

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
SUFFOLK COUNTY BERGEN POINT)	ORDER RESPONDING TO
SEWAGE TREATMENT PLANT)	PETITIONER'S REQUEST THAT
)	THE ADMINISTRATOR OBJECT
Permit ID: 1-4720-00355/00043)	TO ISSUANCE OF A
Facility DEC ID:1472000355)	STATE OPERATING PERMIT
)	
Issued by the New York State)	
Department of Environmental Conservation)	Petition Number: II-2001-03
Region 2)	
_____)	

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

On October 16, 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, to the Suffolk County Bergen Point Sewage Treatment Plant ("Bergen Point"). The Bergen Point permit was issued by the New York State Department of Environmental Conservation, Region 2 ("DEC") on August 28, 2001, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR parts 200, 201, 621, and 624.

The petition alleges that the Bergen Point permit does not comply with 40 CFR part 70 in that: (1) the permit is based on an inadequate permit application in violation of 40 CFR § 70.5(c); (2) the permit is accompanied by an insufficient statement of basis as required by 40 CFR § 70.7(a)(5); (3) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (4) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (5) the permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70 in a number of ways; (6) the permit lacks federally enforceable conditions that govern the procedures for permit renewal, in accordance with 40 CFR §70.5(a)(1)(iii); (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 adequate monitoring and are not practically enforceable. The Petitioner has requested that EPA object to the issuance of the Bergen Point permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

Subsequent to receipt of the NYPIRG petition, EPA performed an independent and in-depth review of the Bergen Point title V permit. Based on a review of all the information before me, including the petition; the permit application; NYPIRG's comments to the NYSDEC on the Draft title V Operating Permit; NYSDEC's Responsiveness Summary to NYPIRG's comments, dated June 28, 2001, and the Final Permit effective August 28, 2001, I deny in part and grant in part the Petitioner's request that I object to this permit, for the reasons set forth in this Order. Petitioner has raised valid issues on the Bergen Point permit, resulting in our granting

portions of the petition. This petition also raised programmatic 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 (“commitment letter” or “November 16 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 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 rules. 67 Fed. Reg. 5216 (Feb. 5, 2002). Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as “applicable requirements”) but does require permits to contain monitoring, record keeping, reporting, and other 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 to understand whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under §§ 505(a) and (b)(1) of the Act and 40 CFR §§ 70.8(a) and (c)(1), States are required to submit all proposed 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, § 505(b)(2) of the Act 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 § 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of 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, the permitting authority or EPA 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.

¹*See* CAA § 505(b)(2); 40 CFR § 70.8(d). Petitioner commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. *See* Letter from Keri Powell, Esq. of NYPIRG to DEC (January 21, 2001) (“NYPIRG Comment Letter”).

II. ISSUES RAISED BY THE PETITIONER ²

On April 13, 1999, NYPIRG sent a petition to EPA which brought programmatic problems concerning DEC's application form and instructions to our attention. 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.).³ EPA has conferred with NYPIRG and DEC relative to these program implementation concerns.

EPA received a letter dated November 16, 2001, from DEC Deputy Commissioner Carl Johnson, committing to address various program implementation issues by January 1, 2002, and to ensure that the permit issuance procedures are in accord with state and federal requirements. DEC's fulfillment of the commitments set forth in the 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 CAA, and EPA's regulations. According to a recent review, DEC has made many of the necessary changes, and is substantially meeting its commitments made in its November 16, 2001 letter.⁴ As a result, EPA has not issued a notice of deficiency at this time. However, failure to properly administer or enforce the program will result in issuance of a Notice of Deficiency pursuant to § 502(i) of the Act and 40 CFR § 70.10(b) and (c).

A. Permit Application

Petitioner alleges, 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). Petition at page 2. As such, Petitioner notes that permit application lacks:

- (1). a statement certifying that the applicant's facility is currently in compliance with all

² Issues A-D have been raised previously by Petitioner and addressed by the Administrator in Orders responding to the 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, Jan. 16, 2002 ("Kings Plaza"), In the Matter of Action Packaging Corp., Petition Number II-2000-02, Jan. 16, 2002 ("Action Packaging"), In the Matter of Albert Einstein College of Medicine of Yeshiva University, Petition Number II-2000-01, Jan. 16, 2002 ("Yeshiva"). These Orders are available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2000.htm>.

³EPA 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 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/>.

⁴See 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. Through June 2002, EPA provided DEC with 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 that the State committed to doing in its November 16, 2001 letter.

applicable requirements (except for emission units that the applicant admits are out of compliance) as required by Clean Air Act § 114(a)(3)(C), 40 CFR §70.5(c)(9)(i), and 6 NYCRR § 201-6.3(d)(10)(i); and

- (2). a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based as required by Clean Air Act §114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201-6.3(d)(10)(ii).

Further, Petitioner alleges that permit application lacks certain information required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4), including:

- (3). a description of all applicable requirements that apply to the facility; and
- (4). a description of or reference to any applicable test method for determining compliance with each applicable requirement.

1. Initial Certification

EPA agrees with Petitioner that the compliance certification process in the application form utilized by the facility in this case, may have enabled the applicant to avoid revealing noncompliance in some circumstances. The DEC form allowed an applicant to certify that it expects to be in compliance with requirements when the permit is issued rather than make a concrete statement as to its compliance status at the time of permit application. If the facility was not in compliance but achieved compliance before the permit was issued, it may have been possible to conceal any previous noncompliance. As provided 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. Where certifications do not address compliance status as of the time of permit application, the State, EPA and the public have been deprived of meaningful information on compliance status which may have a negative effect on source compliance and could impair permit development. Compliance certifications are public documents. Thus, one purpose of the initial compliance certification is to provide an incentive for sources to come into compliance with applicable requirements before they complete their applications. Another purpose is to alert the permitting authority to compliance issues in advance so that it can work with the source on such problems and develop an appropriate schedule of compliance in the title V permit. *See* 40 CFR §§ 70.5(c)(8) and 70.6(c)(3) and (4).

Based on the application form that the facility official completed, Bergen Point certified that it would be in compliance with all applicable requirements at the time of permit issuance, which occurred on August 28, 2001. This certification is further supported by additional information. Routine facility inspections performed by the DEC on November 30, 2000 and on March 28, 2002 indicate that the Bergen Point facility has been in compliance with applicable requirements during this period. Also, since the time of permit issuance, Bergen Point has submitted one annual compliance certification report, dated January 30, 2002, which certifies compliance. EPA does not believe that submission by Bergen Point of a different application (that is, one which would have required compliance certification as of the time of application submission) would have resulted in a title V permit any different from the one ultimately issued. Accordingly, EPA denies the petition with respect to this issue. Although in this case EPA finds no basis for objection on this issue, the State and EPA agree that the application form used by applicants in New York prior to January 1, 2002 did not properly implement the EPA or the State regulations. Therefore, as detailed in its November 16, 2001 letter, the DEC has changed

its forms and instructions accordingly.⁵

2. Statement of Methods for Determining Initial Compliance

The next issue raised by Petitioner relates to an omission in the application form of “a statement of methods used for determining compliance.” 40 CFR § 70.5(c)(9)(ii). Although the application form completed by Bergen Point did not specifically require the facility to certify compliance at the time of permit application, the applicant did provide a statement of methods used to determine initial compliance for each parameter. On page 10 of the application, the applicant references EPA test method 209 F for sampling the sludge sediments charged to the incinerator. On page 11, the applicant references EPA test Method 5 for monitoring particulates emissions from the two incinerators. On page 17, applicant references Method 9 for measuring opacity. On page 27, applicant notes that fuel supplier certification will be used to monitor sulfur content. Thus, the permit application references each method that is used at the facility for assuring compliance. For this reason, EPA denies the petition on this point.

3. Description of Applicable Requirements

Petitioner’s next point is that EPA regulations call for the legal citation to the applicable requirement accompanied by the applicable requirement expressed in descriptive terms. EPA has developed guidance, in the form of “White Papers” which were issued in order to enable States to take immediate steps to reduce the costs of preparing and reviewing initial part 70 permit applications. In “White Paper for Streamlined Development of Part 70 Permit Applications” dated July 10, 1995 (“White Paper 1”), 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 Bergen Point permit application contains codes or citations associated with applicable requirements that are readily available. These codes refer to federal and state regulations that are printed in rule compilations and also are available on-line. Therefore, EPA denies the petition on this point.

This issue regarding citations also was addressed in detail in the July 18, 2000, letter from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection to Robert Warland, Director, Division of Air Resources, DEC. (“July 18, 2000 letter”) The letter explained that the DEC application form and/or instructions for its operating permits program should be clarified with respect to the “non-codified” documents that include applicable requirements, such as NO_x RACT plans, pre-construction and operating permits, etc. EPA pointed out that the application and instructions should make it clear that all supporting information is required in the application with clear cross-referencing to the emission point and applicable requirement cited in

⁵ 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 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.

the printed form. Accordingly, in its November 16 commitment letter, the DEC agreed to amend the application instructions to ensure that applicants include all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing.⁶ The DEC is aware that the documentation necessary to ensure the adequate public participation called for in 40 CFR § 70.7(h) must be available with the application during the public comment period.

4. Statement of Methods for Determining Ongoing Compliance

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-Emission Unit Information of DEC's application form there is a block labeled Monitoring Information that asks applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. Bergen Point completed this section for the following: on pages 10 and 16, for the dry sludge content and the volatile solid content of the sludge charged to the incinerator, respectively; on page 11, for the incinerators' particulates emissions; and on page 17, for the monitoring of opacity. Therefore, because the application references test methods for determining compliance and was correctly completed, Petitioner's fourth issue regarding the permit application is without merit, and is accordingly denied.

B. Statement of Basis

On page 3 of the petition, Petitioner alleges that this proposed title V permit is defective because DEC failed to include an adequate "statement of basis" or "rationale" with the draft permit explaining the legal and factual basis for draft permit conditions. Petitioner goes on to say that the sparse "permit description" fails to satisfy this federal requirement.

The requirement for the "statement of basis" is found in § 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. It is a separate document⁷ which is to be sent to EPA and to interested persons upon request. This requirement for the statement of basis is not contained in § 70.6, which sets forth the required contents of the permit. In fact, 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. 40 CFR § 70.6(a)(1)(i).

⁶ As previously discussed, DEC amended its application form and instructions in accordance with the November 16 commitment letter.

⁷ Unlike permits, statements of basis are not enforceable, do not set limits and do not otherwise create obligations as to the permit holder.

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. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, any source-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.⁸ As a result, the DEC has incorporated certain elements into its “permit review reports.”⁹ In the cited letters, EPA explains the “statement of basis” is to be used to highlight significant decisions or interpretations that were necessary to issuing the permit. These reports are intended not simply to be redundant to the permit but to assist in reviewing what is in the permit. Additionally, in a December 22, 2000 Order responding to 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 method(s) be documented in the permit record. In re In the Matter of Fort James Camas Mill, (“Fort James”), Petition No. X-1999-1, at page 8 (December 22, 2000).

The regulation at 40 CFR § 70.8(c)(3)(ii) requires that the permitting authority submit any information necessary to review adequately the proposed permit. Accordingly, 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 review adequately the draft permit in question. Since the statement of basis can serve a valuable purpose in directing EPA’s and the public’s attention to important elements of the permit and since it is important that EPA perform any 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.

EPA notes that a “Permit Description,” was made available with the Bergen Point’s draft permit, as well as the final effective permit issued on August 28, 2001.¹⁰ While this discussion does not satisfy the requirements of § 70.7(a)(5) in a robust fashion, it does provide needed information on the permit. EPA has concluded that in spite of the recognized faults regarding this description, this issue as raised by Petitioner does not, in this case, warrant objection to the permit, for the reasons described below.

In this case, it is possible to achieve a sufficient understanding of the source using available documents in the permit record. Some very simple sources such as Bergen Point are easily understood through reading the permit or the application, especially when they are not

⁸ 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; November 16, 2001 DEC commitment letter; letter dated December 20, 2001, from EPA Region V to the Ohio EPA (available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/sbguide.pdf>); see also Notice of Deficiency for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2000).

⁹ 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 DEC’s November 16, 2001 commitment letter.

¹⁰ This description includes the nature of the “business” : a 30.5 million gallon per day waste water treatment plant; a discussion of the equipment and operations at the facility; and a discussion of the control equipment and compliance methods utilized at the facility.

subject to applicable requirements or monitoring provisions that rely on source-specific determinations or engineering judgement.¹¹ For example, the weighing and feeding of sewage sludge to the incinerators, which are the main tasks that are performed at the facility and described in the permit, are rather straightforward and easily understood operations. Therefore, EPA believes a more detailed explanatory document as sought by Petitioner is not necessary to understand the legal and factual basis for the draft permit conditions.

Additionally, there is no evidence that the Petitioner was harmed by the absence of a statement of basis. In fact, NYPIRG provided detailed and thoughtful comments on this draft permit establishing that it had a basic understanding of the terms and conditions of this permit. Furthermore, NYPIRG was the only member of the public who showed an interest in this project or filed comments on this draft permit. Accordingly, we do not believe that the circumstances of this case warrant an objection to this permit. Nonetheless, as discussed in Section H, NYPIRG's petition on this permit is being granted on other grounds. DEC's permit issuance process now provides that a permit may not be issued unless it is accompanied by a statement of basis. Therefore, when DEC revises the permit in response to the objection, it should also submit a complete statement of basis (permit review report) that clearly meets the requirements of § 70.7(a)(5).

C. Annual Compliance Certification

The Petitioner's third 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 5. 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 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 Bergen Point 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

¹¹ The applicable requirements listed in this permit as applying to operation of the boilers and incinerators include the following regulations contained in the New York State Implementation Plan (SIP): (1) the opacity requirements of 6 NYCRR § 227-1; (2) the limit of the sulfur content of the fuel oil to 0.20 percent by weight pursuant to the requirements of 6 NYCRR part 225, (3) and the monitoring of the incinerators' hydrocarbon emissions, pursuant to the requirements of 6 NYCRR § 212.11.

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 Bergen Point title V permit includes this language at condition 26, item 26.2.

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 26.2 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 any misunderstanding such as that Petitioner pointed out might occur.

Although this issue does not present grounds for objecting to the Bergen Point 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 H, below, EPA is granting in part NYPIRG’s petition on this permit. Therefore, when the DEC revises the Bergen Point permit in response to this Order, it will also add language to clarify the requirements relating to annual compliance certification reporting.

D. Prompt Reporting of Deviations

Petitioner alleges that the Administrator must object to the proposed permit because it does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). Petition at page 6. Currently, Petitioner claims, no prompt reporting condition is included in the proposed permit. Further, Petitioner states that, in addition to requiring DEC to include in this proposed permit prompt reporting requirements that are consistent with EPA’s past interpretations, EPA must require that these reports be made in writing.

EPA disagrees with Petitioner’s claim that no prompt reporting condition is included in the proposed permit. The Bergen Point permit specify opacity provisions that appropriately require that prompt reporting be made to the DEC (Conditions 33.2, 34.2). These relate to the daily monitoring for opacity. Specifically, when daily observances require that a Method 9 test be performed, and the result of the test indicates a violation, the facility owner/operator is required to contact the DEC representative within one business day of the test and, upon notification, any corrective actions or future compliance schedules are to be presented to the DEC for acceptance. 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 exceedance is significant), or whether to defer the written report until the 6-month monitoring report.

EPA raised this issue with DEC in a July 18, 2000 letter,¹² at Attachment III, item 2. The DEC 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. 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). EPA has addressed the prompt reporting requirement with DEC in order to clarify how DEC will properly exercise this discretion. In the November 16 commitment letter, DEC agreed that for all permits issued on and after January 1, 2002, it will include a requirement for reporting deviations consistent with 6 NYCRR § 201-6.5(c)(3)(ii). 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. DEC has stated that it finds the procedures for prompt reporting contained in 40 CFR § 71.6(a)(3)(iii) (B) to be reasonable and compatible with what is provided for in DEC regulations. Therefore, DEC included these provisions to define “prompt” reporting in permits issued on and after January 1, 2002. When prompt reporting of deviations is required, the reports will be submitted to the DEC, in writing, certified by a responsible official, in the time frame established in the permit condition. It must be noted that there are no provisions in the title V permit program precluding an initial telephone call, by the source, in reporting an exceedance in the context of satisfying the prompt reporting requirement provisions. However, although an initial telephone call may be placed by the source in reporting an exceedance, the source must also provide a written report of the incident, in a time frame consistent with the definition given to “prompt” at 40 CFR § 71.6(a)(3)(iii) (B). As discussed in detail in Section H, below, EPA is granting, in part, the instant petition on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also incorporate these additional prompt reporting requirements into the permit.

E. Startup/Shutdown, Malfunction, Maintenance, and Upset

Petitioner next asserts that Condition 5, which it refers to as the excuse provision, violates 40 CFR part 70. Permit condition 5 states, in part, “[a]t 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” and describes the actions and record keeping and reporting requirements that the facility must adhere to in order for the Commissioner to excuse a violation as unavoidable.

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. EPA is not aware of, and the Petitioner has provided no evidence of, any instances where the DEC relied on these rules to provide

¹² Letter from Kathleen C. Callahan to Robert Warland, July 18, 2000.

blanket exceptions for non-compliance merely because the incidents were reported. This condition appears in many DEC permits, and has been discussed at length in prior Orders by the Administrator. North Shore Towers, Tanagraphics, Rochdale Village, Yeshiva, Action Packaging, Kings Plaza. 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>.

Petitioner raised several specific points on the issue of start-up, shutdown and malfunction which warrant further discussion.

1. Petitioner alleges that the excuse provision included in the proposed permit is not the excuse provision that is in New York's SIP.

The state regulation, 6 NYCRR § 201-1.4, has been in effect since 1996. This regulation is addressed in these permits in a condition labeled as an "applicable federal requirement" and captioned "Unavoidable Noncompliance and Violations." The condition incorporates the language of section 201-1.4, which recognizes that the DEC Commissioner has the discretionary authority to excuse violations of applicable emissions standards from "necessary equipment maintenance, startup/shutdown conditions, and malfunctions or upsets . . . if such violations are unavoidable," where specific procedural and substantive requirements are met.

Although DEC adopted section 201-1.4 in 1996, the regulation has never been approved by EPA for inclusion in the SIP. Instead, in relevant part, the SIP contains section 201.5(e) (hereinafter referred to as the SIP provision), which was removed from the state regulations during the 1996 amendments. This provision, like section 201-1.4, authorizes the Commissioner to excuse certain violations upon a proper showing and compliance with specified procedures: "At the discretion of the commissioner a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up conditions and malfunctions may be excused if such violations are unavoidable."

The SIP provision and section 201-1.4 are similar, but not identical. In reviewing NYPIRG's request for an objection on this ground, EPA concurs in NYPIRG's first complaint: that the permit incorrectly identifies the condition incorporating the language of section 201-1.4 as an "applicable federal requirement." Section 201-1.4 is not part of the approved SIP and so should have been characterized as a state requirement.

In its November 16, 2001 Commitment letter, DEC agreed that effective January 1, 2002, it will include the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, on the State side of all permits.¹³

2. Petitioner states that the draft permit must describe what constitutes "Reasonably Available Control Technology" during conditions that are covered by the excuse provision.

¹³DEC is substantially meeting this commitment. As discussed in section H, below, EPA is granting NYPIRG's petition on this permit on other grounds. 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 of the permit.

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. Pacificorp at 23-24.¹⁴

Moreover RACT is a defined term in the New York SIP. The SIP specifically defines RACT as the “[l]owest emission limit that a particular source is capable of meeting by application of control technology that is reasonably available, considering technological and economic feasibility.” 6 NYCRR § 200.1(bp). There is an identical definition in the current New York regulations that are not part of the approved SIP. 6 NYCRR § 200.1(bs). As explained above, EPA cannot reopen the issue of whether the SIP provision should have required a more specific definition of RACT in the context of deciding whether to object to a title V permit. In any event, NYPIRG has failed to demonstrate that the RACT provision is deficient in this case. 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 Commissioner if and when she chooses to exercise her authority to excuse a violation.

3. Petitioner alleges that the excuse provision does not assure the facility’s compliance because it contains vague, undefined terms that are not enforceable as a practical matter.

Petitioner states that all significant terms must be defined in the permit. The Petitioner alleges that the permit is not practically enforceable because the permit lacks definitions for “malfunction,” “upset,” and “unavoidable.” EPA disagrees with the Petitioner on this issue. The purpose of the permit is to ensure that a source operates in compliance with all applicable requirements. To the extent Petitioner argues that this requirement extends to compliance with the SIP-based commissioner discretion provision, EPA agrees. However, the lack of definitions for the terms “malfunction,” “upset” or “unavoidable” does not, on its face, 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. In the case of the term malfunction, the SIP rule excludes “failures that are caused entirely or partially by poor maintenance, careless operation, or other preventable condition.” 6 NYCRR 201.5(e)(2). Moreover, Petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. In addition, in its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it will include the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, on the State side of all permits. *See* footnote 13. This will help further assure that the excuse provision is not expanded beyond its proper bounds.

4. Petitioner alleges that the proposed permit fails to require prompt written Reports of Deviations from permit requirements due to Startup, Shutdown, Malfunction and Maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B).

As written, the permit only requires the permittee to inform DEC of an exceedance when

¹⁴Memorandum 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”).

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 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 D, *supra*. For instance, the regulations at 6 NYCRR § 201-6.5(c)(3), stated at Condition 25, prescribe that all instances of deviations from permit requirements be clearly identified, stating the probable cause of such deviations and any corrective actions taken, and submitted to the State with the semi-annual compliance report. For a violation to be properly excused, DEC must properly apply the regulation authorizing such discretion and must properly document its findings to ensure the rule was reasonably applied and interpreted. For the reasons stated, EPA denies the petition on this point.

5. Petitioner alleges, on page 10, that the proposed permit fails to clarify that a violation of a federal requirement cannot be excused unless the underlying federal requirement specifically provides for an excuse.

The DEC’s excuse provision 6 NYCRR§ 201-1.4 in the current state regulation and 201.5(e) in the SIP 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).

Petitioner asserts the permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation “unavoidable.” Commissioner discretion conditions apply only to State requirements and cannot apply to federally promulgated requirements. 6 NYCRR § 201-6.5(c)(3)(ii), as amended, clarifies that the DEC’s own rules do not authorize expansion of the Commissioner’s discretion; it provides 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. In its November 16, 2001 Commitment letter, DEC agreed that effective January 1, 2002, it would include the revised provision of 6 NYCRR § 201-6.5(c)(3)(ii) on the federal side of all permits. DEC is substantially meeting this commitment. *See* note 13, *supra*. This will help further assure that the excuse provision is not expanded beyond its proper bounds. Accordingly, the petition is denied on this point.

F. Permit Renewal

According to Petitioner, this title V permit violates 40 CFR part 70 because it lacks the federally enforceable requirement that the facility apply for a renewal permit within six months of permit expiration. Petition at page10. Petitioner cites 40 CFR § 70.5(a)(1)(iii) which provides that, “For purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time, as may be approved by the Administrator, that ensures that the term of the permit will not expire before the permit is

renewed.” Petitioner argues, based on the cited regulations, that the Bergen Point permit violates 40 CFR part 70 because it lacks the federally enforceable requirement that the facility apply for a renewal permit within six months of permit expiration.

The requirement that the facility apply for a renewal permit at least six months prior to the date of permit expiration is set forth in Condition 3 of the General Provisions section of this permit. Petitioner’s claim is therefore without merit and is denied.

H¹⁵. Monitoring

The Petitioner’s last general claim is that the Bergen Point Final Permit does not assure compliance with all applicable requirements as mandated by 40 CFR part 70, because many individual permit conditions lack adequate periodic monitoring and are not practicably enforceable. *See* petition at pages 11,12, and 13. The Petitioner addresses individual permit conditions that allegedly either lack periodic monitoring or are not practicably enforceable.¹⁶ The specific allegations for each permit condition are discussed below.

Section 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, record keeping, 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).

¹⁵Petition document skips from Section F to Section H and makes no reference to Section G. In keeping with the petition, the sections in the EPA’s response are named as they appear in the petition.

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*.

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 non-instrumental monitoring (which may consist of record keeping 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 record keeping 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 40 CFR § 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). Condition 3 (Maintenance of Equipment)

Petitioner alleges that permit Condition 3.1, which cites 6 NYCRR § 200.7 as an applicable requirement, is unenforceable, as currently written. Petitioner states that this condition which requires pollution control equipment to be maintained according to ordinary and necessary practices, does not explain what Bergen Point must do to comply with the condition. Therefore, Petitioner argues, this proposed permit condition must be modified to apply to Bergen Point with specificity, and to include monitoring that is sufficient to assure the facility's compliance. Petition at 14.

In DEC's Response to Comments, DEC stated that this condition is a general requirement. According to DEC, this condition is applied to all air permits and is included even where no applicable requirement necessitates the use of control equipment, as when source

owners voluntarily install control equipment.

Indeed, many SIPs contain generic requirements for facilities to maintain all equipment in proper condition and to carry out proper work practices. These generic requirements are typically provided in the general permit conditions section of the title V permit. In addition, permitting authorities have discretion to develop such general permit conditions that apply to all title V sources. Thus, including a general SIP condition is proper. Therefore, EPA disagrees with Petitioner that monitoring must be added to this provision.

As a general matter, where a control equipment is installed pursuant to an applicable requirement or a source chooses to employ such equipment, appropriate permit conditions are included in the emission units section of the title V permit. For example, at Item 44.2, on page 35 of 49, provision is made for the facility to calibrate a hydrocarbon analyzer that measures hydrocarbon emissions in the incinerator's exhaust gases, at least once every 24-hour operating period. And, Item 46.2, on page 37, is a provision that requires the facility to calibrate the weigh scale that monitors the wet sludge feed rate to the process. Therefore, the Bergen Point permit is not without specific monitoring requirements where these may be called for. For this reason, EPA denies the petition on this point.

(2). Conditions No. 7 and No. 8 (Air Contaminants in Air Cleaning Devices)

Petitioner alleges that permit Conditions 7 and 8, addressing the handling of air contaminants collected in an air cleaning devices should be accompanied by record keeping requirements that assure that Bergen Point handles air contaminants in compliance with permit requirements. Petitioner goes on to state that if these requirements do not apply to Bergen Point, they must be deleted from the permit. Petition at 14-15.

Bergen Point does not have control devices that collect air contaminants to which the applicable requirements regarding handling of collected air contaminants apply. As such, there are no collected materials that require recycling or disposal, or which require special handling to avoid reintroduction to the atmosphere. States have discretion to include language from the general provisions of the SIP as general permit conditions in title V permits. Where an applicable requirement specifies use of, or a source chooses to employ a control device that collects contaminants, then appropriate monitoring requirements must be included under the emissions unit section of the title V permit. EPA denies the petition on this point.

(3). Condition 12 (Applicable Criteria)

Petitioner asserts that facility level Condition 12, which stipulates that the facility shall operate in accordance with any accidental release plan, response plan, or compliance plan, is problematic because those referenced documents are not incorporated into the permit. If not incorporated in the permit, Petitioner argues, such documents should be clearly cross-referenced. Petitioner also suggests that this general condition should be deleted from the permit altogether since it adds nothing to the permit.

EPA disagrees with Petitioner that all types of plans must be part of a title V permit. For instance, risk management plans under 112(r) need not be incorporated into a title V permit. 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, the Petitioner does not allege any specific plans that should have been, but were not, included in the permit as an applicable requirement. Therefore, EPA is denying the petition on this issue.

(4). Condition 14 (Compliance Requirements)

Petitioner states that a title V permit is supposed to give the public and the facility a degree of certainty regarding which requirements apply to the facility. Petitioner alleges that, as written, Condition 14 is ambiguous regarding the applicability of 112(r). Petition at 16.

While EPA agrees with Petitioner that this provision is very general and does not provide information regarding the applicability of § 112(r) 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. Bergen Point did not submit a Risk Management Plan (RMP) to EPA under § 112(r) of the Act and 40 CFR part 68,¹⁷ and, given what we know about this source, it is reasonable to assume that it is not subject to these statutory and regulatory requirements. Accordingly, at most it was harmless error in this case that the permit does not specify the applicability of § 112(r) and part 68 to this facility.

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

(5). Condition 24 and Condition 40 (Emission Unit Definitions)

Petitioner states that proposed permit does not assure the facility's compliance with emission standards because, for the many pollution control devices that are listed in the permit, there are no conditions requiring the operation of these devices, nor does the proposed permit include monitoring conditions to ensure that these pollution control devices are working satisfactorily. Accordingly, Petitioner states, simply mentioning the existence of control equipment at the emission unit descriptions is inadequate to assure the facility's compliance. Petition at 16-17.

Petitioner is simply not correct in stating that the permit does not include conditions that require the proper operation of control equipment. Conditions governing the use of air pollution control equipment for the emission units listed at Conditions 24 and 40 can be found elsewhere in the permit. The permit contains numerous instances whereby operation of certain control

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

equipment is specified. For example, at Item 46.2, page 37, the permit prescribes monitoring devices to continuously measure and record the pressure drop through the wet scrubber and the oxygen content of the incinerator gas. Also, at 46.2, a weight scale is specified in measuring the sludge feed rate to the incinerator. And at 44.2, the facility requires operation of a hydrocarbon analyzer to measure the incinerator's exhaust gases. Further, calibration requirements are specified in the case of the hydrocarbon analyzer and the weigh scale aforementioned. For all the examples cited, the corresponding monitoring requirements are referenced at 40 CFR part 60, NSPS Subpart O. Therefore, Petitioner's claims are not supported by the facts. For this reason, EPA denies the petition on this point.

(6). Condition 26 (Compliance Certification)

Petitioner quotes the permit as stating that the annual certification is "due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department." Petitioner cites a number of problems with this language. First, Petitioner states, it is possible that a facility would not be required to submit the first compliance certification until after the end of the first annual period following the date of permit issuance. According to Petitioner, this violates 40 CFR § 70.6. Second, by adding "unless another quarter has been acceptable by the Department," Petitioner believes that the permit is thereby rendered unenforceable by the public, because it is unclear how the Department will go about revising the date that the certification is due. Specifically, Petitioner is concerned that the DEC can change the due date through an oral conversation with the permittee, without the public knowing that the deadline has been changed. Also, Petitioner questions the adequacy of the phrase "calendar quarter that occurs just prior to the permit anniversary date." Petitioner believes it to be vague because, Petitioner asserts, it is unclear when quarters begin and end. Petitioner concludes that the annual compliance certification is unenforceable as a practical matter and, therefore, the Administrator must object to this proposed permit for this reason. Petition at 17-18.

Submission of the first compliance certification report 30 days after the end of the first annual period, following the date of the permit's issuance, does not contravene part 70 provisions. Annual compliance certification requirements, as outlined at 40 CFR § 70.6, require the submission of an annual compliance report, with no implied submission deadline. Therefore, submitting such report at the end of the first annual period, or the "calendar quarter that occurs just prior to the permit anniversary date" would not violate part 70 provisions. Further, in the case of Bergen Point, the Final Permit was issued in August 27, 2001. In January 2002, permittee elected to submit an annual compliance certification report, thereby opting to submit such report at the end of the calendar year, rather than at the end of the first annual period following the date of permit issuance. Bergen Point, therefore, complied with the submission of the annual certification requirement, ahead of schedule. Hence, EPA finds this issue to be without merit.

Lastly, Petitioner claims that the following permit language "unless another quarter has been acceptable by the Department" might allow DEC to orally agree to a change in submission schedule. There is no evidence that this has caused a problem specifically with Bergen Point's annual certification. However, this phrase is vague, therefore, DEC should remove this language when it reopens the permit for other reasons and ensure that the timing of all reports required by the permit are clear in each permit.

(7). Condition 29 (Required Emission Tests)

The Petitioner comments that Condition 29 of the proposed 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." Petition at 17. 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 applicable requirement. Such a practice, particularly if coupled with a permit shield, could create dual requirements and potential confusion." White Paper 2, Section II.E.3.

The Bergen Point title V permit unambiguously states that 6 NYCRR § 202-1.1 is an applicable requirement. The specific regulatory citation, 6 NYCRR § 202-1.1, places the burden of conducting and reporting any required emissions testing on the permittee. Omitting who shall bear the cost of conducting and reporting mandatory emissions tests does not relieve the permittee from performing and reporting such tests. EPA does not believe a reasonable interpretation of the permit would lead a reader to conclude that anyone other than the permittee should bear the costs of measuring and testing emissions. 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.

(8). Conditions 32, 33, and 34 (Visible Emissions Limit)

The Petitioner alleges that the permit lacks any kind of periodic monitoring to assure compliance with the applicable opacity limitation found in the SIP at 6 NYCRR § 211.3. The Petitioner specifically points to Conditions 33 and 34, whereby plant operators are only required to perform an official Method 9 test after visible emissions are observed for two days. Petitioner urges the Administrator to require Bergen Point to employ COMs to monitor compliance at the stacks. Further, Petitioner urges that the facility be required to perform regular Method 9 tests to assure compliance at those locations other than the stacks, where opacity violations might occur from an emission point. Thus, Petitioner argues, the Administrator must object to this permit because it lacks sufficient monitoring to assure compliance with opacity limitations as required by the Clean Air Act and 40 CFR part 70. Petition at 19-20.

In Bergen Point's January 2002 Annual Compliance Certification report, the permittee indicates that continuous opacity monitors (COMs) have been installed on the incinerators' stacks. Further, that same report indicates that COMs are also being installed on stacks that vent emissions from the facility's boilers. Hence, at those sources where visible emissions are likely to be observed, the facility has adopted the specific monitoring measures to monitor actual emissions that NYPIRG requested. However, the monitoring requirements that are referenced at Conditions 33 and 34 are general permit conditions that apply on a facility-wide level. EPA disagrees with Petitioner's request that the facility be required to perform regular Method 9 tests to assure compliance at all locations where COMs are not installed. Because different emissions units (*e.g.*, combustion, material storage) can create visible emissions that will reach the atmosphere in different ways (*e.g.*, stacked, fugitive), an operator may be unable to conduct the same kind of opacity monitoring at each emission unit where visible emissions arise. Such opacity monitoring requirements are best addressed at the Emission Unit Level section of the permit, as is the case in the Bergen Point permit. Therefore, EPA denies the Petition on this issue.

(9). Conditions 38 and 39 (40 CFR § 61.50, NESHAP Subpart E)

Note: These conditions are referenced as Conditions 36 and 37 in the petition.

Petitioner raises several issues with respect to these two conditions. Petitioner requires

that information pertinent to a stack test performed in March 1995 be included in the permit. Next, Petitioner argues that a statement forbidding the facility from making changes in operation, following a compliance demonstration through either stack testing or sludge sampling, is unenforceable because the test result is not recorded in the permit. Also, Petitioner describes the use of the term “other data” as referenced in the permit, regarding record keeping requirements, as being vague and inadequate. Lastly, Petitioner argues that members of the public have no way of knowing when a permit condition relating to mercury emissions exceeding 1,600 grams per 24-hour, based on stack testing, would become applicable because the result of the stack test is not reported in the permit itself. Petition at 20-21.

All of Petitioner’s claims relate to the reporting of test data in the permit. First, in its Responsiveness Summary, at page 14, DEC described the term “other data” as meaning “any documentation, test protocol, test log and reports, sampling log, analysis results, etc. This is a general term that describes any data that support the determination of the total emissions.” EPA concurs with DEC’s general interpretation of that term.

EPA addressed the issue of reporting previous tests in the July 18, 2000 letter (*see note 12, supra*). In Attachment III, at item 6, EPA states “[t]itle V permits need not include “past” actions. In the Yeshiva permit, for example, the conditions that delineate that stack tests were conducted in 1994 need not be included.” Test data are considered to be supporting documentation which must be made available to the public upon request, but are not necessarily part of the permit. Further, EPA’s White Paper 1, dated July 10, 1995, addresses this issue and clarifies that citations alone may be used to streamline how applicable requirements are described in an application, provided that the requirement is readily available. White Paper 1 further provides that “[t]he 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 referenced materials are currently applicable and available to the public.” White Paper 1 at p. 20. Therefore, with regard to Bergen Point, in addition to the compliance inferred in the permit, members of the public may further scrutinize the facility’s reported compliance by requesting from DEC the submission of any test data referenced in the permit. For these reasons, EPA denies Petitioner’s request that these test data be included in the permit.

However, EPA concurs with Petitioner’s request that the permit identify and record those operational parameters that, if changed, may potentially increase mercury emissions above the level determined by the most recent sludge test. Without the expressed identification and monitoring of those operational parameters which do impact on mercury emissions, the source’s mercury emissions may fluctuate, unbeknown to plant operators or the public. The permit states “No changes shall be made in the operation which would potentially increase emissions above the level determined per the most recent stack test, until the new emission level has been estimated by calculation and the results reported to the Administrator.” In this regard, the permit quotes 40 CFR § 61.53 (d)(4) and 40 CFR § 61.54(e). However, the permit fails to identify those parameters that may not be changed in order to prevent increases in mercury emissions. Also, the permit fails to specify periodic stack testing or sludge sampling for the source. A one-time stack testing for the life of the facility, as is presently implied, would fail to satisfy the basic premise of periodic monitoring and would, therefore, be inadequate. Although in DEC’s Responsiveness Summary, DEC stipulates that the facility will sample the sludge for mercury on an annual basis, no such information is recorded in the permit. For these reasons, EPA is granting the petition and is requiring DEC to prescribe an annual mercury sampling of the sludge as per Method 105 of 40 CFR part 61. This prescribed monitoring regime, has been deemed adequate, as stipulated at 40 CFR 61.55, in satisfying the monitoring of other wastewater

treatment operations which exceed the mercury emissions level recorded at Bergen Point. Also, EPA is requiring DEC to list in the permit those parameters that must be monitored to ensure, as stipulated at Item 38.1(3) of the permit, that mercury emissions are not adversely affected during operations.

(10). Conditions 43 and 53 (Sludge Incinerator Stack Tests)

Note: Condition 43 is referenced as Condition 41 in the petition.

Petitioner cites several issues with respect to the incinerators' stack testing. First, Petitioner states that it is unacceptable for a title V permit to give permittee a year-long grace period before conducting performance tests to demonstrate the facility's compliance with applicable requirements. Petitioner is referring to one of the facility's two incinerators which would be tested up to a year after the resumption of operation. NYPIRG is concerned that this proposed permit will not assure the facility's compliance with applicable requirements until after the stack tests are performed. Petitioner also alleges that a statement in the permit to the effect that the incinerators "will resume operation sometime in 2001" is too vague and would not allow the public to keep track as to when operation resumes at the facility. Hence the public would be prevented from monitoring operating conditions relating to the incinerators. Therefore, Petitioner is requesting that the facility be required to send a timely written notification to the DEC, to inform of the date of operation resumption. Lastly, Petitioner states that the permit does not include an enforceable condition requiring the facility to install and operate, in accordance with any prior schedule, continuous emission monitors or to ensure that oxygen monitors, which are prescribed, function properly. Petitioner states that at a minimum, the permit must include a schedule by which CEMs will be installed and calibrated, along with extensive surrogate monitoring in the interim period that can provide a reasonable assurance of compliance. For all the reasons stated, Petitioner argues that the Administrator must object to this proposed permit. Petition at 18-19.

The permit prescribes that performance tests be performed on both incinerators after they resume operation. These tests will measure mercury emissions and determine the control efficiencies of trace metals: arsenic, cadmium, chromium, nickel, lead, and hexavalent chromium. In July 18, 1989, a performance test was conducted on one of the incinerators. The result showed compliance with respect to the NSPS particulate emission standard of 1.3 lbs/ton. Following the 1989 test, EPA established a maximum wet sludge feed rate for the facility of 4.5 tons/hour, which is the throughput at which the 1989 test was validated. To date, the facility is limited by that operating condition, that is to a maximum wet sludge throughput of 4.5 tons/hour. Further, on March 30, 1995, a performance test for mercury, arsenic, cadmium, chromium, nickel, lead, and beryllium reported results well below the threshold levels established under the NESHAP. Those test results were forwarded to the DEC and the EPA and are part of the public record.

The primary parameter that impacts on contaminant emission rates is the sludge throughput. Therefore, barring any operational change at the facility, it is reasonable to expect that those contaminant emissions will not vary, by any significance, from the facility's original test results, as long as wet sludge throughput is not exceeded, and, correspondingly, the facility will remain in compliance with those emissions listed above. It must also be noted that the two incinerator units are similar in design and, given that they are processing the same feed material and are operating under similar operating conditions, the contaminant emissions are expected to be quite similar under similarly operating scenarios.

Regarding the allegation that the permit term addressing the timing of resumption of operations is too vague, it should be noted that the permit was issued on August 28, 2001, and

the facility's sludge incinerators were put back in service on September 7, 2001. This is a public record issue, as well as an enforcement issue. The facility is obligated to operate within the confines of all the conditions that are stipulated in the permit regardless of the public's knowledge of the resumption of operation. The public may, at any point in time, requisition the facility's historical records for compliance purposes and ascertain any previous actions by the facility. Further, since the facility resumed operation, it has been the subject of inspections by State enforcement authorities, on March 28, 2002. The inspection did not reveal any non-compliance issues at the facility. Therefore, for all the reasons stated above, EPA denies Petitioner's issues regarding Conditions 43 and 53.

(11). Condition 44 (Hydrocarbon Emissions)

Note: This condition is referenced as Condition 42 in the petition.

Petitioner alleges that, in order to assure the facility's compliance, the hydrocarbon analyzer must be operated at all times and, therefore, Petitioner wants appropriate language added to the permit to reflect this requirement. Further, Petitioner wants this condition supported by record keeping requirements to assure the facility's compliance. Petition at 21.

Item 44.2 of the permit, which addresses monitoring frequency, prescribes continuous operation of the hydrocarbon analyzer. Therefore, Petitioner's request that the instrument be operated at all times is already satisfied. Further, the permit prescribes that the instrument must be calibrated at least once every 24-hour operating period. Elsewhere, at Condition 17, permit cites 6 NYCRR § 202-6 as establishing record keeping requirements that are applicable to all monitoring data collected at the facility. DEC's 6 NYCRR § 202-6 stipulates that records of all monitoring data and support information shall be retained for a period of at least 5 years from the date of the monitoring sample, measurement, report, or application. Therefore, Petitioner's claims are not supported on either count. Hence, EPA denies the petition on this issue.

(12). Condition 45 (Sulfur Limit)

Note: This condition is referenced as Condition 44 in the petition.

Petitioner makes two claims with respect to the sulfur limitation that is stated in the permit. On a general note, Petitioner questions the State's practice of relying on fuel suppliers' certifications as a method for assuring the facility's compliance with the fuel's sulfur standard. Petitioner contends that the facility is unable to certify compliance with the sulfur-in-fuel standard unless the facility independently tests its fuel through periodic monitoring. For this reason, Petitioner requests that the Administrator object to the proposed permit. Also, Petitioner points out that, following the release of the draft permit, DEC modified the permit to weaken the sulfur limit in fuel from 0.30% to 0.37%. Petitioner questions the justification for changing the sulfur limit. More pointedly, Petitioner asserts that if the 0.30% sulfur limit that was previously included in the draft permit is contained in a pre-existing SIP-based permit, DEC cannot change the requirement in the title V permit. Petition at 21-22.

In New York State, there are safeguards in place for ensuring compliance with the sulfur limits before the fuel reaches the consumer. A number of regulations rely on certifications, a responsibility that most sources and suppliers must take seriously to avoid liability for substantial penalties. Sulfur-in-fuel certification is a method that EPA itself relies on in certain instances (e.g., certain NSPS rules and PSD provisions). Petitioner has presented no facts to suggest, let alone demonstrate, that the supplier's certification is not adequate to assure the facility's own compliance with the fuel sulfur limitations. Further, 6 NYCRR § 225.1(a), the applicable requirement relating to sulfur fuel content, states that "no person shall sell, offer for sale, purchase or use" noncompliant fuels, as such fuels are specified under this statute. Moreover, the

sulfur-in-fuel standards are enforced by the DEC through random sampling of fuel oil suppliers. Accordingly, EPA disagrees with Petitioner that Bergen Point should be required to repeat the same sulfur-in-fuel analysis its supplier already performed. The sulfur limit in 6 NYCRR 225 applies equally to the seller, purchaser and user, all parties are responsible to demonstrate compliance in their own operations. A certification from the seller of its delivery of a compliant fuel oil to Bergen Point does not abrogate Bergen Point's responsibility to ensure that it burns a compliant fuel oil in its boilers. For these reasons, EPA finds the existing periodic monitoring outlined in the permit with regard to sulfur-in-fuel certification to be appropriate. Therefore, EPA denies the petition on this issue.

With respect to Petitioner's other claim that DEC modified the proposed permit, thereby weakening the sulfur limit from 0.30% to 0.37%, the DEC noted in its Responsiveness Summary that this occurred after Bergen Point commented on the draft permit and requested that this limit be increased to 0.37% from 0.30% sulfur. Indeed, 40 CFR § 70.7 allows for public participation in the permit issuance process. Such participation offers an opportunity for the public and the permittee to comment on the Draft Permit. In this instance, during the public review period, the permittee availed itself of its privilege to comment, and requested the imposition of a less restrictive standard with respect to the sulfur limit in fuel. DEC has discretion in granting such requests, unless pre-existing SIP-based permit conditions explicitly preclude those changes. In this case, DEC granted permittee's request because no pre-existing conditions precluded that change and because 0.37% is less than the SIP limit of 1.0 % wt sulfur in oil for facilities in the Town of Babylon in Suffolk county. Accordingly, EPA denies this issue.

(13). Condition 53 (Particulates)

Petitioner notes that the draft permit released by DEC for public comment cited 6 NYCRR § 227-1 as the basis for a particulate matter limit of 1.3 lb/ton of waste burned. Following Petitioner's comment that all particulate limits in the current version of 6 NYCRR § 227-1 are in terms of lbs/mmBtu, DEC altogether eliminated the condition pertaining to § 227-1 on the basis that another particulate emission limit is already established under 40 CFR part 60, Subpart O, Standards of Performance for Sewage Treatment Plants at 40 CFR § 60.152 (a)(1), which establishes a particulate matter emission limit of 1.30 lb/ton dry sludge input. Also, according to Petitioner, DEC removed former Condition 56 from the draft permit, which had limited particulate matter emissions to 0.56 pounds per hour, pursuant to § 227-1. Petitioner argues that, even if the Subpart O standard is stronger than the standard at § 227-1, DEC must include both standards in the permit because they are both applicable requirements. Petition at 22-23.

EPA concurs with Petitioner. Where emission standards are expressed in different units, under different applicable requirements, all those applicable requirements become applicable requirements of the source. In this case, if DEC omits the emission standards cited at § 227-1, because it believes these latter to be less stringent than those specified at Subpart O, then it is DEC's responsibility to state, in the permit itself, that this "streamlining" has been done and the demonstration for the decision is included in the Statement of Basis.¹⁸ DEC may do so using

¹⁸In White Paper 2, EPA presented a procedure whereby States and sources can determine the set of permit terms and conditions that will assure compliance with all applicable requirements for an emissions point or group of emissions points so as to eliminate redundant or conflicting requirements. In each case, a source may request to subsume one or more less restrictive provisions into a more restrictive provision or create a new provision which contains all the most restrictive terms of the subsumed provisions. The permitting authority may grant this request,

(continued...)

conversion factors to demonstrate that, regardless of the units used, the emission standards cited at § 227-1 meet a lesser standards than those prescribed at Subpart O. Barring such demonstration, DEC may not remove such emission standards from the permit. Therefore, EPA grants the petition on this issue and requires DEC to reopen the permit to include both standards as may be applicable and, if appropriate, to streamline pursuant to White Paper 2.

(14). Conditions 46 through 55 (40 CFR part 60, NSPS Subpart O)

Note: These conditions are referenced as Conditions 44 through 54 in the petition, from pages 23 through 25.

Petitioner raises several issues which are addressed below, in the order they are presented in the permit. According to Petitioner, the deficiencies purported at those conditions relate to 40 CFR part 60, NSPS Subpart O. Petition at 23-25.

- (a). Petitioner comments that Condition 42 in the Draft Permit must provide more detail with respect to how the facility must monitor maximum wet sludge feed rate. In the absence of additional detail, Petitioner argues, this condition does not assure the facility's compliance with applicable requirements.

(Note that in the Final Permit, this issue raised by Petitioner is addressed at Item 54.2) The permit describes the feeding of the sludge as follows " The maximum wet sludge feed rate allowed is 4.5 ton/hour. The sludge rate will be measured using a weigh scale. The weigh scale shall be calibrated on a frequency recommended by the manufacturer." The permit identifies the manner in which the wet sludge feed rate is to be determined, using a weighing device, a weigh limit, and a calibration schedule. However, it is not clear how the permittee will calculate the hourly feed rate from the available data. Therefore, EPA is requiring DEC to amend this permit condition to include a requirement for the permittee to keep a log of the operating hours of each incinerator. For this reason, EPA grants the petition on this issue.

- (b). Petitioner points out that proposed permit requires only annual reporting whereas Part 70 requires semi-annual reporting.

The final effective permit, at Items 44.2, 45.2, 46.2, 48.2, 49.2, 50.2, 51.2, 52.2 , 54.2, and 55.2, stipulates semi-annual reporting. At those conditions, the permit states "Reports due 30 days after every 6 calendar months." Therefore, while the draft permit might have referenced annual reporting, the final permit remedied this condition. For this reason, EPA denies the petition on this issue.

- (c). At Condition 46 (referenced as Condition 54 in petition), Petitioner requests that the permit provides for maintenance and calibration procedures for the various meters (belt weigh scale, pressure device, oxygen analyzer, temperature and fuel flow monitors) in use to monitor compliance. Also, at Condition 46, Petitioner wants the permit to include parameter ranges that will be used to evaluate the compliance status of the facility. According to Petitioner, the Administrator must object to this permit because, it fails to specify the parameter ranges that will be used to monitor the facility's compliance with

¹⁸(...continued)

provided the permit and the statement of basis explain that compliance with the new or more restrictive rule assures compliance with the other rule(s). This analysis makes it clear that all related rules are applicable to the source, and are covered by the permit shield.

applicable requirements.

Petitioner is generally correct in its observation. Except for the oxygen analyzer which specifies an upper monitoring limit, at Item 52.2, no such limits or operating ranges are specified for the other control devices. Although a general statement is made in the permit at Condition 46.2, stipulating that the belt weigh scale, pressure device, oxygen analyzer, temperature and fuel flow monitors will be calibrated, maintained and operated, the permit does not specify a frequency and a calibration method for these devices. While the calibrating procedures themselves can be referenced and do not have to be written in the permit, the calibration frequency of these control devices together with their operating ranges are necessary elements of periodic monitoring and should be included in the permit. Therefore, EPA grants the petition on this issue. Hence, the permit must be reopened to incorporate calibration methods and frequencies, as well as operating ranges, for those monitoring devices.

- (d). Regarding Condition 48, (referenced as Condition 47 in petition) Petitioner states that this opacity monitoring requirement does not satisfy periodic monitoring because “DEC has provided no justification to date for why one opacity reading each day made by an untrained observer is sufficient to assure the facility’s compliance with the opacity limitation.”

At Condition 48, the permit references Condition 34, which requires a once-a-day stack observation for visible emissions. If visible emissions are observed for two consecutive days, then a Method 9 analysis is prescribed. However, since the raising of this issue by Petitioner, the facility installed COMs on the incinerator stacks, as is reported in the facility’s annual compliance report, dated January 30, 2002. It is worth noting that the DEC has the authority to require additional opacity monitoring beyond what is specified in the underlying rule. Therefore, when DEC reopens the permit for other reasons, it should indicate that COMs have been installed on the incinerators’ stacks and are being used in verifying the stacks’ opacity compliance. Correspondingly, the permit must specify a QA/QC program for the newly installed COMs, to ensure their proper operation. As a result of installing the COMs, this issue raised by Petitioner, concerning the adequacy and competency of an observer in taking visual opacity reading, is no longer relevant.

- (e). Regarding Condition 49, (referenced as Condition 48 in petition) Petitioner wants this permit condition to include additional detail with respect to how the grab sample must be taken, the type of records that must be maintained, and the method that is used to test the sample. Petitioner states that this condition is unenforceable because the testing method is not specified.

EPA supports Petitioner’s view that the absence of a referenced method for testing the sludge sample makes this condition unenforceable. The test method that is used for testing the sample should be specified. Also, the exact records that are required to be maintained to prove compliance must be specified. However, while the procedures developed for taking the grab samples should be referenced in the permit, those procedures, in contrast to Petitioner’s view, need not be detailed in the permit itself. These procedures can be referenced in test protocols and support documentation that can be made available to the public upon request. Therefore, EPA grants the petition on this issue. The permit must be reopened to incorporate the test method and any record keeping requirements that may satisfy this condition.

- (f). At Condition 51, Petitioner refers to a statement in the Draft Permit, which referenced a “minimum” dry sludge content. Following NYPIRG’s comments on the Draft Permit, that reference was removed from the Draft Permit. NYPIRG wants this condition reinstated, if applicable, and wants any applicable parameter range to be included in the permit. Also, NYPIRG wants the permit to specify, under Condition 51, the type of records that must be maintained regarding the sludge fed to the incinerator.

Subpart O regulations do not stipulate a “minimum” dry sludge content. Therefore, the absence of that information in the permit does not violate any applicable requirement. Further, the type of records associated with the sludge fed to the incinerators and that are required under Subpart O are already referenced at Conditions 47 and 55. Therefore, EPA denies the petition on this issue.

- (g). Condition 53 relates to the monitoring of the incinerators’ particulate matter emissions. Petitioner alleges that periodic monitoring is not satisfied because a one-time stack testing coupled with a once-daily smoke check by an untrained observer is insufficient to assure the facility’s compliance with the particulate matter standard.

This condition relates to periodic monitoring of the incinerators for particulate matter, through stack testing and parametric monitoring. As part of the stack test, several parameters which directly correlate to particulate matter emissions such as incinerator combustion temperature, wet scrubber pressure drop, fuel feed rate to the incinerator, sludge feed rate, and stack gas oxygen content are also monitored. Also, these parameters are required to be monitored under Subpart O regulations and serve as surrogate monitoring, at all times, to determine the facility’s compliance with particulate matter emissions standards. Therefore, in addition to direct stack testing, particulate matter emissions limits are also monitored via ongoing surrogate monitoring by those aforementioned parameters. For this reason, Petitioner’s claim with respect to inadequate monitoring for particulate matter emissions is denied.

- (h). At Condition 55, Petitioner argues that DEC, in its Responsiveness Summary, has agreed to modify that condition “to incorporate the average pressure drop of the scrubber which was measured during the most recent previous performance test and when the test was done.” Petitioner states that information is still missing from the permit and, as a result, this condition is unenforceable.

EPA concurs with Petitioner. In its Responsiveness Summary, DEC has agreed to incorporate the average pressure drop which was measured for the scrubber during the most recent previous performance test. Such information is used in calculating the percent reduction in pressure drop through the scrubber, and is required under Subpart O reporting requirements. Therefore, EPA grants the petition on this issue and requires that the permit be reopened to revise this condition.

(15). Former Draft Permit Condition 59 (Particulates from Ash Silos)

Petitioner is skeptical of DEC’s decision to remove from the permit a previously stated particulate matter emission limit of 0.0004 lb/hr for the ash silos. Petitioner argues that, if the 0.0004 lb/hr limit from the draft permit is in a federally enforceable pre-existing permit, DEC lacks discretion to eliminate it from the title V permit. Moreover, Petitioner argues, any other conditions in federally enforceable pre-existing permits must be added to this title V permit. Petition at 25-26.

EPA concurs with Petitioner that DEC lacks discretion to eliminate federally enforceable pre-existing conditions from the title V permit without an explanation in the statement of basis and proper public participation. However, in this case, the evidence does not bear out Petitioner's claim. The condition does not appear in the pre-existing state permit. In the permit application, applicant cited 6 NYCRR § 227.1 as an applicable requirement pertaining to the silos' operation. From those regulations, applicant derived the 0.0004 lb/hr particulate matter emission limit that was introduced in the draft permit and subsequently removed from the final permit, upon a finding by DEC that 6 NYCRR § 227.1 did not apply to the facility's silos. Since the 0.0004 lb/hr particulate matter emission limit was not derived from a SIP-based applicable requirement in relation to the silos, DEC contravened no federal regulation by deleting it from the final permit. Therefore, the petition is denied.

(16). Condition 59 (Opacity)

Note: this condition is referenced as Condition 60 in the petition.

Petitioner states that Condition 60 fails to require monitoring sufficient to assure the facility's compliance because no monitoring frequency is specified. Petition at 25.

This opacity condition relates to the facility's boilers. Indeed, citing Method 9 without referencing a monitoring frequency would not satisfy periodic monitoring for opacity. However, subsequent to Petitioner raising this issue, COMs were installed on the boilers' stacks, as reported in the facility's annual compliance report, dated January 30, 2002. Therefore, while EPA grants Petitioner's request to incorporate a monitoring frequency in the permit, the newly installed COMs satisfy the needed periodic monitoring for opacity. Although permittee resolved the issue raised by Petitioner through alternate measures, Petitioner's issue is granted on merit, in relation to the requirements of periodic monitoring. In this instance, when the permit is reopened, any attendant QA/QC program relating to the proper operation of the newly installed COMs must be specified.

III. CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I grant issue H.9, addressing parametric monitoring; issue H.13, addressing reporting requirements of emission standards; issue H. 14(a), addressing periodic monitoring of the sludge fed to the incinerators; issue H.14(c), addressing periodic monitoring of monitoring devices; issue H.14(e), addressing referencing of test methods and record keeping; issue H.14(h), addressing Subpart O reporting requirements; and issue H.16 relating to periodic monitoring for opacity. I object to the issuance of the Suffolk County Bergen Point Sewage Treatment Plant permit on those points, and deny the balance of NYPIRG's petition.

12/16/02

Dated:

Christine Todd Whitman
Administrator