BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF THE LOVETT GENERATING STATION Permit ID: 3-3928-00010/00039 Facility DEC ID: 3392800010 Issued by the New York State Department of Environmental Conservation Region 3	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition Number: II-2001-07

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

On November 26, 2001, the Environmental Protection Agency ("EPA") received a petition from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, for the Lovett Generating Station ("Lovett"). The Lovett permit was issued by the New York State Department of Environmental Conservation's ("DEC") Region 3 Office, and took effect on October 12, 2001, pursuant to title V of the Act, the federal implementing regulations at 40 CFR part 70, and the New York State implementing regulations at 6 NYCRR parts 200, 201, 616, 621, and 624.

The NYPIRG petition alleges that the Lovett permit proposed by the DEC on August 13, 2001 does not comply with 40 CFR part 70 in that: (1) the proposed permit is based upon an inadequate permit application; (2) the proposed permit is accompanied by an insufficient statement of basis; (3) the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (4) the proposed permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (5) the proposed permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70; (6) the proposed permit lacks a compliance schedule designed to bring the Lovett Generating Station into compliance with PSD requirements; (7) the proposed permit fails to include federally enforceable emission limits established under pre-existing permits; (8) the proposed permit does not correctly include the CAA § 112(r) requirements; and (9) the draft permit does not assure compliance with all applicable

requirements because many individual permit conditions lack adequate monitoring and are not practicably enforceable. The Petitioner has requested that EPA object to the issuance of the Lovett permit pursuant to CAA § 502(b)(2) and 40 CFR § 70.8(d).

Subsequent to receipt of the NYPIRG petition, the EPA performed an independent and in-depth review of the Lovett title V permit. Based on a review of all the information before me, including the NYPIRG petition; the Lovett permit application; an August 13, 2001 letter from Robert J. Stanton of DEC to Steven C. Riva of EPA Region 2 regarding Responsiveness Summary/Proposed Final Permit (hereinafter, "Responsiveness Summary"); the Lovett title V permit effective on October 12, 2001 ("title V permit"); and a letter dated July 18, 2000, from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC ("July 18, 2000 letter"); I deny the Petitioner's request in part and grant it in part for the reasons set forth in this Order. In addition to raising issues on the subject Lovett title V permit, NYPIRG's petition also raised general title V program issues, some of which DEC has already addressed and others which DEC is in the process of addressing. *See* letter dated November 16, 2001 from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 ("November 16, 2001 letter").

I. STATUTORY AND REGULATORY FRAMEWORK

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

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

facility emission units and that compliance with these requirements is assured.

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

II. ISSUES RAISED BY THE PETITIONER

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

In its November 16, 2001 letter, the DEC committed to address various program implementation issues by January 1, 2002, and to ensure that permit issuance procedures are performed in accordance with state and federal requirements. EPA is monitoring New York's title V program to ensure that the permitting authority is implementing the program consistent

---

[1] *See* CAA § 505(b)(2) and 40 CFR § 70.8(d). The Petitioner commented during the public comment period by raising concerns with the draft operating permit that are the basis for this petition. *See* comments from Lisa Garcia, Esq. and Keri N. Powell, Esq., Attorneys for NYPIRG to DEC (January 28, 2001) ("NYPIRG comment letter").

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

with its approved program, the Act, and EPA's regulations. Based on EPA's program review, the DEC is substantially meeting the commitments made in its November 16, 2001 letter.[3] As a result, EPA has not at this time issued a notice of program deficiency ("NOD") pursuant to CAA § 502(i) and 40 CFR §§ 70.10(b) and (c). However, failure to properly administer or enforce the program will result in the issuance of a NOD by EPA, by publication of such in the Federal Register.

A. Incomplete Permit Application

The Petitioner's first claim is that the applicant did not submit a complete permit application in accordance with the requirements of CAA § 114(a)(3)(C), 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d). *See* petition at page 2. In making this claim, NYPIRG incorporates a petition that it filed with the Administrator on April 13, 1999, wherein the Petitioner contended that the DEC is inadequately administering its title V program by utilizing a legally deficient standard permit application form.

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

- The application form lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether Lovett was in compliance with all such 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);

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

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

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

[3] The purpose of this EPA program review was to determine whether the DEC made changes to public notices and to select permit provisions as it committed in its November 16, 2001 letter. *See* letter dated March 7, 2002, from Steven C. Riva, Chief, Permitting Section, USEPA Region 2, to John Higgins, Chief, Bureau of Stationary Sources, DEC, which summarizes EPA's review of draft permits issued by the DEC from December 1, 2001 through February 28, 2002. In addition, EPA provided DEC with monthly and/or bi-monthly updates, over a 6-month period, to supplement the information provided in the March 7, 2002 letter. *See* also, EPA's final audit results, transmitted to the DEC via a letter dated January 13, 2003 from Steven C. Riva to John Higgins, which indicate that the DEC is substantially meeting the commitments made in its November 16, 2001 letter.

NYPIRG alleges that omission of the information described above makes it difficult for a member of the public to determine whether a proposed 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.

Finally, NYPIRG asserts that the Lovett permit application that was last signed in June of 1997 was not updated to identify the fact that on May 25, 2000, DEC issued to the Lovett facility a Notice of Violation ("NOV") that cited violations including: (1) the operation of a power plant without obtaining a Prevention of Significant Deterioration permit; and (2) the failure to install pollution control equipment which has resulted in unlawful release of massive amounts of sulfur dioxide and nitrogen oxides into the atmosphere.

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

With one exception, Lovett certified that it would be in compliance with all applicable requirements at the time of permit issuance, which occurred on October 12, 2001.[4] This certification is further supported by additional information. Routine facility inspections performed by the DEC around the time of application submission indicate that the Lovett facility was in compliance during this period except for, in certain instances, opacity exceedances. In fact, the opacity Order on Consent was issued on August 18, 1998, and requirements delineated therein are incorporated into the final title V permit issued to the Lovett facility on October 12, 2001 (see condition number 53 of the title V permit, as well as the discussion in Section I.3 of this Order). EPA believes that, in this case, inclusion of a compliance certification as of the time of application submission would not have resulted in a title V permit any different from the one

[4] In its application form, Lovett certified that, for all units at the facility that are operating in compliance with all applicable requirements, the facility will continue to be operated and maintained to assure compliance for the duration of the permit, except for those units referenced in the compliance plan portion of the permit. Because there was no listing of non-complying sources in Section IV, the compliance plan portion of the permit, the facility was, in effect, certifying that it would be in compliance with all applicable requirements at time of permit issuance, with the following exception. In its title V application, Lovett indicated that it was currently negotiating with DEC a Consent Order/Decree with respect to opacity requirements and, when the Order/Decree was finalized, Lovett would comply with the compliance plan contained therein.

ultimately issued. Accordingly, EPA denies the petition with respect to this issue. However, the State and EPA agree that the application form submitted by Lovett does not properly implement EPA or State regulations. Therefore, as detailed in its November 16, 2001 letter, the DEC has changed its forms and instructions accordingly.[5]

The next issue raised by the Petitioner relates to an omission in the application form of "a statement of methods used for determining compliance." *See* 40 CFR § 70.5(c)(9)(ii). Although the application submitted by Lovett did not specifically require the facility to include a statement of methods, in this case, the applicant did provide information on certain methods used for determining compliance by referring in the permit application, Section IV, to monitoring procedures. Such references include: (1) previously performed emissions testing and the recording of electrostatic precipitator operating parameters for 2 of the utility boilers; and (2) intermittent emissions testing and the recording of fabric filter pressure differentials for certain coal handling activities.

Although the application did not include methods for determining compliance with other applicable requirements, EPA believes these omissions to be harmless error. The application did include citations to all appropriate applicable requirements, a number of which include detailed monitoring requirements (e.g., federal acid rain continuous emissions monitoring requirements, New York State reasonably available control technology (RACT) requirements for nitrogen oxide (NO_x) emissions, and federal New Source Performance Standard requirements). With respect to the facility's applicable requirements, DEC has established in its title V program case-specific monitoring, recordkeeping and reporting provisions to assure compliance. In addition, subsequent to issuance of the title V permit, compliance has also been certified in Lovett's annual compliance certification report submitted to the DEC on January 28, 2002. In conclusion, because EPA believes that Lovett substantially complied with this requirement, even though the application form used was unclear, EPA denies the petition on this issue. However, the State and EPA agree that the methods used for determining compliance must be included in title V applications. As detailed in its November 16, 2001 letter, the DEC has changed its forms and instructions accordingly. *See* note 5, *supra.*

The Petitioner's next point is that EPA regulations call for the legal citation to the applicable requirement to be accompanied by the applicable requirement expressed in descriptive terms. In "White Paper for Streamlined Development of Part 70 Permit Applications" dated July 10, 1995, EPA clarified that citations may be used to streamline how applicable requirements are described in an application, provided the cited requirement is made available as part of the public

---

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

docket on the permit action or is otherwise readily available. The permitting authority may allow the applicant to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject, provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public (e.g., publically available documents include regulations printed in the Code of Federal Regulations or its State equivalent).

The Lovett permit application contains codes or citations associated with applicable requirements that are readily available. That is, these codes refer to federal and state regulations that are printed in rule compilations and also are available on-line. Applicable requirements that would not be as readily available include those corresponding to the facility's NO_x RACT compliance plan and operating plan. Although these plans were not attached to the permit application, they were specifically referenced therein and, as such, were part of the permit record. EPA believes that the omission of a hard copy of these plans is harmless error because the requisite documents were available for public review upon request, and the title V permit ultimately issued incorporated the requisite requirements of these documents. As such, EPA does not believe that the Petitioner was prejudiced because of this omission and, therefore, the petition is denied on this issue.

With respect to "non-codified" documents that include applicable requirements, such as NO_x RACT plans, pre-construction permits and operating permits, in its November 16, 2001 letter, the DEC agreed to amend the application instructions to ensure that applicants include in their title V permit applications, by attaching thereto, all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing. DEC has revised its title V permit application instructions to so state ("New York State Air Permit Application Instructions," December, 2001). *See* note 5, *supra*.

The Petitioner's fourth point is that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. In Section IV of DEC's application form ("Emission Unit Information"), there is a block labeled "Monitoring Information" that requires applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. DEC's application form also requires that applicants provide monitoring information at the facility level (in Section III, "Facility Information"). Although these sections were not completed in full by the applicant, the title V permit ultimately issued addressed all test methods from applicable requirements and, as such, EPA does not believe that the Petitioner was prejudiced by such an omission. Thus, the Petitioner's fourth issue regarding the application form is denied.

The Petitioner's final contention is that the Lovett permit application was not updated to identify a May 25, 2000, Notice of Violation issued by DEC. Issuance of a NOV by a State or federal environmental agency is based on allegations of a violation or violations of an applicable

requirement by that agency. Until a final resolution is made on the matter, the applicant need not revise any pending permit applications to include or reference such an allegation. This issue is discussed in more detail in section F of this Order, below. Therefore, the petition is denied on this issue.

B. Statement of Basis

The Petitioner's second claim alleges that the statement of basis required by 40 CFR § 70.7(a)(5) is insufficient. *See* petition at page 3.

The Petitioner states that DEC's "project description," included with the draft permit, does not satisfy the requirements of 40 CFR part 70. NYPIRG asserts that without an adequate statement of basis, it is virtually impossible for concerned citizens to evaluate DEC's periodic monitoring decisions and to prepare effective comments during the 30-day public comment period.

The Petitioner also discusses the "project description" that was included with the proposed Lovett permit and asserts that such a description is also not adequate for the statement of basis requirements (a proposed permit is issued for EPA review, subsequent to issuance of a draft permit and the public participation period). NYPIRG specifically cites several items that were either not included in the project description or were merely referenced therein. Such items include: (1) the issuance of a DEC Notice of Violation on May 25, 2000; (2) the NO_x RACT Plan; (3) an opacity Consent Order; and (4) the rationale for the monitoring included in the proposed permit. The Petitioner cites a previously-issued EPA Order which states, in part: "the rationale for the selected monitoring method must be clear and 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, December 22, 2000. *See* petition at pages 3 and 4.

The requirement for the "statement of basis" is found in 40 CFR § 70.7(a)(5), which states: "The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it."

The statement of basis is not a part of the permit itself.[6] It is a separate document which is to be sent to the EPA and, also, to interested persons upon request. This requirement for a statement of basis is not contained in 40 CFR § 70.6 which sets forth the required contents of the permit. In fact, 40 CFR § 70.6(a) requires that the permit contain all the explanation that ordinarily would be necessary to determine whether the permit conditions have been accurately

[6] Unlike title V permits, statements of basis are not enforceable, do not set limits, and do not create obligations on the permittee.

expressed. For example, the permit must contain the references to the applicable statutory or regulatory provisions forming the legal basis of the applicable requirements on which the conditions are based. *See* 40 CFR § 70.6(a)(1)(i).

A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. It should highlight elements that EPA and the public would find important to review. The statement should highlight anything that deviates from simply a straight 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.[7] As a result, the DEC has incorporated certain elements into its "permit review reports."[8] In the documents referenced in footnote 7, EPA explains that the "statement of basis" is to be used to highlight significant decisions or interpretations that were necessary in issuing the permit. These reports are not intended to be redundant to the permit but to assist in reviewing what is in the permit. Additionally, as noted by the Petitioner, in the December 22, 2000 Fort James Camas Mill Order, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring methods be documented in the permit record. *See* Fort James Camas Mill Order at page 8, December 22, 2000 (available on line at: http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/petitiondb1999.htm).

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

While EPA agrees with the Petitioner that a statement of basis was not made available

---

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

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

with the draft Lovett permit, we conclude that its absence does not in this case warrant objection to the permit. EPA believes that it is possible to achieve a sufficient understanding of this source using other available documents in the permit record including the permit application, the draft permit that includes a permit description,[9] regulations cited in the permit application (which, in most instances, include the monitoring, reporting and recordkeeping requirements incorporated into the permit to address title V monitoring), other documents referenced but not included with the application,[10] and DEC's Responsiveness Summary. Accordingly, a more detailed explanatory document was not necessary to understand the legal and factual basis for the draft permit conditions. Furthermore, there is no evidence that the Petitioner was harmed by the absence of a statement of basis. In fact, NYPIRG provided detailed and thoughtful comments on Lovett's draft permit establishing that it had a basic understanding of its terms and conditions.

While failure to include a statement of basis with the draft permit does not, in this case, constitute a reason to object to this permit, EPA can object to a permit on such grounds. In this instance, the substantive statement of basis requirements were met through the permit description, the availability of applicable regulations and other available documents in the permit record. Accordingly, EPA does not believe that the circumstances of this case warrant an objection to the Lovett permit and, therefore, denies the petition on this issue.

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

C. Annual Compliance Certification

The Petitioner's third claim alleges that the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5). The Petitioner's allegation is that the proposed permit does not require the facility to certify compliance with all permit conditions, but rather just requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification."

---

[9] Lovett's draft permit, for which a public notice was published in the December 20, 2000 edition of the New York State Environmental Notice Bulletin (ENB), included a description of the facility, the type of equipment, operations and fuel used at the plant, air permit applicability (applicable requirements), the issuance of an Order on Consent for opacity, and the issuance of a Notice of Violation for alleged PSD violations.

[10] As noted above, facility documents such as the NO_x RACT compliance plan and operating plan were specifically referenced in the permit application and, as such, were part of the permit record and were available for public review upon request.

See petition at page 5. Specifically, the Petitioner is concerned with the language in the permit that labels certain permit terms as "compliance certification" conditions. NYPIRG notes that requirements that are labeled "compliance certification" are those that identify a monitoring method for demonstrating compliance. The Petitioner asserts that the only way of interpreting this compliance certification designation is as a way of identifying which conditions are covered by the annual compliance certification. NYPIRG further asserts that permit conditions that lack periodic monitoring are excluded from the annual compliance certification. The Petitioner claims that this is an incorrect application of state and federal regulations because facilities must certify compliance with every permit condition, not just those that are accompanied by a monitoring requirement.

EPA notes, first, that the language in the Lovett permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, follows the language of 40 CFR §§ 70.6(c)(5) and (6). Section 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Section 201-6.5(e)(3) requires the following in annual certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the administrator and shall contain such other provisions as the department may require to ensure compliance with all applicable requirements. The Lovett title V permit includes this language at condition 26, item 26.2.

EPA disagrees with the Petitioner that "the basis of the certification" should be interpreted to mean that facilities are *only* required to certify compliance with the permit terms labeled as "compliance certification." "Compliance certification" is a data element in New York's computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. Condition 26.2 delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

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

Nonetheless, in its November 16, 2001 letter, the DEC has committed to include additional clarifying language regarding the annual compliance certification in draft permits issued on or after January 1, 2002, and in all future renewals so that the permit includes explanatory language so as to preclude any subsequent confusion.

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

D. Prompt Reporting of Deviations

The Petitioner's fourth claim is that the proposed permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). *See* petition at page 5. NYPIRG states that the proposed permit does not include any prompt reporting conditions.

The Petitioner argues that to address this issue, the DEC may use discretion to define prompt reporting in a reasonable manner. NYPIRG suggests two options: (1) include a general permit condition that defines "prompt" under all circumstances, or (2) develop facility-specific conditions to define prompt for individual permit requirements.

The Petitioner further provides past EPA statements of what should define prompt (*see*, e.g., EPA's proposed interim approval of the Arizona title V program at 60 Fed. Reg. 36083, July 13, 1995, which states that prompt should generally be defined as requiring reporting within two to ten days of the deviation). Finally, NYPIRG asserts that any prompt reporting must be made in writing. *See* petition at page 6.

In general, EPA agrees that title V permits must include requirements for prompt reporting of deviations. EPA raised this issue with the DEC in the July 18, 2000 letter at Attachment III, item 2. States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. In any case, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case concern under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).[11]

In this case, there are several provisions in the title V permit that appropriately require that prompt reports be made to the DEC (conditions 45, 46, 48, 53, 54, 75, 82 and 89). These relate to sulfur dioxide emission limits (conditions 45, 46 and 48), sulfur-in-fuel monitoring

[11] These provisions detail the prompt reporting requirement applicable to sources under the federal operating permits program.

(condition 48), opacity requirements (conditions 53, 75, 82 and 89), and nitrogen oxides averaging plan requirements (condition 54). Each of these conditions require that reports be submitted quarterly which, in these cases, is an appropriate use of the prompt reporting requirements of 40 CFR § 70.6(a)(3)(iii)(B) which states: "[t]he permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements." In previous Orders issued for New York State facilities, EPA has determined that semi-annual sulfur-in-fuel reporting is adequate; therefore, in the case of the Lovett facility, quarterly reporting is certainly appropriate. The sulfur content of the fuel-oil must be monitored by submission of a report from the supplier to the facility for each fuel-oil delivery. Because it is highly unlikely that fuel-oil outside of the specifications would be delivered and used, quarterly monitoring reports are appropriate. In addition, since sulfur dioxide emissions are directly related to the sulfur content of the fuel combusted, quarterly reporting is also appropriate in this case. With respect to opacity, monitoring and reporting requirements were established in an August 18, 1998 Order on Consent that was issued to address at the Lovett facility opacity exceedences and ways to mitigate such exceedences. Because the Order on Consent established quarterly reporting, this is appropriate for incorporation into the title V permit. The Lovett facility is required to comply with a NO_x averaging plan for compliance with the NO_x requirements of 6 NYCRR § 227-2.5. To determine compliance under this averaging plan, emissions from the Lovett facility as well as 3 other facilities are calculated either on a 24-hour or a 30-day rolling average. As such, quarterly reporting, which was established in the subject averaging plan, is also appropriate.

With respect to other monitoring provisions in the permit, such as other fuel recordkeeping requirements, and recording of pressure differentials of the fabric filters at the coal handling activities, reporting is required every 6 months. In addition, where stack tests are required to be performed, the test protocols will set forth the reporting requirements of the test results. Normally, test results must be reported within 30-days of the test. Thus, it is EPA's position that the monitoring and reporting requirements delineated in the Lovett title V permit meet the requirements of part 70 and, therefore, the petition is denied on this issue.

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

EPA is granting in part the NYPIRG petition for the Lovett Generating Station. Therefore, when DEC revises the permit in response to this Order, it will also incorporate these additional prompt reporting requirements into the permit as committed in the DEC's November 16, 2002 letter.

E. Startup, Shutdown, Malfunction

The Petitioner's fifth claim is that the proposed permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70. *See* petition at page 6. The NYPIRG petition provides a detailed, 5-part discussion of Condition 8 of the proposed Lovett permit, entitled "Unavoidable Noncompliance and Violations," which it refers to as the DEC's "excuse" provision. The Petitioner's discussion is summarized as follows:

1. The excuse provision included in the proposed permit is not the excuse provision that is in the New York SIP. That is, Condition 8 of the proposed permit cites 6 NYCRR § 201-1.4, which has not been approved by EPA into the New York SIP. The excuse provision in the SIP is at 6 NYCRR § 201.5(e), and includes language similar to that contained in 6 NYCRR § 201-1.4, but does not cover violations that occur during periods of shutdown or upsets. *See* petition at page 7;

2. The proposed permit must describe what constitutes "reasonably available control technology" (RACT) during conditions that are covered by the excuse provision. The Petitioner argues that the requirement to apply RACT during maintenance, startup or malfunction conditions is included in the New York SIP and, as such, is an applicable requirement. Also, to assure compliance with this requirement, NYPIRG contends that the permit must include monitoring, recordkeeping and reporting provisions to assure that RACT is employed during such periods. *See* petition at page 7;

3. The proposed permit does not assure compliance because it contains vague, undefined terms that are not enforceable as a practical matter. Specifically, the SIP-approved excuse provision gives the DEC Commissioner the authority to excuse select violations if they qualify as "unavoidable." NYPIRG contends that this term must be clearly defined in the permit, and must conform to EPA policy memoranda issued on September 28, 1982, February 15, 1983, and September 20, 1999. The Petitioner also asserts that the terms "startup," "malfunction" and "maintenance" must be explicitly defined in the permit. *See* petition at pages 7 and 8;

4. The proposed permit fails to require prompt written reporting of all deviations from permit requirements due to startup, shutdown, malfunction, and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B). The Petitioner notes that, as currently written, the permit allows the facility representative to submit reports of unavoidable violations by telephone, thus precluding a paper trail from being established. NYPIRG contends that written reports must be required to fulfill a primary purpose of the title V program, to provide the public with the capability to determine whether a facility is complying with all applicable requirements on an ongoing basis. *See* petition at pages 8 through 10; and

5. The proposed permit fails to clarify that a violation of a federal requirement cannot be excused unless the underlying federal requirement specifically provides for an excuse. The Petitioner notes that EPA was concerned about this issue when it granted New York interim title V program approval. 61 Fed. Reg. 57589, November 7, 1996. NYPIRG further notes that while New York incorporated into State regulations language clarifying that the discretion to excuse a violation will not extend to federal requirements unless the specific federal requirement provides for such, the proposed permit lacks this language. *See* petition at page 10.

It is EPA's view that the Act, as interpreted in EPA policy,[12] does not allow for automatic exemptions from compliance with all applicable SIP emission limits during periods of start-up, shut-down, malfunctions or upsets. Further, impromptu operation and maintenance practices do not qualify as malfunctions under EPA policy. *See* note 11, *supra*. To the extent that a malfunction provision, or any provision giving substantial discretion to the state agency, broadly excuses sources from compliance with emission limitations during periods of malfunction, EPA believes it should not be approved as part of the federally approved SIP. *See* In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, ("Pacificorp"), at page 23 (November 16, 2000), available on the Internet at: http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf.

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

This position was reiterated in the December 2001 Clarification which confirms that the September 1999 Guidance provides guidance to States and EPA regarding SIP provisions related to excess emissions during malfunctions, startups, and shutdowns. It was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved

---

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

by EPA. Similarly the September 1999 Guidance was not intended to affect existing permit terms or conditions regarding malfunctions, startups and shutdowns that reflect approved SIP provisions, or to alter the emergency defense provisions at 40 CFR § 70.6(g). Existing SIP rules and 40 CFR § 70.6(g) may only be changed through established rulemaking procedures and existing permit terms may only be changed through established permitting processes. Thus, EPA did not intend the September 1999 Guidance to be legally dispositive with respect to any particular proceedings in which a violation is alleged to have occurred. Rather, it is in the context of future rulemaking actions, such as the SIP approval process, that EPA will consider the September 1999 Guidance and the statutory principles on which this guidance is based. *See* December 2001 Clarification at page 1.

EPA is not aware of, and the Petitioner has provided no evidence of, any instances where the DEC relied on its "excuse" regulations to provide blanket exceptions for non-compliance merely because the incidents were reported. While a source operator may be misled into seeking the DEC Commissioner's action on a violation during start-ups, shutdowns, malfunctions or upsets, EPA believes that the Commissioner is aware of the limits on the authority to excuse emission exceedances existing under the DEC's own regulations, and believes that it is unlikely that the Commissioner will exceed the discretion allowed under the State regulations.

In response to the Petitioner's first point, EPA acknowledges that Condition 5 of the title V permit (Condition 8 of the proposed permit), entitled, "Unavoidable Noncompliance and Violations," cites 6 NYCRR § 201-1.4 as the applicable requirement. This provision states in part: "At the discretion of the commissioner a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable." 6 NYCRR § 201-1.4 is a State regulation that has not been approved into the SIP. There is, however, a similar SIP-approved excuse provision at 6 NYCRR § 201.5(e). In its November 16, 2001 letter, the DEC committed to removing the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of title V permits and incorporating the condition into the state side. Based on EPA's program review, DEC is substantially meeting this commitment. *See* note 3, *supra*. Therefore, when DEC revises the permit in response to this Order, it will remove the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of the permit, and incorporate the condition into the state side.

EPA disagrees with the Petitioner's second point that the permit must define RACT as it applies during startup, shutdown, malfunction and maintenance conditions. The DEC's current rules at 6 NYCRR § 201-1.4(d) and the SIP requirements at 6 NYCRR § 201.5 require facilities to use RACT during any maintenance, startup/shutdown, or malfunction condition.

First of all, the term "RACT" is defined in the New York SIP at 6 NYCRR § 200.1(bp) as the: "lowest emission limit that a particular source is capable of meeting by application of control technology that is reasonably available, considering technological and economical feasibility." In those instances where a facility has requested that the DEC Commissioner excuse an exceedence during times of startup, shutdown, malfunction or maintenance, RACT is determined

by the DEC on a case-specific basis. As a practical matter, it is not possible to set forth in advance a detailed definition of RACT that will address all possible startup, shutdown or malfunction events throughout the life of the permit. The specific technology that will constitute RACT will depend on both the nature of the violation and the technology available when the violation occurs. The "excuse" provision allows that determination to be made on a case-by-case basis by the DEC Commissioner if and when she chooses to exercise her authority to excuse a violation. The applicable requirement associated with the emission unit at which the deviation occurred would be incorporated elsewhere in the permit, and this requirement would apply at all times, including during periods of startup, shutdown, malfunction and maintenance. The purpose of RACT is to mitigate the violation or exceedence of the applicable requirement until such time as compliance can once again be achieved.

The third point made by the Petitioner is that the subject provision includes vague and undefined terms that are not practicably enforceable, and that the condition must comply with EPA policy and guidance. EPA disagrees with the Petitioner that definitions for "unavoidable," "startup," "malfunction" and "maintenance" must be included in the permit. The purpose of a title V permit is to ensure that a source operates in compliance with all applicable requirements. The lack of definitions for these terms do not render the permit unenforceable. These are commonly used regulatory terms. In the case of the term malfunction, the SIP rule excludes "failures that are caused entirely or partially by poor maintenance, careless operation, or other preventable condition." 6 NYCRR 201.5(e)(2). Moreover, the Petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. Also, as discussed above, it is not appropriate for title V permits to revise or alter requirements of an approved SIP. Finally, moving the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, to the state side of the permit will further assure that the excuse provision is not expanded beyond its proper bounds.

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

Reporting in order to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See* discussion in Part D of this Order, above. For a violation to be properly excused, the DEC must apply the regulation authorizing such discretion and must properly document its findings to

ensure the rule was reasonably applied and interpreted. Thus the "excuse" reports are in addition to all the other deviation reports. Any deviation for which an excuse is sought will be reported as a deviation or violation in the 6 month report and, if required, in the prompt report of a deviation. This issue was discussed in detail in Section D, above.

Regarding the Petitioner's fifth and final point, of whether the DEC can excuse violations of a federal requirement, DEC's own rules do not authorize such expansion of the Commissioner's discretion. These rules provide that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). In its Responsiveness Summary, the DEC acknowledges that the DEC Commissioner would exercise his or her discretion "in a manner consistent with substantive Federal requirements or enforcement policy, which may or may not allow a violation of an emission standard to be excused in the first place." *See* Responsiveness Summary at page 3.

In its November 16, 2001 letter, the DEC committed to include language regarding the start-up, shut-down, malfunction provisions of the DEC rules only on the state portion of the permit when a permit is being issued, reissued or renewed. As discussed in detail elsewhere in this Order, EPA is granting in part the NYPIRG petition to object to the Lovett permit and, accordingly, this permit will be reissued. Thus, the matter is moot in this regard and we have found the specific issues raised by the Petitioner as to interpretation of the DEC's rule to be without merit. EPA reserves the right to address any misapplication of the DEC's rule with respect to any specific occurrence of a violation of emission limits or other requirements.

F. Compliance Schedule

The Petitioner's sixth claim is that the proposed permit lacks a compliance schedule designed to bring the Lovett Generating Station into compliance with PSD requirements. NYPIRG asserts that on May 25, 2000, the DEC issued a NOV to Orange and Rockland Utilities, Inc. stating that the Lovett facility was operating in violation of Prevention of Significant Deterioration (PSD) requirements. Specifically, the NOV alleged that the Lovett facility was modified various times since 1977 without the company first obtaining a PSD permit, and is being operated without control equipment for sulfur dioxides (SO_2) and nitrogen oxides (NO_x), that would be required by the CAA's PSD requirements. *See* petition at page 10.

The Petitioner also cites 40 CFR § 70.5(c)(8)(iii)(C), which states that if a facility is in violation of an applicable requirement at the time of receipt of an operating permit, then the facility's permit must include a compliance schedule with milestones that lead to compliance. NYPIRG notes that it provided a similar comment to the DEC, and DEC's response was that an NOV has been sent to the facility alleging non-compliance, but the matter has not been settled (as of June 29, 2001); when the matter is settled, the Lovett title V permit will be modified accordingly. *See* Responsiveness Summary at page 5. The

Petitioner further notes that EPA has objected to at least one proposed permit for failure to include a compliance schedule in the permit despite a pending NOV, wherein EPA Region 4 stated that the permit must include a schedule of compliance pursuant to 40 CFR § 70.6(c)(3).[13] *See* petition at pages 11 and 12.

Finally, NYPIRG asserts that pursuant to 40 CFR § 70.5(c)(8)(ii)(C), the Lovett title V permit must include a compliance schedule to address an opacity Consent Order, to which the facility is also subject. The Petitioner asserts that the termination of the opacity Consent Order upon issuance of the title V permit does not obviate the need for a compliance schedule in the permit. *See* petition at page 12.

With respect to the Petitioner's point that the proposed permit lacks a compliance schedule designed to bring the Lovett Generating Station into compliance with PSD requirements, EPA agrees with the DEC that at present, the matter has not been settled, but once it is, the Lovett title V permit will be modified accordingly. Notices of Violation are issued to stationary sources based on violations noted by an environmental agency representative during a facility inspection or during review of facility documents. By issuance of a NOV, the environmental agency outlines the alleged violations together with the needed resolutions to remedy such violations. The NOV also provides the facility an opportunity to rebut such allegations and to request a meeting with the agency to discuss the matter.

The issuance of a NOV and the subsequent correspondence and meeting between the agency and the facility are therefore the beginning stages of a process that could result in an Order on Consent, or some other vehicle, to resolve the violation(s) of the subject NOV. Once an Order on Consent has been issued, then the facility must comply with the schedule delineated therein, and a schedule that resembles or is at least as stringent as the schedule contained in the Order must also be incorporated into the facility's title V permit. *See* 40 CFR §§ 70.5(c)(8)(iii)(C) and 70.6(c)(3).

In the case of the Lovett Generating Station, although a NOV was issued to the facility on May 25, 2000 for alleged violations of PSD requirements, a resolution between the two parties has not as yet come to fruition and, as such, an Order on Consent with a compliance schedule has not as yet been issued. Should an Order on Consent be issued prior to the time that DEC re-opens the Lovett permit in response to this Order, a compliance plan included in the Order on Consent must also be incorporated into Lovett's title V permit. In the event that an Order on Consent has not been issued in time for incorporation into the Lovett permit, there are sufficient safeguards in the title V permit to ensure that the requirements relating to compliance schedules will be complied with at the

---

[13] *See* letter from Winston A. Smith, U.S. EPA Region 4, objection letter re: Gallatin Steel Company, Warsaw, Kentucky, dated August 7, 2000.

appropriate time. See, for example, Conditions 4, 19, 21, and 27 of the Lovett permit that address unpermitted emission sources, the permit shield, re-openings for cause, and permit exclusion provisions, respectively.

Regarding the letter referred to by the Petitioner from EPA Region 4 (see footnote number 13, above), it is EPA's conclusion that the reasons for the objection in the Region 4 case are not the same as the issues presented in the instant petition. In that case, at the time of issuance of the referenced letter a corresponding Consent Decree had already been lodged with the court and was expected to be entered as a final order shortly thereafter. However, because of unanticipated citizen objections, the Consent Decree was not entered until over a year later. Thus, the statement in the EPA Region 4 letter that: "...the permit must include a schedule of compliance..." was based on an assumption that did not come to pass; that is, that a Consent Decree would be issued in time for the compliance schedule included therein to be incorporated into the title V permit upon its being re-opened for cause.

With respect to the Petitioner's final point on this matter, it is EPA's contention that the Order on Consent issued to Lovett for opacity violations has partly been incorporated into the facility's title V permit as appropriate. This matter is discussed in detail in Section I.3, below.

G. Pre-Existing Federally Enforceable Emission Limits

The Petitioner's seventh claim is that the proposed permit fails to include federally enforceable emission limits established under pre-existing permits. NYPIRG contends that the Lovett facility is subject to a number of pre-existing permits issued pursuant to New York's SIP-approved permitting regulations at 6 NYCRR part 201, and the permissible emission rates listed therein must be included in the title V permit. The Petitioner also argues that EPA is already on record requiring that terms and conditions from SIP-approved permits be included in title V permits, and cites a May 20, 1999 letter from John Seitz, EPA to Robert Hodanbosi, STAPPA/ALAPCO. *See* petition at pages 12 and 13.

EPA agrees that federally-enforceable conditions from previously-issued SIP permits (permits to construct and permits to operate) must be included in title V permits. DEC has had a SIP-approved permitting program for many years. Prior to revising its permitting rules at 6 NYCRR part 201, the DEC regulations required facilities to obtain permits to construct for select new and modified emission units, and to apply for and be granted certificates to operate for all non-exempt emission units. These permits, which included citations for the applicable requirements and other "special conditions," if necessary, evolved into certificates to operate after construction and these certificates were subject to renewal every 5 years. (Special conditions were incorporated into certain DEC permits when a regulatory citation alone was not sufficient; for example, to incorporate

site-specific provisions of a NO_x RACT plan, potential to emit limits, etc.).

The revision of New York's permitting regulations resulted in the State now having one permit document for major sources of air pollution, which incorporates a permit to construct, if applicable, the State SIP operating permit, and the title V operating permit. Federally-enforceable conditions from prior permits are brought forward to the current SIP/title V permit, unless the DEC revises the existing permit. If this is the case, then the DEC must identify such previously-listed applicable requirements and process the permit revision to revise or delete such conditions in accordance with the appropriate new source review requirements, including the public review procedures for such.

During the instant review, EPA has not uncovered any pre-existing permits or federally-enforceable conditions that have not been incorporated into the Lovett title V permit. And because the Petitioner has not identified any specific pre-existing permits or conditions that have not been incorporated into the title V permit, the petition is being denied with respect to this issue.

H. CAA § 112(r) Requirements

The Petitioner's eighth claim is that the EPA must object to the proposed permit because it does not correctly include CAA § 112(r) requirements. NYPIRG notes that Condition 14 of the proposed title V permit states, in part, that risk management plans must be submitted to the Administrator if required by Section 112(r). The Petitioner alleges that this condition should state whether or not this requirement applies to the facility and, if the DEC does not know, then it must state such in the Statement of Basis. NYPIRG also contends that EPA has already objected to proposed title V permits based on a similar deficiency, and references a letter dated January 31, 1999 from David P. Howekamp, EPA Region 9 to Ellen Garvey, Bay Area Air Quality Management District. *See* petition at pages 13 and 14.

While EPA agrees with the Petitioner that the provision included in the proposed permit was very general and did not affirmatively state whether CAA § 112(r) applies to this particular source, we do not believe that the absence of such a determination provides a basis for EPA to object to a particular permit on this point. EPA's decision to deny a petition on this issue is described in detail in Orders previously issued; *see*, e.g., In the Matter of Starrett City, Inc., Petition Number II-2001-01, December 16, 2002. This Order is available on the Internet at: http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2000.htm.

With respect to the case at hand, during the time between issuance of the proposed permit and the final permit, the DEC determined that the Lovett facility was not subject to the requirements of § 112(r) of the CAA. As such, the referenced condition was not included in the final title V permit issued to Lovett, effective on October 12, 2001.

Therefore, the petitioned issue has become moot.

I. Monitoring

The Petitioner's ninth claim is that the proposed Lovett 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 page 14. The Petitioner addresses individual permit conditions that allegedly either lack monitoring or are not practicably enforceable.[14] The specific allegations for each permit condition are discussed below.

Facility-Specific Petition Issues

1. Condition 8 (Air Contaminants in Control Devices)

The Petitioner alleges that Condition 8, addressing the handling of air contaminants collected in an air cleaning device, must be supplemented with facility-specific monitoring conditions that cover equipment that is in use at the facility at time of permit issuance. *See* petition at page 15.

The condition, which is also numbered 8 in the final permit, states: "No person shall unnecessarily remove, handle, or cause to be handled, collected air contaminants from an air cleaning device for recycling, salvage or disposal in a manner that would reintroduce them to the outdoor atmosphere."

The air cleaning devices at the Lovett facility include electrostatic precipitators (ESPs) to control particulate matter emissions from utility boilers 4 and 5, and fabric filters to control particulate matter emissions from certain coal handling activities (i.e., located at the coal crusher and transfer buildings). The "contaminants" collected from these air cleaning devices include the flyash from the ESPs and the particulate matter from the fabric filters.

Condition 8 is a general condition from the New York SIP that is included in all title V permits. EPA agrees with the statement made in the NYPIRG petition that: "general conditions should be included in Title V permits..." However, EPA does not agree that monitoring should be incorporated in title V permits to address this particular

[14] With respect to lack of adequate periodic monitoring, the Petitioner cites 40 CFR § 70.6(a)(3) which requires monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance; and 40 CFR § 70.6(c)(1) which requires permits to contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. With respect to practical enforceability, the Petitioner cites the U.S. EPA's Periodic Monitoring Guidance, September 15, 1998, at page 16, which has since been vacated. Appalachian Power v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

general condition. Monitoring to assure compliance with applicable requirements that relate to air cleaning devices should be incorporated into the emission unit section of title V permits. For the Lovett permit, applicable requirements and monitoring related to the transport and disposition of the flyash from the ESPs and the particulate matter from the fabric filters is more appropriately addressed through requiring monitoring that corresponds with New York's general opacity requirement at 6 NYCRR § 211.3, and is discussed in Section I.3 of this Order, below. Therefore, EPA denies the petition on this issue.

However, EPA believes that a detailed description of the contaminants collected in these control devices, and the disposition of such within and from the facility should be included in the DEC's permit review report. As noted elsewhere in this Order, EPA is granting in part the NYPIRG petition to object to the Lovett permit. Therefore, when the DEC revises the subject permit in response to this Order, it should include in the required permit review report the aforementioned detailed description.

2. Condition 29 (Required Emissions Tests)

The Petitioner next comments that Condition 29 of the permit, "Required Emissions Tests," includes everything required under 6 NYCRR § 202-1.1 except the requirement that the permittee "bear the cost of measurement and preparing the report of measured emissions." The Petitioner goes on to cite EPA's "White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program" ("White Paper 2"), which states that it is generally not acceptable to use a combination of referencing certain provisions of an applicable requirement while paraphrasing other provisions of that same requirement. *See* petition at pages 15 and 16.

EPA notes that the language cited by the Petitioner is from the fifth paragraph of section II.E.3 of White Paper 2, which also states that such a practice (i.e., using a combination of referencing certain provisions and paraphrasing other provisions), particularly if coupled with a permit shield, could create dual requirements and potential confusion. The subject condition from the Lovett title V permit unambiguously states that 6 NYCRR § 202-1.1 is an applicable requirement. The specific regulatory citation is unambiguous that the requirements of 6 NYCRR § 202-1.1 apply to Lovett. Omitting who shall bear the cost of conducting and reporting mandatory emissions tests does not relieve the permittee from performing and reporting such tests. For these reasons, the EPA finds no harm in the omission from the permit of the language cited by the Petitioner, and notes that such additional language is unnecessary. As such, the petition is denied with respect to this issue.

3. Condition 53 (Compliance With Opacity Limits)

The final allegation made by the Petitioner is that the permit lacks any kind of

monitoring to assure the facility's compliance with the applicable opacity limitation found in the SIP at 6 NYCRR § 211.3. NYPIRG contends that this requirement is important for parts of the facility not covered by other, more stringent opacity requirements, and if DEC decides to streamline opacity requirements at the facility, then that must be explained in the Statement of Basis. *See* petition at page 16.

The Petitioner also argues that Condition 53 of the draft permit, the condition that describes the applicable requirement of 6 NYCRR § 227-1.3, does not satisfy the federal compliance schedule requirements. NYPIRG contends that this draft condition is deficient in a number of ways, described in detail below. *See* petition at pages 16 and 17.

EPA agrees with the Petitioner that the Lovett permit lacks monitoring to assure compliance with the state's general opacity rule at 6 NYCRR § 211.3. The Lovett title V permit does include opacity provisions for the facility's boilers at conditions 75, 82 and 89, and also, opacity and particulate matter applicable requirements for the coal handling processes at conditions 91 through 97. However, there are no applicable opacity requirements in the permit for the handling of flyash from the ESPs and particulate matter or dust from the coal-handling fabric filters. Accordingly, 6 NYCRR § 211.3 would apply to these activities. Therefore, EPA is granting the NYPIRG petition on this issue, and the DEC must include monitoring in the permit that corresponds to this applicable requirement.[15] Such monitoring must be similar to what has been incorporated into other permits that have monitoring for this applicable requirement (that is, daily observances for visible emissions). *See*, e.g., the title V permit for Starrett City (Conditions 33 and 34 of the Starrett City title V permit effective on November 10, 2000).

With respect to the Petitioner's second issue that Condition 53 of the draft permit does not satisfy the compliance schedule requirements of 40 CFR part 70, five sub-issues were also raised in the petition and are addressed below. One point must first be made. The opacity compliance requirements at issue were incorporated pursuant to an Order on Consent at Condition 53 of the final title V permit issued on October 12, 2001.[16] However, the provision is incomplete in that it is truncated at the second paragraph of

---

[15] There are no monitoring provisions in the New York SIP associated with section 211.3; as such, the provisions of 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) apply. The scope of applicability of this regulation, known as the periodic monitoring rule, was addressed by the US Court of Appeals for the DC Circuit in Appalachian Power v. EPA, 208 F.3d 1015 (D.C. Cir. 2000). The court concluded that, under section 40 CFR § 70.6(a)(3)(i)(B), the periodic monitoring rule applies only when the underlying applicable rule requires "no periodic testing, specifies no frequency, or requires only a one-time test." *Id.* at 1020. Accordingly, DEC must include monitoring in the permit sufficient to "yield reliable data from the relevant time period that are representative of the source's compliance with the permit." Such monitoring should be similar to the monitoring contained in other DEC permits associated with this applicable requirement.

[16] As discussed previously, an Order on Consent to address opacity violations was executed between DEC and the owners/operators of the Lovett facility on August 18, 1998.

section 5 of this condition.[17] Therefore, EPA is granting the NYPIRG petition, in part, on the issue that the Lovett permit does not satisfy the compliance schedule requirements of 40 CFR § 70.6(c)(3). Upon re-opening of the title V permit, the DEC must incorporate all of the requisite requirements from the opacity compliance schedule as delineated in the August 18, 1998 Order on Consent.

1. The Petitioner contends that Condition 53 violates the rule that the compliance schedule may not sanction noncompliance with an applicable requirement by attempting to alter the underlying requirement. NYPIRG states that it is not acceptable that while 6 NYCRR § 227-1.3 states that opacity must not exceed one six minute period per hour of not more that 20 percent opacity, Condition 53.1(3) of the proposed Lovett permit revises the rule to state that an excess opacity emissions event consists of one or more six minute periods in which the average opacity exceed 20 percent, which are caused by the same circumstance.

EPA disagrees with the Petitioner on this matter. Condition 53.2(3) of the final Lovett permit requires that opacity incident reports (OIRs) be filed quarterly. Lovett is required to prepare an OIR for every excess opacity event, which is defined as one or more six minute periods in which the average opacity exceeds 20 percent, and which is caused by the same circumstance. The definition of these events are not equivalent to the language in DEC's opacity regulation, at 6 NYCRR § 227-1.3, because the event, as defined, is from the August 1998 Order on Consent, not from an applicable regulatory requirement. These events simply define those instances where Lovett must prepare and submit a OIR to the DEC. The applicable requirements for opacity are included elsewhere in the Lovett title V permit, specifically at Conditions 75, 82 and 89. As such, the petition is denied on this issue.

2. The Petitioner asserts that Condition 53.1(2) of the proposed permit, which states that the opacity monitors shall be operated and maintained in accordance with the requirements of 40 CFR part 75, the manufacturer's recommendations and Respondent's QA/QC program, is defective because, as written, it not practicably enforceable (i.e., the manufacturer's recommendations are not available to the public). NYPIRG contends that the permit must specify and incorporate specific quality assurance methods.

EPA disagrees with the Petitioner on this point. The specific opacity applicable requirements and monitoring is addressed in permit conditions elsewhere in the permit (numbers 75, 82, 89). In these other conditions, it is stated that the Lovett facility must install and operate COMS in accordance with manufacturers instructions, and properly maintain these monitors to satisfy criteria of 40 CFR part 60, Appendix B. EPA does not

[17] This matter was discussed in a telephone conversation between Gerald DeGaetano of EPA Region 2 and Thomas Miller of DEC Region 3 on January 16, 2003. Mr. Miller acknowledged that Condition 53 of the Lovett title V permit was inadvertently truncated.

agree that in all cases operating and maintenance procedures need to be included in a title V permit. Opacity violations will be promptly reported and any COMS "downtime" will be identified and reported.

With respect to Condition 53 of the Lovett title V permit, the manufacturers recommendations is only one of three monitoring requirements contained in this condition. Condition 53(2) also requires the opacity monitors be operated in accordance with the requirements of 40 CFR part 75 and the QA/QC program (in addition, condition 62 of permit notes that Lovett must install, certify, operate and maintain COMS in accordance with requirements of 40 CFR Part 75). Part 75 provides extensive QA/QC procedures which are readily available to the public and fully adequate as codified. EPA agrees that manufacturers recommendations alone are not sufficient periodic monitoring to assure that the opacity monitors are properly operated and maintained. Most manufacturer recommendations are intended to be general guidelines and are frequently updated to improve operator and equipment performance as time goes on, therefore, EPA does not require that the specifications manual itself be incorporated into a title V permit. Frequent revisions to this document could trigger many unnecessary permit re-openings to adopt the latest changes. In general, such an approach would not be practical. As such, EPA denies the petition on this point.

3. The Petitioner asserts that Condition 53.1(3) of the proposed permit, which states that opacity incident reports shall be made available to DEC on demand, must be revised to require the facility to submit prompt reports of deviations from permit requirements.

First, while Condition 53.2(3) of the final Lovett title V permit retains the language that OIRs shall be made available to DEC on demand, the reporting requirements listed at the end of this condition require the submission of quarterly calendar reports. In addition, as noted in point number 1, above, preparation of these OIRs is not directly related to an applicable regulatory requirement. The pertinent applicable reporting requirements are included in the permit at Conditions 75, 82 and 89, where quarterly reporting is required. As discussed in Section D of this Order, above, it is EPA's position that the reporting required under these 3 conditions constitutes prompt reporting within the meaning of part 70. Therefore, EPA denies the NYPIRG petition on this specific issue.

4. The Petitioner notes that Condition 53.1(8) states that the ESPs shall be operated and maintained in a manner consistent with good air pollution control practices for minimizing emissions, and asserts that the permit must define "good air pollution control practices" in order to be practicably enforceable.

As noted above, condition 53 of the Lovett title V permit was inadvertently truncated, including the language cited by petitioner. Thus, the permit does not currently include any operation and maintenance requirements for the facility's ESPs. Because EPA

cannot address a petition issue on language not included in the permit, EPA denies the NYPIRG petition on this issue. However, as previously discussed in this Order, EPA is granting in part the petition to require that the Lovett permit be re-opened to incorporate all of the requisite requirements from the opacity compliance schedule as delineated in the August 18, 1998 Order on Consent. Pursuant to the re-opening process, NYPIRG will have an opportunity to review the changes and provide additional comments if it believes that problems with the permit conditions remain.

5. The final point on this matter made by the Petitioner is that Condition 53 is not designed to bring the Lovett facility into compliance with applicable opacity requirements. NYPIRG asserts that the compliance schedule should include a penalty schedule that escalates over time, yet the fee schedule included in the August 18, 1998 Order on Consent resets to the lowest penalty level at the beginning of each quarter and, therefore, there is no incentive for the facility to comply with opacity requirements.

EPA does not agree that a penalty schedule as described by petitioner need be incorporated into the Lovett title V permit. As required by 40 CFR § 70.6(c)(3) title V permits must include a compliance schedule that contains remedial measures, "including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements . . .." Such schedule must "resemble and be at least as stringent as that contained in any judicial Consent Decree or administrative order to which the source is subject." *See also*, 40 CFR § 70.5(c)(8)(iii)(C). As discussed previously in this section, a portion of the compliance schedule was inadvertently left out of the Lovett permit and upon re-opening of the title V permit, the DEC must incorporate all of the requisite requirements from the opacity compliance schedule as delineated in the August 18, 1998 Order on Consent. Once DEC satisfies this requirement EPA believes that the compliance schedule contained in the Lovett permit will fully meet the requirements of part 70. To the extent that NYPIRG is concerned that DEC's Order is too lenient in its penalty structure, that issue is not a matter for consideration in responding to a petition to object to the facility's title V permit.

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 Lovett title V permit. This decision is based on a thorough review of the October 12, 2001 permit, and other documents that pertain to the issuance of this permit.

February 19, 2003
Dated:

/s/
Christine Todd Whitman
Administrator

Note: Due to a clerical error, an incorrect version of this Order was presented for signature. Therefore, this Order supercedes the Order signed on February 14, 2003.