7 and G.9 through G.14.

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.

EPA notes, first, that the language in the Columbia permit follows directly the language in 6 NYCRR § 201-6.5(e) which in turn, follows 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 the annual certification: (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. Columbia University's permit includes this language at Condition 14, Item 14.2.

EPA disagrees with Petitioner that “the basis of the certification” should be interpreted to mean that facilities are *only* required to certify the permit terms labeled as “compliance certification.” “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 14 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 references to “compliance certification” found in the permit terms do not appear to negate the DEC’s general requirement for compliance certification of terms and conditions contained in the permit. Because the permit and New York’s regulation require the source to certify compliance or noncompliance, annually for terms and conditions contained in the permit, EPA is denying the petition on this point.

Nonetheless, in its November 16, 2001 letter, the DEC has committed to include additional clarifying language regarding the annual compliance certification in draft permits issued on or after January 1, 2002, and in all future renewals so that the permit includes all the compliance certifications necessary to avoid any misunderstanding such as that Petitioner pointed out might occur.

Although this issue does not present grounds for objecting to the Columbia permit, the DEC has nonetheless elected to take the appropriate steps to improve the administration of its program in this regard. As discussed in detail in Section G, below, EPA is granting NYPIRG’s petition on this permit on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also add language to clarify the requirements of the annual compliance certification reports.

E. Startup, Shutdown, Malfunction

Petitioner's fifth claim is that the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it sanctions the systematic violations of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. Petition at page 9. Petitioner asserts that 6 NYCRR § 201-1.4 conflicts with EPA guidance and must be removed from the state implementation plan (SIP) and federally enforceable permits as soon as possible. In addition, Petitioner asserts that the permit lacks proper limitations on when a violation may be excused and lacks sufficient public notice of when a violation is excused.

Permit condition 5, states, in part, "At the discretion of the commissioner a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable." Petitioner argues that condition 5 is so expansive that it makes emission limits very difficult to enforce and departs from EPA guidance that requires facilities to make every reasonable effort to comply with emission limitations even during startup/shutdown, maintenance and malfunction conditions.¹⁶ Accordingly, Petitioner asserts, the Administrator must object to the proposed permit because it does not include conditions to assure compliance with all applicable requirements as required by 40 CFR § 70.6(a)(1).

The four boilers operated by Columbia undergo frequent startups and shutdowns and require regular maintenance. The nature of this process and the control devices employed is such that more emissions will inherently be produced during these times than during steady-state operation, especially in the case of opacity. These boilers vent to one stack, which is equipped with continuous monitors for opacity, oxygen, and nitrogen oxides. Columbia records all instances of opacity deviations and reports them to DEC quarterly. Columbia appears to be complying with the SIP at 6 NYCRR § 201.5(e)(1) and the State rule at 6 NYCRR § 201-1.4 (a) which allow that detailed reports of maintenance activities need not be submitted if the source employs continuous monitors and submits quarterly monitoring reports.

¹⁶ See Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," (Bennett Memo September 1982); memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," dated February 15, 1983 (Bennett Memo February 1983); Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation to Regional Administrators, Regions I - X, titled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated September 20, 1999 ("September 1999 Guidance"); and Memorandum from Eric Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards to Regional Administrators, titled "Re-Issuance of Clarification - State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated December 5, 2001 ("December 2001 Clarification").

Although DEC receives data from Columbia indicating deviations from the applicable opacity standard, EPA is not aware that DEC has issued any NOV's or initiated enforcement action against Columbia for any opacity violations. In the reports that EPA has reviewed, Columbia does not explicitly request to be excused pursuant to 201-1.4. For example, in the annual certification dated August 25, 2001, Columbia reported a complete inventory of deviations by quarter and explained that each was due to start-ups, shut-downs and malfunctions. Columbia also reported that the corrective actions taken included revisions to maintenance procedures and revisions to the soot blowing schedule.

EPA is not aware of, and Petitioner has provided no evidence of, any instance where DEC relied on the excuse provisions of 6 NYCRR § 201-1.4 or the SIP at 6 NYCRR § 201.5(e) to provide blanket excuses for non-compliance merely because the incidents were reported. Rather Condition 5 provides that it is the DEC's decision whether to pursue enforcement activities on a case-by-case basis, through the exercise of its enforcement discretion.

With respect to enforcement discretion, EPA recognizes and approves such provisions in State SIPs in accordance with EPA guidance, and Condition 5 is modeled upon a provision in the New York SIP. It sets forth the notification requirements that a facility owner and/or operator must follow in the case of excess emissions caused by start-up, shutdown, malfunctions, or upsets. The conditions provide a detailed and thorough procedure to report and correct such violations. These notice requirements are included in the approved SIP and Columbia must adhere to them. Moreover, failure to notify the DEC of the emission violation on a timely basis precludes consideration of the reason for the emission violation in order to mitigate the enforcement response. This procedure is required for occurrences where a source hopes to avail itself of enforcement discretion, but does not establish any right to be excused for the excess emission occurrence.

It is EPA's view that the Act, as interpreted in EPA policy, does not allow for automatic exemptions from compliance with all applicable SIP emissions limits during start-up, shut-down, malfunctions or upsets. Further, improper operation and maintenance practices do not qualify as malfunctions under EPA policy. *See* note 16, *supra*. To the extent that a malfunction provision, or any provision giving substantial discretion to the state agency broadly excuses sources from compliance with emission limitations during periods of malfunction, EPA believes it should not be approved as part of the federally approved SIP. *See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1, ("Pacificorp"), at page 23 (November 16, 2000), available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>.

In any event, as explained in the Pacificorp decision, "even if the provision were found not to satisfy the Act, EPA could not properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the 'applicable requirement' as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP

provisions.” See Pacificorp at 23-24.

The position set forth in Pacificorp was reiterated in the December 2001 Clarification which confirms that EPA’s September 20, 1999 guidance entitled “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (“September 1999 Guidance) provides guidance to States and EPA regarding SIP provisions related to excess emissions during malfunctions, startups, and shutdowns. It was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA. Similarly the September 1999 Guidance was not intended to affect existing permit terms or conditions regarding malfunctions, startups and shutdowns that reflect approved SIP provisions including opacity provisions, or to alter the emergency defense provisions at 40 CFR § 70.6(g). Existing SIP rules and 40 CFR § 70.6(g) may only be changed through established rulemaking procedures and existing permit terms may only be changed through established permitting processes. Thus, EPA did not intend the September 1999 Guidance to be legally dispositive with respect to any particular proceedings in which a violation is alleged to have occurred. Rather, it is in the context of future rulemaking actions, such as the SIP approval process, that EPA will consider the September 1999 Guidance and the statutory principles on which this Guidance is based. See December 2001 Clarification at p. 1.

In sum, Condition 5 relates to SIP provisions governing the exercise of enforcement discretion regarding excess emissions and does not, itself reduce the effectiveness of any applicable requirements derived from State requirements. The DEC’s unavoidable non-compliance and emergency requirements are part of the approved SIP. Whether the SIP meets EPA’s guidance is not an appropriate subject for an objection to a specific permit and is not a reason to object to the permit. Accordingly, the petition is denied on this point.

NYPIRG further asserts that the requirement of 40 CFR § 70.6(a)(1), that permits contain monitoring sufficient to assure compliance, also applies to the excuse provision of 6 NYCRR § 201-1.4 to assure that the provision is not abused. EPA agrees with this general proposition. However, since the DEC Commissioner has discretion to excuse certain violations, any abuse of the excuse provision would be by DEC and not by the source for simply asking for the excuse. In accordance with the provisions of the title V permit, the source is required to monitor compliance, and any violation for which an excuse is sought will be included in the facility’s deviation reports, semi-annual reports and annual reports. Petitioner has not demonstrated that any additional monitoring of the source is required to assure proper exercise of the excuse provision by DEC.

As previously discussed, DEC’s current rules at 6 NYCRR § 201-1.4 and the SIP at § 201.5(e) provide the Commissioner with a discretionary authority to excuse unavoidable non-compliance and violations when certain conditions are met. Moreover, 6 NYCRR § 201-6.5(c)(3)(ii), as amended, clarifies that the DEC’s own rules do not authorize expansion of the Commissioner’s discretion. The DEC’s rules, as amended, provide that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative

defense during start-up, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). DEC's response to comment letter to EPA and NYPIRG on the draft title V permit for Columbia¹⁷ demonstrates to EPA that the DEC's interpretation and application of section 201-1.4 is not inconsistent with the Act, as interpreted by EPA in its guidance. In DEC's Response to Comments Document, DEC acknowledges that it "cannot exercise more discretion than federal requirements allow." Responsiveness Summary re: General Permit Conditions, No. 10, Page 4 of 7.

The permit term should be revised to be consistent with requirements of the Act and the applicable scope of 6 NYCRR § 201-1.4. Accordingly, for permits issued after January 1, 2002, DEC has committed to move this condition to the State side of the permit.¹⁸ EPA believes that the Commissioner is aware of the limits on the authority to excuse emission exceedances existing under the DEC's own regulations, and believes that it is unlikely that the Commissioner will exceed the discretion allowed under the State regulations. Accordingly, the petition is denied with respect to this issue.

Petitioner raised several additional points on the issue of start-up, shutdown and malfunction which warrant further discussion.

1. Petitioner states that New York's regulation 6 NYCRR § 201-1.4 and the corresponding language in the permit do not conform to the September 1999 Guidance. The Petitioner generally alleges that the New York regulation has created a loophole for facilities complying with emission limits because facilities routinely use the excuse provision without proving the violation was unavoidable.

Petitioner suggests that terms addressed in the September 1999 Guidance should be added to the permit. We conclude that it is not necessary for the DEC to restate the September 1999 Guidance in the permit as the guidance is policy and does not constitute an applicable requirement. *See* December 2001 Clarification. In addition, in its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it would include the provision of 6 NYCRR § 201-1.4 on the State side of all permits. *See* note 18, *supra*.

¹⁷ Letter from Elizabeth Clarke, Environmental Analyst, DEC, Region 2, to Steven C. Riva, Chief, Permitting Section, EPA Region 2, dated June 16, 2000, Responses to NYPIRG Comments re: General Permit Conditions, number 10, Unavoidable Noncompliance and Violations, page 4 of 7. The response reads, "This condition is as explicit as necessary and does not excuse or diminish, in any way, the accountability of a source for pollution exceedances. It sets forth a practical procedure for notifying the agency...[T]he agency uses engineering judgment on a case-by-case basis to make a determination as to the unavoidable status of an exceedance. The department also cannot exercise more discretion than federal requirements allow."

¹⁸ DEC is substantially meeting this commitment. *See* note 3. As discussed in detail in Section G, below, EPA is granting NYPIRG's petition on this permit on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also remove the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of the permit, and incorporate the condition into the state side of the permit.

2. Petitioner asserts the permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation “unavoidable.” As discussed in section F, *infra*, the commissioner discretion conditions apply only to State requirements and cannot apply to federally promulgated requirements. In its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it would include the revised provision of 6 NYCRR § 201-6.5(c)(3)(ii) on the federal side of all permits. DEC is substantially meeting this commitment. *See* note 3, *supra*.

3. Petitioner states that all significant terms must be defined in the permit. The Petitioner alleges that the permit is not practically enforceable because the permit lacks definitions for “malfunction,” “upset,” and “unavoidable.” EPA disagrees with the Petitioner on this issue. The purpose of the permit is to ensure that a source operates in compliance with all applicable requirements. To the extent Petitioner argues that this requirement extends to compliance with the SIP-based commissioner discretion provision, EPA agrees. However, the lack of definitions for the terms “malfunction,” “upset” or “unavoidable” does not, on its face, render the permit unenforceable. These are commonly used regulatory terms and are not so inherently vague as to render a permit using these terms practically unenforceable. Moreover, Petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. In addition, in its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it will include the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, on the State side of all permits. *See* note 18, *supra*. This will help further assure that the excuse provision is not expanded beyond its proper bounds.

4. Petitioner also states that the permit must define reasonably available control technology (RACT). DEC’s current rules at 6 NYCRR § 201-1.4(d) and the SIP at 6 NYCRR § 201.5 require facilities to use RACT during any maintenance, startup/shutdown, or malfunction condition. The Petitioner claims that the proposed permit does not define what constitutes RACT or how the government or public knows whether RACT is being utilized at those times. As explained above, EPA cannot properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the “applicable requirement” as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions. Pacificorp at 23-24; *see also* December 2001 Guidance at p.1.

Moreover, RACT is a defined term in the New York SIP. The SIP specifically defines RACT as the “[l]owest emission limit that a particular source is capable of meeting by application of control technology that is reasonably available, considering technological and economic feasibility.” 6 NYCRR § 200.1(bp). There is an identical definition in the current New York regulations that are not part of the approved SIP. 6 NYCRR § 200.1(bs). As explained above, EPA cannot reopen the issue of whether the SIP provision should have required a more specific definition of RACT in the context of deciding whether to object to a title V permit. In any event, NYPIRG has failed to demonstrate that the RACT provision is deficient in this case. 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 during such a period of excess emissions will depend on both the nature of the violation and the technology available when the violation occurs. The SIP provision allows that determination to be made on a case by case basis by the Commissioner if and when she chooses to exercise her authority to excuse a violation.

Columbia is also subject to an opacity standard under the NSPS. The federal regulation at 40 CFR § 60.11(d) explains what facility owners must do during times of SSM to minimize emissions. Rather than using the expression “reasonably available control technology,” § 60.11(d) uses the phrase, “good air pollution control practice.” This rule further explains that the Administrator will determine whether acceptable procedures are being used based on information including, but not limited to, “monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.” Columbia may review these data to determine if it did everything it should have to minimize emissions during SSM.

5. Petitioner next asserts that any title V permit issued to Columbia must require prompt written reporting of all deviations from permit requirements including those due to startup, shutdown, malfunction, and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B). Petitioner states that the permit must require written reports of all deviations.

As written, the permit only requires the permittee to inform DEC of an exceedance when seeking to exercise the excuse provision of 6 NYCRR § 201-1.4. Otherwise, the permit provides that written notifications be provided when requested to do so by the Commissioner. Prompt reporting of deviations is required by 40 CFR § 70.6(a)(3)(iii)(B) which states,

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

Reporting in order to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See* Discussion in Part F *infra*. For a violation to be properly excused, the DEC must properly apply the regulation authorizing such discretion and must properly document its findings to ensure the rule was reasonably applied and interpreted. As further discussed below, EPA denies the petition on this point.

F. Prompt Reporting of Deviations

Petitioner’s sixth claim is that the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). Petition at

page 15. The Petitioner states that the only prompt reporting of deviations is that required by 6 NYCRR § 201-1.4, which governs unavoidable noncompliance and violations during necessary scheduled equipment maintenance, start-up/shutdown conditions and upsets or malfunctions. *See* Condition 17, Item 17.2 (ii) of the final permit. Petitioner argues that any other deviations, including situations where the permittee could have avoided a violation but failed to do so, will not be reported until the six-month monitoring report. The Petitioner alleges that six months cannot be considered “prompt reporting” in all cases.

EPA agrees with Petitioner’s comment. EPA raised this issue with DEC in the July 18, 2000 letter at Attachment III, item 2. The DEC may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. In any case, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. As discussed above, EPA does not consider reports submitted for the purpose of preserving potential claims of an excuse to meet prompt reporting requirements because these reports are optional, and they may not include all deviations, instead only those potentially unavoidable violations that the source seeks to have excused. All deviations must be reported regardless of whether the source qualifies for the excuse. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case concern 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).¹⁹

EPA has addressed the prompt reporting requirement with the DEC in order to clarify how the DEC will properly exercise this discretion. In the November 16 commitment letter, DEC agreed that for all permits issued on and after January 1, 2002, it will include a requirement for reporting deviations consistent with 6 NYCRR § 201-6.5(c)(3)(ii). Indeed, DEC is including such prompt reporting language in each permit that is now issued. For example, with respect to criteria pollutants, DEC now requires in every permit that, “For emissions...that continue for more than two hours in excess of permit requirements, the report must be made within 48 hours.” Additionally, DEC is now requiring in every permit that, “A written notice, certified by a responsible official consistent with 6 NYCRR Part 201-6.3(d)(12), must be submitted within 10 working days of the occurrence.” EPA finds DEC’s new standard permit conditions setting forth procedures for prompt reporting to be reasonable and compatible with the federal regulations at 40 CFR § 71.6(a)(3)(iii)(B).

As discussed in detail in Section G, below, EPA is granting NYPIRG’s petition on this permit on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also incorporate these additional prompt reporting requirements into the permit. Therefore, EPA denies the petition on this issue.

¹⁹ These provisions detail the prompt reporting requirement applicable to sources under the federal operating permit program.

G. Monitoring

Petitioner's seventh claim is that the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable. Petition at page 16. The Petitioner addresses individual permit conditions that allegedly either lack periodic monitoring or are not practically enforceable.²⁰ The specific allegations for each permit condition are discussed below. EPA is granting Petitioner's request that the Administrator object to issuance of the permit for several of the allegations, and denying Petitioner's request for the remaining allegations, as delineated below.

Section 504 (a) and (c) of the Act makes it clear that each title V permit must include "conditions as are necessary to assure compliance with applicable requirements of [the Act], including the requirements of the applicable implementation plan" and "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." In addition, Section 114(a) of the Act requires "enhanced monitoring" at major stationary sources, and authorizes EPA to establish periodic monitoring, recordkeeping, and reporting requirements at such sources. *See also* CAA section 504(b) (EPA may promulgate regulations under title V prescribing procedures and methods for monitoring that are sufficient for determining compliance).

The regulations at 40 CFR § 70.6(a)(3) specifically require that each permit contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring). In addition, 40 CFR § 70.6(c)(1) requires that

²⁰ With respect to lack of what the Petitioner refers to as adequate "periodic" monitoring, NYPIRG cites two separate regulatory requirements: 40 CFR § 70.6 (a)(3) which requires monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance; and § 70.6 (c)(1) which requires permits to contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. In all the monitoring issues presented here, where we have concluded that additional monitoring is needed, either the underlying applicable requirement imposes no monitoring of a periodic nature or the applicable rule contains sufficient periodic monitoring but it was not properly carried over into the permit. Therefore, we are addressing them exclusively under 40 CFR § 70.6(a)(3) and do not rely on 40 CFR § 70.6(c)(1). The scope of applicability of § 70.6(a)(3) was addressed by the US Court of Appeals for the DC Circuit in *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). The court concluded that, under section 40 C.F.R. §70.6(a)(3)(i)(B), the periodic monitoring rule applies only when the underlying applicable rule requires "no periodic testing, specifies no frequency, or requires only a one-time test." *Id.* at 1020. The *Appalachian Power* court did not address the content of the periodic monitoring rule where it does apply, i.e., the question of what monitoring would be sufficient to "yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as is required by 40 C.F.R. §70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2). It is this issue that is raised by the petition at bar. With respect to practical enforceability, the Petitioner cites the U.S. EPA's *Periodic Monitoring Guidance*, September 15, 1998, at 16 which has since been vacated by *Appalachian Power*.

all part 70 permits contain, “Compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.” These requirements are also incorporated into New York’s regulations at 6 NYCRR § 201-6.5(b).

Decisions by the U.S. Court of Appeals for the District of Columbia Circuit shed light on the proper interpretation of these requirements. Specifically, the court addressed EPA’s compliance assurance monitoring (“CAM”) rulemaking (62 Fed. Reg. 54940 (1997) (promulgating, *inter alia*, 40 CFR part 64) in Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Cir. 1999), and reviewed EPA’s periodic monitoring guidance under title V in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

EPA first summarized the relationship between Natural Resources Defense Council and Appalachian Power and described their impact on monitoring provisions under the Clean Air Act in two orders responding to petitions under title V requesting that the Administrator object to certain permits. See In re Pacificorp and In re Fort James Camas Mill. Please see pages 16-19 of the Pacificorp order for EPA’s complete discussion of these issues. In brief, given the clear, multiple statutory directives for adequate monitoring in permits, and in accordance with the D.C. Circuit decisions, EPA concluded that where the applicable requirement does not mandate any periodic testing or monitoring, the requirement of § 70.6(c)(1) that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit.” 40 CFR § 70.6(a)(3)(i)(B). EPA also pointed out that where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such circumstances, EPA found, the separate regulatory standard at § 70.6(c)(1) applies instead. Furthermore, where 70.6(a)(3)(i)(B) applies, it satisfies the general sufficiency requirement of 70.6(c)(1). The factual circumstances of Pacificorp and Fort James Camas Mill are analogous to this case. Accordingly, the reasoning of those decisions is being followed in this case as well.

Facility-Specific Petition Issues ²¹

1. Condition 3 (Maintenance of Equipment)

Petitioner alleges that general permit Condition 3, item 3.1, citing 6 NYCRR § 200.7, should not be included in the Columbia permit unless Columbia University actually operates pollution control equipment. This condition states that pollution control equipment should be maintained according to ordinary and necessary practices, including manufacturer specifications.

²¹ Issues G.1-3, 5, 6 and 8-10 were addressed previously. (see Footnote 2) Most recently, these issues were addressed in the Order responding to the “North Shore Towers” petition, on pages 24-29.

The Petitioner also alleges that if there is control equipment, such condition must be supplemented with monitoring. Petition at page 17. In DEC's Response to Comments, DEC stated that this condition is a general requirement that is applied to all air permits, and that the condition is included even where no applicable requirement necessitates the use of control equipment. DEC further stated that control equipment maintenance plans are typically submitted as part of the application, but do not become enforceable parts of the permit. Responsiveness Summary re: General Permit Conditions, No. 8, page 3 of 7.

Petitioner states that if 6 NYCRR § 200.7 does not apply to Columbia University, this condition must be deleted from the permit. EPA disagrees with Petitioner. Many SIPs contain generic requirements for facilities to maintain all equipment in proper condition. These generic requirements are typically provided in the general permit conditions section of the title V permit. Permitting authorities have discretion to develop such general permit conditions that apply to all title V sources. EPA also is aware that some facilities employ control equipment although not mandated to do so by any specific applicable requirement; thus, including the general SIP condition is not improper.

In this case, the Emission Unit Definition at Condition 24, Item 24.1 of the final permit states that all four boilers have low NO_x burners and one boiler also has flue gas recirculation (FGR). Therefore the record is clear that this general condition does have practical application to Columbia, and it is proper to include it in the permit.

Furthermore, EPA disagrees with Petitioner that monitoring must be added to this provision. Where control equipment is installed pursuant to an applicable requirement, DEC includes such requirement under the emission units section of the title V permit, not the general permit condition section. To support such a requirement, DEC would then include monitoring sufficient to assure compliance. In this particular case, the documents available to EPA indicate that Columbia operates and maintains its control devices at its own option, rather than pursuant to a requirement to do so. Therefore, EPA is not mandating that any specific monitoring for the control equipment be included at this time. In cases where a control device is maintained pursuant to an applicable requirement, monitoring should be provided under the emissions unit section as the DEC deems necessary, and not under the general permit condition section of title V permit. Therefore, EPA denies the petition on this point.

2. Condition 4 (Unpermitted Emission Sources)

Petitioner also raises concern about Condition 4, Item 4.1, relating to unpermitted emission sources. The condition, restating 6 NYCRR § 201-1.2 (adopted March 20, 1996), provides that if an existing emission source was subject to the permitting requirements of 6 NYCRR part 201 at the time of construction or modification and the owner or operator failed to apply for a permit, then the owner or operator must now apply for a permit. The condition further states that the emission source or facility is subject to all regulations that were applicable to it at the time of construction or modification and any subsequent requirements applicable to

existing sources or facilities. Petitioner asserts that the condition is confusing because if the facility is subject to NSR but failed to obtain a required NSR permit, a clear requirement to obtain an NSR permit should be in the permit. Petitioner argues that it is unclear from the permit or the application whether the facility is subject to a pre-existing permit. Petitioner is also concerned that a source may not be subject to penalties if it applies for a permit as required by condition 4.1(a). Petition at page 19.

EPA notes that this provision does not relieve the permitting authority or permittee from including construction permit conditions in the permit. In addition, if the facility is in violation because it does not have the required construction permits, the operating permit must include a compliance schedule. 40 CFR § 70.6(c)(3). Condition 4 expands on what is required by the SIP at 6 NYCRR § 201.2(a) – that no person shall commence construction or proceed with a modification of an air contamination source without having a valid permit – by naming some additional terms for those who violate permitting requirements.

NYPIRG's specific concern that Columbia's permit shield precludes the imposition of penalties is unfounded. The permit shield provides that compliance with the conditions of the permit is deemed to be compliance with applicable requirements for those applicable requirements specifically identified in the permit or those requirements that the State specifically identifies as not-applicable. 40 CFR § 70.6(f). A permit shield can not exonerate or protect from enforcement a facility that lacks required construction permits. Therefore, if it were later discovered that Columbia lacks a construction permit, the permittee would need to apply for the appropriate permits, the title V permit would be reopened, and the facility may be subject to appropriate enforcement actions.

In the present case, Columbia's Permit Description states that neither PSD nor NSR are applicable to the facility, because of federally enforceable capping limitations. These limits were applied to Columbia through previous construction permits. This description, together with the statement in Conditions 37 and 38 that a PSD cap is being set, constitute an extension of the permit shield. Below in sections G.7., G.10., G.13. and G.14., EPA is granting this petition with respect to several flaws in those capping limitations. Nonetheless, Columbia did apply for and receive construction permits from the DEC, as was its obligation. The effect of the permit shield in this case is that Columbia is shielded from the need to apply for a major PSD permit for the currently operating boilers. Any other need for construction permits that may exist from prior actions, or that arise in the future, is not protected by the permit shield, nor is this obligation compromised by Condition 4. Finally, Condition 4 directs what the permittee must do to achieve compliance; it does not address the penalties that may result from non-compliance. Therefore, the condition does not preclude the public, DEC or EPA from bringing an enforcement action and seeking penalties from the facility. Accordingly, EPA denies the petition on this point.

3. Conditions 7 and 8 (Air Contaminants in Control Devices)

Petitioner alleges that the permit must specifically explain how Conditions 7 and 8,

addressing the handling of air contaminants collected in air cleaning devices, applies to Columbia University. Petitioner further asserts that the permit must include recordkeeping requirements to assure that the facility complies with these requirements. Petition at page 19.

EPA denies the petition on this point. The control devices installed on the boilers at Columbia University do not collect air contaminants. As such, there are no collected materials that require recycling or disposal, or which require special handling to avoid reintroduction to the atmosphere. Further, as stated in response to issue G.1, above, States have discretion to include language from the general provisions of the SIP as general permit conditions. Where an applicable requirement specifies a control device that collects contaminants, then appropriate monitoring requirements must be included under the emissions unit section of the title V permit.

4. Condition 10 (Exempt Activities)

Petitioner states that the activities claimed as Exempt Sources as per 6 NYCRR § 201-3.2(c)(44) may not truly fall under the definition of research and development (R&D) activities, and therefore may not truly qualify for exemption from inclusion in the title V permit. Petitioner particularly highlights a concern about Columbia's use of coatings that emit VOC's and air toxics. Petition at page 20. In its application, Columbia lists three exempt graphic arts processes, 160 exempt laboratory exhaust vents, and 10 exempt R&D activities. EPA has reviewed the regulatory status of these specific activities, and we agree that DEC has correctly exempted these activities from the permit.

New York's title V rules regarding exempt sources state that: "Owners and/or operators of stationary sources subject to Subpart 201-6 may consider the activities listed under Section 201-3.2 to be exempt activities unless such activities are subject to an applicable requirement." See 6 NYCRR § 201-3.1(b). Thus, only if there are federally enforceable requirements that apply to these R&D activities, would they not be considered exempt under 6 NYCRR § 201-3.2. EPA has found no such requirements, thus the title V permit need not be reopened for this reason.

Columbia's application states that its graphic arts processes qualify for exemption from air pollution control requirements in the SIP at 6 NYCRR part 234. In stating this, Columbia also asserted that the VOCs in its inks are not A-rated contaminants, thus further exempting the graphic arts processes from regulation under 6 NYCRR § 212.7(p).²² In order to understand and assist the review of the permit, when DEC prepares a statement of basis (*See* Section C, *supra*), it should also specify that the materials used in Columbia's graphic arts processes have not been

²² According to 6 NYCRR § 212.9, an "A" rated contaminant is, "An air contaminant whose discharge results, or may result, in serious adverse effects on receptors or the environment. These effects may be of a health, economic or aesthetic nature or any combination of these." Also according to 6 NYCRR § 212.9, DEC has the discretion to consider the emission rate potential in addition to several other factors when considering how to rate a contaminant.

given an A-rating.

EPA believes there is enough information about the nature of the R&D activities to determine the applicability of title V. According to the SIP at 6 NYCRR § 201.6(j), laboratory exhaust vents are exempt from permitting. This is also consistent with NYSDEC's current regulation at 6 NYCRR § 201-3.2(c)(40), which exempts laboratory exhaust systems from permitting requirements.

The information provided in the List of Exempt Activities attached to the application indicates that Columbia's laboratory operations are used for academic purposes, and are vented from the same buildings where academic research activities are conducted. In the preamble to its proposed revisions to the rules at 40 CFR part 70, EPA suggested a definition of R&D activities that may be relevant to the current discussion:

“Research and development activities means activities conducted to test more efficient production processes or methods for preventing or reducing adverse environmental impacts, provided that the activities do not include the production of an intermediate or final product for sale or exchange for commercial profit, and activities conducted at a research or laboratory facility that is operated under the close supervision of technically trained personnel the primary purpose of which is to conduct research and development into new processes and products and that is not engaged in the manufacture of products for sale or exchange for commercial profit, except in a de minimis manner.”

(60 FR 45565, August 31, 1995)

This definition focuses on the intent of the research activity, not the nature of it. Therefore, if the purpose of the processes described on the exemption form of Columbia University's application is not the sale for profit of a manufactured product, then it is reasonable to classify these activities as R&D for purposes of air permitting. The SIP at 6 NYCRR § 228.1(h)(1) reflects this principle by specifically exempting all R&D activities that involve surface coating, which “produce a product for study rather than eventual sale.” Columbia's primary standard industrial classification code is in major group 82, Educational Services. The information in the record before EPA does not indicate that Columbia engages in the sale for profit of property related to these activities. Because EPA sees no deficiency in the permit as to this issue, we deny the petition.

5. Condition 12 (Operation in Accordance With Applicable Plans)

Petitioner asserts that facility level Condition 12, Item 12.1(i), which says the facility shall operate in accordance with any accidental release plan, response plan or compliance plan, is problematic because the requirements in these documents should be incorporated into the permit as permit terms. The Petitioner asserts that such documents, if not incorporated, should be clearly cross referenced in the permit. Petitioner also suggests that this general condition should be deleted from the permit altogether since it adds nothing to the permit. Petition at page 20.

EPA disagrees with Petitioner that all types of plans must be 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 112(r) need not be incorporated into a title V permit. Thus, DEC's general condition is useful to the title V permit since it also serves to remind the source and the public of those plans that are not part of the title V permit. The general condition can serve as a reminder to the permittee to comply with and apply for requisite permit amendments on a timely basis. Therefore, this facility-level condition does serve a purpose.

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 start-up, shut-down 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 Petitioner does not allege any specific plans that should have been, but were not, included in the permit as an applicable requirement. Therefore, EPA is denying the petition on this issue.

6. Condition 14 (Risk Management Plans)

The Petitioner alleges that the general permit condition, Condition 14, Item 14.3, which states “[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 112(r). Petition at page 21.

While EPA agrees with Petitioner that this provision is very general and does not provide information regarding the applicability of § 112(r) to this particular source, we do not believe that the absence of such a determination provides a basis for EPA to object to this particular permit. Columbia did not submit a Risk Management Plan (RMP) to EPA under § 112(r) of the Act and 40 CFR part 68,²³ and given what we know about the type of emissions activities at this source, it is reasonable to assume that Columbia is not subject to these statutory and regulatory requirements. EPA finds that DEC's failure to specify whether Columbia is subject to § 112(r) and part 68 was therefore at most harmless error²⁴ that did not prejudice the Petitioner or hinder the Petitioner's ability to obtain clarification on this issue.

Furthermore, DEC did not take delegation of § 112(r), and therefore, EPA is responsible for implementing such requirements in New York. Because all applicable requirements must be

²³ All Risk Management Plans are filed with EPA and EPA can verify the submission of an RMP by contacting the RMP Reporting Center at (703) 816-4434.

²⁴ See e.g. Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States, 377 U.S. 235, 248 (1964) (an error can be dismissed as harmless “when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached”); Braniff Airways, Inc. v. Civil Aeronautics Bd., 379 F.2d 453, 466 (D.C. Cir. 1967) (“The Supreme Court's opinion reflects the concern that agencies not be reversed for error that is not prejudicial.”).

included in title V permits, during the early stages of implementation of New York's title V program, EPA asked DEC to include a general requirement regarding § 112(r) in all permits (based on language prepared by EPA). New York has included such general language on § 112(r) in all title V permits as requested by the EPA, and although we agree with Petitioner that this condition is not optimal, as discussed above, the circumstances of this case do not warrant objecting to the permit on this issue. Therefore, EPA denies the petition on this point.

7. Condition 24 (Emission Unit Definition)

The Petitioner remarks that the Emission Unit Definition at Condition 24, Item 24.1, includes a statement that only three of the four boilers are ever operated simultaneously. Petitioner asserts that this language must be separated and made into a free-standing requirement. Petition at page 21. DEC responded to Petitioner's comments by promising to include in the permit a requirement that the operator keep records in a log book indicating which boilers are in operation at a time.

EPA notes that the final permit contains no condition that assures this operating scenario is followed. There is no written requirement that the operator keep logs noting which boilers are in operation at a time. According to the construction permit issued on May 17, 1999 (1999 permit), the facility relies upon this operating scenario of maintaining one boiler off-line at all times for purposes of avoiding applicability to PSD for NO_x and SO₂. If all four boilers are ever operated simultaneously, the 1999 permit would be a sham, and Columbia's continued operation may trigger several major source permitting requirements. Therefore EPA agrees with Petitioner that a requirement to never operate more than three boilers simultaneously must be included as a federally enforceable applicable requirement in the permit. DEC must reopen the permit to include this requirement, as well as the monitoring condition it promised in its responsiveness summary.

EPA also notes that Columbia currently does keep daily records of operating hours of each boiler. In the monthly CEM Summary Reports, the operator indicates the number of hours each boiler operates each day. With this recording system, it is possible that a daily record will show all four boilers operating for some hours in a single day. In reviewing the records submitted as part of the semiannual report for the period February 3, 2001 to August 2, 2001, EPA noted several instances where all four boilers operated in one day. In each instance, one or more boilers had a very small number of hours, usually less than 10. EPA recommends that Columbia make a note in its log on days where each boiler operates some hours, certifying that the overlap in hours did not occur for more than three boilers at a time.

8. Condition 27 (Required Emission Tests)

Petitioner alleges that Condition 27 of Columbia University's permit which cites the requirements under 6 NYCRR § 202-1.1 is incomplete. The Petitioner comments that Condition 27, "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.” Petitioner cites EPA’s “White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program” dated March 5, 1996 (“White Paper 2”) 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. Such a practice, particularly if coupled with a permit shield, could create dual requirements and potential confusion.” Petition at page 22, citing White Paper 2, Section II.E.

EPA disagrees with Petitioner that the omitted clause from 6 NYCRR § 202-1.1 needs to be added to Condition 27. The permit unambiguously states that 6 NYCRR § 202-1.1 is an applicable requirement. In addition, 6 NYCRR § 202-1.1 places the burden of conducting and reporting any required emissions testing on the permittee. EPA does not find the omitted clause to have resulted in a defect in Columbia University’s permit since omitting who shall bear the cost of conducting and reporting mandatory emissions tests does not relieve the permittee from the requirement to perform and report such tests. Furthermore, 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 finds it unnecessary to change Condition 27 as requested by Petitioner. EPA denies the petition on this issue.

9. Condition 30 (Visible Emission Limits)

The petition contains many separate allegations of permit flaws regarding applicable requirements and monitoring relating to opacity emissions: (a) The Petitioner alleges that the permit lacks any kind of periodic monitoring to assure compliance with the applicable opacity limitation found in the SIP at 6 NYCRR § 211.3. Petition at page 22. The Petitioner specifically points to condition 30 which prohibits the facility-wide emissions at Columbia University from exceeding 20% opacity over a six minute average, and 57% in any single six minute period during each hour. (b) Petitioner remarks that unit-specific conditions 39 and 40, citing 6 NYCRR § 211.3, which DEC included in response to NYPIRG’s comments on the draft permit, have the same flaws as Condition 30. Petition at page 23; (c) Petitioner alleges that Conditions 43 and 45, citing 6 NYCRR § 227-1.3, do not reflect the current SIP, and do not contain sufficient monitoring. Petition at page 26.

(a) EPA disagrees with the Petitioner that the permit needs to include monitoring for the facility-level opacity limitation listed in Condition 30, citing the SIP at 6 NYCRR § 211.3. Because different emissions units can create opacity through different processes (combustion, material storage) and reach the atmosphere in different ways (stacked, fugitive), permittees may not know how to comply with a facility-wide monitoring condition. Indeed, an operator may be unable to conduct the same kind of monitoring at each opacity-emitting emissions unit at a facility. Therefore, it is more appropriate to create monitoring in the Emission Unit Level section of the permit. Although EPA denies the petition with respect to facility-level Condition

30, EPA discusses the adequacy of the unit-specific opacity monitoring in subsections 9(b), 9(c) and 11(a), below.

(b) In response to the allegation that the permit lacks any kind of periodic monitoring to assure compliance with the facility level opacity limitation found at Condition 30, citing the SIP at 6 NYCRR § 211.3, DEC created conditions 39 and 40, citing the maximum and average opacity allowed under § 211.3, respectively. These conditions apply specifically to the four boilers when firing natural gas or residual oil. As stated above in Section E., these boilers vent through a common stack which already has a continuous opacity monitor (COM) installed. Petitioner is correct that neither of these conditions specifies the method or frequency of monitoring that will be used to demonstrate compliance. Furthermore, the only place that mentions this COM is the Permit Description in the introduction to the permit.

EPA agrees with the Petitioner that the permit must include monitoring sufficient to assure compliance with Conditions 39 and 40, and is therefore granting the petition on this issue. Below in subsection 9(c), EPA discusses the reasons for granting this petition with respect to Conditions 43 and 45, which contain more restrictive limits than those in Conditions 39 and 40. The monitoring that is required for those conditions will suffice as monitoring for conditions 39 and 40. When DEC revises the permit to address this objection, it may list the required monitoring in each of these conditions, or DEC may wish to streamline these requirements following the guidance in White Paper 2.²⁵ Accordingly, DEC may choose to state that although compliance with the SIP at part 227 assures compliance with the SIP at part 211, both rules are applicable.

(c) Petitioner identifies a SIP-approved version of the opacity rule in 6 NYCRR part 227 that is different from the current State rule, and asserts the permit should include the SIP-approved rule. Petitioner also asserts here that periodic monitoring must accompany each opacity requirement that is placed in the permit. At the time Columbia University submitted its permit application, the SIP-approved opacity rule at 6 NYCRR § 227.4 was very different than the State's adopted rule. In 1999, DEC submitted a revised opacity rule to EPA for approval into the SIP. EPA approved this revised rule on April 19, 2000 (65 FR 20905), effective on May 19, 2000. Thus, DEC was correct to amend the permit between the draft and final versions, and incorporate the newly approved federally enforceable opacity rule in Conditions 43 and 45 of the final permit effective August 3, 2000. Thus, this portion of Petitioner's claim is without merit.

²⁵ In White Paper 2, EPA presented a procedure whereby States and sources can determine the set of permit terms and conditions that will assure compliance with all applicable requirements for an emissions point or group of emissions points so as to eliminate redundant or conflicting requirements. In each case, a source may request to subsume one or more less restrictive provisions into a more restrictive provision or create a new provision which contains all the most restrictive terms of the subsumed provisions. The permitting authority may grant this request, provided the permit and the statement of basis explain that compliance with the new or more restrictive rule assures compliance with the other rule(s). This analysis makes it clear that all related rules are applicable to the source, and are covered by the permit shield.

However, EPA agrees with Petitioner that Conditions 43 and 45 must include appropriate monitoring. Further, EPA notes that Columbia's COM is not installed voluntarily. New York's regulations at 6 NYCRR § 227-1.4(a) (and the SIP at 6 NYCRR § 227.5(a))²⁶ require facilities operating combustion installations with total maximum heat input capacity exceeding 250 mmBtu/hr to install, operate and properly maintain COMs. Columbia's boilers constitute a combustion installation, as defined in 6 NYCRR § 200.1(m), with a total heat input exceeding 250 mmBtu/hr. Thus, the facility must continue to operate and maintain its existing COMs. DEC must reopen and revise the permit to require this monitoring method. Also, the permit must specify that Columbia report its monitoring results on a quarterly basis according to 6 NYCRR § 227-1.4(b), which Columbia already does. Because EPA finds that DEC failed to properly include the periodic monitoring required by the SIP, EPA is granting the petition on this issue.

10. Conditions 36 and 49 (Process Permissible Emissions and Sulfur Limits)

Petitioner identifies various concerns relating to the sulfur-in-fuel limitations in the Columbia permit: (a) Petitioner identifies the 0.3% sulfur-in-fuel limit in Condition 36 and notes that "it appears that the sulfur content of fuel oil is being used in this permit as an aspect of the facility's PTE limit," and asserts that monitoring must be included to assure compliance with this limit. Petition at page 25; (b) Petitioner asserts that the prohibition on the use of fuel oil with a sulfur content of greater than 0.3 percent weight, listed at Condition 49, should be listed on the federally enforceable side of the permit, and should correctly cite the SIP-approved version of the sulfur rule rather than the current State rule. Petitioner further asserts that this provision lacks sufficient monitoring, and recommends that the DEC include a requirement for Columbia to maintain records for each fuel delivery and submit reports semiannually. Petition at page 27.

(a) Condition 36, Item 36.1 of the final permit, citing 6 NYCRR subpart 201-7, arranges the facility's PTE limits by process, distinguishing the emissions that result from oil burning from those resulting from gas burning. Where SO₂ PTE limits are identified under process 001, which is defined as oil burning, the DEC includes hourly and annual SO₂ limits together with the applicable fuel sulfur content limit, measured in percent weight. Because this sulfur in fuel requirement is included in Condition 36, Petitioner believes DEC may have intended it to be part of the method for limiting Columbia's PTE for SO₂. If this is the case, then Petitioner asserts monitoring is needed. EPA agrees with Petitioner that it is unclear whether the sulfur in fuel limit has a bearing on Columbia's SO₂ PTE limit, because there is no restriction in the permit on the quantity of fuel used. Therefore, when DEC reopens the permit as a result of EPA's objection in Section C, it must also include an explanation of why this limit was included here. If DEC is not using the fuel sulfur content limit as part of Columbia's PTE cap, then DEC may

²⁶ 6 NYCRR § 227-1.4(a), although state-enforceable, has been disapproved by EPA, and thus is not a part of New York's SIP. The governing federally enforceable regulation is from the 1972 version of the SIP, at 6 NYCRR § 227.5(a), which is similar to the current state rule except that it does not exempt gas turbines from this requirement.

remove this limit from Condition 36 if it so chooses, provided that a clear explanation is given. EPA sees no need to object to the lack of monitoring in Condition 36. EPA sees no need for sulfur monitoring to be duplicated in Condition 36 if other provisions of the permit adequately describe Columbia's fuel sulfur monitoring obligations. This issue is addressed below in subsection 10(b).

(b) NYPIRG notes that the current State version of 6 NYCRR subpart 225-1 is only enforceable by DEC, while the SIP version is enforceable only by EPA and the public. The rule pertaining to "Fuel Composition and Use" at 6 NYCRR § 225.1(a)(3), although no longer a current NY State rule, is still 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, EPA is granting the petition on this issue, and requiring DEC to reopen the permit to cite the correct applicable requirement, the SIP provision at 6 NYCRR § 225.1(a)(3). EPA is also requiring that DEC correct the error in Condition 49, where the process material is described as numbers 1 and 2 distillate oil. Columbia fires only residual oil in its four primary boilers.

EPA notes that, for facilities in New York City, the current State version of 6 NYCRR subpart 225-1 is environmentally equivalent to the version in New York's SIP. Because the substance of these two versions of part 225 is identical, DEC may wish to streamline these requirements following the guidance in White Paper 2. *See* note 25, *supra*. Accordingly, DEC may choose to subsume the State-only enforceable provision into the SIP provision, provided the permit and the statement of basis explain that compliance with the SIP-approved rule assures compliance with the State rule, while both rules are applicable.

EPA agrees with Petitioner that Condition 49 is not supported by adequate monitoring. In granting this issue, EPA is requiring DEC to incorporate the monitoring requirements from its own regulations at 6 NYCRR §§ 225-1.7 and 225-1.8(a) (and the SIP at 6 NYCRR §§ 225.6(b) and 225.7(a)).²⁷ These regulations require those facilities operating combustion installations with total maximum heat input capacity exceeding 250 mmBtu/hr, who do not operate SO₂ control devices, to retain records on sulfur content and submit periodic reports. In accordance with these regulations, DEC must revise the permit to require recordkeeping of fuel sulfur content per delivery of fuel, and reporting of these data semiannually, to assure compliance with the applicable requirement at 6 NYCRR § 225.1(a)(3). EPA also notes that although there are currently no requirements in the permit to record or report fuel oil sulfur content, Columbia is doing this anyway, as evidenced by the most recently submitted semiannual report.

11. Condition 41 (NSPS Subpart Dc)

²⁷ 6 NYCRR §§ 225-1.7 and 225-1.8(a), although state-enforceable, have not been submitted to EPA in their current form, and thus only the previous form is a part of New York's SIP. The governing federally enforceable regulation is from the 1981 version of the SIP, at 6 NYCRR §§ 225.6 and 225.7(a), which is environmentally equivalent to the current state rule.

Petitioner raises the concern that the permit does not include the proper applicable requirements from the Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units at 40 CFR part 60, subpart Dc. Petition at page 25.²⁸ (a) Petitioner complains that she is unable to locate any condition citing the NSPS at 40 CFR 60.43c(c), and such a condition must be included in the permit. Further, Petitioner asserts that Condition 41, addressing opacity requirements, must include appropriate periodic monitoring. Petition at page 26; (b) Petitioner remarks that the SO₂ limits of the NSPS must apply to Columbia.

(a) Although Petitioner alleges that DEC omitted the opacity requirement of the NSPS at 40 CFR 60.43c(c) from the permit, this provision is included in the final effective permit at Condition 41. Nonetheless, EPA agrees with Petitioner that DEC neglected to include any monitoring for this requirement. As discussed above in subsection 9(c), the SIP at part 227 requires Columbia to install and maintain COM. EPA is granting the petition to require DEC to reopen and revise the permit to specify this monitoring method for the NSPS opacity requirement as well. Because the NSPS opacity requirement is equivalent to that of the SIP at part 227, when DEC revises the permit to address this objection, it may list the required monitoring in each of these conditions, or it may provide a streamlining analysis in the Permit Review Report, in accordance with White Paper 2. *See* note 25, *supra*. In such an analysis, DEC should state that although compliance with the federal NSPS assures compliance with the SIP-approved rule, both rules are applicable.

(b) In its November 5, 1999 comment letter, NYPIRG questioned whether the permit should include the sulfur dioxide limitations from the NSPS subpart Dc. In its responsiveness summary, DEC implied that because the SIP sulfur limitation at 6 NYCRR § 225.1(a)(3) (see discussion above in subsection 10(b)) is more stringent than the requirement at 40 CFR § 60.42c(d) which allows a maximum of 0.5 percent weight, the permit need not include the NSPS provision. Because DEC's response is not completely correct, EPA is recognizing this as a valid petition issue. *See* note 28, *supra*. DEC may, by its choice, include each applicable sulfur standard in the permit. If, however, it chooses to include only the most stringent standard, a streamlining analysis is required, in accordance with White Paper 2. *See* note 25, *supra*. When DEC reopens the permit to address EPA's other objections, DEC must explain that although compliance with the SIP-approved sulfur standard assures compliance with the NSPS sulfur standard, both rules are applicable.

12. Condition 35 (PTE Limits)

Petitioner raises concerns about the practical enforceability of Condition 35 of the permit. Petition at pages 23-25. Condition 35 lists hourly and annual emissions limits that originated from the State Facility Permit that was issued on May 17, 1999, keeping Columbia University

²⁸ In her November 5, 1999 comments at page 20, Petitioner identifies several concerns involving the applicability of NSPS subpart Dc. Although the petition dated September 28, 2000 is brief and vague on this issue, EPA recognizes the complaint filed as it applies to opacity and sulfur dioxide.

out of major source permit review for NO_x and SO₂. Petitioner alleges that the permit must include operational restrictions (*i.e.*, fuel usage) to make these PTE limits practically enforceable. Petitioner further asserts that the monitoring and record keeping that Columbia must conduct is not sufficient to demonstrate compliance with the hourly emission rate limits for either NO_x or SO₂.

EPA has found in some cases that the Clean Air Act and the implementing regulations allow for a flexible evaluation of appropriate methods for ensuring practical enforceability of PTE limits. See In re Orange Recycling and Ethanol Production Facility, Pencor Masada Oxydol, LLC, Petition No. II-2001-05, April 8, 2002 (“Masada”) at p. 4-10 (available on the internet at: http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/masada-2_decision2001.pdf) In brief, EPA concluded that some facilities may qualify for emissions-based PTE limits if certain other permit provisions ensure that the PTE limits are enforceable as a practical matter.

Conditions 37 and 38 contain the monitoring requirements that are intended to help Columbia University track compliance with the requirements of Condition 35. The adequacy of this monitoring, and EPA’s decision on granting or denying the petition on these counts, is discussed below in sections G.13 and G.14.

13. Condition 37 (NO_x Emission Limits)

Petitioner raises two types of complaints regarding NO_x emissions limits: (a) Petitioner alleges that the permit must include a fuel use restriction to make the NO_x PTE limit practically enforceable; (b) Petitioner believes that Condition 37 does not contain sufficient monitoring to assure Columbia’s compliance with the hourly NO_x limit. Petition at page 26.

Condition 37 requires Columbia to continuously monitor NO_x emissions and calculate annual emissions monthly on a rolling total basis. The data collected by these monitors are tabulated daily and reported quarterly, using units of lb/mmBtu, lb/hr and ton/yr. EPA is granting Petitioner’s request on both counts, as described below.

(a) EPA agrees with Petitioner that operational restrictions are necessary in most cases to make PTE limits practically enforceable. Columbia’s permit includes a set of secondary emissions limits, which function essentially as if they were operational restrictions. Condition 36 specifies separate fuel-based emissions limits (137.5 tons/yr from oil, 43.5 tons/yr from gas), which indirectly affect the total amount of fuel burned and even hours of operation to some extent. If Columbia were to continuously operate at full steam load, and if emissions were adequately predicted by emissions factors, then it would be effectively limited to less than 6,000 hours per year by Condition 36 (2,347 hours on oil, 2,900 hours on gas). Normally, Columbia operates at reduced load, and may occasionally achieve better emissions rates than would be predicted by standardized factors. Thus the fuel-based emissions limits in Condition 36 offer sufficient operational flexibility to Columbia while also protecting the integrity of the annual

facility-wide NO_x limit of 181 tons/yr. Given that recently reported actual emissions of NO_x have been less than 50% of the PTE limit, and continuous monitors are employed, this level of protection is adequate. Nonetheless, EPA is requiring DEC to reopen and revise the permit to require recordkeeping and reporting to support the fuel-specific emissions limits in Condition 36.

(b) The permit indeed neglects to address monitoring of the hourly NO_x emissions. DEC must reopen and amend the permit to reflect Columbia's current practice of calculating and reporting information on hourly NO_x emissions from both oil and gas. EPA notes here that the hourly limits on NO_x do not serve to constrain Columbia's annual emissions; rather they provide operational flexibility. Thus, the protections described above in (a) are vital.

14. Condition 38 (SO₂ Emission Limits)

Petitioner raises two types of complaints regarding SO₂ emissions limits: (a) Petitioner alleges that the permit must include a fuel use restriction to make the SO₂ PTE limit practically enforceable; (b) Petitioner believes that Condition 38 does not contain sufficient monitoring to assure Columbia's compliance with the hourly SO₂ limit. Petition at page 26.

Condition 38 requires Columbia to calculate annual SO₂ emissions monthly on a rolling total basis, using continuously-sampling fuel flow meters, EPA emission factors, and an automated data acquisition system. The data compiled by this monitoring system are tabulated daily and reported quarterly, using units of lb/hr and ton/yr. EPA is granting Petitioner's request on the second count, as described below.

(a) EPA agrees with Petitioner that Columbia's permit lacks sufficient provisions to ensure practical enforceability of the SO₂ PTE limit. As described above, Columbia's permit does not restrict the volume of fuel oil burned annually, only the NO_x emissions from fuel oil. If Columbia were to control its NO_x emissions to less than 80% of the amount predicted by the standard emissions factor, then Columbia could burn enough fuel oil to violate its SO₂ PTE limit. EPA thus agrees with Petitioner that the permit must contain a limit on the quantity of fuel oil burned. Accordingly, EPA is granting the petition on this point, and requiring DEC to reopen the permit to restrict oil consumption to less than 6.28 million gallons annually.

(b) The permit indeed neglects to address monitoring of the hourly SO₂ emissions. DEC must reopen and amend the permit to reflect Columbia's current practice of calculating and reporting information on hourly SO₂ emissions resulting from the combustion of oil. EPA notes here that the hourly limit on SO₂ from fuel oil does not serve to constrain Columbia's annual emissions; rather it provides operational flexibility. Thus, the protections described above in (a) are vital.

III CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I

grant the petition on issues G.7. and G.9. through G.14., addressing the operating scenario for capping, opacity monitoring, sulfur monitoring, the NSPS, and PTE limits for NO_x and SO₂, respectively. I object to the issuance of the Columbia Permit on those points, and deny the balance of NYPIRG's petition.

12/16/02
Dated:

Christine Todd Whitman,
Administrator