BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
STARRETT CITY, INC.	)	ORDER RESPONDING TO
	)	PETITIONER'S REQUEST THAT
Permit ID: 2-6105-00263/00008	)	THE ADMINISTRATOR OBJECT
Facility DEC ID: 2610500263	)	TO ISSUANCE OF A STATE
	)	OPERATING PERMIT
Issued by the New York State	)	
Department of Environmental Conservation	)	
Region 2	)	Petition Number: II-2001-01
___________________________________	)	

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

On January 3, 2001, the Environmental Protection Agency ("EPA") received a petition from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, for Starrett City, Inc. ("Starrett City"). Starrett City is a Brooklyn New York Housing Development facility which provides electricity, heating and cooling for the housing development. The Starrett City permit was issued by the New York State Department of Environmental Conservation's ("DEC") Region 2 Office, and took effect on November 10, 2000, pursuant to title V of the Act, the federal implementing regulations at 40 CFR part 70, and the New York State implementing regulations at 6 NYCRR parts 200, 201, 616, 621, and 624.

The NYPIRG petition alleges that the Starrett City permit does not comply with 40 CFR part 70 in that: (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing; (2) the permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c); (3) the permit lacks an adequate statement of basis as required by 40 CFR § 70.7(a)(5); (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 assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions; (6) the permit fails to require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (7) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit

conditions lack monitoring that is sufficient to assure the permittee's compliance and are not practically enforceable; and (8) the permit fails to include the applicable particulate matter limitation that is part of New York's State Implementation Plan. The Petitioner has requested that EPA object to the issuance of the Starrett City permit pursuant to CAA § 502(b)(2) and 40 CFR § 70.8(d).

Subsequent to receipt of the NYPIRG petition, the EPA performed an independent and in-depth review of the Starrett City title V permit. Based on a review of all the information before me, including the NYPIRG petition; the Starrett City permit application; a September 19, 2000 letter from Elizabeth Clarke of DEC to Steven C. Riva of EPA Region 2 regarding Responsiveness Summary/Proposed Final Permit (hereinafter, "Responsiveness Summary"); the Starrett City title V permit effective on November 10, 2000 ("title V permit"); a letter dated July 18, 2000, from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC ("July 18, 2000 letter"); and a letter dated July 19, 2000, from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC ("July 19, 2000 letter"), I deny the Petitioner's request in part and grant it in part for the reasons set forth in this Order. In addition to raising issues on the subject Starrett City title V permit, NYPIRG's petition also raised general title V program issues, some of which DEC has already addressed and others which DEC is in the process of addressing. *See* letter dated November 16, 2001 from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 ("November 16, 2001 letter").

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of New York, effective on December 9, 1996. 61 Fed. Reg. 57589 (Nov. 7, 1996); *see also* 61 Fed. Reg. 63928 (Dec. 2, 1996) (correction); 40 CFR part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to New York's title V operating permit program based, in part, on "emergency" rules promulgated by DEC. 66 Fed. Reg. 63180 (Dec. 5, 2001). Once DEC adopted final regulations to replace the emergency rules, EPA granted full approval to New York's title V operating permit program based on these final regulations. 67 Fed. Reg. 5216 (Feb. 5, 2002). Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements") but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure

compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, States, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under CAA §§ 505(a) and (b)(1) and 40 CFR §§ 70.8(a) and (c)(1), States are required to submit all proposed title V operating permits to EPA for review, and EPA will object to permits determined by the Agency not to be in compliance with applicable requirements or the requirements of 40 CFR part 70. If EPA does not object to a permit on its own initiative, CAA § 505(b)(2) and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. To justify exercise of an objection by EPA to a title V permit pursuant to CAA § 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of 40 CFR part 70. Petitions must, in general, be based on objections to the permit that were raised with reasonable specificity during the public comment period.[1] A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

II. ISSUES RAISED BY THE PETITIONER

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

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

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

In its November 16, 2001 letter, the DEC committed to address various program implementation issues by January 1, 2002, and to ensure that permit issuance procedures are performed in accordance with state and federal requirements. DEC's fulfillment of the commitments set forth in its November 16, 2001 letter will resolve some administration problems. EPA is monitoring New York's title V program to ensure that the permitting authority is implementing the program consistent with its approved program, the Act, and EPA's regulations. Based on a recently-initiated EPA review ("EPA program review"), the DEC is substantially meeting the commitments made in its November 16, 2001 letter.[3] As a result, EPA has not at this time issued a notice of program deficiency ("NOD") pursuant to CAA § 502(i) and 40 CFR §§ 70.10(b) and (c). However, failure to properly administer or enforce the program will result in the issuance of a NOD by EPA, by publication of such in the Federal Register.

A. Public Hearing

The Petitioner alleges that DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying its request for a public hearing. *See* petition at page 3. Specifically, the Petitioner asserts that the DEC applied the standard that governs when it can hold a hearing on its own initiative, rather than the standard that governs when DEC receives a request from a member of the public for a hearing.[4]

This issue has been addressed in previous Orders.[5] The case-specific review of

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[3] *See* letter dated March 7, 2002, from Steven C. Riva, Chief, Permitting Section, USEPA Region 2, to John Higgins, Chief, Bureau of Stationary Sources, DEC. This letter summarizes an EPA review of draft permits issued by the DEC from December 1, 2001 through February 28, 2002. EPA is providing DEC with monthly or bi-monthly updates to supplement the information provided in the March 7, 2002 letter. The purpose of this EPA review was to determine whether the DEC is making changes to public notices and to select permit provisions as it committed in its November 16, 2001 letter.

[4] The Petitioner points out that 6 NYCRR § 621.7 defines two types of hearings: adjudicatory and legislative. Under 6 NYCRR § 621.7(b), DEC determines to hold an adjudicatory public hearing when "substantive and significant issues relating to any findings or determinations the [DEC] is required to make" or where "any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon." Under 6 NYCRR § 621.7(c), DEC shall hold a legislative public hearing if a significant degree of public interest exists.

[5] The issue of denying a public hearing has been raised previously by the Petitioner and addressed by the Administrator in six Orders responding to the following petitions: In the Matter of North Shore Towers Apartments, Inc., Petition Number II-2000-06, July 3, 2002 ("North Shore Towers"); In the Matter of Tanagraphics, Inc., Petition Number II-2000-05, July 3, 2002 ("Tanagraphics"); In the Matter of Rochdale Village, Inc., Petition Number II-2000-04, July 3, 2002 ("Rochdale Village"); In the Matter of Kings Plaza Total Energy Plant, Petition Number II-2000-03, January 16, 2002 ("Kings Plaza"); In the Matter of Action Packaging Corp., Petition Number II-2000-02, January 16, 2002 ("Action Packaging"); and In the Matter of Albert Einstein College of Medicine of Yeshiva University, Petition Number II-2000-01, January 16, 2002 ("Yeshiva"). Each of these Orders is available on the Internet at: http://www.epa.gov/region07/artd/air/title5/petitiondb/petitiondb2000.htm.

NYPIRG's petition on Starrett City indicates that there are no substantive differences in fact between the subject petition and the previously-issued Orders referenced in note 5, *supra*. In those Orders, the Administrator stated that there was no allegation that the Petitioner was prejudiced or harmed as a result of the DEC's use of the incorrect standard, and given the fact that the Petitioner was the only commenter, the DEC could have reasonably concluded that there was not sufficient public interest to hold a hearing on the permit. Accordingly, the Petitioner is referred to the determinations made by the EPA Administrator regarding this issue in the above referenced Orders. Those determinations are hereby re-affirmed in this Order and, therefore, the petition is denied on this issue.

This determination does not mean that the DEC may be inconsistent in the application of its own regulations. As previously discussed, New York's regulations provide that when a member of the public requests a hearing on a draft title V permit, the determination to hold such hearing shall be based on whether "a significant degree of public interest exists." 6 NYCRR § 621.7(c)(1). Thus, to ensure a consistent approach and to prevent further confusion as to what standard applies to title V public hearing requests, DEC has agreed to express in its public notices the standard of whether a significant degree of public interest exists (that is, the standard for holding a legislative hearing under 6 NYCRR § 621.7(c)), and to use such a standard to determine whether to hold a hearing on a draft title V permit. *See* November 16, 2001 letter at page 5. Failure to consistently express this standard and attendant procedures in public notices may result in a finding of program deficiency pursuant to 40 CFR § 70.10(b). According to EPA's program review, the DEC is substantially meeting this commitment. *See* note 3, *supra*. In fact, such hearings have been held for a number of draft title V permits.[6] Furthermore, where EPA concludes that there are appropriate grounds for objecting to a permit due to improper denial of a public hearing, EPA may order a timely objection to any permit pursuant to 40 CFR § 70.8(c)(3)(iii).

B. Permit Application

The Petitioner's second claim is that the applicant did not submit a complete permit application in accordance with the requirements of CAA § 114(a)(3)(C), 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d). *See* petition at page 5. In making this claim, NYPIRG incorporates a petition that it filed with the Administrator on April 13, 1999, wherein the Petitioner contended that the DEC is inadequately administering its title V program by utilizing a legally deficient standard permit application form.

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[6] E.g., Village of Freeport (DEC Permit No. 1-2820-00358/00002); Orange Recycling and Ethanol Production Facility, Pencor Masada Oxynol, LLC (DEC Permit No. 3-3309-00101/00003); Poletti Power Project (DEC Permit No. 2-6301-00084/00015); New York Organic Fertilizer Company (DEC Permit No. 2-6007-00140/00011); Keyspan Energy's Spagnoli Road Energy Center (DEC Permit No. 1-4726-01500/00011); Con Edison's Hudson Avenue Station (DEC Permit No. 2-6101-00042/00011); NYCDEP's North River Waste Water Pollution Control Plant (DEC Permit No. 2-6202-00007/00015); and the Al Turi Landfill (DEC Permit No. 3-3330-00002/00039).

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

- The application form lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether Starrett City was out of compliance and, therefore, whether DEC was required to include in the title V permit a compliance schedule;

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

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

- The application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

NYPIRG alleges that omission of the information described above makes it difficult for a member of the public to determine whether a draft permit includes all applicable requirements. For example, because the DEC application does not require a description of each underlying requirement, it is virtually impossible to identify existing new source review ("NSR") requirements that must be incorporated into title V permits. The Petitioner goes on to state that the lack of information in the application makes it more difficult for the public to evaluate the adequacy of the monitoring in the draft permit.

1. Initial Certification

EPA agrees with the Petitioner that the compliance certification process in the application form utilized by Starrett City in this case could enable applicants to avoid revealing non-compliance in some circumstances. The DEC form used allows applicants to certify that it expects to be in compliance with all applicable requirements at the time of permit issuance, rather than to make a certification as to the facility's compliance status at the time of permit application submission. As provided for in 40 CFR § 70.5(c)(9)(i), permit applicants are required to submit: "a certification of compliance with all applicable requirements by a responsible official consistent with...section 114(a)(3) of the Act." EPA interprets this language as requiring that sources certify their compliance status as of the time of permit application submission.

Starrett City certified that it would be in compliance with all applicable requirements at the time of permit issuance, which occurred on November 10, 2000.[7] This certification is further

[7] In its application form, Starrett City certified that, for all units at the facility that are operating in compliance with all applicable requirements, the facility will continue to be operated and maintained to assure compliance for the duration of the permit, except for those units referenced in the compliance plan portion of the

supported by additional information. Routine facility inspections performed by the DEC before and up until the time of application submission indicate that the Starrett City facility was in compliance during this period. EPA believes that, in this case, the lack of a compliance certification as of the time of application submission would not have resulted in a title V permit any different from the one ultimately issued. Accordingly, EPA denies the petition with respect to this issue. However, the State and EPA agree that the application form submitted by Starrett City does not properly implement EPA or State regulations. Therefore, as detailed in its November 16, 2001 letter, the DEC has changed its forms and instructions accordingly.[8]

2. Statement of Methods for Determining Initial Compliance

The next issue raised by the Petitioner relates to an omission in the application form of "a statement of methods used for determining compliance." *See* 40 CFR § 70.5(c)(9)(ii). Although the application submitted by Starrett City did not specifically require the facility to include a statement of methods, in this case, the applicant did provide information on certain methods used for determining compliance by referring in the permit application, Section IV, to monitoring and recordkeeping procedures used to assure compliance with sulfur-in-fuel requirements.

The application did not include methods for determining compliance with other requirements, including those delineated in New York State opacity, particulate matter, and nitrogen oxides (NO_x) regulations; however, EPA believes these omissions to be harmless error for a source such as this. There are little or no monitoring, recordkeeping or reporting requirements in these corresponding New York State Implementation Plan (SIP) regulations. With respect to these applicable requirements, however, DEC has established in its title V program case-specific monitoring, recordkeeping and reporting provisions to assure compliance. These are described in detail in Section G of this Order, below. In addition, as noted above, a review of historical DEC inspection results indicates that the Starrett City facility has been in compliance with applicable requirements from the time of permit application submission until the time that the permit was issued, on November 10, 2000. Following permit issuance, compliance has also been certified in Starrett City's annual compliance certification report submitted to the DEC on January 24, 2002. In conclusion, because EPA believes that submission by Starrett City of a statement of the methods used to determine compliance would not have resulted in any significant change to the permit issued by the DEC, EPA denies the petition on this issue.

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permit. Because there was no listing of non-complying sources in Section IV, the compliance plan portion of the permit, the facility was, in effect, certifying that it would be in compliance with all applicable requirements at time of permit issuance.

[8] In accordance with the DEC's November 16, 2001 letter, the permit application form was changed to clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. The application form and instructions were changed to clearly require the applicant to describe the methods used to determine initial compliance status. With respect to the citation issue, the application instructions were revised to require the applicant to attach to the application copies of all documents (other than published statutes, rules and regulations) that contain applicable requirements.

3. Description of Applicable Requirements

The Petitioner's next point is that EPA regulations call for the legal citation to the applicable requirement to be accompanied by the applicable requirement expressed in descriptive terms. In "White Paper for Streamlined Development of Part 70 Permit Applications" dated July 10, 1995, EPA clarified that citations may be used to streamline how applicable requirements are described in an application, provided the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. The permitting authority may allow the 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 (e.g., publically available documents include regulations printed in the Code of Federal Regulations or its State equivalent).

The Starrett City permit application contains codes or citations associated with applicable requirements that are readily available. That is, these codes refer to federal and state regulations that are printed in rule compilations and also are available on-line. The one applicable requirement that would not be readily available is that corresponding to the facility's NO_x reasonably available control technology (RACT) compliance plan, with the attendant requirements incorporated into a State facility operating permit issued on May 22, 1996. Although the NO_x RACT plan and the State facility permit were not attached to or referenced in the permit application, they were properly incorporated into the DEC's Starrett City title V file. Although the application form in this case only included a citation to the applicable requirement, EPA believes that this omission is harmless error because the title V permit ultimately issued incorporated select requirements of these documents. In certain instances, requirements of the NO_x RACT plan were not incorporated into the Starrett City title V permit. As noted in section G, below, EPA is granting in part the petition in these cases. Nonetheless, EPA does not believe that the Petitioner was prejudiced because of this omission and, therefore, the petition is denied on this issue.

With respect to "non-codified" documents that include applicable requirements, such as NO_x RACT plans, pre-construction and operating permits, in its November 16, 2001 letter, the DEC agreed to amend the application instructions to ensure that applicants include in their title V permit applications, by attaching thereto, all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing. DEC has revised its title V permit application instructions to so state ("New York State Air Permit Application Instructions," December, 2001).

4. Statement of Methods for Determining Ongoing Compliance

The Petitioner's final point is that the application form lacks a description of or reference

to any applicable test method for determining compliance with each applicable requirement. In Section IV of DEC's application form ("Emission Unit Information"), there is a block labeled "Monitoring Information" that requires applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. DEC's application form also requires that applicants provide monitoring information at the facility level (in Section III, "Facility Information"). Although these sections were not completed in full by the applicant, the title V permit ultimately issued addressed all test methods from applicable requirements and, as such, EPA does not believe that the Petitioner was prejudiced by such an omission. Thus, the Petitioner's fourth issue regarding the application form is without merit and is therefore denied.

C. Statement of Basis

The Petitioner's third claim alleges that the statement of basis required by 40 CFR § 70.7(a)(5) is insufficient. *See* petition at page 7.

The Petitioner states that DEC has begun to include with each draft title V permit a "project description" which, although a step in the right direction, does not satisfy the requirements of 40 CFR part 70. NYPIRG goes on to state that the most glaring deficiency is the failure to provide the basis for the adequacy of the monitoring included in the permit. The Petitioner concludes that without a complete statement of basis, the public cannot effectively evaluate and comment upon the adequacy of draft permits. *See* petition at pages 7 and 8.

The requirement for the "statement of basis" is found in 40 CFR § 70.7(a)(5), which states: "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."

The statement of basis is not a part of the permit itself.[9] It is a separate document which is to be sent to the EPA and, also, to interested persons upon request. This requirement for a statement of basis is not contained in 40 CFR § 70.6 which sets forth the required contents of the permit. In fact, 40 CFR § 70.6(a) requires that the permit contain all the explanation that ordinarily would be necessary to determine whether the permit conditions have been accurately expressed. For example, the permit must contain the references to the applicable statutory or regulatory provisions forming the legal basis of the applicable requirements on which the conditions are based. *See* 40 CFR § 70.6(a)(1)(i).

A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. It should highlight elements that EPA and the public would find important to review. The statement should highlight anything that deviates from simply a straight

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

recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, any facility-specific monitoring requirements, and the permit shield.

EPA has recently provided guidance to permitting authorities that addresses the contents of a "statement of basis" in terms that aid both EPA and the public.[10] As a result, the DEC has incorporated certain elements into its "permit review reports."[11] In the cited documents, EPA explains that the "statement of basis" is to be used to highlight significant decisions or interpretations that were necessary in issuing the permit. Additionally, in a December 22, 2000 Order responding to a petition for objection to the Fort James Camas Mill permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring methods be documented in the permit record. *See* In re In the Matter of Fort James Camas Mill ("Fort James Camas Mill"), Petition No. X-1999-1, at page 8, December 22, 2000 (available on line at: http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/ petitiondb1999.htm).

The regulation at 40 CFR § 70.8(c)(3)(ii) requires that the permitting authority submit any information necessary to adequately review the proposed permit. Accordingly, in some circumstances EPA may object to the issuance of a permit simply because of the lack of necessary information. The missing information could be a statement of basis or any other information deemed necessary to adequately review the draft permit in question. Since the statement of basis can serve a valuable purpose in directing EPA's attention to important elements of the permit and since it is important that EPA perform reviews as quickly as possible, it is a required element of an approved program that EPA receive an adequate statement of basis with each proposed permit.

While EPA agrees with the Petitioner that a statement of basis was not made available with the draft Starrett City permit, we conclude that its absence does not in this case warrant objection to the permit. EPA believes that it is possible to achieve a sufficient understanding of this source using other available documents in the permit record including the permit application, the draft permit that includes a permit description,[12] and DEC's Responsiveness Summary. Starrett City is not subject to applicable requirements or monitoring provisions that rely on source-specific determinations or engineering judgement. Furthermore, there is no evidence that

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[10] *See* letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc., responding to NYPIRG's March 11, 2001 letter; the November 16, 2001 commitment letter; a letter dated December 20, 2001, from EPA Region V to the Ohio EPA (available on the internet at: http://www.epa.gov/region07/programs/ artd/air/title5); *see also* Notice of Deficiency for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2002).

[11] In order to comply with the requirements of 40 CFR § 70.7(a)(5), DEC has committed to prepare and make available at time of issuance of draft permits, a "permit review report," which will serve as DEC's statement of basis. The contents of this permit review report are described in the DEC's November 16, 2001 letter.

[12] Starrett City's draft permit, which was public noticed in the January 19, 2000 edition of the New York State Environmental Notice Bulletin (ENB), includes a description of the facility, the type of equipment and operations at the plant, and the air permit applicability.

the Petitioner was harmed by the absence of a statement of basis. In fact, NYPIRG provided detailed and thoughtful comments on Starrett City's draft permit establishing that it had a basic understanding of its terms and conditions.

Failure to include a statement of basis with the draft permit does not, in this case, constitute a reason to object to this permit. In this instance, the substantive statement of basis requirements were met through the permit description and other available documents in the permit record. Accordingly, EPA does not believe that the circumstances of this case warrant an objection to the Starrett City permit and, therefore, denies the petition on this issue.

Nonetheless, DEC's permit issuance process now provides that a permit may not be issued in draft unless a permit review report has been prepared for the draft permit. This requirement also applies to issuance of draft permits for renewed, and revised or modified permits. As noted above and discussed in detail in Section G, below, EPA is granting in part the NYPIRG petition to object to the Starrett City permit. Therefore, when DEC revises the permit in response to this Order, it will also prepare and submit a complete statement of basis (a "permit review report") pursuant to the requirements of 40 CFR § 70.7(a)(5).

D. Annual Compliance Certification

The Petitioner's fourth claim alleges that the proposed permit distorts the annual compliance certification requirement of the Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5). The Petitioner's allegation is that the proposed permit does not require the facility to certify compliance with all permit conditions, but rather just requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." *See* petition at page 9. Specifically, the Petitioner is concerned with the language in the permit that labels certain permit terms as "compliance certification" conditions. NYPIRG notes that requirements that are labeled "compliance certification" are those that identify a monitoring method for demonstrating compliance. NYPIRG asserts that the only way of interpreting this compliance certification designation is as a way of identifying which conditions are covered by the annual compliance certification. NYPIRG further asserts that permit conditions that lack periodic monitoring are excluded from the annual compliance certification. The Petitioner claims that this is an incorrect application of state and federal regulations because facilities must certify compliance with every permit condition, not just those that are accompanied by a monitoring requirement.

EPA notes, first, that the language in the Starrett City permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, follows the language of 40 CFR §§ 70.6(c)(5) and (6). Section 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Section 201-6.5(e)(3) requires the following in annual certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the

department and to the administrator and shall contain such other provisions as the department may require to ensure compliance with all applicable requirements. The Starrett City title V permit includes this language at condition 28, item 28.2.

EPA disagrees with the Petitioner that "the basis of the certification" should be interpreted to mean that facilities are *only* required to certify compliance with the permit terms labeled as "compliance certification." "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 28.2 delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

The references to "compliance certification" found in the permit terms do not appear to negate the DEC's general requirement for compliance certification of terms and conditions contained in the permit. Because the permit and New York's regulations require the source to certify compliance or noncompliance, annually for terms and conditions contained in the permit, EPA is denying the petition on this point.

Nonetheless, in its November 16, 2001 letter, the DEC has committed to include additional clarifying language regarding the annual compliance certification in draft permits issued on or after January 1, 2002, and in all future renewals so that the permit includes all the compliance certifications necessary to avoid the misunderstanding that NYPIRG pointed out may occur.

Although this issue does not present grounds for objecting to the Starrett City permit, the DEC has nonetheless elected to take the appropriate steps to improve the administration of its program in this regard. As discussed in Section G, below, EPA is granting in part NYPIRG's petition on this permit. Therefore, when the DEC revises the Starrett City permit in response to this Order, it will also add language to clarify the requirements relating to annual compliance certification reporting.

E. Startup, Shutdown, Malfunction

The Petitioner's fifth claim is that the proposed permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. *See* petition at page 10. The Petitioner asserts that 6 NYCRR § 201-1.4, New York's "excuse provision," conflicts with EPA guidance and must be removed from the SIP and federally enforceable permits as soon as possible. NYPIRG states that, in the meantime, the Starrett City permit needs to be modified to include additional monitoring, recordkeeping and reporting so that EPA and the public can monitor the application of this provision (Condition 5 of the title V permit).

The Petitioner further argues that this provision, Condition 5 of the title V permit, is so expansive that it makes emission limits very difficult to enforce. NYPIRG alleges that it is

common to find monitoring reports with potential violations allowed under the excuse provision, and that DEC files seldom include information as to why violations are deemed unavoidable. The Petitioner goes on to state that EPA guidance requires that facilities make every reasonable effort to comply with emission limitations, even during startup, shutdown, maintenance and malfunction conditions. That is, excuse provisions should only apply to infrequent exceedances. NYPIRG asserts that this is not the case for facilities located in New York State, as such facilities appear to possess blanket authority to violate air quality requirements as long as they cite the excuse provision.

In addition, the Petitioner asserts that the proposed Starrett City permit does not assure compliance with applicable requirements because it lacks proper limitations on when a violation may be excused and lacks sufficient public notice of when a violation is excused. NYPIRG asks that the EPA Administrator object to the permit unless DEC adds permit terms to prevent the abuse of the excuse provision, including the following:

1. The permit must include the limitations established by EPA's September 20, 1999 guidance entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" ("September 1999 Guidance"). This guidance clarifies the EPA's approach to State excuse provisions. *See* petition at pages 11 and 12;

2. The title V permit issued to Starrett City must be made clear to indicate that a violation of a federal requirement may not be excused. *See* petition at page 12;

3. To assure practical enforceability, the permit must define the significant terms "upset," and "unavoidable." *See* petition at pages 12 and 13;

4. The permit must also define the term "reasonably available control technology" (RACT) as it applies during startup, shutdown, malfunction and maintenance conditions. *See* petition at page 13; and

5. The Starrett City permit must require prompt written reporting of all deviations from permit requirements including those due to startup, shutdown, malfunction, and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B). *See* petition at pages 13 through 15.

Condition 5 in the title V permit, entitled, "Unavoidable Noncompliance and Violations," cites 6 NYCRR § 201-1.4 as the applicable requirement. This provision states in part: "At the discretion of the commissioner a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable." 6 NYCRR § 201-1.4 is a State regulation that has not been approved into the SIP. There is, however, a similar SIP-approved excuse provision at 6 NYCRR § 201.5(e). In its November 16, 2001 letter, the DEC committed to removing the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of title V permits and incorporating the condition into the state side. Based on EPA's program review, DEC is substantially meeting this commitment. *See* note 3, *supra*. As discussed in detail in Section G, below, EPA is granting in part the NYPIRG petition for Starrett City. Therefore, when DEC revises the permit in

response to this Order, it will also remove the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of the permit, and incorporate the condition into the state side.

It is EPA's view that the Act, as interpreted in EPA policy,[13] does not allow for automatic exemptions from compliance with all applicable SIP emission limits during periods of start-up, shut-down, malfunctions or upsets. Further, improper operation and maintenance practices do not qualify as malfunctions under EPA policy. *See* note 13, *supra*. To the extent that a malfunction provision, or any provision giving substantial discretion to the state agency, broadly excuses sources from compliance with emission limitations during periods of malfunction, EPA believes it should not be approved as part of the federally approved SIP. *See* In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, ("Pacificorp"), at page 23 (November 16, 2000), available on the Internet at: http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf.

In any event, as explained in the Pacificorp decision, "even if the provision were found not to satisfy the Act, EPA could not properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the 'applicable requirement' as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions." *See* Pacificorp at pages 23 and 24.

This position was reiterated in the December 2001 Clarification which confirms that the September 1999 Guidance provides guidance to States and EPA regarding SIP provisions related to excess emissions during malfunctions, startups, and shutdowns. It was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA. Similarly the September 1999 Guidance was not intended to affect existing permit terms or conditions regarding malfunctions, startups and shutdowns that reflect approved SIP provisions, or to alter the emergency defense provisions at 40 CFR § 70.6(g). Existing SIP rules and 40 CFR § 70.6(g) may only be changed through established rulemaking procedures and existing permit terms may only be changed through established permitting processes. Thus, EPA did not intend the September 1999 Guidance to be legally dispositive with respect to any particular proceedings in which a violation is alleged to have occurred. Rather, it is in the context

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[13] *See* Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," (Bennett Memo September 1982); Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," dated February 15, 1983 (Bennett Memo February 1983); Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation to Regional Administrators, Regions I - X, titled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated September 20, 1999 ("September 1999 Guidance"); and Memorandum from Eric Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards to Regional Administrators, titled "Re-Issuance of Clarification - State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,"dated December 5, 2001 ("December 2001 Clarification").

of future rulemaking actions, such as the SIP approval process, that EPA will consider the September 1999 Guidance and the statutory principles on which this guidance is based. *See* December 2001 Clarification at page 1.

EPA is not aware of, and the Petitioner has provided no evidence of, any instances where the DEC relied on these rules to provide blanket exceptions for non-compliance merely because the incidents were reported. Moreover, DEC's Responsiveness Summary demonstrates to EPA that the DEC's interpretation and application of section 201-1.4 is not inconsistent with the Act, as interpreted by EPA in its guidance. See Responsiveness Summary, Response to NYPIRG Comments re: General Permit Conditions at page 4.[14] EPA believes that the Commissioner is aware of the limits on the authority to excuse emission exceedances existing under the DEC's own regulations, and believes that it is unlikely that the Commissioner will exceed the discretion allowed under the State regulations. Accordingly, the petition is denied with respect to this issue.

With respect to the NYPIRG assertion that monitoring must be added to the permit to assure compliance, because the DEC Commissioner has discretion to excuse certain violations, any abuse of the excuse provision would be by DEC and not by the source for simply asking for the excuse. In accordance with the provisions of the title V permit, the source is required to monitor compliance, and any violation for which an excuse is sought will be included in the facility's deviation reports, semi-annual reports and annual reports. The Petitioner has not demonstrated that any additional monitoring of the source is required to assure proper exercise of the excuse provision by DEC.

In sum, Condition 5 relates to SIP provisions governing the exercise of enforcement discretion regarding excess emissions and does not, itself reduce the effectiveness of any applicable requirements derived from the SIP. The DEC's unavoidable non-compliance and emergency requirements are part of the approved SIP. Whether the SIP meets EPA's guidance is not an appropriate subject for an objection to a specific permit and is not a reason to object to the permit. Accordingly, the petition is denied on this point.

The following discussion is in response to the five additional specific points raised by the Petitioner.

1. With respect to the Petitioner's suggestion that terms addressed in the September 1999 Guidance be added to the permit, EPA concludes that it is not necessary for the DEC to restate the September 1999 Guidance in the permit. This guidance is policy and does not constitute an applicable requirement. *See* December 2001 Clarification. Accordingly, the petition is denied with respect to this issue.

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[14] The response reads, "This condition is as explicit as necessary and does not excuse or diminish, in any way, the accountability of a source for pollution exceedances. It sets forth a practical procedure for notifying the agency....[T]he agency uses engineering judgment on a case-by-case basis to make a determination as to the unavoidable status of an exceedance. The department also cannot exercise more discretion than federal requirements allow."

2. Regarding the issue of whether the DEC can excuse violations of a federal requirement, DEC's own rules do not authorize such expansion of the Commissioner's discretion. These rules provide that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). In its Responsiveness Summary, the DEC acknowledges that it "cannot exercise more discretion than federal requirements allow." *See* Responsiveness Summary, Response to Comments re: General Permit Conditions at page 4. In its November 16, 2001 letter, the DEC committed to include language from 6 NYCRR § 201-6.5(c)(3)(ii) on the federal side of permits. Therefore, the petition is denied with respect to this issue.

3. EPA disagrees with the Petitioner that definitions for "upset," and "unavoidable" must be included in the permit. The purpose of a title V permit is to ensure that a source operates in compliance with all applicable requirements. The lack of definitions for the terms "upset" or "unavoidable" do not render the permit unenforceable. These are commonly used regulatory terms, and are not so inherently vague as to render a permit using these terms practically unenforceable. Moreover, the Petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. Moreover, as discussed above, it is not appropriate for title V permits to revise or alter requirements of an approved SIP. Finally, moving the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, to the state side of the permit will further assure that the excuse provision is not expanded beyond its proper bounds. Therefore, the petition is denied with respect to this issue.

4. EPA also disagrees with the Petitioner that the permit must define reasonably available control technology (RACT) as it applies during startup, shutdown, malfunction and maintenance conditions. The DEC's current rules at 6 NYCRR § 201-1.4(d) and the SIP requirements at 6 NYCRR § 201.5 require facilities to use RACT during any maintenance, startup/shutdown, or malfunction condition. As explained above, EPA cannot properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the "applicable requirement" as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions. *See* Pacificorp at pages 23 and 24; *see also* December 2001 Guidance at page 1.

Moreover, 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 DEC Commissioner excuse an exceedence during times of startup, shutdown, malfunction or maintenance, RACT is determined by the DEC 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 during such a period of excess emissions will depend on both the nature of the violation and the technology available when the violation occurs. The SIP provision allows that determination to be made on a case-by-case basis by the DEC Commissioner if and when she chooses to exercise her authority to

excuse a violation. The applicable requirement associated with the emission unit at which the deviation occurred would be incorporated elsewhere in the permit, and this requirement would apply at all times, including during periods of startup, shutdown, malfunction and maintenance. The purpose of RACT is to mitigate the violation or exceedence of the applicable requirement until such time as compliance can once again be achieved. Therefore, the petition is denied with respect to this issue.

5. The Petitioner's final point is that the permit must require written reports of all deviations. The Starrett City title V permit only requires the permittee to inform DEC of an exceedance when seeking to exercise the excuse provision of 6 NYCRR § 201-1.4. Otherwise, the permit provides that written notifications be provided when requested to do so by the DEC Commissioner. Prompt reporting of deviations is required by 40 CFR § 70.6(a)(3)(iii)(B) which states: "Prompt reporting of deviation from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define 'prompt' in relation to the degree and type of deviation likely to occur and the applicable requirements."

Reporting in order to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See* Discussion in Part F *infra.* For a violation to be properly excused, the DEC must properly apply the regulation authorizing such discretion and must properly document its findings to ensure the rule was reasonably applied and interpreted. This issue is discussed in more detail below. Accordingly, the petition is also denied with respect to this issue.

F. Prompt Reporting of Deviations

The Petitioner's sixth claim is that the proposed permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). *See* petition at page 15. The Petitioner states that the only prompt reporting of deviations is that required by 6 NYCRR § 201-1.4, which governs unavoidable noncompliance and violations during necessary scheduled equipment maintenance, start-up/shutdown conditions and upsets or malfunctions. Thus, the Petitioner argues, any other deviations, including situations where the permittee could have avoided a violation but failed to do so, will not be reported until the 6 month monitoring report. The Petitioner alleges that 6 months cannot be considered "prompt reporting." NYPIRG contends that the EPA must object to the Starrett City permit because it lacks a condition to require prompt reporting of all deviations.

In general, EPA agrees with the Petitioner's comment. EPA raised this issue with the DEC in the July 18, 2000 letter at Attachment III, item 2. However, while Condition 5 of Starrett City's title V permit refers only to unavoidable violations, prompt reporting of deviations is required by other portions of the permit.

States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. In any case, States are required to

consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. As discussed above, EPA does not consider reports submitted for the purpose of preserving potential claims of an excuse to meet prompt reporting requirements because these reports are optional, and they may not include all deviations, instead only those potentially unavoidable violations that the source seeks to have excused. All deviations must be reported regardless of whether the source qualifies for an excuse. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case concern 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).[15]

In this case, there are several provisions in the title V permit that appropriately require that prompt reports be made to the DEC (Conditions 33, 34, 53, 55, 57, 66, 68 and 70). These relate to the daily monitoring for opacity. That is, when daily observances require that a Method 9 test be performed, and that test indicates a violation, the facility owner/operator must contact the DEC representative within one business day of the test. This is an appropriate use of the prompt reporting mechanism as it gives discretion to the DEC representative whether to require that a written timely report be filed within a relatively short time frame (in cases where the contravention is significant), or whether to defer the written report until the 6-month monitoring report. In either case, the source will provide a written report of the incident. Where once per permit-term stack tests are required for NO_x emissions, the test protocols will set forth the reporting requirements of the test results. Normally, test results must be reported within 30-days of the test. Finally, the sulfur content of the fuel-oil must be monitored by submission of a report, from the supplier to the facility, for each fuel-oil delivery. Because it is highly unlikely that fuel-oil outside of the specifications would be delivered and used, deferring the monitoring reports to the 6-month report is also appropriate in this case. Thus, EPA denies the petition on this issue.

EPA has addressed this issue with the DEC in order to clarify how it will properly exercise this discretion. In its November 16, 2001 letter, DEC agreed that it will include a requirement for reporting deviations consistent with 6 NYCRR § 201-6.5(c)(3)(ii). Based on EPA's program review, the DEC is substantially meeting this commitment. *See* note 3, *supra*. While this regulation requires inter alia that deviations be reported at least every six months, DEC stated that it will specify less than six months for "prompt" reporting of certain deviations that result in emissions of, for example, a hazardous or toxic air pollutant that continues for more than an hour above permit limits. EPA finds DEC's new standard permit condition that sets forth the procedures for prompt reporting to be reasonable and compatible with the federal regulations at 40 CFR § 71.6(a)(3)(iii)(B). When prompt reporting of deviations is required, the reports will be submitted to the DEC, in writing, certified by a responsible official, and in the time frame established in the permit condition. As discussed in detail in Section G, below, EPA is granting in part the NYPIRG petition for Starrett City. Therefore, when DEC revises the permit in response to this Order, it will also incorporate these additional prompt reporting requirements into

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[15] These provisions detail the prompt reporting requirement applicable to sources under the federal operating permit

the permit as committed in the DEC's November 16, 2002 letter.

G. Monitoring

The Petitioner's seventh claim is that the proposed Starrett City permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack monitoring that is sufficient to assure the Permittee's compliance and are not practicably enforceable. *See* petition at page 17. The Petitioner addresses individual permit conditions that allegedly either lack monitoring or are not practicably enforceable.[16] The specific allegations for each permit condition are discussed below.

Sections 504 (a) and (c) of the Act makes it clear that each title V permit must include "conditions as are necessary to assure compliance with applicable requirements of [the Act], including the requirements of the applicable implementation plan" and "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." In addition, CAA § 114(a) requires "enhanced monitoring" at major stationary sources, and authorizes EPA to establish periodic monitoring, recordkeeping, and reporting requirements at such sources. *See also* CAA section 504(b) (EPA may promulgate regulations under Title V prescribing procedures and methods for monitoring that are sufficient for determining compliance).

The regulations at 40 CFR § 70.6(a)(3) specifically require that each permit contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may

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

consist of recordkeeping designed to serve as monitoring). In addition, 40 CFR § 70.6(c)(1) requires that all part 70 permits contain "compliance certification, testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." These requirements are also incorporated into New York's regulations at 6 NYCRR § 201-6.5(b).

Decisions by the U.S. Court of Appeals for the District of Columbia Circuit shed light on the proper interpretation of these requirements. Specifically, the court addressed EPA's compliance assurance monitoring ("CAM") rulemaking (62 Fed. Reg. 54940 (1997) (promulgating, inter alia, 40 CFR part 64) in Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Cir. 1999), and reviewed EPA's periodic monitoring guidance under title V in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

EPA first summarized the relationship between Natural Resources Defense Council and Appalachian Power and described their impact on monitoring provisions under the Act in two orders responding to petitions under title V requesting that the Administrator object to certain permits. *See* Pacificorp and Fort James Camas Mill. Please see pages 16 through 19 of the Pacificorp Order for EPA's complete discussion of these issues. In brief, given the clear, multiple statutory directives for adequate monitoring in permits, and in accordance with the D.C. Circuit decisions, EPA concluded that where the applicable requirement does not mandate any periodic testing or monitoring, the requirement of § 70.6(c)(1) that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." *See* 40 CFR § 70.6(a)(3)(i)(B). EPA also pointed out that where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, the court of appeals has ruled that the periodic monitoring rule in 40 CFR § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such circumstances, EPA found, the separate regulatory standard at 40 CFR § 70.6(c)(1) applies instead. Furthermore, where 40 CFR § 70.6(a)(3)(i)(B) applies, it satisfies the general sufficiency requirement of 40 CFR § 70.6(c)(1). The factual circumstances of Pacificorp and Fort James Camas Mill are analogous to this case. Accordingly, the reasoning of those decisions is being followed in this case as well.

Facility-Specific Petition Issues

1. Effective Dates in Conditions

The Petitioner describes a general concern with the way in which the Starrett City permit was written. That is, in addition to the provision in the front page of the permit stating that the permit will expire on November 9, 2005, a clause has been added to each specific condition in the permit, stating that the permit term is: "effective between the dates of 11/10/2000 and 11/09/2005." NYPIRG's asserts that including the aforementioned clause with each permit term is not the correct way to limit the overall permit term. The

Petitioner contends that by adding this clause, if a renewal permit is not issued prior to expiration of the current permit, then each permit term will expire on 11/9/2005, even if the permittee submits a complete and timely application (that is, there would be a "hollow" permit, without most applicable requirements). Alternately, if permit expiration is only referenced on the front page of the permit, then the terms would remain in effect if a complete renewal application is timely submitted, but a renewal permit is not issued before the current one expires, and all terms will remain enforceable. *See* petition at pages 17 and 18.

EPA disagrees with the Petitioner that the Starrett City permit will become a "hollow" permit if the renewal permit is not issued before the original permit expires. In accordance with the CAA and Part 70, the DEC regulations at 6 NYCRR § 201-6.7(a)(5) clearly state that *all terms and conditions* of a permit shall automatically continue while DEC reviews the renewal application. The Petitioner'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. 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. Because the Petitioner's assertion is without basis, EPA denies the petition on this issue.

2. <u>Conditions 7 and 8 (Air Contaminants in Control Devices)</u>

The Petitioner next alleges that two conditions of the draft permit, Conditions 7 and 8, addressing the handling of air contaminants collected in an air cleaning device, should not be included if Starrett City does not operate control devices. If Starrett City does have control devices, then the Petitioner asserts that the conditions should include sufficient monitoring requirements. *See* petition at page 18. DEC responded that these conditions are in all permits regardless of whether the facility has air pollution control devices. *See* Responsiveness Summary re: General Permit Conditions at pages 4 and 5.

Permitting authorities have discretion to include as general permit conditions, language from general provisions of the SIP. EPA believes that many facilities, although not subject to any specific applicable requirement, maintain control equipment. Thus, including this generic SIP condition in title V permits is proper. However, in order to alleviate any confusion that this general condition may cause, DEC has been advised that its statement of basis should describe the control devices that are installed at the facility. *See* July 18, 2000 letter at Attachment II, item 7.

Furthermore, EPA disagrees with the Petitioner that periodic monitoring must be added to this provision. As a general matter, where control equipment is installed under an applicable requirement or a source chooses to employ such equipment, appropriate permit conditions are included in the emission units section of the title V permit, not in the general permit condition section. In this particular case, because Starrett City is not subject to any

requirements to operate and maintain a control device, no specific periodic monitoring for control equipment is necessary. For other permits, where a control device is maintained, any necessary monitoring would be provided under the emissions unit section of the title V permit, and not under the general permit condition section. Therefore, EPA denies the petition on this issue.

3. Condition 12 (Operation in Accordance With Applicable Plans)

The Petitioner next asserts that Condition 12 in the draft permit, the general condition which states that the facility shall operate in accordance with any accidental release plan, response plan or compliance plan, is problematic because the requirements in these documents should be incorporated into the permit as permit terms. If not incorporated, the Petitioner asserts that such documents should be clearly cross-referenced in the permit. The Petitioner also suggests that this general condition should be deleted from the permit altogether since it adds nothing to the permit. *See* petition at page 19.

EPA disagrees with the Petitioner that all types of plans must be a part of a title V permit. In certain cases, a facility must comply with a plan that is not part of the title V permit. For instance, risk management plans under CAA § 112(r) need not be incorporated into title V permits. Thus, DEC's general condition is useful to the title V permit since it also serves to remind the source and the public of those plans that are not part of the title V permit. The general condition can serve as a reminder to the permittee to comply with and apply for requisite permit amendments on a timely basis. Therefore, this facility-level condition does serve a purpose.

However, EPA does agree that certain documents should be properly cross-referenced in title V permits. For example, where a facility is subject to plans such as a NO_X RACT plan or a start-up, shut-down and malfunction plan under a maximum achievable control technology (MACT) standard, the permit must specifically say so, and properly incorporate that plan by reference. In this case there is no allegation that this facility requires such a plan or plans.

Because the Petitioner does not allege any specific plans that should have been, but were not included in the permit as an applicable requirement, EPA denies the petition on this issue.

4. Condition 14 (Risk Management Plans)

The next allegation of the Petitioner relates to a general permit condition, Condition 14 of the title V permit, which states that: "[r]isk management plans must be submitted to the Administrator if required by Section 112(r)." The Petitioner alleges that this condition should state whether the facility is or is not subject to CAA § 112(r). *See* petition at page 20.

While EPA agrees with the Petitioner that this provision is very general and does not affirmatively state whether CAA § 112(r) applies to this particular source, we do not believe that the absence of such a determination provides a basis for EPA to object to this particular permit. Starrett City did not submit a Risk Management Plan (RMP) to EPA under CAA § 112(r) and 40 CFR part 68[17] and, based on information provided in the permit application, given what we know about this source with respect to the type of emission activities at the facility, it is reasonable to assume that Starrett City is not subject to these statutory and regulatory requirements. Accordingly, EPA finds that DEC's failure to specify whether Columbia is subject to § 112(r) and part 68 was therefore at most harmless error[18] that did not prejudice the Petitioner or hinder the Petitioner's ability to obtain clarification on this issue.

Furthermore, DEC did not take delegation of CAA § 112(r) and, therefore, EPA is responsible for implementing such requirements in New York. Because all applicable requirements must be in title V permits, during the early stages of implementation of New York's title V program, EPA asked the DEC to include a general requirement regarding CAA § 112(r) in all permits (based on language prepared by EPA). DEC has included such general language on CAA § 112(r) in all title V permits as requested by the EPA, and although we agree with the Petitioner that this condition is not optimal, as discussed above, the circumstances of this case do not warrant objecting to the permit and, therefore, the petition is denied on this issue.

5. Condition 27 (Required Emissions Tests)

The Petitioner next comments that Condition 27 of the draft permit, "Required Emissions Tests," includes everything required under 6 NYCRR § 202-1.1 except the requirement that the permittee "bear the cost of measurement and preparing the report of measured emissions." *See* petition at page 20. The Petitioner goes on to cite EPA's "White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program" ("White Paper 2"), which states that it is generally not acceptable to use a combination of referencing certain provisions of an applicable requirement while paraphrasing other provisions of that same requirement.

EPA notes that the language cited by the Petitioner is from the fifth paragraph of section II.E.3 of White Paper 2, which also states that such a practice (i.e., using a

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[17] All Risk Management Plans (RMP) are filed with EPA and EPA can verify the submission of an RMP by contacting the RMP Reporting Center at (703) 816-4434.

[18] *See e.g.* Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States, 377 U.S. 235, 248 (1964) (an error can be dismissed as harmless "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached"); Braniff Airways, Inc. v. Civil Aeronautices Bd., 379 F.2d 453, 466 (D.C. Cir. 1967) ("The Supreme Court's opinion reflects the concern that agencies not be reversed for error that is not prejudicial.").

combination of referencing certain provisions and paraphrasing other provisions), particularly if coupled with a permit shield, could create dual requirements and potential confusion. The subject condition from the Starrett City title V permit unambiguously states that 6 NYCRR § 202-1.1 is an applicable requirement. The specific regulatory citation is unambiguous that the requirements of 6 NYCRR § 202-1.1 apply to Starrett City. Omitting who shall bear the cost of conducting and reporting mandatory emissions tests does not relieve the permittee from performing and reporting such tests. For these reasons, the EPA finds no harm in the omission from the permit of the language cited by the Petitioner, and notes that such additional language is unnecessary. As such, the petition is denied with respect to this issue.

6. Condition 30 (Visible Emissions Limit)

The next allegation made by the Petitioner is that the permit lacks any kind of monitoring to assure compliance with the applicable opacity limitation found in the SIP at 6 NYCRR § 211.3. *See* petition at page 20. The Petitioner specifically points to condition 30 of the draft permit which prohibit the emissions units at Starrett City from exceeding 20 percent opacity over a six minute average, and 57 percent opacity in any single 6 minute period during each hour. The Petitioner refers to DEC's Responsiveness Summary, which states that the requirement for these conditions are in the SIP and apply to all sources. *See* Responsiveness Summary, Responses to NYPIRG Comments re: General Permit Conditions at page 7. NYPIRG concedes that DEC added monitoring for this applicable requirement, incorporated into the title V permit at conditions 33 and 34.

However, the Petitioner asserts that these permit provisions are unacceptable because a Method 9 test to determine opacity does not have to be scheduled until visible emissions are observed for two consecutive days, and then the facility has an additional two days to perform the test. The Petitioner further alleges that the DEC must explain in a statement of basis why continuous opacity monitors (COMs) are not required. If DEC concludes that COMs are not necessary because the facility is not likely to violate the opacity standard, or COMs are not technically or economically feasible, then the permit must require that the facility maintain a person at all times trained in Method 9 readings who can conduct a reading within one hour after visible emissions are observed. In its petition, NYPIRG asserts that the permit must incorporate additional terms relative to: (a) qualifications of the daily observer; (b) details about the daily observation; (c) details about the Method 9 testing; (d) details about recordkeeping; (e) details about reporting; and (f) a requirement that the observer check for visible emissions at a specific time each day to preclude the observer from waiting until there are no visible emissions. *See* petition at pages 20 through 23.

The November 10, 2000 title V permit contains 3 conditions that relate to this issue, Conditions 32, 33 and 34, all of which are listed within the facility-level section of the permit. Condition 32 delineates the requirements of 6 NYCRR § 211.3 of the SIP, and

conditions 33 and 34 include the monitoring associated with this applicable requirement, relative to the 57 percent opacity limit and the 20 percent opacity limit, respectively. Each of the latter 2 conditions require daily observances by a facility employee of non-exempt stacks and vents and the recording of certain information in a logbook. If any visible emissions other than a steam plume are observed for 2 consecutive days, then the facility must conduct a Method 9 analysis within 2 business days thereafter.

A discussion on the daily monitoring provision is warranted to address the Petitioner's concerns. Historically, opacity exceedances at the Starrett City facility do not seem to occur. First, over the past several years, routine DEC inspections have indicated that the facility has been in compliance with applicable opacity requirements. Second, use of low sulfur fuel-oil means lower particulate emissions and opacity.

With respect to continuous opacity monitors, or COMS, this type of monitoring is more widely used in coal-fired applications or where higher sulfur fuel-oil is burned, and where control equipment such as fabric filters (baghouses) or electrostatic precipitators are employed. Monitoring less frequently than on a "continuous" basis is appropriate where, as here, there exists a reasonable assurance of compliance over all operating conditions; that is, when there is a low variability of emissions and an ample margin of compliance.

The Petitioner also raised concerns about the daily monitoring for visible emissions at the facility, including the qualifications of the observer and the timing of notifying the DEC, among other concerns. The facility observer referenced in Conditions 33 and 34 of the title V permit would not likely be a certified visible emission "reader." The facility observer identifies any visible emissions from the stack, whether or not such emissions would constitute an opacity violation and if such visible emissions are observed for two consecutive days, then the facility is required to make arrangements to have a Method 9 evaluation performed by a certified smoke reader.

It is the EPA's belief that the two-day time frame for this next step to occur is reasonable and appropriate because of the size of the unit and the type of fuel being burned at the facility. Similarly, EPA believes that the next step of the process is also reasonable. If an opacity violation has been documented under Method 9, then the facility must notify the DEC within one business day of the Method 9 opacity test. It must be noted that the visible emissions observances by the facility employee are not Method 9 readings and, therefore, the requirements of Method 9 do not apply. In addition, EPA does not agree with the Petitioner that the facility observer should make his or her observations at the same time each day. Such a constraint would not provide for needed flexibility due to weather problems or the operational status of the facility (i.e., whether the facility was operating in whole or in part). In the absence of using COMs, which in the case of Starrett City does not appear to be economically appropriate or reasonable based on the reasons discussed above, the monitoring procedure delineated in the aforementioned conditions is appropriate.

In conclusion, daily observations for visible emissions are appropriate in this case. There is no applicable requirement that specifically requires Starrett City to install and maintain COMs. Nor, as explained above, does title V require the installation of COMs under the circumstances of this case. Additionally, neither title V nor any applicable requirement to which this facility is subject require that the facility have on the premises at all times a person trained in Method 9 readings who can conduct a reading within one hour after visible emissions are observed. Not all facilities have environmental or plant managers who are trained in Method 9 readings. Therefore, DEC's decision to require a Method 9 reading two days after observing visible emissions over a two day period is acceptable. This time frame is necessary for the facility to hire a trained Method 9 reader. Furthermore, the permit requires that the facility maintain a logbook of all readings. Therefore, conducting daily visible inspections and logging the results of such inspection is adequate to assure that the facility complies with the 20 percent and 57 percent opacity standards.

Because EPA finds that monitoring for the opacity requirement of 6 NYCRR § 211.3 is adequate, we deny the petition on this issue.

7. Conditions 34 and 35 (Sulfur Limitations)

The Petitioner's next comment relates to Conditions 34 and 35 of the draft permit, which address the sulfur-in-fuel requirements for the Starrett City facility. *See* petition at page 23. The first issue raised by NYPIRG is that a statement of basis for this permit must explain why retaining fuel supplier certifications is sufficient to assure compliance with this requirement. In addition, the Petitioner alleges that the provisions for monitoring the sulfur requirements of 6 NYCRR § 225 are inadequate given that Starrett City is never required to independently test the fuel delivered to the facility. NYPIRG asserts that the DEC response that random sampling of fuel suppliers is an effective means of utilizing limited resources to enforce the sulfur-in-fuel requirements is unsatisfactory. *See* Responsiveness Summary, Comments on Specific Draft Permit Conditions at page 6. And lastly, the Petitioner points out that Condition 34 of the draft permit does not cite the correct applicable requirement. The current New York State regulation, which is the one cited, has not been approved into the SIP. *See* petition at page 23.

EPA agrees that a discussion of monitoring for sulfur-in-fuel was not incorporated into a statement of basis, because such a document was not prepared with this draft permit. As discussed in section C, above, EPA denies the petition with respect to this issue. However, because EPA is granting this subject petition in part, which will require that the Starrett City permit be revised and undergo a subsequent public participation process, a permit review report will be prepared at that time, and such a report should address the basis for the monitoring included in the title V permit, including the monitoring related to sulfur-in-fuel applicable requirements.

The monitoring condition to obtain fuel supplier certifications is appropriate for the sulfur-in-fuel applicable requirement for the Starrett City facility. A number of regulations rely on certifications, a responsibility that most sources and suppliers must take seriously to avoid liability for substantial penalties. While some sources may not comply with this requirement, and spot monitoring can be helpful in identifying them, fuel certification is the method that EPA itself relies on in certain instances (e.g., certain NSPS rules and PSD permits, permit provisions). The Petitioner has presented no facts to suggest, let alone demonstrate, that the supplier's certification is not adequate to assure Starrett City's own compliance with the fuel sulfur limitation. While ever more stringent monitoring requirements can always be applied, it is necessary to use methods that are appropriate to the case at hand, based on the applicable requirement, the type and size of the facility, economics, facility location, and other factors, while avoiding the imposition of gratuitously, onerous conditions on the source.

EPA agrees with the Petitioner that sulfur-in-fuel requirements should be identified as federally-applicable requirements. The current State version of the rule (6 NYCRR § 225-1) is only enforceable by DEC, while the SIP version (6 NYCRR § 225.1) is enforceable only by EPA and the public. EPA and NYPIRG have noted that the two regulations are environmentally equivalent. However, the rule pertaining to "Fuel Consumption and Use" at 6 NYCRR § 225.1(a)(3), although no longer a current New York State regulation, remains in the SIP and is therefore federally enforceable. The SIP-approved regulation is the applicable requirement that must be included in the title V permit. Therefore, when DEC reopens the permit to make the other changes required by this Order, the DEC should cite the correct applicable requirement, the SIP provision at 6 NYCRR § 225.1(a)(3), in Conditions 36 and 37 of the title V permit. It would be improper to cite the current State requirements, at 6 NYCRR §§ 225-1.2(a)(2) (for Condition 36) and 225-1.8 (for Condition 37), on the federal side of the permit because these rules have not been federally-approved into the New York SIP. Upon reopening of the permit, DEC should change the citation for these two provisions to 6 NYCRR §§ 225.1(a)(3) and 225.7, respectively. EPA understands, however, that New York no longer has these regulations on its books. Therefore, an alternate method of citing the applicable SIP regulations would also be acceptable; for example, citing the regulations at 40 CFR part 52, Subpart HH.[19]

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[19] For example, in the title V permit issued to the Bristol-Myers Squibb Company, Inc. (DEC Permit No. 7-3126-00016/00263), condition 51, which delineates particulate matter requirements for a facility boiler, cites as the applicable requirement 40 CFR 52, Subpart HH and states, in part: "Monitoring Description: Pursuant to Section 110 of the Federal Clean Air Act, the EPA approved, as part of New York's State Implementation Plan, a regulation for the control of particulate matter. The Department has since revised this rule, changing the applicability criteria and the numerical limits. The revisions, however, have not been approved by the EPA. This condition requires compliance with the rule as it is contained in the federally- approved SIP. This requirement was previously cited as 6NYCRR Part 227.2(b)(1) and is listed in the table of EPA-approved New York State regulations sited under 40 CFR 52.1679 Subpart HH. The requirement is stated as follows:"

Therefore, EPA grants in part and denies in part the petition on these issues.

8. Condition 36 (NO_x RACT Plan)

The Petitioner next alleges that while the permit indicates that Starrett City is subject to NO_x RACT (in Condition 36 of the draft permit), it fails to indicate whether a NO_x RACT plan was submitted by the facility. *See* petition at page 24. And while DEC responded to NYPIRG that the facility submitted a NO_x RACT plan on April 24, 1995 (*See* Responsiveness Summary, Comments on Specific Draft Permit Conditions at page 7), the Petitioner contends that such information must be incorporated into a statement of basis, and requirements included in the NO_x RACT plan must be included in the permit.

Inclusion in a title V permit of a statement that a facility is subject to an applicable requirement is appropriate. The permit condition need not delineate when and whether submission of a NO_x RACT plan was made. However, EPA agrees that the place for discussion of such information is the statement of basis. In this case, such information was not incorporated into a statement of basis because, as previously indicated, such a document was not prepared with this draft permit (refer to the discussion regarding the Statement of Basis in section C, above). Nonetheless, because EPA is granting this subject petition in part, which will require that the Starrett City permit be revised and undergo a subsequent public participation process, a permit review report will be prepared at that time, and such a report should address the requirements associated with being subject to NO_x RACT, including the fact that a NO_x RACT plan was submitted as required.

EPA also agrees with the petitioner that requirements of the NO_x RACT plan are applicable requirements and should be incorporated into the title V permit. Here, these requirements are not included in the Condition identified by Petitioner but in other provisions of the permit. This issue is discussed in detail in section G.9, G.11and G.12, below.

EPA denies the petition on this issue

9. Conditions 40-47 (NO_x Emission Limit for Boilers)

The Petitioner's next allegation relates to Conditions numbered 40 through 47 of the draft title V permit, relating to NO_x emission limits for the facility's boilers. *See* petition at page 24. The Petitioner acknowledged that in response to its comment to DEC that the draft permit lacked monitoring, DEC incorporated a requirement that the facility perform one stack test during the term of the permit. NYPIRG alleges that such monitoring is still not adequate to assure compliance and asserts that the facility must be required to perform annual stack testing, supplemented with other monitoring and maintenance activities sufficient to assure compliance.

The Petitioner also contends that it is likely that the requirement to perform one stack test during the term of the permit (i.e., once every 5 years) will not be met because the DEC will not renew the permit in a timely manner. That is, the current permit will expire before the renewed permit is issued and, thus, the permit provisions will be in effect for a period longer than 5 years.

Finally, NYPIRG states that the permit must be clarified with respect to the NO_x emission limit. The permit lists the limit as: "upper limit of monitoring: 0.3 pounds per million Btus." The Petitioner asserts that stating the limit in this manner is not the same as stating that the facility may not exceed 0.3 lbs/MMBtu.

EPA agrees with the Petitioner that additional monitoring needs to be incorporated into the title V permit to assure compliance with NO_x RACT requirements for the four 143.5 MMBtu per hour natural gas and oil-fired boilers. In addition to the requirement to perform one stack test during the term of the permit, DEC must incorporate provisions that require annual tune-ups for each boiler. That is, the facility must perform an annual tune-up on each of the four boilers, and must maintain a log containing the date of the tune-up, a list of the items adjusted during the tune-up, and the name, title and affiliation of the person that performed the tune-up. Appropriate information from such activities should be included in the 6-month monitoring report and the annual compliance certification report. In addition, documentation on these tune-ups should be retained at the facility for a period of 5 years. Pursuant to Condition II.2 of the "Special Conditions" section of DEC's May 22, 1996 State facility operating permit, such tune-ups should ensure that boiler controls are calibrated and maintained so as to continue low-NO_x operation. The person or persons performing the tune-up should use data from the most recently-performed and approved stack test. Data from the August, 1995 stack test should be used until such time as the stack tests required pursuant to conditions 42 through 49, inclusive, are performed and the results approved by the DEC. It is the EPA's position that the addition of these annual tune-ups together with the stack testing requirement will provide the monitoring necessary to assure compliance with the NO_x RACT requirements for these boilers. These same monitoring requirements have been incorporated by DEC in other title V permits for similar facilities and units (*see* the Yeshiva title V permit). Accordingly, EPA grants the petition on this issue.

EPA does not agree with the Petitioner's assertion that the facility will likely not be issued a renewal permit in a timely manner. First of all, there is no documentation or other evidence provided by NYPIRG to support such an allegation. Additional monitoring requirements or other conditions cannot be incorporated into title V permits based on speculation. EPA believes that it is likely that renewal permits will be processed more expeditiously than the initial permits which were processed by the DEC while concurrently developing and implementing its operating permits program. Therefore, EPA denies the petition on this issue.

Finally, EPA denies the petition regarding NYPIRG's assertion that the NO_x

emission limit in the permit must be clarified. The actual numerical limit is taken directly from the applicable regulation, which is specifically cited at the beginning of each permit condition. The terminology used in the permit, of "upper limit of monitoring," is based upon DEC's application instructions which require the applicant to list, under "limit" the limits, where applicable, which pertain to the monitoring requirement. We have noticed that in recent permits DEC has changed the term to "upper permit limit." *See, e.g.*, Action Packaging Corp., DEC Permit No. 2-6105-00168/00002, effective Sept. 26, 2002; Kings Plaza Total Energy Plant, DEC Permit No. 2-6105-00301/00010, effective Sept. 16, 2002. This confirms our understanding. While the language "upper limit of monitoring" may be confusing, it does not rise to the level of an objectionable issue in this permit.

10. Conditions 48-55 (Opacity Limits for Boilers)

The next assertion by the Petitioner is that the monitoring requirements for opacity limits on the boilers is insufficient to assure compliance with the applicable requirement of 6 NYCRR § 227-1.3(a). These monitoring requirements were listed in the draft permit under condition numbers 48 through 55. *See* petition at page 24. In addition, the Petitioner alleges that the permit includes "credible evidence buster" language by stating compliance is 'based upon the six minute average in reference test Method 9 in Appendix A of 40 CFR 60.' NYPIRG asserts that such language makes Method 9 the exclusive benchmark for demonstrating compliance, and precludes the use of other credible evidence in demonstrating noncompliance. Finally, the Petitioner noted that in a comment to DEC, there was reference in a March 9, 1998 inspection report that each boiler has an alarm setting for when opacity reaches 15 percent, and requested that these alarms be incorporated into the title V permit for monitoring of opacity at the four boilers.

With respect to the adequacy of the opacity monitoring for these boilers, DEC has incorporated daily observances by a company representative, equivalent to the general monitoring provisions established in Conditions 33 and 34 of the title V permit, as described in section G.6, above. That is, monitoring to assure compliance with the opacity requirements of 6 NYCRR § 227-1.3(a) for the 4 boilers are delineated in conditions 50 through 57 of the Starrett City title V permit. This monitoring is equivalent to that required in conditions 33 and 34. Similar to the discussion presented in section G.6 of this Order, above, it is EPA's position that this opacity monitoring for the 4 boilers is also adequate to assure compliance with the opacity requirements of 6 NYCRR § 227-1.3(a). Therefore, the petition is denied with respect to this issue.

EPA also disagrees with the issue raised by the Petitioner regarding "credible evidence buster" language. Nothing in the permit limits EPA, DEC or citizens from using any credible evidence to bring an enforcement action for opacity violations. The Starrett City permit does not say Method 9 is the sole or exclusive method used to determine compliance. The permit accurately recites that Method 9 is the official "reference test" method provided in the SIP opacity limit for the purpose of determining compliance. As EPA explained in adopting its credible evidence rules, this means that reference tests, such as the Method 9 test in this case, performed as specified under EPA and State regulations

are the benchmark against which to compare other emissions or parametric data, or engineering analyses, regarding source compliance. See 62 Fed. Reg. 8314 (Feb. 24, 1997). The permit does not, however, say that Method 9 is the sole or exclusive method used in demonstrating compliance or non-compliance. Rather, the permit condition states that: "Compliance Certification shall include the following monitoring" and thus, does not preclude the use of any other method for determining compliance. In addition, the SIP regulation at 6 NYCRR § 227-1 states in part that: "Compliance with the opacity standard may be determined by....or, (3) *considering any other credible evidence*." *See* 6 NYCRR § 227-1.3(b) (emphasis added). Therefore, EPA denies the petition regarding the alleged use of credible evidence buster language.

With respect to NYPIRG's final issue, EPA has reviewed the March 9, 1998 inspection report and has discussed the alarm setting notations with the DEC inspector. Starrett City appears to have oxygen monitors or analyzers installed with each boiler. This may be a requirement or recommendation made by the City of New York, or something the facility decided to install of its own accord. These oxygen monitors appear be set to some percentage of oxygen that corresponds to an opacity level of 15 percent (that is, correlating the efficiency of the operation of the boiler in terms of the amount of oxygen in the system, to the projected opacity emanating from the stack), at and above which an alarm would sound. According to the DEC, such a methodology is not one that they require; nor is this a federal requirement. The cited DEC inspection report (dated March 9, 1998) simply states the documentation from and associated with these oxygen monitors for informational purposes. As such, EPA believes that the monitoring scheme in the current permit is sufficient and supports the DEC in its position not to incorporate this "alarm" system for the opacity requirements of 6 NYCRR § 227-1.3(a) and, therefore, the petition is denied with respect to this issue.

11. Condition 56 (NO_x Emissions Recordkeeping for Engines)

The Petitioner's next allegation relates to recordkeeping of NO_x emissions from the three internal combustion engines, as delineated in Condition 56 of the draft title V permit. *See* petition at page 25. Specifically, NYPIRG commented that the DEC did not incorporate into the title V permit a number of provisions from a previously-issued State operating permit, dated May 22, 1996. The Petitioner contends that while several of the provisions were incorporated into the final title V permit, two provisions have still not been included; these are: (1) using data from the August 1995 stack test, boiler controls shall be calibrated and maintained such that the boilers continue low-NO_x operation as tested in August 1995; and (2) the reciprocating engines shall be physically limited to operating at a maximum of 1875kw output in dual fuel mode or 2000kw output in diesel-only mode. In addition, NYPIRG asserts that the subject recordkeeping provision in the title V permit does not include adequate monitoring, recordkeeping and reporting requirements to assure compliance, and the condition is unenforceable as a practical matter because the public does not have access to "Appendix J" of the August, 1995 stack test. The Petitioner also contends that this permit condition fails to cite the pre-existing permit as the underlying

source of the conditions. And finally, NYPIRG opines that the DEC lacks the authority to exempt Starrett City from applicable requirements during startup, shutdown and malfunction, yet the title V permit condition, as written, allows such an exemption.

Petitioner here refers to Condition 56 of the draft permit which became Condition 58 in the final permit. Condition 58 in the title V permit issued on November 10, 2000 states, in part: "The reciprocating engines shall have relays installed so that valve timing is maintained along the revised curves described in Appendix J derived from August 1995 stack test. The reciprocating engines shall not operate below 1000KW output except during periods of start up, shutdown, and malfunction."

With respect to the two items noted by the Petitioner from a previously-issued State operating permit, but omitted from the title V permit, the first item, item (1), does not apply to this condition because it refers to operation of the four boilers, and not the internal combustion engines. Calibration and maintenance of these boilers will be addressed via a requirement to be incorporated into the title V permit that the facility perform annual tune-ups on these emission units to ensure continued low-NO_x operation. *See* section G.9, above. With respect to the second item, item (2), EPA agrees with the Petitioner that such a provision either needs to be incorporated into Starrett City's title V permit or, if the DEC believes that these requirements are not necessary, then such requirements need not be incorporated into the Starrett City title V permit but such a decision must be noted in the permit review report and must undergo the proper public participation requirements.

EPA agrees with the Petitioner that permit condition 58 of the November 10, 2000 title V permit issued to Starrett City needs to be revised to incorporate additional monitoring, and to strengthen the practicable enforceability. With respect to the additional monitoring, the Starrett City permit should incorporate requirements that were incorporated into other, similar permits for similar units. *See*, e.g., North Shore Towers Apartments, Inc. (DEC Permit No. 2-6307-00339/00002). That is, the Starrett City permit should incorporate the requirement to maintain hourly records for each engine of the kilowatt output and the operating mode (i.e., whether firing only number 2 fuel-oil, or firing both number 2 fuel-oil and natural gas, the dual-fuel mode). In addition, the DEC requires the facility to demonstrate, by such kilowatt output recording, that the valve timing will be maintained along the revised curves in Appendix J of the August, 1995 stack test, and a copy of this appendix will be made part of the permit. With respect to this latter provision, Appendix J should by used and/or referred to only until such time as a more recent stack test is performed and the results approved by the DEC. Thereafter, a chart of revised curves should be compiled and used for the purposes of the monitoring described above.

Finally, EPA does not agree that Condition 58 needs to be revised to delete reference to operational exemptions during periods of startup, shutdown and malfunction. The referenced language comes directly from the "Special Conditions" section of the May 22, 1996 State facility permit, Condition II.3, which was issued in accordance with the NY SIP and, thus, is a federally-applicable requirement. The condition means that operation

below 1000kw is not normal operating mode. In addition, the kilowatt output must decrease to zero during times of shutdown and, conversely, will increase from zero during times of startup (the output will also likely be affected during any malfunction). This condition, however, is separate from those conditions that list the NO_x emission limit of 9.0 grams per brake horsepower-hour (conditions 59 through 64 of the title V permit). There are no exemptions during periods of startup, shutdown and malfunction from the subject emission limit for the 3 engines in these conditions. Therefore, EPA denies the petition with respect to this issue.

Therefore, as described above, the EPA grants in part and denies in part the petition on this issue.

12. Conditions 57-62 (NO_x Emission Limit for Engines)

The Petitioner next references Conditions 57 through 62 of the draft Starrett City permit, which relate to the NO_x emission limit for the engine-generators, and alleges that the requirement to perform one stack test during the term of the permit is inadequate to assure ongoing compliance. Also, NYPIRG asserts that the NO_x permit emission limit, which lists the "upper limit of monitoring" as 9.0 grams per brake horsepower hour, is unclear and is not the same as stating that the engines may not exceed such a limit. *See* petition at pages 25 and 26.

EPA agrees with the Petitioner that the permit conditions of the November 10, 2000 title V permit issued to Starrett City need to be revised to incorporate additional monitoring (the subject conditions are numbered 59 through 64 in the title V permit). With respect to the additional monitoring, the Starrett City permit should incorporate requirements that were incorporated into other, similar permits for similar units. *See*, e.g., North Shore Towers. As such, the Starrett City title V permit should incorporate the requirement to perform tune-ups of each engine annually and maintain in a log book the adjustments made, the date of the tune-up, and the name, title and affiliation of the person or persons that performed the tune-up. Appropriate information from such activities should be included in the 6-month monitoring report and the annual compliance certification report. In addition, documentation on these tune-ups should be retained at the facility for a period of 5 years. Therefore, EPA grants the petition on this issue.

With respect to the second issue, EPA denies the petition relative to NYPIRG's assertion that the NO_x emission limit in the permit must be clarified. As discussed in Section G.9, above, the actual numerical limit is taken directly from the applicable regulation, which is specifically cited at the beginning of the permit condition. The terminology used in the permit, "upper limit of monitoring," is based upon DEC's application instructions which require the applicant to list, under "limit" the limits, where applicable, which pertain to the monitoring requirement. As detailed in Section G.9, above, in recent permits DEC has changed the term to "upper permit limit" which confirms our understanding of the matter. While the language "upper limit of monitoring" may be

confusing, it does not rise to the level of an objectionable issue in this permit.

13. Conditions 63-68 (Opacity Limits for Engines)

The Petitioner's next allegation is that conditions 63 through 68 of the draft permit lack monitoring to assure Starrett City's compliance with opacity requirements for the three reciprocating engines, and references previous comments (refer to G.6 and G.10, above). *See* petition at page 26.

EPA denies the petition on this issue. Opacity monitoring for these engines includes daily observations by a facility representative, to be followed by the performance of a Method 9 test if any visible emissions are observed for two consecutive days (*see* conditions 66, 68 and 70 of the Starrett City title V permit). In addition, if a Method 9 test is performed, the facility must contact the DEC within one business day thereafter. Records relating to the daily observations will be recorded in a log book to be maintained and retained at the facility. EPA believes that this monitoring procedure is sufficient to assure compliance with the applicable opacity requirement of 6 NYCRR § 227-1.3, for the reasons set forth in sections G.6 and G.10 of this Order, above.

14. Fuel Oil Storage Tank

The Petitioner next alleges that requirements applicable to a 400,000 gallon storage tank at the Starrett City facility are missing from the title V permit. *See* petition at page 26. Specifically, NYPIRG contends that this tank is subject to the requirements of 6 NYCRR parts 204 and 229, and not an "exempt source" as indicated by the DEC (*see* Responsiveness Summary, Comments on Specific Draft Permit Conditions at page 7).

EPA agrees with the DEC that the 400,000 gallon storage tank at the Starrett City facility is an exempt source. In its title V permit application dated May 28, 1997, the applicant indicated that the Starrett City facility includes emission unit 0-1TANK, one 400,000 gallon number 6 fuel-oil storage tank, with a vertical fixed roof. In its February 18, 2000 letter, the Petitioner states that the draft permit provides that the facility is authorized to operate the subject storage tank, but the permit fails to identify any requirements that apply to the tank. *See* NYPIRG comment letter at page 23. As noted above, the DEC stated in its Responsiveness Summary that the tank is an exempt source. More explanation of this conclusion would be appropriate, and is provided below.

First, the category of exempt storage vessels needs clarification. New York's title V regulations list exempt sources at 6 NYCRR § 201-3.2. One of these listings is for: "distillate and residual fuel-oil storage tanks with storage capacities below 300,000 barrels." *See* 6 NYCRR § 201-3.2(c)(21). The Starrett City storage tank that is the subject of this petition has a capacity of 400,000 gallons. According to EPA documentation at AP-42, Appendix A, one barrel (petroleum, U.S.) is equivalent to 42 gallons (U.S.). Therefore, the storage capacity of this tank is approximately 9,524 barrels, which is less than the

exempt threshold of 300,000 barrels. However, New York's title V rules regarding exempt sources go on to state that: "Owners and/or operators of stationary sources subject to Subpart 201-6 may consider the activities listed under Section 201-3.2 to be exempt activities unless such activities are subject to an applicable requirement." *See* 6 NYCRR § 201-3.1(b). That is, if there are federally-applicable requirements that apply to this storage tank, it would not be considered an exempt source under 6 NYCRR § 201-3.2, and the title V permit would need to be reopened to incorporate emission limitations, as well as monitoring, recordkeeping and reporting requirements, as appropriate.

Part 229 of the New York SIP, entitled "Petroleum and Volatile Organic Liquid Storage and Transfer," became effective on April 4, 1993. The applicability threshold for petroleum liquid storage tanks located within the New York City area are those with a storage capacity of 40,000 gallons or more (for tanks that were in use as of October 1, 1982; the Starrett City tank commenced operation during November of 1974 according to information in the title V permit). However, these regulations delineate that petroleum liquids do not include numbers 2 through 6 fuel-oils. *See* 6 NYCRR § 229.2(b)(17). As such, this storage tank which contains No. 6 fuel oil, is not subject to the New York SIP requirements of 6 NYCRR part 229.

In addition, contrary to the assertion by the Petitioner, 6 NYCRR part 204 does not apply to the storage tanks. On May 22, 2001, when EPA approved and promulgated a nitrogen oxides budget and allowance trading program into the New York SIP, with the rule becoming effective on June 21, 2001, it also noted a relocation of the storage tank rules. 66 Fed. Reg. 28059 (May 22, 2001). This notice stated, in part, at 66 Fed. Reg. 28059, 28060:

> ...New York submitted various regulations as revisions to New York's SIP on August 10, 1979. The August 1979 submittal included, among other things, the repeal of part 204 "Hydrocarbon Emissions From Storage and Loading Facilities-New York City Metropolitan Area," because part 204 was superceded by part 229. By Federal Register notice published on February 5, 1980 (45 FR 7803), one of the conditions EPA imposed was either to regulate the storage of petroleum liquids other than gasoline or provide acceptable justification for not regulating such storage. New York submitted adopted revisions to part 229 to address the inclusion of petroleum liquids. On July 1, 1980 (see 45 FR 44273), EPA took final rulemaking to remove this condition after New York revised part 229 to include petroleum liquids. Since part 229 regulated all the sources previously regulated in part 204 and in some cases was more stringent, EPA should have, but inadvertently failed to, remove part 204 from the SIP at that time. As part of today's action, EPA is now revising Title 40, § 52.1679 "EPA approved New York State regulations, "by removing the entry for old part 204, Hydrocarbon Emissions From Storage and Loading Facilities-New York City Metropolitan Area," and adding an entry for the new part 204, "NOX Budget Trading Program."

One other federally-applicable requirement should be discussed. That is, the federal new source performance standards promulgated under 40 CFR part 60, subpart K, Standards of Performance for Storage Vessels for Petroleum Liquids for Which Construction, Reconstruction, or Modification Commenced After June 11, 1973, and Prior to May 19, 1978. The threshold for these federal new source performance standard (NSPS) regulations is also storage vessels with a capacity greater than 40,000 gallons. Again, however, subject storage vessels do not include those that store numbers 2 through 6 fuel oils. As such, this storage tank which contains No.6 fuel oil, is not subject to the New York SIP requirements of 6 NYCRR part 229.

Therefore, because this 400,00 gallon number 6 fuel-oil storage tank is not subject to any federally-applicable requirements, EPA denies the petition on this issue.

H. Particulate Matter Limitation

The final allegation presented by the Petitioner is that the permit does not but must include the applicable particulate matter limitation that is part of the New York SIP. *See* petition at page 26. That is, the Starrett City permit must incorporate the particulate matter limit of 0.10 pounds per MMBtu heat input for each oil-fired stationary combustion unit, pursuant to 6 NYCRR § 227.2(b)(1), which was approved into the SIP on September 22, 1972. In addition, NYPIRG asserts that the permit must also incorporate monitoring sufficient to assure compliance with such a limit. *See* petition at pages 26 and 27.

EPA agrees with the Petitioner and, therefore, grants the petition on this issue.

The Starrett City title V permit includes in the "State Only Enforceable Conditions" section conditions relating to the particulate matter limit of 0.2 pounds per million British thermal units (lb/MMBtu) for each of the 4 natural gas and oil-fired boilers. These conditions are appropriate and in the proper section of the title V permit because the cited requirement, 6 NYCRR § 227-1.2(a)(2), is a State-only requirement; that is, one that was not approved by EPA for inclusion in the New York SIP.

The Petitioner is correct that the New York SIP does include an applicable particulate matter requirement for any emission unit that burns fuel-oil. Such a limit was promulgated by New York State and approved into the SIP at 6 NYCRR § 227.2(b)(1). Although no longer a valid New York State regulation, it is still part of the SIP and, as such, is a federally-applicable requirement that must be incorporated into the "Federally Enforceable Conditions" section of the Starrett City title V permit.

Therefore, the DEC must re-open and revise the Starrett City title V permit to incorporate the applicable particulate matter limit and corresponding monitoring for each of the 4 natural gas and number 6 residual fuel-oil-fired boilers, and the 3 natural gas and number 2 distillate fuel-oil-fired internal combustion engines. Pursuant to 6 NYCRR § 227.2(b)(1), particulate matter emissions from such units are limited to 0.10 lb/MMBtu.

The permit must also incorporate monitoring, reporting and recordkeeping requirements for particulate matter emissions to assure compliance with the applicable standard. Monitoring for these units could include, but not necessarily be limited to, the requirement to perform for each unit one stack test during the term of the permit using the applicable test method, periodic recording of the amount and sulfur content of the fuel-oil used, among other methodologies. In addition, the requirement to perform annual tune-ups at each emission point and to maintain the appropriate records in a log book as described in section G.9 and G.12, above, can also be utilized as monitoring for particulate matter emissions.

Finally, these new permit conditions must either cite directly the applicable requirement of 6 NYCRR § 227.2(b)(1), or may cite the regulations at 40 CFR part 52, Subpart HH. *See* note 26, *supra*.

CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2), I deny in part and grant in part the petition of NYPIRG requesting the Administrator to object to the issuance of the Starrett City title V permit. This decision is based on a thorough review of the November 10, 2000 permit, and other documents that pertain to the issuance of this permit.

12/16/02
Dated:

____
Christine Todd Whitman
Administrator