

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF THE)	
HUNTLEY GENERATING STATION)	ORDER RESPONDING TO
)	PETITIONER'S REQUEST THAT
Permit ID: 9-1464-00130/00020)	THE ADMINISTRATOR OBJECT
Facility DEC ID: 9146400130)	TO ISSUANCE OF A STATE
)	OPERATING PERMIT
Issued by the New York State)	
Department of Environmental Conservation)	
Region 9)	Petition Number: II-2002-01
_____)	

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

On January 7, 2002, the Environmental Protection Agency ("EPA" or "Agency") received a petition from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, for the Huntley Steam Generating Station ("Huntley"). The Huntley permit was issued by the New York State Department of Environmental Conservation's ("DEC") Region 9 Office, and took effect on October 29, 2001, pursuant to title V of the Act, the federal implementing regulations at 40 CFR part 70, and the New York State implementing regulations at 6 NYCRR parts 200, 201, 621, and 624.

The Huntley facility, which is owned by NRG Energy, Incorporated, is a coal-fired electric generating station. It consists of six boilers, four of which have a maximum heat input of approximately 1,000 million British thermal units per hour (MMBtu/hr) and two of which have a maximum heat input of approximately 1,800 MMBtu/hr; and a coal handling operation.

The NYPIRG petition alleges that the Huntley permit proposed by the DEC on approximately September 21, 2001 does not comply with 40 CFR part 70 in that: (1) the proposed permit lacks a compliance schedule designed to bring the Huntley facility into compliance with CAA requirements; (2) DEC violated the public participation requirements of CAA § 502(b)(6) and 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing; (3) the proposed permit is based upon an inadequate permit application; (4) the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (5) the proposed permit does not require prompt reporting of all deviations

from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (6) the proposed permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70; (7) the proposed permit lacks federally enforceable conditions that govern the procedures for permit renewal; (8) the proposed permit fails to include federally enforceable emission limits established under pre-existing permits; (9) the proposed permit lacks monitoring that is sufficient to assure the facility's compliance with all applicable requirements; (10) the proposed permit inappropriately placed compliance requirements that pertain to the ash silo in the State-only side of the permit; and (11) the proposed permit improperly describes the annual compliance certification process. The Petitioner has requested that EPA object to the issuance of the Huntley permit pursuant to CAA § 502(b)(2) and 40 CFR § 70.8(d).

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

Based on a review of all the information before me, including the NYPIRG petition; the Huntley permit application; the administrative record supporting the permit; a September 11, 2001 letter from Jeffrey E. Dietz of DEC to Steven C. Riva of EPA Region 2 regarding the Responsiveness Summary/Proposed Final Permit (“Responsiveness Summary”); the Huntley title V permit effective on October 29, 2001 (“title V permit”); and relevant statutory and regulatory authorities and guidance; I deny the Petitioner's request in part and grant it in part for the reasons set forth in this Order.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of New York, effective on 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 regulations. 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 permit 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 CAA § 505(a) and 40 CFR § 70.8(a), States are required to submit all proposed title V operating permits to EPA for review. Permit objections are addressed in § 505(b)(1) and (2) of the Act, which authorizes the EPA to object if a title V permit contains provisions not in compliance with applicable requirements, including the requirements of the applicable SIP. This petition objection requirement is also contained in the corresponding implementing regulations at 40 CFR § 70.8(c)(1).

Section 505(b)(2) of the Act states that if the EPA does not object to a permit, any member of the public may petition the EPA to take such action, and the petition shall be based on objections that were raised during the public comment¹ period unless it was impracticable to do so. This provision of the CAA is reiterated in the implementing regulations at 40 CFR § 70.8(d). If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

II. ISSUES RAISED BY THE PETITIONER

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

In its November 16, 2001 letter, the DEC committed to address various program implementation issues by January 1, 2002, and to ensure that permit issuance procedures are performed in accordance with state and federal requirements. EPA monitored New York's title

¹ See CAA § 505(b)(2) and 40 CFR § 70.8(d). The Petitioner commented during the public comment period by raising concerns with the draft operating permit that are the basis for this petition. See comments from Keri N. Powell, Esq., Attorney for NYPIRG to DEC (January 9, 2001) ("NYPIRG comment letter").

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

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, the DEC is substantially meeting the commitments made in its November 16, 2001 letter.³ As a result, EPA has not at this time issued a notice of program deficiency ("NOD") pursuant to CAA § 502(i) and 40 CFR §§ 70.10(b) and (c). If EPA determines that DEC is not properly administering or enforcing the program, it will publish an NOD in the *Federal Register*.

A. Compliance Schedule

The Petitioner alleges that the proposed permit lacks a compliance schedule designed to bring the Huntley plant into compliance with CAA requirements. NYPIRG asserts that the DEC has issued three notices of violation ("NOVs") to facility operators for violations of the Act. The petition states that two of the NOVs relate to violations that remain ongoing at the Huntley Station. The first NOV, issued on December 22, 1999⁴ describes violations of opacity limits of the New York SIP at 6 NYCRR § 227-1. The second NOV, issued on May 25, 2000, alleges that the Huntley facility was modified in violation of Prevention of Significant Deterioration (PSD) requirements. Petition at 2.

The Petitioner cites 40 CFR § 70.5(c)(8)(iii)(C), which states that if a facility is in violation of an applicable requirement at the time of receipt of an operating permit, then the facility's permit must include a compliance schedule with milestones that lead to compliance. NYPIRG states that if a power plant is in violation of PSD or SIP requirements, then the facility's title V permit must include a compliance schedule to bring the facility into compliance. The Petitioner also argues that including a compliance schedule in a title V permit will require the facility to immediately begin taking steps to come into compliance, but it would not preclude the facility from contesting the underlying NOV. Petition at 5.

The Petitioner is correct that the proposed permit lacked a compliance schedule designed to bring Huntley into compliance with opacity requirements but the issuance of a

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

⁴ The NOV cited in the NYPIRG petition and appended as Exhibit 1, was not issued to the Huntley facility but, apparently, for Dunkirk Power, LLC. EPA, however, has received from the DEC three NOVs issued for opacity violations at the the Huntley facility; one dated December 22, 1999, another dated January 14, 2002 and the third dated August 28, 2002.

NOV does not trigger this regulatory requirement. In this case, when Huntley submitted its application it certified that the facility would not be in compliance with the applicable SIP opacity limit at the time of permit issuance, and nothing in the permit record indicates that Huntley had come into compliance by the time DEC issued the final permit.⁵

Although Huntley did submit a compliance schedule and a compliance plan as part of its permit application, the Huntley permit did not include the compliance schedule from the application and there is nothing in the permit record explaining this omission.

Accordingly, the final permit does not contain a compliance schedule as required by EPA's and New York's regulations. *See* 40 CFR §§ 70.5(c)(8)(iii) and 70.6(c)(3); 6 NYCRR §§ 201-6.3(d)(9)(iii) and 201-6.5(d)(1) (title V permit must include a schedule of compliance for a source not in compliance with all applicable requirements at the time of permit issuance).

For the reasons set forth in subsequent sections of this order, EPA is granting, in part, NYPIRG's request that EPA object to the Huntley permit. The Huntley permit must accordingly be reissued to address those issues forming the basis for EPA's decision to object to the Huntley permit. In reissuing the Huntley permit, the DEC must either incorporate into the permit a compliance schedule consistent with the requirements of 40 CFR § 70.5(c)(8)(iii) and 6 NYCRR § 201-6.3(d)(9)(iii), or explain in the public notice or statement of basis that a compliance schedule is no longer necessary because the facility is in compliance with the applicable opacity requirements.

DEC has alleged that the owner of the Huntley facility is in violation of the requirements of the PSD program. *See* New York State Department of Environmental Conservation Notice of Violation, May 25, 2000. However, unlike the opacity violations to which the facility certified noncompliance, the owner of Huntley does not concede that the facility is not in compliance with the requirements of PSD and is currently litigating DEC's PSD allegations in the Western District of New York in *State of New York v. Niagara Mohawk Power Corporation, et al.*, No. 02-CV-0024S. Given this litigation is ongoing, it would be premature to require the DEC to include a compliance schedule at this time. Therefore, EPA denies the petition with respect to this issue.

As discussed above, the NOV for alleged PSD violations is currently being litigated in the Western District of New York and a resolution of the NOV's for opacity violations is still being negotiated. It is entirely appropriate for the DEC enforcement process to take its course.⁶ Should an Order on Consent be issued or an adjudicated

⁵ 40 CFR § 70.5(b) requires applicants to promptly submit supplementary facts or new information to the permitting authority if anything contained in the application has changed, was incorrect, or any new requirements have become applicable to the source.

⁶ While nothing in the Act would have *prohibited* the DEC from including a compliance schedule in the Huntley title V permit, the question presented in the petition and answered herein is whether inclusion of a

determination be made prior to the time that DEC re-opens the Huntley permit in response to this Order, a compliance plan and schedule must be incorporated into Huntley's title V permit. In the event that the NOV's have not been resolved in time for incorporation of a compliance schedule into the Huntley permit, there are sufficient safeguards in the title V permit to ensure that the permit shield contained in the Huntley permit may not be used as a defense during any enforcement proceedings and requirements relating to compliance schedules will be complied with at the appropriate time. For example, Conditions 4, 19, 21, and 27 of the Huntley permit address unpermitted emission sources, the permit shield, re-openings for cause, and permit exclusion provisions, respectively.⁷ In addition, the issuance of the 3 NOV's, as well as the pending resolution of the NOV's issued for the alleged opacity and PSD violations are described in some detail on the front page of the Huntley permit, in the "Description" section. Also, the public notice announcing the draft permit acknowledges the NOV's and states that "the above violations are being resolved by the attorneys and the compliance schedules will be included in this permit when finalized."

Therefore, EPA denies the petition on this issue.

B. Public Hearing

The Petitioner also contends that DEC violated the public participation requirements of CAA § 502(b)(6) and 40 CFR § 70.7(h) by inappropriately denying its request for a public hearing. Petition at 5. NYPIRG states that although a written request for a hearing was made, the DEC denied such a request, stating that the "Department has determined that a public hearing on the proposed permit is not warranted." The Petitioner argues that it submitted 30 pages of relevant comments to DEC on the draft permit, and posits that DEC believed that such comments were insufficient in their nature and scope to qualify for a public hearing. Further, NYPIRG argues that a permitting authority has no discretion to refuse to hold a hearing when one is requested. Petition at 5-6.

Neither the CAA or EPA's implementing regulations require a permitting authority to hold a hearing when one is requested. Rather, the CAA and applicable regulations require only that States offer an opportunity for a public hearing. *See* CAA § 502(b)(6)

compliance schedule is *mandatory* as soon as an NOV is issued, but long before the matter has been resolved and the required steps to come into compliance have been identified.

⁷ In particular, condition 27 provides in part: "The issuance of this permit by the Department . . . does not and shall not be construed as barring, diminishing, adjudicating or in any way affecting any currently pending or future legal, administrative or equitable rights or claims, actions, suits, causes of action or demands whatsoever that the Department may have against the applicant including, but not limited to, any enforcement action authorized pursuant to the provision of applicable federal law, . . ."

and 40 CFR § 70.7(h)(2). In accordance with these requirements, the New York title V program provides that DEC has the discretion to hold either a legislative or an adjudicatory public hearing. In this case, the DEC determined that a public hearing was not warranted. *See* Responsiveness Summary (Sept. 11, 2001). As the DEC has the discretion to refuse to hold a public hearing and the Petitioner has not demonstrated that this discretion was not reasonably exercised, NYPIRG's request that EPA object to the permit on these grounds is denied.

C. Incomplete Permit Application

The Petitioner claims that the applicant did not submit a complete permit application in accordance with the requirements of CAA § 114(a)(3)(C), 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d). Petition at 6. In making this claim, NYPIRG incorporates a petition that it filed with the Administrator on April 13, 1999, wherein the Petitioner contended that the DEC is inadequately administering its title V program by utilizing a legally deficient standard permit application form.

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

- The application form lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether the Huntley facility was in compliance with all applicable requirements. The Petitioner asserted that a permit that is developed in ignorance of a facility's current compliance status cannot possibly assure compliance as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1);
- The application form lacks a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based;
- The application form lacks a description of all applicable requirements that apply to the facility; and
- The application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

NYPIRG alleges that omission of the information described above makes it difficult for a member of the public to determine whether a proposed permit includes all applicable requirements, for example, new source review requirements from pre-existing permits. The Petitioner goes on to state that the lack of information in the application also makes it more difficult for the public to evaluate the adequacy of the monitoring in the proposed permit. Petition at 6.

(a) Initial Compliance Certification

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claims here that Huntley failed to submit a proper initial compliance certification with its application, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA Section 505(b)(2) (objection required "if the Petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); 40 C.F.R. § 70.8(c)(1). As explained below, EPA believes that the petitioner has failed to demonstrate that the lack of a proper initial compliance certification, certifying compliance with all applicable requirements at the time of application submission in this instance, resulted in, or may have resulted in, a deficiency in the permit.

The Petitioner is correct that the application form the used by DEC did not clearly require the applicant to certify compliance with all applicable requirements at the time of application submission.⁸ Rather, Huntley certified that it would be in compliance with all applicable requirements, with the exception of opacity requirements for its six boilers, at the time of permit issuance.⁹ In its application, the Huntley facility included this compliance certification, as well as a recommended course of action (referred to by the facility as a "compliance plan") for addressing the opacity exceedances from its six boilers. This "compliance plan" was included in the final title V permit at condition 55. Because the Huntley facility was not in compliance with the applicable opacity limit when it submitted its application on October 1, 1999, even if the application form used by Huntley had required the facility to certify to its compliance at the time of application submission, the ultimate permit issued would have been the same. Accordingly, EPA believes that petitioner has not adequately demonstrated that had Huntley submitted a proper initial compliance certification the final permit would have been any different. Therefore, EPA denies the petition on this issue.

(b) Statement of Methods for Determining Initial Compliance

⁸ In accordance with the DEC's November 16, 2001 letter, the permit application form was changed to clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. The application form and instructions were also 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.

⁹ In its application form, Huntley certified that, for all units at the facility that are operating in compliance with all applicable requirements, the facility will continue to be operated and maintained to assure compliance for the duration of the permit, except for those units referenced in the compliance plan portion of the permit. In Section IV, the compliance plan portion of the permit, the applicant provided a compliance plan for its 6 boilers relative to opacity emissions.

The next issue raised by the Petitioner relates to an omission in the application form of “a statement of methods used for determining compliance” as required by 40 CFR § 70.5(c)(9)(ii). The application submitted by Huntley did not specifically require the facility to include a statement of methods used for determining compliance but the applicant nonetheless provided information on certain methods used for determining compliance by referring in the permit application, Sections III and IV, to the applicable monitoring procedures. Such references include: (1) specific test methods used to analyze waste fuel; (2) vendor-supplied analysis of the sulfur content of the fuel used sulfur in fuel analyses; (3) intermittent emission testing; and (4) use of continuous emissions monitoring systems (CEMS) and continuous opacity monitoring systems (COMS) to monitor sulfur dioxides, nitrogen oxides and opacity. There was also additional documentation appended to the application that would assist in determining compliance, including facility emissions calculations, and the facility’s NO_x RACT Plan. In light of the information provided, EPA believes that the petitioner’s general allegations do not adequately demonstrated that, in this case, had the application submitted by Huntley specifically required the facility to include a statement of methods, the final permit would have been any different. Therefore, EPA denies the petition on this issue.

(c) Description of Applicable Requirements

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

In describing applicable requirements, the Huntley permit application refers to State and Federal regulations. These regulations are publicly available and are also available on the internet. The Huntley permit also contains references to applicable requirements that as a general matter are not as readily available such as the facility’s NO_x RACT compliance plan and operating plan, and previously-issued permits to construct (PCs) and certificates to operate (COs). In this case, the NO_x RACT plan and a number of COs were attached to the permit application. The Huntley permit accordingly contained a description of the applicable requirements that apply to the facility. The petitioner has not shown that any of the descriptions were in error or that the referenced material is not

available to the public. The petition is therefore denied on this issue.

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

The Petitioner's fourth allegation is that the application form lacks a description of, or reference to, any applicable test method for determining compliance with each applicable requirement. EPA disagrees with Petitioner that the application form used by the Huntley facility failed to include a description of, or reference to, any applicable test method that the source intends to use for determining compliance with each applicable requirement. In the emission unit information part (Section IV) of the application form, there is a block labeled "Monitoring Information" that requires applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. The application form also requires the applicant to provide monitoring information at the facility level in the "Facility Information" section of the application. Consistent with 6 NYCRR § 227-2.6(b)(4) and 40 CFR Part 75, Huntley will monitor its NO_x emissions with Continuous Emission Monitors ("CEMs") and submit quarterly NO_x emissions reports as required by 6 NYCRR § 227-2.6(b)(4). A continuous emissions monitor is also installed to record the emissions of SO₂.¹⁰ 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 and instantaneously. With respect to the test method for stack testing to determine compliance with 6 NYCRR § 227, the Huntley facility stated in its application that it will use Reference Method 5 as listed in 40 CFR Part 60. In addition to COMS, Huntley identified Reference Test Method 9 as the method used to determine opacity compliance in accordance with 6 NYCRR § 227-1.3(a). For the coal handling operation, the Huntley facility did not propose any method for determining compliance with the opacity standard because the coal will be unloaded and conveyed to the storage piles in an enclosed system with no potential for fugitive emissions to be released to the outside air. As described above, the application lists CEM/COM as the method to determine compliance with the regulations for opacity, NO_x and SO₂; as well as the sulfur-in-fuel requirements. Therefore, EPA denies the petition on this issue.

D. Annual Compliance Certification

The Petitioner alleges that the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5) by not requiring the

¹⁰ In its application Huntley requested that it be allowed to monitor the sulfur content of the coal fired in terms of the equivalent sulfur dioxide emissions via the use of the CEM. 6 NYCRR § 225.6(b) allows monitoring and recording of sulfur compound emissions expressed as sulfur dioxide continuously at all times while the combustion installation is in service. As such, in the final Huntley permit the DEC included the equivalent sulfur dioxide emission limits that Huntley must monitor.

facility to certify compliance with all permit conditions. The petitioner claims rather that the Huntley permit requires only that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” Petition at 8. Specifically, the Petitioner is concerned with the language in the permit that labels certain permit terms as “compliance certification” conditions. NYPIRG notes that requirements that are labeled “compliance certification” are those that identify a monitoring method for demonstrating compliance. The Petitioner asserts that the only way of interpreting this compliance certification designation is as a way of identifying which conditions are covered by the annual compliance certification. NYPIRG further asserts that permit conditions that lack periodic monitoring are excluded from the annual compliance certification. The Petitioner claims that this is an incorrect application of state and federal regulations because facilities must certify compliance with every permit condition, not just those that are accompanied by a monitoring requirement. Petition at 8.

The language in the permit that labels certain terms as “compliance certification” conditions does not mean that the Huntley facility is *only* required to certify compliance with the permit terms containing this language. “Compliance certification” is a data element in New York’s computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. Condition 26.2 of the permit delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

The language in the Huntley permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, mirrors the language of 40 CFR §§ 70.6(c)(5) and (6). Section 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Section 201-6.5(e)(3) requires the following in annual certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the administrator and shall contain such other provisions as the department may require to ensure compliance with all applicable requirements. The Huntley title V permit includes this language at condition 26, item 26.2.

Therefore, the references in the Huntley permit to “compliance certification” do not negate the DEC’s general requirement for compliance certification of terms and conditions contained in the permit. Accordingly, because the permit and New York’s regulations properly 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.

However, when the DEC revises the Huntley title V permit in response to this Order, it should add language to clarify the requirements relating to annual compliance certification reporting.¹¹

E. Prompt Reporting of Deviations

The Petitioner also claims that the proposed permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). NYPIRG states that Huntley's proposed permit does not include any prompt reporting conditions. Petition at 8.

The Petitioner suggests two options to address this issue: DEC can (1) include a general permit condition that defines "prompt" under all circumstances, or (2) develop facility-specific permit requirements to define prompt for individual permit conditions .

Title V permits must include requirements for the prompt reporting of deviations from permit requirements. *See* 40 CFR § 70.6(a)(3)(iii)(B).¹² States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. Moreover, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case determination under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).¹³

In determining whether an objection is warranted for alleged flaws in the content of a particular permit EPA considers whether the petitioner has demonstrated that the

¹¹ In its November 16, 2001 letter, the DEC 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 as to preclude any confusion or misunderstanding, such as that argued by the Petitioner.

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

¹³ EPA's rules governing the administration of a federal operating permit program require, *inter alia*, that permits contain conditions providing for the prompt reporting of deviations from permit requirements. *See* 40 CFR § 71.(a)(3)(iii)(B)(1)-(4). Under this rule deviation reporting is governed by the time frame specified in the underlying applicable requirement unless that requirement does not include a requirement for deviation reporting. In such a case, the part 71 regulations set forth the deviation reporting requirements that must be included in the permit. For example, emissions of a hazardous air pollutant or toxic air pollutant that continue for more than an hour in excess of permit requirements, must be reported to the permitting authority within 24 hours of the occurrence.

permit is not in compliance with the requirements of the Act, including the requirements of the applicable SIP. *See* CAA § 505(b)(2); 40 CFR § 70.8(c)(1). As explained below, petitioner's allegation that the permit does not contain *any* prompt reporting requirements is without merit. Furthermore, the petitioner has not demonstrated that the various reporting requirements contained in the Huntley permit fail to meet the standard set forth in part 70.

In this case, there are several provisions in the Huntley title V permit that require prompt reports be made to the DEC (conditions 37, 38, 39, 49, 50, 52, 59, 60, 61, 65, 66 and 67). These relate to sulfur dioxide emission limits and/or sulfur-in-fuel monitoring requirements (conditions 37, 38 and 39), opacity requirements (conditions 49, 59 and 65), and nitrogen oxides averaging plan requirements (conditions 50, 52, 60, 61, 66 and 67). Each of these conditions require that reports be submitted quarterly. Quarterly reporting, in these cases, also serves as prompt reporting of deviations. In previous Orders EPA determined that semi-annual sulfur-in-fuel reporting is sufficiently prompt in light of the degree and type of deviation likely to occur; therefore, in the case of the Huntley facility, quarterly reporting for the sulfur-in-fuel requirement is appropriate. The sulfur content of the fuel-oil must be monitored by submission of a report from the supplier to the facility for each fuel-oil delivery. Because it is highly unlikely that fuel-oil outside of the specifications would be delivered and used, quarterly monitoring reports are appropriate. In addition, since sulfur dioxide emissions are directly related to the sulfur content of the fuel combusted, quarterly reporting is also appropriate in this case.

With respect to opacity, the requirement that the facility report quarterly data from its continuous opacity monitoring systems is appropriate prompt reporting. As noted above, the facility and DEC are still in negotiations to resolve the opacity issues at the Huntley facility. Until such time as a conclusion on this matter is reached, the submission of quarterly COM reports, as required by the permit, is appropriate prompt reporting. The Huntley facility is required to comply with a NO_x averaging plan for compliance with the NO_x requirements of 6 NYCRR § 227-2.5. To determine compliance under this averaging plan, emissions from the Huntley facility, as well as four other facilities, are calculated either on a 24-hour or a 30-day rolling average. Quarterly reporting, which was established in the averaging plan, is also appropriate in light of the applicable requirement and the degree and type of deviation likely to occur. For the fugitive emissions from the coal handling operations, Condition 70 requires a daily observation for opacity from these operations to assure compliance with the 20 percent opacity limit of 40 CFR 60, Subpart Y. An EPA Method 9 test is required to be conducted if daily observations, using Method 22, indicate any visible emissions. Any exceedances are required to be reported to DEC no later than the next business day.

With respect to other monitoring provisions in the permit, such as other fuel recordkeeping requirements, the reporting is required every 6 months. As noted above, in previous Orders EPA determined that semi-annual sulfur-in-fuel reporting is sufficiently

prompt in light of the degree and type of deviation likely to occur; therefore, in the case of the Huntley facility with respect to recordkeeping and reporting for other fuel related requirements, semi-annual reporting is appropriate. In addition, where stack tests are required to be performed, the test protocols set forth the reporting requirements of the test results. Normally, test results must be reported within 30-days of the test.

There are two monitoring provisions in the Huntley permit that do not contain adequate provisions for prompt reporting of deviations. These two conditions, 58 and 64, relate to monitoring of ESP parameters for particulate matter emissions, and have no reporting schedules. Therefore, although these conditions were not specifically addressed by the NYPIRG petition, we are nonetheless requiring the DEC to reopen the permit to address this omission. Additional discussion of these conditions, and the needed revisions are provided in Section I.1, below. Therefore, the petition is granted in part on this issue.

F. Startup, Shutdown, Malfunction

Petitioner asserts that the proposed permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70. Petition at 10-13. The petition provides a detailed, 5-part discussion of Condition 6 of the proposed Dunkirk permit, entitled "Unavoidable Noncompliance and Violations," which it refers to as the DEC's "excuse" provision. Petitioner alleges that the "excuse provision" included in this proposed permit reflects the requirements of New York State regulation, 6 NYCRR § 201-1.4. Permit Condition 6 states, in part, that "[a]t 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 applicable SIP emissions limits during periods of 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 or the like, 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, at page 23 (Nov. 16, 2000), available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>. The regulation found at 6 NYCRR § 201-1.4 is a State regulation, adopted in 1996, that has not been approved by EPA for inclusion into the SIP.

Condition 6 of the Dunkirk/Huntley permit provides the DEC with the discretion to excuse the facility from compliance with applicable emission standards under certain

circumstances, based on the State regulation 6 NYCRR § 201-1.4. EPA grants the petition on the point that the DEC improperly included in the Dunkirk/Huntley permit the “excuse provision” based on a regulation that has not been approved into the New York SIP . In its November 16, 2001 letter, the DEC committed to remove the “excuse provision” that cites 6 NYCRR § 201-1.4 from the federal side of title V permits and to incorporate the condition into the state side of the Huntley permit. In accordance with its commitment, DEC must remove the “excuse provision” that cites 6 NYCRR § 201-1.4 from the federal side of the permit. In addition, DEC must include in the permit the provision from its rules that states that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-ups, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). With respect to Petitioner’s other allegations regarding the startup, shutdown and malfunction provision (RACT, definition of terms, prompt report of deviations, “unavoidable” defense), the removal of the “excuse provision” from the federal side of the permit makes moot these concerns.

G. Permit Renewal

The Petitioner’s seventh claim is that the proposed permit lacks federally enforceable conditions that govern the procedures for permit renewal. Petition at 14. That is, NYPIRG argues that the Huntley permit lacks the federally enforceable requirement that the facility apply for a renewal permit within six months of permit expiration, as allegedly required by 40 CFR § 70.5(a)(1)(iii). Although the Petitioner concedes that condition 3 of the “General Provisions” Section of the permit echoes the requisite permit renewal requirements of 40 CFR part 70, it is asserted that this condition is not contained in the “Federally Enforceable Conditions” section of the title V permit and, thus, does not satisfy the federal requirements.

EPA disagrees with the Petitioner that the Huntley permit must include a federally enforceable requirement that the facility apply for a renewal permit within six months of permit expiration. The regulations at 40 CFR § 70.5(a)(1)(iii) simply define what constitutes a “timely” application for renewal purposes. This definition is essential to the interpretation of 40 CFR § 70.7(c)(ii), which explains that permit expiration terminates the source’s right to operate unless a “timely” renewal application has been filed. Any facility that does not renew in a timely manner may be subject to an enforcement action for operating without a permit. EPA finds Petitioner’s allegation to be without merit, and therefore, denies the petition on this point.

H. Pre-Existing Federally Enforceable Emission Limits

The Petitioner argues that the proposed permit fails to include all federally enforceable emission limits. NYPIRG contends that the Huntley facility is subject to a

number of pre-existing permits issued pursuant to New York's SIP-approved permitting regulations at 6 NYCRR part 201. The Petitioner states that the permissible emission rates listed therein are applicable requirements that must be included in the Huntley title V permit. Specifically, the Petitioner references three DEC permits that were attached to the petition. These DEC permits, and the requirements that NYPIRG alleges should be included in the Huntley title V permit, expressed as "permissible emission rates," are as follows:

- For facility boilers 67 and 68, emission limits for particulate matter (PM), sulfur dioxide (SO₂), carbon monoxide (CO), nitrogen oxides (NO_x), and non-methane volatile organic compounds (VOCs);
- For 3 welding booths and 3 welding tables, PM emission limits; and
- For a wastewater treatment plant (WWTP) silo, PM emission limits.

The Petitioner also states that it suspects that an underlying operating permit also exists for facility boilers 63 through 66, although no specific permits were included with the Huntley petition. NYPIRG also contends that DEC apparently has a general policy of omitting terms and conditions of pre-existing permits from a facility's title V permit unless those pre-existing terms and conditions were explicitly mandated by an applicable rule.¹⁴ The Petitioner also argues that "U.S. EPA is already on record requiring [that] terms and conditions of permit [sic] issued pursuant to SIP regulations be included in Title V permits" and cites a May 20, 1999 letter from John Seitz, EPA to Robert Hodanbosi, STAPPA/ALAPCO. Petition at 15-16.

The Petitioner is correct that federally-enforceable conditions from permits issued pursuant to requirements approved into the New York SIP must be included in the Huntley permit. *See* 40 CFR § 70.2; 6 NYCRR § 201-2.1. Construction and operating permits issued in the past, however, may contain requirements that are not "applicable requirements" as defined in the title V program or that are obsolete and are no longer applicable to the facility (e.g., terms regulating construction activity during the building or modification of the source where construction is long completed). In this situation, the DEC may delete inapplicable or obsolete permit conditions by following the modification procedures set forth in the New York regulations. *See* 6 NYCRR §§ 201-6.7, 201-1.6 and

¹⁴ To support this assertion NYPIRG includes the following language from the Huntley facility's Title V Application Supporting Narrative: "It is [Niagara Mohawk Power Corporation's] understanding that DEC will approve permit terms and conditions based upon specific applicable rules cited in the completed Title V application. For this reason, the application includes only those permit conditions from previous operating permits which have been deemed necessary to comply with specific applicable requirements. [Niagara Mohawk Power Corporation] requests that other permit conditions from previous operating permits be removed because they have no underlying applicable requirement."

621.6; *see also* 40 CFR §§ 70.7(e)(4) and 70.7(h). Alternatively, the DEC may announce the intended deletion of old permit conditions in the public notice for the draft title V permit or in the corresponding Permit Review Report (PRR). Either process satisfies the requirement to provide the public with notice and an opportunity to comment on changes to the federally enforceable terms of a pre-existing permit. *See* 6 NYCRR §§ 201-1.6 and 621.6; *see also* 40 CFR 70.7(h).

(a) Boilers 67 and 68

With respect to the pre-existing DEC permit for facility boilers 67 and 68, this permit includes emission limits in two places that were not incorporated into the Huntley title V permit. Section F of the pre-existing permit, “Contaminant Listing” (for PM, SO₂, NO_x, CO and non-methane VOCs), and in the “Special Conditions” section, which references a DEC letter of March 21, 1994 (which delineates conditions for PM, SO₂ and NO_x only). Based on the application forms (and instructions) used for these pre-existing permits, it was the responsibility of the applicant to complete, in Section F, the actual emissions with respect to individual pollutants, and how such emissions were determined. Subsequently, upon issuing the final permit, the DEC would enter the permissible emission rate and, if appropriate, include any special conditions.

EPA believes that the limitations that are set forth in the Huntley permit for boilers 67 and 68 are the only applicable requirements for these boilers. Nonetheless the discrepancies between the current title V permit and the referenced pre-existing permit need to be resolved. Because we are unable to determine whether these limits were properly left out of the Huntley permit, the DEC must provide the public with an opportunity to comment on the appropriateness of these revisions during the permit re-opening. At that time, the DEC must also provide an explanation, either in the public notice or the PRR, as to why each limitation in the November 20, 1996 permit and/or the March 21, 1994 letter was revised or deleted. For example, the following issues should be addressed: (a) why the PM limit was changed from 0.165 lb/MMBtu to 0.17 lb/MMBtu , and why the 18.9 x 10⁵ pounds per year (lb/yr) limit was omitted; (2) why the SO₂ limit of 2.8 lb/MMBtu became 2 separate limits of 2.8 lb/MMBtu (3-month average) and 3.4 lb/MMBtu (24-hour average), and why the 63 x 10⁶ lb/yr limit was omitted; (3) why the 9.4 x 10⁶ lb/yr NO_x limit was omitted; and (4) why the limits for carbon monoxide and non-methane volatile organic compounds were omitted.

(b) Boilers 63 through 66

With respect to the Petitioner’s contention that there must also exist DEC permits for facility boilers 63 through 66, it should be noted that the Huntley title V application appended copies of a number of pre-existing facility permits, including one for these four boilers. However, the copy of the permit for facility boilers 63 through 66 was illegible

and the permissible limits contained in this permit could not be read. Thus, we have no way of knowing whether any federally enforceable emission limits contained in the pre-existing permit for these boilers were improperly left out of the Huntley title V permit. We are therefore unable to determine whether the final Huntley permit is in compliance with all applicable requirements. Upon reopening, the DEC must provide the EPA and the public with a legible draft of the underlying permit, and it must determine whether any additional applicable requirements need to be incorporated into the Huntley title V permit.

(c) Particulate Matter Limits for Three Welding Booths and Three Welding Tables

The next DEC pre-existing permit addressed in the NYPIRG petition was issued for 3 welding booths and 3 welding tables, which are connected to one common stack and one exhaust fan. This DEC permit contains the following “permissible” PM limits: 5.0 grains per 100 Dry Standard Cubic Feet (“DSCF”), and 100 lb/yr. There are no “Special Conditions” listed in this permit.

It appears that this process is listed under New York’s “Trivial Activities” which under New York’s SIP approved regulations do not have to be incorporated into a facility’s title V permit. *See* 6 NYCRR § 201-3.1(b). Indeed, this process was neither listed in the Huntley title V application nor the appended list of exempt activities. In New York’s title V regulations promulgated to implement this program, the DEC lists as trivial, “hand-held or manually operated welding, brazing and soldering equipment.” 6 NYCRR § 201-3.3(c)(54). In addition, there do not appear to be any federally promulgated or NY SIP regulations that apply to this process. As such, it would seem that this process and the aforementioned emission limitations need not be included in the Huntley title V permit. If this is the case, then the DEC must process this title V permit “omission” or “deletion” in the requisite manner during the public review period for the Huntley title V permit re-opening. That is, a discussion of whether these units are indeed “trivial activities” should be included in the public notice or the permit review report during the permit re-opening process.

(d) Particulate Matter Limits for the WWTP Silo

The third and final DEC pre-existing permit addressed in the NYPIRG petition was issued for the WWTP lime silo with a dust collection system on top, that collects lime dust during unloading processes from trucks to the silo (the system reuses filter bags, and the lime dust falls back into the silo via a shaker). This permit contains the following “permissible” PM emission limits: 0.05 grains per DSCF, and 1.6 lb/yr. The “Special Condition” of this permit includes a requirement that the collector must be maintained in good operating condition.

It appears that this process is listed under New York’s “Exempt Activities” which

under New York's SIP approved regulations do not have to be incorporated into a facility's title V permit. *See* 6 NYCRR § 201-3.1(b). Although this process was not listed in the Huntley title V application, it was listed in the appended list of exempt activities. In New York's title V regulations, the DEC lists as exempt, "storage silos storing solid materials, provided all such silos are exhausted through an appropriate emission control device." 6 NYCRR § 201-3.2(c)(27). In addition, there do not appear to be any federally promulgated or NY SIP regulations that apply to this process. As such, it would seem that this process and the aforementioned emission limitations need not be included in the Huntley title V permit. If this is the case, then the DEC must process this title V permit "omission" or "deletion" in the requisite manner during the public review period for the Huntley title V permit re-opening. That is, a discussion of whether these units are indeed "exempt activities" should be included in the public notice or the permit review report during the permit re-opening process.

In conclusion, EPA is granting the NYPIRG petition on this issue. Upon re-opening of the Huntley title V permit pursuant to this Order, DEC must either incorporate into the revised title V permit all of the federally enforceable emission limitations from the aforementioned pre-existing New York State permits, or if it is the position of the DEC that these limits need not be included in the revised Huntley title V permit, then such a determination must be described in sufficient detail in the public notice or the PRR during the permit re-opening process.

I. Monitoring

The Petitioner's ninth claim is that the proposed Huntley permit does not assure compliance with all applicable requirements because many individual permit conditions lack adequate monitoring and are not practicably enforceable. Petition at 17. The Petitioner addresses individual permit conditions that allegedly either lack monitoring or are not practicably enforceable.¹⁵ The specific allegations for each permit condition are discussed below.

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

Facility-Specific Petition Issues

1. Conditions 58 and 64 (Compliance with Particulate Matter Limits for Boilers)

The Petitioner alleges that the proposed permit fails to assure the facility's ongoing compliance with PM limits that apply to the six coal-fired boilers. NYPIRG notes that PM emissions are controlled by cold side electrostatic precipitators (ESPs), and that the monitoring is contained in Conditions 58 and 64 of the proposed title V permit. Specifically, the Petitioner contends that: (1) a Method 5 stack test required once per permit term is not sufficient; (2) the use of opacity as a surrogate for PM monitoring, as DEC explained in its Responsiveness Summary, has not been adequately explained by the State, and there is no discussion in the permit that opacity is being used to monitor for PM emissions; and (3) the permit must include specific limits or ranges for ESP parameters being monitored, including voltage, current, and spark rate. Petition at 17-21.

EPA agrees with the Petitioner that the monitoring included in Conditions 58 and 64 of the Huntley title V permit is not adequate to assure compliance with the applicable PM limit. One stack test per permit term to measure PM emissions from the six Huntley boilers is not sufficient "to yield reliable data from the relevant time period that are representative of the source's compliance with the permit," as required by 40 CFR § 70.6(a)(3)(B), and therefore, monitoring sufficient to meet this standard is necessary.

In responding to NYPIRG's comments on the proposed permit that there are no specific monitoring requirements for particulate emissions to assure compliance with the PM standard, the DEC concluded that the opacity monitoring in Conditions 56, 57, 61 and 62 of the Huntley permit is a surrogate for monitoring of PM emissions (opacity monitoring in the final Huntley title V permit is contained in Conditions 59 and 65¹⁶). *See* Responsiveness Summary at 7. The Responsiveness Summary also noted that opacity is continuously monitored and "the 20 percent standard was developed around data that would correlate to the PM standard for sources of particulates." Responsiveness Summary at 7-8.

In fact, the final permit does use opacity monitoring as a surrogate for insuring compliance with PM emission requirements. *See* Conditions 58 and 64. In this case, opacity from the facility's boilers are monitored by COMs, and the boilers are equipped with ESPs to reduce PM emissions. While opacity from a boiler stack is a good indicator of boiler operation and combustion efficiency, an exact correlation between opacity and PM limits (in this case, a limit of 0.17 pounds per million British thermal units

¹⁶ The conditions in the proposed Huntley permit were combined and renumbered in the final Huntley permit.

(lb/MMBtu)) can be difficult to establish. Accordingly, we are unable to determine, based on the information contained in the permit record, whether opacity monitoring is an appropriate surrogate for monitoring PM emission limits. EPA needs additional information supporting the position taken by the DEC in its Responsiveness Summary that the 20 percent standard was developed around data that would correlate to the PM standard for sources of particulates. In our judgment, any such correlation regarding the Huntley facility must be made using continuous opacity monitoring system (COMS) data from the time that the PM stack test was run. Stack tests performed for compliance determinations often result in emissions less than the federally applicable requirement. If, for example, the once per permit term PM test indicates PM emissions of 10 to 20 percent less than the requisite standard, it would seem to be difficult to correlate that with the COMS data to establish an opacity compliance “trigger.”

In this case if the DEC wishes to use opacity as one of the surrogate methods to assure compliance with PM limits, either alone or with other surrogate monitoring (i.e., ESP parametric monitoring), then the title V permit must include a specific opacity limit in Conditions 58 and 64 that would correlate to the PM limit of 0.17 lb/MMBTU. In addition, these two Conditions, or the Permit Review Report (PRR) must describe in detail how the correlation between opacity and the PM emission limit was established.

The other method noted in the Huntley title V permit, at Conditions 58 and 64, to assure compliance with the PM emission limit is the recording of primary and secondary voltage and current, and the spark rate from the facility’s ESPs. The permit further states that data requirements are to include baseline ESP operating parameter records and sampling data concurrent with emission tests or historical plant records of ESP performance, and Quality Assurance/Quality Control procedures to calibrate, maintain and operate instrumentation in accordance with the manufacturer’s recommendations.

On this issue, EPA agrees with the Petitioner that, if ESP parametric monitoring is to be used as a surrogate to assure compliance with PM emission limits, then additional information regarding the operation of the ESPs is needed. That is, if these ESP operational parameters can be used to determine compliance through the indication of proper operation of these control devices, then specific operational limits (upper level or lower level) and/or operational ranges should be incorporated into the Huntley title V permit. If the DEC believes that levels and/or ranges for specific ESP parameters either are, or can be established and used as a surrogate for PM emission limit compliance, and the DEC intends to incorporate such specific levels or ranges in the permit, then background documentation on how such levels or ranges were established should be described in the PRR. The established ESP parametric levels or ranges could be those recorded during emissions tests, or those listed by the control equipment manufacturer as the settings used for optimum operation.

Finally, as discussed above in Section E, “Prompt Reporting of Violations,” DEC

must incorporate a prompt reporting requirement for the PM parametric monitoring into Conditions 58 and 64, that is related to opacity reporting and ESP parametric reporting, if these methods are to remain in the re-opened and revised Huntley title V permit. No prompt reporting is necessary for the once per permit term PM stack test, as the stack test protocol (required to be submitted and approved prior to the test) addresses all requisite reporting requirements.

Therefore, the NYPIRG petition is granted with respect to these issues.

2. Condition 70 (Emission Limits for Coal Unloading and Handling Processes)

The Petitioner next comments that the proposed permit fails to assure that the facility will operate in ongoing compliance with emission limits that apply to the coal unloading and handling process. NYPIRG contends that Condition 70 of the proposed permit, which relates to these processes, is vague and must be revised to include more specific requirements that will assure compliance with the requisite applicable requirements. Specifically, the Petitioner argues that this condition must incorporate mandatory obligations that will allow the public to ascertain whether the facility is operating in compliance. Provisions that NYPIRG contends are vague include the use of spray equipment, and when corrective action is required. Petition at 21.

EPA agrees with the Petitioner that additional explanation is needed to address certain parts of Condition 70. Based on our review of the permit and the permit record we believe that the methods for assuring compliance with the emission limits that apply to the coal handling processes may be appropriate. However, additional explanatory discussion should be incorporated into Condition 70 to more fully outline the specific procedures used when coal is stored, transferred or loaded (the coal handling operations).

Condition 70.2-1 requires that when coal is being unloaded from a railcar into a building the emissions be minimized by spraying with a nonhazardous soapy water. But there is nothing in the permit specifying when water spraying will be performed, and when it will not be performed. The DEC must explain this during the re-opening process. This condition also states, in part, that use of a non-hazardous soapy water spray is dependent on the moisture content of the coal and the weather. Language should be added to describe how the coal moisture content is determined and at what content spraying will not be performed. In addition, further discussion of weather conditions and associated impacts should be included (e.g., when spraying is not required based on weather conditions). Finally, the frequency and duration of the spraying should be addressed. The reporting requirements of this condition must also be supplemented to indicate each rail car unloading event, whether spraying was performed and, if not, why not (e.g., coal moisture content, that precipitation occurred (when it took place and for how long), etc.). This recorded information should be reported on a semi-annual and annual basis, as part of the 6-month monitoring and annual compliance certification reports.

Condition 70.2-2 contains requirements applicable to coal conveyors and chutes but fails to specify which conveyors and chutes are subject to this condition , if any (this condition notes that *most* of the conveyors are underground or are covered). In addition to this applicability concern, it must also be stated whether water spraying or other forms of wetting is required, and which specific (or category of) conveyors and/or chutes must be controlled in this manner. If spraying is to be used, appropriate recordkeeping and reporting, as described above, should also be incorporated into this condition . Lastly, a more thorough description of the number and location of the chutes should be included in the permit, together with the description of the distances between these chutes and the material receptors.

Finally, Condition 70 requires the coal handling operations to comply with the State's 20 percent opacity limit using EPA Method 9 but because it does not explain what would trigger corrective action it is not practically enforceable. Therefore, the permit must specify under what conditions a Method 9 analysis must be performed (for example, *any* visible emissions noted by the observer), and what the corrective action includes (e.g., water spraying to mitigate particulate matter emissions). Also, the daily observations must be recorded, together with any corrective action taken, and this information must be reported in the 6-month semi-annual monitoring report and the annual compliance certification report, as appropriate.

3. Conditions Relating to Compliance With Opacity Limits

The Petitioner contends that the proposed Huntley title V permit fails to assure the facility's compliance with applicable opacity limits. NYPIRG addresses two specific sub-issues. The first allegation is that the proposed permit must include more detailed reporting requirements. The petition states that monitoring information has not been sufficient to enable the DEC Commissioner to determine whether exceedences were unavoidable, thus qualifying for an excuse. And in addition, the Petitioner argues that there were times when the lack of information precluded the DEC from being able to determine whether an exceedence had actually occurred. NYPIRG also notes that lack of this type of information would limit the public's ability to determine whether an enforcement action would be appropriate. Petition at 22-24.

The second allegation made by the Petitioner is that the requirement that the facility maintain and calibrate its COMS must be identified as a federally enforceable requirement. It is asserted that such a requirement is identified as being enforceable only by the State. NYPIRG reports the State's response that it included a condition on the State-only side of the permit, citing 6 NYCRR § 227-1.4(a), was because this regulation is not in the New York SIP. Furthermore, the Petitioner contends that although there is a separate provision on the Federal side of the permit that cites 6 NYCRR § 227-1.3, this provision should require COMS calibration and maintenance.

Even if we agreed with NYPIRG's allegation that the Huntley permit must include more detailed reporting requirements because the DEC Commissioner has been unable to determine, based on the monitoring information provided, whether exceedences would qualify for an "excuse" there would be no basis for the Administrator to object to the Huntley permit on these grounds. The Act does not allow for automatic exemptions from compliance with all applicable SIP emission limits during periods of start-up, shut-down, malfunctions or upsets. 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. As such, the DEC may not "excuse" unavoidable violations, and as discussed in Section F, above, the permit condition corresponding to Unavoidable Noncompliance and Violations (Condition 5 in the final title V permit) must be moved to the "State-Only" side of the permit. Accordingly, EPA denies the NYPIRG petition on this point.

The next allegation made by the Petitioner is that there were times that the DEC could not even determine whether an opacity exceedence had occurred. In support of this contention NYPIRG cites to language of a NOV that the DEC issued on August 25, 1999, stating in part, that "[t]he number of opacity exceedences is indeterminate because of the inadequate quarterly reporting." We have concluded this claim is without merit. The language cited by the Petitioner is from a NOV (attached to the petition as Exhibit 14) that was issued to a different facility (the Dunkirk Steam Generating Station). And even if this language were applicable to this case, the proper course of action is to bring an enforcement action against the source to address the reporting deficiencies. As such, EPA denies the petition on this point.

EPA also disagrees with NYPIRG's contention that the COMS maintenance and calibration requirements are improperly listed on the State-Only side of the title V permit. The Huntley permit includes Condition 54, which addresses the facility's applicability to the federal acid rain program, and references attached acid rain permits, to which the Huntley Station is also subject. These acid rain permits require the facility to comply with the monitoring provisions of 40 CFR part 75, which contain specific requirements relating to the maintenance and calibration of COMS and continuous emissions monitoring systems. Because the permit contains all of the applicable requirements of the federal acid rain program on the federal side of the Huntley title V permit, the NYPIRG petition is denied.

4. Various Conditions ("Upper Limit of Monitoring")

Finally, the Petitioner alleges that EPA must object to the proposed permit because it states emission limits in a manner that is unenforceable as a practical matter. Petition at 24. That is, NYPIRG contends that throughout the proposed permit, emission limitations are described in terms of the "upper limit of monitoring," and cites as examples conditions

58, 60, 61, 64 and 66.

While it is true that the draft and proposed permits used the term “upper limit of monitoring” to describe the various emission limitations in the Huntley permit, this term has been revised in the final Huntley title V permit. The pertinent emission limitations are described in the final permit as either the “upper permit limit” or the “lower permit limit,” as appropriate. EPA believes that these new terms adequately describe the applicable emission limits and, as such, the petition is denied on this issue.

J. Ash Silo Requirements

The Petitioner alleges that certain compliance requirements designed to prevent future violations of the prohibition against reintroducing collected contaminants into the air are inappropriately placed in the “State-Only” side of the proposed permit. NYPIRG notes that on November 27, 2000, the DEC issued Huntley a NOV for violations of 6 NYCRR § 201-1.8 (reintroduction of collected contaminants to the air) because the flyash silo at the Huntley facility was overfilled, causing the pressure valve to open and ash was emitted from the silo. It is also noted by the Petitioner that the proposed permit cites to 6 NYCRR § 211.2 as the legal basis for this condition. Petition at 24-25.

EPA agrees that the ash silo is subject to a federally applicable requirement [6 NYCRR § 201.7] and therefore the compliance requirements are also federally applicable requirements and belong on the federal side of the permit. The NOV issued by the DEC on November 29, 2000 did not specifically cite 6 NYCRR § 201-1.8 (it cited that the facility was in violation of Article 19 of the Environmental Conservation Law), but the subsequent Order on Consent issued by the DEC on January 9, 2003, cited the facility for violations of 6 NYCRR §§ 200.7 (maintenance of equipment) and 201-1.8. Part 200.7 is in the New York SIP but part 201-1.8 is not part of the approved SIP and, therefore, is a State-Only requirement. Currently, both of these regulatory provisions are included on the federal side of the final Huntley title V permit, as Conditions 3 and 8, respectively. But because Condition 8, which corresponds with part 201-1.8, is a State-Only requirement it should not be included on the federal side of the Huntley permit.¹⁷

The Huntley title V permit includes requirements applicable to the ash silo in Condition 75, which is in the State-Only side of the permit but does not include a comparable condition on the federal side of the permit. Condition 75 cites the “nuisance” regulation codified at 6 NYCRR § 211.2 as the applicable State requirement. However, as explained above this emission unit is also subject to the federally applicable

¹⁷ On June 17, 1996, the DEC requested that EPA approve certain revisions to the New York SIP including the revised regulations of 6 NYCRR § 201-1.8. EPA has not as yet approved this SIP revision request. However, there is a similar SIP regulation (although not exactly the same), codified at 6 NYCRR § 201.7, that addresses this issue.

requirements found at 6 NYCRR §§ 201.7 and 200.7.¹⁸ We therefore conclude that Condition 75 should be moved from the State-Only side of the permit to the federal side of the Huntley permit, and the regulatory citations should list the federally-applicable regulations of 6 NYCRR § 200.7 and 201.7.

The “Monitoring Description” of Condition 75 also includes the federally applicable SIP-approved opacity regulation found at 6 NYCRR § 211.3. Therefore, at the time that the permit revision is made to move Condition 75 to the federal side of the permit, appropriate monitoring, recordkeeping and reporting to assure compliance with 6 NYCRR § 211.3 should be included in this condition. Since this applicable requirement does not require any monitoring, the DEC must include periodic monitoring consistent with the requirements of 6 NYCRR § 201-6.5(b)(2) and 40 CFR § 70.6(a)(3)(B). Such periodic monitoring should be the same or similar to monitoring incorporated into other title V permits that include this opacity requirement. For example, the monitoring might consist of daily observations leading to a Method 9 analysis, if appropriate for such an emission unit (e.g., Conditions 33 and 34 of the Starrett City title V permit effective on November 10, 2000). An alternative monitoring methodology may also be used. There are already some aspects of monitoring to assure compliance with parts 200.7 and 201-1.8 (which would also be applicable to part 201.7). That is, installation and use of a Ramsey gauge level to indicate the amount of ash in the silo. Additional to this, however, the DEC should require appropriate recordkeeping and reporting relative to utilization of this gauge. For example, the level of the ash in the silo should be recorded on some specified time basis (e.g., daily), and reported in the 6-month monitoring report. This provision could also include a more stringent prompt reporting requirement if the DEC determines that a more frequent prompt reporting provision is needed.

Condition 75 also contains measures to mitigate fugitive emissions during emptying of the silo by the use of wetting processes. This requirement should be upgraded to incorporate appropriate monitoring, recordkeeping and reporting. For example, Huntley could ensure that spraying occurs each time that the silo is emptied, ensure that the spraying equipment is maintained in proper working order through scheduled inspections, record in a log book the time, date and duration of all silo emptying actions and whether spraying was performed, and report such activities in the 6-month monitoring report.

Although EPA is denying the NYPIRG petition on the narrow issue of whether 6 NYCRR § 201-1.8 is a federally applicable requirement and therefore, is inappropriately included on the “State-Only” side of the permit, as discussed above, NYPIRG is correct

¹⁸ By including a condition citing 6 NYCRR § 201-1.8 in the federal side of title V permits, DEC apparently believes, albeit mistakenly, that this provision is part of the approved SIP, and therefore is a federal applicable requirement.

that compliance requirements of Condition 75 are federally applicable requirements and therefore DEC must re-open the Huntley title V permit to move Condition 75 from the “State-Only” side of the permit to the federal side, include the appropriate SIP citations, and incorporate requisite monitoring, recordkeeping, and reporting requirements.

K. Annual Compliance Certification

The Petitioner also claims that the proposed Huntley permit improperly describes the annual compliance certification requirement. That is, the proposed permit states that the first annual compliance certification 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. NYPIRG contends that this provision creates a number of problems, including: (1) the possibility that the facility would not be required to submit the first certification until after the end of the first annual period following the date of permit issuance; (2) the unenforceability by the public relative to revising the certification due-date based on the language that states: “unless another quarter has been acceptable by the Department” (that is, NYPIRG is concerned that the DEC can change the due date through an oral conversation with the permittee, without public knowledge); and (3) the vagueness of the language in this condition that reads: “calendar quarter that occurs just prior to the permit anniversary date” Petition at 25.

The language in the final Huntley title V permit regarding this matter states, in part:

“Compliance certifications shall be submitted annually. Certification reports are due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due thirty days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department.”

Submission of the initial compliance certification report in accordance with this schedule does not contravene the 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, neither reporting schedule would violate the 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. Hence, EPA finds this issue to be without merit.

Lastly, the Petitioner claims that the permit language that reads: “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 Huntley’s annual certification. However, EPA agrees that this phrase is vague and, therefore, DEC should remove this language when it re-opens the permit for the other reasons outlined in this Order, and ensure that the timing of all reports required by the permit are clear in each permit.

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 Huntley title V permit. This decision is based on a thorough review of the October 29, 2001 permit, and other documents that pertain to the issuance of this permit.

July 31, 2003
Dated:

_____/s/_____
Marianne L. Horinko
Acting Administrator