

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)
MAIMONIDES MEDICAL CENTER)
)
Permit ID: 2-6102-00103/00002)
Facility DEC ID:2610200103)
)
Issued by the New York State)
Department of Environmental Conservation)
Region 2)

ORDER RESPONDING TO
PETITIONER'S REQUEST THAT
THE ADMINISTRATOR OBJECT
TO ISSUANCE OF A
STATE OPERATING PERMIT

Petition Number: II-2001-04

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

On October 29, 2001, the Environmental Protection Agency ("EPA") received a petition from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, to the Maimonides Medical Center ("Maimonides"). The Maimonides permit was issued by the New York State Department of Environmental Conservation, Region 2 ("DEC") on August 30, 2001, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR parts 200, 201, 621 and 624.

The petition alleges that the Maimonides permit does not comply with 40 CFR part 70 in that:(1) the permit is based upon an inadequate permit application in accordance with the requirements of 40 CFR § 70.5(c); (2) the permit is accompanied by an insufficient Statement of Basis in accordance with 40 CFR § 70.7(a)(5); (3) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (4) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (5) the permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70 in a number of ways; (6) the permit 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 Maimonides Permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

Subsequent to receipt of the NYPIRG petition, EPA performed an independent and in-depth review of the Maimonides title V permit. Based on a review of all the information before me, including the petition; the permit application; NYPIRG's comments to the NYSDEC on the Draft title V Operating Permit; NYSDEC's Responsiveness Summary to NYPIRG's comments, dated July 11, 2001, and the Final Permit, effective August 30, 2001, I deny in part and grant in part the Petitioner's request that I object to this permit, for the reasons set forth in this Order.

Petitioner has raised valid issues on the Maimonides permit, resulting in our granting portions of the petition. This petition also raised programmatic issues, some of which DEC has already addressed and others which DEC is in the process of addressing. *See* letter dated November 16, 2001 from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 (“commitment letter” or “November 16 letter”).

I. STATUTORY AND REGULATORY FRAMEWORK

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

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

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

¹*See* CAA § 505(b)(2); 40 CFR § 70.8(d). Petitioner commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. *See* Letter from Keri Powell, Esq. of NYPIRG to DEC (October 1, 1999) (“NYPIRG Comment Letter”).

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 PETITIONER²

On April 13, 1999, NYPIRG sent a petition to EPA which brought programmatic problems concerning DEC's application form and instructions to our attention. NYPIRG raised those issues and additional program implementation issues in individual permit petitions, including the instant petition, and in a citizen comment letter, dated, March 11, 2001 that was submitted as part of the settlement of litigation arising from EPA's action extending title V program interim approvals. Sierra Club and the New York Public Interest Research Group v. EPA, No. 00-1262 (D.C.Cir.).³ EPA has conferred with NYPIRG and DEC relative to these program implementation concerns.

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

A. Permit Application.

Petitioner alleges that the applicant did not submit a complete permit application in accordance with the requirements of CAA § 114(a)(3)(C), 40 CFR § 70.5(c) and 6NYCRR § 201-6.3(d). Petition at page 2. As such, Petitioner notes that permit application lacks:

² Issues A-D have been raised previously by Petitioner and addressed by the Administrator in six Orders responding to the petitions: In the Matter of North Shore Towers Apartments, Inc., Petition Number II-2000-06, July 3, 2002 ("North Shore Towers"); In the Matter of Tanagraphics Inc., Petition Number II-2000-05, July 3, 2002 ("Tanagraphics"); In the Matter of Rochdale Village Inc., Petition Number II-2000-04, July 3, 2002 ("Rochdale Village"); In the Matter of Kings Plaza Total Energy Plant, Petition Number II-2000-03, Jan. 16, 2002 ("Kings Plaza"); In the Matter of Action Packaging Corp., Petition Number II-2000-02, Jan. 16, 2002 ("Action Packaging"); and In the Matter of Albert Einstein College of Medicine of Yeshiva University, Petition Number II-2000-01, Jan. 16, 2002 ("Yeshiva"). Each of these Orders is available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2000.htm>.

³EPA responded to NYPIRG's March 11, 2001 comment letter by letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc. The response letter is available on the internet at <http://www.epa.gov/air/oaqps/permits/response/>.

⁴See letter dated March 7, 2002, from Steven C. Riva, Chief, Permitting Section, USEPA Region 2 to John Higgins, Chief, Bureau of Stationary Sources, DEC. This letter summarizes an EPA review of draft permits issued by the DEC from December 1, 2001 through February 28, 2002. Through June 2002, EPA provided DEC with monthly updates to supplement the information provided in the March 7, 2002 letter. The purpose of this EPA review was to determine whether the DEC is making changes to public notices and to select permit provisions as it committed in its November 16, 2001 letter.

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

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

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

Additional discussion of the permit application issue has been raised in many NYPIRG petitions, *see* footnote 2, and has been addressed in detail by the Administrator. *See, e.g.,* Yeshiva Order at pages 7 through 10.

1. Initial Certification

EPA agrees with Petitioner that the compliance certification process in the application form utilized by the facility in this case, may have enabled the applicant to avoid revealing noncompliance in some circumstances. The DEC form allowed an applicant to certify that it expects to be in compliance with requirements when the permit is issued rather than make a concrete statement as to its compliance status at the time of permit application. If the facility was not in compliance but achieved compliance before the permit was issued, it may have been possible to conceal any previous noncompliance. As provided in 40 CFR § 70.5(c)(9)(i), permit applicants are required to submit "a certification of compliance with all applicable requirements by a responsible official consistent with...section 114(a)(3) of the Act." EPA interprets this language as requiring that sources certify their compliance status as of the time of permit application submission. Where certifications do not address compliance status as of the time of permit application, the State, EPA and the public have been deprived of meaningful information on compliance status which may have a negative effect on source compliance and could impair permit development. Compliance certifications are public documents. Thus, one purpose of the initial compliance certification is to provide an incentive for sources to come into compliance with applicable requirements before they complete their applications. Another purpose is to alert the permitting authority to compliance issues in advance so that it can work with the source on such problems and develop an appropriate schedule of compliance in the title V permit. *See* 40 CFR §§ 70.5(c)(8) and 70.6(c)(3) and (4).

Based on the application form that the facility official submitted in December 1997, Maimonides certified that it would be in compliance with all applicable requirements at the time of permit issuance, which occurred on August 30, 2001. Nonetheless, in January 1998, subsequent to submitting the application to the State, the facility installed a new 50 millionBTU/hr boiler, while failing to update the application form, as required by 70.5(b), and to give due notice to DEC, as prescribed by 6 NYCRR part 231 (New Source Review in Non-Attainment Areas). As a result, the facility was issued a Notice of Violation (NOV) on February, 2, 2001, by DEC for contravening 6 NYCRR § 231-2, which requires, in addition to notifying the State, the performance of an emission netting analysis for all new sources installed at a major

facility. In accordance with § 231-2 regulations, the emission netting analysis was performed for Maimonides and provided to the State by permittee, prior to permit issuance. Subsequently, that netting analysis has been incorporated into the final effective permit, at Condition 31. Therefore, the facility's non-compliance issues derive from equipment changes at the facility that were made subsequent to the submission of the application. DEC is taking appropriate enforcement action on Maimonides' failure to notify the DEC regarding changes in its equipment. EPA does not believe that submission by Maimonides of a different application (that is, one which would have required compliance certification as of the time of application submission) would have resulted in a title V permit any different from the one ultimately issued. Accordingly, EPA denies the petition with respect to this issue. However, the State and EPA agree that the application form submitted by Maimonides 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

2. Statement of Methods for Determining Initial Compliance

The next issue raised by Petitioner relates to an omission in the application form of "a statement of methods used for determining compliance." 40 CFR § 70.5(c)(9)(ii). Although the application form completed by Maimonides did not specifically require the facility to certify compliance at the time of permit application, the applicant did provide a statement of methods used to determine initial compliance for each parameter. On pages 5, 14, 15, 16, 17, 29, and 30 of the application, the applicant references record keeping as a way of ensuring that fuel sulfur content is not violated. On pages 12, 13, 27, and 28 of the application, the applicant references test Method 25A to monitor particulates emissions from the facility's five permitted boilers. And, on page 7, the applicant references record keeping as a way of ensuring that annual tune-ups are performed on the facility's permitted boilers. The facility certified that this condition is being met in its annual compliance certification report, dated January 30, 2002. Thus, the permit application references each method that is used at the facility for assuring compliance. For this reason, EPA denies the petition on this point.

3. Description of Applicable Requirements

Petitioner's next point is that EPA regulations call for the legal citation to the applicable requirement accompanied by the applicable requirement expressed in descriptive terms. EPA has developed guidance, in the form of "White Papers" which were issued in order to enable States to take immediate steps to reduce the costs of preparing and reviewing initial part 70 permit applications. In "White Paper for Streamlined Development of part 70 Permit Applications" dated July 10, 1995 ("White Paper 1"), EPA clarified that citations may be used to streamline how applicable requirements are described in an application, provided the cited requirement is 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

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

documents include regulations printed in the Code of Federal Regulations or its State equivalent). The Maimonides permit application contains codes or citations associated with applicable requirements that are readily available. These codes refer to federal and state regulations that are printed in rule compilations and also are available on-line. Therefore, EPA denies the petition on this point.

This issue regarding citations was also addressed in detail in the July 18, 2000, letter from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection to Robert Warland, Director, Division of Air Resources, DEC. (“July 18, 2000 letter”) The letter explained that the DEC application form and/or instructions for its operating permits program should be clarified with respect to the “non-codified” documents that include applicable requirements, such as NO_x RACT plans, pre-construction and operating permits, etc. EPA pointed out that the application and instructions should make it clear that all supporting information is required in the application with clear cross-referencing to the emission point and applicable requirement cited in the printed form. Accordingly, in its November 16 commitment letter, the DEC agreed to amend the application instructions to ensure that applicants include all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing.⁶ The DEC is aware that the documentation necessary to ensure the adequate public participation called for in 40 CFR § 70.7(h) must be available with the application during the public comment period.

4. Statement of Methods for Determining Ongoing Compliance

Petitioner’s final point is that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. In Section IV-Emission Unit Information of DEC’s application form, there is a block labeled “Monitoring Information” that asks applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. Various pages in the Maimonides application form, already referenced in this section, namely pages 5, 12-17, and 27- 30 address this point. In these pages, Maimonides provides a description of and/or reference to the applicable test methods for determining compliance with each applicable requirement. Thus, the Petitioner’s fourth issue regarding the application form is without merit and is therefore denied.

B. Statement of Basis.

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

The requirement for the “statement of basis” is found in § 70.7(a)(5) which states:

The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.

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

The statement of basis is not a part of the permit itself. It is a separate document⁷ which is to be sent to the EPA and to interested persons upon request. This requirement for the statement of basis is not contained in § 70.6, which sets forth the required contents of the permit. In fact, § 70.6(a) requires that the permit contain all the explanation that ordinarily would be necessary to determine whether the permit conditions have been accurately expressed. For example, the permit must contain the references to the applicable statutory or regulatory provisions forming the legal basis of the applicable requirements on which the conditions are based. 40 CFR § 70.6(a)(1)(i).

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, and should also list anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, any source-specific monitoring requirements, and the permit shield.

EPA has recently provided guidance to permitting authorities that addresses the contents of a “statement of basis” in terms that aid both EPA and the public.⁸ As a result, the DEC has incorporated certain elements into its “permit review reports.” In the cited letters, EPA explains the “statement of basis” is to be used to highlight significant decisions or interpretations that were necessary to issuing the permit. Additionally, in a December 22, 2000 Order responding to petition for objection to the Fort James Camas Mill permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring method(s) be documented in the permit record. In re In the Matter of Fort James Camas Mill, (“Fort James”), Petition No. X-1999-1, at page 8 (December 22, 2000).

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

EPA notes that a “Permit Description,” was made available with Maimonides’ draft

⁷ Unlike permits, statements of basis are not enforceable, do not set limits and do not otherwise create obligations.

⁸ See letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc., responding to NYPIRG’s March 11, 2001; November 16, 2001 DEC commitment letter; letter dated December 20, 2001, from EPA Region V to the Ohio EPA (available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/sbguide.pdf>); see also Notice of Deficiency for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2000).

⁹ In order to comply with the requirements of 40 CFR § 70.7(a)(5), DEC has committed to prepare and make available at time of issuance of draft permits, a “permit review report,” which will serve as DEC’s statement of basis. The contents of this permit review report are described in DEC’s November 16, 2001 commitment letter.

permit, and was incorporated in the final effective permit issued on August 31, 2001.¹⁰ While this discussion does not satisfy the requirements of § 70.7(a)(5) in a robust fashion, it does provide needed information on the permit. EPA has concluded that in spite of the recognized faults regarding this description, this issue as raised by Petitioner does not, in this case, warrant objection to the permit, for the reasons described below.

In this case, it is possible to achieve a sufficient understanding of the source using other available documents in the permit record. Some very simple sources such as Maimonides are easily understood through reading the permit or the application, especially when they are not subject to applicable requirements or monitoring provisions that rely on source-specific determinations or engineering judgement.¹¹ In this case, the additional information provided in Maimonides' permit helped meet the statement of basis requirements. For example, the permit provides information that the facility's boilers are subject to the NO_x RACT requirements outlined at 6 NYCRR § 227-2, and as such, are further subject to annual tune-ups along with attendant reporting and record keeping requirements. Therefore, EPA believes that in this instance a more detailed explanatory document as sought by Petitioner is not necessary to understand the legal and factual basis for the draft permit conditions.

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

C. Annual Compliance Certification

The Petitioner's third claim alleges that the proposed permit distorts the annual compliance certification requirement of the Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5). The Petitioner's allegation is that the proposed permit does not require the facility to certify compliance with all permit conditions, but rather just requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." See petition at page 5. Specifically, the Petitioner is concerned with the language in the permit that labels certain permit terms as "compliance certification" conditions. NYPIRG notes that requirements that are labeled "compliance certification" are those that identify a monitoring method for demonstrating compliance. NYPIRG asserts that the only way of interpreting this compliance certification designation is as a way of identifying which conditions are covered by

¹⁰ This description includes the nature of the "business" (a 705-bed hospital which provides healthcare); a discussion of the equipment and operations at the facility; air permit applicability; and a discussion of some compliance methods utilized at the facility.

¹¹ The applicable requirements listed in this permit as applying to the boilers include several regulations contained in the New York State Implementation Plan (SIP) as follows: (1) the NO_x RACT requirements of 6 NYCRR § 227-2; (2) the opacity requirements of 6 NYCRR § 227-1; and (3) the limit of the sulfur content of the fuel oil to 0.30 percent by weight pursuant to the requirements of 6 NYCRR part 225.

the annual compliance certification. NYPIRG asserts that permit conditions that lack periodic monitoring are excluded from the annual compliance certification. The Petitioner claims that this is an incorrect application of state and federal regulations because facilities must certify compliance with every permit condition, not just those that are accompanied by a monitoring requirement.

EPA notes, first, that the language in the Maimonides 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 Maimonides title V permit includes this language at condition 29, item 29.2.

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 29.2 delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

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

Nonetheless, in its November 16, 2001 letter, the DEC has committed to include additional clarifying language regarding the annual compliance certification in draft permits issued on or after January 1, 2002, and in all future renewals so that the permit includes all the compliance certifications necessary to avoid any misunderstanding such as that Petitioner pointed out might occur.

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

D. Prompt Reporting of Deviations

Petitioner alleges, on page 6 of the petition, that the Administrator must object to the proposed permit because it does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). Currently, Petitioner claims, no prompt reporting condition is included in the proposed permit. Further, Petitioner states that, in

addition to requiring DEC to include in this proposed permit prompt reporting requirements that are consistent with EPA's past interpretations, the EPA must require that these reports be made in writing.

EPA raised this issue with DEC in a July 18, 2000 letter,¹² at Attachment III, item 2. The DEC may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. In any case, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. Whether or not the State has adopted a general policy on prompt reporting, the specific application of the prompt reporting requirement is a matter of discretion and is subject to review and objection by the Administrator. EPA has addressed the prompt reporting requirement with the DEC in order to clarify how the DEC will properly exercise this discretion. In the November 16 commitment letter, DEC agreed that for all permits issued on and after January 1, 2002, it will include a requirement for reporting deviations consistent with 6NYCRR § 201-6.5(c)(3)(ii). While this regulation requires *inter alia* that deviations be reported at least every six months, DEC stated that it will specify less than six months for "prompt" reporting of certain deviations that result in emissions of, for example, a hazardous or toxic air pollutant that continues for more than an hour above permit limits. DEC has stated that it finds the procedures for prompt reporting contained in 40 CFR 71.6(a)(3)(iii) (B) to be reasonable and compatible with what is provided for in DEC regulations. Therefore, DEC intends to utilize these provisions to define "prompt" reporting in permit conditions. When prompt reporting of deviations is required, the reports will be submitted to the DEC, in writing, certified by a responsible official, in the time frame established in the permit condition. When DEC revises the permit in response to this Order, it must incorporate these additional prompt reporting requirements into the permit.

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

Petitioner next asserts that Condition 7 (referred to as Condition 8 in petition), page 7 of the petition, which it refers to as the excuse provision, violates 40 CFR part 70. Permit Condition 7 states, in part, "[a]t the discretion of the commissioner a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable" and describes the actions and record keeping and reporting requirements that the facility must adhere to in order for the Commissioner to excuse a violation as unavoidable.

In sum, Condition 7 relates to SIP provisions governing the exercise of enforcement discretion regarding excess emissions and does not, itself reduce the effectiveness of any applicable requirements derived from the SIP. The DEC's unavoidable non-compliance and emergency requirements are part of the approved SIP. Whether the SIP meets EPA's guidance is not an appropriate subject for an objection to a specific permit and is not a reason to object to the permit. Accordingly, the petition is denied on this point. This condition appears in many DEC permits, and has been discussed at length in prior Orders by the Administrator. North Shore Towers, Tanagraphics, Rochdale Village, Yeshiva, Action Packaging, Kings Plaza. See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, ("Pacificorp"), at page 23 (November 16, 2000), available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>.

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

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

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

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

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

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

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

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

As explained above, EPA cannot properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the "applicable requirement" as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions. Pacificorp at 23-24.¹⁴

¹³DEC is substantially meeting this commitment. As discussed in section F below, EPA is granting NYPIRG's petition on this permit on other grounds. Therefore, when DEC revises the permit in response to this Order, it will also remove the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of the permit, and incorporate the condition into the state side of the permit.

¹⁴Memorandum from Eric Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards to Regional Administrators, titled "Re-Issuance of Clarification - State (continued...)"

Moreover RACT is a defined term in the New York SIP. The SIP specifically defines RACT as the “[l]owest emission limit that a particular source is capable of meeting by application of control technology that is reasonably available, considering technological and economic feasibility.” 6 NYCRR § 200.1(bp). There is an identical definition in the current New York regulations that are not part of the approved SIP. 6 NYCRR § 200.1(bs). As explained above, EPA cannot reopen the issue of whether the SIP provision should have required a more specific definition of RACT in the context of deciding whether to object to a title V permit. As a practical matter, it is not possible to set forth in advance a detailed definition of RACT that will address all possible startup, shutdown or malfunction events throughout the life of the permit. The specific technology that will constitute RACT during such periods of excess emissions will depend on both the nature of the violation and the technology available when the violation occurs. The SIP provision allows that determination to be made on a case by case basis by the Commissioner if and when she chooses to exercise her authority to excuse a violation.

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

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

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

As written, the permit only requires the permittee to inform DEC of an exceedance when seeking to exercise the excuse provision of 6NYCRR § 201-1.4. Otherwise, the permit provides that written notifications be provided when requested to do so by the Commissioner. Prompt reporting of deviations is required by 40 CFR § 70.6(a)(3)(iii)(B) which states,

Prompt reporting of deviation from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define “prompt” in relation to the degree and type of

¹⁴(...continued)

Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,” dated December 5, 2001 (“December 2001 Clarification”).

deviation likely to occur and the applicable requirements.

Reporting in order to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation, and these reports are required by other provisions of the permit. *See* Discussion in Part D *supra*. The regulations at 6 NYCRR § 201-6.5(c)(3), stated at Condition 28, prescribe that all instances of deviations from permit requirements be clearly identified, stating the probable cause of such deviations and any corrective actions taken, and submitted to the State with the semi-annual compliance report. For a violation to be properly excused, DEC must properly apply the regulation authorizing such discretion and must properly document its findings to ensure the rule was reasonably applied and interpreted.

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

The DEC's excuse provision 6 NYCRR§ 201-1.4 in the current state regulation and 201.5(e) in the SIP provide that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii).

Petitioner asserts the permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation "unavoidable." Commissioner discretion conditions apply only to State requirements and cannot apply to federally promulgated requirements. The regulation at 6 NYCRR § 201-6.5(c)(3)(ii), as amended, clarifies that the DEC's own rules do not authorize expansion of the Commissioner's discretion; it provides that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets. In its November 16, 2001 Commitment letter, DEC agreed that effective January 1, 2002, it would include the revised provision of 6 NYCRR § 201-6.5(c)(3)(ii) on the federal side of all permits. DEC is substantially meeting this commitment. *See* note 13, *supra*. This will help further assure that the excuse provision is not expanded beyond its proper bounds. Accordingly, the petition is denied on this point.

F. Monitoring

The Petitioner's last claim is that the Maimonides Permit does not assure compliance with all applicable requirements as mandated by 40 CFR 70, because many individual permit conditions lack adequate periodic monitoring and are not practicably enforceable. *See* petition at pages 11,12, and 13. The Petitioner addresses individual permit conditions that allegedly either lack periodic monitoring or are not practicably enforceable.¹⁵ The specific allegations for each

¹⁵ With respect to lack of what the Petitioner refers to as adequate "periodic" monitoring, NYPIRG cites two separate regulatory requirements: 40 CFR § 70.6 (a)(3) which requires monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance; and § 70.6 (c)(1) which requires permits to contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. In all the monitoring issues presented here, where we have concluded that additional monitoring is needed, either the underlying applicable requirement imposes no monitoring of a periodic nature or the applicable rule contains sufficient periodic monitoring but it was not properly carried over into the permit. Therefore, we are addressing them exclusively under 40 CFR § 70.6(a)(3) and need not address 40 CFR § 70.6(c)(1). The scope of applicability of § 70.6(a)(3) was addressed by the US Court of Appeals for the DC (continued...)

permit condition are discussed below.

Section 504 (a) and (c) of the Act makes it clear that each title V permit must include "conditions as are necessary to assure compliance with applicable requirements of [the Act], including the requirements of the applicable implementation plan" and "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." In addition, CAA § 114(a) requires "enhanced monitoring" at major stationary sources, and authorizes EPA to establish periodic monitoring, record keeping, and reporting requirements at such sources. *See also* CAA section 504(b) (EPA may promulgate regulations under Title V prescribing procedures and methods for monitoring that are sufficient for determining compliance).

The regulations at 40 CFR § 70.6(a)(3) specifically require that each permit contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" where the applicable requirement does not require periodic testing or instrumental or non-instrumental monitoring (which may consist of record keeping designed to serve as monitoring). In addition, 40 CFR § 70.6(c)(1) requires that all part 70 permits contain, "Compliance certification, testing, monitoring, reporting, and record keeping requirements sufficient to assure compliance with the terms and conditions of the permit." These requirements are also incorporated into New York's regulations at 6 NYCRR § 201-6.5(b).

Decisions by the U.S. Court of Appeals for the District of Columbia Circuit shed light on the proper interpretation of these requirements. Specifically, the court addressed EPA's compliance assurance monitoring ("CAM") rule making (62 Fed. Reg. 54940 (1997) (promulgating, *inter alia*, 40 CFR part 64) in Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Cir. 1999), and reviewed EPA's periodic monitoring guidance under title V in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

EPA first summarized the relationship between Natural Resources Defense Council and Appalachian Power and described their impact on monitoring provisions under the Act in two orders responding to petitions under title V requesting that the Administrator object to certain permits. *See* Pacificorp and Fort James Camas Mill. Please see pages 16 through 19 of the Pacificorp Order for EPA's complete discussion of these issues. In brief, given the clear, multiple statutory directives for adequate monitoring in permits, and in accordance with the D.C. Circuit decisions, EPA concluded that where the applicable requirement does not mandate any periodic testing or monitoring, the requirement of 40 CFR § 70.6(c)(1) that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 CFR § 70.6(a)(3)(i)(B). EPA also pointed out that where the applicable requirement already requires periodic testing or instrumental or non-

¹⁵(...continued)

Circuit in Appalachian Power v. EPA, 208 F.3d 1015 (D.C. Cir. 2000). The court concluded that, under section 40 C.F.R. § 70.6(a)(3)(i)(B), the periodic monitoring rule applies only when the underlying applicable rule requires "no periodic testing, specifies no frequency, or requires only a one-time test." *Id.* at 1020. The Appalachian Power court did not address the content of the periodic monitoring rule where it does apply, i.e., the question of what monitoring would be sufficient to "yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as is required by 40 C.F.R. § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2). It is this issue that is raised by the petition at bar. With respect to practical enforceability, the Petitioner cites the U.S. EPA's Periodic Monitoring Guidance, September 15, 1998, at 16 which has since been vacated by Appalachian Power.

instrumental monitoring, the court of appeals has ruled that the periodic monitoring rule in 40 CFR § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such circumstances, EPA found, the separate regulatory standard at 40 CFR § 70.6(c)(1) applies instead. Furthermore, where 40 CFR § 70.6(a)(3)(i)(B) applies, it satisfies the general sufficiency requirement of 40 CFR § 70.6(c)(1). The factual circumstances of Pacificorp and Fort James Camas Mill are analogous to this case. Accordingly, the reasoning of those decisions is being followed in this case as well.

Facility-Specific Petition Issues

(1). Condition 5 (Maintenance of Equipment)

Petitioner, on page 12, alleges that permit Condition 5 is unenforceable, as currently written, because it does not explain what the permittee must do to comply with the general requirements of 6 NYCRR § 200.7 that requires, “[a]ny person who owns or operates an air contamination source which is equipped with an emission control device to operate such device and keep it in a satisfactory state of maintenance and repair.” Specifically, Petitioner states that the absence of specific maintenance procedures, with respect to an item of equipment (an “abator”) that controls site emissions, precludes the facility from monitoring its own compliance by failing to outline maintenance procedures for that control equipment.

It must be noted that permit Condition 5, which requires facilities with emission control devices to keep these devices in a satisfactory state of maintenance and repair, is a general facility requirement which makes no direct reference to the abator. NYPIRG elected to cite the abator in presenting its argument, although that equipment is not referenced at Condition 5. That equipment is instead referenced in the permit elsewhere at Conditions 74, 75, 89, 90, 91, and 92. Later, in addressing the operation of the abator at those conditions, Petitioner’s claim will be granted. However, here, Petitioner’s claim is denied for the following reasons.

As stated above, Condition 5 is a general facility requirement. Many SIPs contain generic requirements for facilities to maintain all equipment in proper condition and to carry out proper work practices. These generic requirements are typically provided in the general permit conditions section of the title V permit, as is the case here. In addition, permitting authorities have discretion to develop such general permit conditions that apply to all title V sources. For this reason, EPA denies the petition on this point.

(2). Conditions 9 and 10 (Air Contaminants in Air Cleaning Devices)

NYPIRG alleges, on page 13 of the petition, that permit Conditions 9 and 10, addressing the handling of air contaminants collected in air cleaning devices, lack any kind of monitoring to assure the facility’s compliance with these conditions. While NYPIRG agrees that general conditions may be included in title V permits, it argues that such general conditions must be supplemented with facility-specific conditions.

Like Condition 5 above, Conditions 9 and 10 are general permit conditions that are included in all title V permits, regardless of whether an air pollution control device is in place at the time of permit application. As is explained above, States have discretion under the SIP to formulate generic conditions that require facilities to maintain proper work practices, equipment operation and maintenance at all times. Where an applicable requirement specifies use of, or a source chooses to employ a control device specified in the title V permit, specific monitoring requirements that are applicable to that control device must be included, at the section of the permit labeled Emissions Unit Level. Therefore, facility-specific monitoring requirements for

emission units are not to be found under the general condition section of the permit, but at the Emissions Unit Level section. Hence, for the reasons stated, EPA denies the petition on this point.

(3). Condition 14 (Applicable Criteria)

Petitioner asserts, on page 13, that facility level Condition 14, which stipulates that the facility shall operate in accordance with any accidental release plan, response plan, or compliance plan, is problematic because those referenced documents are not incorporated into the permit. If not incorporated in the permit, Petitioner argues, such documents should be clearly cross-referenced.

EPA disagrees with Petitioner that all types of plans must be part of a title V permit. In certain cases a facility must comply with a plan that is not part of the title V permit. For instance, risk management plans under CAA § 112(r) need not be incorporated into title V permits. Thus, DEC's general condition is useful to the title V permit since it also serves to remind the source and the public of those plans that are not part of the title V permit. The general condition can serve as a reminder to the permittee to comply with and apply for requisite permit amendments on a timely basis. Therefore, this facility-level condition does serve a purpose.

However, EPA does agree that certain documents should be properly cross-referenced in title V permits. For example, where the facility is subject to plans such as NO_x RACT or MACT start-up, shut-down, and malfunction plans, the permit must specifically say so, and properly incorporate that plan by reference.

Because Petitioner does not allege any specific plans that should have been, but were not, included in the permit as an applicable requirement, EPA denies the petition on this issue.

(4). Condition 26 (Clean Air Act Section 112 (r) Requirements)

Petitioner alleges that the general permit condition, Condition 14, Item 14.3, which states “[r]isk management plans must be submitted to the Administrator if required by Section 112(r)” should state whether the facility is or is not subject to 112(r). Petition at pages 14-15.

While EPA agrees with Petitioner that this provision is very general and does not provide information regarding the applicability of § 112(r) to this particular source, we do not believe that the absence of such a determination provides a basis for EPA to object to this particular permit. Maimonides did not submit a Risk Management Plan (RMP) to EPA under § 112(r) of the Act and 40 CFR part 68,¹⁶ and given what we know about the type of emissions activities at this source, it is reasonable to assume that Maimonides is not subject to these statutory and regulatory requirements. EPA finds that DEC's failure to specify whether Maimonides is subject to § 112(r) and part 68 was therefore at most a harmless error¹⁷ that did not prejudice the Petitioner or

¹⁶ All Risk Management Plans are filed with EPA and EPA can verify the submission of an RMP by contacting the RMP Reporting Center at (703) 816-4434.

¹⁷ See e.g. Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States, 377 U.S. 235, 248 (1964) (an error can be dismissed as harmless “when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached”); Braniff Airways, Inc. v. Civil Aeronautics Bd., (continued...)

hinder the Petitioner's ability to obtain clarification on this issue.

Following permit issuance, DEC informally notified EPA that Condition 26 is erroneously cited in the permit and that the facility is, in fact, not subject to 112(r) applicability requirements. Therefore, when the permit is revised, as required elsewhere in this section, this condition will be removed.

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

(5). Condition 29 (Compliance Certification)

Petitioner, on page 15, quotes the permit as stating that the annual certification is "due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department." Petitioner cites a number of problems with this language. First, Petitioner states, it is possible that a facility would not be required to submit the first compliance certification until after the end of the first annual period following the date of permit issuance. According to Petitioner, this violates 40 CFR § 70.6. Second, by adding "unless another quarter has been acceptable by the Department," Petitioner believes that the permit is thereby rendered unenforceable by the public, because it is unclear how the Department will go about revising the date that the certification is due. Specifically, Petitioner is concerned that the DEC can change the due date through an oral conversation with the permittee, without the public knowing that the deadline has been changed. Also, Petitioner questions the adequacy of the phrase "calendar quarter that occurs just prior to the permit anniversary date." Petitioner believes it to be vague because it is unclear when quarters begin and end. Petitioner concludes that the annual compliance certification is unenforceable as a practical matter and, therefore, the Administrator must object to this proposed permit for this reason.

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

¹⁷(...continued)

379 F.2d 453, 466 (D.C. Cir. 1967) ("The Supreme Court's opinion reflects the concern that agencies not be reversed for error that is not prejudicial.").

Lastly, Petitioner claims that the following permit language “unless another quarter has been acceptable by the Department” might allow the DEC to orally agree to a change in submission schedule. There is no evidence that this has caused a problem specifically with Maimonides’ annual certification. Therefore, this issue raised by Petitioner is without merit in the present case. However, this phrase is vague and could be problematic in another setting. Thus, DEC must remove this language when it reopens the permit for other reasons.

(6). Condition 32 (Required Emission Tests)

The Petitioner, on page 15, alleges that Condition 32 of the proposed permit, "Required Emissions Tests," includes everything required under 6 NYCRR § 202-1.1, except the requirement that the permittee "bear the cost of measurement and preparing the report of measured emissions." The Petitioner goes on to cite EPA’s "White Paper Number 2 for Improved Implementation of the part 70 Operating Permits Program" dated March 5, 1996 ("White Paper 2"), which states that “it is generally not acceptable to use a combination of referencing certain provisions of an applicable requirement while paraphrasing other provisions of that same applicable requirement. Such a practice, particularly if coupled with a permit shield, could create dual requirements and potential confusion.” White Paper 2, section II.E.3.

The permit unambiguously states that 6 NYCRR § 202-1.1 is an applicable requirement. Further, 6 NYCRR § 202-1.1 places the burden of conducting and reporting any required emissions testing on the permittee. Omitting who shall bear the cost of conducting and reporting mandatory emissions tests from the permit does not relieve the permittee from performing and reporting such tests. EPA does not believe a reasonable interpretation of the permit would lead a reader to conclude that anyone other than the permittee should bear the costs of measuring and testing emissions. For this reason, EPA denies the petition with respect to this issue.

(7). Condition 35 (Visible Emissions Limit)

The Petitioner, on page 16, alleges that the permit lacks any kind of periodic monitoring to assure compliance with the applicable opacity limitation found in the SIP at 6 NYCRR § 211.3. Petitioner asks that the Administrator object to the permit because, according to Petitioner, it lacks sufficient monitoring to assure compliance with opacity limitations as required by the Clean Air Act and 40 CFR part 70.

EPA disagrees with the Petitioner that the permit lacks periodic monitoring to assure compliance with the applicable opacity monitoring limitation found in the SIP at 6 NYCRR § 211.3. With respect to visible emissions, specific opacity requirements are outlined at Conditions 55 and 71 for the five main boilers at the facility, as called for at 6 NYCRR § 227-1.3. Condition 35 is a facility-wide level condition that applies to all emission sources, without specificity. Because different emissions units can create opacity through different processes (combustion, material storage) and reach the atmosphere in different ways (stacked, fugitive), permittees may not know how to comply with a facility-wide monitoring condition. Indeed, an operator may be unable to conduct the same kind of monitoring at each opacity-emitting emissions unit at a facility. Therefore, it is more appropriate to create monitoring in the Emission Unit Level section of the permit, as is done in Maimonides at Conditions 55 and 71. Below in F.9., the adequacy of the opacity monitoring for specific emissions units is discussed. Therefore, EPA denies the petition on this issue.

(8). Condition Requiring Annual Tune-up of Small Boilers

Petitioner requests that the DEC include additional detail with respect to what kind of procedures must be employed during the annual tune-ups. Petitioner argues that, “Under the conditions included in the permit, the facility would be in compliance so long as someone did something to adjust the equipment each year.” Petition at 17. Further, Petitioner argues that the facility must be required to keep records that specify exactly what was done in the annual tune-up. Lastly, Petitioner requests that the facility submit reports of any required monitoring at least every six months. Petitioner does not reference a specific permit condition with this issue.

Pursuant to 6 NYCRR § 227-2.4(d) the facility’s five boilers are required to have annual tune-ups, in accordance with the manufacturer’s recommended procedures or the procedures of an approved specialist. Annual boiler tune-ups are prescribed at Conditions 38, 45, 46, 47, 51, 52, 53, 69, and 70.

First, Petitioner is simply not correct in stating that “the facility would be in compliance so long as someone did something to adjust the equipment each year.” 6 NYCRR § 227-2.4(d) calls for small boiler tune-ups to be performed as per the definition at 6 NYCRR § 227-2.2(b), which requires such adjustments to be made in accordance with procedures provided by the manufacturer or an approved specialist. Therefore, such tune-ups would be performed either per a manufacturer’s or an approved specialist’s guidelines.¹⁸

Such procedures and record keeping provisions are necessary elements of the part 70 compliance requirements, stipulated at 40 CFR 70.6(c). For these reasons, EPA concurs with Petitioner and requires that additional details be included with respect to those annual tune-ups. Thus, the permit must be reopened, to add the requirement to include a summary list of the items adjusted as part of the tune-up. Also, EPA agrees that the facility must submit reports of any required monitoring at least every six months.¹⁹ Therefore, for the reasons stated above, EPA grants the petition on this issue.

(9). Conditions 55 (56 in Petition) and 71 (Opacity Limit under 6 NYCRR § 227-1.3(a))

Petitioner claims, that conditions 55 and 71 fail to assure compliance with 6 NYCRR § 227-1.3(a) because they fail to specify that Permittee must perform a Method 9 opacity reading each day. Petition at 17. Further, Petitioner states that the proposed permit fails to require the facility to keep records of monitoring results that could be used by government officials and members of the public to monitor the facility’s ongoing compliance.

Petitioner is simply not correct in making those claims. At Conditions 55 and 71 [Opacity Limit under 6 NYCRR § 227-1.3(a)] the permit prescribes daily opacity monitoring, using Method 9. Elsewhere, at Condition 19, the permit cites 6 NYCRR § 201-6 as the basis for record keeping requirements that are applicable to all monitoring data collected at the facility. In fact, 6 NYCRR § 201-6.5(c) stipulates that records of all monitoring data and support information shall be retained for a period of at least 5 years from the date of the monitoring

¹⁸Minimum training requirements for Approved Specialists are outlined at the DEC’s Division of Air Resources guidance document titled “DAR-5: Small Boiler Tune-up Requirements for NO_x RACT Compliance.” Further, the same guidance sets forth attendant record keeping requirements for small boiler tune-ups. This document, issued on January 27, 1998, by the DEC’s Bureau of Stationary Sources, is accessible at www.state.ny.us/website/dar/boss/policy-docs.html

¹⁹Air Guide 5 would provide a useful reference for establishing appropriate requirements in this regard.

sample, measurement, report, or application. Therefore, EPA denies the petition on this issue.

(10). Conditions Governing Particulates

Petitioner argues, on page 18, that EPA must object to this permit because it does not include the federally enforceable particulate emission limit of 0.10 Lb/million BTU for oil-fired stationary combustion installations. The permit prescribes a 0.20 Lb/million BTU particulate matter standard for the facility's boilers rather than the stricter standard of 0.10 Lb/million BTU prescribed by the SIP. In addition, Petitioner argues, Maimonides' permit must include monitoring, record keeping, and reporting that can assure compliance with the 0.10 Lb/million BTU standard.

Indeed, at Conditions 81, 82, 83, 84, 86, 87, and 88, the permit states a particulates emission limit of 0.20 Lb/million BTU for the facility's boilers, rather than the stricter standard of 0.10 Lb/million BTU prescribed by the SIP. The regulations at 6 NYCRR § 227.2 (b)(1), approved into the SIP on September 22, 1972, state "No person shall cause, permit or allow a two hour average emission into the outdoor atmosphere of particulates in excess of 0.10 lb/mmBTU heat input from any oil fired stationary combustion installation." Further, in its November 16, 2001 commitment letter (*see note 5 Supra*), the DEC acknowledged the applicability of the federally enforceable SIP limitation for particulate matter of 0.10 Lb/million BTU for oil-fired stationary combustion installations. DEC committed to include, on the federal side of any title V permit issued on and after January 1, 2002, the 0.10 Lb/million BTU standard. Therefore, the permit must be reopened and Conditions 81, 82, 83, 84, 86, 87, and 88 must be revised to reference the stricter particulates emission limit of 0.10 Lb/million BTU and appropriate monitoring for the facilities boilers. Further, these conditions must be moved from the Applicable State Requirement section to the Applicable Federal Requirement section, as these conditions are federally enforceable. The permit must also incorporate monitoring, reporting and recordkeeping requirements for particulate matter emissions to assure compliance with the applicable standard. Monitoring for these units could include the requirement to perform for each unit one stack test during the term of the permit using the applicable test method, periodic recording of the amount and sulfur content of the fuel-oil used, among other methodologies, whatever will assure compliance.

(11). Conditions Governing the Ethylene Oxide Sterilizer

Petitioner, on page 19, cites 5 different issues, all relating to the conditions governing the ethylene oxide sterilizer, and its associated abator. The issues are as follows:

1. While Conditions 74 and 75 require the abator to be in operation whenever ethylene oxide sterilization is conducted, there are no federally enforceable conditions that require the facility to monitor the operation of the abator. Further, Conditions 89, 90, 91, and 92, which relate to operation of the abator, while based on 6 NYCRR § 212.9, are included in the permit as state-only conditions, when in fact they are federally enforceable.
2. Conditions 89 through 92 state that compliance will be measured based on a 24-hour average. The SIP rule does not provide for a 24-hour average.
3. While the SIP supports the application of BACT whenever an extremely hazardous material, such as ethylene oxide, is being emitted, the permit fails to explain whether the facility is required to achieve the 99% emissions reduction or, alternatively, whether the facility is required to apply BACT.

4. DEC provides no evidence to justify that the record keeping requirements that are stipulated at Conditions 90 and 92 are sufficient to assure the facility's compliance.
5. The opacity requirement limiting an average opacity (six minute) of 20 percent or greater from any process or exhaust and/or ventilation system, as prescribed at 6 NYCRR § 212.6(a), is missing from the permit.

These issues are addressed in the same order that they are presented above.

1. Petitioner is correct in stating that the permit has no federally enforceable conditions that require the abator to be in operation when ethylene oxide sterilization is conducted. Presently, compliance requirements for the abator including requirements that the abator must be in operation when sterilization is conducted and requirements for monitoring, recordkeeping, and maintenance, are stated at Conditions 89, 90, 91, and 92, all of which are located in the state-only applicable requirement side of the permit. Ethylene oxide is regulated under SIP rule 6 NYCRR § 212.2. Therefore, when the permit is reopened, Conditions 89 through 92, which include these monitoring and other requirements, must be moved to the federally-enforceable applicable requirement side of the permit, where they belong. As such, EPA grants the petition on this issue.
2. Indeed, the existing SIP rule does not provide for a 24-hour average, in monitoring the emissions from a source. The SIP, as currently written, provides for emission rates potential to be expressed in pound per hour, with no implied averaging method. As such, DEC has no discretion in changing the reporting requirement that is in the SIP. Therefore, when the permit is reopened, the compliance certification associated with the monitoring of ethylene oxide emissions must be revised to report a numerical value, in pounds per hour, as stipulated in Tables 2, 3, or 4 of 6 NYCRR part 212. Hence, EPA grants this issue raised by Petitioner.
3. Petitioner is correct in stating that the permit fails to explain whether the facility is required to achieve the 99% emissions reduction or, alternatively, to apply BACT. The permit should state which of these two applicable requirements is being applied to the source. Therefore, this issue raised by Petitioner is being granted. The permit must be reopened to specify which control criterion is being used by the source.
4. The permit does stipulate some record keeping requirements at Conditions 90 and 92. However, in support of Petitioner's claim, there is no evidence that the stipulated requirements are sufficient to assure compliance with the emission standard. For this reason, the rationale for the monitoring and recordkeeping relating to the abator must be detailed in the Statement of Basis to include conditions that will ascertain that it is operating within its parametric requirements and that it is controlling the emissions that it is intended to control. Therefore, EPA grants the petition on this issue and the permit must be revised as stated.
5. Petitioner is correct in stating that this opacity requirement for process emission sources is missing from the permit with respect to the abator. DEC's 6 NYCRR § 212.6(a), is a SIP requirement that all process emission sources are subjected to. As such, the emission source that is controlled through the abator is also subject to that requirement. Thus, this issue raised by Petitioner is granted and when the permit is reopened, it must include the opacity standard prescribed at 6 NYCRR § 212.6(a).

III. CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I grant in part and deny in part NYPIRG's petition requesting the Administrator to object to the issuance of the Maimonides permit. In sum, NYSDEC is ordered to address the deficiencies identified in Sections F(8), F(10) and F(11) of this order. This decision is based on a thorough review of the permit dated August 30, 2001.

12/16/02
Dated:

Christine Todd Whitman
Administrator