

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

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In the Matter of the Final Title V
Operating Permit Issued to

TANAGRAPHICS, INC.
to operate a lithographic printing facility
located in New York, New York

Permit ID: DEC 2-6205-00088/00004

Issued by the New York State Department of
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF
THE TITLE V OPERATING PERMIT FOR
TANAGRAPHICS, INC.**

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. (“NYPIRG”) hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to issuance of the proposed Title V Operating Permit for Tanagraphics. The permit was proposed to U.S. EPA by the New York State Department of Environmental Conservation (“DEC”) via a letter to Mr. Steven C. Riva (Chief, Permitting Section, Air Programs Branch, U.S. EPA Region 2) dated March 23, 2000. This petition is filed within sixty days following the end of U.S. EPA’s 45-day review period as required by Clean Air Act § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. Id.

In compliance with Clean Air Act § 505(b)(2), NYPIRG’s petition is based on objections to Tanagraphics’ draft permit that were raised during the public comment period provided by DEC. NYPIRG’s comments on the draft permit (minus attachments) are included in Appendix A for reference purposes, only.¹

NYPIRG is a not-for-profit research and advocacy organization that specializes in environmental issues. NYPIRG has more than 20 offices located in every region of New York State.

¹ The original comments on the draft permit are attached to this petition for reference, only. NYPIRG does not wish for all issues raised in the original comments on the draft permit to be incorporated into this petition. Some of the original comments were recommendations for how DEC could make the permit more understandable and useful to the public. DEC’s refusal to consider these recommendations is unfortunate, but not illegal. This petition focuses on aspects of the permit that violate federal law.

Many of NYPIRG's members live, work, pay taxes, and breathe the air in New York County, where Tanagraphics is located.

The U.S. EPA Administrator must object to the Title V permit for Tanagraphics because it does not comply with 40 CFR Part 70. In particular:

- (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing (see p. 3 of this petition);
- (2) the permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c) (see p. 5 of this petition);
- (3) the permit entirely lacks a statement of basis as required by 40 CFR § 70.7(a)(5) (see p. 7 of this petition);
- (4) the permit repeatedly violates the 40 CFR § 70.6(a)(3)(iii)(A) requirement that the permittee submit reports of any required monitoring at least every six months (see p. 9 of this petition);
- (5) the permit distorts the annual compliance certification requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5) (see p. 10 of this petition);
- (6) the permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions (see p. 10 of this petition);
- (7) the permit fails to require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B) (see p. 16 of this petition); and
- (8) the permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practicably enforceable (see p. 17 of this petition).

If the U.S. EPA Administrator determines that a proposed permit does not comply with legal requirements, he or she must object to issuance of the permit. See 40 CFR § 70.8(c)(1) ("The [U.S. EPA] Administrator will object to the issuance of any permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part."). The numerous and significant violations of 40 CFR Part 70 discussed below require the Administrator to object to Tanagraphics' Title V permit.

Discussion of Objection Issues

The Title V permitting program offers an unprecedented opportunity for concerned citizens to learn what air quality requirements apply to a facility located in their community and whether the facility is complying with those requirements. Unfortunately, a poorly written Title V permit may make enforcement under the Clean Air Act even more difficult than it already is, because each permit includes a permit shield. Under the terms of the permit shield, a permittee is protected from enforcement action so long as the permittee is complying with its permit, even if the permit incorrectly applies the law.² Thus, a defective permit may prevent NYPIRG's members as well as other New Yorkers from taking legal action against a permittee who is illegally polluting the air in their community. Furthermore, a Title V permit that lacks appropriate monitoring, recordkeeping, and reporting requirements denies NYPIRG's members and all New Yorkers their right to know whether the permittee is complying with air quality requirements.

Tanagraphics' Title V permit does not assure the facility's compliance with applicable requirements. U.S. EPA must require DEC to remedy the flaws in the permit that are identified in this petition. If DEC refuses to remedy these flaws, U.S. EPA must draft a new permit for Tanagraphics that complies with federal requirements.

A. DEC Violated the Public Participation Requirements of 40 CFR § 70.7(h) by Inappropriately Denying NYPIRG's Request for a Public Hearing

40 CFR § 70.7(h) provides that "all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." The public notice announcing the availability of Tanagraphics' draft permit neither gave notice of a public hearing nor informed the public how to request a public hearing. NYPIRG requested a public hearing in written comments submitted to DEC during the applicable public comment period. See Appendix A at 2.

Despite NYPIRG's extensive comments on the draft permit, DEC denied NYPIRG's request for a public hearing. It is difficult to imagine what a member of the public must allege in order to satisfy DEC's standard for holding a public hearing.

In denying NYPIRG's request for a public hearing, DEC asserted that:

A public hearing would be appropriate if the Department determines that there are substantive and significant issues because the project, as proposed, may not meet statutory or regulatory standards. Based on a careful review of the subject application and comments received thus far, the Department has determined that a public hearing concerning this permit is not warranted.

² The permit shield only applies to requirements that are specifically identified in the permit.

See DEC Responsiveness Summary (cover letter). An examination of the applicable state regulation, 6 NYCRR § 621.7, reveals that DEC applied the wrong standard in denying NYPIRG's request for a public hearing. § 621.7 provides:

§621.7 Determination to conduct a public hearing.

- (a) After a permit application for a major project is complete (see provisions of sections 621.3 through 621.5 of this Part) and notice in accordance with section 621.6 of this Part has been provided, the department shall evaluate the application and any comments received on it to determine whether a public hearing will be held. If a public hearing must be held, the applicant and all persons who have filed comments shall be notified by mail. This shall be done within 60 calendar days of the date the application is complete. A public hearing may be either adjudicatory or legislative.
- (b) The determination to hold an adjudicatory public hearing shall be based on whether the department's review raises substantive and significant issues relating to any findings or determinations the department is required to make pursuant to the Environmental Conservation Law, including the reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project because the project, as proposed, may not meet statutory or regulatory criteria or standards. *In addition, where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon, the department shall hold an adjudicatory public hearing on the application.*
- (c) *Regardless of whether the department holds an adjudicatory public hearing, a determination to hold a legislative public hearing shall be based on the following:*
 - (1) *if a significant degree of public interest exists*

(emphasis added). In denying NYPIRG's request for a public hearing, DEC applied the standard that governs when the agency can hold a hearing upon its own initiative, rather than the standard that governs when the agency must grant a public request for a hearing. Moreover, though DEC can hold a legislative hearing "if a significant degree of public interest exists," DEC apparently determined that NYPIRG's request for a public hearing (made on behalf of NYPIRG's student members at 19 colleges and universities across the state) failed to demonstrate the requisite degree of public interest.

Apparently, DEC will hold a public hearing on a draft Title V permit only if public comments make it reasonably likely that the "project" (as opposed to the permit) must undergo major modifications.³ Because a Title V permit is meant to assure that a facility complies with existing

³ 6 NYCRR § 621.1(q) defines "project" as "any action requiring one or more permits identified in section 621.2 of this Part." (The Title V permit is one of the permits identified in section 621.2). 6 NYCRR § 621.1(o) defines "permit" as "any permit, certificate, license or other form of department approval, suspension, modification, revocation, renewal,

requirements, not to subject the facility to additional applicable requirements, the vast majority of existing facilities will not need to undertake major modifications before receiving a Title V permit. This does not obviate the need for a public hearing. In the context of a Title V permit proceeding, the objective of a public commenter is to ensure that the Title V permit holds the permit applicant accountable for violations of applicable requirements. Typically, the issue is whether significant modifications need to be made to the *permit*, not whether significant modifications need to be made to the *project*. DEC's interpretation of its regulations constructively denies the public an opportunity for a hearing on virtually any Title V permit application submitted by an existing facility. This clear violation of 40 CFR § 70.7(h) requires the Administrator to object to Tanagraphics' Title V permit.

B. The Permit is Based on an Incomplete Permit Application

The Administrator must object to Tanagraphics' Title V permit because Tanagraphics did not submit a complete permit application in accordance with the requirements of Clean Air Act § 114(a)(3)(C), 40 CFR §70.5(c), and 6 NYCRR § 201-6.3(d).

First, Tanagraphics' permit application lacks an initial compliance certification. Tanagraphics is legally required to submit an initial compliance certification that includes:

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

The initial compliance certification is one of the most important components of a Title V permit application. This is because the initial compliance certification indicates whether the permit applicant is currently in compliance with applicable requirements. If Tanagraphics is currently in violation of an applicable requirement, the Title V permit must include an enforceable schedule by which it will come into compliance with the requirement (the "compliance schedule"). Because Tanagraphics failed to submit an initial compliance certification, neither government regulators nor the public can feel confident that Tanagraphics is currently in compliance with every applicable requirement. Therefore, it is unclear whether Tanagraphics' Title V permit must include a compliance schedule.

reissuance or recertification, including any permit condition and variance, that is issued in connection with any regulatory program listed in section 621.2 of this part." Thus, "project" and "permit" are given distinct definitions under state regulations promulgated by DEC. When DEC asserts that a hearing is warranted only when "the project, as proposed, may not meet statutory or regulatory standards," this statement can only be interpreted as requiring a demonstration that the underlying action that requires the permit--the operation of the facility--may not meet statutory or regulatory standards.

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

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

57 FR 32250, 32274 (July 21, 1992). Despite the importance of knowing whether a permit applicant is in compliance with all requirements at the time of permit issuance, Tanagraphics is not required to submit a compliance certification until one full year after the permit is issued. A permit that is developed in ignorance of a facility's current compliance status cannot possibly assure compliance with applicable requirements as mandated by 40 CFR § 70.1(b) and § 70.6(a)(1).

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

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

The omission of this information makes it significantly more difficult for a member of the public to determine whether a draft permit includes all applicable requirements. For example, an existing facility that is subject to major New Source Review ("NSR") requirements should possess a pre-construction permit issued pursuant to 6 NYCRR Part 201. Minor NSR permits, Title V permits, and state-only permits are also issued pursuant to Part 201. In the Title V permit application, a facility that is subject to any type of pre-existing permit simply cites to 6 NYCRR Part 201. Because DEC does not require the applicant to describe each underlying requirement, it is virtually impossible to identify existing NSR requirements that must be incorporated into the applicant's Title V permit. The draft permit fails to clear up the confusion, especially since requirements in pre-existing permits are often omitted from an applicant's Title V permit without explanation.

The lack of information in the permit application also makes it far more difficult for the public to evaluate the adequacy of periodic monitoring included in a draft permit, since the public permit reviewer must investigate far beyond the permit application to identify applicable test methods. Often, draft permit conditions are unaccompanied by any kind of monitoring requirement. Again, there is never an explanation for the lack of a monitoring method.

Tanagraphics' failure to submit a complete permit application is the direct result of DEC's failure to develop a standard permit application form that complies with federal and state statutes and regulations. Nearly a year ago, NYPIRG petitioned the Administrator to resolve this fundamental problem in New York's Title V program. In the petition, submitted April 13, 1999, NYPIRG asked the Administrator to make a determination pursuant to 40 CFR § 70.10(b)(1) that DEC is inadequately administering the Title V program by utilizing a legally deficient standard permit application form. The petition is still pending. U.S. EPA must require Tanagraphics and all other Title V permit applicants to supplement their permit applications to include an initial compliance certification and additional background information as required under state and federal law.

The entire April 13, 1999 petition is incorporated by reference into this petition and is attached hereto as Appendix B.

The Administrator must object to final issuance of the permit to Tanagraphics because the permit is based upon a legally deficient permit application and therefore does not assure Tanagraphics' compliance with applicable requirements.

C. The Permit Entirely Lacks a Statement of Basis as Required by 40 CFR § 70.7(a)(5)

The Administrator must object to the Title V permit for Tanagraphics because it lacks a statement of basis as required by 40 CFR § 70.7(a)(5).⁴ According to § 70.7(a)(5), every Title V permit must be accompanied by a "statement that sets forth the legal and factual basis for the draft permit conditions." Without a statement of basis, it is virtually impossible for the public to evaluate DEC's periodic monitoring decisions (or lack thereof) and to prepare effective comments during the 30-day public comment period.

According to U.S. EPA Region 10:

The statement of basis should include:

- i. Detailed descriptions of the facility, emission units and control devices, and manufacturing processes including identifying information like serial numbers that may not be appropriate for inclusion in the enforceable permit.
- ii. Justification for streamlining of any applicable requirements including a detailed comparison of stringency as described in white paper 2.

⁴ 40 CFR § 70.7(a)(5) provides that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it."

iii. Explanations for actions including documentation of compliance with one time NSPS and NOC requirements (e.g. initial source test requirements), emission caps, superseded or obsolete NOCs, and bases for determining that units are insignificant IEUs.

iv. Basis for periodic monitoring, including appropriate calculations, especially when periodic monitoring is less stringent than would be expected (e.g., only quarterly inspections of the baghouse are required because the unit operates less than 40 hours a quarter.)

Elizabeth Waddell, Region 10 Permit Review, May 27, 1998 (“Region 10 Permit Review”), at 4. Region 10 also suggests that:

The statement of basis may also be used to notify the source or the public about issues of concern. For example, the permitting authority may want to discuss the likelihood that a future MACT standard will apply to the source. This is also a place where the permitting authority can highlight other requirements that are not applicable at the time of permit issuance but which could become issues in the future.

Region 10 Permit Review at 4. In New York, this information is never provided.

NYPIRG is not alone in asserting that the statement of basis is an indispensable part of Title V proceedings. According to Joan Cabreza, EPA Region 10 Air Permits Team Leader:

In essence, this statement is an explanation of why the permit contains the provisions that it does and why it does not contain other provision that might otherwise appear to be applicable. The purpose of the statement is to enable EPA and other interested parties to effectively review the permit by providing information regarding decisions made by the permitting authority in drafting the permit.

Joan Cabreza, Memorandum to Region 10 State and Local Air Pollution Agencies, Region 10 Questions & Answers #2: Title V Permit Development, March 19, 1996.

The Statement of Basis that accompanies the Final Air Operating Permit for Goldendale Compressor Station (Northwest Pipeline Corporation), a facility located in Washington State, is attached to petition as Appendix C. This document is provided as an example of effective supporting documentation for a Title V permit. The statement of basis was prepared by the Washington State Department of Ecology, located in Yakima, Washington.

DEC responded to NYPIRG’s comment that the draft permit lacked a statement of basis by making the conclusory statement that “[i]t is the DEC’s position that the permit application and draft permit provide the legal and factual background and explanation for the draft permit conditions.” Responsiveness Summary, Re: General Permit Conditions, at 2. No reasonable person could conclude

that information provided in Tanagraphics' permit application and draft permit suffices as the statement of basis for all permit conditions. Moreover, the permit application and draft permit are inappropriate vehicles for the type of information that should be provided in the statement of basis. Assertions made by the applicant in the permit application cannot suffice as DEC's rationale for permit conditions; DEC must make its own statement. In addition, since the statement of basis is not meant to be enforceable, the statement of basis should not be part of the enforceable permit. Rather, Tanagraphics' Title V permit must be accompanied by a separate statement of basis.⁵

In the absence of a statement of basis, the permit for Tanagraphics violates Part 70 requirements. The Administrator must object to the issuance of the permit and insist that DEC draft a new permit that includes a statement of basis.

D. The Permit Repeatedly Violates the 40 CFR § 70.6(a)(3)(iii)(A) Requirement that the Permittee Submit Reports of any Required Monitoring at Least Every Six Months

Part 70 requires a permitted facility to submit reports of any required monitoring at least once every six months. See 40 CFR § 70.6(a)(3)(iii)(A). Though a blanket statement about the required six month reports is tucked away in the general conditions of the permit, most individual monitoring conditions are followed by a statement that reporting is required only "upon request by agency."

Under Part 70, the "monitoring" covered by the six month monitoring reports includes any activity relied upon for determining compliance with permit requirements, including general recordkeeping (e.g., maintaining records of gasoline throughput), compliance inspections (e.g. inspections to ensure that all equipment is in place and functioning properly), and emissions testing. Because the permit is contradictory regarding when Tanagraphics must submit monitoring results under particular permit conditions, it is unclear what, if anything, will be included in the six-month monitoring reports. A permit cannot assure compliance with applicable requirements without making it clear that reports of *all* required monitoring must be submitted to the permitting authority at least once every six months.

In response to NYPIRG's comments on the draft permit with respect to reporting requirements, DEC points to the general condition requiring reports of any required monitoring at least every six months. DEC then asserts that "[i]ndividual permit conditions default to the 6-month reporting requirement unless a more frequent reporting period is required by a rule. Individual monitoring conditions specify reporting requirements." See Responsiveness Summary, Re: General Permit Conditions, at 3. This explanation is unacceptable. First, the permit does not include the "default"

⁵ Shortly after the close of the public comment period on Tanagraphics' draft permit, DEC began providing a "permit description" to accompany draft permits released for facilities located in New York City. These permit descriptions do not satisfy the requirement for a statement of basis because they fail to explain DEC's rationale for periodic monitoring decisions. Nevertheless, a permit description is at least a start toward creating a statement of basis as required by Part 70.

language. Second, other draft permits released by DEC for public comment include monitoring conditions that specifically require submittal of reports on an annual basis rather than every six months, even though the same six month reporting requirement is included as a general condition in those permits. This contradicts DEC's assertion that monitoring reports are always due every six months unless "a more frequent reporting period is required by a rule." A better characterization of DEC's position is that monitoring reports are due every six months unless a *different* reporting period is required by a rule. Following this logic, if a rule only requires reporting "upon request," DEC considers this to be the applicable reporting requirement. If DEC wanted Tanagraphics to submit reports of a particular type of monitoring every six months, it would say so in the space next to "reporting requirements." DEC clearly believes that it can circumvent the six-month reporting requirement at will. Unless this permit is modified to clearly identify the monitoring results that must be included in Tanagraphics' six month monitoring reports, the reports are unlikely to be useful in assuring the facility's compliance with applicable requirements.

The Administrator must object to issuance of this permit because it contains repeated violations of Part 70's clear cut requirement that reports of all required monitoring must be submitted at least once every six months.

E. The Permit Distorts the Annual Compliance Certification Requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5)

Under 6 NYCRR § 201-6.5(e), a permittee must "certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices," at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirement included in Tanagraphics' permit (identified as Condition 14 in the permit) does not require Tanagraphics to certify compliance with all permit conditions. Rather, the condition only requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." DEC then proceeds to identify certain conditions in the permit as "Compliance Certification" conditions. Requirements that are labeled "Compliance Certification" are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. Those permit conditions that lack periodic monitoring (a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal regulations. Tanagraphics must certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

DEC's only response to NYPIRG's concerns regarding deficiencies in the compliance certification requirement is that "[t]he format of the annual compliance report is being discussed internally and with EPA." DEC Responsiveness Summary, Re: General Conditions, at 3. DEC's response is unacceptable. The annual compliance certification requirement is the most important aspect of the Title V program. The Administrator must object to any permit that fails to require the permittee to certify compliance (or noncompliance) with all permit conditions on at least an annual basis.

F. The Permit Does Not Assure Compliance With All Applicable Requirements as Mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) Because it Illegally Sanctions the Systematic Violation of Applicable Requirements During Startup/Shutdown, Malfunction, Maintenance, and Upset Conditions

The Administrator must object to Tanagraphics' permit because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. On its face, 6 NYCRR § 201-1.4 (New York's "excuse provision") conflicts with U.S. EPA guidance regarding the permissible scope of excuse provisions and should not have been approved as part New York's State Implementation Plan ("SIP"). U.S. EPA must remove this provision from New York's SIP and all federally-enforceable operating permits as soon as possible. Meanwhile, Tanagraphics' permit must be modified to include additional recordkeeping, monitoring, and reporting obligations so that U.S. EPA and the public can monitor application of the excuse provision (and thereby be assured that the facility is complying with applicable requirements).⁶

The loophole created by exceptions for startup/shutdown, maintenance, malfunction, and upset (the "excuse provision") is so large that it swallows up applicable emission limitations and makes them extremely difficult to enforce. It is common to find monitoring reports filled with potential violations that are allowed under the excuse provision. Agency files seldom contain information about why violations are deemed unavoidable. In fact, there is no indication that regulated facilities take steps to limit excess emissions during startup/shutdown and maintenance activities.

U.S. EPA guidance explains that facilities are required to make every reasonable effort to comply with emission limitations, even during startup/shutdown, maintenance and malfunction conditions. (U.S. EPA guidance documents are attached hereto as Appendix D). According to U.S. EPA, an excuse provision only applies to infrequent exceedances. This is not the case for facilities located in New York State. New York facilities appear to possess blanket authority to violate air quality requirements so long as they assert that the excuse provision applies.

40 CFR § 70.6(a)(a) provides that each permit must include "[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." The permit does not assure compliance with applicable requirements because it lacks (1) proper limitations on when a violation may be excused, and (2) sufficient public notice of when a violation is excused.

A Title V permit must include standards to assure compliance with all applicable requirements. The Administrator must object to Tanagraphics' permit unless DEC adds terms to the permit that prevent abuse of the excuse provision. Specific terms that must be included in any Title V permit issued to Tanagraphics are described below.

⁶ The excuse provision is identified as Condition 5 in the permit.

1. Any Title V permit issued to Tanagraphics must include the limitations established by recent U.S. EPA guidance.

In a memorandum dated September 20, 1999 (“1999 memo”), U.S. EPA’s Assistant Administrator for Enforcement and Compliance Assurance clarified U.S. EPA’s approach to excuse provisions. In particular:

- (1) The state director’s decision regarding whether to excuse an unavoidable violation does not prevent EPA or citizens from enforcing applicable requirements;
- (2) Excess emissions that occur during startup or shutdown activities are reasonably foreseeable and generally should not be excused;
- (3) The defense does not apply to SIP provisions that derive from federally promulgated performance standards or emission limits, such as new source performance standards and national emissions standards for hazardous air pollutants.
- (4) Affirmative defenses to claims for injunctive relief are not allowed.
- (5) A facility must satisfy particular evidentiary requirements (spelled out in the 1999 memo) if it wants a violation excused under the excuse provision.⁷

Tanagraphics’ permit does not include the restrictions set out in (1), (3), and (4). Moreover, the permit lacks most of the evidentiary requirements referred to in (5). As for (2), both the language of the permit and the DEC’s own enforcement policy conflict with U.S. EPA’s position that excess emissions during

⁷ In the case of an exceedance that occurs due to startup, shutdown, or maintenance, the facility must demonstrate that:

- The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design;
- The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- At all times, the facility was operated in a manner consistent with good practice for minimizing emissions;
- The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;
- All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
- All emissions monitoring systems were kept in operation if at all possible;
- The owner or operator’s actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and
- The owner or operator properly and promptly notified the appropriate regulatory authority.

The factual demonstration necessary to justify a defense based upon an unavoidable malfunction is similar to that for startup/shutdown. See 1999 Memo.

startup, shutdown, and maintenance activities are not treated as general exceptions to applicable emission limitations.

The Administrator must object to Tanagraphics' permit and require DEC to draft a new permit that includes the limitations described in the 1999 memorandum.

2. The permit makes it appear that a violation of a federal requirement can be excused even when the federal requirement does not provide for an affirmative defense. Any Title V permit issued to Tanagraphics must be clear that violation of such a requirement may not be excused.

The permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation "unavoidable," regardless of whether an "unavoidable" defense is allowed under the requirement that is violated. U.S. EPA was concerned about this issue when it granted interim approval to New York's Title V program. In the Federal Register notice granting program approval, 61 Fed. Reg. 57589 (1996), U.S. EPA noted that before New York's program can receive full approval, 6 NYCRR §201-6.5(c)(3)(ii) must be revised "to clarify that the discretion to excuse a violation under 6 NYCRR Part [sic] 201-1.4 will not extend to federal requirements, unless the specific federal requirement provides for affirmative defenses during start-ups, shutdowns, malfunctions, or upsets." 61 Fed. Reg. at 57592. Though New York incorporated clarifying language into state regulations, the permit lacks this language. Any Title V permit issued to Tanagraphics must be clear that a violation of a federal requirement that does not provide for an affirmative defense will not be excused.

3. Any Title V permit issued to Tanagraphics must define significant terms.

For a Title V permit to assure compliance with applicable requirements, each permit condition must be enforceable as a practical matter. Limitations on the scope of the excuse provision are not practicably enforceable because the permit lacks definitions for "upset," and "unavoidable."

A definition for "upset" is elusive. The SIP-approved version of 6 NYCRR Part 201 does not even include the word "upset." "Upset" shows up mysteriously in the current regulation. Current § 201-1.4 lacks a definition. Current § 200.1 lacks a definition. 40 CFR Part 70 lacks a definition. A definition of this term must be included in the permit. Since no statutory or regulatory authority provides a definition for "upset," the only logical definition of "upset" is the definition for "malfunction," above. Otherwise, "upset" should be deleted from the permit.

NYPIRG cannot locate the definition of "unavoidable" in any applicable New York statute or regulation. A definition must be included in the permit because otherwise this condition is impermissibly vague. U.S. EPA's policy memorandum on excess emissions during startup, shutdown, maintenance, and malfunction, dated February 15, 1983. ("1983 memo") defines an unavoidable violation as one where "the excesses could not have been prevented through careful and prudent planning and design and that bypassing was unavoidable to prevent loss of life, personal injury, or severe property damage."

Memorandum from Kathleen Bennett, Assistant Administrator for Air, Noise and Radiation, to Regional Administrators, dated Feb. 15, 1983. Either this definition or an alternative definition with the same meaning must be included in the permit.

DEC's refusal to define critical terms in the excuse provision makes impossible for the public to assess the appropriateness of a decision by the Commissioner to excuse a violation (in the rare situation that a member of the public actually manages to discover that a violation was excused).

The problems caused by the vagueness of the excuse provision could be partially resolved by making it clear that the excuse provision does not shield the facility in any way from enforcement by the public or by U.S. EPA, even after a violation is excused by the DE Commissioner. In addition to the right to bring an enforcement action against facility that illegally pollutes the air, however, the public must be able to evaluate the propriety of a decision by the DEC Commissioner to excuse a violation. Since the public has the right to bring an enforcement action against a permit violator, the public should have access to any information relied upon by DEC is determining that a violation could not be avoided.⁸ If the permit provides only scanty details about the types of violations that may be excused, DEC and the permittee are unlikely to provide the public with any information justifying the excuse.

4. Any Title V permit issued to Tanagraphics must define "reasonably available control technology" as it applies during startup, shutdown, malfunction, and maintenance conditions.

Though 6 NYCRR § 201-1.4(d) requires facilities to use "reasonably available control technology" ("RACT") during any maintenance, start-up/shutdown, or malfunction condition, the permit does not define what constitutes RACT under such conditions or how the government and the public knows whether RACT is being utilized at those times. Any Title V permit issued to Tanagraphics must define RACT as it applies during startup, shutdown, malfunction, and maintenance conditions. Also, the permit must include monitoring, recordkeeping, and reporting procedures designed to provide a reasonable assurance that the facility is complying with this requirement.

5. Any Title V permit issued to Tanagraphics must 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).

Any Title V permit issued to Tanagraphics must require the facility to submit prompt written reports of any deviation from permit requirements in accordance with 40 CFR §70.6(a)(3)(iii)(B). 40 CFR § 70.6(a)(3)(iii)(B) demands:

⁸ It is interesting that while some state agencies and industry representatives assert that citizen suits are sometimes brought against facilities for "minor" violations, DEC's position with respect to the excuse provision in this permit means that the public is denied information about the environmental seriousness of a violation and whether the violation was actually unavoidable. Thus, the public's ability to analyze the significance of a violation is severely constricted.

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

Unfortunately, the excuse provision in the permit (Condition 5) fails to require adequate reporting of deviations of permit conditions during startup/shutdown, maintenance, malfunction, and upset conditions. In the case of deviations that occur during startup/shutdown or maintenance, the facility isn’t required to submit a deviation report at all “unless requested to do so in writing.” In the case of deviations that allegedly occur due to malfunction, the permit requires deviation reports, but allows these reports to be made by telephone rather than in writing. Thus, a violation can be excused without creating a paper trail that would allow U.S. EPA and the public to monitor abuse.

DEC responded to NYPIRG’s comments regarding the lack of written deviation reports by stating:

The condition clearly states that deviations from permit requirements are to be reported promptly (as prescribed under 6 NYCRR §201-1.4). It includes all deviations without distinction to avoidable or unavoidable according to the reporting requirements specified in 6 NYCRR § 201-1.4 which, in turn, requires a communication within 2 days and written report within 30 days.

Responses to NYPIRG Comments, re: General Permit Conditions at 4. DEC’s response is misleading because the agency fails to acknowledge that written deviation reports are only required if they are specifically requested by the DEC Commissioner. In addition, DEC fails to acknowledge the circumstances under which a deviation report is simply not required unless specifically requested by the DEC Commissioner.

40 CFR § 70.6(a)(3)(iii)(B) provides no exceptions to the requirement that a Title V permit require prompt reporting of all deviations from permit requirements. DEC may not waive this requirement under any circumstance. Furthermore, given that a primary purpose of the Title V program is to allow the public to determine whether polluters are complying with all applicable requirements on an ongoing basis, reports of deviations from permit requirements must be in writing so that they can be reviewed by the public. Additional support for the argument that these reports must be made in writing is found in 40 CFR § 70.5(d), which provides that “[a]ny application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness.” U.S. EPA’s White Paper #1 interprets this provision of Part 70 as requiring “responsible officials to certify monitoring reports, which must be submitted every 6 months, and ‘prompt’ reports of any deviations from permit requirements whenever they occur.” U.S. EPA, *White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995) at 24. A deviation report that is submitted by telephone rather than in writing cannot be “certified” by a responsible official as required by Part 70.

Tanagraphics' Title V permit would leave the public completely in the dark as to whether DEC is excusing violations on a regular basis. An excuse provision that keeps the public ignorant of permit violations cannot possibly satisfy the Part 70 mandate that each permit assure compliance with applicable requirements.

Any Title V permit issued to Tanagraphics must include the following reporting obligations:

- (1) *Violations due to Startup, Shutdown and Maintenance.*⁹ The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (The permit only requires reports of violations due to startup, shutdown, or maintenance “when requested to do so in writing”).¹⁰ The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report promptly after a deviation occurs. (The permit does not require submittal of a report “if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements”).¹¹ Finally, a deadline for submission of these reports must be included in the permit.

- (2) *Violations due to Malfunction.* The facility must provide both written notification and a telephone call to DEC within two working days of an excess emission that is allegedly unavoidable due to “malfunction.” (The permit only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement).¹² The facility must submit a detailed written report within thirty days after the facility exceeds an emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The permit only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”).¹³

⁹ NYPIRG interprets U.S. EPA’s 1999 memorandum as prohibiting excuses due to maintenance.

¹⁰ See Condition 5(a) in the permit.

¹¹ *Id.* Item 17.2(iv) of the permit, which governs “Monitoring, Related Recordkeeping and Reporting Requirements” contains the same flaw.

¹² See Condition 5(b) in the permit.

¹³ *Id.*

G. The Permit Fails to Require Prompt Reporting of All Deviations From Permit Requirements as Mandated by 40 CFR § 70.6(a)(3)(iii)(B)

Item 17.2 of the permit governs the reporting of all types of violations under the permit, not just those that might be considered “unavoidable” under 6 NYCRR § 201-1.4. As discussed above, 40 CFR § 70.6(a)(3)(iii)(B) requires prompt reporting of any violation of permit requirements. Item 17.2 violates this clear-cut reporting requirement.

At first glance, Item 17.2 appears to comply with the prompt reporting requirement. It states:

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

- ii. Report promptly (as prescribed under Section 201-1.4 of Part 201) to the Department:
 - deviations from permit requirements, including those attributable to upset conditions,
 - the probable cause of such deviations, and
 - any corrective actions or preventive measures taken.

Unfortunately, the only reporting required by Item 17.2 is the reporting required by 6 NYCRR § 201-1.4. As discussed above, § 201-1.4 only governs “Unavoidable Noncompliance and Violations.” A facility is required to comply with § 201-1.4 only if it wants the violation excused as “unavoidable.” 6 NYCRR § 201-6.5(c)(3)(ii) explains that “all other permit deviations shall only be reported as required under 201-6.5(c)(3)(i) unless the Department specifies a different reporting requirement within the permit.” 6 NYCRR § 201-6.5(c)(3)(i) states that the permit must include “submittal of reports of any required monitoring at least every 6 months.”

Thus, if the permittee could avoid a violation but failed to do so, the permit allows the permittee to withhold information about the violation from government authorities for six months. Six months cannot possibly be considered “prompt reporting” The Administrator must object to the permit because it does not require prompt reporting of all deviations from permit limits.

H. The Permit Does Not Assure Compliance With All Applicable Requirements as Mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) Because Many Individual Permit Conditions Lack Adequate Periodic Monitoring and are not Practically Enforceable

1. A Title V permit must include periodic monitoring that is sufficient to assure the government and the public that the permitted facility is operating in compliance with all applicable requirements.

A basic tenet of Title V permit development is that the permit must require sufficient monitoring and recordkeeping to provide a reasonable assurance that the permitted facility is in compliance with

legal requirements. The periodic monitoring requirement is rooted in Clean Air Act § 504, which requires that permits contain “conditions as are necessary to assure compliance.” 40 CFR Part 70 adds detail to this requirement. 40 CFR §70.6(a)(3) 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) requires all Part 70 permits to contain “testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.” Part 70’s periodic monitoring requirements are incorporated into 6 NYCRR § 201-6.5(b).¹⁴

2. Every condition in a Title V permit must be practicably enforceable.

In addition to containing adequate periodic monitoring, each permit condition must be “enforceable as a practical matter” in order to assure the facility’s compliance with applicable requirements. To be enforceable as a practical matter, a condition must (1) provide a clear explanation of how the actual limitation or requirement applies to the facility; and (2) make it *possible* to determine whether the facility is complying with the condition.

The following analysis of specific permit conditions identifies requirements for which periodic monitoring is either absent or insufficient and permit conditions that are not practicably enforceable.

3. Analysis of specific permit conditions

a. Facility Level Permit Conditions

¹⁴ 6 NYCRR § 201-6.5(b) states that:

Each Title V facility permit issued under this Part shall include the following provisions pertaining to monitoring:

(1) All emissions monitoring and analysis procedures or test methods required under the applicable requirements, including any procedures and methods for compliance assurance monitoring as required by the Act shall be specified in the permit;

(2) Where the applicable requirement does not require periodic testing or instrumental or non-instrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit shall specify the periodic monitoring sufficient to yield reliable data from the relevant time periods that are representative of the major stationary source’s compliance with the permit. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirements; and

(3) As necessary, requirements concerning the use, maintenance, and installation of monitoring equipment or methods.

6 NYCRR § 201-6.5(e)(2) further provides that a Title V permit must include “[a] means for assessing or monitoring the compliance of the stationary source with its emission limitations, standards, and work practices.”

Condition 3, Item 3.1 (Maintenance of Equipment):

The permit recites the general requirement under 6 NYCRR § 200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer's specifications. This condition must be supplemented with periodic monitoring. A currently written, condition 3 does not describe Tanagraphics' pollution control equipment or explain the manufacturer's specifications for maintenance. Nor does the condition require Tanagraphics to perform specific maintenance activities or document inspections. Under circumstances where an applicable requirement lacks monitoring requirements sufficient to provide a reasonable assurance of compliance, periodic monitoring must be added. Thus, this requirement must not be stated generally, but must be applied specifically to this facility. The permit must explain exactly what qualifies as reasonable maintenance practices and spell out the manufacturer's specifications. Furthermore, the permit must require Tanagraphics to perform periodic monitoring that assures the facility's compliance with maintenance requirements.

In response to NYPIRG's comments on the draft permit with respect to this permit condition, DEC asserted:

As noted in the comment, this is a general requirement under 6 NYCRR § 200.7 which is applied to all air permits. While this condition may appear in some instances where no pollution control equipment is in operation, the condition will be retained as is in order to ensure that maintenance is addressed for those instances where control equipment is in place. Source owners may install control equipment voluntarily, that is, without having the permit address the specific control equipment. The condition would apply without having the permit address the specific control equipment. Maintenance plans are typically submitted as part of documentation in support of the application. Based on engineering judgment, we believe that incorporating this information as enforceable permit conditions would be both onerous and unnecessary. If required control equipment fails to operate and permit limits are exceeded an enforcement action would be initiated.

Responses to NYPIRG Comments, re: General Permit Conditions, at 3.

DEC's response does not justify the agency's failure to identify whether the requirement applies to Tanagraphics and, if the requirement applies, the agency's failure to include sufficient periodic monitoring to assure compliance. First, a "general requirement" is a requirement that applies to all facilities in the same way. This is not a general requirement because it may not even apply to Tanagraphics. A Title V permit must identify the requirements that apply to the permitted facility, not provide a shopping list of requirements that might apply. As explained in U.S. EPA's preamble to 40 CFR Part 70:

The [Title V] program will generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the [Clean Air] Act.

Currently, a source's obligations under the Act (ranging from emissions limits to monitoring, recordkeeping, and reporting requirements) are, in many cases, scattered among numerous provisions of the SIP or Federal regulations. In addition, regulations are often written to cover broad source categories, therefore it may be unclear which, and how, general regulations apply to a source.

57 Fed. Reg. 32250, 32251 (July 21, 1992). DEC's assertion that it is proper to include an inapplicable requirement in a permit without explanation simply because there is a slight chance that the facility may voluntarily install equipment that would subject it to this requirement at some point during the permit term is unacceptable. In the off chance that the facility does voluntarily install pollution control equipment during the permit term, this requirement will apply to the facility even if it is not included in the permit. Part 70 requires a Title V permit to include all requirements that apply to the facility as of the date of permit issuance, not all requirements that might somehow become applicable to the facility during the permit term.

Second, section 504 of the Clean Air Act makes it clear that each Title V permit must include "conditions as are necessary to assure compliance with applicable requirements of [the Clean Air Act], including the requirements of the applicable implementation plan." Here, the permit lacks conditions designed to assure Tanagraphics' compliance with an applicable SIP requirement. DEC fails to provide a justification for its failure to include periodic monitoring to assure Tanagraphics' compliance with this condition. Instead, DEC simply alleges that based upon "engineering judgment," periodic monitoring would be "onerous and unnecessary."

Finally, the point of requiring a facility to maintain pollution control equipment properly is to prevent an exceedance of applicable pollution limits. DEC dismisses the preventative nature of this applicable requirement and simply asserts that if the control equipment fails AND Tanagraphics violates an emission limitation, an enforcement action will be initiated. Notice that DEC says nothing about the possibility of an enforcement action brought to enforce the requirement that pollution control equipment be maintained properly. This is because DEC will have no way of knowing whether Tanagraphics complies with this requirement because the permit condition is not supported by periodic monitoring.

DEC's refusal even to identify whether this requirement applies to Tanagraphics, let alone the agency's failure to include sufficient periodic monitoring to assure compliance with this requirement, is a clear violation of Part 70 requirements and justifies the Administrator's objection to this permit.

Condition 4, Item 4.1 (Unpermitted Emission Sources):

The permit states that if the owner failed to apply for a necessary permit, the owner must apply for the permit and the facility will be subject to all regulations that were applicable at the time of construction or modification. We have several concerns.

First, if Tanagraphics is currently subject to a New Source Review ("NSR") or "Prevention of Significant Deterioration ("PSD") permit, the terms of that permit must be included in the Title V permit

and the permit must be cited as the basis for the requirements. If Tanagraphics does not have a NSR or PSD permit, DEC must not issue Tanagraphics a Title V permit until it has made a reasonable investigation into whether Tanagraphics is required to have such a permit. The results of this investigation must be explained in a “statement of basis.” Our confusion over whether Tanagraphics is subject to a NSR or PSD permit is based upon the fact that neither DEC’s standard permit application form nor DEC’s draft permits make it clear whether a facility is subject to a pre-existing permit.

Second, based upon the language of Item 4.1, it appears that the only penalty Tanagraphics will face in the event that DEC discovers that the facility lacks a required permit is the requirement to obtain the permit. In other words, the facility will not be penalized. If Item 4.1 remains in the permit, it is essential that a clause be added that states that if it is discovered that Tanagraphics lacks a required permit, Tanagraphics will be subject to all penalties authorized by state and federal law. Otherwise, there is a possibility that the permit shield will block DEC, U.S. EPA, and the public from imposing such penalties.

NYPIRG recognizes that Condition 4 is simply a recitation of 6 NYCRR § 201-1.2. While this approach may work for some regulatory requirements, it does not work for this one because of the existence of the permit shield. Under the permit shield, compliance with the terms of the condition are tantamount to compliance with the law. In this case, it appears that if the facility goes ahead and applies for a permit that it should have applied for earlier, it will be in compliance with the law and penalties cannot be assessed. While it is possible (and perhaps likely) that a court would not interpret the permit shield in this manner, there is no reason to take that risk.

Condition 7, Condition 8 (air contaminants collected in air cleaning devices):

Conditions 7 and 8 both apply to the handling of air contaminants collected in an air cleaning device. If Tanagraphics relies upon an air cleaning device that collects air contaminants, this permit must include recordkeeping requirements sufficient to assure that Tanagraphics handles air contaminants in compliance with permit requirements. If these requirements do not apply to Tanagraphics, they must be deleted from the permit. Alternatively, the currently non-existent statement of basis could explain that while this requirement does not currently apply to Tanagraphics, the rule will apply in the event that such a device is installed. Including inapplicable requirements in a permit without explanation only serves to confuse the public.

In response to NYPIRG’s comments on the draft permit with respect to these permit conditions, DEC asserted that “[t]his condition is included with all air permits regardless of whether or not air pollution controls are in place.” DEC’s refusal to identify whether this requirement applies to Tanagraphics and to include sufficient periodic monitoring if it does apply is a clear violation of Part 70 and requires the Administrator to object to this permit.

Condition 12, Item 12.1 (Applicable Criteria):

Condition 12 is a generic condition stating that the facility must comply with any requirements of an accidental release plan, response plan, or compliance plan. NYPIRG is concerned that requirements in these documents might not be incorporated into the permit. If such documents exist, they are applicable requirements and must be included as permit terms. Furthermore, any enforceable requirements contained in “support documents submitted as part of the permit application for this facility” must be incorporated directly into the permit. DEC responded to NYPIRG’s comments on this condition by stating that “[a]ll of the relevant requirements of any supporting documents have been fully incorporated into the draft permits.” Responses to NYPIRG Comments, Re: General Permit Conditions at 5. Even if all relevant requirements are *not* incorporated into Tanagraphics’ permit, there is no reason to include this unenforceable condition in the permit. Because of its vagueness, this permit condition adds absolutely nothing to the permit. As U.S. EPA’s White Paper #2 explains:

Referenced documents must also be specifically identified. Descriptive information such as the title or number of the document and the date of the document must be included so that there is no ambiguity as to which version of which document is being referenced. Citations, cross references, and incorporations by reference must be detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation. Where only a portion of the referenced document applies, applications and permits must specify the relevant section of the document. Any information cited, cross referenced, or incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced.

U.S. EPA, *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program*, March 5, 1996, at 37. The permit’s vague reference to “[a]ny reporting requirements and operations under an accidental release plan, response plan and compliance plans as approved as of the date of the permit issuance” (documents that may or may not exist) cannot possibly satisfy the White Paper #2 requirement that referenced documents be specifically identified and detailed enough that the manner in which the material applies to Tanagraphics is clear.

Condition 14, Item 14.3 (Compliance Requirements):

The permit makes reference to “risk management plans” if they apply to the facility. Somewhere in the permit, it needs to say whether or not CAA § 112(r) applies to this facility. As explained above in connection with Condition 3, the permit must explain what requirements apply to the facility, not simply indicate what might apply. If DEC does not know whether the rule applies, it must say so in the statement of basis. If Tanagraphics is required to submit a § 112(r) plan but has not done so, the permit must include a compliance schedule.

Condition 26 (Required Emissions Tests):

In comments on the draft permit, NYPIRG pointed out that Condition 26 includes everything that is required under 6 NYCRR §202-1.1 except the requirement that the permittee “shall bear the

cost of measurement and preparing the report of measured emissions.” This condition is clearly applicable to Tanagraphics and must be included in the draft permit. It is inappropriate to paraphrase a requirement and leave out one or more conditions. This practice results in confusion over what conditions are applicable to the source. In fact, EPA’s *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* states explicitly 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 at 40. The difference here is that the draft permit paraphrases some of the requirements, while entirely failing to describe or reference other requirements.

DEC did not respond to this comment.

Conditions 29 (Visible emission limited):

NYPIRG’s comments on the draft permit with respect to the condition identified in the proposed permit as Condition 29 pointed out that the draft permit lacked any kind of periodic monitoring to assure Tanagraphics’ compliance with the applicable opacity limitation. (6 NYCRR § 211.3).

DEC responded to NYPIRG’s comment by providing the following information:

This requirement is part of the SIP and applies to all sources however it should be replaced by two separate monitoring conditions (see A and B below). The conditions specify the limit that is not to be exceeded at any time together with an averaging time, monitoring frequency and reporting requirement. To date, EPA has not provided guidance as to the method and frequency of monitoring opacity for general category sources that do not require continuous opacity monitors. This is a nationwide issue that is being dealt with on a source category-by-source category basis. At this point in time we have established a periodic monitoring strategy for oil-fired boilers that are not otherwise required to have COMs. The rest of the emission point universe is divided between those emission points where there is no expectation of visible emissions and those where there are some visible emissions. This category is further subdivided into those source categories where opacity violations are probable and those where opacity violations are not likely. We are currently working to establish engineering parameters that will result in an appropriate visible emission periodic monitoring policy.

Responses to NYPIRG Comments: General Permit Conditions, at 6. While NYPIRG is encouraged by the fact that DEC plans to develop an appropriate visible emission periodic monitoring policy, the periodic monitoring required to demonstrate Tanagraphics’ compliance with 6 NYCRR § 211.3 remains inadequate.

First, the additional conditions described by DEC in its response to NYPIRG's comments appear to be missing from the permit.¹⁵

Second, conditions A and B as referred to in DEC's responsiveness summary do not constitute periodic monitoring. Neither requirement specifies what kind of monitoring is to be performed (other than stating that the averaging method is a 6-minute average). Neither requirement specifies how often any monitoring is to be performed, other than stating "as required." Neither requirement specifies a regular reporting requirement, except "upon request by regulatory agency." It cannot be argued that these conditions suffice as periodic monitoring.¹⁶

Third, NYPIRG is concerned by DEC's position that so long as a national policy has not been developed, DEC is free to issue Title V permits that lack periodic monitoring sufficient to assure compliance. This is a clear violation of 40 CFR Part 70. While a national policy would certainly be helpful to DEC, such a policy is not a prerequisite for inclusion of appropriate periodic monitoring in each individual Title V permit.¹⁷

Finally, it is unclear how the information provided by DEC regarding the "emission point universe" relates to Tanagraphics. Tanagraphics' Title V permit must assure compliance at each emission point. DEC may not omit required periodic monitoring from Tanagraphics' permit on the basis that DEC has not gotten around to developing appropriate periodic monitoring.

The Administrator must object to this permit because it lacks sufficient periodic monitoring as required by the Clean Air Act and 40 CFR Part 70.

b. Monitoring of VOC and HAP emissions

Tanagraphics is required to apply for a Title V permit because it emits volatile organic compounds (VOCs) and hazardous air pollutants (HAPs) at major source levels. The VOC and HAP emissions are released from the various coatings employed at the facility. Tanagraphics complies with VOC RACT by using only low-VOC coatings. Thus, the most important conditions in Tanagraphics' Title V permit are those conditions that govern the VOC content of the coatings in use at the facility.

¹⁵ A copy of the permit was provided to NYPIRG by U.S. EPA Region 2. DEC does not provide public commenters with a copy of a permit when it responds to comments. In light of the fact that the permit is different from the draft permit (and that the permit doesn't always match up with the changes described in DEC's response to comments), NYPIRG requests that U.S. EPA direct DEC to provide commenters with a copy of the permit when it is forwarded to U.S. EPA for review.

¹⁶ It also doesn't appear necessary to break the conditions into two sub-conditions. The only difference between the two sub-conditions is that one specifies that the "upper limit" is 20 percent while the other specifies that the "upper limit" is 57 percent. In all other respects the two conditions are identical.

¹⁷ In fact, the Clean Air Act scheme of providing state agencies with responsibility for and a degree of discretion over the design of Title V programs operates as an incentive for each state permitting authority to make determinations regarding issues that have not been fully resolved by U.S. EPA.

Under applicable requirements, Tanagraphics is required to abide by three different types of requirements. First, Tanagraphics must periodically perform Method 24 tests to directly measure the VOC content of coatings. Second, Tanagraphics must make sure that all coatings are stored in closed containers. Finally, Tanagraphics must maintain various records from the supplier in addition to coating usage records to provide some degree of assurance that the coatings are in compliance with VOC limits.

To assure compliance with VOC limits, it is NYPIRG's position that Tanagraphics' Title V permit should:

- Require the facility to perform regular inspections to ensure that coatings are kept in closed containers as required by 6 NYCRR § 228.10 and 6 NYCRR § 234.6. Records should be kept of the results of each inspection, and a report of this monitoring activity must be submitted to DEC at least once every six months.
- Require Method 24 testing of each coating before it is put into use at the facility. When the facility plans to add a new coating to its line, it must report the change to DEC before beginning to use the coating and schedule Method 24 testing.
- Tanagraphics should be required to maintain supplier and usage records that provide a reasonable assurance that the facility is only using coatings that have been deemed compliant after a Method 24 test. The permit must clearly explain how the records assure Tanagraphics' compliance with VOC emission limitations.

NYPIRG made these recommendations in comments on the draft permit. Unfortunately, DEC chose not to incorporate these recommendations into the final permit. While DEC possesses discretion over what kind of periodic monitoring to include in a Title V permit, any such monitoring plan must be sufficient to assure Tanagraphics' compliance with applicable requirements. On its face, NYPIRG finds that the periodic monitoring included in Tanagraphics' permit is inadequate to satisfy Part 70 requirements.

In the following discussion, we review specific permit conditions that relate to VOC limitations and respond to DEC's reply to our comments on the draft permit.

Work Practice Standards

Conditions 32 and 34 (Handling, storage, and disposal of VOCs):

Both Condition 32 and Condition 34 require Tanagraphics to comply with work practices that reduce VOC emissions, such as storing coatings in closed containers. DEC added these two permit conditions to the permit after NYPIRG pointed out that they were not included in the draft permit. Though NYPIRG also commented that the permit must include periodic monitoring to assure

Tanagraphics' compliance with these conditions, DEC chose not to establish periodic monitoring when it added these conditions to the permit. DEC provided no explanation for this lack of periodic monitoring. Some sort of regular inspections must be performed by the facility to assure compliance with the required work practices.

Method 24 Testing of Actual VOC Content of Coatings
Conditions 38, 40, 41.

For this Title V permit to assure Tanagraphics' compliance with applicable requirements, the VOC content of each coating used at the facility must be tested using Method 24. Unfortunately, while the permit refers to Method 24 testing, the permit is vague about exactly when this testing must be performed. As a result, this permit is unenforceable as a practical matter.

Condition 38 (VOC limit under § 234.3(b)(2)):

Condition 38 establishes that under 6 NYCRR § 234.3(b)(2), Tanagraphics must not use a fountain solution that contains more than 10 percent by weight of VOC. Method 24 is the reference test method. The flaw in this permit condition is that the frequency of Method 24 testing is too vague to be enforceable; Method 24 testing is required "per batch of product/raw material change." This is a change from the draft permit, which required testing on an annual basis. In commenting on the annual testing requirement in the draft permit, NYPIRG asserted that DEC must provide support in the statement of basis for why annual testing is sufficient to assure compliance with § 234.3(b)(2). In particular, NYPIRG pointed out that:

If Tanagraphics always uses the same solutions and the VOC content of those solutions never varies, it is probably appropriate to only require testing on an annual basis. Under any other circumstance, some form of periodic monitoring must supplement the annual testing requirement.

After the public comment period, DEC revised this condition to only require monitoring "per batch of product/raw material change." It is possible that this change to the permit was an attempt to deal with NYPIRG's concern over whether Tanagraphics is allowed to switch to an untested coating without informing DEC and without performing the Method 24 test. Unfortunately, the new permit condition fails to make it clear when Tanagraphics must perform a Method 24 test on a new coating. (Does the permit require testing before the coating is first used at the facility? Within thirty days after first use? Within one year?)

As explained above, NYPIRG's position is that each coating must be tested using Method 24 before it is put into use at the facility. When the facility plans to add a new coating to its line, it must be required to report the change to DEC *in writing* before beginning to use the coating and schedule Method 24 testing. Moreover, the condition fails to make it clear that each coating must be tested when multiple coatings ("raw materials") are added at the same time. Because of the vagueness as to when

Method 24 testing must be performed and which coatings must be tested, condition 38 does not assure Tanagraphics' compliance with 6 NYCRR § 234.3(b)(2).

In addition to requiring Tanagraphics to perform Method 24 testing to demonstrate that each new coating complies with the VOC limitation, the permit must require Tanagraphics to perform Method 24 testing on any coating that it is currently in use but has not yet been tested. The statement of basis must clearly identify the coatings that have already been tested, the date of the test, the results of the test, and a summary of Tanagraphics' usage records. Otherwise, there will be no record of which coatings have already been tested and the public will be unable to determine when a new coating is employed at the facility that has not been tested. The permit cannot assure Tanagraphics' compliance with VOC limits if the public is unable to determine whether a coating that is in use at the facility has been tested.

Conditions 40 and 41 (VOC Limit under 6 NYCRR § 228.7):

Condition 40 contains the requirement under 6 NYCRR § 228.7 that “[c]oatings applied to fabric may contain no more than 2.9 pounds of volatile organic compounds per gallon of coating (minus water and excluded VOC) as applied.” Similarly, Condition 41 contains the requirement under 6 NYCRR § 228.7 that “[c]oatings used for the surface coating of paper and other web materials may contain a maximum of 2.9 pounds of volatile organic compounds per gallon of coating (minus water and excluded VOC) as applied.” Both Condition 40 and Condition 41 apply to emission unit U-0002. The reference test method for both conditions is Method 24.

Unfortunately, conditions 40 and 41 both violate 40 CFR Part 70 because they lack periodic monitoring that is sufficient to assure Tanagraphics' compliance with the VOC limit contained in 6 NYCRR § 228.7. Instead of requiring periodic monitoring, the permit simply states that the monitoring frequency is “single occurrence.” DEC failed to provide any sort of explanation for this lack of periodic monitoring and chose not to address NYPIRG's comments on this issue.

Recordkeeping as Surrogate Monitoring of Compliance With VOC Limits (Conditions 31, 33, 39)

Apparently, DEC hopes to rely on recordkeeping requirements to assure Tanagraphics' compliance with VOC limits after initial Method 24 tests show that each coating in use at the facility is in compliance with 6 NYCRR § 228 and § 234. However, it is not at all clear that the recordkeeping established under this permit will result in “reliable data from the relevant time period that are representative of the source's compliance” as mandated by 40 CFR § 70.6(a)(3).

NYPIRG is particularly concerned about the fact that Tanagraphics is apparently not required to provide data that has already been converted into the units in which compliance with the underlying requirement is measured. For example, § 234.4(b)(2) limits fountain solutions to 10 percent VOCs by weight or less. Periodic monitoring to assure compliance with § 234.4(b)(2) is found in Condition 33, which includes the recordkeeping requirements of § 234.4(b)(3). In particular, Tanagraphics must keep

records of the name, VOC content in lbs per gallon, and the usage in gallons of each fountain solution used at the facility. It is not at all clear, however, how compliance with § 234.4(b)(2) will be measured. On the one hand, it could be argued that each fountain solution, no matter how much is used, must comply with the 10 percent VOCs by weight limit. On the other hand, it could be argued that compliance with § 234.4(b)(2) is measured based on the average VOC content of all fountain solutions used over the course of a month. The fact that Condition 33 requires the facility to keep track of the total usage in gallons of each solution over the course of a month, and that monitoring frequency is described as “monthly” makes it seem as though compliance is based on a monthly average of all solutions used. The Title V permit must clear up this confusion and leave no doubt as to the way that compliance with applicable requirements is to be measured.

The monitoring reports submitted by Tanagraphics must contain data that represents the compliance status of the facility. In other words, the monitoring reports must document the percentage of VOC’s by weight in a way that demonstrates compliance or non-compliance with § 234.4(b)(2). Members of the public must not be required to perform additional calculations in order to be assured of the facility’s compliance with § 234.4(b)(2). Otherwise, this permit condition is not enforceable as a practical matter.

The recordkeeping requirements designed to assure compliance with 6 NYCRR § 228.7 suffer from a similar problem as the recordkeeping requirements under § 234.4(b)(2). Conditions 40 and 41 contain the § 228.7 requirement that the VOC content of coatings may not exceed 2.9 lbs/gal as applied. Condition 31 contains the recordkeeping requirements of § 228.5(a), which require Tanagraphics to maintain certification from the coating supplier/manufacturer which verifies the parameters used to determine the actual VOC content of the as applied coating. In addition, Condition 31 requires Tanagraphics to maintain purchase, usage, and/or production records of the coating material. Condition 39 provides the method of calculation of the actual VOC content of the as applied coating. Unfortunately, at no point does the Title V permit require Tanagraphics to perform the necessary calculations and submit a report of the results to DEC. In the absence of such a requirement, this permit is not enforceable as a practical matter and U.S.EPA must object to its issuance.

In responding to NYPIRG’s comments on the draft permit, DEC entirely failed to address NYPIRG’s concerns about the lack of sufficient periodic monitoring to assure compliance with 6 NYCRR § 228.7 and § 234.4(b)(2).

c. Requirements Left Out of the Permit

In comments made during the public comment period, NYPIRG pointed out that two different opacity requirements appeared to apply to Tanagraphics but were not included in the draft permit. In particular, NYPIRG identified §228.4, which provides that:

No person shall cause or allow emissions to the outdoor atmosphere having an average opacity of 20 percent or greater for any consecutive six-minute period from any emission source subject to this Part.

In addition, NYPIRG identified § 234(e), which provides that:

No person shall cause or allow emissions to the outdoor atmosphere having an average opacity of 10 percent or greater for any consecutive six-minute period from any emission source subject to this Part.

With respect to both requirements, NYPIRG commented that they must be included in the permit and they must be supported by periodic monitoring that is sufficient to assure Tanagraphics' ongoing compliance.

DEC did not deny that these requirements apply to Tanagraphics. Rather, DEC stated that "[t]he opacity limitation is established in the Cond. 30 (6 NYCRR Part 211.3). No change is necessary."

DEC is incorrect in arguing that Condition 30 effectively incorporates the opacity requirements of § 234 and § 228. Condition 30 (actually, condition 29 in the final permit provided to NYPIRG by U.S. EPA) only cites to 6 NYCRR § 211.3 as the basis for the opacity limitation. While it is sometimes acceptable for a permitting authority to streamline several similar requirements into one condition, U.S. EPA's White Paper #2 makes it clear that:

Permitting authorities must include citations to any subsumed requirements in the permit's specification of the origin and authority of permit conditions. In addition, the part 70 permit must include any additional terms and conditions as necessary to assure compliance with the streamlined requirement. In all instances, the permit terms and conditions must be enforceable as a practical matter.

U.S. EPA, *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* (March 5, 1996) at 13. Thus, Condition 29 of the final permit does not incorporate the opacity requirements of § 228 and § 234. U.S. EPA must object to the issuance of this permit because it does not include all applicable requirements.

In addition to the fact that Condition 29 in the final permit does not identify § 234 and § 228 as the origin and authority of the opacity requirement, Condition 29 is insufficient as a streamlined opacity requirement because the opacity requirement of 6 NYCRR § 211.3 is not as strict as the opacity requirements of § 234 and § 228, described above. Unlike § 228.4, § 211.3 allows one continuous six-minute period per hour of not more than 57 percent opacity. And, § 234(e) sets the opacity limit at 10 percent, not 20 percent as described in Condition 29. A Title V permit must assure compliance with EACH applicable requirement. If DEC wishes to streamline multiple opacity requirements into one condition, that condition must assure compliance with all subsumed requirements. Even if DEC modified the existing Condition 29 to cite to § 228, § 234, the permit would be deficient because it does not assure compliance with the opacity requirements of § 228 and § 234.

Finally, as discussed above in our comments on Condition 29, Condition 29 entirely lacks

periodic monitoring. DEC provides no explanation as to why periodic monitoring is not necessary to assure Tanagraphics' compliance with § 211.3. In addition to the fact that Condition 29 does not suffice to incorporate the opacity requirements of § 228 and § 234 into the permit, U.S. EPA must object to issuance of this permit because it lacks periodic monitoring to assure Tanagraphics' compliance with any of the three opacity requirements.

Conclusion

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the Title V permit for Tanagraphics.

Respectfully submitted,

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