



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

NOV 25 2014

Honorable Joseph Martens
Commissioner
New York State Department of
Environmental Conservation
625 Broadway
Albany, New York 12233-1011

Dear Commissioner Martens:

Enclosed with this letter are the results of EPA's recent audit of New York's title V Operating Permit Program ("OPP"). EPA conducts an audit of New York's program every four years as part of its oversight responsibilities. The third quadrennial audit was conducted on June 18, 2014. This audit focused on the progress New York has made in addressing issues and concerns EPA identified in its 2010 audit, on new issues that may have surfaced during our permit oversight reviews, and on the adequacy of the title V fee program that funds the OPP. The bases for EPA's evaluation are the requirements of title V of the federal Clean Air Act (CAA), EPA's regulations implementing the CAA which are codified at 40 CFR part 70 and New York's OPP as approved on February 5, 2002.

EPA's audit covers both the permitting component and the funding component of the OPP. With respect to the title V funding component, I want to bring to your attention a serious issue that warrants your immediate action. The New York program appears to lack sufficient funding and has since 2006. Despite the 2009 fee increase approved by the New York State Legislature that provided much needed additional revenues, the title V fund continues to have a negative balance. The title V fee program was first evaluated in 1999 prior to New York receiving full program approval. The fee audit at that time focused on the procedures to ensure proper accounting of title V and non-title V activities and methods to avoid mixing of title V and non-title V funds. In this audit, EPA performed a more in-depth evaluation of the title V fee program. It appears from the audit that money from the General Fund has been used to supplement the funding needs of the title V program. As you know CAA section 502(b)(3) and 40 CFR §70.9 require all reasonable direct and indirect costs of developing and administering the permit program to be paid for by fee revenues collected from sources subject to the program. Thus, New York may not supplement the OPP fees with money from the General fund, and the fact that such monies are necessary to adequately implement the program is evidence that the OPP fees are not sufficient for the task. The audit report contains recommendations on ways to increase the title V fund. EPA is committed to working closely with you and your staff to explore options to resolve the fiscal issues of New York's OPP. NYSDEC's response to our recommendations made in this audit report will mark the beginning of a joint EPA and NYSDEC effort towards bringing New York's OPP back on a self-sustainable path. Deficiency in funding the title V program is serious and could be the basis of a future finding of a violation of section 502(b)(3) of the CAA and 40

CFR §70.9. If such a finding were to occur, the State would be subject to the provisions of 40 CFR §70.10(d) if the deficiency is not corrected in a timely manner.

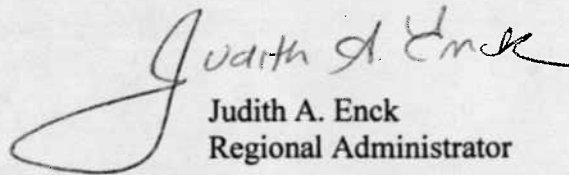
Concerning the implementation and enforcement of National Emission Standards for Hazardous Air Pollutants (NESHAP) standards issued pursuant to CAA section 112 and other federal standards, NYSDEC maintains that it is not required to implement and enforce those requirements even after the requirements are incorporated into a source's title V permit. NYSDEC is correct that a state is not required to take delegation under 40 CFR, Part 63 Subpart E to independently implement and enforce the federal NESHAP, and NYSDEC has not accepted delegation of several of the federal NESHAP. EPA understands that NYSDEC will include all applicable requirements in title V permits, even where the state has not yet taken delegation of the provisions but that it is not willing to enforce such requirements. NYSDEC is not correct that if it has not taken delegation it is excused from implementing and enforcing those applicable federal NESHAP provisions once those provisions are incorporated into a title V permit. The CAA and EPA's regulations implementing the requirements of title V require states to assert the authority to implement and enforce, and actually implement and enforce, all applicable CAA requirements as a condition of program approval. See CAA sections 502(b)(5)(A), (B) and (E) and 502(d)(1); see also 40 CFR §70.4(b)(3). NYSDEC's argument that additional state action incorporating federal regulations into state law is required before applicable requirements can be included in a title V permit and enforced pursuant to that title V permit is without foundation and contrary to the express requirements of the CAA. Please refer to Section II.D of the audit report for detail.

Our review of select permits reveals that the New York program issues permits of acceptable quality from some but not all of the regional offices. For instance, our review found certain types of permit conditions should be supported with better documentation in order to comply with 40 CFR §70.7(a)(5). Other permit conditions may need to be supplemented with additional requirements in order to comply with 6NYCRR 201-7.1(d). Please refer to Section II of the audit report for detail. I am certain that NYSDEC is committed to issuing permits of high quality. As such, I seek your commitment that all nine NYSDEC regional offices provide better documentation for future title V permits as discussed in detail in Section II of this report as part of DEC's response to this audit.

Please provide your response to the requests made in this audit report within 90 days of receiving this letter. The issues that should be addressed in DEC's response to this report (e.g., the title V funding issues, DEC's commitment to improve documentation of permit actions, DEC's commitment to ensure enforceability of all title V permit conditions, etc.) are summarized in Section IV of the audit report. EPA Region 2 is committed to working with NYSDEC to resolve issues identified in the attached report.

We wish to thank your staff, especially Christopher LaLone and Ron Lassonde, for their cooperation in the course of our audit. If you have any questions, please do not hesitate to call me or have your staff contact Steven Riva at (212) 637-4074.

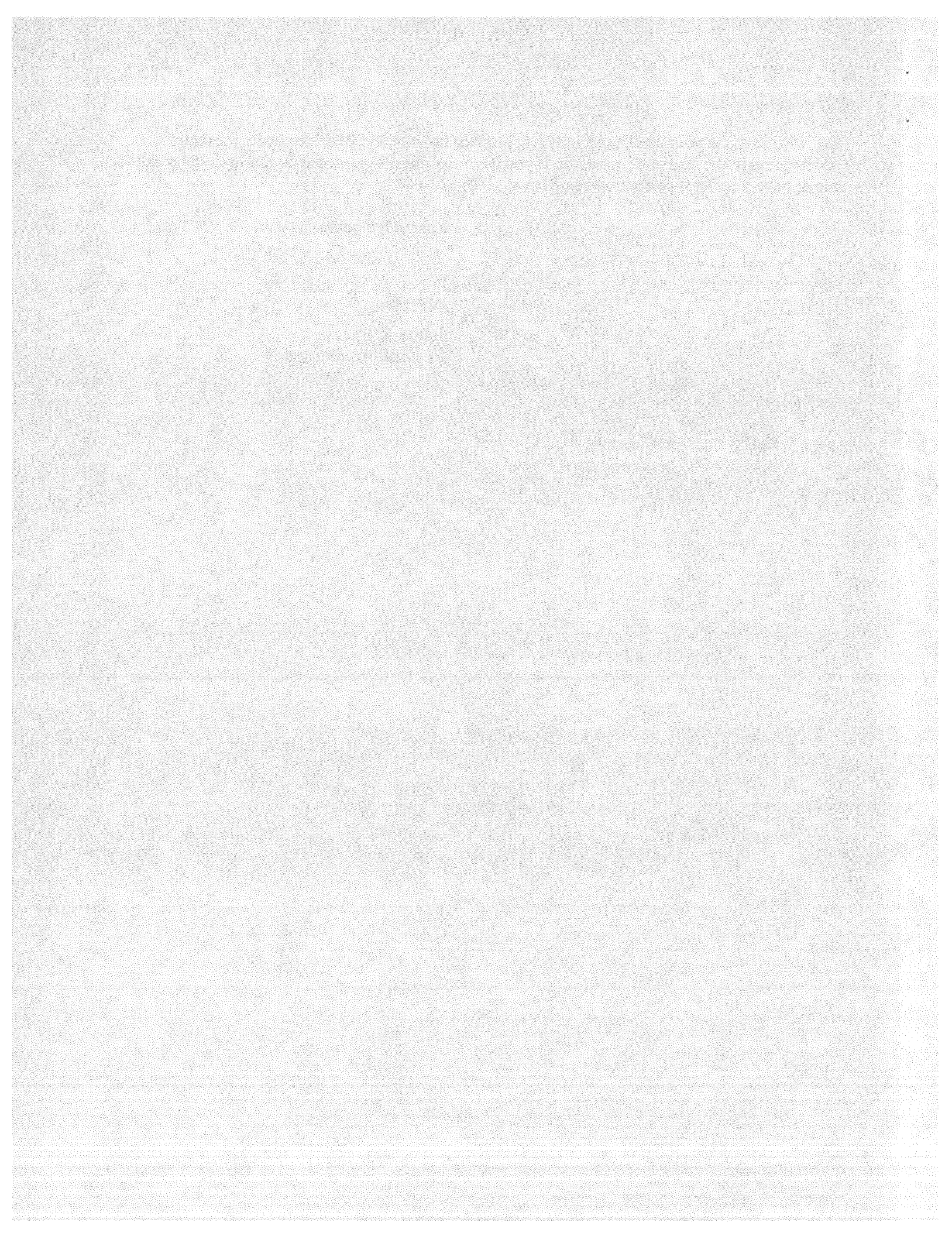
Sincerely yours,

A handwritten signature in cursive script, reading "Judith A. Enck". The signature is written in dark ink and is positioned to the left of the printed name and title.

Judith A. Enck
Judith A. Enck
Regional Administrator

Enclosure

cc: Robert Stanton, Director
Bureau of Stationary Sources
DAR, NYSDEC



**Environmental Protection Agency's (EPA's) 3rd Quadrennial Review of the
New York State Department of Environmental Conservation (NYSDEC)
Title V Operating Permit Program**

I. Introduction

II. Title V Operating Permit Program

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- B. Emission Information
- C. Capping Limits
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- E. Permit Application

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- A. Funding Analysis
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V. List of Attachments and Appendices

- Attachment A- New York State Attorney General's Opinion dated June 27, 1996
- Attachment B- April 28, 2014 Letter and Questionnaire from Steven Riva of EPA to Robert Stanton of NYSDEC
- Attachment C - Response to EPA's Questionnaire dated May 30, 2014 from Ron Lasonde of NYSDEC to Suilin Chan of EPA
- Attachment D - June 18, 2014 Meeting Agenda and List of Attendees
- Attachment E - "Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits" by Stephen D. Page, Director of OAQPS dated April 30, 2014
- Appendix A - Facility Emissions Summary of Permit Review Report for Empire Power Plant
- Appendix B - Letters from John Filippelli of EPA to David Shaw of NYSDEC
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- Appendix D - Notices of Adoption of the Operating Permit Program Fee Rule Pursuant to 6 NYCRR Subpart 482-2 Published for FY 2006 – FY 2014
- Appendix E- Actual Expense Reports for FY 2009 – FY 2013
- Appendix F - ESD's CAA Small Business Environmental Ombudsman Annual Report for State Fiscal Year 2009
- Appendix G - Annual Report of the Small Business Environmental Assistance Program for State Fiscal Year 2009/10
- Appendix H - New York State Department of Health Clean Air Compliance Act Activities dated April 2009/March 2010

I. Introduction

EPA Region 2 conducts an audit of one of its state programs once every four years. Periodic program audits coupled with EPA's on-going oversight review of select permit actions provide a reasonable assessment of the state's title V program. The purpose of program audits is to determine whether the state's program is being implemented consistent with the requirements of title V of the CAA and the EPA regulations implementing the statute and the approved State Operating Permit Regulations.

The New York State Department of Environmental Conservation (NYSDEC) was granted full approval for its Operating Permit Program ("OPP") on February 5, 2002 based on its program submittal, including the New York State Attorney General's June 27, 1996, opinion submitted in support of NYSDEC's request for program approval (see [Attachment A](#)). EPA Region 2 conducted a title V fee program audit in 1999, the first title V permit program audit in 2006 and the second permit program audit in 2010. The third audit which was conducted on June 18, 2014 is a composite audit of both the fee and permit program aspects of the title V program.

EPA Region 2 was aware of fiscal concerns during the 2010 audit (i.e., State's General Fund was needed to supplement insufficient title V fee revenues) but the Agency did not review the title V fee program because the New York State Legislature in 2009 adopted a new fee schedule that had only been in effect a few months before the EPA audit. A meaningful assessment of the fee program could not be conducted until the new fee schedule was implemented for a few cycles. During the 2010 audit, EPA learned that the primary reasons for reduction in title V fee revenue were continual reduction in the total actual emissions and the number of sources subject to the program. The title V fees from Part 70 sources are based on the actual emissions; to reduce the fees charged, many facilities reduced their actual emissions by operating more efficiently, maintaining proper operation of their emission control devices, and removing emission units that were no longer needed. The title V emission inventory decreased further when facilities took synthetic minor permit limits to reduce their potential to emit to less than the title V threshold, thereby avoiding title V applicability or closed their facilities altogether. These reductions in emissions have contributed to the title V funding shortfall in the State of New York.

In the 2014 program audit, EPA (1) revisited the issues identified in the October 7, 2010 audit report, (2) addressed issues uncovered during our routine oversight review of draft/proposed permits, and (3) conducted a comprehensive review of New York's title V fee program. We began with a letter and questionnaire to NYSDEC dated April 28, 2014 (see [Attachment B](#)). NYSDEC provided a response to our questionnaire via electronic mail on May 30, 2014 (see [Attachment C](#)). An on-site visit was conducted on June 18, 2014, to meet with DEC personnel to discuss the information requested in our June 2014 letter. See [Attachment D](#) for a list of attendees and the agenda. This audit report is developed based on:

- DEC's response to the questionnaire
- Information obtained during the June 18, 2014 on-site audit visit
- EPA's routine oversight review of select title V permits (including permit review reports, public notices, draft permits, etc.)
- DEC's "Notices of Adoption of the Operating Permit Program Fee Rule pursuant to 6 NYCRR Subpart 482-2" published for FY 2009 – FY 2013, and

- Information provided on a DVD received on the date of the visit.

Information on the DVD included annual accounting reports for FY 2008 – FY 2013, annual reports from agencies/contractor working in support of the small business program (the Empire State Development, Environmental Facilities Corporation, and Department of Health), and supporting documentation for these reports. Section II of this audit report pertains to issues related to the permit program, Section III pertains to issues related to the fee program and Section IV provides a summary of action items.

II. Title V Operating Permit Program

40 CFR §70.7(a)(5) requires the permitting authority to provide a statement of basis that explains the basis of the draft permit conditions. DEC provides the information called for in a statement of basis in the form of a Permit Review Report (PRR). The PRR provides a description of each applicable requirement and lists the permit conditions that implement the applicable requirement. It also provides a list of the monitoring conditions identified by the permit condition number and the type of monitoring required. While the PRRs reviewed by the Agency provide valuable information regarding the permit conditions, they appear to lack to provide two pieces of information that are helpful to the public and EPA:

- Justification for gap-filling monitoring
- Emission rates for all regulated pollutants

- A. Rationale for Gap-filling Monitoring in the Permit Record. Based on DEC's response to the audit questionnaire, it is not clear that DEC is consistently including the rationale for gap-filling monitoring in the PRR. In accordance with applicable statutory and regulatory requirements, the statement of basis, or in the case of New York, the PRR, must contain adequate information regarding monitoring necessary to assure compliance with applicable requirements. The rationale for monitoring requirements selected by a permitting authority must be clear and documented in the permit record (e.g., in the Statement of Basis). See 40 CFR §70.7(a)(5); see also *In the Matter of US Steel Corporation – Granite City Works*, Petition No. V-2011-2 (Order on Petition) (Dec. 3, 2012) at 10; *In the Matter of CITGO Refining & Chemicals Co.*, Order on Petition No. VI-2007-01 (May 28, 2009) at 7. This issue was further discussed in the April 30, 2014, guidance issued by Stephen D. Page, Director of EPA's Office of Air Quality Planning and Standard, titled "Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits." See Attachment E.

During the on-site visit, DEC acknowledged the importance of including the justification for gap-filling monitoring in the PRR and doing a better job in this area. EPA requests that DEC adhere to the regulatory obligations for the permit record to include adequate monitoring to assure compliance with applicable requirements, as well as a reasoned explanation for any gap-filling monitoring. These issues have been emphasized on a number of occasions in title V petition orders, as noted above. As part of its response to this audit report, EPA expects a commitment from DEC that all of its 9 regional offices

will provide the required documentation for gap-filling monitoring in the PRR beginning 90 days from the date of this report.

- B. Emissions Information. Our oversight review of draft and proposed title V permit modifications shows that the public notice often lacks information on emission changes as required by 40 CFR §70.7(h)(2). This was confirmed during the on-site visit. Emission changes for modifications have not been included in the public notice or PRR as a routine practice. The PRR only provides the range in tons per year within which pollutants are emitted by the facility; no specific emission rate is provided for any pollutant (see Appendix A). DEC's response to the audit questionnaire notes that to include an emissions summary in the PRR would require system enhancements which, due to fiscal and staff resource constraints, are limited to technical fixes that address major system deficiencies. As such, it was discussed during the on-site visit that emission information for both new constructions and modifications could be provided in the public notice as a workable alternative to both EPA and DEC.

For modifications to title V permits, 40 CFR §70.7(h)(2) requires the public notice to provide information on "the emissions change involved in any permit modification" to keep the public informed of changes that may affect the air quality in areas within their community. Our oversight review indicates that the following permit modifications had no emission information provided in the public notice: County of Franklin Landfill, Occidental Chemical Corp., Riga Landfill, Brookhaven LFG Engines, Ontario Landfill, and North River Wastewater Treatment Plant. All 9 NYSDEC regional offices need to comply with 40 CFR §70.7(h)(2) by providing in the public notice the change in emissions for each pollutant emitted by the emission unit(s) involved in the permit modification. EPA requests a copy of the public notice for a permit modification issued by each of its 9 regional offices since the date of this audit report to reflect implementation of this regulatory requirement.

Emission information for initial and renewal permits is very useful in helping EPA target its oversight review of proposed permit actions; therefore, such information is requested of DEC. 40 CFR §70.8(a)(1) requires the permitting authority to:

"provide to the Administrator a copy of each permit application (including any application for permit modification), each proposed permit, and each final part 70 permit. The applicant may be required by the permitting authority to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the permitting authority may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan."

Pursuant to 40 CFR §70.8(a)(1), we would like to receive as a separate document, along with the PRR, an emission summary sheet that lists the emission rate in tons/year for each air pollutant emitted (including those that are below the NSR/PSD or title V threshold levels) by the source requesting an initial permit or a renewal permit, at the time DEC

submits the proposed permit to EPA. The emission summary sheet should also identify the name and location of the facility, the type of permit action, and the date of the application. EPA would like a commitment from DEC that all of its 9 regional offices will provide the emission summary sheet beginning 90 days after the date of this report.

- C. Capping Limits. DEC's rule at 6 NYCRR 201-7.1(a) allows the owner or operator of a facility subject to Part 201 (Permits and Registrations) to accept enforceable permit conditions that restrict or cap emissions from the facility or an emission source below the thresholds of one or more applicable requirements, i.e., synthetic minor limits. EPA believes proposing emission limits to avoid applicable requirements is a permit action that warrants a discussion in the PRR. The PRR needs to provide a statement that sets forth the legal and factual basis for the draft permit conditions, in particular, capping limits which serve to avoid an applicable requirement. During EPA's oversight review of New York's proposed title V permits, EPA found discussion of non-applicability due to capping limits included in the PRR or public notice in some cases and none in others. DEC's response to the questionnaire acknowledged that "the degree of the capping discussion in a notice or PRR of any given permit may vary by the individual permit writer."

The type of information that should be included in the statement of basis when capping limits result in a source not being subject to an applicable requirement is already stipulated in New York's rule at 6 NYCRR 201-7.1(c) which requires:

"A facility permit or facility permit modification application that proposes a cap must contain the following material in addition to the requirements of Subparts 201-5 or 201-6 of this Part, whichever is applicable:

(1) a complete description of the proposed emission cap, including all background information on the emission sources and processes involved, including, but not limited to:

- (i) emissions of individual regulated pollutants;
- (ii) duration and frequency of emissions;
- (iii) existing or proposed control equipment;
- (iv) other emission sources releasing the same contaminants at the facility;
- (v) calculations assessing the applicability status of the facility; and
- (vi) calculations demonstrating that the cap will obviate the requirement to obtain a title V facility permit and/or comply with an applicable requirement."

In addition, 6 NYCRR 201-7.1(d) requires that "[t]he facility owner or operator must also include a proposed monitoring, recordkeeping, and reporting strategy that will be used to demonstrate that the emissions limitations under the proposed cap are verifiable, and enforceable, along with the proposed permit conditions." Stipulation of the capping limits alone is not sufficient; monitoring, recordkeeping and reporting must be included in the permit to ensure practical enforceability of the capping limit and assure non-applicability

of the otherwise applicable requirements. EPA's oversight review indicates that this is not done in all cases in all regional offices. Failure to include the requisite monitoring, recordkeeping, and reporting requirements on capping limits may render the limits and therefore, the non-applicability, ineffective. DEC needs to ensure that each capping limit is stipulated in the permit with the appropriate monitoring, recordkeeping, and reporting requirements, consistent with DEC regulations.

In order to establish the legal and factual basis for the capping conditions, the PRR must include a discussion of the emission limits along with the proposed monitoring strategies. Our review shows that the level of information provided to support non-applicability determinations, due to capping limits, in some PRR's may not satisfy 40 CFR §70.7(a)(5). Since NYSDEC's Air Guide 10 requires the justification of capping limits to be provided in the public notice, NYSDEC may satisfy the requirement of 40 CFR §70.7(a)(5) by attaching a copy of the public notice to the PRR or copy the information from the public notice to the PRR. DEC needs to ensure that each PRR includes a capping discussion that is consistent with EPA regulations and DEC's Air Guide 10.

DEC must ensure that all DEC permit writers consistently comply with the requirements of EPA and DEC regulations. EPA requests a copy of the first PRR and draft permit issued by each of DEC's 9 regional offices since the date of this audit report to demonstrate compliance with the above.

D. Federal Enforceability.

- a) New York's way of accepting delegation of federal standards is to incorporate them by reference into the State's rules. All federal standards for which New York has accepted delegation are listed in 6NYCRR 200.10 and the corresponding tables. In addition, NY narrows the delegation to the standard listed on specific pages of the CFR published on a specific date or the Federal Register citation that corresponds to EPA's promulgation and lists this information in the Table. Federal standards not listed in the tables are not independently implemented and enforced by New York. In addition, revisions to federal standards already accepted by New York are not automatically incorporated into 6NYCRR 200.10 and the corresponding tables by virtue of the acceptance of the original standard. In general, any new or revised standard promulgated after delegation is not considered accepted until either of the following is incorporated by reference into 6NYCRR 200.10 and the corresponding tables: 1) the Federal Register that published the revision is identified with the specific page numbers or 2) the CFR that codified the revision is identified with the specific page numbers.

EPA does not take issue with New York's process of accepting delegation of federal standards, such as those issued pursuant to CAA section 112, pursuant to the appropriate authority to accept delegation of federal standards. See e.g. 40 CFR Part 63, Subpart E – "Approval of State Programs and Delegation of Federal Authorities." States are not required to take delegation of all Federal standards, including those issued pursuant to CAA section 112; however, New York's discretion in deciding when and if to take delegation of such standards does not excuse the state from

including all applicable requirements into the title V permits it issues. See CAA sections 502(b)(5)(A), (B) and (E) and 502(d)(1); see also 40 CFR §70.4(b)(3). That requirement is nondiscretionary and integral to the proper functioning of its title V program, and it is separate from the discretion provided to states in determining whether to take delegation of certain Federal standards (e.g. standards issued pursuant to sections 111 and 112). We understand that NYSDEC will include all applicable requirements in title V permits, even where the state has not yet taken delegation. However, contrary to New York's assertions, the fact that NYSDEC has not accepted delegation of certain Federal standards and has not updated 6NYCRR 200.10 and the corresponding tables with those standards does not prevent New York from both including and enforcing all applicable requirements included in a source's title V permit. New York's interpretation, coupled with its delays in incorporating by reference, undermines its ability to comply with 40 CFR §70.4(b)(3)(i), which requires the permitting authority to "[i]ssue permits and assure compliance with each applicable requirement and requirement of this part by all part 70 sources." The EPA regulations at 40 CFR §70.2 define applicable requirements to include, among other things, any standard or other requirement under section 111 and 112 of the Act as they apply to emissions units in a part 70 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates). It is improper for a title V permitting authority to interpret its regulations in a manner that undermines its ability to include and enforce applicable requirements in a title V permit, particularly where the cited statute does not expressly prevent the state from complying with its title V responsibilities.

There are 11 NESHAP promulgated and included in 40 CFR part 63 after July 1, 2009 that are awaiting action from NYSDEC to incorporate them into 6NYCRR 200.10, and for that reason, the state is asserting it cannot incorporate the terms of those rules into title V permits consistent with the requirement to include all applicable requirements in title V permits. However, as explained above, regardless of whether these NESHAP have been incorporated into 6NYCRR 200.10, they are applicable requirements because they are included in 40 CFR part 63, and thus, these standards must be included in title V permits issued by NYSDEC to applicable sources in the state. Furthermore, we do not understand the delay in incorporation of certain federal standards into 6NYCRR 200.10, as EPA has provided NY with repeated reminders (see Appendix B) to perform the updates the state asserts are necessary to comply with its title V responsibility. While we believe the state should act expeditiously in revising 6NYCRR 200.10 to list the 11 NESHAP standards if the state intends to take delegation of those standards pursuant to Part 63, Subpart E, such action is not required for the state to include those standards in title V permits to the extent they are applicable to sources within the state.

With regard to future federal standards, NYSDEC must incorporate all requirements applicable to title V sources into title V permits, within the time frames provided in the relevant rules, even if the state has not accepted delegation of the federal standards or not incorporated them into 6NYCRR 200.10.

- b) With regard to RACT variances that have been approved by DEC but not yet approved by EPA and incorporated into the SIP, DEC currently lists them on the state and federal section of title V permits. It is inappropriate to list these state-revised limits on the state and federal section of title V permits without identifying them as non-federally enforceable as they may be misconstrued as having been reviewed and approved by EPA. Until they are approved into the SIP by EPA, the state-approved RACT variances are not federal applicable requirements as defined by 40 CFR §70.2. 40 CFR §70.6(b)(2) provides that “the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements.” Such designation is usually done by creating a “state-only” section in the title V permit to house all non-federally enforceable permit conditions including RACT variances that have not been approved by EPA. Alternatively, DEC may consider identifying SIP limits that would be superseded by RACT variance instead of designating RACT variances in the state-only section of the title V permit. Under this scenario, DEC identifies with an asterisk a SIP emission limit that would be superseded by a source-specific RACT variance that is undergoing EPA’s review. The asterisk denotes that the SIP emission limit would be changed to the source-specific RACT variance value via an administrative amendment upon EPA’s approval. Once the RACT variance is approved, DEC would replace the SIP limit with the RACT variance via an administrative amendment. As part of NYSDEC’s response to this audit, EPA requests that DEC commit to designating on the state-only section of the title V permit RACT variances that have not been approved into the SIP by EPA, or informing EPA of a different method of designation, or listing only existing SIP limits in the permit but denoting those for which source-specific RACT variances have been submitted to EPA for approval.

- E. Permit Application. In the April 28, 2014 questionnaire, EPA asked DEC to quantify the percentage of permits issued as merged construction/title V permits and how the merged process is handled in the public notice and PRR. Following its review of DEC’s response to the questionnaire, EPA had questioned whether NSR/title V permit applications are reviewed and issued in a merged process. During the on-site visit, EPA sought clarification on how NSR and title V permit applications are handled for major sources that existed before and after the Tailoring Rule came into effect. The program description DEC provided via email is slightly different from the provisions found in 6 NYCRR 201-6.2(a)(2) and (3) and merits further discussion.

During the on-site visit, EPA also inquired whether there is any backlog in the issuance of initial permits, renewals, or significant modifications. NYSDEC responded that due to staffing shortage and the need for more qualified staff, permit applications are being prioritized in this manner: projects such as new constructions that boost economic development will be reviewed first followed by permit modifications and renewals. While significant modifications are being processed for a particular facility, minor modifications that are submitted during that time may be combined with the significant modification depending on the timing of the significant modification process.

F. Operating Permit Rule Revisions

EPA reminded NYSDEC that changes to 6 NYCRR 201-6 or any part of New York's title V program need to be submitted to EPA as a program revision for incorporation into New York's Title V Operating Permits Program to meet federal enforceability requirements. During the on-site visit, NYSDEC appreciated the reminder and agreed to do so as appropriate.

III. Title V Fee Program

A. Funding Analysis

Pursuant to 40 CFR §70.9, the State is required to collect sufficient title V fees based on emissions from subject sources to fund all direct and indirect costs of the program. We understand that New York obtains money from the State General Fund to supplement the title V fee revenues, a practice which raises concerns with regard to the State's CAA title V fee obligations.

The New York title V Operating Permit Program applies to 417 sources with total emissions of 116,243 tons as of March 31, 2014. The number of employees within DEC who work on the title V program on a full time basis is 34 as of April 24, 2014. The program currently has a running deficit that accumulates to \$17,885,690 as of March 31, 2014 in spite of the fee increase in 2009. The amount of title V fees collected from sources subject to the program is inadequate to cover all expenses associated with running the New York Title V Program; a funding shortfall has been carried over every year since 2006. Money from the General Fund has been used to cover the shortfall each and every year. While EPA recognizes the many variables that affect title V fee projection, a funding shortfall that continues for eight consecutive years is of a serious nature that ought to be addressed by NYSDEC.

New York's title V fee program consists solely of emissions based fees collected from title V affected facilities. Title V fees are collected from subject sources every year based on the actual emissions reported. All fees collected are deposited into the Operating Permit Program Account of the New York State Clean Air Fund, established by the State Finance Law. However, money from this account is not directly disbursed to pay for the costs of administering the title V program. At the beginning of each fiscal year, money appropriated from the General Fund account is used to pay for title V expenses. This account is reimbursed with title V money as the fee revenue is received. Without the title V appropriation, expenses cannot be paid until a sufficient amount of title V fees are collected. In essence, the title V appropriation is needed to bridge funding gaps that occur before the fee revenue is received and to pay for title V expenses when the title V fee revenue for the fiscal year runs out. When the title V fees collected cannot fully reimburse the General Fund for the appropriated amount, a negative balance appears on the accounting reports. See Appendix C.

The title V appropriation is not directly related to or dictated by the amount of emissions reported in the subject fiscal year. The Executive Branch (the New York Governor's

Office) submits a proposed budget that includes funding levels for the various State departments to the legislature for approval (in January for the State of New York) prior to the beginning of the fiscal year. The New York State fiscal year runs from April 1st to March 31st with budget approval normally occurring in the June/July timeframe. The funding level requested by the Governor has been based on the emissions that occurred two years ago, two calendar years before the beginning of the subject fiscal year. Other factors such as prior fiscal year's expenses, inflation, the state of the State's finances, etc. all come into play in the Governor's funding level projection for the title V program. The funding level for the title V program appropriated by the State Legislature can be less than or greater than the amount actually collected from subject sources. Based on our review, the appropriation for the title V program approved for FY 2010, 2011 and 2012 actually exceeded the amount of title V fees collected, but it still fell short of the amount needed to pay for each of those fiscal years' expenses.

New York State currently charges a non-uniform title V fee rate to subject sources. The fee rate is different depending on the amount of annual emissions emitted. For comparison purposes, the presumptive minimum fee rate for sources subject to 40 CFR §70 for FY 2015 (from September 1, 2014 through August 31, 2015) is \$48.27 per ton. Below is the fee schedule that was approved by the State legislature in 2009.

- \$45 per ton for total annual emissions of less than 1,000 tons
- \$50 per ton for total annual emissions of 1,000 tons or more but less than 2,000 tons
- \$55 per ton for total annual emissions of 2,000 tons or more but less than 5,000 tons
- \$65 per ton for total annual emissions of 5,000 tons or more up to 7,000 tons

A rough calculation based on the total annual emissions for FY 2009, 2010, 2011 and 2012 and the maximum fee rate of \$65 per ton still shows a deficit for each of those years. See table below. The "Actual Expenses" column represents the actual amount incurred by DEC and the Small Business Program ("SBP") that covered personal services (i.e., payroll), fringe benefits, indirect costs, and non-personal services (e.g., travel, inspections, building, equipment, etc.) during those fiscal years. The information used to prepare this table can be found in Appendix D for the annual emissions and Appendix E for the actual expenses.

The shortfalls shown below merely reflect the deficit for the subject fiscal year and do not include the cumulative deficit from prior years which amounts to over \$17 million as of March 31, 2014, when added together.

Fiscal Year	Annual Emissions	Maximum Fee Revenue	Actual Expenses	Shortfall
2009/2010	197,603 tons	\$12,844,195	\$18,466,000 DEC: \$16,890,000 SBP: \$1,576,000	-\$5,621,805
2010/2011	164,023 tons	\$10,661,495	\$17,405,000 DEC: \$15,989,000 SBP: \$1,216,000	-\$6,743,505

2011/2012	162,032 tons	\$10,532,080	\$14,894,000 DEC: \$13,715,000 SBP: \$1,179,000	-\$4,361,920
2012/2013	159,000 tons	\$10,335,000	\$14,763,000 DEC: \$13,796,000 SBP: \$967,000	-\$4,428,000
2013/2014	108,977 tons	\$7,083,505	Not yet available	

The fact that insufficient fee revenue is generated even at the maximum fee rate affirms a severe funding problem that calls for immediate action. Inadequate funds can be resolved by increasing the fees collected or by reducing the costs of program implementation. New York's title V fee rates currently do not adjust according to the Consumer Price Index (CPI). We understand from DEC that any increase in fees, including imposing the CPI adjustment, would require legislative action. Absent periodic adjustments per the CPI, inflation essentially reduces the title V fee rates over time. Given that the current fee schedule at its maximum rate does not generate adequate revenue to fund the title V program, without an increase in fee rates, it is very likely that title V fee revenue will be insufficient to cover title V expenses in years to come.

Pursuant to 40 CFR §70.9, the presumptive minimum fee rate set at \$25 per ton in 1989 is now \$48.27 per ton in FY 2015 adjusted according to the CPI. Although fee rates set at higher than the presumptive minimum are not subject to the annual CPI adjustment as stipulated in 40 CFR §70.9, fee rates at or lower than the presumptive minimum are. New York's fee rate for emissions lower than 1,000 tons is \$3.27 per ton lower than the 2015 presumptive minimum of \$48.27 per ton. If New York wants to keep a graduated emission fee schedule, the lowest fee rate must be at least equal to the presumptive minimum. Assuming that the State does not reduce its expenses and/or that the amount of overall revenue does not rise substantially without a fee increase, the higher fee rates on the graduated fee schedule would most likely need to be higher than New York's current maximum fee rate of \$65 per ton since even this fee rate, charged of all subject sources, cannot generate sufficient fee revenues to fully fund the program.

Since the New York title V fee program has been unable to fully fund the title V permit program even at its maximum fee rate, eliminating fee rates lower than the maximum would appear to be an important component of the solution to the funding issues of the title V program. In its response to the audit questionnaire, DEC stated that if additional funds were available, it would "enable DEC to cultivate a more vigorous and robust program that would provide the ability to...shorten permit review times, especially renewals..." EPA encourages DEC to share ideas along this line in its response to this audit report. EPA will provide any assistance necessary to facilitate DEC's effort in this regard.

Another factor that affects title V fee revenue is the amount of emissions reported by sources. The requirement for sources to pay for each ton of emission emitted helped set

an emission reducing trend that has resulted in sources replacing old and inefficient equipment, making better efforts to maintain their emission control devices, removing emission units that are no longer needed, etc. Some sources even request emission limits to restrict their emissions to less than the title V threshold levels to "cap out" of the title V program altogether, further reducing the State's title V emission inventory and title V fee revenue. The work performed to determine title V applicability for sources that capped out of the title V program is not paid for once those sources drop out of the title V inventory. A funding option that may recuperate some or all of those lost fee revenue is to charge fees for title V applicability review from sources that want to cap out of the title V program. New York is encouraged to explore this potential funding option.

An innovative idea for New York to run the title V program on a balanced budget is to pay for all title V expenses solely from fees collected from subject sources. Under this scenario, the State would need to collect title V fees one year ahead so that the amount of title V fee revenue for the upcoming fiscal year is known and is used to budget the program activities for the fiscal year. The amount and type of work to be done in the upcoming fiscal year must commensurate with the amount of fees already collected. The title V fund would be available for disbursement at the beginning of the fiscal year and the amount of fees for the upcoming year may be adjusted by collecting non-emissions based fees on an "as needed" basis. A different budgeting process for the title V program would need to be in place to support such a scenario, free from the appropriation process. DEC is encouraged to explore this idea further as an option to resolve the imbalance budget issues.

B. Small Business Programs

New York's title V fee revenue also funds programs that assist the small business community as required by section 507 of the CAA. The CAA requires states to establish the Small Business Environmental Assistance Program (SBEAP), the Small Business Ombudsman, and the Compliance Advisory Panel to help small businesses comply with the requirements of title V of the CAA. To ensure adequate funding for these programs, states are required to fund their activities via title V fee revenues. See section 502(b)(3)(A). Section 507 of the CAA lists the role and responsibilities of each of these programs. In sum, the SBEAP provides detailed technical assistance, publications, and tools to help small businesses come into or remain in compliance with environmental regulations. The Small Business Ombudsman is a State advocate acting on behalf of small businesses and representing them on environmental issues. The Compliance Advisory Panel consists of small business owners and representatives who consult and advise on the contents/components of the SBEAP.

- a) The Small Business Environmental Ombudsman (SBEO) was established in February 1992 by the NYSDEC. The SBEO is a resource within the State government for the small business community. Services under the SBEO are provided and managed by the Empire State Development (ESD) pursuant to section 507 of the CAA and codified in the Economic Development Law §137. ESD is a New York State agency and employees who work within the SBEO are funded through the title V fee program. The SBEO represents small business stationary sources on issues

relating to compliance with the CAA and the State's rules and regulations. Specifically, the SBEO provides assistance in resolving complaints and disputes between small businesses and regulatory agencies; locating sources of funds to comply with air quality requirements; and identifying sources to provide the technical information needed to comply with regulations. The SBEO also represents the small business community by commenting on draft federal, state and local air quality rules and regulations. Workshops and seminars are conducted to keep the small business stationary sources informed of new regulations. ESD submits an annual report summarizing the tasks undertaken by the SBEO for each fiscal year to NYSDEC. Upon reviewing ESD's "Annual Report for State Fiscal Year 2009 (April 1, 2009 to March 31, 2010) (see Appendix F), EPA found activities that do not relate to New York's title V program were being required to be covered under the SBEO by State legislation. Specifically, Section VII, under "SBEO and ESD One-Stop Compliance Review," stated:

"Recently enacted legislation directs ESD to provide comprehensive compliance review to every small business that contacts us through our Regional Offices. Compliance is defined broadly to include all regulation such as labor, tax, health, and worker safety. One area in which ESD has long-established outreach service and expertise for regulatory compliance helping small firms comply with all applicable environmental regulations. The SBEO program will be working closely with our Regional Offices to extend environmental compliance expertise to the many firms that contact us for economic development assistance."

The SBEO's role and responsibilities are established in section 507(a)(3) as:

"A designated State office within the relevant State agency to serve as ombudsman for small business stationary sources in connection with the implementation of this Act."

Regulations on labor, tax, health, and worker safety are not functions of the title V permitting program. All activities and costs associated with helping small businesses comply with such regulations cannot be covered by the title V fee revenue. NYSDEC may cover these expenses with other State Fund money such as the General Fund.

- b) The SBEAP was established by NYSDEC and managed under contract by the New York State Environmental Facilities Corporation (EFC). Since EFC is not a New York State agency, the costs associated with the SBEAP are paid to EFC under the category of "Nonpersonal Services." EFC provides technical expertise to help small businesses meet federal and State environmental requirements. Specifically, the SBEAP provides information on control technologies, pollution prevention, material substitution, process modification, and permitting as well as on-site visits to help companies address site-specific operational concerns. The SBEAP also conducts workshops and seminars to inform small business stationary sources of new

regulatory requirements and how to come into compliance with them. EFC submits annual reports to NYSDEC summarizing the tasks undertaken by the SBEAP for each fiscal year (see Appendix G for the FY 2009 report).

Based on our review, the SBEO and SBEAP have been providing much needed assistance to the small business community so that small businesses can comply with federal and state requirements. These two programs offer to the same small business community assistance on different aspects of the same regulatory requirements. However, there may be overlap when it comes to conducting workshops and seminars on the same regulations. Effort should be made between the SBEO and SBEAP to ensure that workshops and seminars are not repeated but coordinated to deliver the same benefits to the small business community without adding costs to the New York title V program.

- c) The New York title V fees also fund activities undertaken by the New York State Department of Health (DOH). An annual report is submitted by DOH detailing its activities for each fiscal year. The amount of title V fund paid to DOH for their assistance in the title V program totaled \$597,000 for FY 2009, \$621,000 for FY 2010 and \$711,000 for FY 2011 and \$553,000 for FY 2012. The tasks that DOH undertakes do not all pertain to the title V permitting program, in fact, a majority of the tasks are only generally related to New York's air programs and none is specifically associated with implementation or compliance with title V requirements. The following activities were listed in the Summary Section of the "New York State Department of Health Clean Air Compliance Act Activities" dated April 2009/March 2010 (see Appendix H):
1. Assessment of Emission Sources – assist the NYSDEC staff in the health risk assessment of select source categories (e.g., solid waste incinerators) and provide guidance for incorporating environmental justice concerns into the permit application review process.
 2. Asthma and the Environment – conduct research to determine environmental factors that contribute to asthma in an effort to develop public health programs to minimize exposure to those factors by the public.
 3. Responding to Inquiries – respond to inquiries on air toxics issues and the related post-exposure health effects.
 4. Development/Review of Standards, Regulations and Guidelines – provide comments on proposed federal and/or state regulations related to air quality.
 5. Electric Generating Facilities – inform New York State Board on Electric Generation Siting and the Environment on decisions related to this source category with technical expertise and evaluate potential public health impacts as a result of emissions from electric generating facilities.

6. **Criteria and Hazardous Air Pollutants** – provide comments on proposed changes to the NAAQS for NO₂ and SO₂; tracks environmental hazards on health effects, birth defects, birth outcomes, asthma, etc.; and create maps of cancer incidence.
7. **Special Studies** – as a member of the State Energy Planning Board, the DOH Commissioner participates in the State’s energy planning effort which ensures adequate power supply, advocates new technologies and efficiency in energy development, preserves the environment, reduce dependence on imported gas and oil, stimulate economic growth, and preserve the individual welfare of NY citizens and energy users. DOH also provides technical support for state’s Environmental Justice Brief and Climate Action Plan. Other studies as requested by NYSDEC are also conducted.

Many of the activities listed above pertain to research studies on health issues due to emissions of criteria and HAPs from select facilities, technical support on State rule development or emission guidelines, energy usage forecasts, State’s plan for future sources of energy, etc. Of the seven activities listed, only DOH’s participation in the Mapping Workgroup of the Governor’s Task Force on Environmental Justice where areas of environmental justice concerns are identified (under “Assessment of Emission Sources”) pertains to title V permitting. Funding all of these activities through the title V fee revenues calls into question compliance with 40 CFR § 70.9. Tasks or activities that are unrelated to meeting the requirements of title V of the CAA must be defunded from the title V fee program. NYSDEC should scrutinize the activities undertaken by DOH for relation to the title V requirements. NYSDEC should submit to EPA justification for funding any and all tasks undertaken by the DOH with the title V fees. Expenses for non-title V related activities must be transferred to other funding mechanism, e.g., the State General Fund.

IV. Summary of Action Items

Below is a summary of the issues or discussion items presented in this audit that should be followed up with action from the NYSDEC in coordination with the EPA Region 2 Office. Please refer to Sections II and III of this report for details.

Issues	Actions Needed from NYSDEC
<p>Rationale for Gap-filling Monitoring in Permit Record</p>	<ol style="list-style-type: none"> 1) DEC should submit to EPA a commitment that all of its 9 regional offices will provide the required documentation for gap-filling monitoring in the PRR beginning 90 days after the date of this report. 2) DEC should identify all gap-filling monitoring in the “Basis for Monitoring” section of the PRR with a brief discussion of the selected monitoring.

<p>Emission Information</p>	<ol style="list-style-type: none"> 1) For permit modifications, DEC should provide in the public notice the change in emissions for each pollutant emitted by the emission unit(s) involved in the permit modification. 2) DEC should submit to EPA a copy of the public notice for a permit modification issued by each of its 9 regional offices since the date of this audit report to reflect implementation of 40 CFR §70.7(h)(2). 3) DEC should submit to EPA a commitment that all of its 9 regional offices will provide the emission summary sheet with the PRR within 90 days after the date of this report. 4) DEC should submit to EPA for initial permits and renewal permits an emission summary sheet which lists the emission rate in tons/year for each air pollutant emitted by the source (including those that are below the NSR/PSD or title V threshold levels).
<p>Capping Limits</p>	<ol style="list-style-type: none"> 1) DEC should substantiate in either the public notice or the PRR all capping limits that render applicable requirements no longer applicable to the source. 2) All permits with capping limits should be issued with appropriate monitoring, recordkeeping and reporting requirements. 3) DEC should submit to EPA a copy of the first PRR and draft permit issued by each of its 9 regional offices containing the justification for capping limits that render applicable requirements inapplicable to the source and the requisite monitoring, recordkeeping and reporting requirements.

Federal Enforceability	<ol style="list-style-type: none">1) DEC should include all non-delegated federal standards in the title V permits to be issued by all 9 NYSDEC regional offices.2) DEC should submit to EPA a copy of the first draft permit from each of its 9 regional offices showing non-delegated federal standards being included in the title V permit.3) If DEC intends to accept delegation of the 11 federal standards noted in EPA's June 4, 2014 letter (see <u>Appendix B</u>), EPA requests a commitment to incorporate them into 6NYCRR 200.10 and the corresponding tables within 6 months of the date of this report.4) EPA requests a commitment from DEC to update 6NYCRR 200.10 and the corresponding tables within 6 months of the promulgation of future federal standards.5) DEC should commit to designating RACT variances that have not been approved into the SIP by EPA on the state-only section of the title V permit, or inform EPA of a different method of designation, or list only existing SIP limits in the permit but denote those for which source-specific RACT variances have been submitted to EPA for approval.
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<p>Title V Fee Program</p>	<p>Following are additional suggested measures to address New York's title V fiscal issues. Please provide a response to each of the items suggested below within 90 days of receiving this audit report.</p> <ol style="list-style-type: none">1) Explore ways that may allow the title V program to be funded solely with title V fee revenues.2) Submit to legislature a request for CPI adjustment for all title V fee rates.3) Submit to the legislature a request to eliminate the fee rates that are lower than the maximum fee rate from the variable fee schedule.4) Elaborate on ways to shorten permit review times.5) Explore ways the SBEO and SBEAP can coordinate workshops and seminars on the same standards to save costs.6) Transfer from the title V fund to the General Fund activities associated with SBEO's assistance to small businesses for compliance with New York regulations that relate to labor, tax, health, and worker safety. NYSDEC must commit to this in writing in its response to this audit report and reflect this commitment in its annual reports.7) Transfer from the title V fund to the General Fund DOH's activities that are not related to title V. For those activities that will be paid for by title V, NYSDEC must specifically identify them with justification for each. NYSDEC must commit to this in writing in its response to this audit report and reflect this commitment in its annual reports.
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