

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
NYCDEP NORTH RIVER)	ORDER RESPONDING TO
WATER POLLUTION CONTROL PLANT)	PETITIONER'S REQUEST THAT
Permit ID: 2-6202-00007/00015)	THE ADMINISTRATOR OBJECT
Facility DEC ID: 2620200007)	TO ISSUANCE OF A STATE
)	OPERATING PERMIT
Issued by the New York State)	
Department of Environmental Conservation)	Petition No.: II-2002-11
Region 2)	
_____)	

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

On October 1 and 4, 2002, the Environmental Protection Agency ("EPA") received petitions from the City of New York Law Department on behalf of the New York City Department of Environmental Protection ("NYCDEP") and the New York Public Interest Research Group ("NYPIRG"), respectively, requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, to the North River Water Pollution Control Plant ("North River") operated by the NYCDEP, located in New York, New York.

The North River permit was issued by the New York State Department of Environmental Conservation, Region 2 ("NYSDEC") on October 22, 2002, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR parts 200, 201, 621 and 624.

The North River Water Pollution Control Plant is a publically owned secondary wastewater treatment plant. It began operations in 1986 and has the capacity to treat 170 million gallons each day, discharging treated effluent into the Hudson River. Equipment at the facility that emits air pollution includes boilers, pump and blower engines, a flare, emergency power generators, a gasoline dispensing station, some wastewater treatment processes including aeration tanks, and some sludge handling processes including digesters.

The NYCDEP petition alleges that the North River permit does not comply with 40 CFR part 70 in that: 1) NYSDEC violated public participation requirements by (a) failing to hold an additional public comment period because the final permit differed significantly from the draft that was reviewed, and (b) improperly denying NYCDEP's request for an adjudicatory hearing; 2) the permit's inclusion of the Air Quality Monitoring Network is improper; and 3) several other testing and monitoring conditions are unreasonable. The NYCDEP has requested that EPA

object to the issuance of the North River permit pursuant to CAA § 505(b)(2) and 40 CFR § 70.8(d) for any or all of these reasons.

NYPIRG's petition alleges that the North River permit does not comply with 40 CFR part 70 in that: 1) the permit is based on an inadequate permit application; 2) the draft permit was accompanied by an inadequate statement of basis; 3) the final permit fails to set out conditions to assure compliance with generally applicable requirements; 4) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); 5) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); 6) the excuse provision in the state implementation plan (SIP) for startup, malfunction and maintenance conditions must be included in the permit; 7) the permit lacks monitoring that is sufficient to assure the facility's compliance with all applicable requirements and many individual permit conditions are not practically enforceable; 8) the permit fails to include terms to assure compliance with all applicable compliance schedules; and (9) the final permit may improperly limit the dates during which the permit conditions apply. NYPIRG has requested that EPA object to the issuance of the North River permit pursuant to CAA § 505(b)(2) and 40 CFR § 70.8(d) for any or all of these reasons.

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

Based on a review of all the information before me, including the petitions; the administrative record supporting the permit, including but not limited to the North River permit application, petitioners' comments to the NYSDEC on the draft title V operating permit, a June 20, 2002 letter from E. Clarke of NYSDEC to S. Riva of EPA Region 2 transmitting the Responsiveness Summary/Proposed Final Permit ("Responsiveness Summary"), the final Permit Review Report, the final North River permit of October 22, 2002; the annual compliance certification dated February 10, 2003; and relevant statutory and regulatory authorities and guidance, I deny the petitioners' requests in part and grant in part for the reasons set forth in this Order.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. In 2002, EPA granted full approval to New York's title V operating permit program. *67 Fed. Reg.* 5216 (Feb. 5, 2002). Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as “applicable requirements”) but does require permits to contain monitoring, record keeping, reporting, and other compliance requirements when not adequately required by existing applicable requirements to assure compliance by sources with existing applicable emission control requirements. *57 Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, states, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under CAA § 505(a) of the Act and 40 CFR §§ 70.8(a), states are required to submit all proposed operating permits to EPA for review. Section 505(b)(1) of the Act authorizes EPA to object if a title V permit contains provisions not in compliance with applicable requirements, including the requirements of the applicable SIP. *See also* 40 CFR § 70.8(c)(1).

Section 505(b)(2) of the Act states that if EPA does not object to a permit, any member of the public may petition EPA to take such action, and the petition shall be based on objections that were raised during the public comment period¹ unless the petitioner demonstrates that it was impracticable to do so, or unless the grounds for objection arose after the close of the comment period. *See also* 40 CFR § 70.8(d). If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

ISSUES RAISED BY THE PETITIONERS

I. Procedural Issues

Several of petitioners’ complaints identify alleged flaws in the administrative process that led to issuance of the North River permit. Specifically, NYCDEP claims that NYSDEC should have held an additional public comment period and it improperly denied NYCDEP’s request for an adjudicatory hearing. In addition, NYPIRG claims that the application submitted by NYCDEP was not in compliance with the requirements of the CAA, 40 CFR part 70 and 6 NYCRR part 201.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, EPA considers whether the petitioners have demonstrated that the

¹ *See* CAA § 505(b)(2); 40 CFR § 70.8(d). Petitioners commented during the public comment period, raising many concerns with the draft operating permit that are the basis for this petition. *See* letters from Tracy Peel of NYPIRG to DEC (June 6 and 13, 2002), and letters from Deputy Commissioner Lopez of NYCDEP to DEC (from June 1, 2001 to February 12, 2004).

alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA § 505(b)(2) (objection required "if the Petitioner demonstrates . . . that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]); 40 CFR § 70.8(c)(1). As explained below, EPA believes that the petitioners have failed to demonstrate that: NYSDEC's failure to offer an additional comment period or grant NYCDEP's hearing request; the lack of a proper initial compliance certification; the lack of more detailed statements of methods for determining compliance and the lack of descriptions of applicable requirements, resulted in, or may have resulted in, a deficiency in the North River permit.

A. NYCDEP Petition

1. Additional Comment Period and Adjudicatory Hearing

NYCDEP presents two claims regarding NYSDEC's public participation procedures. First, NYCDEP claims NYSDEC made significant and substantive revisions to the North River permit after the close of the public comment period that began on May 1, 2002, and this warranted an additional opportunity for comments. The NYCDEP, in its petition, claims that "neither DEP nor the public were afforded an opportunity to comment on major substantive conditions imposed by the modified permit." NYCDEP petition at 2. NYCDEP is specifically referring to the incorporation of provisions from its existing North River Order on Consent (NROC) into the permit, and associated conditions not present in the draft permit. Second, NYCDEP claims NYSDEC improperly denied its request for an adjudicatory hearing on the revised draft North River permit. NYCDEP petition at 2.

The CAA requires a title V permit program to have "adequate, streamlined, and reasonable procedures...for public notice, including offering an opportunity for public comment and a hearing." CAA 502 (b)(6). EPA's regulations implementing the Act mirror this language and state "...all permit proceedings...shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." 40 CFR 70.7 (h). The CAA and part 70 generally do not require permitting authorities to conduct a second round of comments or hold a public hearing when one is requested.. *See, e.g., In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Petition II-2000-07 at 7 (May 2, 2001) ("*Masada*").

In this particular instance, the NYSDEC published a Notice of Revised Draft Air Permit and Legislative Public Hearing for the North River title V permit on May 1, 2002. NYSDEC extended the comment period until June 14, 2002 after holding the legislative hearing on June 4, 2002. As NYCDEP notes in its petition, NYCDEP participated in this hearing and objected to the incorporation by reference of an existing consent decree into its title V permit. NYCDEP petition at 1-2. In response to these and other comments, NYSDEC revised and sent the proposed permit to EPA for its review. Following these revisions, NYCDEP asked for an additional round of public comment and an adjudicatory hearing on the proposed permit. NYCDEP has neither alleged nor demonstrated that the changes in the revised permit are not a direct result of or logically derived from the public comment process in which it participated.

Absent such a demonstration, a second round of public comment likely to elicit comment on the same issues is not necessary to meet the CAA's mandate requiring "adequate, streamlined, and reasonable procedures" that allow for "expeditious review of permit actions." *See* CAA § 502(b)(6). For this reason, I deny the petition on this issue.

Prior to raising to EPA its claim that NYSDEC improperly denied its request for an adjudicatory hearing, NYCDEP repeatedly made this request to NYSDEC. NYCDEP requested an issues conference (first phase of such a hearing) at the June 4, 2002 public hearing and in a subsequent letter on July 2, 2002. In its Responsiveness Summary, after noting that a basis for holding an adjudicatory hearing exists if "substantive and significant comments" were received, NYSDEC concludes that there is no basis for holding such a hearing. Responsiveness Summary at 4. Given that the NYCDEP had already commented and participated in the public hearing that included a discussion on whether and how provisions of the existing NROC should be included in the title V permit, NYSDEC could have reasonably concluded that there were no "substantive and significant" comments, on which to hold an adjudicatory hearing on this permit. Therefore EPA denies the petition on this issue.

EPA notes that some developments have occurred since the petition was filed on September 30, 2002. The permit was issued on October 22, 2002. Then, in a letter dated November 15, 2002, NYCDEP again requested an adjudicatory hearing. On December 11, 2002, NYSDEC and NYCDEP agreed to stay the processing of the hearing request in order to seek a negotiated resolution to issues. According to a letter dated May 27, 2004, the NYSDEC's Administrative Law Judge has extended the stay on processing NYCDEP's hearing request until September 30, 2004. Also according to this letter, the parties are discussing a revised consent order and have reached agreement in principle.

B. NYPIRG Petition

1. Incomplete Permit Application

NYPIRG alleges that the NYCDEP did not submit a complete permit application in accordance with the requirements of the CAA § 114(a)(3)(C), 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d). NYPIRG petition at 2. Specifically, NYPIRG is concerned that the NYCDEP's North River permit application failed to satisfy legal requirements because it omitted: (a) an initial compliance certification that includes a statement certifying that the applicant's facility is currently in compliance with all applicable requirements (except for emission units that the applicant admits are out of compliance) as required by CAA § 114(a)(3)(C), 40 CFR § 70.5(c)(9)(i) and 6 NYCRR § 201-6.3(d)(10)(i); (b) a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based, as required by CAA § 114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii) and 6 NYCRR § 201-6.3(d)(10)(ii); (c) a description of all applicable requirements that apply to the facility; and (d) a description of or reference to any applicable test method for determining compliance with each applicable requirement, as required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4).

NYPIRG alleges that omission of the information described above makes it difficult for a member of the public to determine whether a draft permit includes all applicable requirements. NYPIRG further states that the lack of information in the application makes it more difficult for the public to evaluate the adequacy of monitoring in the draft permit. Petition at 3.

(a) Initial Certification

NYPIRG alleges that NYCDEP failed to submit a statement certifying its initial compliance status in accordance with CAA § 114(a)(3)(C), 40 CFR § 70.5(c)(9)(i), and 6 NYCRR § 201-6.3(d)(10)(i). NYPIRG asserts that, absent such certification, it is difficult to determine whether the facility was in compliance with applicable requirements at the time it submitted its application. Petition at 2-3. NYPIRG separately raises the issue of the need for a compliance schedule. Petition at 16. EPA's reasons for denying the petition on the compliance schedule issue are described below in section II.B.7.

NYPIRG is correct that the NYCDEP did not certify compliance with all applicable requirements at the time of application submission, on December 8, 1998. NYCDEP, following the application instructions, certified that the North River plant would be in compliance with all applicable requirements at the time of permit issuance and certified that for all units at the facility that are operating in compliance with all applicable requirements, the facility would continue to be operated and maintained to assure compliance for the duration of the permit. The one exception was for the boilers, where NYCDEP noted in the Compliance Plan portion of Section IV (page 30), that NYCDEP did not perform annual tune-ups on boilers 1 or 3 in 1998 as required by 6 NYCRR § 227-2.4(d), and it expected to perform the required tuneups on these emission units by the end of 1999. The annual compliance certification filed by NYCDEP on February 10, 2003 confirms that NYCDEP did perform the required tune-ups in 2002, the year in which the permit was issued.

Therefore, even if the NYCDEP had certified its compliance at the time of application submission, the ultimate permit issued would have been the same. Accordingly, NYPIRG has not adequately demonstrated that the submission of a different initial compliance certification may have resulted in different terms and conditions in the permit. As such, the petition is denied with respect to this issue.

(b) Statement of Methods for Determining Initial Compliance

NYPIRG alleges that the application submitted by NYCDEP was inadequate because it did not specifically include a statement of methods used for determining compliance in accordance with CAA § 114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201-6.3(d)(10)(ii). Petition at 2. EPA disagrees with NYPIRG's allegation.

The federally regulated air pollution emissions from the North River facility are primarily from the combustion of fuel in the pumps, engines and boilers. On pages 11, 13, 20, 22, 29 and 30 of the permit application, NYCDEP describes its past nitrogen oxides (NO_x) testing activities, and its proposed methods of monitoring the NO_x and opacity from these

combustion sources, to ensure compliance with the applicable SIP emissions limits. In addition, on page 4 of the application, NYCDEP describes the monitoring method used to assure compliance with the SIP requirements for sulfur content in fuel. Also, on page 5 of the application, NYCDEP describes its proposed calculation methods for estimating the volatile organic compound (VOC) and hazardous air pollutant (HAP) emissions facility-wide. Therefore, the permit application provided information by which emissions compliance, as expressed through applicable requirements, can be monitored. While EPA notes that the final permit contains specific monitoring methods that were not referenced in the permit application (i.e., Item 62.2 requires daily visual inspections of gasoline vapor collection systems), NYSDEC included these monitoring requirements in the final permit and NYPIRG has not shown that omission of these requirements from the application resulted in a deficient permit. For this reason, the petition is denied on this issue.

(c) Description of Applicable Requirements

NYPIRG claims that the North River Plant's title V application was flawed in that NYCDEP failed to include a narrative description of applicable requirements that apply to the facility in accordance with 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4). Petition at 3. EPA disagrees that the application submitted by NYCDEP failed to comply with the applicable regulations. Citations may be used to streamline how an applicable requirement is described in an application, provided that the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. *See White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995) at 20-21. In addition, a permitting authority may allow an applicant to cross-reference previously issued preconstruction and part 70 permits, state or local rules and regulations, state laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject; provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public. Documents available to the public include regulations printed in the Code of Federal Regulations or its state equivalent. *See id.*

Consistent with EPA guidance, NYCDEP submitted its North River permit application using references to applicable state and Federal regulations. For example, pages 2-5, 11-13, 20-22 and 29-30 of the application identify several applicable requirements, including but not limited to, 6 NYCRR §§ 201-6, 211.3, 225-1.8 and 227-2.4. These regulations are publicly available and are also available on the internet. In addition, the application also provides a narrative description of certain requirements. For example, pages 11, 13, 20, 22, 29 and 30 of the permit application contain descriptions of applicable requirements that apply to the facility. NYPIRG has not shown that any of the descriptions were in error or may have resulted in a deficient permit or that the referenced material is not available to the public. The petition is therefore denied on this issue.

(d) Statement of Methods for Determining Ongoing Compliance

NYPIRG's fourth allegation is that the application lacks a description of, or reference to, any applicable test method for determining compliance with each applicable requirement in

accordance with 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4). Petition at 3. EPA disagrees with NYPIRG's allegation.

NYCDEP specifies that compliance with applicable requirements is achieved through various monitoring methods, described on pages 11, 13, 20, 22, 29 and 30 of the permit application. Although other compliance methods were not stated in the permit application, these were later stated in the final permit. Notwithstanding these omissions, as explained above in section (b), NYPIRG has not demonstrated that NYCDEP's failure to include, in its application, a statement of methods for determining compliance with each applicable requirement, resulted in a deficient permit. For this reason, the petition is denied on this issue.

II. Technical Issues

A. NYCDEP Petition

1. Air Quality Monitoring Network

NYCDEP states that it strenuously opposes Condition 8 of the DEC Special Conditions, which mandates the operating of an expanded Air Quality Monitoring Network. NYCDEP petition at 2. In the final permit, this condition is found at DEC Special Condition 6, citing 6 NYCRR § 617.7. This condition is included in a five-page prologue to the title V permit, in which DEC listed General and Special Conditions. The heading on page 2 of 5 reads, "For the purpose of your title V permit, the following section contains state-only enforceable terms and conditions." The federally-enforceable section then follows this section.

Permitting authorities may include, at their discretion, state-only (i.e. non-federally enforceable) requirements in a title V permit. *See generally* 40 CFR § 70.6(b)(2). State-only terms are not subject to the requirements of title V and, therefore, are not evaluated by EPA unless those terms may either impair the effectiveness of the title V permit or hinder a permitting authority's ability to implement or enforce the title V permit.² In this case, EPA finds that there is no such impairment of or hindrance to enforcing the title V permit because DEC Special Condition 6 does not affect the federal enforceability of any applicable requirement. Therefore, I deny the petition on this point.

2. Sulfur In Fuel

The second technical issue raised by NYCDEP's petition relates to the sampling protocols used to determine the sulfur content of fuel oil. Conditions 14 through 17 of the final permit address the requirements pertaining to the allowable sulfur content in the distillate oil used by the NYCDEP at the North River plant. NYCDEP asserts that the random fuel sampling

² *In the Matter of Harquahala Generating Station Project*, Order Responding to Petitioner's Request that the Administrator Object to Issuance of a State Operating Permit, Permit No. V99-015, at 5 (July 2, 2003).

program followed by the Department of Citywide Administrative Services (DCAS), coupled with a DCAS requirement to use fuel with less than 0.05 percent sulfur, should be sufficient to assure NYCDEP's compliance with the permit limit of 0.2 percent fuel sulfur content. NYCDEP petition at 4.

Final Permit Condition 15 states that the facility should accept fuel delivery only when the fuel supplier provides a certification that the fuel meets the permit's sulfur content limits and when the fuel supplier tests the sulfur content of each delivery in a manner satisfactory to the NYSDEC. By contrast, the draft permit only imposed an obligation on the fuel supplier to provide the certifications for each delivery. NYCDEP asserts that it does not have control over the sampling protocol because of the citywide contract for distillate oil that is administered by DCAS. NYCDEP petition at 4.

The CAA requires that a petition "be based only on objections to the permit that were raised with reasonable specificity during the public comment period." CAA § 505(b)(2). EPA has not been able to find evidence that this issue was raised during either of the public comment periods or during any of the related discussions with NYSDEC. A petitioner, however, may raise an issue that was not previously raised if it can demonstrate either that it was impracticable to raise such an objection or the grounds for such objection arose after the comment period. In this case, the NYSDEC amended the sulfur monitoring provisions after the close of the comment period, creating obligations with which the NYCDEP must comply. Therefore, EPA is addressing this issue in this Order.

It is within the NYSDEC's authority to include in title V permits monitoring requirements contained in SIP rules and such "periodic monitoring" as may be required under under 40 CFR § 70.6(a)(3)(i)(B). *See 69 Fed. Reg.* 3202 (January 22, 2004). In reviewing the permit record, it is unclear whether the final permit imposes any obligation that is inconsistent with the DCAS' citywide fuel oil contract. As required by the SIP at 6 NYCRR § 225.7, suppliers of fuel must conduct sampling and testing of fuel sulfur for all quantities of oil sold. Indeed, the public file reviewed by EPA contained fuel certifications for nearly every day of the reporting period. Based on this information, it is possible the DCAS' random fuel sampling protocol, as described by the NYCDEP, may complement the SIP requirements by independently confirming the supplier's certifications.

Neither Condition 15 nor the revised permit review report (PRR) provided with the final permit explain whether the fuel sampling for each delivery required by the permit is consistent with the DCAS contract. Therefore, EPA is granting the NYCDEP petition on this issue, and requiring the NYSDEC to clarify Condition 15 or specifically explain in the PRR how the requirements of final permit Condition 15 are to be carried out.

3. Hydrogen Sulfide

The third technical issue raised by NYCDEP relates to hydrogen sulfide (H₂S), regulated at 6 NYCRR § 257-10. Conditions 22 and 23 of the final title V permit require ambient monitoring of H₂S as well as management of an alarm system and maintenance of a

meteorological database. NYCDEP alleges that (a) 6 NYCRR § 257-10 is a state regulation and should not be listed as federally enforceable; (b) 60 days is not a reasonable time frame for installing meteorological equipment; and (c) the community monitors should not be set at an alarm level of 10 parts per billion (ppb). Petition at 4.

NYCDEP raised some general concerns related to this issue during its comments on early drafts of the permit. The facility maintains four on-site H₂S monitors and others that are located in the nearby community. In a letter dated March 13, 2002, NYSDEC agreed to remove all permit conditions related to the community monitors from the permit. In its July 2, 2002 letter, NYCDEP listed the reinstatement of these permit conditions as one of the reasons for requesting an issues conference with NYSDEC.

(a) Federal Enforceability of Hydrogen Sulfide Conditions

NYCDEP opposes including Conditions 22 and 23 in the federally enforceable section of the permit because they are based on 6 NYCRR § 257.10, which is not approved into the New York SIP. As stated above in section II.A.1., permitting authorities may include, at their discretion, state-only (i.e. non-federally enforceable) requirements in a title V permit. *See generally* 40 CFR § 70.6(b)(2). Therefore, because NYCDEP is correct in asserting that 6 NYCRR § 257-10 is not in the approved SIP, I am granting the petition and requiring DEC to designate these conditions as state-only enforceable.

(b) Installation of Meteorological Equipment

Final permit Condition 23 requires the NYCDEP to submit a monitoring plan to the NYSDEC, and to install meteorological equipment, if required by NYSDEC, within 60 days of plan approval. Because this is a state-only condition, EPA is granting this petition without addressing the merits of this claim in this Order. Rather, as stated above in (a), EPA is requiring NYSDEC to reopen the permit and move this provision to the state-only section of the permit.

(c) Monitor Alarm Level

Final permit Condition 22 requires an investigation and corrective action if a community monitor reads H₂S above 10 ppb on a one-hour average. Because this is a state-only condition, EPA is granting the petition without addressing the merits of this claim. Rather, as stated above in (a), EPA is requiring NYSDEC to reopen the permit and move this provision to the state-only section of the permit.

4. Engine Stack Tests

NYCDEP's fourth technical issue relates to required stack testing of NO_x emissions. Condition 31 of the final permit requires each of the five pump engines, emission unit "1-PUMPE," to be tested every three years for NO_x emissions, according to 6 NYCRR § 227-2.6(c). Condition 43 of the final permit requires each of the five blower engines, emission unit "2-BLENG," to be tested similarly. NYCDEP asserts that the permit incorrectly states that each

engine was tested previously. NYCDEP requests the testing frequency be (a) decreased to once per permit term, and (b) required only at representative engines. Petition at 4.

As explained above, the CAA requires that a petition “be based only on objections to the permit that were raised with reasonable specificity during the public comment period.” CAA § 505(b)(2). A petitioner, however, may raise an issue that was not previously raised if it can demonstrate either that it was impracticable to raise such an objection or the grounds for such objection arose after the comment period. In this case, another commenter asked NYSDEC to explain why the frequency of stack testing in the permit is sufficient to assure compliance. Also, the NYSDEC changed the permit regarding representative testing after the close of the comment period. Therefore, EPA is addressing NYCDEP’s stack testing concerns and these are discussed below.

(a) Frequency of NO_x Stack Testing

In its petition, NYCDEP claims that the accepted industry standard is stack testing once per permit term, or every five years. NYSDEC, however, has determined that these engines must be tested every three years to meet the requirements of 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) (permit must contain “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit . . .”). In this case, EPA notes that DEC may have a reasonable basis to require this frequency of testing. The primary fuel burned in the engines is sludge digester gas. The primary constituent of digester gas is methane, but it also contains variable amounts of impurities, based on the quality of the influent to the North River plant and various operating parameters maintained during the wastewater treatment process. While the engines also burn distillate oil and natural gas, which are more refined fuels, because the permit record indicates that there is sufficient variability in this operation, a three-year testing frequency is reasonable. Therefore, I deny the petition on this claim.

(b) Representative Testing

Both the draft permit and the 1992 Order on Consent³ required representative stack testing of emissions from blower and pump engines at the North River plant. During the public comment period, a commenter asked NYSDEC to explain why representative testing is sufficient. In its Responsiveness Summary, the NYSDEC responded that, “the revised permit required NYCDEP to stack test each of the 10 engines.” (Responsiveness Summary, p. 10, No. 27). NYCDEP has neither alleged nor demonstrated that the changes in the revised permit are not a direct result of or logically derived from the public comment process. In fact, the NYSDEC has the authority and obligation to be responsive to public comments and make changes to permits that either directly result from or are logically derived from such comments.

³ North River Order on Consent, July 1, 1992. Schedule B, item D requires testing of two pump engines and one blower engine. This representative testing is also required for both diesel and dual fuel modes.

In this case, EPA notes that NYSDEC may have a reasonable basis to require testing of each engine, as actual operating hours vary greatly between engines, giving rise to differing needs for routine maintenance. The normal operating scenario at the North River plant is to operate two pump engines and three blower engines. However, some wastewater conditions require a different number of engines to be operated. As many as four pump or blower engines could operate during peak demand, but because peak blower conditions are not the same as peak pump conditions, there will not be a time when all eight engines are operating. At all times, one pump engine and blower engine remain off line, either on standby or for maintenance. Due to these variable operating conditions, the engines are likely to have dissimilar levels of wear and tear, and different emissions rates. Thus, testing of each engine is reasonable, because it may be difficult to determine which engine emits “representative” emissions. For these reasons, I deny the petition on this point.

5. Operation of Continuous Opacity Monitors

The fifth technical issue raised by NYCDEP in its petition relates to opacity monitoring. NYCDEP asserts that continuous opacity monitors (COM) should not be required on any of the North River pump or blower engines. NYCDEP states that it intends to continue to operate its existing COM currently installed on the pump engines. However, NYCDEP claims that it should not be required to do so by the permit. Petition at 4.

The NYCDEP commented several times to the NYSDEC, protesting installation of continuous opacity monitors on the five blower engines. Several members of the public commented that the COM should be installed and maintained. One version of the draft permit proposed that the COM from the pump engines be moved temporarily to the blower engines, with possible discontinuation after 24 months of data showing compliance. The NYSDEC responded to the NYCDEP on March 13, 2002, and to the public in its Responsiveness Summary, stating that COM would be required on all pump and blower engines for the life of the permit (Responsiveness Summary, p. 2, No. 3; p. 9, No. 24).

The final permit requires the use of COM to monitor opacity from all pump engines, according to Conditions 33, 34, 35, 36 and 37. The regulatory authority cited for these conditions is 6 NYCRR § 227-1.3(a). In addition, the NROC required the installation of COM on each pump engine (*See* Order on Consent, Schedule B, task D, p. 55, no. 16), though no specific date was set for completion of this task. According to the NYCDEP’s testimony at the June 4, 2002 hearing, the COM on the pump engines have been in operation since 1999. NYCDEP, in its 1998 permit application, proposed quarterly visible emissions observations as monitoring for the pump and blower engines. In its petition, NYCDEP states that it conducts daily visual observations of all engine stacks, thus the COM are unnecessary. NYCDEP also asserts that there have been no smoke concerns at these stacks in the last three years.

EPA is also aware that the NYCDEP and NYSDEC are currently negotiating a revised NROC. See discussion above in section A.2. Notwithstanding those negotiations, NYCDEP’s current permit terms require it to operate the COM on the pump engines. Therefore, I deny the

petition with respect to NYCDEP's request to operate the pump engine COM on a voluntary basis.

With respect to the installation of COM on the blower engines, EPA believes it is within the NYSDEC's authority to include in title V permits monitoring requirements contained in SIP rules and such "periodic monitoring" as may be required under 40 CFR § 70.6(a)(3)(i)(B). *See* 69 Fed. Reg. 3202 (January 22, 2004). The underlying SIP regulation at 6 NYCRR § 227-1.3 offers alternatives for opacity monitoring, among them being Method 9 readings and COM, however, the regulations impose no monitoring requirements of a periodic nature. In the final permit, NYSDEC included duplicative monitoring requirements for opacity from the blower engines. In addition to requiring quarterly visible emissions observations using Reference Test Method 9, as described by Condition 39, the permit requires a daily Method 9 test on each blower engine according to Conditions 45, 46, 47, 48 and 49. Further, Condition 38 requires daily visible emissions observations, which are less formal than Method 9 tests. Lastly, the final permit also requires the use of COM on all blower engines, citing 6 NYCRR § 227-2.6(b) at Condition 42. Depending on the circumstances, any of these monitoring methods could, in some cases, meet the requirements of 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) (permit must contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit . . ."). In this case, EPA finds that, while the various monitoring methods are not incompatible, the reasoning for NYSDEC's decision to include multiple monitoring methods is unclear. As described below in section II.B.1(d)(i), EPA is granting NYPIRG's petition to include a rationale for monitoring methods in the NYSDEC's statement of basis. NYSDEC may conclude that the current monitoring methods and the frequency of such monitoring must be retained and no changes are required to the permit conditions; or NYSDEC may determine that the current conditions relating to monitoring methods and frequency of monitoring for opacity must be modified. NYSDEC must however explain the reason for its monitoring decisions. In addition, NYSDEC must revise Condition 42 to cite the correct authority at 6 NYCRR § 227-1.3. The current cite to 6 NYCRR § 227-2.6(b) is inaccurate because it describes the use of continuous emissions monitors to determine compliance with Reasonably Available Control Technology (RACT) for NO_x emissions.

For the above reasons, I am denying the petition challenging the requirement to maintain COM on the pump and blower engines, but in granting NYPIRG's petition (see section II.B.1(d) below) I am requiring NYSDEC to reopen the permit to clarify the opacity monitoring requirements, and correct the regulatory citation for requiring COM on the blower engines.

6. State Enforceable Conditions

NYCDEP's final petition points relate to permit conditions designated by NYSDEC as state-only enforceable. Many of these conditions set forth the facility's obligations regarding ambient air quality monitoring for hydrogen sulfide, formaldehyde, volatile organic compounds (VOCs), metals and particulate matter (PM₁₀ and PM_{2.5}). Other conditions specify work practices to minimize odors from the facility. NYCDEP restates its earlier complaint regarding the inclusion of any terms related to the North River Air Quality Monitoring Network

(NRAQMN) at the plant. NYCDEP also lists three specific complaints related to conditions in this section of the permit. Petition at 4, 5.

As stated above in sections II.A.1 and 3, permitting authorities may include, at their discretion, state-only (i.e. non-federally enforceable) requirements in a title V permit. *See generally* 40 CFR § 70.6(b)(2). In a petition seeking EPA objection to state-only terms in a title V permit, EPA will address those terms if they may either impair the effectiveness of the title V permit or hinder a permitting authority's ability to implement or enforce the title V permit. In this case, EPA finds that there is no such impairment of or hindrance to enforcing the title V permit because these permit terms do not affect the federal enforceability of any applicable requirement. The general matter of including the NRAQMN in the permit is addressed above in section II.A.1. The three individual complaints are addressed below.

(a) Installation of Monitors

NYCDEP specifically alleges that contracting restraints prevent it from installing monitors within 60 days, as mandated by final permit Conditions 72 and 74. Petition at 5. Because Conditions 72 and 74 these are state-only conditions and do not affect the federal enforceability of any applicable requirement, I deny the petition on this point.

(b) Formaldehyde Monitoring

NYCDEP states that it does not understand why formaldehyde monitoring is being required by NYSDEC, as specified in final permit Conditions 72 and 74. It claims that the North River plant is only one of several potential sources of formaldehyde in the community, and that no other facility routinely monitors this pollutant. Petition at 5. Because Conditions 72 and 74 are state-only conditions and do not affect the federal enforceability of any applicable requirement, I deny the petition on this point.

(c) Hydrogen Sulfide Limit

NYCDEP claims that the NYSDEC has inappropriately set the in-stack H₂S emission level at 10 ppb. Final permit Condition 68 requires the one-hour average H₂S concentration in the stacks discharging from the odor control systems to be less than 10 ppb, using continuous monitoring. NYCDEP states that it is willing to accept a 10 ppb alarm level, or alternatively, a stack emission limit that accounts for the dispersion that occurs after the gases exit the stack. Petition at 5. Because Condition 68 is a state-only enforceable condition and it does not affect the federal enforceability of any applicable requirement, I deny the petition on this point.

B. NYPIRG Petition

1. Statement of Basis

NYPIRG alleges the permit is deficient because NYSDEC failed to include an adequate statement of basis or rationale with the draft permit explaining the legal and factual basis for the

permit conditions. NYPIRG asserts that NYSDEC's permit review report (PRR), which NYSDEC creates to serve this purpose, is missing certain key elements. Petition at 4. NYPIRG also asserts that NYSDEC's failure to provide the public with an adequate statement of basis to support the North River permit seriously impeded the ability of the public to participate in the permitting process. Petition at 6. Throughout its petition, NYPIRG makes numerous separate complaints regarding deficiencies in the North River PRR. These are grouped into five categories: (a) General Issues, (b) Descriptive Issues, (c) Applicability Issues, (d) Monitoring Issues, and (e) Consent Order Issues, each discussed below.

EPA's title V regulations state that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it." 40 C.F.R. § 70.7(a)(5). Commonly referred to as a "statement of basis," this provision is not part of the permit itself, but rather a separate document which is to be sent to EPA and to interested parties upon request. As for content required under § 70.7(a)(5), EPA interprets this section as requiring that a statement of basis describe the origin or basis of each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of applicable requirements. Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA a record of the applicability and technical issues surrounding the issuance of the permit. *See e.g., In Re Port Hudson Operations, Georgia Pacific*, Petition No. 6-03-01, at pages 37-40 (May 9, 2003) ("*Georgia Pacific*"); *In Re Doe Run Company Buick Mill and Mine*, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002) ("*Doe Run*"). Finally, EPA has interpreted section 70.7(a)(5) to require that the rationale for the selected monitoring requirements be documented in the permit record. *See In Re Fort James Camas Mill*, Petition No. X-1999-1, at page 8 (December 22, 2000) ("*Ft. James*"); Region V Letter to State of Ohio (December 20, 2001) (available at "<http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/sbguide.pdf>"); and Notice of Deficiency to State of Texas, 67 Fed. Reg. 732 (January 7, 2002.)

The failure of a permitting authority to meet the procedural requirements of § 70.7(a)(5), however, does not necessarily demonstrate that the resulting title V permit is substantively flawed. In reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. *See* CAA § 505(b)(2) (objection required "if petitioner demonstrates . . . that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); *see also*, 40 CFR § 70.8(c)(1). Where the record as a whole supports the terms and conditions of the permit, flaws in the statement of basis generally will not result in an objection. *See e.g., Doe Run* at 24-25. In contrast, where flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, EPA will object to the issuance of the permit. *See e.g., Ft. James* at 8; *Georgia Pacific* at 37-40.

(a) General Issues

In addition to several specific allegations listed below, NYPIRG makes two general allegations: (i) NYSDEC's discussion of monitoring in the PRR is primarily a recitation of the permit's requirements rather than an explanation of why those requirements are sufficient. Petition at 5, and (ii) the NYSDEC must supplement its PRR with an explanation of any conditions from previously issued permits that are not being transferred to the title V permit. Petition at 6.

(i) Rationale for Decisions

In this case, EPA agrees with NYPIRG that the final North River PRR does not provide an explanation for certain of NYSDEC's permitting decisions. In subsections (c)(iii), (c)(iv), (d)(i) and (d)(iii), EPA concludes that the lack of explanation in the permit record of the determination that the facility is a non-industrial publically owned treatment works (POTW), how the regulations at 6 NYCRR §§ 201-3 and 211.3 apply to the facility, and the rationale for opacity monitoring on the engines, may have resulted in one or more deficiencies in the North River permit. As a result, EPA is granting NYPIRG's petition on those specific issues.

(ii) Prior Permit Conditions

NYPIRG makes a general allegation that the absence of conditions from previously-issued permits require an explanation in the statement of basis. In its petition, NYPIRG provides no specific instances of such conditions that were omitted from the title V permit. Nor did NYPIRG raise this issue with reasonable specificity during the comment period. *See* CAA § 505(b)(2). In fact, EPA has found no evidence that any commenter raised this issue to the NYSDEC during the comment period. Therefore, NYPIRG has not demonstrated that the NYSDEC's failure to explain the absence of prior permit conditions, resulted in, or may have resulted in, a deficiency in the North River permit. EPA denies the petition on this point.

(b) Descriptive Issues

NYPIRG alleges the PRR has three deficiencies regarding NYSDEC's description of activities at the North River plant that cause air pollution. NYPIRG alleges that (i), the processes listed on pages three through six of the PRR do not indicate what types of pollutants are being emitted. Petition at 4; (ii) the PRR must explain where digester gas is produced and emitted. Petition at 15; and (iii) the PRR needs to detail current or anticipated emissions rates of each pollutant listed in Tables 2-4 of 6 NYCRR part 212, to which the wastewater, sludge, and miscellaneous processes at the North River plant are subject. Petition at 16.

(i) Process Descriptions

NYPIRG claims that the process descriptions on pages three through six of the final PRR, are not adequate to describe to a non-engineer the factual basis for specific permit conditions. Petition at 4. For each of the six significant emission units at the North River plant, the PRR describes the individual emission points, their modes of operation, their location within the plant, and other relevant facts.

Title V permit applications must contain information sufficient to verify which requirements are applicable to the source. 40 CFR §70.5(c)(3). The North River application is part of the permit record that supports the NYSDEC's permitting decision. While the process descriptions on pages three through six of the PRR do not explicitly list each pollutant emitted by each process, other sections of the PRR, as well as the permit record, address this issue. For example, Attachment 1 of the NYSDEC's December 8, 1998 permit application includes 14 pages of estimates of potential emissions from each process. This attachment provides details on emissions of particulate matter, NO_x, sulfur dioxide (SO₂), carbon monoxide, VOC and HAP from each combustion process at the plant. From the wastewater, sludge and miscellaneous processes, VOC and HAP estimates are provided. However, the emissions data from these latter three processes are insufficient to determine how 6 NYCRR § 212.4(a) applies. Section 212.4(a) prohibits a person from exceeding the applicable permission emission rate which is determined from specific Tables 2, 3, or 4 of 6 NYCRR part 212 for the environmental rating issued by the Commissioner. EPA discusses this below in paragraph (b)(iii) and in section II.B.6(e), and is granting the petition and requiring NYSDEC to revise Conditions 56, 57, and 58 because EPA has determined that these conditions are not practically enforceable. When NYSDEC reopens the permit to revise Conditions 56, 57 and 58, it must provide its rationale on how it applied 6 NYCRR §212.4 (a), along with the basis for its monitoring decisions, in the PRR.

(ii) Digester Gas

The information requested by NYPIRG regarding the production and emission of digester gas is present in the final PRR. The final PRR states that digester gas is produced in components of emission unit 5-SLUDG, the sludge handling processes. PRR at 29. The final PRR also explains that digester gas is combusted as a primary fuel in the pump and blower engines and the boilers and that the digester gas is stored in a holding tank, identified as process WGT within emission unit 5-SLUDG. PRR at pp 3-6. The PRR further explains that when digester gas is produced in amounts greater than can be combusted usefully in the engines or boilers, or stored in the tank, it is flared at emissions unit 6-MISCL. Finally, the PRR explains that any vapor losses of digester gas as it is transported within the North River plant are vented to the odor control systems.

The only permit condition regulating digester gas is Condition 13, a facility-wide condition requiring recordkeeping of digester gas production. EPA has not identified other applicable requirements pertaining to the North River plant's production and use of digester gas. As explained above, the PRR describes in some detail the production and

emission of digester gas. Therefore, EPA finds that NYPIRG's claim is unfounded and denies the petition on this point.

(iii) Process Emissions Rates

NYPIRG's third descriptive issue relates to emissions from processes at the North River plant subject to general process emissions limits pursuant to 6 NYCRR §212.4(a). The wastewater treatment and sludge handling processes are subject to this SIP rule, as are the flare and the gasoline station. As described below in section II.B.6(e), this rule states that "[n]o person shall cause or allow emissions that exceed the applicable permissible emission rate as determined from Table 2, Table 3, or Table 4 of 6 NYCRR part 212 for the environmental rating issued by the commissioner."

As described more fully below in section II.B.6(e) without more detailed information, including the applicable environmental rating for each pollutant emitted, EPA agrees with NYPIRG that Conditions 56, 57 and 58 are not practically enforceable and is granting the petition. Further, the permit record does not have sufficient information, including the applicable environmental rating for each pollutant emitted, to determine how 6 NYCRR § 212.4(a) applies to these processes. When NYSDEC reopens the permit to revise Conditions 56, 57 and 58, it must describe in the PRR its rationale on how it applied 6 NYCRR §212.4 (a), along with the basis for its monitoring decisions.

(c) Applicability Issues

NYPIRG alleges the PRR has four deficiencies regarding NYSDEC's determinations of regulatory applicability for activities at the North River plant. NYPIRG alleges that (i) the PRR fails to set out the factual basis for the determination that the engines are "lean burn." Petition at page 4; (ii) the PRR must state the factual and legal basis for the requirements regulating NO_x from the boilers. Petition at pages 4, 16; (iii) the PRR must explain the basis for NYSDEC's determination that the North River plant is a "non-industrial POTW." Petition at 4; and (iv) the PRR must state whether or how six general requirements apply to the facility. Petition at 7.

(i) Lean Burn Engines

NYPIRG's claim that the PRR fails to set out the factual basis for the determination that the engines are "lean burn" is unfounded. On pages 11 and 20 of the North River application, NYCDEP identified the NO_x RACT rule for lean burn engines, 6 NYCRR § 227-2.4(f), and the application identified the manufacturer and model of these engines. Following submission of the application, when issuing the title V permit NYSDEC notes in the PRR states that the pump and blower engines are lean burn. PRR at 29. Technically, engines that combust fuel with an air to fuel ratio of greater than one are defined as lean burn, though typical lean burn engines do not operate with an air to fuel ratio less than 14. Because the permit record is clear as to this applicability issue, EPA denies the petition on this point.

(ii) Boiler Issues

NYPIRG alleges that three applicability issues related to the boilers must be described in the PRR. Specifically, NYPIRG claims the PRR must state the heat input (in British thermal units per hour (Btu/hr)) of the boilers, to establish the factual basis for applying several state regulations, and the PRR fails to state whether NYCDEP submitted a NO_x RACT plan for its “large” boilers. Petition at 4. Further, NYPIRG claims the PRR must describe the factual and legal basis for required boiler tune-ups. Petition at 16.

The draft and final permits, as well as the PRR, state that three of the four boilers operated at the North River plant are 32.3 million Btu/hr, and the fourth is 8.6 million Btu/hr. Because this necessary information was present, EPA is denying the petition on this point. According to the definitions at 6 NYCRR § 227-2.2, boilers with maximum heat input capacity greater than 20 and equal to or less than 50 million Btu/hr are “small”, not “large”. While the NO_x RACT regulations at 6 NYCRR § 227-2.3 require large boilers and other combustion sources to submit a compliance plan, small boilers were not required to submit a plan until recently.⁴ NYSDEC’s North River permit application uses the term “large” boilers to distinguish the smallest boiler from the other three, which relatively, are larger. This is simply an informal description, and not a legal definition for applicability purposes. In writing the permit and PRR, NYSDEC adopted language from the permit application. Although EPA recognizes this may have created some confusion, the permit record clearly states the heat input of the boilers, and therefore EPA denies the petition on this point. NYPIRG’s third point is that the PRR must explain the factual and legal basis for the requirement (Condition 51) that the boilers have annual tune-ups. According to 6 NYCRR § 227-2.4(d), owners of small boilers must conduct annual tune-ups and maintain certain information in a log book. Both the PRR and the permit clearly describe this regulation and its applicability to the boilers at the North River plant. Therefore, EPA denies the petition on this point.

(iii) Non-Industrial Publically Owned Treatment Works

NYPIRG alleges the PRR must explain the basis for DEC’s determination that the North River plant is a “non-industrial POTW.” Petition at 4. HAP emissions from POTW are regulated under the National Emission Standards for Hazardous Air Pollutants (NESHAP) at 40 CFR subpart VVV. A business owner is subject to this subpart if the three conditions described at 40 CFR § 63.1580 are met. First, the business owner owns or operates a POTW that includes an affected source. Second, the affected source is located at a POTW which is a major source of HAP emissions, or at any industrial POTW regardless of whether or not it is a major source of HAP. Third, this POTW is required to develop and implement a pretreatment program as defined by 40 CFR § 403.8

⁴ NYSDEC amended its regulations effective February 11, 2004. NYSDEC no longer exempts small boilers from the requirement to submit compliance plans. However, this amended rule is not yet approved into the SIP, so it is not a federally enforceable requirement.

(for a POTW owned or operated by a municipality, State, or intermunicipal or interstate agency), or the POTW would meet the general criteria for development and implementation of a pretreatment program (for a POTW owned or operated by a department, agency, or instrumentality of the Federal government). *See*, 40 CFR § 63.1580.

In the permit and the PRR, NYSDEC states the North River plant is subject to subpart VVV, as an existing non-industrial POTW. According to the general provisions at 40 CFR 63 subpart A, a source is considered “existing” if it commenced construction prior to the proposal date of an applicable rule. EPA proposed subpart VVV on December 1, 1998 (63 FR 66084). According to subpart VVV, the determination of whether a POTW is industrial or non-industrial depends on the specific industrial facilities that send their wastewater to a POTW for treatment. An industrial POTW is defined at 40 CFR 63.1595, as a POTW that accepts a waste stream regulated by an industrial NESHAP and provides treatment and controls as an agent for the industrial discharger. The industrial discharger complies with its NESHAP by using the treatment and controls located at the POTW. The NYSDEC explains on page 29 of the PRR that the North River plant is a non-industrial POTW based on information from the application and 40 CFR 63 subpart VVV. While EPA sees no reason to question NYSDEC’s determination, EPA has found no information in the application or the permit record that supports NYSDEC’s determination. Therefore, EPA is granting the petition on this point, and is requiring NYSDEC to provide a brief explanation in the PRR of its determination that the North River plant is a non-industrial POTW; that is, no industrial facility relies on it to treat HAP-containing wastewater regulated by an industrial NESHAP.

(iv) General Requirements

NYPIRG asserts that the PRR must state whether or how the following requirements apply to the facility: Maintenance of Equipment - 6 NYCRR § 200.7; Unpermitted Emission Sources - 6 NYCRR § 201-1.2; Recycling and Salvage - 6 NYCRR § 201-1.7; Prohibition of Reintroduction of Collected Contaminants to the Air - 6 NYCRR § 201-1.8; Proof of Eligibility for Sources Defined as Exempt Activities - 6 NYCRR § 201-3.2(a); Proof of Eligibility for Sources Defined as Trivial Activities - 6 NYCRR § 201-3.3(a). Petition at 7. These general conditions are among several listed in the facility-wide portion of the permit under the heading “Notification of General Permittee Obligations.” EPA agrees with NYPIRG that a title V permit and its supporting record should clearly state the applicability of requirements.

In this case, as described in the PRR in the Description of Operations section, NYCDEP maintains wet chemical scrubbers and carbon adsorbers to control air emissions from its wastewater treatment and sludge handling processes. Thus, the Maintenance of Equipment requirement is applicable to the North River plant. In addition, the Recycling and Salvage requirement is applicable. This is because the carbon adsorbers collect contaminants, and must be sent off site to a special facility for

regeneration. Similarly, the Prohibition of Reintroduction requirement is applicable, although it is extremely unlikely that the adsorbed contaminants would be reintroduced to the air even if a spent carbon cartridge were improperly handled. For the reasons stated above, EPA believes the permit record adequately described the applicability of the three regulations described above. Thus, EPA is denying the petition on this aspect of NYPIRG's issue. The merits of NYPIRG's claim regarding any associated monitoring required to be in the permit are discussed below in section II.B.2(b).

Although NYCDEP listed five exempt activities, defined at 6 NYCRR § 201-3.2, in its North River permit application, NYPIRG does not allege that any specific requirements have been omitted that apply to these activities. Activities listed as exempt need only be identified in a title V permit if the activity is subject to an applicable requirement. EPA believes that at least one of these activities, the operation of two emergency generators, may be subject to applicable requirements. However, the permit record does not provide sufficient documentation to support this conclusion. Furthermore, the permit record does not clearly state whether the other exempt activities (44 storage tanks, seven laboratory vents and one unit for applying odor neutralizers) listed in the North River application are subject to any applicable requirements. Therefore, because NYSDEC's failure to clarify the regulatory status of exempt activities may have resulted in a deficiency in the North River permit, EPA is granting the petition on this issue.

Similar to exempt activities, those activities listed as trivial under 6 NYCRR § 201-3.3 need only be identified in a title V permit if the activity is subject to an applicable requirement. However, because applicants are not required to submit information on any of the 94 activities listed as trivial under 6 NYCRR § 201-3.3, the permit record does not provide enough information to confirm whether the NYCDEP conducts any trivial activities at the North River plant that are subject to applicable requirements. EPA is granting the petition on this issue and requiring NYSDEC to include a statement in the PRR explaining whether the North River plant conducts activities listed under 6 NYCRR §§ 201-3.2 and 201-3.3 that are subject to applicable requirements.

The Unpermitted Emission Sources provision is included in all New York title V permits. EPA acknowledges that states have discretion to include language from the general provisions of their regulations as general permit conditions in title V permits. This provision expands on what is required by the SIP at 6 NYCRR § 201.2(a), that no person shall commence construction or proceed with a modification of an air contamination source without having a valid permit, by naming some additional terms for those who violate permitting requirements. It serves as a reminder to the NYCDEP to follow the construction permitting requirements of 6 NYCRR part 201. Therefore, it is not necessary for the NYSDEC to explain the North River plant's applicability to this provision in the permit or the PRR. Thus, EPA is denying the petition on this point.

(d) Monitoring Issues

NYPIRG alleges the PRR has three deficiencies regarding NYSDEC's explanation of its reasoning for monitoring decisions in the permit. NYPIRG alleges that (i) the PRR fails to set out the factual basis for requiring the facility to operate COM. Petition at 4; (ii) the PRR fails to set out the factual basis for the permit's emissions limits and monitoring for the pump and blower engines. Petition at 4; and (iii) the PRR must provide the factual basis for NYSDEC's decision on applying the general opacity regulation. Petition at 15.

(i) Continuous Opacity Monitors

The NYCDEP operates continuous opacity monitors (COM) on its five pump engine stacks. The final North River permit requires NYCDEP to install additional COM on the blower engine stacks. NYSDEC was clear in its Responsiveness Summary that all engines need to have COM for the duration of the permit. However, NYSDEC also included in the final permit other monitoring methods for opacity. See section II.A.5. above. As a result, the final permit has multiple monitoring requirements with which the facility must comply, for the same applicable requirement. EPA believes that the lack of an explanation in the permit record for requiring multiple methods of monitoring for the same applicable requirement, including in the PRR, may have resulted in a deficient permit. Therefore, I am granting the petition and requiring NYSDEC to explain the basis for multiple monitoring requirements for the same applicable requirement.

(ii) Engine Emissions

NYPIRG alleges the PRR fails to set out the factual basis for the permit's emissions limits and monitoring for the pump and blower engines. Petition at page 4. Although NYPIRG suggests that its concern relates to 6 NYCRR part 227, and relates to heat input, fuel use, and type of engine (lean burn), there is not enough detail in the petition to define NYPIRG's claim. NYPIRG lists 20 conditions of the draft permit that are allegedly affected by this lack of an adequate PRR. In its Responsiveness Summary, NYSDEC stated that, "the PRR includes the size of emission units 2BLENG and 1PUMP and the type of fuel used. In addition, the PRR was revised to include that they are 'lean burn engines.'" See Responsiveness Summary, Item 19, page 8. Because the permit condition numbers are different in the final permit, EPA must respond to this claim in a general manner. NYSDEC's rules at 6 NYCRR part 227 regulate opacity, NO_x and particulates. Elsewhere in this Order, EPA is granting the petitions for flaws relating to opacity and NO_x monitoring for the engines. See subsection (d)(i) above, and section II.B.6(d), below. When NYSDEC reopens the permit for the reasons stated in those sections, it must provide the basis for its monitoring decisions in the PRR. Aside from these two issues, EPA has not identified flaws relating to engine emissions regulated under 6 NYCRR part 227 that may have resulted in a deficiency in the title V permit. Therefore, EPA denies the petition on this point.

(iii) General Opacity Regulation

NYPIRG alleges that facility-wide permit Conditions 11 and 12 are not sufficient to assure compliance at individual emissions points. NYPIRG further asserts that if NYSDEC decides opacity monitoring is not needed at each emission point to which 6 NYCRR § 211.3 applies, the PRR must provide the factual basis for this decision. Petition at 15.

As described below in section II.B.6(a), Conditions 11 and 12 only apply to emissions units not regulated by other parts of New York's air regulations. EPA has concluded that the permit record is unclear as to the applicability of this regulation to the emissions units at the North River plant, and is therefore granting the petition. If NYSDEC determines that the regulation does apply, it must include in the permit periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the emission unit's compliance with the SIP, pursuant to 40 CFR § 70.6(a)(3)(i)(B) and include the rationale for this monitoring, including the rationale for a decision not to include monitoring, in the PRR.

(e) Consent Order Issues

Finally, NYPIRG alleges the PRR has two deficiencies regarding NYSDEC's treatment of the 1992 North River Order on Consent (NROC). NYPIRG alleges the PRR fails to describe the contents of the NROC or how the facility is out of compliance. Petition at 4. NYPIRG also alleges that the PRR must explain whether the current NROC has been effective in bringing the plant into full compliance, and if violations continue, why the NROC remains an adequate tool. Petition at 6.

The final permit addresses the fact that the North River plant is operating under Consent Order R236699105, at Condition 2. The PRR states that the North River plant's compliance with the NROC is being monitored, and violations are being addressed through enforcement proceedings. PRR at 9.

EPA has reviewed a copy of the final NROC, dated July 1, 1992. It was provided to EPA as part of the permit record. EPA has no reason to believe this was not available to the public as well. As described below in section II.B.7, EPA is denying a separate NYPIRG claim regarding incorporation of requirements from the NROC. The federally enforceable applicable requirements addressed in the NROC relate to opacity and NO_x emissions from the pump and blower engines. As described below in section II.B.7, the past violations for these engines have been addressed. In its petition, NYPIRG notes that the NYSDEC issued an administrative complaint against NYCDEP in 2002, and questions the effectiveness of the NROC if violations continue to occur at the facility. EPA's records show that on October 8, 2002, the NYSDEC issued an administrative consent order to NYCDEP for Clean Water Act violations at the North River plant. EPA's records support NYSDEC's statement that CAA violations are being addressed through enforcement proceedings. As stated above in section I.A.1, the NYCDEP has recently conducted discussions with NYSDEC regarding a revised NROC. Although EPA recognizes that a more detailed description in the PRR would have helped ease the public's concerns over possible ongoing violations at this facility, EPA does not believe the lack of a

more detailed description in this case, resulted in, or may have resulted in, a deficiency in the North River permit. Therefore, EPA denies the petition on this point.

In summary, EPA has identified three of NYPIRG's statement of basis claims that have merit. A lack of explanation in the permit record of the determination that the facility is a non-industrial POTW, how 6 NYCRR §§ 201-3 and 211.3 apply to the facility, and the rationale for opacity monitoring on the engines may have resulted in one or more permit flaws. Thus, EPA is unable to conclude that the permit is in compliance with the requirements of this Act, including the requirements of the applicable [SIP]. *See* CAA § 505(b)(2); *see also* 40 CFR § 70.8(c)(1).

2. Compliance with Generally Applicable Requirements

(a) Risk Management Plan

NYPIRG alleges that the permit must state whether CAA § 112(r) applies to the facility and must indicate which requirements in the facility's 112(r) plan are enforceable by the public. Petition at 6-7.

The reference to Risk Management Plans ("RMP") appears at Condition 25 of the permit. This condition states, in part: "If a chemical . . . listed in Tables 1, 2, 3 or 4 of 40 CFR § 68.130 is present in a process in quantities greater than the threshold quantity listed in Table 1, 2, 3 or 4, the following requirements will apply." The condition goes on to list these requirements. This condition is written generally because of the nature of the section 112(r) requirements, which are different from other applicable permit requirements. Since applicability is based on having a listed 40 CFR § 68.130 substance over the threshold quantity located at the facility, applicability may fluctuate over the life of the permit. Therefore, although general section 112(r) permit conditions do not definitively state whether an individual source is subject to the risk management plan requirements, the permit structure ensures that the permit covers any newly subject source, or any source whose applicability fluctuates, thereby ensuring that the section 112(r) permit obligations remain up to date.

Where a source is subject to section 112(r), its permit must include certain conditions necessary to implement and assure compliance with these requirements. However, risk management plans under section 112(r) need not be incorporated into title V permits. NYCDEP has submitted a RMP to EPA for the North River plant. However, in August 1999, after the deadline for RMP submittal, Congress amended 112(r) and mandated that EPA exempt regulated flammable substances used as fuel or held for sale as fuel at retail facilities. EPA amended part 68 on March 13, 2000, affecting this exemption. *65 Fed. Reg.* 13243 (March 13, 2000). In reviewing the RMP submitted to EPA by NYCDEP, it appears that the only reason the North River plant was required to submit a RMP was the flammable fuel stored at its gasoline dispensing station. According to EPA, sources who were only subject to part 68 for substances that are now exempt need not take action. They may choose to leave their RMP as a voluntary submission in EPA's database, or they may request withdrawal (*65 Fed. Reg.* 13247).

The North River title V permit currently states that NYCDEP must comply with part 68 and certify appropriately if a listed chemical is present above threshold quantities. This language is appropriate and need not be amended. As explained above, if North River were to trigger the section 112(r) and Part 68 requirements, the requirements of Condition 25 would become applicable to the source. For these reasons, EPA denies the petition with respect to this issue. However, the PRR must be amended to indicate whether the facility is subject or exempted.

In addition, NYSDEC must meet its accidental release prevention program obligations under 40 CFR § 68.215(e).⁵ This will insure that NYSDEC, EPA, and the public will be able to track a source's compliance with section 112(r) requirements even if the applicability fluctuates. For these reasons, EPA is denying NYPIRG's request to incorporate the RMP into the permit, while requiring NYSDEC to revise the PRR explaining the North River plant's current program applicability.

(b) General Permittee Obligations

As described above in section II.B.1(c)(iv), NYPIRG alleges that the permit does not indicate how six items in the final permit, under the heading "Notice of General Permittee Obligations," apply to the North River plant. Petition at 7. These items are described by the titles: Maintenance of Equipment; Unpermitted Emissions Sources; Recycling and Salvage; Prohibition of Reintroduction; Proof of eligibility for sources defined as Exempt; Proof of eligibility for sources defined as Trivial. NYPIRG states that the PRR must state whether or how these requirements apply to the facility. Further, NYPIRG alleges the permit should include facility-specific conditions, imposing sufficient monitoring and recordkeeping to ensure compliance with these requirements. Petition at 7.

EPA has addressed the claim regarding the content of the PRR above, in section II.B.1(c)(iv). As described above, EPA has concluded that three of the six items apply to the North River plant (Maintenance of Equipment, Recycling and Salvage, Prohibition of Reintroduction), and the permit record adequately supports this applicability decision. Further, EPA has concluded that the items pertaining to Proof of eligibility for sources defined as Exempt and Trivial may apply, and EPA is granting the petition to require NYSDEC to clarify the applicability of these provisions.

⁵ NYSDEC has several general section 112(r) obligations, which are found in 40 CFR § 68.215(e), and are further discussed in an April 20, 1999, memorandum from Steven J. Hitte (OAQPS) and Kathleen M. Jones (OSWER) entitled: "Title V Program Responsibilities concerning the Accidental Release Prevention Program." These responsibilities include: (1) verifying that sources register and submit a risk management plan, (2) verifying that sources certify compliance with the requirement to submit a risk management plan, and (3) general enforcement responsibilities.

NYPIRG states that while these conditions should continue to be included as general conditions, the permit should include sufficient monitoring and recordkeeping requirements as well. EPA has determined that the permit contains adequate monitoring and recordkeeping for the three applicable items. Conditions 67-69 of the final permit contains language requiring monitoring of the control equipment to assure it is operating effectively. This monitoring also serves as compliance monitoring for the general Maintenance of Equipment provision. In addition, the final permit contains requirements for management practices to properly handle collected air contaminants. Conditions 69 and 73. This monitoring also serves as compliance monitoring for the general Recycling and Salvage and Prohibition of Reintroduction provisions. For these reasons, EPA is denying the petition on this issue for these requirements.

As described above, the permit record does not clearly state whether there are applicable requirements to which the exempt or trivial activities are subject. Notwithstanding any activity's eligibility to be classified as exempt or trivial, the title V permit must include monitoring to assure these activities are conducted in compliance with all applicable requirements. *See* 69 Fed. Reg. 3202 (January 22, 2004). If, in addressing this issue described above in section II.B.1(c)(iv), the NYSDEC concludes additional requirements must be included in the permit, NYSDEC must also include appropriate recordkeeping or monitoring to assure compliance with those requirements.

3. Annual Compliance Certification

NYPIRG alleges that the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5) by not requiring the facility to certify compliance with all permit conditions. NYPIRG raises three issues with regard to the annual compliance certification. First, NYPIRG claims that because the North River permit labels certain terms “compliance certification”, only these terms are included in the annual certification requirement. Petition at 7. Second, NYPIRG is concerned that the language in the permit suggests some conditions are not subject to certification because the permit, under the “General Permittee Obligation” heading, states “[t]he items listed below are not subject to the annual compliance certification requirements under Title V.” Third, NYPIRG alleges that the permit is vague with regard to the deadline to submit the annual compliance certification. Petition at 8.

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

The language in the North River permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, mirrors the language of 40 CFR §§ 70.6(c)(5). Six NYCRR § 201-

6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Six NYCRR § 201-6.5(e)(3) requires the following in annual certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether the compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the Administrator and shall contain other provisions as the department may require to ensure compliance with all applicable requirements. The North River permit includes this language at Condition 6. Therefore, the references to “compliance certification” do not negate NYSDEC’s general requirement for compliance certification of terms and conditions contained in the permit. EPA is denying the petition on this point.

NYPIRG objects to the fact that items listed as “General Permittee Obligations” in the North River permit are not subject to annual certification. NYPIRG alleges that this format for the North River permit does not meet the annual compliance certification requirements of 40 CFR § 70.6(c)(5). NYPIRG notes that NYSDEC lists certain items under “General Permittee Obligations” which the permit states “are not subject to the annual compliance certification requirements under Title V.”

As a general matter, EPA does not object to a permitting authority’s inclusion of a list of general advisory items that do not require certification. However, the “Notification of General Permittee Obligations” section in this permit appears under the heading “Federally Enforceable Conditions.” Federal regulations require annual certification for “terms and conditions” contained in the permit. 40 CFR § 70.6(c)(5). As such, the items in the “Notification of General Permittee Obligations” section are subject to certification. EPA, therefore, objects to this permit because it attempts to exclude what are represented to be “Federally Enforceable Conditions” from the certification requirement. EPA will work with NYSDEC during the permit re-opening process to identify items on this list that may be excluded from the annual certification requirement⁶ based on whether these items are purely advisory in nature and are not obligations of the permittee. EPA grants the petition on this issue.

In addition, NYPIRG alleges that the permit violates 40 CFR § 70.6 because it fails to clarify the deadline for submittal of the annual compliance certification. The permit states that the annual certification is “due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department.” *See* Condition 6. NYPIRG cites a number of problems with this language. First, NYPIRG claims it is possible that a facility would not be required to submit the first compliance certification until

⁶ NYSDEC’s Letter of Commitment outlined that NYSDEC would “[o]n a case-by-case basis, . . . exclude from the certification terms that do not create an obligation on the permittee.” Letter from Carl Johnson, Deputy Commissioner, NYSDEC to George Pavlou, Director, EPA, Region 2, at 7 (November 16, 2001).

after the end of the first annual period following the date of permit issuance. Second, by adding “unless another quarter has been acceptable by the Department,” NYPIRG believes that the permit is rendered unenforceable by the public because it is unclear how the Department will revise the date that the certification is due. Specifically, NYPIRG is concerned that the NYSDEC can change the due date through an oral conversation with the permittee, without the public knowing that the deadline has been changed. Also, NYPIRG finds the phrase “calendar quarter that occurs just prior to the permit anniversary date” vague because it is unclear when quarters begin and end. NYPIRG concludes that the annual compliance certification is unenforceable as a practical matter and requests EPA to object to this permit.

Under the “Reporting Requirements” section of Condition 6, the permit states that “[t]he initial report is due 7/30/2003” and that “[s]ubsequent reports are due on the same day each year.” As such, EPA does not agree with NYPIRG’s argument since the permit clearly identifies an enforceable deadline for the initial compliance certification report as well as subsequent annual compliance reports. EPA therefore denies the petition on this point.

4. Prompt Reporting of Deviations

NYPIRG alleges the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). Petition at 8. NYPIRG states that instead, the permit contains a state-only enforceable condition (DEC Special Condition 6) and a facility-wide federally enforceable condition (Item 5.2) which are insufficient to meet the prompt reporting requirements of part 70. Final permit Condition 5 states that, “Where the underlying applicable requirement contains a definition of prompt or otherwise specifies a time frame for reporting deviations, that definition or time frame shall govern.” NYPIRG alleges this is illegal because 40 CFR § 70.6(a)(3)(iii)(B) requires NYSDEC to consider the “degree and type of deviation likely to occur” as well as the underlying applicable requirements. Petition at 9. Condition 5 also contains a timetable for promptly reporting deviations of hazardous and other regulated air pollutants under some circumstances, while all other deviations need only be reported in the six-month monitoring report. NYPIRG alleges this timetable is illegal for two reasons. First, the timetable is arbitrary and does not protect the community from dangerous releases. Secondly, the six month default reporting is illegal because the requirement to promptly report deviations is distinct from the semiannual reporting requirement. Petition at 9-10. NYPIRG requests that EPA order NYSDEC to revise the permit so that the prompt reporting requirements allow government officials and the public to gain quick access to information regarding air pollution problems at the North River plant. Petition at 11.

Title V permits must include requirements for the prompt reporting of deviations. 40 CFR § 70.6(a)(3)(iii)(B). States may adopt prompt reporting requirements for each permit condition on a case-by-case basis, or may adopt general requirements by rule, or both. Whether the NYSDEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case determination under the rules applicable to the approved program, although a general provision

applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).⁷

As explained below, NYPIRG's allegation that the North River permit does not contain prompt reporting requirements is without merit. In issuing the North River permit, NYSDEC included several provisions that require reporting of deviations promptly. NYPIRG has not demonstrated that the various reporting requirements contained in the permit fail to meet the standard set forth in part 70.

The North River permit also has several provisions that require prompt reports of deviations to NYSDEC based on the degree and type of deviation likely to occur. *See e.g.*, Conditions 33, 38, 42, 50 and 59. These conditions require that reports, including information on any deviations, be submitted more frequently than the semiannual reporting stipulated at 40 CFR § 70.6(a)(3)(iii)(A). These conditions require reports (including reports of deviations) to be submitted at time frames ranging from the next business day to quarterly. For example, Condition 42 requires opacity data to be conveyed to the NYSDEC by telemetry on a continuous basis, in addition to quarterly reports. This reporting requirement includes reports of deviations and is more frequent than the semiannual reporting required by 40 CFR § 70.6(a)(3)(iii)(A) and serves as prompt reporting consistent with 40 CFR § 70.6(a)(3)(iii)(B). NYSDEC has properly used its discretion to require more frequent or prompt reporting. NYPIRG has not shown that NYSDEC failed to exercise its discretion reasonably in defining "prompt" in relation to the degree and type of deviation likely to occur or that the underlying requirements are deficient in prescribing reporting that is less than "prompt" as defined under 40 CFR § 70.6(a)(3)(iii)(B). Therefore, the petition is denied on this issue.

NYPIRG argues that Condition 5 sets up arbitrary distinctions between violations because there is no rational basis to require that a 61 minute violation of a HAP is subject to the prompt reporting requirement while a 60 minute violation is not subject to that prompt reporting requirement. NYPIRG suggests revising the reporting schemes so that the reporting times get progressively longer as the duration of the violation gets smaller. Petition at 10. First, EPA disagrees that the short-term reporting times in Condition 5 are arbitrary. The EPA has analyzed the issue of prompt reporting and crafted the timetable in 40 CFR § 71.6(a)(3)(iii)(B) based on reasoned consideration of likely scenarios. Furthermore, the North River permit contains site-specific requirements for short term reporting for pollutants of concern at this facility. For

⁷ EPA's rules governing the administration of the federal operating permit program require, inter alia, that permits contain conditions providing for the prompt reporting of deviations from permit requirements. See 40 CFR § 71.6(a)(3)(iii)(B)(1)-(4). Under this rule, deviation reporting is governed by the time frame specified in the underlying applicable requirement unless that requirement does not include a requirement for deviation reporting. In such a case, the part 71 regulations set forth the deviation reporting requirements that must be included in the permit. For example, emissions of a HAP that continue for more than an hour in excess of permit requirements must be reported to the permitting authority within 24 hours of the occurrence.

example, Condition 67 requires continuous submittal of hydrogen sulfide data to NYSDEC through telemetry, in addition to quarterly reports. Not only is this pollutant the cause of many nuisance complaints at the facility, it is an indicator of how well the plant operations are running. Because the North River permit contains prompt reporting requirements for pollutants of concern at this facility, EPA denies the petition on this issue.

5. Requirements for Requesting Excuse of a Violation

NYPIRG alleges the North River permit does not properly incorporate the requirements that apply when a facility owner requests that the NYSDEC excuse a violation. Petition at 11. NYPIRG notes that the state-enforceable excuse provision at 6 NYCRR § 201-1.4 is included in the state-only side of the North River title V permit, but the federally approved (SIP) excuse provision at 6 NYCRR § 201.5(e) is not, but should be, on the federal side of the permit, as it is an applicable requirement.⁸ NYPIRG contends that NYSDEC should add provisions to the North River permit, as follows:

(1) The SIP-approved excuse provision is more restrictive than the provision in the currently-effective New York regulation, and it is the SIP provision that must be included in the federal side of the title V permit. In addition, because 6 NYCRR § 201.5(e) is part of the New York SIP, it is the only excuse provision that can be used to excuse violations of SIP requirements. Petition at 12.

(2) The SIP excuse provision requires that during any maintenance, start-up or malfunction conditions, RACT shall be applied. Because the application of RACT in these instances is an applicable requirement, terms and conditions as to what constitutes RACT for North River should be included in the title V permit, together with associated monitoring, record-keeping and reporting requirements. Petition at 13.

(3) The permit must require prompt written reports of deviations from permit requirements due to start-up, shutdown, malfunction and maintenance. Petition at 13.

⁸ The characterization of this provision as potentially “excusing” certain violation of federal requirements is somewhat misleading. The CAA does not allow for automatic exemptions from compliance with applicable SIP emission limits during periods of start-up, shutdown, malfunction or upsets. Further, improper operation and maintenance practices do not qualify as malfunctions under EPA policy. To the extent that a malfunction provision, or any provision giving a substantial discretion to the state agency broadly excuses sources from compliance with emission limitations during periods of malfunction or the like, it is the Agency’s position that it should not be approved as part of the federally approved SIP. *See In re PacifiCorp’s Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1, at 23 (Nov. 16, 2000), available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>.

EPA is granting the petition on NYPIRG's first issue, that the SIP "excuse" provision of 6 NYCRR § 201.5(e) should be included on the federal side of the permit. EPA will work with the NYSDEC to include appropriate language in the North River title V permit.

EPA disagrees with NYPIRG's second point that the permit must define RACT as it applies during maintenance, startup, or malfunction conditions. The SIP-approved regulations of 6 NYCRR § 201.5 require facilities to use RACT during any maintenance, startup, or malfunction condition. The term "RACT" is defined in the New York SIP at 6 NYCRR § 200.1(bp) as the: "lowest emission limit that a particular source is capable of meeting by application of control technology that is reasonably available, considering technological and economical feasibility." In those instances where a facility has requested that the NYSDEC Commissioner excuse an exceedance during times of startup, malfunction or maintenance, RACT is determined by the NYSDEC on a case-specific basis.

As a practical matter, it is not possible to set forth in advance a detailed definition of RACT that will address all possible startup, shutdown or malfunction events throughout the life of the permit. The specific technology that will constitute RACT will depend on both the nature of the violation and the technology available when the violation occurs. The "excuse" provision allows that determination to be made on a case-by-case basis, by the NYSDEC Commissioner, if and when she chooses to exercise her authority to excuse such a violation. The applicable requirement associated with the emission unit at which the deviation occurred is incorporated elsewhere in the permit, and this requirement would apply at all times. The purpose of this case-by-case RACT determination is to mitigate the violation or exceedance of the applicable requirement until such time as compliance can once again be achieved. Therefore, EPA denies the petition on this issue.

With respect to NYPIRG's third issue, reporting in order to preserve a claim that the deviation should be excused is not a required report. These "excuse" reports are in addition to all the other deviation reports required by the title V permit. Any deviation for which an excuse is sought will also be reported as a deviation or violation in the six-month monitoring report and, if required, in the prompt reporting of deviation requirements delineated at Condition 5 (see section II.B.4, above). Thus, EPA denies the petition on this issue.

6. Monitoring

NYPIRG claims that the North River permit does not assure compliance with all applicable requirements because many individual permit conditions lack adequate monitoring and are not practicably enforceable. Petition at 13. NYPIRG addresses several individual permit conditions that allegedly either lack monitoring or are not practicably enforceable. The specific allegations for each permit condition are discussed below.

(a) Compliance with Opacity Limitations

NYPIRG alleges that final permit Conditions 11 and 12, citing 6 NYCRR § 211.3, regulating opacity on a facility-wide level, are not sufficient to assure compliance at individual

emissions points. NYPIRG states that NYSDEC must prepare specific emission limitations and monitoring conditions for each emission unit to which this requirement applies. Petition at 15. NYPIRG also alleges that NYSDEC's description of the regulation is improper, in that the "upper permit limit" and the splitting of the regulation into two permit conditions, does not adequately describe the limitation. Petition at 15. NYPIRG's allegation that the PRR must provide the factual basis for NYSDEC's monitoring decisions regarding this requirement is addressed above in section II.B.1(d)(iii).

Conditions 11 and 12 set forth the generally applicable SIP opacity requirement which prohibits air contamination sources from exhibiting opacity greater than 20 percent (six minute average) except for one continuous six-minute period per hour of not more than 57 percent opacity. 6 NYCRR § 211.3. NYPIRG correctly notes that the permit says this regulation applies "except as permitted by a specific part of title 6 of the NYCRR." This means this rule applies to emission units that are not otherwise covered by a specific rule. Therefore, if the North River plant operates emissions units not covered by another opacity rule in title 6 of the NYCRR, this rule would apply and the permit would need to include "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2).

Most of the emissions units appear to be subject to opacity regulations other than 6 NYCRR § 211.3. However, it is unclear whether the flare is considered a combustion installation and thus regulated under part 227. Therefore, EPA is granting the petition and requiring the NYSDEC to clarify whether 6 NYCRR § 211.3 applies to any emission unit at the North River plant. If, in addressing this objection, the NYSDEC concludes additional requirements must be added to the permit, NYSDEC must also include appropriate recordkeeping or monitoring to assure compliance with those requirements. Furthermore, the NYSDEC must include in the PRR its rationale for the selected monitoring requirements, as described above in section II.B.1(d)(iii).

EPA disagrees that the splitting of the regulation into two permit conditions and labeling the emission rate as "upper permit limit" fails to adequately describe the regulation. Conditions 11 and 12 are written to complement each other, so that together, they completely describe the regulation at 6 NYCRR § 211.3. Although these conditions look nearly identical, they are distinguished by two lines near the end of each condition. The lines labeled, "Upper Permit Limit" and "Averaging Method" clarify which part of the regulation is being described. For example, the "Upper Permit Limit" lines in Conditions 11 and 12 read, "57 percent" and "20 percent," respectively. EPA finds that the permit is enforceable as a practical matter using this format. The petition is therefore denied.

(b) Digester Gas

NYPIRG alleges that Condition 13 of the final permit must specify where digester gas production and emission will be measured, and include the process or formula for determining the measurement. NYPIRG further asserts that the daily log currently required by the permit should include the name of the recordkeeper, the date for which the information is being

recorded, the background measurements used to determine daily production and emission of digester gas, and the amount of digester gas produced and emitted. Petition at 15.

In its Responsiveness Summary, NYSDEC stated that “Permit Condition 13 and the Permit Review Report were reworded to include the suggested record keeping language” (Page 8, no. 21). The final permit includes several of NYPIRG’s suggestions. The draft permit required the facility to maintain a daily log of digester gas produced and emitted to the atmosphere, with semiannual reporting. According to final permit Condition 13, NYCDEP must include in this log information on determination of measurement, name of recordkeeper, and date of information recorded. The descriptions of the production, use and emission of digester gas in the draft and final PRR’s is described above in section II.B.1.

EPA finds that the NYSDEC has been responsive to NYPIRG’s comments on this issue. Therefore, I deny the petition on this point.

(c) Use of Continuous Opacity Monitors

NYPIRG alleges that the permit conditions requiring the use of COM need to be amended, and provides the specific language it alleges must be included. This language relates to final permit Condition 42, regulating opacity from the blower engines. NYPIRG states that the permit must require monitoring, recordkeeping and reporting of the hours of operation for the process monitored by COM, including details on whether COM operation corresponds to process operation. NYPIRG also requests that the exception for COM operation be narrowed to times when the COM is undergoing routine maintenance or quality control checks. NYPIRG’s other two points relate to language in the draft permit allowing NYCDEP to discontinue use of COM on the blower engines after certain requirements have been met.

This permit condition changed significantly from draft to final, as described above in section II.A.5. NYPIRG’s petition is based on an earlier draft of the permit. EPA finds that the NYSDEC has been responsive to NYPIRG’s comments on this issue. Further, the final permit differs from the draft permit to such a degree that two of NYPIRG’s points are no longer relevant. Aside from the multiple monitoring requirements discussed above in section II.A.5, EPA finds no deficiencies in the permit regarding this issue. Therefore, I deny the petition on this point.

(d) Manufacturer’s Specifications

NYPIRG alleges that two permit conditions, specifying that NYCDEP follow manufacturer’s specifications, are overly vague. Petition at 16. Final permit Condition 30, describing actions NYCDEP will take to ensure compliance of the pump engines with NO_x RACT, states that, “periodic maintenance will be performed in accordance with manufacturer’s specifications.” Final permit Condition 41 has identical language, and applies to the blower engines. NYPIRG asserts that these specifications are not available to the public, therefore the permit needs to set out specific acts and timetables for this maintenance. NYPIRG further

alleges that the maintenance activities must be reported so as to assure compliance with the applicable requirements. Petition at 16.

In its Responsiveness Summary, the NYSDEC (page 9, no. 26) replied that manufacturer's specifications are part of the permit because they are referenced in the permit. NYSDEC further states that these specifications are maintained at the facility, and are available to the NYSDEC upon request. EPA disagrees with NYSDEC that the manufacturer's specifications are part of the permit, because they have not been incorporated by reference, nor have they been included in the North River permit record. EPA does not recommend incorporating the engines' specification manual by reference, because that would necessitate a permit revision each time the manual was revised. However, EPA does believe a copy of relevant portions of the manual should be included in the North River permit record, and updated with each permit renewal.

EPA agrees with NYPIRG that the permit should set out specific acts and timetables for the maintenance activities that will yield reliable data from the relevant time period that are representative of the engines' compliance with the SIP at 6 NYCRR § 227-2.4(f)(2). *See* 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2). Although the permit includes language regarding diagnostic data, engine oil analysis, and comparison of fuel consumption versus power output of the units, there are no details on the frequency of this monitoring. Conditions 31 and 43 of the final permit include requirements for each engine to have a NO_x stack test every three years. While stack tests are an important part of periodic monitoring, it is important in this instance that the permit also specify monitoring to assure compliance in between stack tests. EPA is granting the petition on this point and requiring NYSDEC to revise Conditions 30 and 41 to specify activities that NYCDEP routinely performs in accordance with the manufacturer's specifications, to assure these engines run at optimum conditions. These activities must be prescribed so as to yield reliable short-term data that are representative of the engines' compliance with the one-hour average specified by the SIP. NYSDEC must also provide its rationale for this monitoring in the PRR that will be issued with the revised permit.

EPA agrees with NYPIRG that this monitoring must be reported to the NYSDEC. Although Conditions 30 and 41 state that reporting is "upon request by regulatory agency," Condition 5 requires permittees to comply with these conditions by reporting required monitoring semiannually. For these reasons, EPA is denying the petition on this aspect of NYPIRG's claim.

(e) Process Emissions Rates

NYPIRG alleges that conditions citing applicable tables in 6 NYCRR part 212 must set specific emission limits for each pollutant emitted by the regulated processes. Final permit Conditions 56, 57 and 58 pertain to the wastewater treatment processes (4-WWTRE), the sludge handling processes (5-SLUDG) and the gasoline dispensing pump and waste gas tower (6-MISCL), respectively. These conditions each cite 6 NYCRR § 212.4(a) and restate this regulation, which allows emissions according to Tables 2 or 3 or 4 of part 212. NYPIRG alleges that the PRR must describe the North River plant's emissions rates of the pollutants regulated by

these tables. NYPIRG further asserts that the permit must contain monitoring, recordkeeping and reporting sufficient to assure compliance with the allowable emissions rates defined by the applicable tables in this regulation. Petition at 16.

Conditions 56, 57 and 58 each state: “No person shall cause or allow emissions that exceed the applicable permissible emission rate as determined from Table 2, Table 3, or Table 4 of 6 NYCRR part 212 for the environmental rating issued by the commissioner.” Yet, as noted by NYPIRG, neither the permit nor the PRR specify which pollutants are emitted by these processes.

NYPIRG’s allegations regarding the content of the PRR are addressed above in section II.B.1(b)(iii). Without more detailed information, including the applicable environmental rating for each pollutant emitted, Conditions 56, 57 and 58 are not practically enforceable. Further, the federally applicable SIP requirement does not contain “periodic testing or instrumental or noninstrumental monitoring” *See* 40 CFR § 70.6(a)(3)(i)(A) and 6 NYCRR § 201-6.5(b)(2). Therefore, these conditions must be supported with monitoring that will yield reliable data from the relevant time period that are representative of these processes’ compliance with the SIP at 6 NYCRR § 212.4(a). *See* 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2). For these reasons, EPA is granting the petition on this issue. NYSDEC is hereby ordered to revise Conditions 56, 57 and 58 of the permit to include the specific degree of air cleaning required for each of these processes, and include monitoring consistent with the requirements of part 70. In addition, a report must be submitted to NYSDEC every six months to satisfy the semi-annual reporting requirements of 6 NYCRR part 201 and 40 CFR part 70.

(f) Gasoline Transport Activities

NYPIRG claims that the permit should clarify whether the North River plant is subject to the requirement listed at final permit Condition 61, which governs gasoline transport activities regulated at 6 NYCRR § 230.2. NYPIRG also alleges that the permit needs to set a deadline for completion of the required actions, and include monitoring, recordkeeping and reporting sufficient to assure compliance. Petition at 16.

Condition 61 sets forth operational requirements for owners and operators of gasoline transport vehicles and dispensing sites. According to the permit, NYCDEP operates one gasoline storage tank and one dispensing pump at the North River plant. Thus, this emissions unit is subject to the requirements of 6 NYCRR part 230. Conditions 60 through 63 list the provisions of this rule that NYSDEC has determined are applicable. Condition 61 restates five items from the regulation at 6 NYCRR § 230.2(f). Items 3, 4 and 5 are ongoing operational practices that have no associated completion schedule. Item 2 relates to training of operators of gasoline transport vehicles. The first item requires installation of vapor collection or control systems, but does not set deadlines for such actions. Deadlines and other applicability criteria are set in 6 NYCRR § 230.2(a) through (e).

NYPIRG is correct that the applicability of these provisions needs further clarification. Specifically with respect to Condition 61, the applicability of Item 2 is questionable because the

permit does not indicate whether NYCDEP employs and/or is responsible for the training of an operator of a gasoline transport vehicle. With respect to the timing of installation of a vapor control system, the only information provided is on the first page of the permit, where the description indicates the North River plant started in 1986. If the gasoline dispensing site was installed or modified after June 27, 1987, both stage I and stage II controls are required (implied prior to operation), whereas if it were installed between January 1, 1979 and June 27, 1987, only stage I controls are required (See 6 NYCRR §§ 230.2(b) and (d)(1)). The permit is inconsistent with the application of these provisions. Condition 60 cites 6 NYCRR § 230.2(d)(1), which requires both stage I and II controls; however, Condition 61 has been written to remove all references to stage II controls. EPA is granting the petition on this point and requiring NYSDEC to clarify the applicability of these provisions to the North River plant, and revise the permit accordingly.

Regarding monitoring, the final permit includes such provisions at Conditions 62 and 63. However, Condition 62, citing 6 NYCRR § 230.2(g), only applies to stage II control systems. When NYSDEC clarifies applicability as described above, it should also confirm whether this provision is applicable. If stage II controls are indeed required, then NYSDEC must also include a permit condition citing 6 NYCRR § 230.2(k)(ii), requiring periodic testing of stage II control systems, as well as 6 NYCRR § 230.5(d), requiring notarized reports of tests conducted pursuant to 6 NYCRR § 230.2(k). For these reasons, I grant the petition on this issue.

7. Compliance Schedules

NYPIRG alleges that the North River title V permit must include a compliance schedule for the North River plant that meets the requirements of 40 CFR § 70.5(c)(8)(iii)(C) because the plant is operating in ongoing or intermittent violation of various environmental regulations. Petition at 17. NYPIRG also asserts that the conditions of a state consent order are not enforceable by the public. NYPIRG further alleges that the permit's reference of the NROC at Condition 2 is inappropriate, and requests more specific details be included in the permit, including requirements for operator training. Petition at 17.

NYSDEC states that the NROC contains no federally applicable air requirements, therefore there are no provisions from the NROC that would be included in the federal section of the title V operating permit. *See* Responsiveness Summary at 7. The NYSDEC's response is not technically correct. In fact, the NROC does address alleged violations of federally enforceable applicable requirements. Further, permit conditions that address those provisions of the NROC have been incorporated into the title V permit. By way of background, the NYCDEP had conducted stack tests required by its permits to construct, and exceeded NO_x and opacity limits for the pump and blower engines.⁹ To remedy this, the NROC required stack testing of NO_x

⁹ On July 9, 1991 and in March 1992, NO_x testing was conducted on representative pump engines. On July 24, 1991, NO_x testing was conducted on one blower engine. Opacity exceedances from pump and blower engines stacks were observed by the NYSDEC on numerous occasions, including April 9, 1992.

emissions from the engines in order to determine if the revised operations and maintenance protocols had brought the engines into compliance with their permits to construct. The required stack testing of the engines for NO_x has since been conducted.¹⁰ According to the permit record, the engines passed these tests. The NYSDEC has subsequently included the applicable SIP requirements in the title V permit (Re: NO_x, see discussion above in section II.A.4; re: opacity, see section II.A.5). All other provisions of the 56-page NROC related to water quality issues or odor/quality of life issues.

As discussed above in section I.A.2, NYCDEP and NYSDEC are currently negotiating an amended NROC. After that process has concluded, NYSDEC will have the authority to incorporate any applicable requirements from the revised NROC into the permit, if it believes this is warranted. Notwithstanding this, the permit's current referencing of the NROC is appropriate. Therefore, EPA denies the petition on this issue.

8. Effective Dates of Permit Terms

NYPIRG's last petition issue is a concern with the way in which the final North River permit was written. That is, in addition to the front page of the permit stating that the permit will expire on October 21, 2007, a clause has been added to most permit conditions, that the permit term is "effective between the dates of 10/22/2002 and 10/21/2007." NYPIRG asserts that including the aforementioned clause with each permit term is not the correct way to limit the overall permit term. NYPIRG contends that by adding this clause, if a renewal permit is not issued prior to the expiration of the current permit, then each permit term will expire on October 21, 2007, even if the permittee submits a complete and timely application (that is, there would be a "hollow" permit, without most applicable requirements). Petition at 17.

EPA disagrees with NYPIRG that the North River permit will become a "hollow" permit if the renewal permit is not issued before the initial permit expires. The NYSDEC regulations at 6 NYCRR § 201-6.7(a)(5) clearly state that all terms and conditions of a permit shall automatically continue while NYSDEC reviews the renewal application. NYPIRG's interpretation of New York's operating permit rule is not correct. All terms and conditions of a title V operating permit will remain effective as long as a timely and complete renewal application has been submitted in accordance with the deadline established in 6 NYCRR § 201-6. We understand this labeling to be NYSDEC's way of establishing the initial effective date of a permit term rather than a termination for the term. EPA interprets the later date, since it always coincides with the end date of the term of the permit itself, to be simply a reiteration of the term of the permit. EPA, therefore, denies the petition on this issue.

CONCLUSION

¹⁰ According to the permit application, representative stack testing was completed in 1994. According to the permit record, further testing was conducted after engine modifications were completed in 1999/2000.

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I deny in part and grant in part the petitions of NYCDEP and NYPIRG, requesting the Administrator to object to the issuance of the North River title V permit. This decision is based on a thorough review of the October 22, 2002 permit, and other documents that pertain to the issuance of this permit.

September 24, 2004

Date

/s/

Michael O. Leavitt
Administrator