BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| IN THE MATTER OF<br>DYNERGY NORTHEAST GENERATION<br><br>Permit ID: 3-3346-00011/00017<br>Facility DEC ID: 3334600011<br><br>Issued by the New York State<br>Department of Environmental Conservation<br>Region 2 | ) | ORDER RESPONDING TO<br>PETITIONER'S REQUEST THAT<br>THE ADMINISTRATOR OBJECT<br>TO ISSUANCE OF A<br>STATE OPERATING PERMIT<br><br>Petition Number: II-2001-06 |

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

The United States Environmental Protection Agency ("EPA") received a petition dated November 18, 2001, 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 Dynergy Northeast Generation for its Danskammer Generating Station located at 994 River Road, Newburgh, New York 12550. The permittee will be referred to as "Danskammer" for purposes of this Order. The Danskammer facility consists of four large steam generating boilers, two burn gas and oil and two burn gas, oil, and coal; a coal unloading and handling operation; a fly and bottom ash handling operation; and a water treatment and discharge process. The Danskammer permit was issued by the New York State Department of Environmental Conservation, Region 2 ("DEC") on November 29, 2001, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR parts 200, 201, 621 and 624.

The petition alleges that the Danskammer permit does not comply with 40 CFR part 70 in that: (I) the permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c); (II) the permit lacks an adequate statement of basis as required by 40 CFR § 70.7(a)(5); (III) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (IV) the permit does not require prompt reporting of any deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (V) the permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70; (VI) the permit lacks federally enforceable conditions that govern the procedures for permit renewal; (VII) the permit lacks monitoring sufficient to assure the facility's compliance with all applicable requirements;

(VIII) the permit fails to include federally enforceable emission limits established under pre-existing permits; (IX) the permit does not properly include CAA § 112(r) requirements; (X) the permit improperly describes the annual compliance certification due date; and (XI) the permit does not assure Danskammer's compliance with applicable sulfur dioxide ($SO_2$) emission limitations. The Petitioner has requested that EPA object to the issuance of the Danskammer Permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

Subsequent to the receipt of NYPIRG's petition, the EPA performed an independent and in-depth review of the Danskammer title V permit. Based on a review of all the information before me, including the petition; the permit application; a August 3, 2001 letter from Robert J. Stanton of DEC to Steven C. Riva of EPA regarding DEC's response to comments received on the draft operating permit [hereinafter, "response to comments document"]; a September 26, 2001 letter from Steven C. Riva of EPA to Robert J. Stanton of DEC providing EPA's comments on the proposed Danskammer permit; an October 15, 2001 letter from Steven C. Riva of EPA to Robert J. Stanton of DEC providing additional EPA comments on the proposed Danskammer permit; the Danskammer permit of November 29, 2001; and two letters dated July 18, 2000 and July 19, 2000 from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC; I deny in part and grant in part the Petitioner's request that I object to this permit. The reason for my decisions are set forth in this Order. Petitioner has raised valid issues on the Danskammer permit, which has resulted in my 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 to EPA for review all operating permits proposed pursuant to title V 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 already 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[2]

[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. of NYPIRG to DEC (January 22, 2001) ("NYPIRG Comment Letter").

[2] Issues I-V, VII, and IX have been raised previously by Petitioner and addressed by the Administrator in several Orders responding to the petitions. *See, e.g.*, In the Matter of Maimonides Medical Center, Petition Number II-2001-04, Dec. 16, 2002 ("Maimonides"); In the Matter of Suffolk County Bergen Point Sewage treatment Plant, Petition Number II-2001-03, Dec. 16, 2002 ("Bergen Point"); In the Matter of Starrett City, Inc., Petition Number II-2001-01, Dec. 16, 2002 ("Starrett City"); In the Matter of Columbia University, Petition Number II-2000-08, Dec. 16, 2002 ("Columbia University"); In the Matter of Elmhurst Hospital, Petition Number II-2000-09, Dec. 16, 2002 ("Elmhurst Hospital"); 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:

(continued...)

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.).[3] EPA has conferred with NYPIRG and DEC regarding 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. 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. Based on EPA's program review, DEC is substantially meeting the commitments[4] made on its November 16, 2001 letter. As a result, EPA has not issued a notice of deficiency ("NOD") at this time. Failure to properly administer or enforce the program will result in the issuance of a NOD pursuant to § 502(i) of the Act and 40 CFR § 70.10(b) and (c).

(I) Permit Application

Petitioner 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 2. 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

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[2](...continued)
http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2000.htm.

[3] 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/respons/.

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

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:

A. The application form lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether Danskammer is in compliance with every applicable requirement and whether DEC was required to include a compliance schedule in the title V permit;

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

C. The application form lacks a description of all applicable requirements that apply to the facility; and

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

A. Initial Compliance Certification

EPA agrees with Petitioner that the compliance certification process in the application form utilized by the facility in this case, may have enabled the applicant to avoid revealing noncompliance in some circumstances. The DEC form used allows an applicant to certify that it expects to be in compliance with requirements when the permit is issued rather than to make a certification as to its compliance status at the time of permit application submission. As provided in 40 CFR § 70.5(c)(9)(i), permit applicants are required to submit "a certification of compliance with all applicable requirements by a responsible official consistent with...section 114(a)(3) of the Act." EPA interprets this language as requiring that sources certify their compliance status as of the time of application submission. Where certifications do not address compliance status as of the time of permit application, the State, EPA and the public have been deprived of meaningful information on compliance status which may have a negative effect on source compliance and could impair permit development. Compliance certifications are public documents. Thus, one purpose of the initial compliance certification is to provide an incentive for sources to come into compliance with applicable requirements before they complete their applications. Another purpose is to alert the permitting authority to compliance issues in advance so that it can work with the source on such problems and develop an appropriate schedule of compliance in the title V permit. *See* 40 CFR §§ 70.5(c)(8) and 70.6(c)(3) and (4).

Defects in the application process can provide a basis for objecting to a title V permit if flaws in the application could result in a deficient permit. However, there is no evidence in this case that problems with the application form caused such substantial defects in the final permit

that an objection is warranted. Petitioner neither showed that the lack of a compliance certification was the cause of a defective permit for Danskammer nor showed that a compliance schedule should have been included in but was omitted from the permit. A standard application form shall include "a compliance plan that contains . . . a description of the compliance status of the source with respect to all applicable requirements." 40 CFR § 70.5(c)(8)(i). Part 70 also requires that the plan contain a compliance schedule to bring the source into compliance with requirements with which it was not complying and "a statement that the source will continue to comply" with those applicable requirements with which it was complying. 40 CFR §§ 70.5(c)(8)(ii)(A) and (iii). DEC's rules at 6 NYCRR § 201-6.3(d)(9) track these part 70 requirements. Thus, in the absence of a statement certifying compliance at the time of application submission, the consequence in the final permit may be the omission of a compliance schedule to address noncompliance that occurred as of the date of application submission. In the case of Danskammer, the source certified that it will be in compliance with all applicable requirements at the time of permit issuance (which occurred on November 29, 2001). EPA does not believe that submission by Danskammer of a different application (that is, one which would have required compliance certification as of the time of application submission) would have resulted in a title V permit any different from the one ultimately issued. Because the Petitioner failed to demonstrate that the lack of either an initial compliance certification or a compliance schedule led to the issuance of a defective permit, EPA denies the petition with respect to this issue.

Although in this case EPA finds no basis for objection on this issue, the State and EPA agree that the application form used by applicants in New York prior to January 1, 2002 did not properly implement the EPA or the State regulations. Therefore, as detailed in the November 16, 2001 commitment letter, DEC changed its forms and instructions accordingly.[5]

B. 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 methods used for determining compliance." Although the application form completed by Danskammer 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 of the listed applicable requirements. Danskammer properly completed the "Monitoring Information" section of the application for each emission point with a description of the method for determining compliance with each applicable rule/requirement. Because Danskammer already

[5] In summary, 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.

has in place continuous emissions monitors (CEMs) for monitoring the emissions of sulfur dioxide ($SO_2$) and nitrogen oxides ($NO_{x)}$ and a continuous opacity monitor (COM) for monitoring opacity, the application identified data collection via the CEMs/COM as the method for demonstrating compliance with emissions standards for the four boilers. Discrete samples are taken from each delivery of fuel oil to determine compliance with sulfur content requirements. For the coal handling operation, Danskammer stated it uses a baghouse as a control device. The baghouse is maintained according to manufacturer's specifications to assure the required control efficiency of 99% is achieved. Therefore, proper maintenance of the baghouse, which involves periodic inspection of the bags for leakage and replacement, reduces fugitive particulates by 99%. Petitioner's claims that Danskammer's application lacked a statement of methods used for determining initial compliance are without merit; therefore, EPA denies the petition on this point.

C. Description of Applicable Requirements

The Petitioner's next point is that EPA's regulations call for the legal citation to the applicable requirement to be accompanied by the applicable requirement expressed in descriptive terms. 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).

The Danskammer permit application contains codes or citations associated with applicable requirements that are readily available. *See* White Paper 1 at p. 20-21. That is, these codes refer to federal and state regulations that are printed in rule compilations and are also available on-line. Non-codified documents such as the $NO_x$ Reasonably Available Control Technology (RACT) plan although not included were referenced in this case and are available from DEC's files. On page 3 of the application, Danskammer stated it will continue to operate in accordance with its $NO_x$ RACT Compliance and Operating Plans. Condition 46 of the permit which requires Danskammer to use the system averaging equation to calculate the $NO_x$ emissions referenced the $NO_x$ RACT compliance plan as being submitted on November 1993 and approved by DEC on April 29, 1994. Basically, 6 NYCRR § 227-2.5(b) allows a system-wide averaging option for demonstrating compliance with 0.25 lb of $NO_x$ /MMBtu for very large boilers that have the capability to burn gas and oil and 0.42 lb of $NO_x$/MMBtu if the primary fuel is coal with dry bottom ash. 6 NYCRR § 227-2 defines a very large boiler as a device with maximum heat input capacity greater than 250 MMBtu per hour (MMBtu/hr) that combusts any fuel. Danskammer elected this system-wide averaging option in its $NO_x$ RACT compliance plan. The

units that are part of the averaging plan include Danskammer 1, 2, 3, and 4 and Roseton 1 and 2. Consistent with 6 NYCRR § 227-2.6(a)(1), Danskammer will monitor its $NO_x$ emissions with CEMs and submit quarterly $NO_x$ emissions reports as required by 6 NYCRR § 227-2.6(b)(4). In addition, Danskammer listed a Consent Order to which it is subject, Index No. 9599-85, on page 27 of the application. EPA finds the Danskammer application to be in accord with EPA guidance. While specific citations followed by a description of the applicable requirement would make the application more informative, the lack of it, in this case, does not warrant an objection by EPA. Therefore, EPA denies the petition on this point because the rules/regulations and operating plans to which Danskammer is subject are publicly available in codified form/on-line or in the DEC permit record files.

This issue regarding citations was also 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.[6] 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.

D. Statement of Methods for Determining Ongoing Compliance

Petitioner alleges that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. EPA disagrees with Petitioner that the application failed to describe the methods Danskammer will use to determine its compliance status relative to each applicable requirement. Danskammer completed the "Monitoring Information" section of the application for each emission point with a description of the method for determining compliance with each applicable rule/requirement. As discussed above, a continuous emissions monitor (CEM) is installed to record the emissions of $NO_x$ and $SO_2$ and a continuous opacity monitor (COM) is installed to record opacity on a continuous basis. Data collected via the CEM/COM systems disclose the compliance status of the source continually throughout the day. Discrete samples are taken from each delivery of fuel oil to determine compliance with the sulfur content requirements. With respect to the test Method

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

for stack testing to determine compliance with 6 NYCRR § 227-2, applicant stated that it will use Reference Method 5 as listed in 40 CFR part 60. In addition, DEC identified Reference Test Method 9 as the method to use in determining opacity compliance with 6 NYCRR § 212.6. For the coal handling operation, Danskammer stated it will use baghouse as a control device. The baghouse will be maintained according to manufacturer's specifications to assure a control efficiency of 99%. An emission test will be performed once per permit term to determine compliance with this removal efficiency. As described above, the application lists CEM/COM as the monitoring to determine compliance with regulations for opacity, $NO_x$, and $SO_2$; and fuel sampling for sulfur-in-fuel. Because the application included a description of or reference to applicable testing/monitoring methods for determining compliance, EPA denies the petition on this point.

(II) Statement of Basis

Petitioner alleges that the proposed permit is accompanied by an insufficient statement of basis. Petitioner asserts a discussion in the statement of basis is particularly needed to explain why Condition 5 (monitoring requirements for the electrostatic precipitators) and Condition 78 (annual Method 9 evaluation for the coal handling and storage facility) are adequate to assure compliance with the particulate matter ("PM") standards. According to 40 CFR § 70.7(a)(5), each draft permit should include a statement that sets forth the legal and factual basis for the draft permit conditions. Petition at page 4. Petitioner refers to the "Permit Description" included with Danskammer'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 document[7] 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).

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

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, clarify and describe 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.[8] As a result, the DEC has incorporated certain elements into its "permit review reports."[9] In the cited documents, EPA 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 November 17, 2000 and the final permit of November 29, 2001 contain a Permit Description. This discussion provides a description on the various operations at the facility, the types of equipment in place, the control devices utilized and the type of

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[8] *See* letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., NYPIRG, responding to NYPIRG's March 11, 2001; November 16, 2001 DEC commitment letter; and 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).

[9] In order to comply with the requirements of 40 CFR § 70.7(a)(5), DEC has committed to prepare and 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.

emissions monitoring employed.[10] However, EPA notes that this permit description fails to explain how specific monitoring selected assures compliance with emission standards. For example, the permit at Condition 78 requires an annual Method 9 test to determine opacity compliance at the coal handling facility. An annual opacity reading may appear to be infrequent and even inadequate to assure compliance with 6 NYCRR § 212.6 for the public who is not familiar with the operation and control devices that are already in place at the facility. The adequacy of the annual opacity reading would have been clear had DEC explained in the Statement of Basis that the coal is transported by rail or marine vessels to the Danskammer facility. During the unloading/loading operation, coal fugitives are controlled with water spraying. Coal is transferred through an enclosed conveyor to the coal crushers where coal is ground under negative pressure to capture the coal fugitive emissions. A Method 9 evaluation is performed within 180 days of initial permit issuance when coal is being loaded/unloaded to determine the adequacy of the water spray control. Because the coal fugitives are properly controlled and a Method 9 test is performed initially, it is acceptable for Danskammer to perform an annual Method 9 subsequently to ensure that compliance with the opacity standard is maintained. Such description would help the reader understand why a Method 9 performed once a year would be adequate in assuring compliance with the opacity standard of 6 NYCRR § 212.6. *See* Section VI. B, *infra*, for a discussion of the kind of monitoring that will be applied to this part of the facility.

Although DEC did not provide a Statement of Basis (or a Permit review Report), it is still possible to achieve a sufficient understanding of the Danskammer facility 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 response to comments document. The advantage of a Statement of Basis is that it provides information in an organized fashion so as to facilitate an understanding of the rationale for certain permit conditions. Danskammer is subject to applicable requirements that rely on source-specific determinations[11] as well as those that apply generally to its source type. The permit record contains sufficient information describing these requirements. A more detailed explanatory document was not necessary to understand the legal and factual basis for the permit conditions in this case. Furthermore, there is no evidence

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[10] The permit description includes the nature of the "business" (an utility with four large boilers, two burn gas and oil only and two burns gas, oil, and coal; a coal handling facility; and a fly and bottom ash handling facility); a discussion of the equipment and operations at the facility; air permit applicability; air pollution control device and the monitoring system employed.

[11] 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 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) $NO_x$ RACT requirements of 6 NYCRR § 227-2; (5) the $NO_X$ Budget requirements of 6 NYCRR § 227-3; and (6) Acid Rain requirements of 40 CFR part 75. As monitoring, Danskammer's permit includes continuous emissions monitors (CEM) to determine compliance with the $NO_X$ RACT requirement, continuous opacity monitors (COM), fuel analysis for fuel sulfur content, and CEM for $SO_x$.

that the Petitioner was harmed by the lack of a comprehensive statement of basis. In fact, NYPIRG provided detailed and thoughtful comments on Danskammer's draft permit establishing that it had a basic understanding of its terms and conditions.

EPA finds a Statement of Basis or an explanation/description of why certain monitoring schemes are deemed sufficient in assuring compliance to be extremely helpful to the reader. However, 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 Danskammer 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 revised or modified and renewed permits. As discussed in detail in Section VII, EPA is granting the NYPIRG petition to object to the Danskammer 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).

(III) Annual Compliance Certification

Petitioner 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). The Petitioner's allegation is 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." *See* petition at page 5. Specifically, the Petitioner is concerned with the language in the permit that labels certain permit terms as "compliance certification" conditions. NYPIRG notes that requirements that are labeled "compliance certification" are those that identify a monitoring method for demonstrating compliance. NYPIRG asserts that the only way of interpreting this compliance certification designation is as a way of identifying which conditions are covered by the annual compliance certification. NYPIRG asserts that permit conditions that lack periodic monitoring are excluded from the annual compliance certification. The Petitioner claims that this is an incorrect application of state and federal regulations because facilities must certify compliance with every permit condition, not just those that are accompanied by a monitoring requirement. Petition at page 24, Section XI.

EPA notes, first, that the language in the Danskammer 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). 6 NYCRR § 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. 6 NYCRR § 201-6.5(e)(3) requires the following in annual certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether

compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the Administrator and shall contain such other provisions as the department may require to ensure compliance with all applicable requirements. The Danskammer title V permit includes this language at Condition 29.

EPA disagrees with the Petitioner that "the basis of the certification" should be interpreted to mean that facilities are *only* required to certify compliance with 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 29 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 regulations 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 Danskammer permit, the DEC has nonetheless elected to take the appropriate steps to improve the administration of its program in this regard. As discussed in Section VII, below, EPA is granting in part NYPIRG's petition on this permit. Therefore, when the DEC revises the Danskammer permit in response to this Order, it will also add language to clarify the requirements relating to annual compliance certification reporting.

(IV) Prompt Reporting of Deviations

Petitioner alleges the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). Petitioner requests DEC to define prompt in the Danskammer permit. Petitioner suggests DEC to either 1) include a general condition that defines what constitutes "prompt" under all possible circumstances, or 2) develop facility-specific conditions that define what constitutes "prompt" for each individual permit requirement. Petitioner also requests that DEC require all prompt reporting to be done in writing. Petition at page 6.

EPA raised this issue with DEC in the July 18, 2000 letter from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2 to Robert Warland, Director, Division of Air Resources, DEC, 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. 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).[12]

EPA has addressed this issue with the DEC in order to clarify how it will properly incorporate into title V permits prompt reporting of deviations. In its November 16, 2001 letter, DEC agreed that it will include a requirement for reporting deviations consistent with 6 NYCRR § 201-6.5(c)(3)(ii). Based on EPA's program review, the DEC is substantially meeting this commitment. *See* note 4, *supra*. While this regulation requires inter alia that deviations be reported at least every six months, DEC stated that it will specify less than six months for "prompt" reporting of certain deviations that result in emissions of, for example, a hazardous or toxic air pollutant that continues for more than an hour above permit limits. EPA finds DEC's new standard permit condition that sets forth the procedures for prompt reporting to be reasonable and compatible with the federal regulations at 40 CFR § 71.6(a)(3)(iii)(B). When prompt reporting of deviations is required, the reports will be submitted to the DEC, in writing, certified by a responsible official, and in the time frame established in the permit condition.

With regard to the Danskammer permit, EPA reviewed Petitioner's allegation that the permit lacks prompt reporting of deviation requirements. EPA disagrees with Petitioner's claim since DEC did include requirements to report deviations more promptly than six months as provided in 40 CFR § 70.6(a)(3)(iii)(B).

With regard to what constitutes "prompt," 40 CFR § 70.6(a)(3)(iii)(B) states "[t]he permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements." In the case of Danskammer, emissions of $NO_x$ and $SO_2$ are monitored by CEM. $NO_x$ emissions are calculated monthly and reported quarterly to meet the $NO_x$ Budget Plan requirements of 6 NYCRR § 227-2.5(b), see Condition 46. EPA finds the quarterly reporting of $NO_x$ emissions to be consided adequate for prompt reporting of $NO_x$ given that the CEM system itself alerts the facility of an excursion instantaneously. Although $SO_2$ emissions as recorded by the CEM are reported semi-annually, the sulfur content of each shipment of fuel oil delivered is analyzed and recorded, see Condition 44. Each shipment of coal delivered is also analyzed and recorded per Conditions 71 and 75 to ensure compliance with the

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

sulfur-in-coal limit set forth in these conditions. Since the emissions of $SO_2$ is directly relate to the sulfur content of the fuel combusted in the boilers, compliance with the $SO_2$ limit would be achieved as long as the the sulfur analysis confirms that a compliant fuel is delivered. Given that the $SO_2$ emissions are monitored using the CEM system which alerts the facility of an excursion instantaneously, EPA does not find it necessary to require reporting of $SO_2$ excursions or sulfur content deviations more promptly than every six months.

The PM emissions are controlled by an electrostatic precipitator (ESP) for all four boilers. The ESP will be monitored using a digital data acquisition system and reported semi-annually. With the control devices maintained as required in Condition 4, the permit assures that PM emissions are controlled to the permitted levels. However, since PM emissions are affected by improper operation of the boilers, opacity is monitored to indicate boiler operation. In this instance, opacity is being monitored via a COM and the opacity readings are used as an indicator for proper boiler operation. Condition 45 incorporates the requirements of an April 1999 Consent Order that requires an Opacity Incident Report (OIR) be submitted quarterly to DEC for review and approval. EPA finds the quarterly reports on opacity to be prompt reporting given that Danskammer is already required to implement opacity reduction in accordance with the 1999 Consent Order. EPA does not believe requiring more frequent opacity reporting would result in additional remedies to the opacity or PM problem not already called for in the Order. The coal handling (equipped with water sprays) and ash handling facilities use a baghouse to control the PM fugitive emissions. The baghouse is inspected monthly for bag replacement and stack tested once per permit term. EPA finds the prompt reporting provisions to be sufficient in this case; therefore, EPA denies the petition on this point.

(V) Startup, Shutdown, Malfunction

Petitioner asserts that the proposed permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70. See petition at page 7-11. The petition provides a detailed, 5-part discussion of Condition 8 of the proposed Danskammer permit, entitled "Unavoidable Noncompliance and Violations," which it refers to as the DEC's "excuse" provision. Permit Condition 8, 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."

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. 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 November 2001 Clarification which confirms that the 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* November 2001 Clarification at page 1.

(A). Petitioner asserts that the excuse provision included in the proposed permit is not the excuse provision that is in the New York SIP. That is, Condition 8 of the proposed permit cites 6 NYCRR § 201-1.4, which has not been approved by EPA into the New York SIP. The excuse provision in the SIP is at 6 NYCRR § 201.5(e), and includes language similar to that contained in 6 NYCRR § 201-1.4, but does not cover violations that occur during periods of shutdown or upsets. Petition at page 7.

In response to the Petitioner's claim, EPA acknowledges that Condition 8 of the title V permit entitled, "Unavoidable Noncompliance and Violations," cites 6 NYCRR § 201-1.4 as the applicable requirement. This provision 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." 6 NYCRR § 201-1.4 is a State regulation that has not been approved into the SIP. There is, however, a similar SIP-approved excuse provision at 6 NYCRR § 201.5(e). In its November 16, 2001 letter, the DEC committed to removing the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of title V permits and incorporating the condition into

the state side. Based on EPA's program review, DEC is substantially meeting this commitment. *See* note 3, *supra*. Therefore, when DEC revises the permit in response to this Order, it will 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.

(B) Petitioner states that the permit must "include terms and conditions in each permit that clarify what constitutes reasonably available control technology (RACT) for this facility during maintenance, startup, and malfunction conditions." 6 NYCRR § 201-1.4(d) and 6 NYCRR § 201.5 require facilities to use RACT during any maintenance, startup/shutdown, or malfunction condition. Petition at page 8.

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.

Petitioner's request is not feasible as a practical matter since 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 he/she chooses to exercise her authority to excuse a violation. Hence, EPA finds the permit to be consistent with SIP requirements and denies the petition on this issue.

(C) Petitioner asserts the permit does not assure the facility's compliance because it allows the DEC Commissioner to excuse violations of any federal requirement during startup, maintenance, and malfunction conditions if they qualify as "unavoidable." Petitioner requests the Administrator to object to the permit because it does not include clarifying language to assure compliance with all applicable requirements as required by 40 CFR § 70.6(a)(1). Petition at page 8.

EPA disagrees with the Petitioner that definitions for "unavoidable," "startup," "malfunction" and "maintenance" must be included in the permit. The purpose of a title V permit is to ensure that a source operates in compliance with all applicable requirements. The lack of definitions for these terms do not render the permit unenforceable. These are commonly used regulatory terms. In the case of the term malfunction, the SIP rule excludes "failures that are caused entirely or partially by poor maintenance, careless operation, or other preventable condition." 6 NYCRR 201.5(e)(2). Moreover, the Petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. Also,

as discussed above, it is not appropriate for title V permits to revise or alter requirements of an approved SIP. Finally, moving the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, to the state side of the permit will further assure that the excuse provision is not expanded beyond its proper bounds. Therefore, the petition is denied with respect to this issue.

(D) The proposed permit fails to require prompt written reporting of all deviations from permit requirements due to startup, shutdown, malfunction, and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B). The Petitioner notes that, as currently written, the permit allows the facility representative to submit reports of unavoidable violations by telephone. NYPIRG contends that written reports must be required to fulfill a primary purpose of the title V program, to provide the public with the capability to determine whether a facility is complying with all applicable requirements on an ongoing basis. Petition at page 9.

Reporting in order to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement , however, are required to be reported in writing regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See* Discussion in Section IV, *supra.* For a violation to be properly excused, the DEC must apply the regulation authorizing such discretion and must properly document its findings to ensure the rule was reasonably applied and interpreted. Thus the "excuse" reports are in addition to other deviation reports. Any deviation for which an excuse is sought will be reported as a deviation or violation in the 6 month report and, if required, in the prompt report of a deviation. This issue was discussed in detail in Section IV, *supra*. EPA disagrees with Petitioner that the suggested reporting regime must be added to the permit in order to assure no misuse of the excuse provisions. The Danskammer permit already contains recordkeeping requirements for exceedances associated with equipment maintenance or startup/shutdown activities that are identical to those requested by Petitioner. This information is required to be submitted in the semi-annual reports. Condition 28 states, "[i]n the case of any condition contained in this permit with a reporting requirement of "Upon request by regulatory agency" the permittee shall include in the semiannual report, a statement for each such condition that the monitoring or recordkeeping was performed as required or requested and a listing of all instances of deviations from these requirements." EPA finds the semi-annual reporting requirement to be appropriate for the reporting of emission exceedances due to equipment maintenance, startup or shutdown. With regard to reporting of deviations due to malfunctions, EPA finds the requirement to report verbally within two working days of Danskammer becoming aware of the incident and in writing within 30 days when requested by DEC is consistent with 40 CFR § 70.6(a)(3)(iii)(B) which allows the State to define "prompt" appropriately for the individual situation. Accordingly, the petition is denied with respect to this issue.

E. Petitioner is concerned that the Commissioner may excuse violations of any federal requirements that he/she deems unavoidable regardless of whether an "unavoidable" defense is allowed under the requirement that is violated. Petitioner requests EPA to clarify that a violation of a federal requirement that does not provide for an affirmative defense will not be excused.

Petition at page 11.

Regarding the Petitioner's fifth and final point, of whether the DEC can excuse violations of a federal requirement, DEC's own rules do not authorize such expansion of the Commissioner's discretion. These rules 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). In its Responsiveness Summary, the DEC acknowledges that the DEC Commissioner "cannot excercise more discretion than federal requirements allow." See Responsiveness Summary at page 2 of 9. In its November 16, 2001 letter, the DEC committed to include language from 6 NYCRR § 201-6.5(c)(3)(ii) on the federal side of permits. Therefore, the petition is denied with respect to this issue. However, as discussed in detail elsewhere in this Order, EPA is granting in part the NYPIRG petition to object to the Danskammer permit. Therefore, when DEC revises the permit in response to this Order, it will also include the aforementioned language on the federal side of the title V permit.

(VI) Permit Renewal

Petitioner alleges the Danskammer permit violates 40 CFR part 70 because it lacks the federally enforceable requirement that the facility apply for a renewal permit at least six months prior to th date of permit expiration. Petition at page 11. The part 70 regulations provide, "[f]or purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time, as may be approved by the Administrator, that ensures that the term of the permit will not expire before the permit is renewed." 40 CFR § 70.5(a)(1)(iii). Although Condition 4 of the "General Provisions" Section of the permit echoes the renewal requirement by stating that "[t]he permittee must submit a renewal application at least 180 days before expiration of permits for Title V Facility Permits], Petitioner finds it to be insufficient in meeting 40 CFR § 70.5(a)(1)(iii). Hence, Petitioner believes EPA must object to the Danskammer permit because it lacks the federally enforceable requirement that the facility apply for a renewal permit within six months of permit expiration.

40 CFR § 70.5(a)(1)(iii) simply defines what constitutes a "timely" application for renewal purposes. This definition is essential to the operation of 40 CFR § 70.7(c)(ii), which prevent the permit from expiring, provided a timely and complete application for renewal has been submitted. Any facility that does not renew in a timely manner would be subject to the provisions of CAA § 502(a) regarding operation without a permit. The definition in Condition 4 does not effect the enforceability of § 502(a). EPA finds Petitioner's request to be without merit; therefore, EPA denies the petition on this point.

(VII) Monitoring

Petitioner alleges that the Danskammer permit contains permit conditions that do not have sufficient monitoring to assure compliance with all applicable requirements. Petition at

page 12. Specifically, Petitioner alleges the following conditions fail the part 70 requirements for sufficient monitoring:

(A) The Danskammer facility operates 4 boilers, identified as Units 1 to 4. Units 1 and 2 are rated at 65 megawatts (MW) each and are capable of buming No. 6 fuel oil and natural gas. Unit 3 is rated at 135 MW and Unit 4 is rated at 235 MW. Both Units 3 and 4 are capable of combusting No. 6 fuel oil, natural gas, and coal. Currently, Conditions 66 and 68 require Units 1 and 2 to be limited to 0.10 pounds of particulate matters (PM) per million Btu (lbs/MMBtu) when burning fuel oil. Conditions 70 and 74 limit the PM emissions of Units 3 and 4 to 0.10 lbs/MMBtu when burning fuel oil. When coal is being burned at Units 3 and 4, Conditions 72 and 76 limit Danskammer to a PM limit of 0.03 lbs/MMBtu. Petitioner alleges the permit violates 40 CFR § 70.6(a)(3)(i)(B) by not requiring periodic monitoring sufficient to assure compliance with these limits. Petitioner pointed out a number of problems in this regard. First, Petitioner finds the once per permit term emissions testing to be inadequate in demonstrating compliance. Petitioner asserts an annual emissions test should be required. Second, Petitioner believes that DEC should discuss in the Statement of Basis how opacity monitoring and the permit in general assure compliance with the PM standards. Third, Petitioner claims "a trigger opacity level" must be established during the requested annual emissions test and included in the permit to show the opacity level at which a violation of the PM limit would occur. Petitioner claims the permit does not assure compliance with the PM limits. Petition at page 12.

The permit contains extensive monitoring requirements of operating parameters as discussed below. The opacity from all four boilers are monitored by a COM and all four boilers are equipped with an ESP to reduce PM emissions. Opacity from a boiler stack is a good indicator of boiler operation and combustion efficiency. Any unusual opacity reading would alert the operator to check on the operation of the boilers and control equipment. The ESPs are required to be in operation when the boiler is either burning fuel oil or coal. Routine monitoring for the ESPs include: 1) monitoring the number of operation fields, primary and secondary voltage and current, and spark rate and 2) monitoring the current and voltage at each transformer and spark rate in each section. These parameters can provide highly relevant data regarding the removal efficiency of the ESP which, in turn, controls the amount of PM emissions. However, the permit lacks established operating ("indicator") ranges for these parameters and thus fails to assure compliance with the PM limits. When the permit is reopened to include the proper operating ranges for these parameters, EPA believes COM and ESP monitoring would be adequate to assure compliance with the PM standards in between emissions tests. As such, an annual emission test would not be necessary. DEC is ordered to reopen the permit to include operating ranges for the parameters of Condition 5 to serve as an indicator of compliance with the PM limit. Accordingly, EPA grants the petition on this issue

While EPA finds Petitioner's request for a discussion in the Statement of Basis as to why DEC believes the required opacity monitoring and the permit in general assure compliance with the PM standards to be reasonable, the lack of it does not render the permit deficient. DEC will reopen the permit on other grounds, at which time, the revised permit will be issued with a

"Permit Review Report" consistent with DEC's November 16 Commitment Letter.

Petitioner next claims that the recordkeeping option suggested in Condition 5 for the distributed control system DCS is flawed. Condition 5 states, "data shall be recorded by DCS or similar digital data acquisition system, or as an alternative, this data shall be manually recorded for each six-minute period during which average opacity exceeds 20 percent." Petitioner asserts DEC must provide justification in the Statement of Basis as to why it believes the manual data recording method is an adequate substitute for digital recording. Petitioner doubts manual recording may serve as a trustworthy recording method for regular use. Petitioner believes this condition needs to be changed to mandate digital recording at all times except during certain narrowly-defined circumstances where manual recordkeeping may be substituted. Also, Petitioner asserts that DEC must provide more detail in Condition 5 in order to make this condition enforceable as a practical matter.

EPA agrees with Petitioner that data recorded by DCS are significantly more accurate than manual data recording and should be used. DEC must provide the permittee with a clear understanding of what monitoring obligation it has with regard to the ESP recordkeeping requirement. EPA grants the petition on this issue. DEC is directed to reopen the permit for Condition 5 to require that DSC be used at all times except during certain narrowly-defined circumstances when manual recordkeeping may be substituted.

Petitioner asserts that Conditions 72 and 76 which stipulate a PM limit of 0.03 lbs/MMBtu for Units 3 and 4 when burning coal must be revised to cite 6 NYCRR § 200.6 instead of 6 NYCRR § 227-1.2(a)(3) as the regulatory basis for this limit.

6 NYCRR § 227-1.2(a)(3) sets a PM limit of 0.10 lbs/MMBtu, not 0.03 lbs/MMBtu. The 0.03 lbs/MMBtu was established from a pre-construction permit which is an enforceable permit under the New York State SIP. Prior to revising its permitting rules at 6 NYCRR part 201, the DEC regulations required facilities to obtain permits to construct for select new and modified emission units, and to apply for and be granted certificates to operate for all non-exempt emission units. These permits, which included citations for the applicable requirements and other "special conditions," if necessary, evolved into certificates to operate after construction and these certificates were subject to renewal every 5 years.

The revision of New York's permitting regulations resulted in the State now having one permit document for major sources of air pollution, which incorporates a permit to construct, if applicable, the State SIP operating permit, and the title V operating permit. Federally-enforceable conditions from prior permits are brought forward to the current SIP/title V permit, unless the DEC revises the existing permit. If this is the case, then the DEC must identify such previously-listed applicable requirements and process the permit revision to revise or delete such conditions in accordance with the appropriate new source review requirements, including the public review procedures for such.

Since the 0.03 lbs/MMBtu limit was derived from a federally enforceable state operating permit it is an applicable requirement and must be carried over into the title V permit. Because, as discussed above, the title V permit is also the state operating permit, when DEC revises the permit as required to do so on other grounds, it should properly cite to the original authority from which the 0.03 lbs/MMBtu was derived. This is to ensure that federally enforceable limits from pre-existing state operating permits do not expire.

(B) Coal Unloading and Handling Process

Petitioner requests EPA to object to this permit on the basis that the monitoring conditions that apply to the plant's coal unloading and handling process are inadequate to assure the source's compliance with applicable requirements. Petitioner claims the only monitoring required under the permit is an emissions test conducted once during the term of the permit. Petitioner asserts a once per permit term emissions test is inadequate to assure that the baghouse complies with the required 99% reduction in PM emissions. Petitioner suggests an annual emissions test using a test method specified in the permit. Currently no test method is specified in Condition 77. Although Petitioner notices that Condition 6 of the permit contains requirements for fabric filter inspection on a monthly basis, Petitioner finds problems with the monitoring for the baghouse because Condition 6 does not provide any details on what is to be inspected. Petitioner presented the compliance assurance monitoring options for fabric filters from EPA's CAM Technical Guidance Document[13] as activities Danskammer should adopt to supplement the periodic monitoring already required. These activities include daily observations of visible emissions or opacity; continuous opacity monitoring; monitoring of pressure drop across baghouse; monitoring of the condition of the fabric filter; or bag leak detection monitoring. Lastly, Petitioner stated Condition 77 is not enforceable as a practical matter because it lacks an averaging period for determining compliance with the 99% PM emission reduction requirement. Petition at page 17.

The emission unit specific permit conditions that apply to the coal unloading and handling facility are stipulated in Conditions 77, 78, and 79. Condition 6 which contains requirements for the monitoring of the fabric filters is found in the Facility Level Section of the permit and applies to all baghouses that are installed at Danskammer. Condition 77 requires the utilization of a baghouse to reduce the PM emissions associated with the coal handling operation by 99% whenever coal is being handled. This condition also requires a once per permit term emission testing to determine if the baghouse is achieving a 99% removal efficiency. Condition 78 requires the coal handling facility to comply with an opacity limit of less than 20% in accordance with 6 NYCRR § 212.6(a). To minimize fugitive coal emissions, this condition requires the utilization of water spray on the coal whenever coal is being unloaded. To determine compliance with the 20% opacity limit, this condition requires an annual Method 9 test

[13] U.S. EPA Technical Guidance Document: Compliance Assurance Monitoring, Revised Draft, August 1998. Available at www.epa.gov.

conducted when coal is being unloaded at the facility. Condition 79 stipulates requirements from Subpart Y of the New Source Performance Standards, 40 CFR § 60.252(c), which applies to the opacity emissions associated with coal transferring, processing, and loading/unloading. This standard also sets an opacity limit of no more than 20%. The facility is required to perform an initial Method 9 opacity evaluation within 180 days of the issuance of the title V permit. The Method 9 evaluation must be performed during the time when coal is being unloaded from a marine vessel.

Petitioner's concern that the fabric filter inspector would not know what to inspect absent detailed instructions in Condition 6 has no merit. Condition 4[14] requires the emission control device, the baghouse in this case, to be maintained according to manufacturer's specifications. It is not necessary to repeat the manufacturer's instructions for maintaining the fabric filters. As long as the permit directs the source to consult the manufacturer's specifications to maintain proper operation of the baghouse, the details of how to inspect fabric filters need not be specified in Condition 6. The baghouse will attain its designed removal efficiency as long as the fabric filters are not clogged or broken. Monitoring of pressure drop across the baghouse, monitoring of the condition of the fabric filter, or monitoring bag leak with a detection monitor all serve the same purpose. These monitoring tools are suggested in the CAM guidance to prevent malfunction of the baghouse due to broken or clogged bags. The use of these monitoring tools as appropriate would be sufficient to prevent the baghouse from operating with broken or clogged bags. The monthly inspection requirement of Condition 6 will ensure that clogged or broken fabric filters will be replaced to ensure proper operation of the baghouse at the coal unloading and handling facility. Operation and maintenance of the baghouse according to the manufacturer's specifications means an annual emissions test would not be necessary to assure compliance with the PM limits. EPA finds the monthly fabric filter inspection and the once per permit term emissions test to be adequate monitoring to assure compliance with the required removal efficiency of 99%. However, EPA agrees that the test method for the emission test should be specified in the permit. Since this permit will be reopened for other reasons, EPA finds it appropriate for DEC to specify the emissions test method under Condition 77 at that time.

Petitioner's claim that Condition 77 is unenforceable because it fails to include an averaging period for determining compliance with the 99% removal efficiency requirement applicable to the coal unloading and handling facilities (page 18 of the Petition) is denied. The baghouse for this equipment is expected to maintain the required removal efficiency for any measurable period of time; under these circumstances, the absence of an averaging time means

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[14] Condition 4 states, "Any person who owns or operates an air contamination source which is equipped with an emission control device shall operate such device and keep it in a satisfactory state of maintenance and repair in accordance with ordinary and necessary practices, standards and procedures, inclusive of manufacturer's specifications, required to operate such device effectively."

that instantaneous compliance is required, and no averaging time need be specified in the permit for this purpose.

Petitioner then alleges that Condition 78 and 79, which require annual Method 9 evaluation and an initial Method 9 evaluation, respectively, in demonstrating compliance with the 20% opacity limit, to be inadequate monitoring. Petitioner found no explanation in the permit or Statement of Basis for this sparse monitoring requirement, and thus requests EPA to object to this permit for inadequate periodic monitoring. Petition at page 19. Petitioner is correct that the permit file contains no explanation as to why an annual Method 9 test is sufficient to assure compliance. Nor is it obvious from the record or common experience that such monitoring is adequate to assure compliance in this particular case. Upon reopening, DEC may well be able to conclude that monitoring of the control device for purposes of assuring compliance with the PM limit (discussed above), together with recordkeeping demonstrating compliance with the requirement to use water spray when coal is being unloaded, is sufficient. But such an explanation must be provided by DEC and cannot be assumed by EPA in the first instance.

(C) Fly and Bottom Ash Handling

Petitioner claims the annual Method 9 opacity evaluation under Condition 80 cannot assure compliance with the 20% opacity standard of 6 NYCRR § 212.6(a) for emissions from fly and bottom ash handling, and asks EPA to object to the issuance of this permit. Petition at page 20. Annual Method 9 evaluation may be acceptable when the fly and bottom ash handling operation is performed with a control device, if there is direct or parametric monitoring of the operation and maintenance of the control device and established indicator ranges that are correlated with the opacity standard. However, the record does not indicate that adequate control device monitoring is in place here. Accordingly, upon reopening of the permit, DEC should either explain why an annual Method 9 evaluation is adequate in this instance or add appropriate monitoring to the revised permit.

(D) Opacity Limit

Petitioner alleges that the permit lacks any kind of monitoring to assure compliance with the applicable opacity standards found in the SIP at 6 NYCRR § 211.3. Petition at page 20. Petitioner asserts this opacity requirement is particularly important for parts of the plant that are not covered by an additional, more stringent opacity requirement. EPA disagrees with the Petitioner that the permit lacks sufficient monitoring to assure compliance with 6 NYCRR § 211.3. Condition 42 limits the opacity from any air contamination source to less than 20% (six-minute average) except for one continuous six-minute period per hour of not more than 57% opacity. 6 NYCRR § 211.3. This condition applies to the facility as a whole (a "facility-wide" requirement); it is meant to be a generally applicable requirement for process sources which are not subject to an express opacity limit. As long as other conditions in the permit contain adequate monitoring provisions for opacity, EPA finds it acceptable to leave Condition 42

unchanged. Different emissions units can create opacity through different processes (combustion, material storage, etc.) and reach the atmosphere in different ways (stacked, fugitive), 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 include monitoring requirements in the Emission Unit Level sections of the permit to meet opacity requirements as DEC did in the Danskammer permit in Conditions 45, 65, 67, 69, 73, 78, 79, and 80. All of these conditions impose an opacity limit of 20% which cover all of the opacity emitting units including the four boilers, the coal unloading and handling operation, and the fly and bottom ash handling operation at Danskammer. As discussed above, EPA finds sufficient periodic monitoring to have been included in these conditions to assure compliance with their respective 20% opacity limit. There is no need to supplement Condition 42 with periodic monitoring requirements since all of the opacity emitting units are already addressed in the Emission Unit Level section of the permit. Therefore, EPA finds no merit in Petitioner's claim and denies the petition on this point.

(VIII) Pre-existing Permit Limits

Petitioner alleges DEC omitted permit limits established from pre-existing permits that are applicable requirements for the Danskammer part 70 permit. Petitioner notes that a construction permit issued to the Danskammer Plant in 1985 limits the two coal crushers and tail pulley area of the two belt conveyors to a PM emission rate of 0.05 lbs/hr. Petitioner also requested EPA objection based on a letter[15] from Wayne J. Mancroni, Central Hudson Gas & Electric (CHE & G), to Cheryl O'Brien, DEC Region 3, dated June 3, 1997 which referenced a prior telephone conversation between CHG & E and DEC where DEC representative agreed to remove restrictions for PM and VOC from Dankammer's (1996) "Permit to Construct" for the coal delivery system. Petitioner alleges the PM limit applies to the coal handling operation and DEC left out pre-existing permit requirements from the Danskammer title V permit. These permits were issued pursuant to 6 NYCRR Part 201 which has been part of the approved SIP for New York. Petitioner notes that these emission limits are expressed as "permissible" emission rates in their respective construction permits. Petitioner asserts the SIP makes it clear that the "permissible emission rate" included in SIP-based Part 201 permits is an enforceable requirement. Therefore, Petitioner requests EPA's objection to the Danskammer permit on the basis that it fails to include federally enforceable emission limits from two pre-existing construction permits issued by the DEC under a SIP-approved permit program. Petition at page 21.

EPA agrees with Petitioner that construction permits issued under a SIP-approved permit program are federally enforceable by law. Emission limits stipulated in such permits are thus federally enforceable. 40 CFR § 70.6(a)(1) requires the part 70 permit to contain "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." Omission from part

[15] This letter refers to the June 10, 1996, Permit to Construct issued to Danskammer.

70 permits emission limitations established in pre-existing construction permits is grounds for objection pursuant to 40 CFR § 70.8(c)(1).

In the case of Danskammer, the 1985 permit issued for the two coal crushers and belt conveyors is subject to 6 NYCRR § 212.4(c) for process emissions. Specifically, 6 NYCRR § 212.4(c) states "no person will cause or allow emissions of solid particulates that exceed 0.050 grains of particulates per cubic foot of exhaust gas, expressed at standard conditions on a dry gas basis." Therefore, the limit on total particulates as stipulated in Danskammer's 1985 construction permit is 0.05 grains/$ft^3$, not 0.05 lbs/hr as suggested by Petitioner. The monitoring required to assure compliance with this mass limit is stipulated in 6 NYCRR § 212.11(a) where it requires owners and/or operators to conduct capture efficiency and/or stack emissions testing using acceptable procedures pursuant to 6 NYCRR § 202. These requirements from the 1985 permit are stipulated in Condition 77 of the permit which requires a baghouse to be utilized for the air exhausts of the coal crushing and coal storage emission sources whenever they are in operation. DEC requires the baghouse to meet a capture efficiency of 99 percent. Consistent with the requirement of 6 NYCRR § 212.11(a), DEC requires Dankammer to perform an emission test to determine compliance with the baghouse removal efficiency of 99 percent. This emission test is required once per permit term. As explained in the above discussion, the requirements of the 1985 permit were not omitted but were stipulated in the Danskammer title V permit under Condition 77. The associated monitoring provisions are stipulated in Conditions 78 and 79 as discussed below.

In addition to the once per permit term emission testing, the baghouse is subject to monthly inspections. All inspection logs will record such information as 1) the date and time of each inspection; 2) any problems found; and 3) any maintenance performed. Further, the Danskammer permit also contains provisions to monitor opacity as the surrogate for monitoring particulate emissions at the coal handling and storage facility. Condition 78 stipulates an opacity limit of 20% as required by 6 NYCRR § 212.6(a), a requirement for water spray on the coal whenever coal is unloaded onto the conveyor and an annual Method 9 evaluation. Condition 79 imposes additional opacity monitoring requirements from the New Source Performance Standard, Subpart Y (40 CFR § 60.252(c))[16] for the conveyor which is used for transporting coal from the marine vessels to the coal pile. The opacity limit for the conveyor is no greater than 20% and a Method 9 is required to be performed within 180 days of permit issuance when coal is being unloaded from a marine vessel. Danskammer performed the requisite Method 9 reading on April 22, 2002 and reported the results on May 13, 2002. The report demonstrated compliance with the 6-minute average opacity limit of 20%. EPA denies the petition that DEC omitted applicable requirements from a 1985 pre-construction permit issued to Danskammer from the part 70 permit because, as discussed above, they were included in Condition 77.

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[16] Danskammer is subject to Subpart Y of the NSPS, codified at 40 CFR § part 60, for having constructed the conveyor after October 24, 1974.

EPA finds no merit to Petitioner's claim that applicable requirements from the 1996 pre-construction permit were omitted from the part 70 permit. EPA agrees with Petitioner that all pre-existing permit requirements must be transferred to the title V permit and may not be omitted unless such deletions or changes have already undergone the proper permit modification procedures as required under the SIP. In the case of Danskammer, changes (deletion of the VOC limit and conversion of the PM emission limit to an opacity limit) were made to the Certificate to Operate prior to issuance of the title V permit. The issue at hand is not one where DEC deleted a pre-existing permit requirement from the title V permit, rather it is one where DEC deleted permit conditions from a "Permit to Construct." EPA did not find the title V permit issued to Danskammer to have omitted pre-existing permit requirements (PM and VOC limits) since the "Permit to Operate" which replaced the "Permit to Construct" did not have those limits in it prior to the issuance of the part 70 permit. DEC's alleged failure to follow proper procedures when making changes to its title I permit is outside the scope of this petition. Nonetheless, EPA reviewed documents from DEC's files and questioned DEC personnel regarding those deletions and offers this explanation. The VOC limit was deleted from the 1996 "Permit to Construct" for the coal handling system because it was included erroneously. The coal handling system was a delivery hopper and a 3,500-foot long enclosed conveyor for transporting coal taken from marine vessels. Since there are no VOC emissions associated with this coal transferring operation, the VOC limit listed on the June 10, 1996 "Permit to Construct" was a mistake. DEC deleted this limit when it issued the "Certificate to Operate." The PM emission limit was changed to an opacity limit in the "Certificate to Operate." The 1996 "Permit to Construct" in fact identified the particulate emissions as "coal dust." DEC corrected the limit on particulates from a mass emission limit to one in terms of opacity in the 1997 "Certificate to Operate." Because EPA believes that DEC did not leave out pre-existing permit requirements from Danskammer's permit, EPA denies the petition on this point.

(IX) Risk Management Plans

The Petitioner alleges that the general permit condition, Condition 17, Item 17.2 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). Petitioner requests EPA to object to the Danskammer permit on the basis that it is uncertain whether it assures compliance with all applicable requirements including those under § 112(r). Petition at page 22.

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. Danskammer did not submit a Risk Management Plan (RMP) to EPA under § 112(r) of the Act and 40 CFR part 68,[17] because, based on the information provided in Danskammer's

[17] All Risk Management Plans are filed with EPA and EPA can verify the submission of an RMP by contacting (continued...)

application, Danskammer is not subject to these statutory and regulatory requirements. 40 CFR part 68 applies to "an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process, as determined under 40 CFR § 68.115." Further, 40 CFR § 68.115(b)(2)(ii) specifically exempts gasoline used as fuel for internal combustion engines from having to be considered for applicability under this part. Therefore, not providing information on the applicability of §112 (r) and 40 CFR part 68 to the facility is harmless error in this case and does not form a basis for an objection. Therefore, EPA denies the petition on this point.

Furthermore, DEC did not take delegation of § 112(r); therefore, EPA is responsible for implementing such requirements in New York. Whether or not a specific source is subject to § 112(r) is determined by EPA, not the State. Because all applicable requirements must be 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. 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 issue.

(X) Annual Certification Condition

Petitioner noted that the draft permit stated that the annual certification is "due 30 days after the end of the calendar year." The proposed and final permits subsequently state that the annual certification is "due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department." Petitioner cites a number of problems with this language. First, Petitioner states, it is possible that a facility would not be required to submit the first compliance certification until after the end of the first annual period following the date of permit issuance. According to Petitioner, this violates 40 CFR § 70.6. Second, by adding "unless another quarter has been acceptable by the Department," Petitioner believes that the permit is rendered unenforceable by the public, because it is unclear how the Department will revise the date that the certification is due. Specifically, Petitioner is concerned that the DEC can change the due date through an oral conversation with the permittee, without the public knowing that the deadline has been changed. Also, Petitioner finds the phrase "calendar quarter that occurs just prior to the permit anniversary date" vague because it is unclear when quarters begin and end. Petitioner concludes that the annual compliance certification is unenforceable as a practical matter and requests EPA to object to this permit. Petition at 24.

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(...continued)
the RMP Reporting Center at (703) 816-4434.

Submission of the initial compliance certification report 30 days after the end of the first annual period, following the date of permit issuance, does not contravene part 70 provisions. Annual compliance certification requirements, as outlined at 40 CFR § 70.6, require the submission of an annual compliance report, with no implied submission deadline. Whether the certification was submitted 30 days following the end of the calendar year or 30 days following four calendar quarters after permit issuance the reporting exercise itself would not violate Part 70 provisions. Since the permittee is already required to submit quarterly emissions report and semi-annual monitoring reports, the compliance status of the facility is disclosed to the DEC on an on-going basis. In this case, the Danskammer permit was issued on November 29, 2001 and Danskammer submitted an annual compliance certification on January 10, 2003. Hence, EPA finds this issue to be without merit.

Lastly, Petitioner claims that the following permit language "unless another quarter has been acceptable by the Department" might allow DEC to orally agree to a change the submission schedule without public notice. There is no evidence that this has caused a problem specifically with Danskammer's annual certification. However, this phrase is vague, therefore, DEC should remove this language when it reopens the permit for other reasons and ensure that the timing of all reports required by the permit are clear in each permit.

(XI) Sulfur Dioxide ($SO_2$) Emission Limitations

Petitioner finds Danskammer's permit to have omitted the sulfur limit imposed by a 1987 Stipulation and Order on Consent (Consent Decree) which established conditions under which the Danskammer coal reconversion project may be operated. In the Matter of the Department of Environmental Protection of the City of New York, et al., Index No. 9599-85. The Consent Decree stipulates that the coal fuel burned in Units 3 and 4 must have a sulfur content not to exceed 0.7% (1.1 lb $SO_2$ per million Btu on a 24-hour average basis). The Danskammer permit contains only the 1.1 lb $SO_2$/MM Btu emissions limit and not the 0.7% sulfur-in-fuel limit. The subject omission was not inadvertent; in fact, DEC stated in the public notice (announcing the Danskammer draft permit) published in the "The Times Herald-Record" on December 20, 2000 that "[t]hese limits are equivalent and apply to Units #3 and #4. The Department has determined that only one of these limits need apply and the Permit will require compliance with 1.1 pound per million BTU limit." DEC's rationale for not including both limits was the two limits are equivalent and only one of the two is necessary to assure compliance with the National Ambient Air Quality Standard (NAAQS) for $SO_2$. 40 CFR § 70.5(c)(iii)(C) requires a schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance and that such schedule resemble and be "at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject." As such Petitioner asserts both limits must be included in Danskammer's permit. Petitioner requests EPA's objection on the basis that the Danskammer permit fails to include and assure compliance with all applicable $SO_2$ emission limitations. Petition at page 24.

EPA agrees with Petitioner that conditions from the 1987 Consent Decree are applicable

requirements that must be included in Danskammer's title V permit. In fact, EPA made the same argument regarding this issue to DEC in a letter dated September 26, 2001 during our proposed permit review. In our September 26, 2001, letter, EPA offered the following option to DEC to resolve this issue should DEC maintains its premises that there is no need to include both limits:

> "We recommend that if you wish to retain only one of the two forms of this sulfur limit, then the permit should specify the range of coal heating values on which the permit is based. We also recommend that, should you choose to discard one of the forms of this sulfur limit, you include an explanation of your reasoning in the facility description."

DEC responded on November 15, 2001 in a letter from Robert J. Stanton, P.E., Regional Air Pollution Control Engineer, Region 3 of DEC to Steven Riva, Chief, Permitting Section, EPA, Region 2, which insisted that the Order (the Consent Decree) allowed the 1.1 lb $SO_2$/MMBtu limit to be used as an alternative to the sulfur-in-coal limit and maintained that including both sulfur-in-coal and $SO_2$ limits are not required. Despite DEC's claim of unwarranted change to the permit to include both limits, the final permit issued to Danskammer did include the 0.7% sulfur-in-coal limit when the heating value of the coal is less than 12,727 BTU per pound. See Condition 71. Because DEC has supplemented Danskammer's permit with conditions suggested by EPA for assuring compliance with the $SO_2$ NAAQS, EPA finds this issue resolved. Therefore, EPA denies the petition on this point.

Conclusion

For the reasons set forth above and pursuant to CAA § 505(b)(2), I deny in part and grant in part the petition of NYPIRG requesting the Administrator to object to the issuance of the Danskammer title V permit. This decision is based on a thorough review of the November 29, 2001 permit, and other documents that pertain to the issuance of this permit.

February 14, 2003
Dated:

/s/
Christine Todd Whitman
Administrator