

April 13, 1999

Carol Browner, Administrator

United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Request for a Determination that the New York State Department of Environmental Conservation is Inadequately Administering New York's Title V Program

Dear Ms. Browner:

Enclosed is a petition on behalf of the New York Public Interest Research Group (NYPIRG) requesting that the United States Environmental Protection Agency (EPA) make a determination pursuant to 40 CFR §70.10(b)(1) that the New York State Department of Environmental Conservation (DEC) is inadequately administering New York's Title V Operating Permits Program.

NYPIRG is confident that DEC is capable of administering a model Title V permitting program. While reviewing permit files and learning about New York's permitting program, we have been assisted by many helpful and knowledgeable DEC staff members. We believe, however, that several changes must be made in New York's Title V program in order to bring the program into compliance with legal requirements and to fulfill the Congressional goal of full public participation in the permitting process.

Over the past several months, the NYPIRG staff has spent a significant amount of time reviewing New York Title V permit applications and general air division files in DEC's Region 2 office. Unfortunately, our investigation leads us to conclude that critical flaws in DEC's standard permit application form significantly impede public participation in the permitting process. In particular, DEC's standard application fails to conform with legal requirements because it requests insufficient background information from applicants about applicable requirements and monitoring methods. In addition, the standard application form fails to request adequate compliance certification information, as required by law.

The deficiencies in DEC's standard application form cause problems for both government regulators and the public. The lack of sufficient background information harms the public because members of the general public lack both the time and the training to obtain relevant information about a particular facility if that information is missing from the permit application. The lack of an adequate compliance certification requirement means that both members of the public and government authorities will face difficulty in bringing an enforcement action against an applicant who omits from his or her application information about ongoing pollution violations. Without the required information, effective participation during public comment periods preceding issuance of a Title V permits is extremely unlikely.

Revising the standard permit application form is not the only step that DEC needs to take to support public participation in New York's permitting program. DEC also needs to make plans to ensure that all information relied upon by the agency in developing a draft Title V permit is available to the public at the start of the public comment period, as required by federal regulations.

Finally, DEC should make improvements in the permitting program that, while not explicitly mandated by law, would help to ensure that New York fulfills the Congressional goal of full public participation in permitting and enforcement under the Title V program. First, DEC should create monitoring and record-keeping forms for use by facility operators that can be understood by the general public. Second, DEC should make permit information easily available to the public by posting applications, draft permits, and facility reports on the Internet. Third, DEC and EPA should meet with members of the public, either formally or informally, to monitor and improve opportunities for public participation in the permitting process.

A primary purpose of the Title V program is to increase public understanding of air quality regulation as it applies to stationary sources, and to involve the public in permit development and enforcement. We ask EPA to require DEC to implement changes in New York's Title V program that would make the program more consistent with the laudable public participation goals of Title V.

The protection and improvement of air quality in New York State is one of NYPIRG's highest priorities. DEC's failure to abide by legal requirements as they relate to citizen participation is a critical flaw in the administration of New York's program and requires prompt corrective action. NYPIRG believes that the problems described in this petition can be resolved quickly and easily. We look forward to working with EPA and DEC to protect the health of New York's citizens by improving opportunities for public participation in New York's Title V program.

Sincerely,

Keri Powell
Staff Attorney

Larry Shapiro
Senior Attorney

cc: Jeanne M. Fox, Regional Administrator, EPA Region 2
John P. Cahill, Commissioner, NYS DEC

**REQUEST FOR A DETERMINATION THAT THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION IS INADEQUATELY
ADMINISTERING NEW YORK'S TITLE V PROGRAM**

Preliminary Statement

Following extensive review of permit applications at the Region 2 office of the New York State Department of Environmental Conservation (DEC), Petitioner New York Public Interest Research Group (NYPIRG) concludes that New York State's standard Title V permit application fails to satisfy legal requirements. Applicants who base their permit applications solely upon New York's standard application form violate the law by failing to provide:

- (1) Certain background information required by 40 CFR §70.5(c)(4), and 6 NYCRR §201-6.3(d)(4), including:
 - (a) a description of all applicable requirements that apply to the facility, and
 - (b) a description of or reference to any applicable test method for determining compliance with each applicable requirement.
- (2) An initial compliance certification that includes:
 - (a) 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);
 - (b) a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based as required by CAA §114(a)(3)(B), 40 CFR §70.5(c)(9)(ii), and 6 NYCRR §201-6.3(d)(10)(ii).

In addition to violating both state and federal law, the absence of required information seriously hinders public participation in permit proceedings. Furthermore, the lack of an adequate initial compliance certification makes it difficult if not impossible to prosecute applicants who falsely certify compliance with applicable requirements.

Petitioner requests that EPA take immediate steps to remedy this critical deficiency in New York's Title V permitting program. In particular, EPA must make a determination pursuant to 40 CFR §70.10(b)(1) that DEC is inadequately administering New York's Title V operating permits program. In addition, EPA must ensure that DEC:

- (1) Modifies the standard permit application form and accompanying permit application instructions to conform with legal requirements,
- (2) Requires permit applicants to update applications to include (a) a complete compliance certification and (b) a description of all applicable requirements and description of or reference to applicable monitoring, record-keeping, or reporting methods.

NYPIRG recommends that the necessary changes in NY's Title V permit application form be modeled after the application form developed by the Illinois Environmental Protection Agency. *See* Attachments 1, 2. Finally, EPA and DEC should work with members of the public to develop ways to make New York's Title V permitting program both accessible and comprehensible to the public.

I. New York's Standard Title V Permit Application Form Fails to Satisfy the Requirements of Federal and State Law

DEC's standard permit application form fails to request information from applicants that is explicitly required by the Clean Air Act, federal regulations (40 CFR Part 70), and state regulations that serve as the basis for EPA approval of New York's permitting program (6 NYCRR Subpart 201-6). New York's permit application violates legal requirements in two primary ways.

First, the New York permit application form requests insufficient background information. While an applicant is legally required to cite and describe all requirements that apply to his or

her facility, New York's application form only requires applicants to supply numerical citations to regulations unaccompanied by a description of any kind. Unfortunately, while some applicable requirements are spelled out in regulations, others are contained in pre-construction permits, compliance plans, consent orders, and other documents previously approved by DEC. Thus, a Title V application based upon DEC's standard permit application form lacks legally required information that is essential to effective permit development and review.¹

Second, New York's standard application form fails to include all of the requirements for compliance certification required by law. The law requires that each permit application contain a statement that the facility is in compliance with all applicable requirements. This statement must be supported by an identification of the monitoring and record-keeping methods used for determining compliance. New York's permit application form fails to require an applicant to make a statement that his or her facility is in compliance with all applicable requirements. Furthermore, New York's application does not require an applicant to describe the methods on which this initial compliance certification is based.

Compliance certifications lay the groundwork for the entire permitting program. DEC's failure to require adequate compliance certifications substantially undermines important objectives of the Title V permitting program. The purpose of the compliance certification is to require applicants whose facilities are not in compliance with all requirements to establish an enforceable schedule for achieving compliance. Unless applicants accurately report their compliance status, permits will be based upon insufficient information and will be inadequate to ensure compliance with the law.²

¹ This deficiency in DEC's standard permit application form is described in more detail in Part IIA of this petition.

² The repercussions of DEC's failure to require applicants to submit adequate compliance certifications are described in more detail in Part IIB of this petition.

As a result of DEC's failure to comply with legal requirements, permits are drafted and issued based upon insufficient information, and members of the public are denied a fair opportunity to participate in the permitting process. The following discussion lays out specific federal and state requirements and compares these requirements to the information requested by DEC in its standard permit application form.

A. New York's Title V Permit Application Fails to Satisfy Clean Air Act Permit Application Requirements

Congress spelled out the requirements for compliance certifications in CAA §114(a), which states:

- (a) For the purpose . . . of determining whether any person is in violation of any [emission standard, standard of performance, or regulation of solid waste combustion], or any requirement of [a state implementation plan] . . .

- (3) The Administrator shall in the case of any person which is the owner or operator of a major stationary source . . . require . . . submission of compliance certifications. Compliance certifications shall include (A) identification of the applicable requirement that is the basis of the certification, (B) the method used for determining the compliance status of the source, (C) the compliance status, (D) whether compliance is continuous or intermittent, (E) such other facts as the Administrator may require.

While the EPA Administrator may require additional information in a compliance certification, the certification must, at the very least, include the information listed in §114(a)(3). DEC violates this Congressional directive by failing to require applicants to submit complete compliance certifications.

B. New York's Application Form Violates Federal Regulations

The Clean Air Act directs EPA to promulgate regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These regulations are published in 40 CFR Part 70. 40 CFR §70.5(c) explains that though state and local permitting

authorities may exercise discretion in developing permit applications forms, the forms and attachment must include (in addition to other information):

(4) The following air pollution control requirements:

- (i) citation and description of all applicable requirements, and
- (ii) Description of or reference to any applicable test method for determining compliance with each applicable requirement.

(5) Requirements for compliance certification, including the following:

- (i) A certification of compliance with all applicable requirements by a responsible official consistent with paragraph (d) of this section and section 114(a)(3) of the Act.
- (ii) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods;

New York's standard Title V permit application form does not require an applicant to describe applicable requirements or to cite or refer to applicable test methods. Instead, the standard permit application form only requires applicants to provide the numerical citation to the relevant regulation.

In addition to omitting critical background information, New York's standard permit application form fails to require applicants to make a statement certifying compliance with applicable requirements as required by §70.5(c)(9)(i). Nor does New York's application form require an applicant to support the certification with a statement of methods relied upon for the purpose of certifying compliance, as is required by §70.5(c)(9)(ii). These omissions are in clear violation of the requirements of 40 CFR Part 70.

C. New York's Standard Permit Application Form Fails to Request the Information Required By Federally-Approved New York Regulations

Most of New York's Title V permitting requirements are found in 6 NYCRR Subpart 201-6. New York submitted 6 NYCRR Subpart 201-6 to EPA for approval as part of New York's Title V operating permits program. In 1996, based largely upon an assessment of the adequacy of 6 NYCRR Subpart 201-6, EPA granted DEC interim authority to administer a Title V permitting program. Pursuant to EPA's delegation agreement with DEC, EPA must ensure that DEC complies with EPA-approved state regulations.

The permit application requirements outlined in 6 NYCRR Part 201 are nearly identical to the federal requirements described above. 6 NYCRR § 201-6.3(d)(4) states that the application forms and attachments must contain the following air pollution control requirements:

- (i) Citation and description of all applicable requirements, and
- (ii) Description of or reference to any applicable test method for determining compliance with each applicable requirement.

In addition 6 NYCRR § 201-6.3(d)(10) mandates that the application include requirements for compliance certification, including:

- (i) A certification of compliance with all applicable requirements by a responsible official consistent with this Section;
- (ii) An identification of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods.

New York's regulations track the requirements of CAA §114 and 40 CFR Part 70. Thus, the regulations comply with federal law. The standard application form, however, as well as applications submitted on the basis of this flawed form, are in blatant violation of state and federal regulations. This serious deficiency in New York's Title V program must be remedied immediately.

D. The Instructions Accompanying New York's Permit Application Form Confirm that the Application Form Fails to Adequately Address Legal Requirements for the Submission of Background Information or Compliance Certifications.

As noted above, DEC's standard permit application form and accompanying instructions confirm that the application form does not require an applicant to describe the requirements that apply to a source or to refer to applicable methods for determining compliance with these requirements. Furthermore, the permit application does not require an applicant who does not submit a remedial compliance plan to state affirmatively that his or her facility is in compliance with all applicable requirements. Nor does the application form require the applicant to describe the methods used for ascertaining the current compliance status of the source.

The absence of this information from the permit application is not immediately apparent, however, because some sections of the application form are deceptively similar to the missing sections. In part, this confusion results from the fact that Title V regulations include several requirements that may seem similar. For example, the regulations require a “compliance certification,” a “compliance plan,” a “compliance schedule,” and a general “certification” that everything contained in the application is truthful. DEC increases the confusion, however, by sometimes conflating requirements, and at other times interchanging the names of the various requirements. The end result is that the standard permit application form fails to adequately address several essential permit application components.

The permit application does include sections entitled “Compliance Certification.” *See* Attachment 3, New York State Department of Environmental Conservation Air Permit Application at 3-3, 3-6 [hereinafter “Permit Application”]. The instruction booklet informs the applicant, however, that he or she is only required to complete these sections of the application if (a) he or she is proposing a monitoring requirement that is not directly required by an applicable

regulations, or if (b) he or she is proposing that the permit include an alternative compliance assurance method to the method required in the applicable regulation. *See* Attachment 4, New York State Air Permit Application Instructions at 4-3-4-4, 4-7-4-8 [hereinafter “Permit Application Instructions”]. Thus, the “compliance certification” sections of the application form are only concerned with proposed methods for certifying compliance in the future. Clearly, this section of the application form does not suffice as a statement of the currently-employed methods for determining compliance upon which the initial compliance certification is based as required by CAA §114(a)(3)(B), 40 CFR §70.5(c)(9)(ii), and 6 NYCRR §201-6.3(d)(10)(ii).

Another section of the permit application form that could be mistaken for the missing “compliance certification” requests that the applicant check off boxes next to “compliance statements.” *See* Attachment 3, p. 3-2. These statements only relate to the applicant's intention to comply with applicable requirements in the future, however. The “compliance statements” do not suffice as an initial compliance certification in which the applicant assures current compliance with all applicable requirements and details the methods used for determining compliance.³

It appears that in developing the standard permit application form, DEC erroneously concluded that the law does not require new permit applicants to describe the methods relied upon in making the initial compliance certification. Such an interpretation of Title V requirements is clearly incorrect. First, as stated above, Congress unequivocally stated in CAA §114 that a compliance certification must include a description of the methods used for determining compliance. Congress did not differentiate between the compliance certification

³ Instead, the “compliance statements” found in New York's standard permit application form are meant to fulfill the requirement found in 40 CFR §70.5(c)(8)(iii) and 6 NYCRR §201-6(d)(9)(iii) that the applicant submit a “compliance schedule,” and the requirement found in 40 CFR §70.5(c)(9)(iii) and 6 NYCRR §201-6.3(d)(9)(iv) that the applicant submit a schedule for future submissions of compliance certifications.

made at the initial application stage and the compliance certification made after the permit is issued.

Second, a comprehensive reading of regulatory permit application requirements demonstrates that the “statement of methods used for determining compliance” required as part of the mandated “compliance certification” refers exclusively to methods used to certify current compliance. The information that is legally required to be included in a Title V permit application can be divided into two basic categories. The first type of information is background information necessary to determine what requirements apply to a facility and how the applicant can reasonably demonstrate compliance with those requirements in the future. The second type of information demonstrates the facility's current compliance status. Information about current compliance status is important because it determines whether the applicant must submit a remedial compliance plan.

Federal and state regulations require applicants to submit information about compliance assurance methods in two different parts of the application. First, applicants must submit background information about the various types of applicable monitoring, record-keeping, and reporting methods that may be relied upon to ascertain compliance in the future. Second, applicants must submit current compliance information that describes how the applicant ascertains compliance at the time the application is submitted.

1. Background Information

Federal and state regulations require applicants to submit a large amount of background information, including information such as the facility's yearly emissions of regulated pollutants, stack height, the existence of pollution control equipment, and the date of construction of the facility. Furthermore, regulations require an applicant to cite and describe all requirements that

apply to the applicant's facility, and to cite or refer to “any applicable test method for determining compliance with each applicable requirement.” It is important to note that New York's standard permit application fails to request all of the background information required by 40 CFR §70.5(c) and 6 NYCRR §201-6.3(d)(4). First, the applicant is not required to describe applicable requirements. Instead, the applicant is only required to provide the numerical citation for relevant regulations. *See* Attachment 3, Permit Application, pp. 3-2, 3-6; Attachment 4, Permit Application Instructions, pp. 4-2, 4-5. Second, the applicant is never required to cite or refer to any applicable test method for determining compliance with each applicable requirement. The only part of the application that requires the applicant to describe test methods is the “compliance certification” section (discussed above) on pages 3 and 6 of the permit application. This section, however, only requires applicants to mention proposed testing methods that are not already required by regulation. Applicants who are content to rely upon methods described in regulations are not required to cite or describe any compliance methods whatsoever.

2. Current Compliance Information

In addition to requiring applicants to provide certain background information, state and federal regulations require applicants to submit compliance certifications that include a certification of compliance with all applicable requirements, followed by “a statement of methods used for determining compliance, including a description of monitoring, record-keeping, and reporting requirements and test methods.” 40 CFR §70.5(c)(9)(ii), *See also* 6 NYCRR §201-6.3(d)(10). There is no reasonable way to interpret these regulatory requirements other than that for the purpose of determining whether the applicant's facility is in compliance with all requirements, the applicant must describe the monitoring and record-keeping methods

relied upon in certifying current compliance with all applicable requirements. Unfortunately, applicants are never required to identify current methods for ascertaining compliance. Thus, the application form omits critical information explicitly required by the Clean Air Act and federal and state regulations.

II. Permit Application Deficiencies Impede Public Participation in the Permitting Process and Efforts to Ensure the Truthfulness of Compliance Certifications

A. The Omission of Essential Background Information from Permit Applications Substantially Increases the Time and Resources Necessary for a Member of the Public to Participate Effectively in Draft Permit Review.

Experience demonstrates that the deficiencies in DEC's standard permit application form cripple public participation efforts. A primary purpose of Title V was to increase public involvement in air quality regulation. The Title V program is meant "to make it easier for the public to learn what requirements are being imposed on sources and to facilitate public participation in determining what further requirements to impose." 56 Fed. Reg. 21712, 21713 (May 10, 1991). Unfortunately, a member of the public attempting to participate in the development of Title V permits in New York will find it extremely difficult to ascertain "what requirements are being imposed on sources." This difficulty is the direct result of DEC's failure to require applicants to submit all the information required by federal and state regulations.

As explained above, instead of requiring applicants to both cite and describe applicable requirements as mandated by law, DEC's permit application form only requires applicants to provide the numerical citation to relevant regulations. No other description is provided. Citation to relevant regulations, however, only satisfies one aspect of the requirement that applicants cite and describe all applicable requirements. Under state and federal law, "applicable requirements" include more than just those requirements spelled out in regulations. "Applicable requirements"

also include terms and conditions of pre-construction permits, compliance plans⁴, consent orders resulting from enforcement actions, and any reporting requirements and operating restrictions approved as part of a facility's accidental release plan. See 6 NYCRR §201-2.1(b)(5) and 40 CFR §70.2. Obviously, regulatory citations provide insufficient information about the nature and source of a requirement that is derived from a previously approved plan, order, or permit.

In addition, even for applicable requirements that are actually spelled out in regulations that are cited in an application, DEC's failure to require applicants to describe these requirements in the application itself means that a member of the public must dedicate a substantial amount of time to identify the content of relevant regulations. A member of the public attempting to review a draft permit must obtain access to a law library and look up each regulation to identify the nature of each requirement. The public reviewer must also read through the regulations and attempt to determine the applicable test methods for determining compliance, since the standard permit application fails to request this information from applicants. Sometimes the methods will vary according to the particular circumstances of the facility, and therefore cannot be gleaned solely from a reading of the applicable regulation. If DEC complied with regulations and required applicants to submit this information as part of the permit application, none of this research would be necessary. Particularly in light of the fact that the public comment period prior to issuance of a Title V permit is only thirty days, the extra research burden created by DEC's failure to request required background information significantly inhibits public participation in draft permit review.

⁴ For example, under 6 NYCRR §227-2.3, many facilities must submit a compliance plan that demonstrates how they will comply with rules requiring the use of "reasonably available control technology" (RACT) for controlling emissions of oxides of nitrogen (NO_x). The terms and conditions of these plans become federally enforceable requirements and must be included in a facility's Title V permit.

B. The Absence of Mandatory Compliance Certification Information in New York's Permit Applications Undermines Attempts to Ensure the Trustworthiness of Initial Compliance Certifications

DEC's failure to require applicants to submit a statement certifying compliance with applicable requirements and a description of the methods upon which the certification is based prevents both members of the public and government regulators from ensuring that initial compliance certifications are trustworthy.

First, deficiencies in DEC's standard application form impede any effort to take enforcement action against an owner or operator of a facility who falsely certifies compliance with applicable requirements. Under the current system, the applicant never states outright that his or her facility is in compliance with all applicable requirements. While it could be argued that an applicant who elects not to submit a remedial "compliance plan" with the application is in essence stating that his or her facility is operating in compliance with all applicable requirements, such a dispute would require judicial resolution. Thus, the unnecessary ambiguity caused by DEC's failure to require applicants to make a clear statement of compliance in the application significantly increases the likelihood of litigation over compliance certification issues.

Even if a court is willing to infer that an applicant who elects not to submit a remedial compliance plan is in effect certifying compliance with all requirements, DEC will face a battle over which monitoring and record-keeping information forms the basis for the certification. This ambiguity is the result of DEC's failure to abide by legal requirements and insist that applicants describe the methods upon which the initial compliance certification is based.

Apart from the legal difficulties caused by DEC's failure to require adequate compliance certifications, the lack of information about monitoring, recordkeeping, and reporting activities relied upon by an applicant for compliance certification purposes seriously complicates efforts

by members of the public to investigate the reliability of a compliance certification in the first place. Because DEC does not require applicants to list the methods relied upon in making the compliance certification, the only way a member of the public can cross-check the certification is to investigate all of the identified requirements and guess at what monitoring is required. By contrast, if the applications included all information required by law, a member of the public could simply refer to the application to determine the basis for the compliance certification and then request a copy of relevant information under the New York State Freedom of Information Law (FOIL). New York Public Officers Law Art. 6.

Perhaps DEC's failure to require applicants to describe the basis of their certifications is rooted in the fact that for some facilities, no monitoring or record-keeping information exists upon which to base a compliance certification. If this is so, however, the public has a right to know about the current lack of accountability and the unreliability of the compliance certification.

For members of the public to participate effectively in permit development, information about the current monitoring and record-keeping practices of facilities must be available. Simply providing the public with a draft permit that contains the compliance methods that DEC is now proposing for the first time is insufficient to allow for effective public participation in permit proceedings.

III. DEC Must Modify New York's Standard Permit Application Form to Comply with Federal and State Regulations

In order to comply with federal and state regulations, DEC must update New York's standard permit application to include all required background and compliance certification information. Attached to this petition are permit application materials developed by the Illinois Environmental Protection Agency. *See* Attachments 1 and 2. NYPIRG proposes that DEC rely

upon the Illinois permit application form as a model for changes that must be made in New York's standard permit application form.

A. Illinois Title V Permit Application Forms

Attachment 1 is the "Compliance Certification" form developed by the Illinois Environmental Protection Agency. Page 1 of the form asks: "Does the signatory of this form hereby certify that the source is in compliance with all applicable requirements?" The applicant then must check off either "YES" or "NO." If the response is "NO," the applicant must explain. *See* Attachment 1, p. 1-1. Page 2 of the form requires the applicant to list the relevant regulation (by number) and compliance determination method⁵ that applies to each emission unit. *See* Attachment 1, p. 1-2. Pages 3, 4, and 5 of the form require applicants to provide a narrative description of the methods used to determine compliance, including testing methods⁶, monitoring procedures⁷, recordkeeping⁸, and reporting⁹. *See* Attachment 1, pp. 1-3, 1-4, 1-5. On page 5 of the form, the applicant must certify the truthfulness of the information provided in the compliance certification. *See* Attachment 1, p. 1-5.

Attachment 2 contains excerpts from Illinois' basic permit application form that requests background information necessary to design a permit for the applicant. The section of the permit application that requests background information on "applicable rules" is on page 1 of

⁵ The accompanying instructions to this form, found on page 7 of Attachment 3, explain that an example of a "compliance determination method" is "stack test of CO."

⁶ The accompanying instructions to this form, found on page 7 of Attachment 3, explain that an example of a "Test Method" is "Particulate Matter Stack Test Method USEPA Method 5 - Incinerator INT-4."

⁷ The accompanying instructions to this form, found on page 7 of Attachment 3, explain that an example of "monitoring procedures" is "continuous opacity monitor - Boiler #4."

⁸ The accompanying instructions to this form, found on page 7 of Attachment 3, explain that an example of recordkeeping is "Nitrogen content of oil - Boiler #4."

⁹ The accompanying instructions to this form, found on page 7 of Attachment 3, explain that an example of reporting is "annual report of all regulated air pollutants from all emission units at source."

Attachment 4. This section of the application requires applicants to provide the specific emission standards and limitations set by record-keeping, reporting, monitoring, and testing rules and procedures applicable to each emission unit. In referring to the applicable rules, applicants must cite and describe each requirement with specificity, as required by federal regulation.

Page 2 of attachment 4 requests that the applicant provide “compliance information.” This section of the permit application satisfies the requirement that applications include a description of or reference to any applicable method for determining compliance with each applicable rule. Here, applicants must provide “an explanation of how initial compliance is to be, or was previously demonstrated.” Furthermore, applicants must provide an “explanation of how ongoing compliance will be demonstrated.” Finally, applicants must inform the permitting authority of “parameters that relate to air emissions for which records are being maintained to determine fees, rule applicability or compliance.” Thus, the Illinois permit application form informs the permitting authority and the public of every compliance determination method required by law, of the particular compliance determination methods relied upon as the basis for the initial compliance certification, and of every other type of monitoring and recordkeeping activity that is currently undertaken by the applicant.

Though NYPIRG has not performed a comprehensive analysis of the legal sufficiency Illinois' entire permit application form, it is our opinion that the sections of the Illinois application that pertain to background information on applicable rules and compliance information, as well as the separate “compliance certification” form are done correctly.¹⁰

Therefore, NYPIRG recommends reliance upon the Illinois Permit Application form as a model for changes to be made in New York's form.

¹⁰ Furthermore, NYPIRG has no opinion about the Illinois EPA in general, or about any other aspect of the Illinois EPA's administration of the Illinois Title V program.

IV. Steps Must be Taken to Improve Opportunities for Public Participation in New York's Title V Program

In addition to correcting the deficiencies in New York's standard permit application form, EPA should take additional steps to ensure that New York's Title V program is, in reality, accessible to the public.

First, DEC needs to create a reliable system for providing the public with information necessary for permit review. Federal regulations require that any information relied upon by a permitting authority in drafting a Title V permit must be available to the public during the public comment period. 40 CFR §70.7(h)(2). The public notice announcing the start of the public comment period must include, in addition to other information:

[T]he name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, including those set forth in § 70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority that are relevant to the permit decision.

40 CFR § 70.7(h)(2). Currently, when DEC releases draft permit for public review, the public notice informs the public that copies of the permit application and draft permit are available at the relevant DEC regional office. The notice does not inform the public that other relevant supporting materials are also available to the public. Furthermore, when DEC provides a member of the public with access to the permit application materials, the only document provided is the actual permit application.

Obviously, however, DEC relies upon more than just the Title V application in developing a draft permit. For example, DEC relies upon previously issued pre-construction permits to determine New Source Review requirements. To establish the terms of remedial compliance plans, DEC certainly relies upon previously issued consent orders. Finally, permit

terms governing a facility's NOx¹¹ emissions will certainly be derived from the facility's NOx RACT plan. None of this information is contained in DEC's "Title V application files." Furthermore, it does not appear that DEC plans to maintain a public file containing all information relevant to the draft permit. Instead, DEC is apparently relying upon the New York State Freedom of Information Law (FOIL) procedures to provide the public with access to these documents. Unfortunately, under FOIL, DEC frequently takes a month or more to provide requested information to the public. Clearly, FOIL is an inadequate vehicle for assuring that members of the public obtain sufficient information to participate effectively in the 30-day permit review process.

The unavailability of a public file of the information relied upon by the permitting authority in drafting a facility's Title V permit also raises the issue of DEC's plans for maintaining adequate files of future facility submissions. These files should contain all of the monitoring reports and compliance certifications that facility owners/operators submit to DEC under the terms of the permits. We suspect that DEC is content to maintain files in the same manner that files are currently maintained. Under the current system, all reports are placed together in one large facility file. In addition to facility reports, this file generally contains correspondence, old permits and application forms, and inspection reports.

After permits are issued, citizen activists will need to monitor facility compliance with permit terms. For this to be done efficiently, reports of the same type need to be placed together. Thus, for each facility there needs to be a folder with compliance certifications, a folder with record-keeping submissions, a folder with reports of deviations, and so forth. Under Title V, the failure to submit required reports in a timely fashion is itself a violation. DEC needs to maintain orderly files on facilities so that both the EPA and the public can easily ascertain whether the

¹¹ Oxides of Nitrogen.

required reports are submitted, and whether they demonstrate compliance with applicable requirements.

In addition to maintaining public files of facility reports, DEC needs to create reporting forms that make sense to the public. At present, many monitoring reports contain only the monitoring results, and not the standard against which the results must be measured. For example, a report might contain the sulfur content of fuel used at a site, but the report does not compare the results to the standard. Title V reports should include the standard, a comparison of the result to the standard, and an explanation, if necessary, of why a particular deviation may not represent a violation. Unless monitoring and record-keeping reports are made comprehensible, the Congressional goal of substantive public participation in the permitting process will remain elusive.

Finally, New York Title V permit information should be available to the public electronically. In an effort to facilitate public participation, states around the country are posting Title V permits on the Internet. Illinois, Indiana, Wisconsin, Michigan, and Ohio, among other states, are all posting Title V permits, timetables for permit issuance, compliance certifications, and facility reports on the Internet. While the availability of permit information on the Internet does not guarantee public participation in the process, it lays a critical foundation for public involvement.

DEC already encourages facilities to submit permit application in electronic format. If a facility submits the application on paper, DEC converts the application to electronic form before releasing a draft permit for public comment. It should be relatively easy, therefore, for DEC to place this information on the agency's web site. Providing permit information on the Internet is a simple way to vastly improve opportunities for public participation in the permitting process. If

DEC and EPA are serious about fulfilling the Congressional mandate of public participation in Title V permitting and enforcement, all Title V permit information should be available on DEC's web site.

Public participation in New York's Title V program is unnecessarily difficult. NYPIRG strongly recommends that the above improvements be made to New York's program. Furthermore, NYPIRG encourages both EPA and DEC to work with members of the public, either formally or informally, to improve the public accessibility of New York's Title V program. Such a collaborative process is likely to increase public confidence in the permitting program and improve the air quality of New York State.

IV. Requested Relief

EPA is obligated to correct the deficiencies in New York's Title V program. Although EPA gave DEC interim authorization to administer New York's Title V program in 1996, EPA retains the responsibility of ensuring that the program is administered in accordance with applicable statutory and regulatory authority. Petitioner hereby requests that EPA make a determination pursuant to 40 CFR §70.10(b)(1) that DEC is inadequately administering New York's Title V Operating Permits Program. In addition, EPA should ensure that DEC modifies its Title V application form and instructions to comply with legal requirements and that DEC requires applicants to update their submissions to include all required information. Furthermore, EPA should fulfill Title V's public participation mandate by ensuring that all New York State permit information is easily understandable and available.

CONCLUSION

Based upon extensive investigation into DEC's implementation of New York's Title V permitting program, Petitioner believes that DEC's failure to require permit applicants to provide all of the information required by law seriously inhibits public participation in permit development and enforcement. Because public participation is a vital component of the Title V program, prompt resolution of this problem is critical. Petitioner hereby requests that EPA either make a determination that the DEC is inadequately administering New York's Title V Operating Permits Program or ensure that DEC brings the program into compliance with legal requirements.

Respectfully submitted,

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