BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF CAMDEN COUNTY ENERGY RECOVERY ASSOCIATES FACILITY Permit Activity No.: BOP990001 Program Interest No.: 51614 Issued by the New Jersey Department of Environmental Protection	)))))))))	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition No.: II-2005-01

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

On February 17, 2005, the Environmental Protection Agency ("EPA") received a joint petition from the South Jersey Environmental Justice Alliance ("SJEJA"), the New Jersey Public Interest Research Group ("NJPIRG") and South Camden Citizens in Action, collectively referred to as "Petitioners" hereafter, 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"), CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f, to the Camden County Energy Recovery Associates facility ("CCERA"), located in Camden, New Jersey.[1]

The CCERA permit was issued by the New Jersey Department of Environmental Protection ("NJDEP") on December 22, 2004, pursuant to title V of the Act, the federal implementing regulations, 40 C.F.R. part 70, and the New Jersey State implementing regulations at N.J.A.C. 7:27-22.

CCERA is a municipal solid waste combustion facility that produces electricity which is sold to the grid. The facility consists of three mass burning combustors, each of which is capable of burning 350 tons of unprocessed refuse per day. The facility is a major source of several air pollutants, including nitrogen oxides (NO_X), carbon monoxide (CO) and sulfur dioxide (SO_2). CCERA is also classified as a major source of hazardous air pollutants.

1 The deadline for filing a petition with EPA to object to the CCERA permit was February 22, 2005. Therefore, EPA considers this petition to be timely.

Petitioners seek an objection to the CCERA permit on the following grounds: 1) NJDEP denied the Petitioners access to the full administrative record during the public comment period; 2) the public notice announcement for CCERA's draft permit failed to include the required information under 40 C.F.R. § 70.7(h)(2); 3) the draft permit was not accompanied by a statement of basis; 4) the permit application did not include a signed compliance certification that meets the requirements of 40 C.F.R. § 70.6(c)(5)(iii); 5) the permit does not include a compliance schedule for the facility; and 6) the permit was issued in violation of the state and federal environmental justice executive orders. The Petitioners have requested that EPA object to the issuance of the CCERA permit, pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) for any or all of these reasons.

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

Based on a review of all the information before me, I deny the petitioners' request in part and grant in part for the reasons set forth in this Order.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1), 42 U.S.C. § 7661d(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 Jersey effective June 17, 1996. 61 *Fed. Reg.* 24715 (May 16, 1996); 40 C.F.R. part 70, Appendix A. On November 30, 2001, EPA granted full approval to New Jersey's title V operating permit program. 66 *Fed. Reg.* 63168 (Dec. 5, 2001). 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), 42 U.S.C. §§ 7661a(a) and 7661c(a).

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

Under CAA §§ 505(a), 42 U.S.C. §§ 7661d(a), and 40 C.F.R. §§ 70.8(a), states are required to submit all proposed title V operating permits to EPA for review. Section 505(b)(1) of the Act, 42 U.S.C. § 7661d(b)(1), authorizes EPA to object if a title V permit contains provisions not in compliance with applicable requirements, including the requirements of the applicable State Implementation Plan (SIP). *See also* 40 C.F.R. § 70.8(c)(1).

Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), states that if the EPA does not object to a permit, any member of the public may petition the EPA to take such action, and the petition shall be based on objections that were raised during the public comment period unless it was impracticable to do so. *See also,* § 70.8(d).[2] If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 C.F.R. §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

ISSUES RAISED BY THE PETITIONERS

I. Unavailability of Certain Documents During Public Review Period

The Petitioners claim that certain important documents were not made available to them during the public comment period. Specifically, Warren Environmental and Health Consulting Services, Inc. (Warren Consulting), on behalf of SJEJA, asked for copies of arsenic stack test results, but was not provided a copy of the 2003 stack test results for arsenic emissions. Petitioners claim that the lack of access to this test result hindered their ability to submit comprehensive comments on the draft permit. Petition at 3-4.

EPA agrees that access to information is a necessary prerequisite to meaningful public participation. *See,* In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC, Petition No. II-2001-07, May 2, 2001. Public involvement is encouraged under title V (*See*, e.g., CAA sections 502(b), 503(e) and 505(b), 42 U.S.C. §§ 7661a(b), 7661b(e) and 7661d(b)), EPA's implementing regulations (*See*, 40 C.F.R. §§ 70.7 and 70.8) and New Jersey's implementing regulations (N.J.A.C. 7:27-22). In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioners' claims that the NJDEP improperly withheld relevant documents, EPA considers whether a Petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See*, CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2) (requiring an objection "if the petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act....").

---

2 The Petitioners commented during the public comment period, raising the concerns with the draft operating permit that are the basis for this petition.

Based on the documents transmitted to EPA during our review, it appears that stack testing for arsenic was performed in February 2003. A June 22, 2004 memorandum developed by the Bureau of Technical Services states that the 2003 arsenic stack test results for each unit indicated compliance for arsenic based on the average of three test runs. This memorandum was generated between the close of the public comment period and the transmittal of the proposed permit to EPA.

It does not appear that, and the Petitioners failed to explain how, the lack of information on the 2003 arsenic stack test results might have hindered Petitioners in making their substantive comments on the draft permit. Petitioners commented on the draft permit assuming noncompliance with the relevant arsenic emission standard. Given that the 2003 stack testing showed compliance with the arsenic limit, it is not clear what additional comments or concerns Petitioners would have raised based on this stack testing. In fact, even when made aware of the 2003 arsenic stack test results, the Petitioners continue to assert noncompliance without addressing the 2003 test results. This suggests that even if the document in question had been included in the file, it would not have altered the Petitioners' comments. *See,* Petition at 13.

EPA encourages NJDEP to manage their files carefully to ensure that documents such as stack test results are reviewed and included in the file expeditiously. However, Petitioners have not demonstrated that NJDEP's failure to provide the 2003 stack test results to them resulted in, or may have resulted in, a flaw in the permit. Accordingly, EPA denies the petition on this issue.[3]

II. Inadequate Public Notice

The Petitioners allege that the public notice announcement violated 40 C.F.R. § 70.7(h)(2) by not including information about how members of the public could obtain the draft permit, the application and other relevant supporting materials. Petition at 4.

40 C.F.R. § 70.7(h)(2) requires that the public notice of a draft title V permit provide contact information for an individual from whom the public may obtain additional information, "including...all relevant supporting materials" and "all other materials available to the permitting authority that are relevant to the permit decision." EPA obtained a copy of the public notice from NJDEP which explicitly designated two locations where the public could review relevant documents and identified a person to contact for additional information:

> Before a final permit is issued, the public has this opportunity to comment on the draft permit. The public notice and draft permit are available for inspection at the address below and at the Southern Regional Field Office located at One Port Center, 2 Riverside Drive, Suite 201, Camden, NJ 08103 (856-614-3602). If you would like to inspect the

---

3 In Sections III and V of this Order, however, EPA is separately requiring NJDEP to provide a statement of basis and specifically to explain its rationale for why the monitoring for arsenic will be sufficient to ensure compliance with the permit's emission limits for arsenic.

draft permit at either location, please call in advance for an appointment. The public notice can also be viewed at www.state.nj.us/dep/aqpp. Any comments on this draft permit must be addressed to: David Olson, New Jersey Department of Environmental Protection, Division of Air Quality, Bureau of Operating Permits, 401 East State St. - 2nd Floor, Box 27, Trenton, NJ 08625, 609-633-0730

Although the notice did not specifically mention that relevant materials other than the draft permit may be reviewed, Petitioners have not demonstrated that the lack of this information caused, or may have caused, a flaw in the permit. Indeed, Petitioners have requested additional information on the permit, as discussed elsewhere in this order. Accordingly, the petition is denied on this issue.

III. Statement of Basis

Petitioners allege that the CCERA draft permit was not accompanied by a statement of basis. Petition at 5-7. Petitioners assert that the failure to issue a statement of basis is a violation of the title V regulations[4] and unnecessarily prohibits the public from adequately participating in the public review and comment period for the draft permit.

EPA's title V regulations state that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it." 40 C.F.R. § 70.7(a)(5). Commonly referred to as a "statement of basis," this provision is not part of the permit itself, but rather a separate document which is to be sent to EPA and to interested parties upon request.

A statement of basis must describe the origin or basis of each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that EPA and the public would find important to review.[5] Rather than restating the

---

4 The Petitioners incorrectly allege violation of 40 C.F.R. § 71.11(b), which does not apply because the Camden permit was not issued under the Federal Operating Permit Program, 40 C.F.R. part 71. As noted below, the relevant regulatory provision is 40 C.F.R. § 70.7(a)(5).

5 Additional guidance was provided in a letter dated December 20, 2001 from Region V to the State of Ohio on the content of an adequate statement of basis which is available at http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/sbguide.pdf. Region V's letter recommends the same five elements outlined in a Notice of Deficiency ("NOD") recently issued to the State of Texas for its title V program. *See*, 67 *Fed. Reg.* at 732 (January 7, 2002). These five key elements of a statement of basis are (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. Id. at 735. In addition to the five elements identified in the Texas NOD, the Region V letter further recommends the inclusion of the following topical discussions in the statement of basis: (1) monitoring and operational restrictions requirements; (2) applicability and exemptions; (3) explanation of any conditions from previously issued permits that are not being transferred to the title V permit; (4) streamlining requirements; and (5) certain other factual information as necessary. In a letter dated February 19, 1999 to Mr.

permit, it should list anything that deviates from simply a straight recitation of applicable requirements. The statement of basis should highlight items such as the permit shield, streamlined conditions, or any monitoring that is required under 40 C.F.R. § 70.6(a)(3)(i)(B). Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA a record of the applicability and technical issues surrounding the issuance of the permit. *See, e.g., In Re Port Hudson Operations, Georgia Pacific*, Petition No. 6-03-01, at pages 37-40 (May 9, 2003) ("*Georgia Pacific*"); *In Re Doe Run Company Buick Mill and Mine*, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002) ("*Doe Run*"); *In Re Fort James Camas Mill*, Petition No. X-1999-1, at page 8 (December 22, 2000) ("*Ft. James*").

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

In this case, as discussed below, the permitting authority's failure to adequately explain its permitting decisions either in a statement of basis or elsewhere in the permit record is a serious flaw which calls the adequacy of the permit itself into question. By reopening the permit, the permitting authority is ensuring compliance with the fundamental title V procedural requirements of adequate public notice and comment required by sections 502(b)(6) and 503(e) of the Act, 42 U.S.C. §§ 7661a(b)(6) and 7661b(e), and 40 C.F.R. § 70.7(h), as well as ensuring that the rationale for the terms and conditions of the permit, including decisions about appropriate monitoring, is clearly explained and documented in the permit record. *See*, 40 C.F.R. §§ 70.7(a)(5) and 70.8(c); *Ft. James* at 8.

David Dixon, Chair of the CAPCOA Title V Subcommittee, the EPA Region IX Air Division provided a list of air quality requirements to serve as guidance to California permitting authorities that should be considered when developing a statement of basis for purposes of EPA Region IX's review. This guidance is consistent with the other guidance cited above. Each of the various guidance documents, including the Texas NOD and the Region V and IX letters, provides generalized recommendations for developing an adequate statement of basis rather than "hard and fast" rules on what to include in any given statement of basis. Taken as a whole, they provide a good roadmap as to what should be included in a statement of basis on a permit-by-permit basis, including such considerations as the technical complexity of the permit, the history of the facility, and the number of new provisions being added at the title V permitting stage.

For the proposed CCERA permit, NJDEP did not provide EPA with a separate statement of basis document. In its response to public comments, NJDEP addresses the statement of basis by stating that "by virtue of the form and content of New Jersey operating permits, they fulfill the federal requirement for the statement of basis. Putting the statement of basis in a separate document is unnecessary." *See,* NJDEP Hearing Officer's Report at 6. As such, NJDEP argues it complied with the substantive requirements of the statement of basis.

In responding to the Petition, EPA reviewed the final CCERA permit and all supporting documentation, including, but not limited to, the permit application, the proposed permit, the response to comments documents and various stack test results. After our review of the permit record, we believe that this documentation does not adequately support the factual basis for certain standard title V conditions, applicability determinations for source-specific applicable requirements, and monitoring and recordkeeping decisions. For example, as noted in Section V below for arsenic testing, the permit record fails to provide a discussion pertaining to how or why the selected monitoring is sufficient to meet the requirements of title V and Part 70. In addition, the permit does not include any monitoring to assure compliance with certain applicable requirements which do not otherwise have monitoring requirements. Ref.#s 45 through 60 on pages 29 and 30 of the final permit contain annual emissions limits for the facility's combustors, yet do not have any associated monitoring or recordkeeping. However, the permit record fails to discuss or explain why no monitoring should be required. *See*, 40 C.F.R. § 70.6(a)(3)(i)(B) (where applicable requirements do not require periodic monitoring, permits must contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit"). NJDEP should explain how the facility will demonstrate compliance with these limits, and satisfy the requirements of § 70.6(a)(3), if no monitoring or recordkeeping is required. Accordingly, I find that the Petitioners' claim in regard to this issue is well founded, and am requiring NJDEP to reopen the CCERA permit and make available to the public an adequate statement of basis that provides the public and EPA an opportunity to comment on the title V permit and its terms and conditions.

IV. Annual Compliance Certification

Petitioners allege that the Camden facility is in violation of the requirement at 40 C.F.R. § 70.6(c) to provide a signed annual compliance certification. Petition at 7. It is not clear if Petitioners are alleging that the permit fails to contain a requirement for an annual compliance certification, or are alleging that the facility has failed to file a timely or proper annual certification. However, neither of these issues would provide a basis for objecting to the CCERA permit.

The requirement for an annual compliance certification under 40 C.F.R. § 70.6(c)(1) and (5) is satisfied in Section J of the Permit under "Facility Specific Requirements" at Ref #7. NJDEP requires that these annual certifications be submitted within 60 days after the anniversary of the final permit approval date and annually thereafter. Since Camden's final operating permit

was approved on December 22, 2004, their first annual certification is not due until February 2006. Accordingly, EPA denies the petition with respect to this issue.

V. Compliance Schedule

The Petitioners' argue that the Camden facility has had numerous violations and was not in compliance at the time they submitted their application or during the public comment period, and therefore the permit needs to include a compliance schedule. The Petitioners further identify several comments regarding the Camden facility which they believe have not been adequately addressed by NJDEP. Petition at 8. These comments are as follows:

2003 Enforcement Actions

The Petitioners identify eight enforcement actions in 2003 related to malfunctions of the electrostatic precipitator ("ESP") which Petitioners claim are part of a recurring pattern, and as a consequence, the permit should have strict compliance conditions with shutdown ramifications for noncompliance. The Petitioners further assert that while NJDEP staff initially recommended denial of an affirmative defense for these exceedances, such affirmative defense appears to have been eventually accepted. Petition at 11. The Petitioners believe that acceptance of an affirmative defense for these exceedances would be contrary to New Jersey Law. The Petitioners allege, therefore, that a compliance schedule is required.

It is not clear from the Petition what Petitioners' basis is for their claim that the NJDEP "accepted" an affirmative defense claim by the facility. The Hearing Officer's Report indicates that two penalties, totaling $4,000, were assessed as a result of the violations identified by Petitioners. *See,* Hearing Officer's Report at 16. In any event, however, the Hearing Officer's Report, issued as part of the final permit process, finds that the facility "*is* in compliance with its existing air quality permits." *Id.* at 1 (emphasis added)

Part 70 requires a compliance schedule be included in all permits where a facility is not in compliance with all applicable requirement at the time of permit issuance. *See* 40 C.F.R. §§ 70.6(c), 70.5(c)(8). Petitioners have not presented evidence, much less demonstrated, that the facility was not in compliance with any applicable requirement at the time of permit issuance. Since the Petitioners offered no evidence of ongoing noncompliance, and the Hearing Officer has made a determination that this facility is in compliance, the petition is denied on this issue.

Failure to Include Requirements Regarding Malfunctions

The Petitioners claim that the Camden permit fails to include certain conditions that must be carried over from the facility's PSD permit (the "1996 Permit"). These conditions are related to the required maintenance and reporting (1996 Permit, D.1), malfunction certification (1996 Permit D.3.c.iii-iv), and the burden of proof requirements related to emergency malfunctions. (1996 Permit D.3.a). Petition at 12. It is not clear whether Petitioners view the maintenance and reporting requirements of the 1996 Permit as a generally applicable obligation on the source.

However, the 1996 Permit does not require maintenance, malfunction and emergency reporting absent a claim under these conditions related to emergency malfunctions.

The final Camden operating permit properly incorporates the requirements of the 1996 air permit relating to the maintenance of equipment and malfunction certifications in Condition D.1 of the 1996 Permit. *See,* Emission Unit U1, OS2, OS4 and OS6 Ref.# 3. In addition, the Camden permit also requires the permittee to certify that the malfunction did not occur as a result of improperly designed equipment, lack of preventive maintenance, careless or improper operation or operator error, as required in Condition D.3.c.iii-iv of the 1996 Permit. *See,* Emission Unit U1, OS2, OS4 and OS6, Ref.#4. Finally, the permit does include a condition which states that the burden of proof requirements related to emergency malfunction lie with the permittee, as required under Condition D.3.a of the 1996 Permit. *See,* Emission Unit U1, OS2, OS4 and OS6, Ref. #1. Therefore, the CCERA title V permit properly incorporates the requirements of the 1996 PSD permit, and there is no basis for objecting to the permit on this issue.

Maintenance and Repair Records

The Petitioners' state that there is no record in the files or in NJDEP's *Response to Public Comments on the Draft Air Permit for the Camden County Energy Recovery Associates Facility in Camden New Jersey* of major repairs or equipment replacement at the facility, and no records that the facility is being properly maintained. Petitioners' further state that they specifically asked for these records if such records existed. Petition at 13.

There is no applicable requirement or Part 70 requirement and accordingly no permit condition which requires CCERA to submit maintenance and repair records to NJDEP for inclusion into their files. The 1996 Permit only requires that the facility certify the equipment was properly maintained when seeking a start-up/shutdown or malfunction allowance. According to NJDEP, they do not have any such documents for this facility.

40 C.F.R. 70.7(h)(2) requires that NJDEP makes available to the public materials relevant to a title V permitting decision. However, it appears NJDEP did not consider these records relevant.[6] In its file request the Petitioner did not claim, much less make a showing, that these files were relevant to the terms and conditions of the final permit.

Since Petitioners have failed to demonstrate a violation of the procedures required under 40 C.F.R. 70.7(h)(2), and have further failed to demonstrate that such a violation resulted or may have resulted in a flaw in the permit, EPA is denying the petition with respect to this issue.

Arsenic Exceedances

6 *See,* October 19, 2005 email from David Olson, NJDEP to Carla Adduci, EPA Region 2.

The Petitioners state that the stack test results (from 2001 and 2002) for arsenic which were provided to them during the public comment period indicated exceedances and there is no further evidence or monitoring that will ensure that the facility will not continue to exceed its permit limits. Petition at 13.

The emission limits for arsenic are being carried over from the 1996 Air Permit, but that permit does not specify periodic monitoring for these emission limits. 40 C.F.R. § 70.6(a)(3)(i)(B) requires that "[w]here the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record keeping designed to serve as monitoring), [each title V permit must contain] periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. § 70.6(c)(1) further confirms that monitoring selected under § 70.6(a)(3)(i)(B) must be "sufficient to assure compliance with the terms and conditions of the permit."

While the final operating permit requires annual stack testing for arsenic, the rationale for this selected monitoring and how it will ensure compliance with the facility's arsenic limits is not included in the permit record. Such a rationale is required under Part 70, and is particularly important where, as here, there is prior evidence that suggests exceedances of permit limits. Accordingly, EPA is granting the petition on this issue and requiring NJDEP to explain the rationale for the specified monitoring, and why NJDEP believes it is "sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit."

Cumulative Impacts

The Petitioners request a review of the cumulative impacts of all facilities in the Camden area to determine whether CCERA is responsible for the soot/ash incidences occurring in the surrounding neighborhood. Petitioners also state that without investigations by the permittee and/or DEP and given the facility's violations, DEP should revise the penalty system for CCERA from monetary fines to a penalty that reduces operations, since that may cause the source to strictly adhere to the permit. Petition at 13.

A cumulative impact study is not a requirement for obtaining a title V permit, but rather may be required during preconstruction review if the project meets certain requirements. The title V operating permit program does not generally impose new substantive air quality control requirements, but rather incorporates otherwise applicable requirements. Petitioners have not identified any applicable requirement that would require a cumulative impact study.[7] For these reasons, EPA is denying the petition with respect to this issue.

---

7 Although not required under Part 70, it appears that NJDEP is conducting a "Camden Waterfront South Air Toxics Pilot Study" to learn more about the sources of air pollution in the neighborhood. *See*, Hearing Officer's Report at 19. The study will include approximately 50 facilities located within or near the Camden Waterfront South neighborhood and includes the CCERA facility. The study will include: (1) finding the sources of

Similarly, title V requires permits to assure compliance, but does not specify what specific enforcement actions must be taken to assure compliance. As noted above, Part 70 requires that before a permit is issued, a source must either be in compliance with all applicable requirements, or else the permit must contain a schedule of compliance to ensure that the source achieves compliance. Title V does not authorize EPA to require NJDEP to revise its penalty system in response to a title V petition under CAA § 505(b)(2). For these reasons, EPA is denying the petition with respect to this issue.

Compliance Schedule

The Petitioners' request that a compliance schedule be established for CCERA that includes (1) a complete engineering review of the history of maintenance, repair and replacement for all major equipment; (2) a review of the manufacturer's specifications; (3) establishment of an inspection, maintenance and repair schedule; and (4) requirements for maintenance and repair and reporting of same into permit as enforceable permit conditions. Petition at 14.

40 C.F.R. §§ 70.5(c)(8)(iii)(C) and 70.6(3) require that if a facility is in violation of an applicable requirement and it will not be in compliance at the time of permit issuance, its permit must include a compliance schedule that meets certain criteria. For sources that are not in compliance with applicable requirements at the time of permit issuance, compliance schedules must include "a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance". 40 C.F.R. §§ 70.5(c)(8)(iii)(C). If the reported violation has been corrected prior to permit issuance, a compliance schedule is no longer necessary.

In this case, the Petitioners have not demonstrated that the facility is not in compliance with any applicable requirement justifying the imposition of a compliance schedule. NJDEP states that CCERA is in compliance with its existing air quality permits. *See*, Hearing Officer's Report at 1. In addition, EPA has no evidence to the contrary. Although EPA is granting this petition in part because NJDEP failed to explain a number of its permitting decisions, as specified in this order, NJDEP's failure and EPA's resulting objection are not evidence that the facility is in fact in violation of any applicable requirement. Therefore, the petition is denied with respect to this issue.

---

air toxics and particulate matter; (2) collecting detailed information about the air pollution sources; (3) identifying the air toxics and particulates that pose the greatest health risks to people who live in the neighborhood and finding the sources of that pollution and (4) finding ways to reduce the health risks. The latest information regarding this initiative can be found at http://www.nj.gov/dep/ej/.

VI. Environmental Justice - Executive Order 12898

The Petitioners' argue that granting a permit to a habitual violating facility without stricter monitoring, reporting and penalty phases violates the state and federal environmental justice executive orders.[8]

Executive Order 12898, signed on February 11, 1994, focuses federal attention on the environmental and human health conditions of minority populations and low-income populations with the goal of achieving environmental protection for all communities. The Executive Order also is intended to promote non-discrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities' access to public information on, and an opportunity for public participation in, matters relating to human health or the environment. It generally directs federal agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental affects of their programs, policies, and activities on minority and low-income populations.

Environmental justice issues can be raised and considered in a variety of actions carried out under the Clean Air Act, as for example when EPA or a delegated state issues a-NSR permit.[9] Unlike NSR permits, however, title V generally does not impose new, substantive emission control requirements, but rather requires that all underlying applicable requirements be included in the operating permit. Title V also includes important public participation provisions as well as monitoring, compliance certification and reporting obligations intended to assure compliance with the applicable requirements.

In this particular case, Petitioners have not demonstrated how their particular environmental justice concerns demonstrate that the CCERA title V permit fails to properly identify and comply with the applicable requirements of the Clean Air Act.[10] Thus, the petition to object to the permit on this particular issue must be denied.

---

8 The following discussion focuses on the federal Executive Order, because the state order provides even less of a basis for objection to a title V permit. *See* CAA § 504(c) (permits must assure compliance with applicable requirements of the Clean Air Act); CAA 505(b)(2) (objection required where petitioner demonstrates the permit ins not in compliance with the requirements of the Clean Air Act); 40 C.F.R. § 70.2 (defining "applicable requirement" to include specified standards or requirements promulgated pursuant to the Clean Air Act).

9 Indeed, as indicated in the response to another title V permit petition, section 173(a)(5) of the Act, 42 U.S.C. § 7503(a)(5) requires that a permit for a "major source" subject to the NSR program may be issued only if an analysis of alternative sites concludes that "the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification." *See*, Borden Chemical, Inc., title V petition No. 6-01-01 (Dec. 22, 2000), pp. 34-44, available at http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/borden_response1999.pdf.

10 EPA notes that, in response to public comments; NJDEP has included, where reasonable, stricter monitoring requirements in the final permit than were in the draft permit. For example, stack testing for arsenic (as

However, as a recipient of EPA financial assistance, the programs and activities of NJDEP, including its issuance of the CCERA permit, are subject to the requirements of title VI of the Civil Rights Act of 1964, as amended, and EPA's implementing regulations, which prohibit discrimination by recipients of EPA assistance on the basis of race, color, or national origin. 42 U.S.C. 2000d et seq.; 40 C.F.R. Part 7. The Petitioners may file a complaint under title VI and EPA's title VI regulations if they believe that the state discriminated against them in violation of those laws by issuing the permit to CCERA. The complaint, however, must meet the jurisdictional criteria that are described in EPA's title VI regulations in order for EPA to accept it for investigation.[11]

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), I deny in part and grant in part the petition requesting an objection to the issuance of the CCERA title V permit.

JAN 2 0 2006

Date

Stephen L. Johnson
Administrator

well as for beryllium, chromium and nickel) has been increased from once per permit term in the draft permit to annually in the final permit. *See,* U1 OS Summary Ref #1. In addition, the permit contains continuous monitoring for opacity, total hydrocarbons, oxygen, NOx, CO and SO2; quarterly testing for mercury and annual stack testing for PM-10, HCl and dioxin/furans.

11 Under title VI, a recipient of federal financial assistance may not discriminate on the basis of race, color, or national origin. Pursuant to EPA's title VI administrative regulations, EPA's Office of Civil Rights conducts a preliminary review of title VI complaints for acceptance, rejection or referral. 40 C.F.R. § 7.120(d)(1). A complaint should meet jurisdictional requirements as described in EPA's title VI regulations. First, it must be in writing. Second, it must describe alleged discriminatory acts that may violate EPA's title VI regulations. Title VI does not cover discrimination on the grounds of income or economic status. Third, it must be timely filed. Under EPA's title VI regulations, a complaint must be filed within 180 calendar days of the alleged discriminatory act. 40 C.F.R. § 7.120(b)(2). Fourth, because EPA's title VI regulations only apply to recipients of EPA financial assistance, it must identify an EPA recipient that allegedly committed a discriminatory act. 40 C.F.R. § 7.15.