BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF THE KEYSPAN GENERATION FAR ROCKAWAY STATION Permit ID: 2-6308-00040/00011 Facility DEC ID: 2630800040 Issued by the New York State Department of Environmental Conservation Region 2	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition Number: II-2002-06

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

On July 5, 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 Keyspan Generation LLC's Far Rockaway Station Power Plant ("Keyspan Far Rockaway"). This permit was issued by the New York State Department of Environmental Conservation's ("DEC") Region 2 Office, and took effect on May 8, 2002, 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 Keyspan Far Rockaway title V permit was modified twice, with effective dates of March 2, 2004 ("Modification 1") and June 17, 2004 ("Modification 2").

Keyspan Far Rockaway is an electricity generating utility station owned and operated by Keyspan Corporate Services, LLC. The facility consists of one 100 MWe (megawatts of electricity) turbine/generator boiler set, operating on pipeline natural gas, and #1, #2 and #6 fuel-oils. The boiler also has the capability of burning waste-oil generated on-site for energy recovery. The facility includes an industrial steam boiler for building heating; this is a Hurst series 400 boiler with a design heat input of 12.6 million British thermal units per hour, and fires natural gas.

The NYPIRG petition alleges that the Keyspan Far Rockaway permit proposed by the DEC on March 21, 2002 does not comply with the Clean Air Act or 40 CFR part 70 in that: (1) 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; (2) the permit is based upon an

inadequate permit application; (3) the draft permit failed to include an adequate statement of basis; (4) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (5) the 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 permit's startup/shutdown, malfunction, maintenance and upset provision violates 40 CFR part 70; (7) the permit fails to include federally-enforceable conditions that govern the procedures for permit renewal; and (8) the permit lacks monitoring that is sufficient to assure the facility's compliance with all applicable requirements. The Petitioner has requested that EPA object to the issuance of the Keyspan Far Rockaway 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 Keyspan Far Rockaway permit application; the administrative record supporting the permit; a March 21, 2002 letter from Elizabeth A. Clarke of DEC to Steven C. Riva of EPA Region 2 regarding the Responsiveness Summary/Proposed Final Permit ("Responsiveness Summary"); the Keyspan Far Rockaway title V permit effective on May 8, 2002 ("title V permit"); Modification 1; Modification 2; 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 full approval to New York's title V operating permit program on February 5, 2002. 67 *Fed. Reg.* 5216. 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, record keeping, reporting, and other compliance requirements when not adequately required by existing applicable requirements to assure compliance by sources with existing applicable emission control 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) of the Act and 40 CFR §§ 70.8(a), States are required to submit all proposed operating permits to EPA for review. Section 505(b)(1) of the Act authorizes 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 reflected in the corresponding regulations at 40 CFR § 70.8(c)(1).

Section 505(b)(2) of the Act states that if EPA does not object to a permit, any member of the public may petition EPA to take such action, and the petition shall be based on objections that were raised during the public comment period[1] 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

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as the Petitioner's claims below that DEC improperly denied NYPIRG's request for a public hearing, and that the application form submitted by Keyspan was not in compliance with the requirements of the CAA, Part 70 and 6 NYCRR Part 201, 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 § 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 CFR § 70.8(c)(1).

A. Public Participation

The Petitioner's first claim is that 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. *See* Petition at 2. The Petitioner submitted written comments to DEC during the public comment period and requested a public hearing, which DEC denied in its March 21, 2002 Responsiveness Summary. NYPIRG further contends that a significant degree of public interest in the permit should have been evident from its submission of 25 pages of written comments. The Petitioner asserts that EPA must object to the Keyspan Far Rockaway title V permit on the basis that DEC's refusal to hold a public hearing is a violation of the program's public participation requirements.

In its petition, NYPIRG does not demonstrate or even allege that a public hearing on this permit would have garnered additional information such that it may have resulted in different

[1] *See* CAA § 505(b)(2); 40 CFR § 70.8(d). The Petitioner commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. *See* comments from Keri N. Powell, Esq. of NYPIRG to DEC (July 18, 2000) ("NYPIRG Comment Letter").

terms and conditions in the permit. In fact, NYPIRG notes in its petition that it submitted 25 pages of relevant comments to DEC on the draft permit. DEC responded in writing to these comments in its March 21, 2002 Responsiveness Summary, and modified certain conditions based on comments. Accordingly, in this case, NYPIRG does not demonstrate that DEC's failure to grant a hearing on the Keyspan Far Rockaway permit resulted in, or may have resulted in, a deficiency in the permit.

Additionally, the Act and corresponding regulations require that permitting authorities offer an opportunity for a public hearing. *See* CAA § 502(b)(6) and 40 CFR § 70.7(h)(2). In accordance with these federal 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* the cover letter of the Responsiveness Summary. Only NYPIRG submitted public comments and a request that a public hearing be held. DEC could have reasonably concluded that a significant degree of public interest did not exist and exercised its discretion to not hold a public hearing. The Petitioner has not demonstrated that this discretion was not reasonably exercised. Therefore, NYPIRG's request that EPA object to the permit on these grounds is denied.

B. Inadequate Permit Application

The Petitioner's second claim is 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). *See* Petition at 2 and 3.

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

(1) The application form lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether the Keyspan Far Rockaway 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);

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

(3) The application form lacks a description of all applicable requirements that apply to the facility; and

(4) 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 listed above makes it difficult for a member of the public to determine whether a draft permit includes all applicable requirements. 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. *See* Petition at 2 through 4.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as the Petitioner's claims here that Keyspan failed to submit a complete permit 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, the Petitioner has failed to demonstrate that the lack of a proper initial compliance certification or a more detailed statement of methods for determining initial compliance, resulted in, or may have resulted in, a deficiency in the permit.

(1) Initial Compliance Certification

The Petitioner alleges that Keyspan failed to submit a statement certifying its initial compliance status in accordance with CAA § 114(a)(3)(C), 40 CFR § 70.5(c)(9)(i), and 6 NYCRR § 201-6.3(d)(10(i). NYPIRG is correct that the application form used by DEC did not clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. In its application form, Keyspan certified that it would be in compliance with all applicable requirements at the time of permit issuance, and 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 this section of the permit application (Section IV), the applicant indicates that it is not in compliance with 6 NYCRR § 227-1.3(a), the SIP opacity requirements. The application further stated that the applicant and the DEC are currently negotiating terms of a consent order/decree concerning the opacity rules and, when such is finalized, Keyspan will comply with the terms of the consent order. The title V permit application was submitted on June 5, 1997, and the fully executed Order on Consent was issued on May 8, 1998. In addition, requirements relating to this Consent Order are included in the title V permit at Conditions 55 and 66. Therefore, even if the application form used by Keyspan 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, because the Petitioner has not demonstrated that the Keyspan permit fails to comply with applicable requirements, EPA denies the petition on this point.

(2) Statement of Methods for Determining Initial Compliance

The Petitioner alleges that Keyspan's application form omitted "a statement of methods used for determining compliance" as required by 40 CFR § 70.5(c)(9)(ii). The application

submitted by Keyspan did not specifically require the facility to include a statement of methods used for determining compliance in accordance with CAA § 114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201-6.3(d)(10)(ii). Nonetheless, the applicant provided information on certain methods used for determining compliance by referring in the permit application, in Section IV, to purchasing fuel-oil "on specification" (that is, the fuel-oil supplier must provide fuel that meets the State's sulfur-in-fuel requirements), intermittent emission testing, and continuous opacity monitoring. Additional documentation was also appended to and/or referenced in the application, including continuous emissions monitoring plans, the Title IV (Acid Rain) application, and the company-wide NO_x RACT plan. These materials provided DEC with sufficient information to discern how this facility determined its compliance, and will continue to comply with applicable requirements. In light of the information provided and as explained above, the Petitioner has not demonstrated that, in this case, had the application submitted by Keyspan required the facility to include a separate statement of the methods for determining compliance, the terms and conditions in the final permit may have been any different. Therefore, EPA denies the petition on this issue.

(3) Description of Applicable Requirements

The Petitioner's next claim is that Keyspan submitted an inadequate title V permit application because it failed to include a narrative description of applicable requirements that apply to the facility in accordance with 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4). 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* at 20 - 21 (July 10, 1995). 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.*

Consistent with EPA guidance, in describing applicable requirements, the Keyspan permit application refers to State and Federal regulations. For example, pages 2 and 6 of the application (Sections III and IV) cite as federally applicable requirements the State SIP regulations at 6 NYCRR §§ 225-1 and 227-2 (sulfur-in-fuel and NO_x RACT requirements), and the federal acid rain requirements at 40 CFR part 72. These regulations are publicly available and are also available on the internet. *See e.g.,* New York regulations at *www.dec.state.ny.us/website/regs/; see also,* federal regulations at *www.epa.gov/epahome/cfr40.htm*.

In addition, the Keyspan permit application includes references to applicable requirements that as a general matter are not as readily or widely available as the regulations above, such as the facility's NO_x RACT compliance plan which, in this case, was attached to the permit application. 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.

(4) 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. *See* 40 CFR § 70.5(c)(4)(ii). In the emission unit information part of the application form (Section IV), 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. For example, the Keyspan permit application includes, among others, continuous opacity monitoring and intermittent stack testing as methods for determining ongoing compliance with the facility's applicable requirements. The Petitioner has not demonstrated that the terms and conditions of the final permit may have been different had the application contained different descriptions. Therefore, EPA denies the petition on this issue.

C. Inadequate Statement of Basis

The Petitioner's third claim is that the draft permit was not accompanied by an adequate statement of basis or "rationale." *See* Petition at 5. While NYPIRG acknowledges that DEC did issue a "permit review report" ("PRR," the State's version of the required statement of basis) for the proposed Keyspan Far Rockaway permit, the Petitioner alleges that this document is missing certain key elements. Specifically, NYPIRG contends that the PRR did not provide explanations for nitrogen oxides ("NO_x") reasonably available control technology ("RACT") monitoring, and the status of compliance with a previously-issued Consent Order for opacity.

The statement of basis requirement is set forth at 40 CFR § 70.7(a)(5), which states that "the permitting authority shall provide a statement of basis that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions)." The statement of basis is not a part of the permit itself. It is a separate document which is to be sent to EPA and to interested persons upon request.[2] A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. However, it is not a short form of the corresponding permit. Instead, the statement

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

of basis should highlight elements that EPA and the public would find important to review.[3] Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, the permit shield, and any monitoring that is required under 40 CFR § 70.6(a)(3)(i)(B) or 6 NYCRR § 201-6.5(b)(2). Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA with a record of the applicability and technical issues surrounding the issuance of the permit. *See e.g., In Re Port Hudson Operation Georgia Pacific ("Georgia Pacific")*, Petition No. 6-03-01, at pages 37-40 (May 9, 2003); *In Re Doe Run Company Buick Mill and Mine ("Doe Run")*, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002). Finally, in responding to a petition filed in regard to the Fort James Camas Mill title V permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for the selected monitoring method be documented in the permit record. *See In Re Fort James Camas Mill ("Ft. James")*, Petition No. X-1999-1, at page 8 (December 22, 2000).

While EPA's regulations require a permitting authority to provide EPA with a statement of basis, the failure of a permitting authority to meet this requirement does not necessarily demonstrate that the title V permit is substantively flawed. As noted previously, in reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the Petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. Thus, where the record as a whole supports the terms and

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[3] *See* letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc., responding to NYPIRG's letter of March 11, 2001; November 16, 2001 DEC commitment letter, from Carl Johnson, Deputy Commissioner, DEC; 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 ("NOD") for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2000). Region V's letter recommends the same five elements outlined in the Texas NOD. That is, the five key elements of a statement of basis are (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. Id. at 735. In addition to the five elements identified in the Texas NOD, the Region V letter further recommends the inclusion of the following topical discussions in the statement of basis: (1) monitoring and operational restrictions requirements; (2) applicability and exemptions; (3) explanation of any conditions from previously issued permits that are not being transferred to the title V permit; (4) streamlining requirements; and (5) certain other factual information as necessary. In a letter dated February 19, 1999 to Mr. David Dixon, Chair of the CAPCOA Title V Subcommittee, the EPA Region IX Air Division provided a list of air quality requirements to serve as guidance to California permitting authorities that should be considered when developing a statement of basis for purposes of EPA Region IX's review. This guidance is consistent with the other guidance cited above. Each of the various guidance documents, including the Texas NOD and the Region V and IX letters, provide generalized recommendations for developing an adequate statement of basis rather than "hard and fast" rules on what to include in any given statement of basis. Taken as a whole, they provide a good roadmap as to what should be included in a statement of basis on a permit-by-permit basis, considering the technical complexity of the permit, history of the facility, and the number of new provisions being added at the title V permitting stage, to name a few factors.

conditions of the permit, flaws in the statement of basis generally will not result in an objection. *See e.g., Doe Run* at 24-25. In contrast, where flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, EPA will object to the issuance of the permit. *See e.g., Ft. James* at 8; *Georgia Pacific* at 37-40.

In this case, the Permit Review Report issued with the proposed permit, as well as those issued with the draft permits issued on March 2, 2004 and June 17, 2004, the application, the Responsiveness Summary, and other available documents in the permit record, contain adequate information to support the elements of the permit identified in NYPIRG's claim.

The first contention by the Petitioner is that the PRR should set out the factual basis for the NO_x RACT system-wide average emissions plan, where it can be located, and how compliance with applicable requirements will be assured. The title V permit application, in Section III, "Facility Applicable Requirements," page 2, lists NO_x RACT as an applicable requirement by citing 6 NYCRR § 227-2. In addition, the application indicated (in Section IV, "Emission Unit Compliance Certification," page 6) that NO_x RACT compliance is maintained in accordance with the DEC-approved system-wide NO_x RACT compliance plan, which was also referenced (in the "Supporting Documentation" section, page 10), and attached to the permit application. The PRR also discusses the applicability of the NO_x RACT requirements to the Keyspan Far Rockaway facility. The methodology to assure compliance with this applicable requirement is provided both in the NO_x RACT compliance plan, and in permit Conditions 35 and 56.

NYPIRG's second contention is that the PRR must explain the facility's opacity compliance status, the status of the corresponding Consent Order, and the Keyspan Far Rockaway title V permit must address the requirements of this Consent Order. In the June 5, 1997 title V permit application, Keyspan indicated that it was negotiating with the DEC terms of a consent order/decree relative to opacity requirements, and that once the document was finalized, it would comply with the provisions therein (see Section IV, "Compliance Plan," page 8). The Order on Consent for opacity was subsequently issued on May 8, 1998. The DEC also explained in the PRR that Keyspan Far Rockaway was not in compliance with applicable opacity requirements, and was subject to the aforementioned Order on Consent for the establishment of an opacity reduction program. The requirement to comply with the provisions of this Order, which establishes monitoring and reporting, is delineated in Condition 55 of the title V permit

The general allegations by the Petitioner that the statement of basis does not include explanations for NO_x RACT and the status of compliance with a previously-issued Consent Order for opacity are without merit. Because the circumstances in this case do not warrant an objection to the permit, the petition is therefore denied on this issue.

D. Annual Compliance Certification

The Petitioner's fourth allegation is that the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5) by not making clear that the facility is required to certify compliance with all permit conditions, not just those that are identified as "Compliance Certification" conditions, and accompanied by a monitoring requirement. *See* Petition at 6. In addition, NYPIRG asserts that this certification provision creates confusion with respect to when the annual certifications must be submitted. Specifically, the Petitioner complains about the language included in the condition which provides that the 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." The Petitioner finds this language problematic in that: (1) the first report could be submitted after the first anniversary date of the permit, in violation of 40 CFR § 70.6; and (2) the final clause of the condition (providing for a different due date, if acceptable by the DEC), if enacted, would be unenforceable by the public. *See* Petition at 7.

With respect to the Petitioner's first issue, the conditions in the permit that are labeled "Compliance Certification" are not the only conditions for which Keyspan must annually certify compliance. "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 23 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. Condition 23 further clearly states that "the provisions labeled herein as "Compliance Certification" are not the only provisions of this permit for which annual certification is required."

The language in the Keyspan Far Rockaway 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). 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 the 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 other provisions as the department may require to ensure compliance with all applicable requirements. The Keyspan Far Rockaway permit includes this language at Condition 23. Therefore, the references to "Compliance Certification" do not negate DEC's general requirement for compliance certification of terms and conditions contained in the permit and, as such, EPA is denying the petition on this point.

Regarding the Petitioner's second issue, the schedule for submitting the facility's annual compliance certification reports is also listed in Condition 23 of the title V permit. This condition makes clear that reports are due: "30 days after the reporting period. The initial report is due 4/30/2003. Subsequent reports are due on the same day each year. " (*see* Condition 23.2 of the Keyspan Far Rockaway permit). Keyspan submitted its first annual compliance certification report on April 30, 2003 and the second report earlier than it was due, on April 28, 2003. Regarding the Petitioner's concern 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, EPA does not agree with this contention because the permit clearly identifies an enforceable deadline for the initial compliance certification report as well as subsequent annual compliance reports. Therefore, the Petitioner's claim is without merit and is denied.

E. Prompt Reporting of Deviations

The Petitioner's fifth claim is that the proposed permit does not require the permittee to submit prompt reports of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). NYPIRG notes that the Keyspan Far Rockaway permit requires the facility to report some deviations promptly, while others can be deferred until the facility submits its 6-month monitoring report. The Petitioner asserts that prompt reporting must be more frequent than semiannually, because prompt reporting is a distinct reporting obligation under the regulations at 40 CFR § 70.6(a)(3)(iii)(A) (the semi-annual reporting requirement) and (B) (the prompt reporting requirement). Finally, NYPIRG states that prompt reporting must be provided for every type of deviation, and permit conditions that contain conflicting, less stringent deviation reporting requirements must be revised to remove the conflicting language and replaced by appropriate language. *See* Petition at 7 and 8.

Title V permits must include requirements for the prompt reporting of deviations from permit requirements. *See* 40 CFR § 70.6(a)(3)(iii)(B).[4] 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).[5]

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[4] 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 requirement."

[5] 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

The Keyspan Far Rockaway title V permit addresses prompt reporting of violations in Condition 22. This condition states that the facility must report deviations in accordance with the time frames specified in the underlying applicable requirements. However, if the underlying applicable requirement does not establish a time frame for prompt reporting of deviations, Keyspan must report according to the following schedule: (1) for emissions of a hazardous or toxic air pollutant that continue for more than an hour in excess of permit requirements, notify the permitting authority by telephone within 24-hours; (2) for emissions of any other regulated pollutant that continue for more than two hours in excess of permit requirements, notify the permitting authority by telephone within 48-hours; and (3) for all other deviations of permit requirements, report such deviations in the 6-month monitoring report. If emission exceedances described in (1) and (2) above, occur, the facility's responsible official must also submit to the DEC a written notice of such occurrences. All deviations from permit requirements must be identified in the 6-month report.

EPA disagrees with the Petitioner that the permit needs to supplement the above prompt reporting requirements with additional conditions for prompt reporting of deviations as stipulated in 40 CFR § 70.6(a)(3)(iii)(B). Pollutant-emitting activities at the Keyspan Far Rockaway facility are monitored in a number of different ways. EPA believes semi-annual reporting can be accepted as prompt reporting of many deviations for this facility based on the degree and type of deviation likely to occur and the applicable requirements. For instance, the steam boiler for building heating and the utility boiler are capable of burning natural gas or fuel-oil. To demonstrate compliance with the applicable sulfur-in-fuel limits, Keyspan must maintain records of fuel sulfur content for each delivery of fuel oil. *See* Conditions 32, 33, and 34 of the Keyspan Far Rockaway title V permit. For the utility boiler, Keyspan Far Rockaway must comply with the opacity requirements of 6 NYCRR § 227-1 (*see* Conditions 55 and 66 of the title V permit). A fully executed Order on Consent was issued on May 8, 1998 to address opacity exceedances from Keyspan facilities. This Order provides monitoring, recordkeeping and quarterly reporting requirements to establish an opacity reduction program meant to continually track opacity, and to assure that the permittee will put in place procedures to reduce the instances of opacity violations. The steam boiler for building heating is additionally subject to the opacity requirements of 6 NYCRR § 227-1.3(a) (*see* Conditions 73 and 74 of the Keyspan Far Rockaway title V permit). A facility representative must observe the boiler stack daily, record all observations, and retain such records for 5-years. If any non-steam visible emissions are observed for 2 consecutive days, then a Method 9 opacity analysis must be conducted within 2 business days of the second observation. If the Method 9 analysis indicates a contravention of the applicable opacity standard, then the DEC must be contacted within one business day of the Method 9 analysis with any corrective action and/or future compliance schedules.

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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.

Because the Petitioner has not demonstrated that the reporting requirements contained in the Keyspan Far Rockaway title V permit fail to meet the standard set forth in 40 CFR § 70.6(A)(3)(iii)(B), the petition is denied on this issue.

F. Startup/Shutdown, Malfunction, Maintenance and Upset Provision

The Petitioner's sixth claim is that Condition 77 of the Keyspan Far Rockaway permit, relating to violations during startup/shutdown, malfunction, maintenance and upset occurrences, violates 40 CFR part 70, as follows. *See* Petition at 8 through 11. Specifically, the Petitioner's assertions are as follows:

(1) Condition 77 of the title V permit, entitled, "Unavoidable noncompliance and violations" (hereinafter referred to as the "excuse" provision) reflects the requirements of the New York State regulations at 6 NYCRR § 201-1.4, which is not a SIP-approved rule. DEC must revise this permit condition so as to correspond to the SIP-approved excuse provision at 6 NYCRR § 201.5(e). *See* Petition at 8 and 9.

(2) The excuse provision requires that during any maintenance, start-up or malfunction conditions, reasonably available control technology ("RACT") shall be applied. Because the application of RACT in these instances is an applicable requirement, terms and conditions as to what constitutes RACT for Keyspan Far Rockaway should be included in the title V permit, together with associated monitoring, record-keeping and reporting requirements. *See* Petition at 9.

(3) The title V permit must define the term "unavoidable," in accordance with EPA's Startup, Shutdown and Malfunctions Policy, and must also include definitions for startup, malfunction and maintenance. *See* Petition at 9 and 10.

(4) The permit must require prompt written reports of deviations from permit requirements due to start-up, shutdown, malfunction and maintenance. *See* Petition at 10 and 11.

Condition 77 of the Keyspan Far Rockaway permit, which cites the State regulation at 6 NYCRR § 201-1.4, is a "State-only" requirement, and is properly located in the "State-only" enforceable side of the permit. This condition provides the DEC with the discretion to excuse the facility from compliance with applicable state-only emission standards under certain circumstances, based on the state-specific criteria set forth in 6 NYCRR § 201-1.4. The Petitioner's allegations concerning Condition 77 were based on the premise that this condition was located in the federal and state enforceable side of the permit. Since this condition is actually located in the State-only side of the permit, the Petitioner's allegations regarding this provision (RACT, definition of terms, prompt reporting of deviations, "unavoidable" defense) have no merit because this condition is not included in the federal and state enforceable section of the permit. In addition, the DEC included clarifying language in the final Keyspan Far

Rockaway permit stating that violations of federal requirements may not be excused unless the specific federal regulation provides for an affirmative defense during startups, shutdowns, malfunctions, or upsets. *See* Condition 22.2. Therefore, EPA denies the petition on this point.

However, NYPIRG is correct that there is an excuse provision in the approved New York SIP at 6 NYCRR § 201.5(e) and, as such, EPA will require that DEC incorporate this provision in the federal and State enforceable section of the title V permit upon re-opening.

G. Permit Renewal

The Petitioner's seventh claim is that the proposed permit lacks federally enforceable conditions that govern the procedures for permit renewal. See Petition at 12 and 13. That is, NYPIRG argues that the Keyspan Far Rockaway 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 Keyspan Far Rockaway 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)(1)(ii), which explains that permit expiration terminates the source's right to operate unless a "timely" renewal application has been filed. *See* 6 NYCRR § 201-6.3(a)(4). 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. Monitoring

The Petitioner's eighth claim is that the Keyspan Far Rockaway permit does not assure compliance with all applicable requirements because many individual permit conditions lack adequate monitoring and are not practicably enforceable. *See* Petition at 13 and 14. The Petitioner addresses individual permit conditions that allegedly either lack monitoring or are not practicably enforceable. The specific allegations for each permit condition are discussed below.

Facility-Specific Petition Issues

1. Maintenance of Equipment

The Petitioner alleges that the condition relating to maintaining pollution control equipment must not be stated generally, but must be applied specifically to the Keyspan Far Rockaway facility. NYPIRG further states that this condition, which requires such equipment to be maintained according to ordinary and necessary practices, including manufacturer's specifications, must explain with specificity what the permittee must do to comply and, additionally, the condition must include appropriate periodic monitoring. *See* Petition at 14.

Permitting authorities have discretion to develop general permit conditions that apply to all title V sources. The maintenance of equipment condition (Condition 2) is a general requirement which is incorporated into all New York title V permits, even where no applicable requirement necessitates the use of control equipment. This type of general or generic requirement is commonly found in SIPs. For example, many SIPs contain generic requirements for facilities to maintain all equipment in proper condition and to carry out proper work practices. DEC includes these generic requirements in the "general permit conditions" section of its title V permits.

As a general matter, where control equipment is installed pursuant to an applicable requirement or a source chooses to employ such equipment, appropriate permit conditions are included in the "emission units" section of the title V permit. In this case, there is no "pollution control equipment" at the Keyspan Far Rockaway facility. As such, EPA denies the petition on this point.

Further, it would be appropriate to include monitoring, recordkeeping and reporting with conditions that specifically delineate the facility's emission limitations or other operational or process restrictions. For example, monitoring requirements within a condition that lists particulate matter emission limits for a coal-fired boiler controlled by an electrostatic precipitator will also be sufficient monitoring relative to the "maintenance of equipment" provision; that is, the boiler/ESP monitoring requirements would also act as "surrogate" monitoring with respect to monitoring for the maintenance of the subject control equipment. Therefore, EPA disagrees with Petitioner that monitoring, recordkeeping and reporting must be added to this provision.

2. Unpermitted Emission Sources

The Petitioner also raises concerns about Condition 3, relating to unpermitted emission sources (presently "Condition D" of the permit). This condition provides that if an existing emission source was subject to the permitting requirements of 6 NYCRR Part 201 at the time of construction or modification and the owner or operator failed to apply for a permit, then the owner or operator must now apply for a permit. NYPIRG is concerned that, in such cases, sources would not be penalized. The Petitioner further asserts that the provisions of this condition go against the permit shield provisions of the permit (*see* permit Condition W). That is, if the facility applies for a permit that it should have applied for earlier, it will be in compliance with the law, and penalties cannot be assessed. *See* Petition at 14 and 15.

EPA notes that this provision states that the emission source or facility is subject to all regulations that were applicable to it at the time of construction or modification and any subsequent requirements applicable to existing sources or facilities. In addition, this provision does not relieve the permitting authority or permittee from including applicable construction permit conditions in the permit. Also, if the facility is in violation for not having proper construction permits, the permit must include a compliance schedule. *See* 40 CFR § 70.6(c)(3).

The SIP at 6 NYCRR § 201.2(a), and stated at Condition D of the permit, provides that no person shall commence construction or proceed with a modification of an air contamination source without having a valid permit. The Petitioner's specific concern that the permit shield could preclude the imposition of penalties is unfounded. The permit shield stipulates that compliance with the conditions of the permit is deemed to be compliance with those applicable requirements that are *specifically identified* in the permit or those requirements that the State *specifically identifies* as not applicable. *See* 40 CFR § 70.6(f) and 6 NYCRR § 201-6.5(g) (emphasis added). Therefore, the permit shield does not exonerate a facility that fails to have any required construction permits. If a violation is later discovered, the permittee would have to apply for the proper construction permits, and the title V permit would be reopened to include the necessary applicable requirements. *See* 6 NYCRR § 201-6.5(i). Additionally, the facility would be subject to any other appropriate enforcement actions and/or penalties. Item D directs what the permittee must do to achieve compliance. It does not address the penalties that may result from non-compliance. Therefore, Item D does not preclude the public, DEC or EPA from bringing an enforcement action or seeking penalties from the facility. Accordingly, the petition is denied on this point.

3. Air Contaminants Collected in Air Cleaning Devices

NYPIRG alleges that 2 separate permit conditions (Condition 4, entitled "Recycling and Salvage," and Condition 5, entitled "Prohibition of Reintroduction of Collected Contaminants to the Air") should not be included as general conditions, because it does not appear that the facility uses an air cleaning device. Further, the Petitioner alleges that if these facility-specific conditions do apply, then the permit must explain how the requirements therein apply to the facility and must include sufficient monitoring to assure compliance. *See* Petition at 15.

Conditions 4 and 5 are general requirements which are incorporated into all New York title V permits, even where no applicable requirement necessitates the use of air cleaning devices. Many SIPs contain generic requirements for facilities to properly handle and otherwise process materials collected in such air cleaning devices. Permitting authorities have discretion to include language from the general provisions of the SIP as general permit conditions in title V permits. DEC includes these generic requirements in the general permit conditions section of its title V permits.

As a general matter, where air cleaning devices are installed pursuant to an applicable requirement, or a source chooses to employ such equipment, appropriate permit conditions are included in the emission units section of the title V permit. As such, EPA denies the petition on this point.

4. Applicable Criteria

The Petitioner next asserts that the condition entitled, "Applicable Criteria, Limits, Terms, Conditions and Standards," which stipulates that the facility shall operate in accordance with any accidental release plan, response plan, or compliance plans, as well as support documents submitted as part of the permit application, is problematic because those referenced documents are not incorporated into the permit, if such documents exist. *See* Petition at 15.

EPA disagrees with the Petitioner that all types of plans must be a part of a title V permit. EPA does agree, however, that certain documents should be properly incorporated into title V permits. For example, where a facility is subject to plans such as a NOx RACT plan or a startup, shutdown and malfunction plan under a maximum achievable control technology ("MACT") standard, the permit must specifically say so and properly incorporate that plan, or the applicable portions thereof, either directly into the permit or by reference. In this case, the facility is subject to NOx RACT, and its NOx RACT plan is appropriately incorporated into its title V permit at Conditions 35 and 56. Therefore, EPA denies the petition on this issue

5. Risk Management Plans

The Petitioner notes that the permit (at Condition 11 of the draft permit) states that the facility must submit risk management plans if so required by CAA § 112(r). NYPIRG therefore contends that the Keyspan Far Rockaway title V permit must list whether or not this requirement applies to the facility. *See* Petition at 15.

The reference to Risk Management Plans ("RMP") that was stated at Condition 11 of the draft permit was deleted, and replaced by new Condition 1-3. This new condition states, in part: "If a chemical . . . listed in Tables 1, 2, 3 or 4 of 40 CFR § 68.130 is present in a process in quantities greater than the threshold quantity listed in Table 1, 2, 3 or 4, the following requirements will apply." The condition goes on to list these requirements. This condition is written generally because of the nature of the section 112(r) requirements, which is different from other applicable permit requirements. Since applicability is based on having a listed 40 CFR § 68.130 substance over the threshold quantity located at the facility, applicability may fluctuate over the life of the permit. Therefore, although general section 112(r) permit conditions do not definitively state whether an individual source is subject to the risk management plan requirements, the permit structure ensures that the permit covers any newly subject source, or any

source whose applicability fluctuates, thereby ensuring that the section 112(r) permit obligations remain up to date.

Keyspan did not include section 112(r) requirements in its application, nor has it submitted a Risk Management Plan (RMP) to EPA, the agency responsible for implementing section 112(r) requirements in New York, under CAA § 112(r) and 40 CFR part 68. Additionally, the Petitioner has presented no evidence to suggest that Keyspan Far Rockaway is subject to section 112(r) requirements. If a source is subject to these requirements, its permit must include certain conditions necessary to implement and assure compliance with such requirements. Therefore, based on information provided in the permit application, given what we know about this source with respect to the type of emission activities at the facility, and absent any information to the contrary, it is reasonable to assume that Keyspan Far Rockaway is not subject to these statutory and regulatory requirements. Additionally, as explained above, if Keyspan were to trigger the section 112(r) and Part 68 requirements, the requirements of Condition 1-3 would become applicable to the source. For these reasons, EPA denies the petition with respect to this issue.

Although we find no basis for objecting to the permit on this issue, we do believe that DEC must meet its accidental release prevention program obligations under 40 CFR § 68.215(e).[6] This will ensure that DEC, EPA, and the public will be able to track a source's compliance with section 112(r) requirements even if the source's applicability fluctuates. Therefore, EPA Region 2 will work with DEC on the appropriate changes to its application and annual compliance certification requirements to ensure sources are aware of the section 112(r) requirements, and to ensure compliance with these requirements, if applicable.

6. Low Sulfur Fuel

The Petitioner contends that DEC must explain in the PRR why fuel-oil supplier certifications are sufficient to assure compliance with low sulfur fuel-oil requirements. In addition, NYPIRG asserts that the permit conditions that deal with sulfur-in-fuel regulations must require reports of monitoring at least every 6-months. *See* Petition at 15 and 16.

While the Keyspan Far Rockaway PRR does not specifically describe why fuel-oil certifications are appropriate monitoring to assure compliance with the sulfur-in-fuel requirements, this has been established in previous EPA Orders; *see*, e.g., *In the Matter of North Shore Towers Apartments, Inc.*, Petition No. II-2000-06, at page 28 (July 3, 2002). The

[6] DEC has several general section 112(r) obligations, which are found in 40 CFR § 68.215(e), and are further discussed in an April 20, 1999, memorandum from Steven J. Hitte (OAQPS) and Kathleen M. Jones (OSWER) entitled: "Title V Program Responsibilities Concerning the Accidental Release Prevention Program." These responsibilities include: (1) verifying that sources register and submit a risk management plan, (2) verifying that sources certify compliance with the requirement to submit a risk management plan, and (3) general enforcement responsibilities.

monitoring condition to obtain fuel supplier certifications is appropriate for the sulfur-in-fuel applicable requirements for the Keyspan Far Rockaway facility. A number of regulations rely on certifications, a responsibility that most sources and suppliers take seriously. Fuel certification is the method that EPA itself relies on in certain instances (e.g., certain NSPS rules, PSD permits, etc.). In addition, DEC explained that random fuel-oil supplier sampling has been shown to be an effective means to enforce fuel-in-sulfur requirements utilizing limited resources. In addition, sulfur characteristics do not change between the supplier and the end-user. *See* Responsiveness Summary at 8. Therefore, EPA denies the petition with respect to this issue.

With respect to sulfur-in-fuel reporting, all required reports are due every six months, with the first report due October 30, 2002 (see Conditions 32, 33 and 34 of the Keyspan Far Rockaway title V permit). For these reasons, EPA denies the petition with respect to this issue.

7. Waste Fuel A

The Petitioner alleges that Condition 64 of the permit, relating to the firing of waste-oil, is deficient because, although it references requirements of an "Attachment A," such a document is not attached to the permit, nor is it described therein. In addition, NYPIRG contends that combustion of waste fuel must be treated as an alternate operating scenario pursuant to 40 CFR § 70.6(a)(9). As such, NYPIRG continues, the permit must include a clear explanation of the monitoring, record keeping and reporting requirements when waste-oil is burned, and the Statement of Basis must explain how the chosen monitoring, record keeping and reporting will assure compliance with the applicable requirements. Finally, the Petitioner writes that the Statement of Basis must provide a demonstration that Keyspan has satisfied the prerequisites to burning waste-oil, in accordance with the requirements of 6 NYCRR § 225-2.4. *See* Petition at 16.

First, the Petitioner merely cites to 40 CFR § 70.6(a)(9) without providing any explanation, factual support or analysis for its contention that combustion of Waste Fuel A must be treated as an alternative operating scenario. In this instance, the burning of waste-oil is just one of the several fuels used to run the 100 MWe utility boiler, including pipeline natural gas, and #1, #2 and #6 fuel-oils. Therefore, EPA denies the petition on this issue.

With respect to Condition 64, while the electronic version of the Keyspan Far Rockaway title V permit and the permits on file at the DEC did not append "Attachment A, " this attachment is included in DEC's title V file for this facility and is available to the public (*see* January 23, 2002 letter from Paul Lynch, Keyspan to Cicily Nirappel, DEC Region 2 Office). This attachment describes appropriate monitoring, record keeping and reporting requirements to assure compliance with the applicable requirements of 6 NYCRR § 225-2. However, it is uncertain whether this facility complies with the eligibility requirements of 6 NYCRR §§ 225-2.3 and 225-2.4 (while the Keyspan Far Rockaway title V permit application included information on

waste-oil analyses in letters from the mid-1980s, these analyses were from the waste-oil generated at other Keyspan facilities).

While Condition 64 provides Keyspan with the authority to burn waste-oil at the facility, based on annual compliance certification reports and other information in the title V files, Keyspan did not burn any waste-oil at this facility through March 31, 2004. However, because the title V permit permits burning waste-oil, the permit and the corresponding PRR must be revised to address certain issues. As such, EPA is granting the NYPIRG petition on this issue, as discussed below.

If Keyspan has not and will not in the future burn waste-oil at its Far Rockaway facility, DEC should re-open the title V permit to remove Condition 64. Alternately, if Keyspan may burn waste-oil in the future, the permit should be re-opened and revised to either: (1) append "Attachment A" to the Far Rockaway permit (so as to make the attachment accessible in both the electronic, web-site version of the permit, and the hard copy of the permit included in the DEC's title V facility files); or (2) revise Condition 64 to incorporate the limits, monitoring, record keeping and reporting requirements that are described in this attachment. In addition, if Condition 64 is to remain in the permit, the PRR must include a discussion of how Keyspan Far Rockaway complies with the eligibility requirements of the underlying applicable requirements, including the combustion efficiency demonstration pursuant to 6 NYCRR § 225-2.3(b)(1)(ii), and the fuel constituent analyses requirements of 6 NYCRR §§ 225-2.4(a)(2) and (b).

8. Removal of Certain Conditions from the Permit

The Petitioner asserts that because Conditions 33, 34, 35, 46 and 48 were removed from the draft permit (conditions relating to fuel contaminant limits for lead, sulfur, total halogens and PCBs), the PRR must provide the legal and factual basis for failing to address these pollutants; otherwise, the aforementioned conditions must be re-inserted into the permit. *See* Petition at 16.

In NYPIRG's July 18, 2000 Comment Letter to the DEC, the Petitioner describes concerns with draft permit Conditions 33, 34, 35, 46 and 48 (provisions relating to the lead, sulfur, total halogen, and PCB content, respectively, of waste-oil). As noted in the waste-oil monitoring discussion above, the DEC must re-open the Keyspan Far Rockaway title V permit and either delete the waste-oil provision (Condition 64), or revise it to include Attachment A or the requirements delineated therein and, also, to provide in the PRR a discussion relative to the demonstration that the waste-oil at the facility complies with the requirements of 6 NYCRR § 225-2, including the allowable content in this fuel of lead, sulfur, total halogens, and PCBs. Therefore, EPA grants the NYPIRG petition on the waste-oil issue as described in section II.H.7 of this Order, above.

9. Opacity

The Petitioner contends that the title V permit includes conflicting requirements relative to opacity; that is, Condition 65 requires continuous opacity monitoring, while Conditions 81 through 85 requires monitoring only when burning fuel-oil. NYPIRG alleges that Keyspan is not performing continuous opacity monitoring pursuant to an exemption under 6 NYCRR § 227-1.4, but such an exemption may not be valid because it is for units that burn only natural gas, and the Keyspan Far Rockaway facility burns fuel-oil in addition to natural gas. The Petitioner states that a comprehensive discussion of this matter should be included in the Statement of Basis. The Petitioner also asserts that Conditions 73 and 74 are "conditional conditions" that fail to state whether they actually apply to the facility. Finally, NYPIRG contends that the underlying legal requirements relating to the opacity provisions are not accurately identified. That is, both the SIP and State-Only opacity requirements must be included in the title V permit with the corresponding limitations, and appropriate monitoring, record keeping and reporting. *See* Petition at 16 through 18.

Condition 65 requires a continuous opacity monitoring system ("COMS") for the 100 MWe turbine/generator boiler set, to assure compliance with the applicable requirements of 6 NYCRR § 227-1.3. This condition includes appropriate monitoring, record keeping and reporting requirements for opacity emissions. Keyspan is required to comply with the provisions of this Condition. Conditions 81 through 85 are listed in the "State-Only" enforceable side of the Keyspan Far Rockaway permit and because these conditions do not relieve the facility of its obligations in the federally enforceable section of the permit, EPA is not addressing these conditions in this Order. For these reasons, EPA denies the petition with respect to this issue.

With respect to Conditions 73 and 74, these provisions are not "conditional conditions" that fail to state whether they actually apply to the facility. Both these conditions relate to the 12.6 MMBtu per hour Hurst series 400 boiler, regarding the opacity requirements of 6 NYCRR § 227-1.3(a). These 2 provisions are not conditional. They create obligations on the facility to limit opacity, and establish monitoring, record keeping and reporting requirements. That is, a facility representative must observe the boiler stack daily for visible emissions, and must record each observation (and retain such records for a period of 5 years). If 2 consecutive days of any visible emissions are observed, then the facility must conduct a Method 9 opacity analysis within 2 business days thereafter, with the resulting analysis being recorded. If this analysis indicates a contravention of the opacity standard, Keyspan must contact the DEC within one business day of the Method 9 test, and present any corrective action or future compliance schedule. It is the EPA position that for this size and category boiler, the monitoring described above is adequate to assure compliance with the cited opacity requirements. As such, EPA denies the petition with respect to this issue.

Finally, the applicable federal requirement citation for Conditions 65, 73 and 74, which are conditions contained in the federal and State enforceable side of the permit, is listed as 6 NYCRR § 227-1.3(a). This is the appropriate SIP citation relative to the facility's opacity requirements, and each of these 3 conditions includes the applicable SIP opacity limitation. The

currently-effective State-enforceable opacity regulations are also the regulations codified at 6 NYCRR § 227-1.3(a); that is, the New York SIP regulations and the State-Only regulations are one and the same. NYPIRG's assertion on this matter is without merit. Therefore, EPA denies the petition on this matter.

10. Conditions Regarding Emission Reduction Credits

The Petitioner notes that the title V permit application and facility file do not indicate that emission reduction credits (ERCs) apply to the Keyspan Far Rockaway facility, and contends that if Keyspan has obtained ERCs based on facility operational changes or modifications, then this information must be included in the Statement of Basis. In addition, NYPIRG states that any limits necessary to ensure that emission reductions are permanent, quantifiable and enforceable must be included in the title V permit. *See* Petition at 18.

DEC deleted Condition 39 of the draft title V permit, a provision relating to emission reduction credits, because New York State indicated that the condition was not applicable to the Keyspan Far Rockaway facility. See Responsiveness Summary at 9. In addition, the Petitioner did not provide specific information or explanation as to why this topic relates to an applicable requirement that must be included in this permit. As such, EPA denies the petition with respect to this issue.

11. Episode Action Plan

The Petitioner contends that to be practicably enforceable, the title V permit must set a date by which the facility must submit an episode action plan, and the condition must define "air pollution episode" and set out the components of an episode action plan. *See* Petition at 18.

This issue relates to Condition 27 of the Keyspan Far Rockaway title V permit, which includes general language from 6 NYCRR § 207, "Control Measures for an Air Pollution Episode."

Both Condition 27, and the underlying regulations on this matter state, in part, that: "Any person who owns a significant air contamination source shall submit a proposed episode action plan to the commissioner within 90 days of his request therefor." Based on a review of the title V files and discussions between EPA and representatives of both DEC and Keyspan, a request by the DEC Commissioner to submit an episode action plan has not been made. Nor has the Petitioner provided any information to indicate that the DEC did make such a request of Keyspan for its Far Rockaway facility. Keyspan would not be required to submit such a plan unless and until a request to do so is made by the DEC Commissioner. In light of this status, the general language included in Condition 27, which outlines the facility's obligation if a request is made by the DEC, is appropriate. Therefore, EPA denies the petition with respect to this issue.

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 Keyspan Far Rockaway title V permit. This decision is based on a thorough review of the May 8, 2002 permit, and other documents that pertain to the issuance of this permit.

Dated: September 24, 2004

/s/
Michael O. Leavitt
Administrator