

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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In the Matter of the Application of

EASTMAN KODAK CO

Permit ID: 8-2614-00205/01801

to operate three power generation
emission units located in Buildings 31
and 321 at the Kodak Park manufacturing facility
located in Rochester, New York

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PETITION REQUESTING THE ADMINISTRATOR OBJECT TO THE PROPOSED
TITLE V OPERATING PERMIT FOR THREE POWER GENERATION EMISSION
UNITS LOCATED AT EASTMAN KODAK CO.'S KODAK PARK FACILITY
SUBMITTED ON BEHALF OF
THE NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. (“NYPIRG”) hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to the proposed Title V Operating Permit (“permit”) for the Eastman Kodak Co. to operate three of Kodak Park’s emission units related to power generation, operated under contract by Trigen Cinergy Solutions, located in Rochester, New York. NYPIRG expects a response from EPA within sixty days of its receipt of this petition as required by Clean Air Act § 505(b)(2).

NYPIRG is a not-for-profit research and advocacy organization that specializes in environmental issues. NYPIRG has more than 20 offices located in every region of New York State. NYPIRG has members who live, work, pay taxes, and breathe the air near where the facility is located.

If the U.S. EPA Administrator determines that this permit does not comply with applicable requirements or the requirements of 40 CFR Part 70, she must object to

issuance of the permit. See 40 CFR § 70.8(c)(1) (“The [U.S. EPA] Administrator will object to the issuance of any permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part.”). We hope that U.S. EPA will act expeditiously to respond to NYPIRG’s petition, and in any case, will respond within the 60-day timeframe mandated in the Clean Air Act.

In compliance with Clean Air Act § 505(b)(2), NYPIRG’s petition is based on objections to the draft permit for this facility that were raised during the comment period provided by DEC. NYPIRG’s review of the adequacy of this proposed permit reveals serious legal deficiencies that undermine the public participation goals of Title V. As our comments explain, this proposed permit violates both state and federal laws and regulations. Furthermore, if issued as currently written, this proposed permit will serve as an ineffective tool for monitoring the facility’s compliance with air pollution limitations.

NYPIRG believes that the Title V permitting program offers an unprecedented opportunity for concerned citizens to learn what air quality rules apply to facilities located in their communities and to determine whether those facilities are complying with legal requirements. Unless Title V permits are written correctly, however, these permits cannot live up to their promise. In fact, a poorly written Title V permit makes monitoring and enforcement under the Clean Air Act even more difficult than it already is, because each of New York’s Title V permits includes a permit shield. Under the terms of the permit shield, a permittee is protected from enforcement action so long as the permittee’s facility is complying with its permit, even if the permit incorrectly applies the law¹. Thus, a defective permit may prevent NYPIRG’s members as well as other New Yorkers from taking legal action against a permittee who is illegally polluting the air in their community. Furthermore, a Title V permit that fails to include appropriate monitoring, recordkeeping, and reporting requirements will prevent NYPIRG’s members and all New Yorkers from ever knowing whether a polluter is complying with legal requirements. Unless EPA requires correction of the deficiencies in the proposed permit that are

¹ The permit shield only applies to requirements that are specifically identified in the permit.

identified in this petition, NYPIRG members and other concerned New Yorkers will be unable to adequately protect their air quality.

Our comments address deficiencies with the permit's provisions regarding "operational flexibility," permit application; the permit review report; the permit format; terms used in the permit; clear and unambiguous application of applicable requirements to the facility; permit monitoring conditions; the condition excusing discharges in the case of "unavoidable" start-up/shutdown, malfunction, maintenance and upset; conditions addressing applicable compliance schedules; and format of the permit. Each of these deficiencies serves as a ground requiring the Administrator to object to this permit.

I. Operational Flexibility Provisions

A. Title V intended to give the public an oversight role

A central Congressional purpose behind the Title V operating permits program in the Clean Air Act Amendments of 1990 was to provide for a single operating permit that would assure compliance with all air requirements applicable to a facility. The adoption of the operating permits program represented a break with the past, when a facility was often left to make its own determination as to whether it was subject to any given air pollution limitation or standard. Not infrequently, there were errors in interpretation, failures to realize that certain regulations applied, and, at some facilities, sometimes outright circumvention of applicable requirements.

The Title V program was adopted, in part, to bring oversight and involvement by EPA, the State permitting authority, neighboring States, and the public to Clean Air Act applicability determinations. Under Title V, the facility, the state permitting agency, EPA and the public all have an opportunity to review a facility's activities and the applicable clean air law and have input on how the rules will be applied to the facility. This review and input happens every five years (when a permit is renewed) or any time in between when a permit is modified.

To give facilities some flexibility, Congress included in Title V of the Clean Air Act a provision to allow for facilities to make changes at their plants without modifying their permits --and thus without undergoing public review and input-- in some very limited circumstances. These so-called “off-permit” changes are allowed IF: 1) the changes are not a “modification” as defined under Title I of the Act; 2) the changes do not exceed emissions allowable under the permit whether expressed as either a rate or total of allowable emissions; and 3) the facility gives advance written notice to the EPA Administrator and the permitting authority at least 7 days in advance. CAA § 502(b)(10). Title I of the act defines modification at 111(a)(4) and at 112(a)(5)). In the context of new source performance standards, Title I of the Act defines a modification as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. § 7411(a)(4), CAA § 111(a)(4). Title I defines modification differently in terms of hazardous air pollutants. There, a modification is “any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted.” 42 U.S.C. § 7412(a)(5), CAA § 112(a)(5).

The Administrator must object to this permit because its operational flexibility provisions contain contradictory language, language that undermines the fundamental purpose of the Title V program, and language violating the regulatory and statutory limits on operational flexibility. Permit condition 8 explains that Kodak may undertake a wide variety of changes under the protocol that would otherwise require a permit modification, including “6 NYCRR Part 200 ‘modifications.’” 6 NYCRR 200 modifications include facility changes that increase the hourly emission rate, emission concentration, or emission opacity of any pollutant or that result in the emission of any air pollutant not previously emitted. 6 NYCRR 200(as). These are one of the types of off-permit changes specifically excluded from off-permit modification under CAA § 502(b)(10), 42 U.S.C. 7661a(b)(10) and 40 C.F.R. § 70.4(b)(12).

NYPIRG is pleased that the proposed permit contains a new, restriction on use of the operational flexibility protocol, not included in the draft permit, stating that the protocol does not apply to “any change that would exceed the emissions allowable under the permit whether expressed as a rate or in terms of total emissions,” (see Condition 8, Section II.B), but in order to clarify this requirement, the language of Condition 8, Section II.A. needs to be revised to state which specific “modifications” under 6 NYCRR § 200 are allowed.

NYPIRG remains concerned that the permit sets out an operational flexibility review period without actually setting out any DEC obligation to undertake a review. DEC can simply ignore the notification. The off-permit change could go into effect if the 30-day review period elapses without any DEC action. The public is unlikely to be aware of the inaction in time to challenge it. Under the proposed permit, DEC’s other responses to a notice of change pursuant to the operational flexibility protocol are to approve the change, or require a permit modification, or require Kodak to undertake a more detailed review of the change. Under draft permit condition 8, should DEC determine that a permit modification or more detailed review is necessary, it must inform Kodak, in writing, within just 15 days from the date Kodak notified DEC of its off-permit change. The permit sets out no criteria DEC must consider when reviewing an off-permit change to determine whether a more detailed review or a permit change is necessary.

The “operational flexibility” provisions in this permit appear to be based in part on the concepts set forth in DEC’s draft policy dated 2/16/01 entitled “Operational Flexibility in Air Operating Permits and Registrations Issued Under Part 201” and on EPA’s draft guidance dated Aug. 7, 2000, entitled “Design of Flexible Air Permits, Operating Permits Program White Paper Number 3.” See BMS permit, p. 22, item 6.2, section I. Since neither guidance document has been finalized, it is inappropriate for DEC to issue a permit based on the concepts set forth in those documents. Moreover, NYPIRG believes that the concepts set forth in the draft guidance documents violate

federal and state regulations implementing the Clean Air Act Title V, nonattainment New Source Review, minor New Source Review, and Prevention of Significant Deterioration Programs. One factor that probably contributed to EPA's decision not to finalize White Paper #3 over the past year is that dozens of environmental groups submitted comments to EPA alleging that the concepts set forth in the document are illegal.

In its response to NYPIRG's comments, DEC stated these draft guidances "were used only in that sense to provide consistency in how permitting concepts might be used under the authority granted by Title V legislation and state and federal regulations. The guidance documents were not used as the regulatory or legal basis for the condition." (Responsiveness Summary, Appendix G, p. 4).

The operational flexibility provisions contained in this permit also conflict with regulatory requirements in a number of different ways. First, the operational flexibility offered to Kodak is much broader than the flexibility allowed under 6 NYCRR § 201-6.5(f)(6). That regulatory provision only applies to "operating changes." Here, Kodak is being given authority to make not just operating changes, but also to install entirely new emission units and modify pollution control equipment. Moreover, 6 NYCRR § 201-6.5(f)(6) does not supersede the Title V requirements governing permit modifications. See 6 NYCRR § 201-6.7(c) and (d). It is clear that the Title V regulations intend for a facility to apply for a permit modification when it undertakes a change at the facility that triggers significant additional monitoring, whether at a new emission source or at a new emission point. Many of the changes covered by the operational flexibility provisions in this draft permit should require either a major or a minor modification to the facility's Title V permit.

The operational flexibility provisions contained in this draft permit also conflict with New York's State Implementation Plan ("SIP"). Part 201 of the SIP (state effective date April 4, 1993), states "no person shall commence construction of an air contamination source or proceed with a modification without having a valid permit to construct issued by the Commissioner." See § 201.2(a). Under § 201.4(a), "the

commissioner will not issue a permit to construct or a certificate to operate unless he determines that,” among other things, “(1) the operation of the source will not prevent the attainment or maintenance of any applicable air quality standard.” Moreover, “a permit to construct shall be valid for up to one year from the date of issuance unless renewed by the commissioner upon written application for periods of not more than one year or unless suspended or revoked by the commissioner.” See § 201.5(a). Finally, “a certificate to operate will cease to be valid under the following circumstances . . . (1) the air contamination source or its method of operation is changed to constitute a modification or reconstruction. The source owner must first obtain a permit to construct for the modification or reconstruction.” 6 NYCRR § 201.5(d). In clear conflict with SIP rule Part 201, the draft Title V permit would allow Kodak to make modifications of its facility without applying for and obtaining a permit to construct.

Under 40 CFR § 70.6(a)(9), a Title V permit must include “terms and conditions for reasonably anticipated operating scenarios.” The permit “must ensure that the terms and conditions of each such alternative scenario meet all applicable requirements and the requirements of this part.”

Finally, in order to give Kodak this operational flexibility under its Title V permit, DEC may be allowing Kodak to discard a large number of federally enforceable emission limits contained in pre-existing permits that currently apply to the plant. These permits were issued pursuant to 6 NYCRR Part 201, which has been part of New York’s SIP for decades. The emission limits in the underlying permits are expressed as “permissible” emission rates. “Permissible emission rate” is defined in 6 NYCRR § 200.1(bj) as “[t]he maximum rate at which air contaminants are allowed to be emitted to the outdoor atmosphere. This includes . . . (3) any emission limitation specified by the commissioner as a condition of a permit to construct and/or certificate to operate.” Similarly, the SIP version of 6 NYCRR § 201 states that “a certificate to operate will cease to be valid under the following circumstances . . . (3) the permissible emission rate of the air contamination source changes.” 6 NYCRR § 201.5(d)(3) (effective 4/4/93). Thus, the

SIP makes it clear that the “permissible emission rate” included in SIP-based Part 201 permits is an enforceable requirement.

U.S. EPA is already on record requiring the terms and conditions of permit issued pursuant to SIP regulations to be included in Title V permits. In a letter to Robert Hodanbosi of STAPPA/ALAPCO, U.S. EPA stated:

Title V and the part 70 regulations are designed to incorporate all Federal applicable requirements for a source into a single title V operating permit. To fulfill this charge, it is important that all Federal regulations applicable to the source such as our national emission standards for hazardous air pollutants, new source performance standards, and the applicable requirements of SIPs and permits issued under SIP-approved permit programs, are carried over into a title V permit. All provisions contained in an EPA-approved SIP and all terms and conditions in SIP-approved permits are already federally enforceable (see 40 CFR § 52.23). The enactment of title V did not change this. To the contrary, all such terms and conditions are also federally enforceable “applicable requirements” that must be incorporated into the Federal side of a title V permit [see CAA § 504(a); 40 CFR § 70.2)]. Thus, if a State does not want a SIP provision or SIP-approved permit condition to be listed on the Federal side of a title V permit, it must take appropriate steps in accordance with title I substantive and procedural requirements to delete those conditions from its SIP or SIP-approved permit. If there is not such an approved deletion and a SIP provision or condition in a SIP-approved permit is not carried over to the title V permit, then that permit would be subject to an objection by EPA.

Letter from John Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO, dated May 20, 1999. Thus, it is clear that the emission limits contained in Kodak’ pre-existing SIP permits must be included in the facility’s Title V permit.

In response, DEC states that “DEC never intended to elevate all state pollution control requirements contained in stationary source operating permits to a federally enforceable status. Moreover, neither DEC nor EPA intended that state requirements would become federally enforceable merely by virtue of Part 201 being included in the SIP. Indeed, DEC issued permits pursuant to the former Part 201 to major stationary sources containing a myriad of state requirements which EPA never enforced.” DEC

Responsiveness Summary, Draft Title V Permit for Kodak Park, Dec. 23, 2002, App. G, p.14.

Enforced or not, EPA clearly intended to include emission limits from pre-existing permits as applicable requirements that must be included in Title V permits. Forty C.F.R. 70.2 states that “applicable requirement”

- means all of the following as they apply to emissions units in a part 70 source...:
- (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;
 - (2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act.

Id. Additionally, every Title V permit must include “conditions as are necessary to assure compliance with applicable requirements...including the requirements of the applicable implementation plan.” CAA § 504(a), 42 U.S.C. 7661c(a). See also, 40 C.F.R. 70.6(a)(1).

If all the emission limits from pre-existing permits were included in this Title V permit, Kodak would be much less able to make changes at the facility without obtaining a permit modification. This is because the permit does not give pre-approval to changes that increase emissions in violation of an applicable requirement. While DEC has the authority to revise the pre-existing permits to eliminate the applicable emission limits, DEC must provide the public with notice of such action. Moreover, DEC must evaluate the air quality impact of eliminating these limits and assess whether the removal of these limits triggers applicability of the Clean Air Act Prevention of Significant Deterioration (“PSD”) program or Nonattainment New Source Review (“NNSR”) program. Since the emission limits in the pre-existing permits were part of New York’s SIP, DEC cannot pretend as though they never existed.

The permit is also deficient because it fails to limit the operation of the permit shield to changes made under the operational flexibility protocol. Such a limitation is clearly required by 40 C.F.R. § 70.4(b)(12)(i)(B).

In summary, the operational flexibility provision included in the permit is too broad to comply with 42 U.S.C. 7661a(b)(10), CAA § 502(b)(10), 40 CFR Part 70.6, NYCRR part 201, and New York's SIP. IF DEC did not intend to allow increases in emission rates and total allowable emissions, it must remove this language from the permit. DEC must eliminate all provisions that pre-approve modifications at the plant, including, among other things, the installation of new equipment, the transfer of an emission unit from one location to another, and the use of an emission unit to operate in a manner that is not specified in the permit. The only flexibility that can be provided to Kodak is the flexibility that is specifically allowed under applicable MACT regulation and the flexibility to switch back and forth between common, currently employed operating scenarios that are specified in the permit. For each operating scenario, the permit must specifically identify the equipment and the operating process, each requirement that applies to each scenario, and monitoring conditions that are sufficient to assure the facility's compliance with each requirement. The permit must also make it simple for a member of the public to determine which operating scenario is employed at any given time. Finally, DEC must add all emission limits from pre-existing permits to this Title V permit, and include monitoring that is sufficient to assure that the facility operates within these limits.

II Permit Application

This application for a Title V permit must be denied because the applicant has not submitted 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).

First, the permit application lacks an initial compliance certification. Each applicant is legally required to submit an initial compliance certification that includes:

- (1) a statement certifying that the applicant's facility is currently in compliance with all applicable requirements (except for emission units that the applicant admits are out of compliance) as required by Clean Air Act § 114(a)(3)(C), 40 CFR §70.5(c)(9)(I), and 6 NYCRR § 201-6.3(d)(10)(I);
- (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).

The initial compliance certification is one of the most important components of a Title V permit application. This is because the initial compliance certification indicates whether the permit applicant is currently in compliance with applicable requirements.

Because the applicant failed to submit an initial compliance certification, neither government regulators nor the public can truly determine whether the facility is currently in compliance with every applicable requirement.

DEC's responsiveness summary states: "NYPIRG's reading of Part 201 and Part 70 to require that the permit application include a description of the methods upon which the compliance certification was based is not consistent with how the Department as well as EPA Region 2 Staff have interpreted their respective regulations." Responsiveness Summary, App. G, p. 16. NYPIRG's interpretation does not appear to be inconsistent with EPA's. EPA has noted that 40 CFR § 70.5(c)(9)(ii) requires the statements in the permit application regarding the compliance status of the facility to include "a statement of methods used for determining compliance." See, for example, Order in Response to Petition to Object to Columbia University, U.S. EPA (Dec. 16, 2002) pp. 7-8.

In the preamble to the final 40 CFR part 70 rulemaking, U.S. EPA emphasized the importance of the initial compliance certification, stating that:

[I]n § 70.5(c)(9), every application for a permit must contain a certification of the source's compliance status with all applicable requirements, including any applicable enhanced monitoring and compliance certification requirements promulgated pursuant to section 114 and 504(b) of the Act. This certification must indicate the methods used by the source to determine compliance. This requirement is critical because the content of the compliance plan and the schedule of compliance required under § 70.5(a)(8) are dependent on the source's compliance status at the time of permit issuance.

57 FR 32250, 32274 (July 21, 1992). A permit that is developed in ignorance of a facility's current compliance status cannot possibly assure compliance with applicable requirements as mandated by 40 CFR § 70.1(b) and § 70.6(a)(1).

In addition to omitting an initial compliance certification, this permit application lacks certain information required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4), including:

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

The omission of this information makes it significantly more difficult for a member of the public to determine whether a draft permit includes all applicable requirements. For example, an existing facility that is subject to major New Source Review ("NSR") requirements should possess a pre-construction permit issued pursuant to 6 NYCRR Part 201. Minor NSR permits, Title V permits, and state-only permits are also issued pursuant

to Part 201. In the Title V permit application, a facility that is subject to any type of pre-existing permit simply cites to 6 NYCRR Part 201. Because DEC does not require the applicant to describe each underlying requirement, it is virtually impossible to identify existing NSR requirements that must be incorporated into the applicant's Title V permit. The draft permit fails to clear up the confusion, especially since requirements in pre-existing permits are often omitted from an applicant's Title V permit without explanation.

The lack of information in the permit application also makes it far more difficult for the public to evaluate the adequacy of monitoring included in a draft permit, since the public permit reviewer must investigate far beyond the permit application to identify applicable test methods.

III. Inadequate Statement of Basis

Under 40 C.F.R. Sec. 70.7(a)(5), each Title V draft permit must set out a "statement of basis" or rationale explaining the legal and factual basis for its permit conditions. DEC states that its permit review report for the draft permit for this facility is intended to satisfy this requirement. (PRR, p. 1). NYPIRG is pleased that DEC prepared a permit review report for the draft of this proposed permit, but is disappointed that the permit review report did not set out the legal and factual basis for all permit conditions.

A. Deficient description of factual basis

1. Emission units, points and processes

To establish the factual basis for its specific permit conditions applying to specific emission units, emission points and processes, the permit review report needs to explain which regulated pollutants are generated by which processes and where these pollutants are emitted. The process descriptions in some cases explain that a process emits less than or more than some threshold amount of some pollutant, but do not indicate all pollutants emitted by the process, and never indicate which hazardous air pollutants are emitted by a

particular process. The process descriptions alone are not adequate to inform a non-engineer of what types of regulated pollutants may be emitted.

B. Deficient description of legal basis

The permit review report listing and description of regulations does not set out the legal basis for why the regulations have been applied to the facility, or any particular emission unit, emission point, or process. Rather, the permit review report merely provides a section of brief narrative descriptions of some regulations, labeled “Applicability Discussion” (pp. 20 - 27), a section of brief narrative descriptions of some other regulations, labeled “Basis for Monitoring;” and a table, labeled “Compliance Certification” indicating which condition number applies a type of monitoring to a particular “Facility/EU/WP/ Process/ES.” The two sections of narrative description summarize many of the regulations cited elsewhere in the permit, but does not cross-reference these descriptions with permit conditions and does not set out the legal basis for why the regulation is relevant to the facility or any particular emission unit, emission source, or process.

The table indicates, apparently, which permit condition number is associated with a particular “Facility/EU/Process/ES” and regulation. The table does not set out the legal basis for applying a particular law to a particular “Facility/EU/Process/ES” nor does it set out the legal basis for determining that a particular condition satisfies a regulation. The table does not even indicate what applicable requirement is being monitored, instead unhelpfully categorizing each of the condition as either “record keeping/maintenance procedures” or “monitoring of a process or control device parameters as a surrogate.”

The permit review report does not adequately explain the distinction between NYS regulations that were approved by EPA as part of New York’s SIP (“SIP regulations”), and are thus federally enforceable, and NYS regulations adopted by NYS that have not been approved by EPA and are not part of the SIP and are not federally

enforceable (“non-SIP regulations”). The draft permit does not cite SIP regulations and non-SIP regulations in a manner that allows the reader to distinguish between the two.

As the basis for some of its federally enforceable conditions, the draft permit cites non-SIP NYS regulations adopted by NYS that have not been approved by EPA and are not part of the SIP and are not federally enforceable. The permit must cite the SIP regulation, if any, for each federally enforceable condition.

In some cases where a non-SIP regulation is less stringent than the SIP regulation on the same subject, the permit contains only the state-enforceable condition based on the less stringent non-SIP regulation, citing only the non-SIP regulation. The permit must contain a federally enforceable condition based upon the more stringent SIP regulations, and the state-enforceable condition on the same subject must note that the permit contains a more stringent federally enforceable condition on the same subject, and note the condition number of the federally enforceable condition.

DEC responded to our comments regarding the inadequacy of the statement of basis by stating: “The Department believes the information contained in the PRR, the draft permit and the permit application, all of which are made available for public review, satisfy the requirements of 40 CFR 70.7(a)(5).” See Responsiveness Summary, App. G, p. 18. However, as noted in Order in Response to Petition to Object to the Title V permit for Starrett City, EPA Dec. 16, 2002, “[a] statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. It should highlight elements that EPA and the public would find important to review. The statement should highlight anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, any facility-specific monitoring requirements, and the permit shield. EPA has recently provided guidance to permitting authorities that addresses the contents of a “statement of basis in terms that aid both EPA and the public....In the cited documents, EPA explains that the “statement of basis is to be used to highlight significant decisions or interpretations that were necessary in issuing the permit. Additionally, in a

December 22, 2000, Order responding to a petition for objection to the Fort James Camas Mill permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring methods be documented in the permit record. *See In re In the Matter of Fort James Camas Mill* (“Fort James Camas Mill”), Petition No. X-1999-1, at page 8, December 22, 2000 (available on line at: <http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/petitiondb1999.htm>). The permit review report for this facility contains no such rationale for monitoring methods selected.

IV. General Permittee Obligations

The permit contains certain conditions under the heading “notice of general permittee obligations” that do not indicate how they will be applied to the facility. These include Item C, maintenance of equipment; Item D, unpermitted emission sources; Item F, recycling and salvage; and Item G, prohibition of reintroduction of collected contaminants to the air; Item I, proof of eligibility for sources defined as exempt; and Item J, proof of eligibility for sources defined as trivial.

This is problematic because the Title V program was intended to clarify what general regulations applied to a source. In its preamble to the final rule for 40 CFR 70, regarding state operating permit programs, EPA noted “regulations are often written to cover broad source categories, therefore, it maybe unclear which, and how, general regulations apply to a source,” 57 Fed. Reg. 140, p. 32251. EPA stated “[the Title V] program will generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the requirements.” 57 Fed. Reg. 140, p. 32251.

In its responsiveness summary, DEC states:

In In the Matter of Action Packaging Corp, (USEPA Administrator Order, January 16, 2002), the Administrator of the USEPA affirmed that “generic

requirements may be provided in the general permit conditions section of the Title V permit” and “permitting authorities have discretion to develop a general permit condition section that applies to all title v sources.” Consequently, it is the Department’s position that this section is appropriate and will remain unchanged.

Responsiveness Summary, App. G, pp. 21-22. When EPA reviewed the general permit conditions of the Action Packaging permit, that permit did not contain a heading specifically excluding general permit terms from compliance certification. In the Kodak permit, the heading to section of “General Permittee Obligations” specifically states “[t]he items listed below are not subject to the annual compliance certification requirements under Title V.” As more fully stated below, Title V requires certification of compliance with all applicable requirements. These “general permittee obligations” are requirements and compliance with these requirements must be certified annually. Preparing permit conditions that provide information explaining how these requirements can be complied with would make certification easier.

NYPIRG agrees that these conditions should continue to be included as general conditions in the permit, but the permit review report must state whether or how these requirements apply to the facility, and the permit must include facility-specific conditions applying these requirements, imposing sufficient monitoring and recordkeeping to ensure compliance with these requirements, and compliance certification reporting.

VII. Annual Compliance Certification Requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5)

Under 6 NYCRR § 201-6.5(e), a permittee must “certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices,” at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). Located at Condition 7, the condition does not require the facility to certify compliance with all permit conditions. Rather, the condition only requires that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” DEC then proceeds to identify certain conditions in the draft permit as

“Compliance Certification” conditions. Requirements that are labeled “Compliance Certification” are those that identify a monitoring method for demonstrating compliance. The permit conditions that lack monitoring (often a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal law. The permittee must certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

In response to our previous petitions objecting to permits because of this deficient language, EPA has failed to object to this permit language because EPA apparently reads this language to require annual compliance certification for all permit terms and because it is satisfied by DEC’s promise to clarify the ambiguous language with an additional statement about compliance certification. See, for example, Order in response to Petition to Object to the Title V Permit for Starrett City, Inc., EPA Dec. 16, 2002, pp. 11-12. This new, promised language states “the provisions labeled herein as ‘Compliance Certification’ are not the only provisions of this permit for which an annual certification are required.” See proposed permit, Condition 7.

DEC states in its responsiveness summary that a nearly identical ruling in Order in Response to Petition to Object to the Title V Permit for Action Packaging

refuted NYPIRG’s contention that ‘permit conditions that lack monitoring ... are excluded from the annual compliance certification.’ In fact, EPA stated in the Action Packaging ruling that ‘The references to ‘compliance certification’ found in the permit terms do not appear to negate the DEC’s general requirement for compliance certification of all terms and conditions.’

See Responsiveness Summary, p. 22. All the same, in permit orders in response to NYPIRG petitions after the date of the Action Packaging Order, EPA acknowledges that it has conferred with DEC in an effort to minimized confusion on this point. See Order in Response to Petition to Object to the Title V Permit for Rochdale Village, EPA, July 3, 2002.

In the context of the permit as a whole, the promised language does little to clarify that all permit terms are subject to compliance certification. First, it does not state unequivocally that every term of the permit is subject to annual compliance certification. Many terms of the permit are, of course, not labeled “compliance certification.” For example, p. 22 in the table of contents includes several terms that are not labeled compliance certification. Some are labeled “operational requirements,” “PTE determination,” or “batch vapor and in-line machine base design requirements.” The supposedly clarifying language of Condition 7 provides little guidance as to which of these conditions is subject to annual compliance certification. DEC needs to remove such confusing labeling and use a different terms for the requirements now labeled “compliance certification,” such as “compliance monitoring for (fill in the blank) standard at emission unit (fill in the blank).

Secondly, the promised language does little to clarify certification requirements because DEC has begun to add yet more confusing language. DEC did not merely add language the above-noted clarifying language when it amended the compliance certification portions of its permits. As noted in NYPIRG’s comments on this facility and in Section IV above, DEC has now begun segregating almost 30 federally enforceable requirements, stemming from the SIP or federal regulations, under a heading that states:

FEDERALLY ENFORCEABLE CONDITIONS

****** Facility Level ******

NOTIFICATION OF GENERAL PERMITTEE OBLIGATIONS

The items listed below are not subject to the annual compliance certification requirements under Title V. Permittees may also have other obligations under regulations of general applicability.

See permit p. 7. The rationale for this deficiency is noted in the responsiveness summary for this permit, where DEC states:

The Department also understands that with respect to the requirement that all terms and conditions have to be certified annually, such a requirement does not

mandate that a permittee certify to terms and conditions that do not create an obligation on the permittee (e. g., terms providing for the duration of a permit). Thus, on a case-by-case basis, the Department may exclude from the certification terms that do not create an obligation on the permittee.

Responsiveness Summary, App. G, p. 20. The general obligations section does include terms and conditions that do create an obligation on the permittee, and the topic heading excludes these terms from annual compliance certification. The permit thus makes it possible for the facility to fail to report its compliance with a host of applicable requirements. The facility will not need to report whether it has operated any air contamination device sealed by the commissioner. See Permit Item A. The facility will not be required to report whether or not it is keeping on site, for a period of five years, records relating to activities that it claims are exempt. See Permit Item I. It will not have to certify that it had paid fees and that the fees are consistent with the schedule authorized by DEC. See Permit Item R. It will not have to certify that it has not burned, caused, allowed or permitted open burning of garbage or rubbish generated by industrial or commercial activities. See Item AA. These are just a few examples of general permittee obligations that either create a permittee obligation or may create an obligation on the part of the permittee under certain circumstances.

With no requirement to certify annually to each permit term, the permit is in violation of CAA § 504(c), which requires that “[e]ach permit issued under this subchapter shall set forth ... compliance certification...requirements to assure compliance with the permit terms and conditions. Id., 42 U.S.C. § 7661c(c). The Administrator must object to the permit because of its failure to require annual compliance certification of each and every term of the permit and its failure to impose requirements to assure compliance with all permit terms and conditions.

VIII. Prompt Reporting

The Administrator must object to this permit because it does not require prompt reporting of all deviations from the permit. A key feature of the Title V program is that it

requires a polluter to promptly report a violation of permit conditions. See 40 CFR § 70.6(a)(3)(iii)(B)(stating that each Title V permit must require “prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective action or preventive measures taken.”). This requirement is in addition to the requirement under 40 CFR § 70.6(a)(3)(iii)(A) that each Title V permit require “submittal of reports of any required monitoring at least every 6 months.”

The permit for this facility violates the prompt reporting requirement because it does not require the facility to report all deviations promptly. Instead, the permit sets up a reporting scheme whereby the facility is required to report some deviations promptly, while reports of other deviations can be withheld until it is time for the facility to submit its six-month monitoring report. The primary permit condition governing prompt reporting is condition 6. This permit condition is rather lengthy and sets up a variety of different reporting obligations depending on a variety of factors. To start, condition 6 states that the permittee must:

Notify the Department and report permit deviations an incidences of noncompliance stating the probable cause of such deviations, and any corrective actions or preventive measures taken. Where the underlying applicable requirement contains a definition of prompt or otherwise specifies a time frame for reporting deviations, that definition or time frame shall govern.

This portion of condition 6 is patently illegal. Under 40 CFR § 70.6(a)(3)(iii)(B), “the permitting authority shall define ‘prompt’ in relation to the degree and type of deviation likely to occur and the applicable requirements.” Here, DEC is defining ‘prompt’ based solely upon the language of the underlying applicable requirement. Under the law, DEC must look not only at the underlying applicable requirement but also at the degree and type of deviation likely to occur. DEC’s explicit decision not to examine the degree and type of deviation likely to occur is arbitrary and capricious.

Condition 6 goes on to set out a reporting scheme for deviations from applicable

requirements where the underlying applicable requirement does not specify a reporting frequency. It states:

- (1) For emissions of a hazardous air pollutant or a toxic air pollutant (as identified in an applicable regulation) that continue for more than an hour in excess of permit requirements, the report must be made within 24 hours of the occurrence.
- (2) For emissions of any regulated air pollutant, excluding those listed in paragraph (1) of this section, that continue for more than two hours in excess of permit requirements, the report must be made within 48 hours.
- (3) For all other deviations from permit requirements, the report shall be contained in the 6 month monitoring report required above.

This portion of permit condition 6 also violates federal requirements. First, this reporting scheme sets up arbitrary distinctions between different kinds of violations. Under (1), if the facility violates an emission standard for a toxic air pollutant for 61 minutes, the facility must submit a report to DEC within 24 hours. If the violation is for 60 minutes, however, no report is due for up to 6 months. There is no rational basis for DEC's determination that a 61-minute violation is so serious as to require a report within 24 hours, while a 60-minute violation is so inconsequential that it need not even be reported until the six month report is due. While we understand that a line must be drawn somewhere, the distinction between these two deviations cannot possibly be so great as to warrant such a huge discrepancy in mandatory reporting requirements. Rather, it would make much more sense for reporting times to get progressively longer as the duration of the violation gets smaller. So, for example, the facility could be required to report a violation with a duration of between 30 and 61 minutes within 48 hours, a violation of between 15 and 29 minutes within 72 hours, etc. Even better would be a reporting scheme that requires a report within 1 hour any time that a facility violates an emission limitation that applies to a toxic air contaminant. After all, toxic pollutants are dangerous in very small quantities. Over the span of 5 minutes, a facility could release a quantity of toxic pollution that could be highly dangerous to the surrounding community. By the time a report is submitted 24 hours later, the damage may already have occurred.

Though experts are certain to disagree over how quickly a facility should be required to report a violation, it is clear that the reporting scheme included in this Title V permit is not based on reasoned consideration of “the degree and type of deviation likely to occur and the applicable requirements.” Permits issued by DEC must comply with 40 CFR § 70, which sets out a different standard for prompt reporting. DEC must rewrite this reporting scheme after giving careful consideration to the factors set forth in 40 CFR Part 70.

Part (2) of the portion of Condition 6 quoted above suffers from the same arbitrariness as Part (1). Moreover, as with the provision pertaining to toxic air pollutants, we are dismayed to see that so long as the facility comes into compliance with an applicable requirement for at least one fleeting moment every two hours, the facility could operate in violation of emission limitations on an almost continuous basis and never be required to submit a prompt report of its violations to DEC.

Part (3) as quoted above conflicts with federal law because it creates a huge category of deviations from permit conditions that are not subject to the prompt reporting requirement contained in 40 CFR § 70.6(a)(3)(iii)(B). It does this by stating that reports for deviations other than those that fall into categories (1) and (2) are only to be reported in the six month monitoring reports. Defining “prompt” as every six months is no different from saying that the prompt reporting requirement does not apply to certain kinds of deviations. This is clearly illegal. The prompt reporting requirement applies to all deviations from permit terms, regardless of the duration of the deviation. In defining “prompt,” DEC must select a time period for the submission of prompt reports that is shorter than the six month reporting requirement, since the prompt reporting requirement is distinct from the six month reporting requirement. As EPA stated in dozens of Federal Register notices pertaining to state Title V programs:

The EPA believes that prompt should generally be defined as requiring reporting within two to ten days of the deviation. Two to ten days is sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems. For sources with a

low level of excess emissions, a longer time period may be acceptable. However, prompt reporting must be more frequent than the semiannual reporting requirement, given this is a distinct reporting obligation under Sec. 70.6(a)(3)(iii)(A).

60 Fed. Reg. 36083 (July 13, 1995) (granting interim approval to Arizona's Title V program).

The next section of permit condition 6 goes on to say:

(4) This permit may contain a more stringent reporting requirement than required by paragraphs (1), (2) or (3) above. If more stringent reporting requirements have been placed in this permit or exist in applicable requirements that apply to this facility, the more stringent reporting requirement shall apply.

Determining whether more frequent reporting is required under any other provisions of the permit is quite difficult. This is because the permit conditions do not include a line where DEC must specifically identify the prompt reporting requirement. Rather, the reporting requirement is typically buried in the permit condition, and it may or may not pertain explicitly to prompt reports of deviations. Moreover, our review of the permit conditions reveals an additional and even more troubling problem: for the most part, this facility is not required to perform monitoring that assures its ongoing compliance with applicable requirements. Where ongoing compliance monitoring is not required, there cannot be any evidence of a deviation from permit conditions.

While Part 70 gives DEC discretion over how to define "prompt," the definition that DEC selects must be reasonable. U.S. EPA has already issued statements in dozens of Federal Register notices setting out what it believes to be a reasonable definition of "prompt." For example, when proposing interim approval of Arizona's Title V program U.S. EPA stated:

The EPA believes that prompt should generally be defined as requiring reporting within two to ten days of the deviation. Two to ten days is sufficient time in most cases to protect public health and safety as well as

to provide a forewarning of potential problems. For sources with a low level of excess emissions, a longer time period may be acceptable. However, prompt reporting must be more frequent than the semiannual reporting requirement, given this is a distinct reporting obligation under Sec. 70.6(a)(3)(iii)(A).

60 Fed. Reg. 36083 (July 13, 1995). DEC should use U.S. EPA's interpretation of the prompt reporting requirement in developing a definition of "prompt" to be included in this permit. For deviations of emission limitations, prompt should be defined as within 48 hours. Forty-eight hours is currently the deadline for a facility to report an "unavoidable" violation that it wishes to have excused by the DEC commissioner. If unavoidable violations must be reported within 48 hours, then avoidable violations must also be reported in that time frame.

Condition 6 does not require prompt reporting of HAPs if the excess emission continues for any time less than one hour, regardless of the amount of HAP(s) emitted. It does not require prompt reporting of excess emissions of other regulated air pollutant if the excess emission continues for any time less than two hours, regardless of the amount of regulated pollutant emitted. Condition 6.2 allows the facility to report deviations other than excess emissions of HAPs or other regulated air pollutants semi-annually, which as discussed above, is not "prompt." Thus, if the facility "deviated" from its permit by failing to undertake required monitoring of a pollutant, and the facility had no knowledge of an emission exceedance, the permit would not require this deviation from a monitoring requirement to be reported until the six-month compliance report was due, unless the underlying monitoring requirement specified a more stringent reporting requirement. If the facility used parametric monitoring, such as the recording of the temperature of the vapor condenser outlet gas (draft permit, p. 250, condition 200) to determine compliance with an emission limitation, and the temperature was beyond permitted values, the facility could argue that this deviation from permitted values was not itself an emission exceedance and thus did not need to be reported until the six-month compliance report. The prompt reporting condition needs to provide prompt reporting for every type of deviation, and other conditions which currently contain conflicting less stringent deviation reporting requirements, need to have the conflicting language removed and

replaced by language noting that deviation reporting requirements are contained in Condition 6.2.

IX. Startup/Shutdown, Malfunction, Maintenance, and Upset Provision

The permit's startup/shutdown, malfunction, maintenance, and upset provision, Condition 982, violates 40 CFR Part 70. This condition in the permit states in part that "[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." The condition goes on to describe the actions and recordkeeping and reporting requirements that the facility must adhere to in order for the Commissioner to excuse a violation as unavoidable. In these comments, we refer to this condition as the "excuse provision." As detailed below, the excuse provision included in this draft permit violates 40 CFR Part 70.

The 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). Under permit condition 6, "if the permittee seeks to have a violation excused as provided in 201-1.4, the permittee shall report such violations as required under 201-1.4(b). However, in no case may reports of any deviation be on a less frequent basis than those described in paragraphs (1) through (4) above." Though the permit language is ambiguous, it appears that under circumstances where a facility wishes for a violation to be excused, the reporting requirements of 6 NYCRR § 201-1.4 apply instead of the prompt reporting requirement. This creates a problem because the reporting requirements contained in the excuse provision do not comply with 40 CFR § 70.6(a)(3)(iii)(B). Specifically, the permittee is allowed to submit reports of "unavoidable" violations by telephone rather than in writing.

In its Order in Response to a Petition to Object to the Title V Permit for Bergen Point Sewage Treatment Plant, EPA noted that, “[f]or 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.”

Unfortunately, as written, the permit condition will not assure that the facility applied the proper methods for requesting an excuse or that it applied. Thus, a violation can be excused without creating a paper trail that would allow U.S. EPA and the public to monitor whether the facility is abusing the excuse provision by improperly claiming that violations qualify to be excused. Since a primary purpose of the Title V program is to allow the public to determine whether polluters are complying with all applicable requirements on an ongoing basis, reports of deviations from permit requirements must be in writing so that they can be reviewed by the public. An excuse provision that keeps the public ignorant of violations cannot possibly satisfy the Part 70 mandate that each permit assure compliance with applicable requirements.

X. Insufficient Information in the Six Month Monitoring Reports:

Under 40 CFR Part 70, reports of any required monitoring must be submitted to DEC and made available to the public at least once every six months. Though many monitoring conditions in this draft permit include a space for “reporting requirements,” there is sometimes contradictory, confusing language in the permit. Many monitoring conditions in the permit do not always say that reports are due every six months, as required, or at some more frequent interval, based upon the underlying requirements, but instead sometimes say “Reporting Requirements: As required – See monitoring description.” The monitoring description then fails to state that reports are due at least once every six months. DEC must correct this problem by reviewing each permit condition individually to determine whether it conflicts with the six month reporting requirement. Since reporting of all required monitoring must occur every six months, at a minimum,

and promptly if deviations are noted, each permit condition should at a minimum, refer to the requirements of Condition 6 and set out any additional monitoring as required.

Additionally, the permit should contain a condition stating that deviation reports, six-month reports and annual compliance certifications from the facility must state reports of any emissions monitoring or parametric monitoring in the same units and frequency as were used in the relevant permit condition. For example, if a permit condition limits emission of a particular pollutant to less than 10 pounds per hour, the annual compliance certification, six month monitoring report and any report of a deviation from this condition must state the results of emission reporting in pounds of pollutant per hour.

XI. Many Individual Permit Conditions Without Adequate Monitoring and Not Practicably Enforceable

The draft permit does not assure compliance with all applicable requirements because many individual permit conditions lack adequate monitoring and are not practicably enforceable. A basic tenet of Title V permit development is that the permit must require sufficient monitoring and recordkeeping to provide a reasonable assurance that the permitted facility is in compliance with legal requirements. As U.S. EPA explained in its recent response to a Title V permit petition filed by the Wyoming Outdoor Council:

[W]here the applicable requirement does not require any periodic testing or monitoring, section 70.6(c)(1)'s requirement 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 C.F.R. § 70.6(a)(3)(I)(B). Where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, however, as noted above the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even

if that monitoring is not sufficient to assure compliance. In such cases the separate regulatory standard at § 70.6(c)(1) applies instead. By its terms, § 70.6(c)(1) - like the statutory provisions it implements - calls for sufficiency reviews of periodic testing and monitoring in applicable requirements, and enhancement of that testing or monitoring through the permit necessary to be sufficient to assure compliance with the terms and conditions of the permit.

U.S. EPA, *In re PacifiCorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Order Partially Granting and Partially Denying Petition for Objection to Permits*, November 16, 2000, pp. 18-19.

In addition to containing adequate monitoring, each permit condition must be “enforceable as a practical matter” in order to assure the facility’s compliance with applicable requirements. To be enforceable as a practical matter, a condition must (1) provide a clear explanation of how the actual limitation or requirement applies to the facility; and (2) make it possible to determine whether the facility is complying with the condition. The permit review report that accompanies the permit and is apparently intended to be the statement of basis fails to provide the legal and factual basis for these permit terms and fail to indicate how the terms of the permit will assure compliance.

XII. Conditions fail to state what facility must do to comply with applicable requirement that is cited

Throughout the permit, there are permit conditions that merely quote or paraphrase a law or regulation without indicating what Kodak must do to comply with the regulation. In many cases, it is even unclear whether or not the quoted regulation applies to Kodak at all. The Title V permit must do more than just list requirements that may apply to the facility. As noted by EPA:

[T]itle V permit conditions must be written with enough specificity to assure that the permit applicant, the public and regulatory authorities know what requirements apply....A title V permit may refer to, cross reference, or incorporate by reference, a rule, an existing permit, or other applicable requirements to fill in the details on monitoring, record keeping or reporting; but only to the extent that the information is publicly available, detailed enough that

the manner in which the citation applies to a facility is clear, and is not reasonably subject to misinterpretation. Material incorporated into a permit by reference must be specific enough to define how the applicable requirement applies, and the referenced material should be unambiguous in how it applies to the permitted facility.

Order in Response to Petition to Object to Doe Run Co. Buick Mine and Mill, EPA, July 31, 2002, pp. 11-12. The permit conditions must take the applicable requirement and set terms, specific to the facility and specific emission units, emission points and processes, and state what Kodak must do to comply with the law. The statement of basis must set out the legal and factual basis for how the applicable requirements have been applied to the facility.

XIII. Conclusion

As currently written, this draft permit will not assure the facility's compliance with all applicable requirements. Thus, the draft permit does not meet the minimum requirements of 40 CFR Part 70. Unless the facility is willing to accept modifications to this permit that will allow the public and government officials to monitor the facility's ongoing compliance with applicable requirements, this permit application must be denied.

Dated: April 1, 2003
New York, New York

Respectfully submitted,

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