

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
KODAK PARK DIVISION)	
POWER AND STEAM GENERATION)	ORDER RESPONDING TO
)	PETITIONER’S REQUEST THAT
Permit ID: 8-2614-00205/01827)	THE ADMINISTRATOR OBJECT
Facility DEC ID: 8261400205)	TO ISSUANCE OF A STATE
)	OPERATING PERMIT
Issued by the New York State)	
Department of Environmental Conservation)	
Region 8)	Petition Number: II-2003-01
_____)	

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

On April 1, 2003, the Environmental Protection Agency (“EPA” or “Agency”) received a petition from the New York Public Interest Research Group, Inc. (“NYPIRG” or “Petitioner”) requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, for Eastman Kodak Company’s power generation plant (“Kodak Power Plant”) in Rochester, New York. This permit was issued by the New York State Department of Environmental Conservation’s (“DEC”) Region 8 Office, and took effect on February 20, 2003, pursuant to title V of the Act, the federal implementing regulations at 40 CFR part 70, and the New York State implementing regulations at 6 NYCRR parts 200, 201, 621, and 624. The title V permit for the Kodak Power Plant was later modified with an effective date of November 24, 2004 (“Permit Mod 1”).

The Kodak Power Plant generates steam and electricity to support the manufacturing processes at Kodak Park in Rochester, New York. The power plant is comprised of: (1) coal and ash storage, handling and conveying systems; (2) fuel-oil and boiler feed water storage tanks; and (3) stationary combustion installations, including four #6 fuel-oil-fired package boilers, four bituminous coal-fired built-up boilers, one #6 fuel-oil-fired built-up boiler, four #6 fuel-oil and bituminous coal-fired built-up boilers, and one #2 fuel-oil and low-sulfur bituminous coal-fired (and NSPS-affected) built-up boiler.

The NYPIRG petition alleges that the draft Kodak Power Plant permit does not comply with the Clean Air Act or 40 CFR part 70 in that: (1) the permit’s 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; (2) the applicant did not submit a complete permit application in accordance with the requirements of CAA § 114(a)(3)(C), 40 CFR § 70.5(c), and 6 NYCRR § 201-6.3(d); (3) the draft permit failed to include an adequate statement of basis; (4) the permit does not explain the applicability of the “general permittee obligations” listed therein, and must include facility-specific conditions for these requirements, including monitoring; (5) the permit does not conform to the annual compliance certification requirements of title V in that it does not require certification for all terms of the permit; (6) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (7) the permit’s startup/shutdown, malfunction, maintenance and upset provision violates 40 CFR part 70; (8) the permit does not include sufficient information regarding the requisite 6-month monitoring reports; (9) many individual permit conditions do not contain adequate monitoring and are not practicably enforceable; and (10) the permit contains conditions that fail to indicate how the facility must comply with the cited applicable requirements. The Petitioner has requested that EPA object to the issuance of the Kodak Power Plant title V permit pursuant to CAA § 502(b)(2) and 40 CFR § 70.8(d).

EPA has reviewed these allegations pursuant to the standard set forth by 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, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2002).

Based on a review of all the information before me, including the NYPIRG petition; the Kodak Power Plant permit application; the administrative record supporting the permit; the final Kodak Power Plant title V permit effective on February 20, 2003 (“title V permit”); Permit Mod 1; and relevant statutory and regulatory authorities and guidance; I deny the Petitioner’s request in part and grant it in part for the reasons set forth in this Order.

I. STATUTORY AND REGULATORY FRAMEWORK

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

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as “applicable requirements”) but does require permits to contain monitoring, record keeping, reporting, and other compliance requirements when not adequately required by existing applicable requirements to assure compliance by sources with existing applicable emission control requirements. *57 Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, States, and the

public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under § 505(a) of the Act and 40 CFR §§ 70.8(a), States are required to submit all proposed operating permits to EPA for review. Section 505(b)(1) of the Act authorizes EPA to object if a title V permit contains provisions not in compliance with applicable requirements, including the requirements of the applicable SIP. This petition objection requirement is also reflected in the corresponding regulations at 40 CFR § 70.8(c)(1).

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

II. ISSUES RAISED BY THE PETITIONER

A. Operational Flexibility

The Petitioner's first claim is that the title V permit's operational flexibility provisions (delineated at Condition 8) contain contradictory language, language that undermines the fundamental purpose of the title V program, and language that violates the regulatory and statutory limits on operational flexibility. *See* petition at pages 3 through 10.

Specifically, NYPIRG raises the following allegations and/or comments:

- (1) The permit's operating flexibility provisions are more broad than the provisions allowed under 6 NYCRR § 201-6.5(f)(6), in that Kodak is given authority to install entirely new emission units and modify pollution control equipment. This aforementioned provision does not supercede the title V requirements governing permit modifications. The operating flexibility provisions in the permit also conflict with New York State's requirements for a facility to obtain a permit to construct prior to commencing construction of an air contamination source, or proceeding with a modification (*see* 6 NYCRR § 201.2(a)). *See* petition at pages 6 and 7.

¹ *See* CAA § 505(b)(2); 40 CFR § 70.8(d). The Petitioner commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. *See* comments from Tracy Peel of NYPIRG to DEC (September 17, 2002) ("NYPIRG Comment Letter").

Specifically, Condition 8 of the Kodak permit allows “6 NYCRR part 200 modifications” without having to undergo permit revisions. This is not allowed under off-permit changes provisions delineated at CAA § 502(b)(10) and 40 CFR § 70.4(b)(12). While NYPIRG acknowledges that a change to Condition 8 was made (from the draft to the proposed permit) to indicate that off-permit changes would not include “changes that would exceed emissions allowable under the permit whether expressed as a rule or in terms of total emissions,” the Petitioner argues that 6 NYCRR part 200 modifications must be specifically listed in the permit. *See* petition at pages 4 and 5.

- (2) The Kodak title V permit sets forth an operational flexibility review period for the DEC of 30-days, but does not specifically require the State to undertake a review, nor does it set forth criteria the DEC must consider in determining whether a more detailed review is needed or if a permit change is required. This must be corrected. *See* petition at page 5.
- (3) By granting Kodak operational flexibility in its title V permit, the DEC may be excluding a large number of federally enforceable emission limits from previously issued, pre-existing permits issued under 6 NYCRR part 201. Specifically, these relate to emission limits in such permits identified as “permissible emission rates.” Incorporation of such limits into the title V permit would likely impact the operational flexibility provisions because pre-approval of select changes cannot be given to changes that would increase emissions in violation of an applicable requirement. While NYPIRG acknowledges that the DEC can revise or eliminate limits from pre-existing permits, it must be done in accordance with applicable public notice requirements, and an assessment must be made as to whether such changes would trigger any CAA new source review requirement. *See* petition at pages 7 through 9.
- (4) The title V permit fails to limit the operation of the permit shield to changes made under the operational flexibility protocol, as required by 40 CFR § 70.4(b)(12)(i)(B). *See* petition at page 10.

In summary, the Petitioner asserts that the operational flexibility provision cannot include pre-approval of modifications such as installing new equipment, transfer of a unit from one location to another, or operation of an emission unit in a manner not specified in the permit. NYPIRG goes on the state that the only flexibility that can be provided is flexibility allowed under an applicable MACT regulation, or the ability to switch between common, currently employed operating scenarios that are specified in the permit. *See* petition at page 10.

It should be noted that EPA has not based this response to the Petitioner’s assertions on Kodak’s operational flexibility permit provisions on the guidance documents referenced by NYPIRG (*see* petition at pages 5 and 6). This response and the corresponding conclusions are based solely on the CAA and the associated federal and State of New York regulations.

- (1) Conflict with Operational Flexibility Provisions, and Part 200 Modifications

It appears that Condition 8 was not intended to authorize an alternative operating scenario but, rather, it appears that Condition 8 may be intended to facilitate "off-permit" changes, pursuant to 40 CFR § 70.4(b)(12) or § 70.4(b)(14).² Section 70.4(b)(12) allows, in certain circumstances, permittees to make changes without permit revisions, provided the permittee gives the Administrator and the permitting authority notice, and the permit shield does not apply to the changes. For example, permittees are allowed to make such "off-permit" changes under section 70.4(b)(12) where the changes constitute "Section 502(b)(10) changes" if the changes are not modifications under Title I, and the changes do not exceed the emissions allowable under the permit.

"Section 502(b)(10) changes" are defined in 40 CFR § 70.2 as changes that contravene an express permit term but do not violate applicable requirements or contravene federally enforceable monitoring, recordkeeping, reporting, or compliance certification requirements.³

Section 70.4(b)(14) provides that a State may allow "changes that are not addressed or prohibited by the permit . . . to be made without a permit revision" if the State ensures that each such change meets all applicable requirements and does not violate any existing term or condition.⁴ In addition, the permittee must document the changes and provide notice to the permitting authority and EPA, and the changes are not eligible for the permit shield.

The preamble to the final Part 70 regulations highlights that section 70.4(b)(14) does not apply to activities that are "addressed" by the permit. "Therefore, off-permit changes cannot alter the permitted facility's obligation to comply with the compliance provisions of its title V permit, which under § 70.6 will be 'addressed' in each permit. Such requirements include monitoring (including test methods), recordkeeping, reporting, and compliance certification requirements." *57 Fed. Reg. 32269-70* (July 21, 1992).

² Part 70 does not require permits to contain provisions addressing changes under 40 CFR § 70.4(b)(12) or § 70.4(b)(14), but EPA recognizes that, under the provisions of NYCRR Part 201, DEC may provide guidelines in permits for making use of these provisions, and such guidelines may be useful to EPA, the permitting authority, and the source.

³ EPA's response to comments on the final Part 70 regulations provides an example that section 70.4(b)(12) would apply if a permit specified use of a specific brand of coating, and the facility wishes to switch to a different brand of coating that complied with the emissions limit applicable to the original coating. *See Response to Comments at 6-20.*

⁴ Changes that would be modifications under Title I, or subject to a requirement under Title IV, of the Act may not be made under this provision. *See 40 CFR. § 70.4(b)(15).*

It does not appear that Condition 8 is limited to section 70.4(b)(14)⁵ changes, those that are not prohibited or addressed by the permit. It also does not appear that Condition 8 is limited to changes allowed under section 70.4(b)(12)⁶, such as Section 502(b)(10) changes. Moreover, changes that are allowed under either section 70.4(b)(12) or section 70.4(b)(14) must be excluded from the scope of the permit shield, but the permit does not limit the applicability of the permit shield for changes made pursuant to Condition 8. In addition, notification⁷ of changes made under these provisions must be sent to EPA but the permit does not require notice to EPA.⁸ Thus, Petitioner is correct in alleging that Condition 8 is not consistent with the operational flexibility, or off-permit, provisions in Part 70. For the reasons explained above, and to further clarify the purpose of this condition, the DEC must explain in the PRR the scope of this provision and the part 70 provisions it implements. DEC must also must re-open the permit to ensure that Condition 8 is consistent with the requirements of Part 70 and DEC's approved title V program.

(2) DEC Review

Regarding the Petitioner's allegation that the permit does not set out an obligation for the DEC to review the notifications submitted by Kodak, we note that nothing in title V or part 70 requires permits to include conditions obligating permitting authorities to review notifications submitted pursuant to sections 70.4(b)(12) or (b)(14). Also nothing in title V or part 70 requires title V permits to contain conditions which set forth how a permitting authority must review such submittals.

⁵ States are not required to adopt regulations to implement section 70.4(b)(14) off-permit changes.

⁶ 6 NYCRR 201-6.5(f)(6) implements 40 CFR 70.4(b)(12). This provision enables sources to make certain changes, such as "502(b)(10) changes," without requiring a permit revision.

⁷ Notice should include a brief description of the change, the date on which the change will occur, the resultant emissions change, the pollutants emitted, any new requirements that become applicable as a result of the change, and any permit term or condition that is no longer applicable as a result of the change. *See* 40 CFR §§ 70.4(b)(12) and (b)(14).

⁸ It appears that DEC inadvertently omitted this notification section. That is, in its December 23, 2002 Responsiveness Summary, the DEC indicated that it would add to Condition 8 of the permit the requirement for Kodak to notify the EPA regarding operational flexibility changes at section 8.2.III.B.1 (*see* Appendix C, page 11 of Responsiveness Summary). Therefore, upon the re-opening of the Kodak Power Plant title V permit, the DEC should also incorporate this language.

Section III.C of Condition 8 of the permit discusses DEC's review of the proposed Kodak changes. This condition states that Kodak may proceed ". . .30 days from the Department's receipt of the notification or upon prior Department approval, whichever is first. . ." (*See* Condition 8.2.III.C.1.) EPA agrees with the Petitioner that the permit allows for the possibility that Kodak may proceed with a change without the DEC having reviewed the proposal. However, in the event that DEC reviews the change, the permit does require at Condition 8.2.III.C.4 that the DEC respond to Kodak within 15 days of receipt of a notification if the DEC determines that either: (1) a Permit modification is necessary (III.C.2), or (2) additional review is required (III.C.3). That is, this provision provides that the DEC will conduct a review on each proposal to determine if paragraphs (2) or (3) of Condition 8.2.III.C are applicable.

Regarding the allegation that the permit does not set forth the criteria that the DEC is to use in determining whether the requirements of Condition 8.2.III.C.2 or III.C.3 would apply, EPA disagrees with the Petitioner. In paragraph (2), the permit states that the DEC reviews Kodak's proposals against the criteria in section III.A of the condition, assesses air quality impacts, and looks at the proposal's significance with respect to New York's State Environmental Quality Review Act ("SEQRA," at 6 NYCRR 617). Additionally, this permit provision is to delineate the requirements for Kodak, the permittee. It is not intended to incorporate all of DEC's obligations in carrying out the implementation of its programs under the CAA.

As previously noted, nothing in the Act or 40 CFR part 70 requires permits to include conditions obligating permitting authorities to review notifications submitted pursuant to sections 70.4(b)(12) or (b)(14). Therefore, EPA denies the petitioner on this matter.

(3) Previously Issued Permits

The Petitioner also alleges that the DEC impermissibly decided to discard a large number of federally enforceable emission limits contained in pre-existing permit that currently apply to the plant. EPA agrees that all federally enforceable emission limits contained in pre-existing permits must be properly incorporated into the title V permit. However, NYPIRG did not identify the specific permit conditions or emission limits from pre-existing permits that it believes should have been included in Kodak's title V permit but were omitted. Accordingly, Petitioner has failed to demonstrate a deficiency in the permit, and EPA denies the petition on this point. *See* CAA Section 505(b)(2) (objection required "if the Petitioner demonstrates. . . that the permit is not in compliance with the requirements of [the Act], including the requirements of the applicable [SIP]."); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003).

(4) Permit Shield

Regarding the permit shield, the Petitioner is correct that this shield would not apply to any off-permit change made pursuant to Condition 8 (*see* 40 CFR § 70.4(b)(12)(i)(B), and 40 CFR § 70.4(b)(14)(iii)), and that this condition is silent on the permit shield. Condition W

addresses generally how the permit shield operates and states, in part, that: “All permittees granted a Title V facility permit shall be covered under the protection of a permit shield, except as provided under 6 NYCRR Subpart 201-6.” This general permit condition is not sufficient to restrict the operation of the permit shield from the off-permit changes in Condition 8. Therefore, the petition is granted on this issue. DEC must revise Condition 8 to clarify that off-permit changes made at the Kodak facility shall not be eligible for the permit shield.

B. Inadequate Permit Application

The Petitioner’s second claim is that the applicant did not submit a complete permit application in accordance with the requirements of CAA § 114(a)(3)(c), 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d). *See* Petition at pages 10 through 13.

The Petitioner’s concerns regarding the application are summarized as follows:

- (1) The application lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether the Kodak Power Plant was in compliance with all applicable requirements. The Petitioner asserted that a permit that is developed in ignorance of a facility’s current compliance status cannot possibly assure compliance as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1);
- (2) The application lacks a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based;
- (3) The application lacks a description of all applicable requirements that apply to the facility; and
- (4) The application lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

NYPIRG alleges that omission of the information listed above makes it difficult for a member of the public to determine whether a draft permit includes all applicable requirements. The Petitioner goes on to state that the lack of information in the application also makes it more difficult for the public to evaluate the adequacy of the monitoring in the proposed permit.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as the Petitioner’s claims here that Kodak failed to submit a complete permit application, EPA considers whether the Petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit’s content. *See* CAA Section 505(b)(2) (objection required “if the petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]”); 40 C.F.R. § 70.8(c)(1). As explained below, the Petitioner has failed to demonstrate that

the lack of a proper initial compliance certification or a more detailed statement of methods for determining initial compliance, resulted in, or may have resulted in, a deficiency in the permit.

(1) Initial Compliance Certification

The Petitioner alleges that Kodak failed to submit a statement certifying its initial compliance status in accordance with CAA § 114(a)(3)(C), 40 CFR § 70.5(c)(9)(i), and 6 NYCRR § 201-6.3(d)(10)(i). NYPIRG is correct that the application form used by DEC did not clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. In its application form, Kodak certified that it would be in compliance with all applicable requirements at the time of permit issuance, and certified that for all units at the facility that were operating in compliance with all applicable requirements, the facility would continue to be operated and maintained to assure compliance for the duration of the permit, except for those units referenced in the compliance plan portion of the permit. In this section of the permit application (Section IV), the applicant indicated that it is not in compliance with 6 NYCRR § 227-1.3, the SIP opacity requirements. The application further stated that the applicant and the DEC were negotiating terms of a consent order concerning the opacity requirements and, when such order was finalized, Kodak would comply with the compliance plan contained therein. A fully executed Order on Consent was issued on August 4, 1999, and the Order terminated upon issuance of the title V permit. The initial Kodak Power Plant title V permit included all the requirements of the “Opacity Reduction Program” as delineated in Appendix 1 of the Order, at conditions 26 through 33. In Permit Mod 1, each of these conditions was deleted because the activities described therein were completed. However, this permit modification added a new condition, numbered 1-8, to address the opacity requirements of 6 NYCRR § 227-1.4(b). Therefore, the Petitioner has failed to demonstrate that even if the application form used by Kodak had required the facility to certify to its compliance at the time of application submission, the ultimate permit issued would have been any different. Accordingly, because the Petitioner has not demonstrated that the Kodak Power Plant permit fails to comply with applicable requirements, EPA denies the petition on this point.

(2) Statement of Methods for Determining Initial Compliance

The Petitioner alleges that Kodak’s application form omitted “a statement of methods used for determining compliance” as required by 40 CFR § 70.5(c)(9)(ii). The application submitted by Kodak did not specifically require the facility to include a statement of methods used for determining compliance in accordance with CAA § 114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201-6.3(d)(10)(ii). Nonetheless, the applicant provided information on certain methods used for determining compliance by referring in Section IV of the permit application to the following: (1) at the coal and ash storage, handling and conveying systems, each particulate control device has a photo-optic cell with an alarm at the outlet, and when the alarm sounds, the filter is serviced; and (2) for the stationary combustion installations (boilers), (a) performing coal sampling and analyses; (b) record keeping of the heat input and the type and amount of fuel burned; (c) posting of the emission limits and operational restrictions in

the facility's control room; (d) implementing a preventive maintenance program for the opacity monitors; (e) operating, maintaining and monitoring the electrostatic precipitators (ESP) to minimize emissions; (f) applying emission factors to the units' heat input to assure compliance with carbon monoxide limits; (g) performing annual boiler tune-ups to assure compliance with particulate matter limits; and (h) continuously monitor nitrogen oxides emissions, among other activities. This information provided DEC with sufficient information to discern how this facility determined its compliance, and will continue to comply with applicable requirements. In light of the information provided and as explained above, the Petitioner has not demonstrated that, in this case, Kodaks' failure to submit a more complete statement of the methods for determining compliance, resulted in, or may have resulted in, a deficiency in the permit. demonstrated that, in this case, had the application submitted by Kodak required the facility to include a separate statement of the methods for determining compliance, the terms and conditions in the final permit would have been any different. Therefore, EPA denies the petition on this issue.

(3) Description of Applicable Requirements

The Petitioner's next claim is that Kodak submitted an inadequate title V permit application because it failed to include a narrative description of applicable requirements that apply to the facility in accordance with 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4). EPA disagrees with Petitioner on this issue. Citations may be used to streamline how applicable requirements are described in an application, provided that the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. In addition, a permitting authority may allow an applicant to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject, provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public. Documents available to the public include regulations printed in the Code of Federal Regulations or its State equivalent. For further discussion see *White Paper for Streamlined Development of Part 70 Permit Applications* at 20 - 21 (July 10, 1995).

Consistent with EPA guidance, in describing applicable requirements, the Kodak permit application properly references State and Federal regulations. For example, page 6 of the application (Section IV) cites as federally applicable requirements the State SIP regulations at 6 NYCRR §§ 212.6 (opacity requirements for the coal and ash handling systems), 229 (petroleum liquid storage requirements for the storage vessels), 225 and 227 (sulfur-in-fuel, and opacity and nitrogen oxides requirements for the boilers), and the federal new source performance standards requirements at 40 CFR § 60.110(b) (requirements for petroleum storage vessels), and 40 CFR § 60.40 (requirements for fossil fuel fired steam generators). These regulations are publicly available and are also available on the internet. See, e.g., New York regulations at

www.dec.state.ny.us/website/regs/; see also, federal regulations at www.epa.gov/epahome/cfr40.htm.

In addition, the Kodak permit application includes documentation that as a general matter is not as readily or widely available as the regulations above. For example, Kodak included in Section 2 of Appendix A of its application, special conditions from prior permits issued to the facility. The index page to this section lists three columns of emission point ID numbers, each corresponding to a set of special conditions attached to the application. The Petitioner has not shown that any of the descriptions were in error or that the referenced material is not available to the public. Finally, Petitioner did request DEC that provide additional information on the applicable requirements referenced in its application. The petition is therefore denied on this issue.

- (4) Description of or Reference to any Applicable Test Method for Determining Ongoing Compliance With Each Applicable Requirement.

The Petitioner's fourth allegation is that the application form lacks a description of, or reference to, any applicable test method for determining compliance with each applicable requirement. See 40 CFR § 70.5(c)(4)(ii). In the emission unit information part of the application form (Section IV), there is a block labeled "Monitoring Information" that requires applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. For example, the Kodak permit application includes, among others, (1) replacement of filters upon the sounding of an alarm; (2) coal sampling and analysis; (3) a preventive maintenance program for the opacity monitors; (4) annual tune-ups to assure boiler maintenance; and (5) the monitoring of the voltage and amperage at each electrostatic precipitator field, as methods for determining ongoing compliance with the facility's applicable requirements. In this case, the Petitioner has not met its burden of demonstrating that the application's "Monitoring Information" section resulted in, or may have resulted in, a deficiency in the permit. Therefore, EPA denies the petition on this issue.

C. Inadequate Statement of Basis

The Petitioner's third claim is that the draft permit was not accompanied by an adequate statement of basis or "rationale." While NYPIRG acknowledges that DEC did issue a "permit review report" ("PRR," the State's version of the required statement of basis) for the draft Kodak Power Plant permit, the Petitioner alleges that this document did not set out the legal and factual basis for all permit conditions. See petition at pages 13 through 16.

Specifically, NYPIRG contends that the PRR did not set forth the factual basis for specific permit conditions applying to specific emission units, emission points and processes. The Petitioner asserts that in some cases, explanations are provided indicating that a process emits a pollutant in amounts above or below a threshold amount of a pollutant, but these

explanations do not address all pollutants emitted at each process, and they fail to indicate which hazardous air pollutants are emitted by a particular process.

In addition, NYPIRG alleges that the PRR does not set forth the legal basis to explain why a particular regulation is relevant to the facility or to any particular emission unit, emission point or process. The Petitioner further contends that the permit does not adequately differentiate between regulations approved as part of New York's State Implementation Plan ("SIP"), and those regulations not approved into the SIP. Indeed, the Petitioner contends that some federally enforceable conditions in the draft permit cite to non-SIP-approved regulations. Finally, NYPIRG asserts that the PRR does not contain the rationale for the monitoring methods selected in the permit.

The statement of basis requirement is set forth at 40 CFR § 70.7(a)(5), which states 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 statement of basis is not a part of the permit itself. It is a separate document which is to be sent to EPA and to interested persons upon request.⁹ A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. However, it is not a short form of the corresponding permit. Instead, the statement of basis should highlight elements that EPA and the public would find important to review.¹⁰ Rather than

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

¹⁰ See letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc., responding to NYPIRG's letter of March 11, 2001; November 16, 2001 DEC commitment letter, from Carl Johnson, Deputy Commissioner, DEC; letter dated December 20, 2001, from EPA Region V to the Ohio EPA (available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/sbguide.pdf>); see also Notice of Deficiency ("NOD") for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2000). Region V's letter recommends the same five elements outlined in the Texas NOD. That is, the 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. 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, provide 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, considering the technical complexity of the permit, history of the facility, and the number of new provisions being added at the title V permitting stage, to

restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, the permit shield, and any monitoring that is required under 40 CFR § 70.6(a)(3)(i)(B) or 6 NYCRR § 201-6.5(b)(2). 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 with a record of the applicability and technical issues surrounding the issuance of the permit. *See, e.g., In Re Port Hudson Operations, Georgia Pacific* (“*Georgia Pacific*”), Petition No. 6-03-01, at pages 37-40 (May 9, 2003); *In Re Doe Run Company Buick Mill and Mine* (“*Doe Run*”), Petition No. VII-1999-001, at pages 24-25 (July 31, 2002). Finally, in responding to a petition filed in regard to the Fort James Camas Mill title V permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for the selected monitoring method be documented in the permit record. *See In Re Fort James Camas Mill* (“*Ft. James*”), Petition No. X-1999-1, at page 8 (December 22, 2000).

As noted previously, 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) which states, in part, that an objection is required “if petitioner demonstrates . . . that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]”; *see also*, 40 CFR § 70.8(c)(1). Thus, where the record as a whole supports the terms and conditions of the permit, flaws in the statement of basis generally will not result in an objection. *See, e.g., Doe Run* at 24-25. In contrast, where flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, EPA will object to the issuance of the permit. *See, e.g., Ft. James* at 8; *Georgia Pacific* at 37-40.

In this case, the Permit Review Report issued with the draft permit, the application, and other available documents in the permit record contain adequate information to support the elements of the permit identified in NYPIRG’s claims. The Petitioner has not demonstrated, nor does the permit record indicate, that any deficiency in the PRR may have resulted in one or more deficiencies in the Kodak Power Plant title V permit. As such, EPA is denying NYPIRG’s petition on this issue.

With respect to specific assertions, the first contention by the Petitioner is that the PRR needs to explain which regulated pollutants (including hazardous air pollutants) are generated by which processes, and where the pollutants are emitted.

Title V permit applications must contain information sufficient to verify which requirements are applicable to the source. *See* 40 CFR §70.5(c)(3). The Kodak application is part of the permit record that supports the DEC’s permitting decision. While the facility and

name a few factors.

operational descriptions in the PRR do not explicitly list each pollutant emitted by each process, other sections of the PRR, as well as the permit record, address this issue. For the 3 emission units at the Kodak Power Plant, the PRR describes the individual emission points, their modes of operation, their location within the plant, and other relevant facts.

While statements of basis are to set forth the factual basis for the permit conditions, permitting authorities have discretion as to how to accomplish this requirement. The PRR for the Kodak Power Plant includes a list and the amounts of all regulated pollutants emitted at the facility (in terms of emission ‘ranges’) and, although it does not cross-reference to specific emission units, it does list what applicable requirements apply to the facility, and what the specific emission processes are. For all of these reasons, EPA has determined that the PRR includes sufficient factual information as required by 40 CFR § 70.7(a)(5).

NYPIRG’s second contention is that the PRR fails to cross-reference the explanations of regulations that apply to the facility with specific permit conditions, and fails to explain why a regulation is relevant to the facility or any individual emission unit, emission source, or process. In the “Regulatory Analysis” section of this report, the DEC lists the applicable rules, and cross-references them to the individual emission units and processes, and to the corresponding permit conditions. In addition, a section of the table of contents of Permit Mod 1, beginning on page 2, entitled, “List of Conditions,” delineates each applicable requirement by emission unit and process. EPA disagrees with the Petitioner that these lists must be cross-referenced with the descriptions contained in the narrative sections of the PRR entitled, “Applicability Discussion” and “Basis for Monitoring.” While statements of basis are to set forth the factual basis for the permit conditions, permitting authorities have discretion as to how to accomplish this requirement.

With respect to applicability determinations, EPA has determined that, in this case, the PRR includes sufficient information. The section in the Kodak PRR entitled, “Applicability Discussion” includes statements of specific applicability in the narrative descriptions of regulations. Further, NYPIRG has not identified any specific issues of applicability that DEC has failed to clarify in the PRR. For these reasons, EPA has determined that the Kodak PRR meets the requirements of 40 CFR § 70.7(a)(5). As such, EPA denies the petition on this point.

NYPIRG’s third contention is that the PRR must explain the distinction between New York State regulations that were approved into the New York State Implementation Plan (“SIP”), and are thus federally enforceable, and New York State regulations which have been promulgated at the State-level, but not approved into the SIP and, therefore, are not federally enforceable. The Petition goes on to state that some title V permit conditions cite only the non-SIP New York State regulations which, in some cases, are less stringent than the corresponding SIP requirement.

Title V permits are to include all applicable requirements for a source of air pollution, and these regulations are to be incorporated into what is known as the “federal/state-side” of the

permit. Permitting authorities may also include, on the “State-Only Side” of the permit, State or Local regulations and requirements which would not be federally enforceable. *See* 40 CFR § 70.6(b)(2) and 6 NYCRR § 201-6.6(a). The federal/state-side of the permit must include only requirements that are federally enforceable; that is, in terms of State rules, only regulations that have been approved by the EPA into the State’s implementation plan, or certain provisions approved by EPA as part of the New York State operating permits program at 6 NYCRR § 201-6. Non-SIP regulations cannot generally be included in the federal/state-side of the permit, but may be incorporated into the State-only side. Although States may streamline requirements if more than one rule applies to an emission unit for a particular regulated pollutant (e.g., a SIP rule and a non-SIP rule), the federal/state-side of the permit must include the SIP requirements unless and until it is replaced by approval into the SIP of the State-only regulation. *See* 40 CFR §§ 70.1(b) and 70.6(a)(1); *see generally White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program*, at 6 - 9. Given this, a discussion of the non-SIP regulations that are listed on the State-only side of the permit need not be included in the PRR as this document is intended solely for setting forth the factual and legal bases of federally applicable permit conditions. The only exception to this is if the permitting authority streamlined multiple requirements (federally applicable and non-federally applicable) into a condition on the federal side of the permit. The Petitioner did not identify any instance where such streamlining occurred. That is, NYPIRG did not identify any specific permit condition or conditions where a non-SIP approved regulation was cited and, as such, failed to demonstrate any deficiency in the permit. Therefore, the petition is denied on this issue.

NYPIRG’s fourth and final contention is that the PRR does not, but should, contain the rationale for the monitoring methods selected. EPA regulations require that all title V permits include monitoring to assure compliance with the terms of the permit. This should include any monitoring delineated in the applicable requirement, and other additional, “gap-filling” monitoring in cases where the underlying regulation has no periodic monitoring or the monitoring required consists of only a one-time monitoring occurrence (e.g., one stack test over the life of the unit). *See* 40 CFR § 70.6(a)(3)(i)(B). The Kodak PRRs include a section entitled, “Basis for Monitoring,” where the law or regulation that is the basis for the emission unit’s monitoring is listed and explained. For example, the Kodak Power Plant’s PRR lists the requirement to continuously monitor nitrogen oxides emissions via use of continuous emissions monitoring systems (“CEMS”) pursuant to 6 NYCRR § 227-2.4; and the requirement to continuously monitor opacity emission limits to determine compliance pursuant to 40 CFR part 60, subpart D; among other explanations. While the Petitioner is correct that EPA requires statements of basis to provide the rationale for monitoring (*see Fort James*), permitting authorities have discretion as to how this requirement is implemented. It should be noted the requirement that permitting authorities must provide a rationale for the selected monitoring is only applicable if the permitting authority is gap filling under the periodic monitoring rule or if the underlying applicable requirement provides for alternative monitoring methods (i.e., the permitting authority should provide a brief explanation as to why one alternative was chosen over another if it is not already clear from the applicable requirement). In this case, Petitioner did not provide any specific instances of omissions or deficiencies with respect to this requirement and

therefore has not met its burden of demonstrating that the PRR's "Basis for Monitoring" section may have resulted in a deficiency in the permit. EPA finds the petitioner's general claim of an inadequate statement of basis to be without merit; therefore, EPA denies the petition on this issue.

D. General Permittee Obligations

The Petitioner's fourth claim is that certain conditions listed under the heading: "Notice of General Permittee Obligations" do not indicate how or whether they apply to the facility (including, condition C, 'maintenance of equipment,' condition D, 'unpermitted emission sources,' condition F, 'recycling and salvage,' condition G, 'prohibition of reintroduction of collected contaminants to the air,' condition I, 'proof of eligibility for sources defined as exempt,' and condition J, 'proof of eligibility for sources defined as trivial.'). NYPIRG contends that the title V program was intended to document which general regulations apply to a facility. The Petitioner asserts that the PRR must state whether or how these obligations apply to the Kodak Power Plant, and the permit must include sufficient monitoring, record keeping and reporting for those obligations that are applicable. Lastly, NYPIRG asserts that title V requires annual compliance certification with all applicable requirements, and these general permittee obligations are exempt from this requirement (further explained in the next section). *See* petition at pages 16 and 17.

With respect to the general permittee obligations cited by the Petitioner, these general conditions are among several listed in the facility-wide portion of the permit under the heading "Notification of General Permittee Obligations." EPA agrees with NYPIRG that a title V permit and/or its supporting record should clearly state the applicability of such generic requirements.

In this case, as described in the Kodak Power Plant's title V permit, the Kodak facility includes emission control devices, including electrostatic precipitators ("ESP") and fabric filters. Thus, the Maintenance of Equipment requirement (relating to emission control devices) is applicable to the Kodak facility. In addition, the Recycling and Salvage requirement (relating to the collection of materials in air cleaning devices) is applicable because the ESPs and fabric filters collect contaminants which must be handled in the appropriate manner. Similarly, the Prohibition of Reintroduction requirement is applicable. EPA believes the permit record adequately described the applicability of the three regulations described above. Thus, EPA is denying the petition on this aspect of NYPIRG's issue. The merits of NYPIRG's claim regarding the requirement for annual compliance certification is explained in Section E, below.

With respect to Item I, Appendix C of Kodak's application includes a list of exempt activities, defined at 6 NYCRR § 201-3.2. It should be noted that Kodak submitted one application to cover its entire facility in Rochester, New York. However, the DEC issued 2 individual title V permits for the facility; one covers the power plant which is the subject of this Order (DEC permit ID 8-2614-00205/01827), and the other permit covers the manufacturing processes (DEC permit ID 8-2614-00205/01801). Activities listed as exempt need only be

identified in a title V permit if the activity is subject to an applicable requirement. However, NYPIRG does not allege that any specific requirements have been omitted that apply to these activities. Kodak's manufacturing title V permit includes two emission units that are defined as including equipment that would otherwise be exempt pursuant to 6 NYCRR § 201-3.2 but are subject to generally applicable requirements. Emission unit F-AC001 includes solvent exempt metal cleaning equipment subject to 6 NYCRR part 234, and F-AC002 includes exempt stationary combustion sources subject to 6 NYCRR part 227. The emission unit definition section beginning on page 3 of Kodak's PRR for the manufacturing facility includes statements explaining the applicability of the general requirements to these two emission units. For these reasons, EPA concludes the permit record provides sufficient documentation to explain the applicability of exempt activities at Kodak's manufacturing facility. Therefore, EPA is denying the petition on this aspect of NYPIRG's issue.

In contrast with exempt activities, those activities listed as trivial under 6 NYCRR § 201-3.3 need not be identified in a title V application. However, Item J of Kodak's permit states that if Kodak operates a source that is listed as trivial, Kodak may be required to certify that the source operates within the specific criteria described in section 201-3.3. EPA believes that title V permits should include emission units that would otherwise be categorized as trivial under 6 NYCRR § 201-3.3 only if they are subject to generally applicable requirements. The Petitioner did not demonstrate that the permit is not in compliance with the applicable requirements of the Act or the requirements of Part 70 in that NYPIRG did not allege that any specific requirements have been omitted that apply to these activities. As such, EPA denies the petition on this issue.

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

With respect to NYPIRG's claims that monitoring requirements must be included in the permit for these general conditions where they do apply, it is appropriate to include monitoring, recordkeeping and reporting requirements in the "emission unit" section of title V permits. These conditions specifically delineate the facility's emission limitations or other operational or process restrictions. For example, monitoring requirements within a condition that lists particulate matter limits for fugitive emissions controlled by a baghouse, will also be sufficient monitoring relative to the "maintenance of equipment" provision; that is, the monitoring included to assure compliance with the particulate matter limits would also act as "surrogate" monitoring with respect to monitoring for the maintenance of the subject control equipment. It must also be noted that "improper" equipment maintenance does not necessarily equate to violations of

applicable requirements.¹¹ Lastly, it is to the benefit of the facility owner to ensure that all pollution control equipment is properly maintained so as to ensure as long a life as possible of such equipment, given the fact that control equipment is extremely costly. In this case, Petitioner has not demonstrated that permit is not in compliance with applicable requirements, and therefore, EPA denies the petition on this matter. *See* CAA § 505(b)(2); 40 CFR § 70.8(c)(1); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n. 11 (2d Cir. 2002).

NYPIRG's assertion regarding the requirement for annual compliance certification is explained fully in the next section.

E. Annual Compliance Certification

The Petitioner raises two issues regarding annual compliance certification. First, NYPIRG alleges that Condition 7 of the permit does not require the facility to certify compliance with all permit conditions, as required by 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), but rather that the condition requires only that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” Second, NYPIRG notes that the DEC has segregated about 30 conditions under the heading “Notification of General Permittee Obligations,” and the Kodak title V permit indicates that these conditions are not subject to the annual compliance certification requirements. *See* petition at pages 17 through 20.

Specifically, the Petitioner is concerned with the language in the permit that labels certain permit terms as “compliance certification” conditions. NYPIRG notes that requirements that are labeled “compliance certification” are those that identify a monitoring method for demonstrating compliance, and those conditions that lack monitoring are excluded from the annual compliance certification requirement, which is an incorrect application of State and federal law. While the Petitioner concedes that ‘new’ language was added to title V permits to address this matter (stating that: “the provisions labeled herein as ‘Compliance Certification’ are not the only provisions of this permit for which an annual certification is required”), it argues that such language does not unequivocally state that all permit terms are subject to the annual compliance certification. In addition, regarding the general permittee obligations, (including, for example, condition A - ‘sealing,’ condition I - ‘proof of eligibility for sources defined as exempt activities,’ condition R - ‘fees,’ and condition AA - ‘open fires’) NYPIRG contends that EPA must object to the Kodak title V permit on this matter because the facility must annually certify compliance for each and every term of the permit.

¹¹ For example, if a facility uses a baghouse to control particulates (PM) from an oil-fired boiler, the maintenance schedule might require cleaning the bags every month. Cleaning the bags twice a year would be considered “improper” equipment maintenance; yet, the facility may still be meeting its PM emission limit despite its failure to follow the equipment maintenance schedule.

The language in the permit that labels certain terms as “compliance certification” conditions does not mean that the Kodak facility is *only* required to certify compliance with the permit terms containing this language. “Compliance certification” is a data element in New York’s computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. Condition 1-1 of the permit delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

The language in the Kodak permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, mirrors the language of 40 CFR §§ 70.6(c)(5) and (6). Section 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Section 201-6.5(e)(3) requires the following in annual certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts as the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the administrator and shall contain such other provisions as the department may require to ensure compliance with all applicable requirements. The Kodak title V permit includes this language at condition 1-1.2. The references in the Kodak permit to “compliance certification” do not negate the DEC’s general requirement for compliance certification of terms and conditions contained in the permit and, therefore, New York’s regulations properly require the source to certify compliance or noncompliance annually for terms and conditions contained in the permit. The petition is therefore denied with respect to this issue.

Regarding the Petitioner’s second issue, as a general matter, EPA does not object to a permitting authority’s inclusion of a list of general advisory items that do not require certification. However, the “Notification of General Permittee Obligations” section in this permit appears under the heading “Federally Enforceable Conditions.” Federal regulations require annual certification for “terms and conditions” contained in the permit. *See* 40 CFR § 70.6(c)(5). As such, the items in the “Notification of General Permittee Obligations” section are potentially subject to certification (for example, conditions C, F, and G of the Kodak Power Plant title V permit, referenced in Section D, above). EPA, therefore, objects to this permit because it attempts to exclude what are represented to be “Federally Enforceable Conditions” from the certification requirement. EPA has been working with the DEC on this matter and, in fact, EPA sent New York a letter delineating how this section of title V permits should be revised.¹² Specifically, this letter describes that the “general permittee obligations” can be segregated into three categories, as follows: (1) conditions that a permittee need not ever certify annually for compliance; (2) conditions that a permittee must always certify; and (3) conditions that a

¹² *See* September 22, 2004 letter from Walter Mugdan, EPA Region 2 to Carl Johnson, DEC, regarding “Changes to Clean Air Act Title V Permits - Annual Compliance Certification.”

permittee must certify only if that condition applies to the facility. Regarding the specific obligations discussed by NYPIRG in its petition, the September 24, 2004 EPA letter requires categorizing conditions A and D as not ever having to be certified, conditions R and AA as always having to be certified, and conditions C, F, G, I and J as having to be certified only if the condition is applicable. Therefore, EPA grants the petition on this issue.

F. Prompt Reporting

The Petitioner's sixth claim is that the proposed permit does not require the permittee to submit prompt reports of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). See petition at pages 20 through 26. NYPIRG notes that the Kodak Power Plant permit requires the facility to report some deviations promptly, while others can be deferred until the facility submits its 6-month monitoring report. The Petitioner asserts that prompt reporting must be more frequent than semiannually, because prompt reporting is a distinct reporting obligation under the regulations at 40 CFR § 70.6(a)(3)(iii)(B). NYPIRG notes that the Kodak permit, at Condition 6, sets up a variety of different prompt reporting requirements based on various factors, but asserts that these procedures are arbitrary, and Condition 6 violates federal requirements. Finally, the Petitioner states that, for the most part, the facility is not required to perform monitoring that assures compliance with applicable requirements and, therefore, deviations from compliance requirements cannot be ascertained or reported.

Title V permits must include requirements for the prompt reporting of deviations from permit requirements. See 40 CFR § 70.6(a)(3)(iii)(B).¹³ States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. Moreover, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case determination under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).¹⁴

The Kodak title V permit addresses prompt reporting of violations in Condition 1-2. This condition states that the facility must report deviations in accordance with the time frames

¹³ 40 CFR § 70.6(a)(3)(iii)(B) states: "[t]he permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirement."

¹⁴ EPA's rules governing the administration of a federal operating permit program require, *inter alia*, that permits contain conditions providing for the prompt reporting of deviations from permit requirements. See 40 CFR § 71.6(a)(3)(iii)(B)(1)-(4). Under this rule deviation reporting is governed by the time frame specified in the underlying applicable requirement unless that requirement does not include a requirement for deviation reporting. In such a case, the part 71 regulations set forth the deviation reporting requirements that must be included in the permit. For example, emissions of a hazardous air pollutant or toxic air pollutant that continue for more than an hour in excess of permit requirements, must be reported to the permitting authority within 24 hours of the occurrence.

specified in the underlying applicable requirements. However, if the underlying applicable requirement does not establish a time frame for prompt reporting of deviations, Kodak must report according to the following schedule: (1) for emissions of a hazardous or toxic air pollutant that continue for more than an hour in excess of permit requirements, notify the permitting authority by telephone within 24-hours; (2) for emissions of any other regulated pollutant that continue for more than two hours in excess of permit requirements, notify the permitting authority by telephone within 48-hours; and (3) for all other deviations of permit requirements, report such deviations in the 6-month monitoring report. If emission exceedances described in (1) and (2) above, occur, the facility's responsible official must also submit to the DEC a written notice of such occurrences within 10 working days. All deviations from permit requirements must be identified in the 6-month report. Therefore, the prompt reporting requirements contained in the final Kodak permit distinguish between the prompt reporting required for potentially dangerous excess emissions and other types of deviations. This criteria reflects a reasoned judgment regarding the circumstances in which an expeditious notification is warranted. For any other deviations, the report must be submitted every six months unless the specific permit condition provides for more frequent deviation reporting. Additionally, these prompt reporting requirements are consistent with EPA's own interpretation of the prompt reporting requirements, adopted after public notice and comment, in the Part 71 federal title V program. For example, the Kodak Power Plant is required to have and operate continuous emission monitoring systems ("CEMS") to measure emissions of nitrogen oxides (refer to condition 39 of the title V permit). Therefore, if emissions of this pollutant continue for more than two hours in excess of permit requirements, Kodak must notify the DEC by telephone within 48-hours of the occurrence pursuant to condition 1-2.2

EPA disagrees with the Petitioner that the permit needs to supplement the above prompt reporting requirements with additional conditions for prompt reporting of deviations as stipulated in 40 CFR § 70.6(a)(3)(iii)(B). Pollutant-emitting activities at the Kodak Power Plant facility are monitored in a number of different ways. EPA believes that a less frequent reporting schedule (quarterly or semi-annual) can be accepted as prompt reporting for certain deviations at the Kodak facility, based on the degree and type of deviation likely to occur and the applicable requirements. For instance, to demonstrate compliance with the applicable sulfur-in-fuel limits, Kodak must maintain records of fuel sulfur content for each delivery of coal and fuel oil. See, for example, Conditions 21, 22, 1-5, 1-6 and 1-7 of the Kodak Power Plant's title V permit. In previous Orders, EPA determined that semi-annual sulfur-in-fuel reporting is sufficiently prompt in light of the degree and type of deviation likely to occur. See, e.g., *In the Matter of North Shore Towers Apartments, Inc.*, Petition No. II-2000-06, at page 28 (July 3, 2002); and *In the Matter of the Keyspan Generation Far Rockaway Station*, Petition No. II-2002-06, at page 18 (September 24, 2004). The sulfur content of the coal and fuel-oil is monitored by submission of a report from the supplier to the facility for each fuel delivery. Because it is highly unlikely that fuel outside of the specifications would be delivered and used, semi-annual monitoring reports are appropriate. For the facility's boilers, Kodak has installed and continuously monitors opacity, and is required to submit quarterly reports, including excess emissions occurrences. With respect to particulate matter, Kodak must perform annual tune-ups on the boilers, and

conduct one stack test per permit term; reports on these activities are to be submitted semi-annually. Finally, for the baghouses at the coal and ash handling systems, installed to control particulate matter emissions, Kodak must monitor the pressure drop across the baghouse once per shift, and this information shall be reported semi-annually.

Because the Petitioner has not demonstrated that the reporting requirements contained in the Kodak title V permit fail to meet the standard set forth in 40 CFR § 70.6(A)(3)(iii)(B), the petition is denied on this issue.

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

The Petitioner's seventh claim is that Condition 982 of the Kodak permit, relating to violations during startup/shutdown, malfunction, maintenance and upset occurrences, violates 40 CFR part 70. See Petition at pages 26 and 27. In addition, the Petitioner cites permit condition 6, and asserts that the permit fails to require prompt written reports of deviations in accordance with 40 CFR § 70.6(a)(3)(iii)(B), instead allowing reporting by telephone pursuant to 6 NYCRR § 201-1.4(b). NYPIRG maintains that, as written, this permit condition will not assure that the facility applies the proper methodology for requesting an excuse, and will not provide a "paper trail" to allow EPA and the public to monitor whether the facility is abusing this provision.

Condition 198 of the Kodak Power Plant title V permit, which cites the State regulation at 6 NYCRR § 201-1.4, is a "State-only" requirement, and is properly located in the "State-only" enforceable side of the permit. This condition provides the DEC with the discretion to excuse the facility from compliance with applicable state-only emission standards under certain circumstances, based on the state-specific criteria set forth in 6 NYCRR § 201-1.4. Since this condition is located in the State-only side of the permit, the Petitioner's allegations regarding this provision have no merit.

With respect to draft permit condition 6, the DEC has included clarifying language in the Kodak title V permit (condition 1-2.2 in Permit Mod 1) stating that violations of federal requirements may not be excused unless the specific federal regulation provides for an affirmative defense during startups, shutdowns, malfunctions, or upsets.¹⁵ See 6 NYCRR § 201-6.5(c)(3)(ii). Therefore, EPA denies the petition on this point.

¹⁵ The characterization of this provision as potentially "excusing" certain violations of federal requirements is somewhat misleading. The CAA does not allow for automatic exemptions from compliance with applicable SIP emission limits during periods of start-up, shutdown, malfunctions or upsets. Further, improper operation and maintenance practices do not qualify as malfunctions under EPA policy. To the extent that a malfunction provision, or any provision giving a substantial discretion to the state agency broadly excuses sources from compliance with emission limitations during periods of malfunction or the like, EPA believes it should not be approved as part of the federally approved SIP. See *In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1, at 23(Nov. 16, 2000), available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>.

H. Semi-Annual Monitoring Reports

The Petitioner's eighth claim is that certain monitoring conditions in the permit do not adequately delineate that monitoring reports must be submitted to the DEC at least once every 6 months (and that these permit conditions contain contradictory and/or confusing language). NYPIRG contends that all such permit conditions must be individually reviewed and, at a minimum, refer to the requirements of Condition 6, which lays out the requirements for the 6-month monitoring reports. Finally, the Petitioner contends that these and other required reports must list emissions and monitoring information using the same units and frequency as were used in the relevant permit condition. *See* petition at pages 27 and 28.

Condition 1-2.2 of the Kodak Power Plant title V permit (Modification 1) states, in part:

“To meet the requirements of this facility permit with respect to reporting, the permittee must:

Submit reports of any required monitoring at a minimum frequency of every 6 months, based on a calendar year reporting schedule. These reports shall be submitted to the Department within 30 days after the end of a reporting period. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by the responsible official for this facility.”

The Petitioner argues that, sometimes, the title V permit's reporting requirements state that reports are due: “As required - see monitoring description.” Although NYPIRG does not reference any specific conditions, EPA acknowledges that although the title V permit does indeed include such language in a few conditions, the majority of permit conditions relating to monitoring require semi-annually reporting. An example of the former case includes Condition 50, relating to NO_x budget accounts; however, the description included in this permit condition requires more frequent reporting than semi-annual reporting (in this case, quarterly reporting). Indeed, there are a number of other permit conditions that do not require semi-annual reporting, but require more frequent, i.e., quarterly reporting (for example, Condition 1-9, relating to NO_x RACT requirements and the use of CEMS).

EPA does not agree that permit changes to further describe the requisite reporting requirements or to cross-reference other permit conditions are needed. Although such a redundancy can, in some cases, be helpful to the reader, the lack of such does not negate the reporting prescribed in Condition 1-2.2, nor does it equate to a permit deficiency. With respect to the Petitioner's concern regarding required reports using the same units and frequency as were used in the relevant permit condition, EPA disagrees that this should be delineated in title V permits. For these reasons, EPA denies the petition on this issue.

I. Many Conditions Lack Adequate Monitoring and are Not Practicably Enforceable

The Petitioner's ninth contention is that the Kodak title V permit does not assure compliance with all applicable requirements because many individual permit conditions lack adequate monitoring and are not practicably enforceable. *See* petition at pages 28 and 29.

As noted previously, CAA § 505(b)(2) 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 40 CFR part 70. In this case, NYPIRG did not identify the specific permit condition or conditions that lack adequate monitoring and/or are not practicably enforceable.¹⁶ Accordingly, because the Petitioner has failed to demonstrate a deficiency in the Kodak title V permit, EPA denies the petition on this matter.

J. Conditions Fail to State How Facility Must Comply with Cited Applicable Requirement

The Petitioner's tenth and final assertion is that, throughout the permit, there are conditions that merely quote or paraphrase a law or regulation without indicating what the facility must do to comply and, in many cases, it is even unclear whether or not the cited regulation applies at all. Specifically, NYPIRG asserts that permit conditions must set forth terms specific to the facility and the subject emission unit, point and/or process, to which the applicable requirement applies, and state what the facility must do to comply. In addition, the Petitioner argues that the statement of basis (PRR) must set out the legal and factual basis for how the applicable requirements have been applied to the facility. *See* petition at pages 29 and 30.

EPA disagrees with the Petitioner's contention which was general in nature and did not include permit-specific examples (that is, NYPIRG did not demonstrate in its petition that the permit does not comply with the CAA). All conditions in the Kodak Power Plant title V permit include both the regulatory citation, and the specific emissions unit, point, source and/or process (in certain cases, no emission unit, etc. is listed because the applicable requirement pertains to the overall facility itself; that is, general processes or procedures with which Kodak must comply).

For example, Condition 1-5 does not include an emissions unit designation because it cites the sulfur-in-fuel requirements of 6 NYCRR § 225-1, which relate to fuel use at the entire facility. Condition 41 cites the NO_x reasonably available control technology ("RACT")

¹⁶ The Petitioner provided a general argument that in the Kodak title V permit, many conditions lack adequate monitoring and are not practicably enforceable. It is EPA's belief that the Kodak Power Plant permit includes monitoring that adheres to the requirements of 40 CFR part 70. For example, Condition 1-8, relating to opacity regulated under 6 NYCRR § 227-1.4(b), correctly includes the applicable requirements to monitor opacity using continuous opacity monitoring systems (COMS), and to report excess emissions quarterly. Also, Condition 42 delineates the particulate matter emission requirements of 6 NYCRR § 227.2(b)(1). This regulation does not specify any monitoring. The DEC has included in the title V permit the requirement to perform annual boiler tune-ups and to report the results of these quarterly.

requirements of 6 NYCRR § 227-2.4, and notes that this requirement is for emissions unit U-00015 and emissions process K07 (facility boilers used for generating process steam and electricity, and the number 6 fuel-oil-fired package boilers located in building 031). For these reasons, EPA denies the petition on this issue.

CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2), I deny in part and grant in part the petition of NYPIRG requesting the Administrator to object to the issuance of the Kodak Power Plant title V permit. This decision is based on a thorough review of the February 20, 2003 permit, Permit Mod 1, and other documents that pertain to the issuance of this permit.

Dated: __02/18/2005_____

_____/S/_____
Stephen L. Johnson
Acting Administrator