



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
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NOV 3 2010

Honorable Peter M. Iwanowicz
Acting Commissioner
New York State Department of
Environmental Conservation
625 Broadway
Albany, NY 12233-8540

Dear Acting Commissioner Iwanowicz:

This is to apprise you of the results of EPA's second audit of the New York State Title V Operating Permits Program. The purpose of the audit is to evaluate New York's operating permits program to ensure that the State is implementing it consistent with the requirements of Title V of the Clean Air Act and EPA's implementing regulations at 40 CFR part 70. We also briefly reviewed the fee schedule to ensure that the fees collected are adequate to run the program.

As you know, the Title V program was established to develop a comprehensive way to identify and implement all requirements for major sources of air pollution, provide an opportunity for citizens to be involved in this permitting process, and improve compliance with emission control requirements. The Clean Air Act required each State to enact statutes and regulations to implement this operating permits program. EPA fully approved the New York program in February of 2002.

We wish to thank your staff for their cooperation, which has enabled my staff to complete this audit in a timely manner. The information provided during the July 12, 2010 on-site visit, and the comprehensive responses to our questionnaire and other inquiries, all contributed to the completion of the enclosed audit report.

Our audit shows that the New York State Title V program is being implemented in a manner that is generally consistent with the Clean Air Act and the federal and State of New York implementing regulations. New York has adequately addressed many of the issues detailed in EPA's program audit that was conducted in 2006, however, the present audit and our ongoing program oversight have identified additional areas that need to be addressed. These include the following:

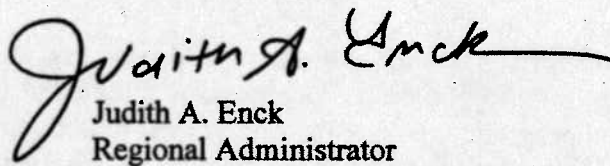
- Changing the practice of incorporating reasonably available control technology (RACT) variance limits into the permit before such variances are approved by EPA;

- Lowering the backlog of overdue permitting actions (72 renewals and 46 significant modifications as of June 30);
- Improving consistency among annual compliance certification submissions; and
- Determining whether New York has adequate staff to fully implement its Title V program.

Please refer to the enclosed audit report for more detail.

If you have any questions, please do not hesitate to call or have your staff contact Steven Riva at (212) 637-4074.

Sincerely,


Judith A. Enck
Regional Administrator

Enclosure

cc: David J. Shaw, Director
Division of Air Resources
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Robert Stanton, Director
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DAR, NYSDEC

**Environmental Protection Agency's (EPA) Review of the
New York State Department of Environmental Conservation (NYSDEC)
Title V Operating Permits Program
October 7, 2010**

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- II. Title V Permit Program Review Findings
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 - B. List of Participants at the July 12, 2010 Meeting
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I. Introduction

The New York State Operating Permits Program was granted full approval on February 5, 2002 (67 FR 5216), pursuant to title V of the Clean Air Act ("CAA") and its implementing regulations at 40 CFR part 70. In accordance with EPA's oversight responsibilities in section 502(b)(3)(C)(i) of the CAA and 40 CFR §70.10, EPA Region 2 conducted its first audit of New York State's title V fee program in June of 1999, and the first permit program audit in December of 2006. The purpose of a fee audit is to determine whether the permitting authority is adequately administering an approved fee program to ensure adequate funding for its title V Operating Permits Program. *See* section 502(b)(3)(C)(i) of the CAA and 40 CFR §70.10(d). The purpose of a permit program audit is to determine whether the State program is being implemented the way in which it was approved by EPA. In addition, a program audit will determine whether the State program has undergone any changes that may have resulted in a program that is not in compliance with the requirements of part 70. *See* 40 CFR §70.10(b) and (c).

The purpose of this audit is to review the permit program as a follow up to the 2006 audit in which EPA noted, in part, that some changes and/or improvements should be made. Because New York recently made a significant change to the fees charged to title V permit holders, a comprehensive fee audit was not deemed necessary at this time. It would be more prudent to allow the new fee program to operate one or more cycles prior to the next full EPA fee review.

The program audit that is the subject of this report began with a May 10, 2010 letter to the New York State Department of Environmental Conservation ("NYSDEC") that included a questionnaire requesting certain information and documentation to facilitate EPA's effort. *See Attachment A*. This questionnaire included inquiries relating to program management (permit issuance, staffing and resources, and permit requirements), and the permitting process (permit issuance, compliance certification, monitoring, integration of other CAA requirements, and exemptions), as well as follow-up actions on issues identified during or after the last program audit. Regarding the fee program, only a general discussion and update were requested.

Region 2 staff visited the NYSDEC Central office in Albany on July 12, 2010 to discuss New York State's title V operating permits program vis-à-vis the EPA questionnaire. *See Attachment B* for the list of the meeting participants.

This audit report is based on the responses received during the July 12, 2010, on-site visit, NYSDEC's official response to the questionnaire (letter dated July 30, 2010, *see Attachment C*), as well as other information provided and/or cited during the July meeting and in subsequent e-mails.

This report is organized in accordance with the EPA questionnaire. That is, for each section and sub-section of EPA's questionnaire: the original question is posed; the NYSDEC response is set forth (in full or summarized); and EPA's conclusion on the issue at hand and the current implementation in the State's title V program is presented.

II. Title V Permit Program Review Findings

Information considered in the program portion of this assessment includes NYSDEC's response to a comprehensive questionnaire submitted by EPA, discussions with NYSDEC Division of Air Resources ("DAR") personnel, documents provided by NYSDEC on and subsequent to the day of the visit, and title V permits and other documentation relating to select facilities.

The questionnaire was a compilation of questions relating to program management, specific permitting processes, and follow-up issues and concerns from the 2006 program audit. EPA also reviewed operating permits relating to select issues such as new source review ("NSR") requirements.

Questionnaire Section 1 - Program Management

Part A - Permit Issuance

Question: Describe the procedures to assure consistency among the different NYSDEC Regional offices and permit writers. How is NYSDEC management kept up-to-date on Title V activities? Provide examples.

NYSDEC Response: NYSDEC's DAR, the department responsible for implementing the title V operating permits program, is organized with a centralized, "headquarters" office in Albany, plus nine Regional offices throughout the State. The DAR established a number of procedures and documents to address permit processing consistency and the issuance of equivalent/similar permits throughout the nine NYSDEC Regional offices. Significant time was spent training employees on the standardized procedures for writing and issuing title V permits.

First, a computer system, the Air Facility System or AFS was developed to facilitate the writing of title V permits and to ensure, to the greatest extent possible, standardized permits throughout New York. For example, there is a library of applicable regulations and standard conditions within the AFS that each permit writer will access and use to develop the permit. There are also guidance documents developed by the DAR to assist the Regional permit writers in their permitting tasks; these include detailed instructions, a Permit Manual, and a Quality Assurance Manual, among others. Finally, DAR Albany staff are available to the Regional offices to assist the permit writers; occasional Regional office audits are also performed to ensure that the program is being implemented as required.

NYSDEC managers are kept apprised of title V program activities primarily through monthly and quarterly reports. These reports summarize the permitting status throughout the State, specifically tracking the number and name of permits: (i) up for renewal, (ii) administratively extended, and (iii) that have expired.

EPA Conclusion: Based on EPA's ongoing oversight of the NYSDEC title V program, standardized permits are being issued by the State. While this would normally be difficult to achieve given the decentralized nature of the DAR, the development and use of the AFS, guidance documents, and training have resulted in a coherent permit issuance process. Every title V permit is organized in the same way, and includes a cover page, generic facility-wide permit conditions, source-specific facility-wide conditions, followed by emission unit-specific requirements. State-only requirements are listed at the end of every permit. The library of conditions in the AFS computer system takes much of the guess work out of how an applicable requirement needs to be incorporated into the permit. This is especially important for periodic monitoring provisions that do not come directly from a rule or regulation.

NYSDEC's management reports contain sufficient data for a supervisor to track progress of the permitting program, specifically relating to overdue action items. Information is provided in both summary form (total actions State-wide and for each Regional office), and in source-specific listings (formatted by Regional office).

Part B - Staffing/Resources

Question: EPA asked NYSDEC to respond to five questions regarding staffing and resources, as follows: (1) How many people work on title V activities, and how many of them work solely on Title V; (2) For the rest of the staff, how much time is devoted to title V and how is that determined (e.g., from time sheets, self-reporting, etc.); (3) Is training available for new and existing employees and, if so, how frequently; (4) Is staff turnover significant? Describe on a Regional and State-wide basis; and (5) Is staffing sufficient to run the title V program?

NYSDEC Response: NYSDEC has indicated that it has sufficient staffing, at present, to run the title V operating permits program. During New York's 2009/2010 fiscal year, 215 employees worked almost 43,000 hours on title V activities; however, none of these employees worked solely on title V activities. Relative to title V work performed, NYSDEC employees code specific tasks on their bi-weekly time cards, and these data are used to track title V activities in NYSDEC's "Leave and Accrual Tracking System" ("LATS").

Training on title V is provided for both new and current, seasoned employees, based on need and staff requests. In general, an employee can expect to attend a training course at least once every one and a half years, with new employees being provided initial training shortly after coming on board. NYSDEC training is performed both at the Central office in Albany, as well as at Regional offices. Travel constraints will not eliminate training, but will sometimes shift it from "in-person" events to use of tapes, DVDs or teleconferences. In addition to training provided by the DAR, New York State employees also may attend training provided by other organizations, including EPA, NESCAUM, STAPPA, others.

While staff turnover is not a significant issue, a hiring freeze precludes the replacement of those who have left and that will leave in the immediate future.

EPA Conclusion: Based on EPA's ongoing oversight of the NYSDEC title V program, we can conclude that title V-related training is sufficient because the results (i.e., the title V operating permits being issued) point to a program that is meeting the requirements of the CAA and part 70.

With respect to whether staffing is adequate, there are some permit activity backlogs. EPA receives select permit data from States every 6 months to enter into our Title V Operating Permit System ("TOPS") database. Based on the two latest submissions, New York has a backlog with respect to the timely issuance of permit renewals and significant permit modifications (a backlog of between 60 and 70, and between 40 and 50, respectively). We are aware that there are reasons other than staffing and resources for these backlogs (e.g., enforcement issues, test results needed or pending, new permit conditions being addressed). However, both EPA and the NYSDEC should continue to track these data and, should this situation worsen, action would need to be taken.

Part C - Permit Requirements

Question: How does NY reconcile discrepancies between a current State rule and an old State Implementation Plan ("SIP") regulation and how is this addressed in title V permits? Provide examples.

NYSDEC Response: With respect to how NYSDEC reconciles discrepancies between a current SIP requirement (an EPA-approved State regulation to address federal CAA requirements) and a superseding, but not yet SIP-approved State regulation, this had been a problem in the past because the superseding requirement should not have been, but often was, incorporated into the title V permit.

NYSDEC has revised its regulations at 6 NYCRR part 201 to ensure consistency with the NY SIP (and has also requested of EPA SIP revisions to add, remove or modify certain sections of part 201 as well as other State rules). In addition, NYSDEC modified the title V mandatory conditions to be consistent with the approved NY SIP.

NYSDEC also notes that the library of "applicable regulations" in the AFS contains all appropriate federal and State requirements and citations. The State rules that are not approved into the NY SIP are designated as State-enforceable only, and can only be entered onto the State-only side of the title V permit. Two examples of where an "old" SIP rule still exists but is not consistent with current State regulations are: (i) 6 NYCRR part 227.2(b)(1) which regulates particulate emissions from oil-fired stationary combustion units (this rule dates from 1971), and (ii) the sulfur-in-fuel regulations under part 225-1 (rule dates from 1979). Even though the "old" SIP requirement is inconsistent with the current NY State regulation, the SIP requirement will be included in the title V permit, if applicable. The current NY State requirement will also be included in the permit, but on the State-only enforceable portion of the permit.

EPA Response: While this had been an issue of concern to EPA in the past, NYSDEC's changes to how this situation is addressed appear to have corrected the problem, with one exception as discussed below. EPA's review of a few title V permits that included these conditions (i.e., conditions relating to New York's rules at parts 225 and 227) indicates that, in general, the problem has been corrected; reference title V permits EF Barrett Power Station in Island Park, New York; Pinelawn Power in West Babylon, New York; and Con Edison Hudson Avenue Station in Brooklyn, New York.

The one exception was identified by our office in the past several weeks, based on staff discussions, and has to do with how NYSDEC implements reasonably available control technology (RACT) variances. Under NY State regulations, a source subject to RACT may request from the NYSDEC a variance from these requirements, and based on the source's request, the State may approve such a request of a lesser degree of control. Should the NYSDEC approve a RACT variance, it must then be submitted to EPA for a SIP revision for the particular NY State regulation under which the request was made. EPA has ascertained that variance-approved control requirements are being incorporated into the title V permit before EPA has approved the corresponding SIP revision. Rather, the variance limit should be incorporated into the State-only enforceable side of the title V permit until such time as the SIP approval is finalized. These NYSDEC processes must be corrected.

Questionnaire Section 2 - Permitting Process

Part A - Permit Issuance

EPA asked NYSDEC to respond to five questions regarding the permit issuance process.

Question #1: Describe the significant modification process from cradle to grave.

NYSDEC Response: NYSDEC provided a step-by-step listing of the process for issuing a title V operating permit for a significant permit modification. It is the same process used to issue a permit for a new source or to issue a renewal permit, and includes: (i) the applicant contacting a NYSDEC Regional office; (ii) a pre-permitting meeting; (iii) an administrative completeness review; (iv) an application completeness determination; (v) a notice of complete application; (vi) review of any public comments submitted; (vii) a public hearing(s); (viii) preparation of a responsiveness summary; and (ix) a final permit decision. Refer to Attachment C, Response to EPA's Program Review Questionnaire, for a more complete discussion.

EPA Conclusion: EPA acknowledges that this is the proper procedure to use to issue a significant title V permit modification.

Question #2: How are sources with compliance issues handled vis-à-vis title V permits? Provide examples.

NYSDEC Response: Any source with a compliance issue (that is, the source is out of compliance with at least one of its title V permit conditions) must address compliance in the permit. As such, if a consent order ("CO") has been issued to bring the source into compliance, the provisions of the CO will be included in the permit (although the CO may be referenced and/or attached, in practice, the permit writer includes all of the steps of the CO as individual conditions in the permit proper). Alternately, if a source is out of compliance but no CO has been issued, then a compliance plan will be entered into the permit. These procedures are laid out in detail in NYSDEC's Permit Manual.

EPA Conclusion: EPA agrees that these are the proper procedures to use for non-complying sources.

Question #3: Are there still "general permits?" Provide examples.

NYSDEC Response: Yes, NYSDEC does use one general permit, for small combustion sources. There are 21 sources in New York (mostly in New York City) that are covered by this general title V permit. The NYSDEC also has another general permit, in draft stage, for rock crushing activities. However, the State is uncertain whether to finalize this general permit.

EPA Conclusion: The small combustion source general permit has been available for many years and was initially reviewed and approved by EPA Region 2 staff. The State's use of this permit is appropriate.

The one concern of EPA is our (and the public's) inability to easily identify the sources covered by the small combustion general permit; that is, there is no "flag" or other means of identifying these sources in the NYSDEC web-site listing of issued and draft title V permits. Instead, a specific request has to be made to the DAR to obtain such a listing. EPA requests that general permit source identification be made easier.

Question #4: If a compliance assurance monitoring ("CAM") plan is required, is it attached as a separate document? Provide examples.

NYSDEC Response: If a source is subject to CAM, it must submit to NYSDEC an implementation plan with its title V renewal application, and any required monitoring will be incorporated into the renewal permit. Examples of requisite CAM monitoring can be found in the Citgo Petroleum - Albany, and the AES Greenidge title V permits.

EPA Conclusion: Based on the NYSDEC response and review of the two title V permits referenced, EPA acknowledges that these are the proper procedures to use for CAM requirements.

Question #5: Describe issues, problems and/or "roadblocks" encountered in the permitting process that prevent timely permit issuance.

NYSDEC Response: With respect to issues, problems and/or "roadblocks" encountered

in the permitting process that prevent timely permit issuance, the NYSDEC offered the following:

- Adequate staffing is always a critical issue regarding timely permit issuance;
- Permits that have been extended for long periods are usually for the more complex sources, ones that require additional time to process;
- At present, New York State does not have delegation of the federal PSD program of 40 CFR part 52.21, or approval of an independent PSD permitting program. In cases where PSD applies, the State must await EPA's issuance of the PSD permit before incorporating it into the title V operating permit;
- The title V permit is not final until the completion of EPA's 45-day review period (of the "proposed" title V permit). Often-times, there is no EPA review, and the proposed permit becomes the final permit without any changes being made to the permit. The State notes that it would be beneficial for EPA to provide a more expedited review or decision at the proposed permit stage; and
- Other reasons for delay include required stack tests, legal issues, issues relating to NO_x RACT, situations where MACT rules have been vacated, among other issues.

EPA Conclusion: The number of staff that work on title V program issues should correspond to the amount of fees collected. As noted above, EPA wants to allow some time to elapse subsequent to the recent fee increase before reviewing fee and staff concerns in more detail.

One of the impediments noted above by the NYSDEC has been resolved. Since the time of the audit, EPA has approved NY State's NSR permitting rules at title 6 of the New York Code of Rules and Regulations, Part 231. This approval will eliminate the time delays associated with NYSDEC awaiting EPA's issuance of a PSD permit, because the State can now process PSD permits on its own.

With respect to EPA's 45-day review of proposed permits, it must be noted that this is both a statutory and regulatory time frame that cannot be shortened.

Part B - Compliance Certification

Question: Does the annual compliance certification identify the methods for determining compliance? Provide examples.

NYSDEC Response: Annual compliance certifications that are submitted by the permittee must include "the method(s) used for determining the compliance status of the facility, currently and over the reporting period...". Instructions to complete such certification can be found at the following link:

http://www.dec.ny.gov/docs/air_pdf/tvcert.pdf

EPA Conclusion: EPA agrees that the specific methods for determining compliance must be cited in the annual submission, whether the monitoring cited is required in the title V permit or not.

Several annual compliance certification forms, obtained in-house at EPA, were reviewed for this audit (EPA Region 2's Air Compliance Branch receives copies of annual compliance certifications on an ongoing basis). The certifications reviewed indicated that, in general, specific compliance monitoring methods were cited in the annual reports. Some reports include a more specific monitoring description therein, while others only reference the corresponding title V permit; the first procedure noted above is preferred as the certification reviewer can use the submitted report as a stand alone document. While NYSDEC's instructions, referenced above in the State's response, state that a more comprehensive description be included in the certification, this is not always done. The NYSDEC should follow-up with these sources so that they provide better future certifications. The compliance certifications reviewed were those for Griffiss Central Heat Services Corporation in Rome, Cogen Corporation in Brooklyn, and Taino Towers in Manhattan.

Part C - Monitoring

Question: EPA asked NYSDEC to respond to four questions regarding monitoring, as follows: (1) Do permits allow periods when monitoring is not required? If so, explain; (2) Are there any monitoring exemptions? If so, explain; (3) Explain how monitoring is addressed during periods of start-up, shutdown and malfunctions. Provide examples, if available; and (4) Discuss the "Basis for Monitoring" section in the Permit Review Report ("PRR").

NYSDEC Response: Regarding questions #1 and #2, yes, non-monitoring is allowed during unavoidable conditions. With respect to question #3, monitoring is required during periods of start-up, shutdown and malfunctions unless there is an unavoidable condition that prevents monitoring. Lastly, for question #4, the permit (and PRR) writer provides justification for the selected monitoring in accordance with the NYSDEC's Permit Manual. This would include why a specific monitoring action was selected and how it will assure compliance for the particular applicable requirement. In certain cases, this section of the PRR will include a discussion of why little or no periodic monitoring is appropriate.

EPA Conclusion: The NYSDEC response regarding monitoring requirements needs to be expanded. It is understood that there may be times when an unavoidable situation would prevent emissions from being monitored (e.g., an outage or breakdown of the monitoring system). However, it is uncertain what the NYSDEC's response is regarding other unavoidable situations vis-à-vis required monitoring. As an example, if an unavoidable situation results in non-complying operation of an emission unit, is the source owner not required then to monitor? This needs to be clarified.

EPA reviewed a number of New York's PRRs with respect to the Basis of Monitoring section. This review indicates that there remains significant variation among the Regional offices (and possibly among individual permit writers within each Regional office) regarding how this section of the report is prepared.

For example, the PRR for AES Greenidge only states under the Basis for Monitoring that the action is for a title V permit renewal. Alternately, this section of the PRR for AES Somerset goes into detail of why specific monitoring is required in the permit for each monitoring scheme. Other PRRs with adequate to good Basis for Monitoring discussions include Bowline Point Generating Station, General Electric Steam Turbine Generator Global, and New York Methodist Hospital, among others.

In general, the Basis of Monitoring section of the PRR should not include generic language regarding specific rules or regulations or refer to the corresponding permit condition, but should identify the specific monitoring that is required and provide the reasoning behind why such monitoring was chosen, or why there is no monitoring associated with an applicable requirement. It is of little use to a reviewer of the PRR to read only what the regulations require for a particular contaminant from an emission unit.

Part D – Integration of title V Permit with CAA titles I, III and IV

EPA asked NYSDEC to respond to two questions regarding permit integration.

Question #1: Explain the process regarding issuance of title IV permits.

NYSDEC Response: Title IV acid rain permit applications are logged into NYSDEC's Department Application Retrieval Tracking system and processed the same way as a title V application. The final acid rain permit is attached in its entirety to the source's title V permit. Each acid rain permit must contain: (a) the continuous emissions monitoring systems ("CEMS") or other approved monitoring required to measure emissions of sulfur dioxide, oxides of nitrogen, carbon monoxide, and volumetric flow and opacity; (b) the requirement to hold allowances for each ton of sulfur dioxide emitted during the calendar year; (c) the appointment of a designated representative to represent the source owners and operators in all matters relating to the holding and disposal of allowances; and (d) the requirement to submit a title IV application.

EPA Conclusion: Pursuant to the requirements of the CAA, New York State had to issue all title IV acid rain permits to affected sources prior to having its title V operating permits program approved and in place. Subsequently, once the corresponding title V permit was issued, the independent acid rain permit was attached, as required, because title IV provisions are federally applicable requirements. The NYSDEC acid rain permit issuance processes are appropriate.

Question #2: Are all applicable title I and title III requirements (PSD, NSPS, MACT) being incorporated into title V permits? Provide examples of each.

NYSDEC Response: Yes, all NSPS and MACT conditions and requirements are incorporated into title V permits. PSD conditions and requirements are incorporated into title V permits after EPA issues the PSD permit. The following examples are provided: for PSD (40 CFR 52.21), Wyeth Pharmaceuticals and Carr Street Generating Station; for NSPS (40 CFR 60), Carr Street Generating Station and Sullivan County Landfill; and for NESHAPS (40 CFR 63), Auburn Landfill and Cornell University Main Campus.

EPA Conclusion: Unlike the acid rain program, conditions for PSD, NSPS, and MACT requirements are subsumed into the title V permit. This is the NYSDEC procedure even in cases where a PSD permit is issued as a stand-alone permit, independent of the title V permit. EPA agrees that this is the proper way to address these CAA title I requirements as long as the title V permit includes the proper regulatory citation. Based on our review of the permits referenced above, NYSDEC is properly including these CAA terms in title V permits.

Part E – Compliance Exemptions

EPA asked NYSDEC to respond to two questions regarding compliance exemptions.

Question #1: Do permit conditions exempt compliance with SIP emission limits during periods of startup/shutdown, malfunction and maintenance? Provide examples.

NYSDEC Response: Federal violations may only be excused for an affirmative defense under paragraph 201-6.5(c)(3)(ii): “If the permittee seeks to have a violation excused as provided in section 201-1.4 of this Part, the permittee shall report such violations as required under section 201-1.4(b) of this Part. In order to have a violation of a Federal regulation (such as a new source performance standard or national emissions standard for hazardous air pollutants) excused, the specific Federal regulation must provide for an affirmative defense during start-up, shutdowns, malfunctions or upsets. All other permit deviations shall only be reported as required under subparagraph (i) of this paragraph, unless the DEC specifies a different reporting requirement within the permit.”

EPA Conclusion: NYSDEC’s requirements with respect to start-up, shutdown and malfunction and maintenance events are in concert with those of EPA. In fact, the State provision, as quoted above, is included as a condition in all title V permits.

Question #2: Do State rules or permits allow variances, or periods of non-compliance? If so, provide citations.

NYSDEC Response: Some state regulations, such as 6 NYCRR Part 232 (Perchloroethylene Dry Cleaning Facilities) and Part 228 (Surface Coating Processes) allow variances (see Sections 232.3 and 228.3, respectively). Additionally, under Section 201-1.4, (Unavoidable Noncompliance and Violations), “at the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be

excused if such violations are unavoidable.”

Another variance example in Part 234.3(f)(3) allows a facility to shutdown their afterburners from November 1st through March 31st for purposes of energy conservation. This is during the low ozone producing season.

EPA Conclusion: NYSDEC’s response indicates that these are State-only provisions, which is appropriate as blanket variances would not be available under the CAA.

Questionnaire Section 3 – Follow-Up on Issues/Concerns from the 2005 Audit

Part A – Incorporating Federal Rules By Reference

Question: Discuss the procedures and frequency of the updating of the “Incorporation by Reference” table at 6 NYCRR Part 200.10.

NYSDEC Response: The reference table at 6 NYCRR Part 200.10 is generally updated every two years by DAR staff. The table references the appropriate federal Code of Federal Regulations (CFR) volume.

EPA Conclusion: This table contains all of the federal regulations (acid rain, NSPS, MACT, etc.) that, if applicable, must be included in title V permits. 6 NYCRR Part 200.10 provides the NYSDEC with the authority to include these federal provisions in title V permits, and to enforce the federal requirements as necessary. With each regulatory update, NYSDEC must provide to three separate New York State offices, copies of all of the referenced CFRs. During the July 12, 2010 meeting, DAR staff asked if EPA could be of assistance in providing copies of the CFRs as needed by NYSDEC. EPA will investigate the possibility of assisting NYSDEC in this matter.

Because of the frequent changes and additions to federal regulations (especially those relating to the MACT program), EPA would prefer a more ambitious schedule to update this table. While it is understood that much work goes into promulgation of State regulations and, in fact, that it normally takes almost one year to finalize a regulation, EPA believes that annual updating of this table is more appropriate to assure proper implementation of the title V permitting program, and requests that NYSDEC do so.

Part B – Integration of the Construction and Operating Permit Programs (“Merged” Program) Into Title V Permits

Question: Provide a summary of the merged permit process for title V operating permits and NSR construction permits, as it relates to: (1) the public notice; (2) the PRR; and (3) permit conditions, and provide examples. Describe the content of the public notice and PRR, and provide examples of each.

NYSDEC Response: NYSDEC submitted a draft revision to Air-Guide 10, “Federal

Enforceability of Air Permits,” and also referenced chapters 15 and 16 of its Quality Assurance Manual for more detailed information. Also attached was a PRR for Mason Industries in Hauppauge, NY.

Regarding Public Notices, the following information should be included in a public notice: Applicant/owner name and address, Facility name and location/address, Permits applied for and the tracked record's application ID, Brief project description based on the Draft Permit and/or PRR, SEQR and SHPA review determinations, Name of the SEQR lead agency and Written public comments deadline date. In addition to the project description for title V permits, the notice must include the following text to satisfy commitments to EPA and NYPIRG, and to comply with Department regulations: “In accordance with 6NYCRR Parts 621.5(d)(9) and 201-6.4(c), the Administrator of the United States Environmental Protection Agency (USEPA) has the authority to bar issuance of any Title V Facility Permit if it is determined not to be in compliance with applicable requirements of the Clean Air Act or 6NYCRR Part 201. Persons wishing to inspect the subject Title V files, including the application with all relevant supporting materials, the draft permit, and all other materials available to the DEC (the "permitting authority") that are relevant to this permitting decision should contact the DEC representative listed below. It is recommended that an appointment be made to confirm the availability of the subject files. The DEC will endeavor to make the files available within 2 business days of contact, during normal business hours (8:30 am through 4:45 pm), unless the requestor wishes to inspect the files at a later date. DEC will evaluate the application and the comments received on it to determine whether to hold a public hearing. A public hearing may be legislative or adjudicatory. A legislative public hearing is a proceeding which provides an additional opportunity for public comment. DEC's determination to hold a legislative public hearing will be based on whether a significant degree of public interest exists. If a legislative public hearing is to be held, a Notice of Hearing will be published which will include the time and place of the hearing and submitting comments. The applicant and all persons who have filed comments on the permit will be notified by mail of the public hearing. Comments and requests for a legislative public hearing should be in writing and addressed to the Department representative listed below. An adjudicatory public hearing is a trial type proceeding which provides the opportunity for adjudication on the basis of evidence, including direct testimony and cross examination. An adjudicatory hearing is held only if substantive and significant issues relating to any findings or determinations the Department is required to make pursuant to the Environmental Conservation Law exist. A copy of the Department's permit hearing procedures is available upon request or on the Department web site at: <http://www.dec.state.ny.us/website/ohms/gudph1.htm>.”

With respect to PRRs, the content is important for those interested in a summary of the regulatory basis of the requirements in the permit. PRR's should explain the rationale used in developing each permit, determining what requirements apply, and how compliance monitoring should be implemented. It should also explain why certain requirements were left out of the permit, such as exempt activities (especially those that may have been previously permitted under prior versions of Part 201), or requirements for non-exempt sources in previous permits (i.e., old Air-100's and former title V

permits) that have become obsolete. If an adequate PRR is not provided with each permit, the door is left open for questions to be posed by intervenors on why certain requirements were placed in the permit, why others were not and what is being done in the permit to monitor compliance. This has resulted in findings against the Department related to objections raised by the public after permits have been issued.

EPA Conclusion: Regarding the issue at hand, the draft Air Guide 10 provides a good policy overview to NYSDEC permit writers on how to establish permits with federally enforceable conditions to, for example, limit emissions to below NSR thresholds. This was a significant issue during EPA's review process to approve the NYSDEC title V program, which subsequently was resolved.

The other issue relates to NSR (including PSD) conditions and "capping" limits, and how these are included in title V permits and described in public documents. While PSD and capping limits are properly cited in title V permits (citation 40 CFR part 52.21 and 6 NYCRR part 201-7, respectively), there could be improvements in describing these actions and limits, especially in NYSDEC public notices.

While the generic public notice language that NYSDEC provided above is appropriate, it is uncertain whether the language inserted regarding "brief project description based on the Draft Permit and/or PRR, SEQR and SHPA review determinations" is sufficient to explain NSR/PSD requirements and capping activities that would preclude NSR and, if capping applies, the federal enforceability of such limits (as a result of New York's merged title V and construction permits). It would be helpful if the NYSDEC could reference specific public notices that address this matter. PRRs are certainly more descriptive regarding NSR and capping limits, but here again, it is uncertain whether federal enforceability would be adequately described; specific permit review reports that address this issue are requested.

It is also requested that NYSDEC provide any available materials relating to these matters, including any air guides for public notices and PRRs, or any pertinent information on these issues in any other permitting guidelines (e.g., the NYSDEC permit manual).

III. Title V Fee Schedule Review Findings

Section 502(b)(3)(A) of the CAA requires each state to collect sufficient fees to cover the costs of its Operating Permits Program. Section 502(b)(3)(C)(iii) of the CAA and 40 CFR §70.9(a) and (d) further require that all fees collected be solely used to cover the direct and indirect costs of implementing the title V program.

Pursuant to 40 CFR §70.10(c), it is EPA's responsibility to review periodically the State's implementation of the title V fee program to ensure that fees are collected and handled in conformance with section 502(b)(3)(A)-(B) of the CAA and 40 CFR §70.9.

As previously noted in this report, a comprehensive fee program review was not a part of this audit. That said, we were encouraged that the NYSDEC was recently able to work to increase the State of New York's title V fees and, as such, have determined that a full fee audit should wait until several cycles have passed.

Specifically, NY State amended its Environmental Conservation Law 72-0303 in 2009 to raise title V fees from the \$45.00 per ton limit (which was in place for many years) to a sliding scale that maxes out at \$65.00 per ton of pollutant emitted. This \$65.00 per ton amount is for pollutants that are annually emitted in an amount equal to or greater than 5,000 tons. NY State also charges: \$55.00 per ton for emissions of 2000 tons per year or more up to 5000 tons; \$50.00 per ton for emissions of 1000 tons per year or more up to 2000 tons; and \$45.00 per ton for emissions less than 1000 tons per year. This schedule applies to each regulated air pollutant. In addition, the 2009 amended law also raised the cap from 6,000 tons to 7,000 tons. That is, a title V permit holder need only pay fees for a regulated air pollutant up to 7,000 tons emitted annually.

All of the fees collected under this program are dedicated for use in the NYSDEC title V operating permits program, and the monies collected are deposited in the "Operating Permit Program Account" in the Clean Air Fund. This account is subject to audit by the Office of the New York State Comptroller.

IV. Conclusions and Recommendations

In general, NYSDEC is implementing its title V operating permits program in a complete and efficient manner, in accordance with EPA's February 2002 program approval and the CAA and implementing regulations at 40 CFR part 70. This is all the more impressive given the decentralized nature of the NYSDEC organization. That said, there is always room for improvement and, as described above in the body of this report, there are areas and issues that both the NYSDEC and EPA should work together to improve, and should continue to track. These issues are listed below. Toward this end, EPA will schedule a meeting or teleconference call early next year, after the NYSDEC has had the opportunity to review and consider these recommendations, to follow-up on the issues of concern of this report.

1. NYSDEC must change its practice of incorporating RACT variance limits into the federally-enforceable side of the title V permit until such variances are approved by EPA.
2. Both the permitting and SIP groups of EPA and NYSDEC need to address necessary SIP revisions to better comply with CAA requirements.
3. Overdue permitting actions (permit renewals, significant permit modifications) should continue to be tracked, and ways to mitigate such delays should be discussed by EPA and NYSDEC during the upcoming meeting/call.

4. EPA and NYSDEC need to discuss in more detail the issue regarding merged construction and operating permits and how important aspects of these merged permits are addressed in the permit itself, as well as in public notices and PRRs.
5. With respect to annual compliance certifications, NYSDEC staff should contact those sources whose annual compliance certification reports need to be improved relative to the methods for determining compliance. Such method descriptions should be more comprehensive and usable as a stand-alone document.
6. NYSDEC needs to clarify periodic monitoring requirements during times of unavoidable conditions in accordance with the discussion presented earlier in this report.
7. NYSDEC should strive to make the Basis of Monitoring section of PRRs more consistent on a State-wide basis, and to ensure that this section can stand alone from other documents (i.e., the corresponding permit). Such changes should make the PRR more user friendly and useful to EPA and the public.
8. NYSDEC should change that area of its web-site that lists issued and draft permits to flag those sources that have a general permit or find an alternate way of more easily allowing EPA and the public to identify these sources.