

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
NEW YORK CITY TRANSIT	)	
AUTHORITY	)	ORDER RESPONDING TO
	)	PETITIONER’S REQUEST THAT
Permit ID: 2-6105-00262/00009	)	THE ADMINISTRATOR OBJECT
Facility DEC ID: 2610500262	)	TO ISSUANCE OF A
	)	STATE OPERATING PERMIT
Issued by the New York State	)	
Department of Environmental Conservation	)	Petition Number: II-2002-04
Region 2	)	
_____	)	

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

The United States Environmental Protection Agency (“EPA”) received a petition dated May 16, 2002, from the New York Public Interest Research Group, Inc. (“NYPIRG” or “Petitioner”) requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, to the New York City Transit Authority’s (“NYCTA”) East New York bus depot located at 1 Jamaica Avenue, Brooklyn, New York 11207. The permittee will be referred to as “NYCTA” for purposes of this Order. The NYCTA facility is a repair and maintenance facility for subway cars which consists of three boilers, two fluorescent light bulb crushers, a gasoline dispensing station, one gasoline storage tank, and three spray paint booths. The NYCTA permit was issued by the New York State Department of Environmental Conservation, Region 2 (“DEC”) on March 22, 2002, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR parts 200, 201, 621 and 624.

The petition alleges that the NYCTA permit does not comply with 40 CFR part 70 in that: (I) DEC violated the public participation requirements of CAA §502(b)(6) and 40 CFR §70.7(h) by inappropriately denying NYPIRG's request for a public hearing; (II) the permit is based on an inadequate application; (III) the permit does not include an adequate statement of basis as required by 40 CFR § 70.7(a)(5); (IV) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (V) the permit does not require prompt reporting of any deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (VI) the permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70; (VII) the permit does not include federally enforceable conditions that require timely permit renewal; and (VIII) the permit lacks monitoring sufficient to assure the facility's compliance with all applicable requirements. The Petitioner has requested that EPA object to the issuance of the NYCTA Permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

EPA has reviewed these allegations pursuant to the standard set forth by Section 505(b)(2) of the Act, which places the burden on the petitioner to demonstrate to the Administrator that the permit is not in compliance with the applicable requirements of the Act or the requirements of Part 70. See also 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2002).

Based on a review of all the information before me, including the petition; the permit application; a January 28, 2002 letter from Elizabeth Clarke of DEC to Steven C. Riva of EPA regarding DEC's response to comments received on the draft operating permit [hereinafter, "response to comments document" or "Responsiveness Summary"]; comments on the draft

permit submitted by NYPIRG on August 9, 2001; the administrative record supporting the permit; and relevant statutory and regulatory guidance; I deny in part and grant in part NYPIRG's request for an objection to the NYCTA title V permit for the reasons set forth in this Order.

**A. STATUTORY AND REGULATORY FRAMEWORK**

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

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

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

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

Section 505(b)(2) of the Act states that if the EPA does not object to a permit, any member of the public may petition the EPA to take such action, and the petition shall be based on objections that were raised during the public comment period<sup>1</sup> unless it was impracticable to do so. This provision of the CAA is reiterated in the implementing regulations at 40 CFR § 70.8(d). If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

## **B. ISSUES RAISED BY PETITIONER**

On April 13, 1999, NYPIRG sent a petition to EPA which brought programmatic problems concerning DEC's application form and instructions to our attention. NYPIRG raised

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<sup>1</sup> See CAA § 505(b)(2); 40 CFR § 70.8(d). Petitioner commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. See Letter from Lisa Garcia and Tracy A. Peel, Esq. of NYPIRG to DEC (August 9, 2001) ("NYPIRG Comment Letter").

those issues and additional program implementation issues in individual permit petitions, including the instant petition, and in a citizen comment letter, dated March 11, 2001 that was submitted as part of the settlement of litigation arising from EPA's action extending title V program interim approvals. *Sierra Club and the New York Public Interest Research Group v. EPA*, No. 00-1262 (D.C.Cir.).<sup>2</sup>

EPA received a letter dated November 16, 2001, from DEC Deputy Commissioner Carl Johnson, committing to address various program implementation issues by January 1, 2002, and to ensure that the permit issuance procedures are in accord with state and federal requirements. EPA monitored New York's title V program to ensure that the permitting authority is implementing the program consistent with its November 16, 2001 "commitment letter," New York's approved program, the Act, and EPA's regulations.

Based on EPA's program review, DEC is substantially meeting the commitments<sup>3</sup> made in its November 16, 2001 letter. As a result, EPA has not issued a notice of deficiency ("NOD") at this time. Failure to properly administer or enforce the program may result in the issuance of a NOD pursuant to § 502(i) of the Act and 40 CFR § 70.10(b) and (c).

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

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

(I) Public Hearing

NYPIRG claims DEC improperly denied NYPIRG's request for a public hearing on the NYCTA permit as provided for in 40 CFR §70.7(h). NYPIRG submitted written comments with a request for a public hearing to DEC during the public comment period. DEC denied the hearing request and discussed its rationale in its January 28, 2002 letter to EPA transmitting DEC's response to comments. NYPIRG asserts that it requested a hearing so its members could participate in the permit proceeding by submitting oral comments on the draft permit. NYPIRG contends that a significant degree of public interest in the permit should have been evident from its submission of thirty pages of written comments. NYPIRG requests EPA's objection to the NYCTA permit on the basis that DEC did not hold a public hearing before the final permit was issued and requests that DEC hold a public hearing on the permit. Petition at 2.

In its petition, NYPIRG does not demonstrate or even allege that a public hearing on this permit would have garnered additional information such that it may have resulted in different terms and conditions in the permit. In fact, by its own admission, NYPIRG submitted thirty pages of relevant comments to DEC on the draft permit. DEC responded in writing to these comments in its January 28, 2002, Responsiveness Summary. Accordingly, in this case, NYPIRG does not demonstrate that DEC's failure to grant a hearing on the permit resulted in, or may have resulted in, a deficiency in the permit.

Additionally, neither the CAA or EPA's implementing regulations require a permitting authority to hold a hearing when one is requested. Rather, the CAA and applicable regulations require that States offer an opportunity for a public hearing. *See* CAA § 502(b)(6) and 40 CFR § 70.7(h)(2). In accordance with these requirements, the New York title V program provides that

DEC has the discretion to hold either a legislative or an adjudicatory public hearing when one is requested during the public's review of a draft title V permit. In this case, NYPIRG requested a public hearing but the DEC determined that a public hearing was not warranted. Response to Comments dated January 28, 2002. As the DEC has the discretion to refuse to hold a public hearing and the Petitioner has not demonstrated that this discretion was not reasonably exercised, NYPIRG's request that EPA object to the permit on these grounds is denied.

## (II) Permit Application

Petitioner alleges that the applicant did not submit a complete permit application in accordance with the requirements of the CAA§114(a)(3)(C), 40 CFR §70.5(c) and 6 NYCRR §201-6.3. Petition at 2. Petitioner incorporates a petition that it filed with the Administrator on April 13, 1999, contending that the DEC's application form is legally deficient because it fails to include specific information required by both the EPA regulations and the DEC regulations. This earlier petition asks EPA to require corrections to the DEC program.

With regard to the NYCTA permit application, petitioner claims that the application lacks an initial compliance certification, a statement of the methods for determining initial compliance, a description of all applicable requirements, and a statement of the methods for determining compliance on an on-going basis. EPA's response to each of these allegations is delineated below.

### (a) Initial Compliance Certification

NYPIRG claims the NYCTA application form lacked an initial compliance certification

with respect to all applicable requirements. NYPIRG asserts that, absent such certification, it is difficult to determine whether the facility was in compliance with applicable requirements at the time it submitted its application. Petition at 2.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claims here that NYCTA failed to submit a proper initial compliance certification with its application, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA Section 505(b)(2) (objection required "if the Petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); 40 CFR § 70.8(c)(1). As explained below, EPA believes that petitioner has failed to demonstrate that the lack of a proper initial compliance certification, certifying compliance with all applicable requirements at the time of application submission, resulted in, or may have resulted in, a deficiency in the permit.

The application form used by DEC did not clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. Instead, NYCTA certified that it would be in compliance with all applicable requirements at the time of permit issuance while noting in the compliance plan section for the boilers that these emission units will not be in compliance at the time of permit issuance<sup>4</sup>. Therefore, even if the application form used by NYCTA had required the facility to certify to its compliance at the time of application submission, the ultimate permit issued would have been the same. Accordingly,

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<sup>4</sup> In its application form, NYCTA certified that, for all units at the facility that are operating in compliance with all applicable requirements, the facility will continue to be operated and maintained to assure compliance for the duration of the permit, except for those units referenced in the compliance plan portion of the permit.



because the petitioner has not demonstrated that the NYCTA permit fails to comply with applicable requirements, EPA denies the petition on this point.

(b) Statement of Methods for Determining Initial Compliance

The application form lacks 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). Petition at 3.

Specifically, the Petitioner alleges that the application form omits “a statement of methods used for determining compliance” as required by 40 CFR § 70.5(c)(9)(ii). EPA disagrees with petitioner that the application form used by the NYCTA facility failed to include any description of, or reference to, any applicable test method that the source intends to use for determining compliance with each applicable requirement. While NYCTA’s application form did not include the methods for determining compliance, for example, with the opacity limit of 6 NYCRR § 227-1.3 for the boilers, it did specify the recordkeeping needed to assure compliance with the opacity limit of 6 NYCRR § 228.4. However, when DEC issued the permit it included the necessary methods for determining compliance. For instance, to determine compliance with the opacity standard of 6 NYCRR § 227-1.3, the permit requires NYCTA to conduct daily visible emission observations and a Method 9 test if visible emissions are seen for two consecutive days. See Condition 45. In light of the fact that the permit corrected the omission from the permit application, EPA believes that had the application submitted by NYCTA included a statement of

methods, the final permit would not have been any different. The permit has been issued with the necessary methods for determining compliance; therefore, EPA denies the petition on this point.

(c) Description of Applicable Requirements

Petitioner's next claim is that EPA's regulations require the applicable requirements contained in a title V permit be accompanied by a narrative description of the requirement. NYPIRG alleges that such omission makes it difficult for a member of the public to determine whether a proposed permit includes all applicable requirements. Petition at 3.

Citations may be used to streamline how applicable requirements are described in an application, provided that the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. *See White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995) at 20-21. In addition, a permitting authority may allow an applicant to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject, provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public. Documents available to the public include regulations printed in the Code of Federal Regulations or its State equivalent. *See id.*

In describing applicable requirements, the NYCTA permit application refers to State and Federal regulations. For example, page 6 of the NYCTA application identifies several applicable

requirements including, but not limited to 6 NYCRR §§ 225 and 227. These regulations are publicly available and are also available on the internet. The petitioner has not shown that any of the descriptions were in error or that the referenced material is not available to the public. The petition is therefore denied on this issue.

(d) Statement of Methods for Determining Ongoing Compliance

The Petitioner further states that the application form lacks a description of or reference to any applicable test method for determining ongoing compliance with each applicable requirement. Petitioner alleges that the lack of information in the application also makes it more difficult for the public to evaluate the adequacy of monitoring in the proposed permit. Petition at 3.

Although the application form failed to include any description of, or reference to, any applicable test method that the source intends to use for determining compliance with each applicable requirement, DEC included them when it issued the permit. The methods for determining initial compliance are the same for subsequent or on-going compliance. For instance, the permit requires NYCTA to conduct daily visible emission observations and a Method 9 test if visible emissions are seen for two consecutive days to determine compliance with the opacity standard of 6 NYCRR § 227-1.3. *See* Condition 45. For the same reasons discussed above in II.(b), EPA denies the petition on this issue.

III) Statement of Basis

Petitioner alleges that the permit is defective because DEC failed to include an adequate statement of basis or “rationale” with the draft permit explaining the legal and factual basis for the permit conditions. NYPIRG claims that without a statement of basis it is difficult to evaluate DEC’s monitoring decisions. Therefore, NYPIRG requests that DEC develop an adequate statement of basis for the draft permit and re-release it for a new public comment period. NYPIRG states that the lack of an adequate statement of basis prevents concerned citizens from effectively evaluating periodic monitoring decisions and preparing effective comments during the 30-day public comment period. Petition at 4.

Section 70.7(a)(5) of EPA’s permit regulations states that “the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions).” The statement of basis is not part of the permit itself. It is a separate document which is to be sent to EPA and to interested persons upon request.<sup>5</sup>

A statement of basis ought to contain a brief description of the origin or basis for each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should highlight items such as the permit shield, streamlined conditions, or any monitoring requirements that is required under 40 CFR 70.6(a)(3)(i)(B) or 6 NYCRR section 201-6.5 (b)(2). Thus, it should include a discussion of the

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<sup>5</sup> Unlike permits, statements of basis are not enforceable, do not set limits and do not create obligations. Thus, certain elements of statements of basis, if integrated into a permit document, could create legal ambiguities.

decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA with a record of the applicability and technical issues surrounding the issuance of the permit.<sup>6</sup> See e.g., *In the Matter of Port Hudson Operation Georgia Pacific* (“Georgia Pacific”), Petition No. 6-03-01, at pages 37-40 (May 9, 2003); *In the Matter of Doe Run Company Buick Mill and Mine* (“Doe Run”) Petition No. VII-1999-001, at pages 24-25 (July 31, 2002). Finally, in responding to a petition filed in regard to the Fort James Camas Mill title V permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for the selected monitoring method be documented in the permit record. See *In Re Fort James Camas Mill* (“Ft. James”), Petition No. X-1999-1, at page 8 (December 22, 2000).

EPA’s regulations provide that the permitting authority must provide EPA with a statement of basis. 40 CFR § 70.7(a)(5). The failure of a permitting authority to meet this requirement, however, does not necessarily demonstrate that the title V permit is flawed. In

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<sup>6</sup> Additional guidance was provided in a letter dated December 20, 2001 from Region V to the State of Ohio on the content of an adequate statement of basis. See <http://www.epa.gov/rqytgrnj/programs/artd/air/title5/t5memos/sbguide.pdf>. Region V’s letter recommends the same five elements outlined in a Notice of Deficiency (“NOD”) recently issued to the State of Texas for its title V program. 67 Fed. Reg. 732 (January 7, 2002). These five key elements of a statement of basis are (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. *Id.* at 735. In addition to the five elements identified in the Texas NOD, the Region V letter further recommends the inclusion of the following topical discussions in the statement of basis: (1) monitoring and operational restrictions requirements; (2) applicability and exemptions; (3) explanation of any conditions from previously issued permits that are not being transferred to the title V permit; (4) streamlining requirements; and (5) certain other factual information as necessary. In a letter dated February 19, 1999 to Mr. David Dixon, Chair of the CAPCOA Title V Subcommittee, the EPA Region IX Air Division provided a list of air quality requirements to serve as guidance to California permitting authorities that should be considered when developing a statement of basis for purposes of EPA Region IX’s review. This guidance is consistent with the other guidance cited above. Each of the various guidance documents, including the Texas NOD and the Region V and IX letters, provide generalized recommendations for developing an adequate statement of basis rather than “hard and fast” rules on what to include in any given statement of basis. Taken as a whole, they provide a good roadmap as to what should be included in a statement of basis on a permit-by-permit basis, considering the technical complexity of the permit, history of the facility, and the number of new provisions being added at the title V permitting stage, to name a few factors.

reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. Thus, where the record as a whole supports the terms and conditions of the permit, flaws in the statement of basis generally will not result in an objection. In contrast, where flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, EPA will object to the issuance of the permit. *See e.g., Ft. James at 8, Georgia Pacific at 37-40.*

In this case, the final permit contains a permit description providing a brief description of the various operations, the emission units subject to applicable requirements and a list of emission activities that are classified as exempt or trivial at the facility. While the permit description does not provide the amount of detail a statement of basis would in terms of explaining how the selected monitoring assures compliance, the simplicity of the nature of NYCTA's operation as a repair and maintenance shop for subway cars and buses helps to make this permit easy to understand. The monitoring strategies selected for this facility are established in the applicable rules. For example, visible emission observation/Method 9 are required to monitor opacity from the boiler stacks, Method 24 and calculations performed using the equation listed in 6 NYCRR § 228.2 are required to monitor the VOC contents of coating materials, and daily inspection of the Stage II control system is required for the gasoline dispensers. The permit record, in this instance contains sufficient information describing these requirements. Given that the NYCTA operation at this facility is not a complicated or complex operation, a more detailed

explanatory document was not necessary to support the adequacy of the permit itself, nor was it necessary to understand the legal and factual basis for the final permit conditions. Accordingly, EPA does not believe that the circumstances of this case warrant an objection to the NYCTA permit and, therefore, denies the petition on this issue<sup>7</sup>.

(IV) Annual Compliance Certification Condition

Petitioner raises certain issues with regard to the annual compliance certification requirement. Petitioner alleges that the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5) by not requiring the facility to certify compliance with all permit conditions. Petitioner claims rather that the NYCTA permit requires only that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification,” as stated in Condition 24. Specifically, petitioner is concerned with the language in the permit that labels certain permit terms as “compliance certification” conditions. NYPIRG notes that requirements that are labeled “compliance certification” are those that identify a monitoring method for demonstrating compliance. NYPIRG interprets such compliance certification “designations” as a way of identifying which conditions are covered by the annual compliance certification requirement. NYPIRG further asserts that permit conditions that lack periodic monitoring are thus excluded

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<sup>7</sup> In accordance with the November 16 2001 letter, DEC’s permit issuance process now provides that a permit may not be issued in draft unless a comprehensive permit review report has been prepared for the draft permit. This requirement also applies to the issuance of draft permits for revised or modified and renewed permits. Thus, the re-opening and re-issuance of this permit will provide EPA and the public an additional opportunity to comment on legal and factual basis for the draft permit conditions.

from the annual compliance certification. Moreover, NYPIRG claims DEC's intent to designate only those permit conditions designated for the annual compliance certification is apparent from the language Condition 24.2(ii) which states "[t]he responsible official must include in the annual certification report all terms and conditions contained in this permit which are identified as being subject to certification, including emission limitations, standards or work practices." Petitioner claims such "designation" an incorrect application of state and federal regulations because facilities must certify compliance with every permit condition, not just those that are accompanied by a monitoring requirement. Therefore, NYPIRG requests EPA to object to the NYCTA permit on this basis. Petition at 6.

The language in the permit that labels certain terms as "compliance certification" conditions does not mean the NYCTA facility is *only* required to certify compliance with those permit terms containing this language. "Compliance certification" is a data element in New York's computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. Condition 24.2(i) of the permit delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

The language in the NYCTA permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, mirrors the language of 40 CFR §§ 70.6(c)(5) and (6). 6 NYCRR § 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Section 201-6.5(e) requires the following in annual certifications: (i) the identification of each term or condition of the permit that is the basis



of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the Administrator and shall contain such other provisions as the department may require to assure compliance with all applicable requirements. The NYCTA title V permit includes this language at Condition 24.2(i). Therefore, the references to “compliance certification” do not negate the DEC’s general requirement for compliance certification of terms and conditions contained in the permit. Because the permit and New York’s regulations comply with 40 CFR §70.6(c)(5), EPA is denying the petition on this point. However, when the DEC revises the permit in response to other sections of this Order, it should add language to clarify the requirements relating to annual compliance certification reporting.<sup>8</sup>

The second issue raised by petitioner concerns the submission dates for annual compliance certifications. The draft permit stated that annual certification reports are “due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department.” Petition at 6-7. Based on EPA’s review, Condition 24 clearly states that the initial report is due 1/30/03 eliminating any ambiguity as to when the initial report was due. The schedule set forth in the permit is appropriate for complying

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<sup>8</sup> In its November 16, 2001 letter, the DEC committed to include additional clarifying language regarding the annual compliance certification in draft permits issued on or after January 1, 2002, and in all future renewals so as to preclude any confusion or misunderstanding, such as that argued by the Petitioner.

with the annual compliance certification requirements of this permit. In addition, there is no evidence that this language caused a problem with NYCTA's initial annual certifications especially since this certification has already been submitted in a timely manner. Therefore, EPA denies the petition on this point.

(V) Prompt Reporting of Deviations

Petitioner claims the NYCTA permit does not require the permittee to submit prompt reports of any deviations from permit requirements as mandated under 40 CFR § 70.6(a)(3)(iii)(B). Petitioner notes that while the permit now contains a timetable for reporting of deviations of hazardous air pollutants or other regulated air pollutants under some circumstances, all other deviations are required to be reported only in the six-month monitoring report. NYPIRG asserts that this requirement in Condition 25 does not correctly apply the prompt reporting requirements because prompt reporting must be more frequent than the semi-annual reporting requirement. NYPIRG asks EPA to object to the NYCTA permit and order DEC to require the submission of prompt written reports of all deviations from permit conditions. Petition at 7.

Title V permits must include requirements for the prompt reporting of deviations from permit requirements. *See* 40 CFR § 70.6(a)(3)(iii)(B).<sup>9</sup> States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. Moreover, States are required to consider prompt reporting of deviations from

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<sup>9</sup> 40 CFR § 70.6(a)(3)(B) states: “[t]he permitting authority shall define “prompt” in relation to the degree and type of deviation likely to occur and the applicable requirement.”

permit conditions in addition to the reporting requirements of the explicit applicable rules.

Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case determination under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).<sup>10</sup>

In this case, DEC states in Condition 25 that NYCTA must report deviations in compliance with the time frame specified in the applicable requirements. However, if the applicable requirement does not establish a time frame for prompt reporting of deviations, NYCTA must report according to the procedures specified in Condition 25. This condition requires that when emissions of a hazardous air pollutant or a toxic air pollutant continue for more than an hour in excess of permit requirements, NYCTA must report the instance to DEC within 24 hours by telephone. When emissions of any regulated air pollutant continue for more than 2 hours in excess of permit requirements, NYCTA must report to DEC within 48 hours by telephone. A written notice certified by a responsible official must be submitted within 10 working days of an occurrence of deviations and also identified in the semi-annual report. All other deviations from permit requirement are reported in the semi-annual report.

EPA disagrees with the Petitioner that the permit needs to supplement the above prompt reporting requirements with additional conditions for prompt reporting of deviations as stipulated

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<sup>10</sup> EPA's rules governing the administration of a federal operating permit program require, *inter alia*, that permits contain conditions providing for the prompt reporting of deviations from permit requirements. See 40 CFR § 71.6(a)(3)(iii)(B)(1)-(4). Under this rule deviation reporting is governed by the time frame specified in the underlying applicable requirement unless that requirement does not include a requirement for deviation reporting. In such a case, the part 71 regulations set forth the deviation reporting requirements that must be included in the permit. For example, emissions of a hazardous air pollutant or toxic air pollutant that continue for more than an hour in excess of permit requirements, must be reported to the permitting authority within 24 hours of the occurrence.

in 40 CFR § 70.6(a)(3)(iii)(B). Because of the nature of the operation of the NYCTA facility, i.e., a maintenance and repair shop for the New York City subway cars and buses, the pollutant emitting activities are monitored, for the most part, through the monitoring of work practices. For instance, the gasoline dispensing station which allows refueling of buses at the repair shop is subject to the Stage I and Stage II vapor collection systems requirements of 6 NYCRR § 230.2. NYCTA is required to perform daily visual inspection of these systems to ensure that all worn-out or defective components are repaired or replaced to ensure a tight fit at the nozzles of the refueling hose. The light bulb crushers are equipped with filters to capture fugitive particulate. NYCTA is required to perform a weekly visual inspection of the filters to ensure that they are replaced as necessary. The spray paint booths are equipped with two water curtains which are turned on to capture fugitive volatile organic compounds (VOC) emissions whenever any of the three paint booths is in operation. The facility is also required to record in a log whether the water curtains were operating when the paint booths were in use. The three small boilers at NYCTA are capable of burning natural gas or Number 6 fuel oil and are subject to a maximum sulfur-in-fuel limit of no more than 0.3% by weight. To demonstrate compliance with this limit, NYCTA must maintain records of fuel sulfur content for each delivery of fuel oil. EPA believes semi-annual reporting can be accepted as prompt reporting of deviations for this facility based on the degree and type of deviation likely to occur and the applicable requirements. The Petitioner has not demonstrated that the reporting requirements contained in the NYCTA permit fail to meet the standard set forth in 40 CFR § 70.6(A)(3)(iii)(B). Thus, EPA denies the petition on this issue.

(VI) Startup/Shutdown, Malfunction, Maintenance, and Upset Provision

Petitioner asserts that the proposed permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70. The petition provides a detailed, 4-part discussion of Condition 76 of the permit. NYPIRG alleges that the permit allows NYCTA to assert an affirmative defense under the "excuse provision" of Condition 76 for violations that occur during equipment maintenance, startup/shutdown, malfunctions, or upsets as long as the violations are unavoidable. First, NYPIRG claims that the excuse provision of Condition 76 has not been approved by the EPA as part of the New York SIP. The version of the excuse provision that was approved into the SIP is found under 6 NYCRR § 201.5 and that version does not cover violations that occur during "shutdown" or "upsets" so those words must be deleted from the draft permit. Second, NYPIRG alleges the excuse provision as found in Condition 76 fails to specify the "reasonable available control technology" (RACT) that must be employed during maintenance, startup or malfunction conditions. Third, the excuse provision fails to define what type of conditions would be considered unavoidable; thereby undermining the enforceability of this permit. Fourth, NYPIRG alleges both Conditions 76 and 25 to be deficient for not requiring timely written reports of deviations due to startup, shutdown and maintenance with appropriate deadlines. Absent written reports of deviation, the public would be unable to review such violations. For violations due to malfunction, NYPIRG suggests that both telephone and written notification to DEC within two working days and written report within 30 days. See Petition at 8-10.

In the NYCTA permit, DEC incorporated the “excuse provision”<sup>11</sup> that cites 6 NYCRR section 201-1.4 into the state-only side of the permit. *See* Permit Condition 76. This condition provides the DEC with the discretion to excuse the facility from compliance with applicable state-only emission standards under certain circumstances, based on the state-specific criteria set forth in 6 NYCRR § 201-1.4. Petitioner’s allegations concerning Condition 76 were based on the premise that this condition was located in the federal and state enforceable side of the permit. Since this condition is actually located in the State-only side of the permit, Petitioner’s allegations regarding this provision (RACT, definition of terms, prompt reporting of deviations, “unavoidable” defense) have no merit because this condition is not included in the federal and state enforceable section of the permit. In addition, DEC included clarifying language in the final NYCTA permit stating that violations of federal requirements may not be excused unless the specific federal regulation provides for an affirmative defense during startups, shutdowns, malfunctions, or upsets. Condition 76.1(e). EPA denies the petition on this point.

With regard to NYPIRG’s allegation concerning the lack of written reporting requirements in Condition 25, EPA finds no merit in petitioner’s claim. Condition 25 clearly requires for HAPs and other regulated air pollutants “[a] written notice, certified by a responsible official consistent with 6 NYCRR Part 201-6.3(d)(12), must be submitted within 10

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<sup>11</sup> The CAA does not allow for automatic exemptions from compliance with applicable SIP emissions limits during periods of start-up, shut-down, malfunctions or upsets. Further, improper operation and maintenance practices do not qualify as malfunctions under EPA’s policy. To the extent that a malfunction provision, or any provision giving substantial discretion to the state agency broadly excuses sources from compliance with emission limitations during periods of malfunction or the like, EPA believes it should not be approved as part of the federally approved SIP. *See In re PacifiCorp’s Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1, at 23 (Nov. 16, 2000), available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>

working days of an occurrence for deviations...” All other deviations must be identified in the six-month monitoring report. Therefore, EPA denies the petition on this point.

(VII) Permit Renewal

Petitioner alleges the NYCTA permit violates 40 CFR part 70 because it lacks the federally enforceable requirement that the facility apply for a renewal permit at least six months prior to the date of permit expiration. Petitioner cites 40 CFR § 70.5(a)(1)(iii) which provides that “[f]or purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time, as may be approved by the Administrator, that ensures term of the permit will not expire before the permit is renewed.” Petitioner argues that the NYCTA permit violates 40 CFR part 70 because it does not include a requirement that the facility apply for a renewal of its permit within six months of permit expiration date. Petition at 11.

The regulations at 40 CFR § 70.5(a)(1)(iii) simply define what constitutes a “timely” application for renewal purposes. This definition is essential to the interpretation of 40 CFR § 70.7(c)(ii), which explains that permit expiration terminates the source’s right to operate unless a “timely” renewal application has been filed. Any facility that does not renew its permit in a timely manner may be subject to an enforcement action for operating without a permit. EPA finds Petitioner’s allegation to be without merit, and therefore, denies the petition on this point.

(VIII) Periodic Monitoring

Petitioner alleges the NYCTA permit does not assure compliance with all applicable

requirements because many individual permit conditions lack adequate monitoring and are not practicably enforceable. Petition at 13. Petitioner identifies individual permit conditions that allegedly either lack monitoring or are not practicably enforceable. The specific allegations for each permit condition are discussed below.

### **Facility-Specific Petition Issues**

#### **Inadequate Citations**

Petitioner asserts that because a large number of conditions in the draft permit simply refer to 6 NYCRR section 201-6 as the citation for the underlying requirement, it is difficult to locate the actual underlying applicable requirement. Petition at 12.

The federal operating permit program regulations require title V permits to specify and reference the origin of an authority for each term or condition in the permit. *See* 40 CFR § 70.6(a)(1)(i). Thus, EPA agrees that generic citations to an entire subpart can make it difficult for the public to locate the underlying applicable requirement. A review of the final NYCTA permit, however, reveals that in those instances where DEC references the entire subpart as the federally applicable requirement, the conditions contain additional descriptive information that enables identification of the actual applicable requirement. For example, although certain conditions simply reference 6 NYCRR § 201-6 as the federally applicable requirement, it is possible to discern the applicable requirement from the Condition title (*see e.g.*, Condition 16 entitled “Monitoring, Related Recordkeeping and Reporting Requirements,” Condition 21 “Right to Inspect”) and the narrative description of the particular applicable requirements. In fact, in



most instances, the narrative description contained in these permit conditions are quoted directly from the underlying applicable requirement. The petition is therefore denied on this issue.

### **Maintenance of Equipment**

Petitioner alleges that the permit's reference to 6 NYCRR §200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer's specifications is too general and must be applied to NYCTA with specificity. Petitioner also wants monitoring, record keeping, and reporting requirements to be included in the revised permit to assure compliance with the maintenance requirements. Petitioner asserts that the statement of basis must also explain the adequacy of the monitoring requirements. Petition at 12.

Permitting authorities have discretion to develop general permit conditions that apply to all title V sources. The maintenance of equipment condition (Condition 3) is a general requirement which, is incorporated into all New York title V permits even where no applicable requirement necessitates the use of control equipment. This type of general or generic requirement is commonly found in SIPs. For example, many SIPs contain generic requirements for facilities to maintain all equipment in proper condition and to carry out proper work practices. DEC includes these generic requirements in the general permit conditions section of its title V permits. Thus, even if Condition 3 is not currently applicable to the NYCTA facility, including it in the NYCTA permit does not render the permit deficient.

As a general matter, where control equipment is installed pursuant to an applicable requirement or a source chooses to employ such equipment, appropriate permit conditions are

included in the emission units section of the title V permit. As such, EPA denies the petition on this point.

### **Emergency Defense**

Petitioner asserts that a definition for “emergency” should be incorporated into the permit for clarity. Petition at 13. NYPIRG does not attempt to demonstrate or even allege that the failure to include a definition of “emergency” in the NYCTA permit renders it substantively deficient or unenforceable. Moreover, as stated in previous Orders, commonly used regulatory terms or terms that are already defined in the regulations do not have to be defined in the permit. See e.g., *In the Matter of Suffolk County Bergen Point Sewage Treatment Plant (“Bergen Point”)*, Petition No. II-2001-03, at page 12 (December 16, 2002); *In the Matter of Maimonides Medical Center (“Maimonides”)*, Petition No. II-2001-04, at page 12 (December 16, 2002); *In the Matter of Elmhurst Hospital (“Elmhurst Hospital”)*, Petition No. II-2000-09, at page 16 (December 16, 2002). As NYPIRG correctly notes, “Emergency” is defined at 6 NYCRR § 201-2.1(b)(12). Thus, any reference to the term “emergency” in the NYCTA permit would be governed by the definition set forth in the New York regulations. Therefore, EPA denies the petition on this point.

### **Air Contaminants Collected in Air Cleaning Devices**

NYPIRG alleges that while two separate permit Conditions should continue to be included as general conditions, they must also be included as facility-specific conditions if the facility uses an air cleaning device. Further, these facility-specific conditions must explain how

these requirements apply to the facility and include sufficient monitoring to assure compliance. Petitioner also requests that the statement of basis indicate whether the facility actually operates an air cleaning device that collects air contaminants. Petition at 14.

Permitting authorities have discretion to develop general permit conditions that apply to all title V sources. The general requirements regarding air contaminants collected in air cleaning devices (Conditions 6 and 7) are incorporated into all New York title V permits even where no applicable requirement necessitates the use of control equipment. This type of general or generic requirement is commonly found in SIPs. DEC includes these generic requirements in the general permit conditions section of its title V permits. Thus, even if Conditions 6 and 7 are not currently applicable to the NYCTA facility, including them in the NYCTA permit does not render the permit deficient.

As a general matter, where control equipment is installed under an applicable requirement, appropriate permit conditions are included in the emission units section of the title V permit. In this case, the only air cleaning device is the filter at the light bulb crushers. Conditions 52 and 54 require weekly inspection of the crushers and filters for proper operation. Petitioner's concern is addressed in the permit; therefore, EPA denies the petition on this issue.

### **Applicable Criteria, Limits, Terms, Conditions and Standards**

Petitioner asserts that Condition 11 which stipulates that the facility shall operate in accordance with any accidental release plan, response plan, and compliance plans, as well as support documents submitted as part of the permit application is problematic because those referenced documents are not incorporated into the permit. Petition at 13.

EPA disagrees with the Petitioner that all types of plans must be a part of a title V permit. In certain cases, a facility must comply with a plan that is not part of the title V permit. For instance, risk management plans under CAA § 112(r) need not be incorporated into title V permits. However, EPA does agree that certain documents should be properly cross-referenced in title V permits. For example, where a facility is subject to plans such as a NO<sub>x</sub> RACT plan or a startup, shutdown and malfunction plan under a maximum achievable control technology (“MACT”) standard, the permit must specifically say so and properly incorporate that plan by reference. In this case, there is no allegation that this facility requires such a plan or plans.

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

### **Compliance Requirements**

Petitioner alleges that the permit fails to assure the plant’s compliance with its risk management plan and should state whether NYCTA is subject to CAA § 112(r) and provide plan details. Petition at 14.

During the early stages of implementation of New York’s title V program, and before the promulgation of the Risk Management Program Rule, 61 Fed. Reg. 31667 (June 20, 1996), EPA asked DEC to include a general requirement regarding section 112(r) in all permits. The language in Condition 13 reflects DEC’s implementation of this request.

Petitioner has presented no evidence to suggest that NYCTA is subject to section 112(r) requirements. If a source is subject to section 112(r), its permit must include certain conditions necessary to implement and assure compliance with these requirements. However, NYCTA did

not include section 112(r) requirements in its application, nor has it submitted a Risk Management Plan (RMP) to EPA, which is responsible for implementing section 112(r) requirements in New York. Therefore, based on the information provided, and absent any information to the contrary, it is reasonable to conclude that section 112(r) does not apply to this source. This conclusion is further supported by the fact that gasoline is excluded from 40 CFR § 68. Accordingly, we find no basis for objecting to the permit on these grounds.

Although there is no basis for objecting to the permit on this issue, DEC must meet its accidental release prevention program obligations under 40 CFR § 68.215(e).<sup>12</sup> This will insure the ability of DEC, EPA, and the public to track a source's compliance with section 112(r) requirements even if the source's applicability fluctuates. Therefore, EPA Region 2 will work with DEC on the appropriate changes to its application and annual compliance certification requirements to ensure sources are aware of the section 112(r) requirements, and to ensure compliance with these requirements, if applicable.

### **Six Month Monitoring Reports**

Petitioner alleges the permit violates the 40 CFR part 70 requirement that the permittee submit reports of any required monitoring at least every six months. Petitioner asserts that many conditions in the permit do not include the six month reporting requirement. Petitioner also

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<sup>12</sup> DEC has several general section 112(r) obligations, which are found in 40 CFR § 68.215(e), and are further discussed in an April 20, 1999, memorandum from Steven J. Hitte (OAQPS) and Kathleen M. Jones (OSWER) entitled: "Title V Program Responsibilities concerning the Accidental Release Prevention Program." These responsibilities include: (1) verifying that sources register and submit a risk management plan, (2) verifying that sources certify compliance with the requirement to submit a risk management plan, and (3) general enforcement responsibilities.

asserts that the monitoring reports must contain a summary of all monitoring results, regardless of whether deviations were recorded. Petition at 14.

EPA disagrees with the Petitioner that the permit as currently written needs to be modified with regard to the reporting requirement. Condition 25 of the permit requires, among other things, that the permittee submit required monitoring reports every six months unless the permit contains a more stringent reporting requirement. This six-month reporting condition applies to all monitoring, regardless of whether a frequency was included in the specific condition. In addition to what is required by 40 CFR § 70.6(a)(3)(iii), Condition 25 requires the semiannual report to include a summary of the testing results of any emission testing performed during the previous six month reporting period. Therefore, EPA denies the petition on this issue.

### **Permit Exclusion Provisions**

Petitioner asserts that the permit (Condition 26) must be modified to make it clear that enforcement actions against the facility brought by EPA or the public pursuant to the federal citizen suit provision (CAA § 304) are unaffected by issuance of this permit. Petition at 15.

EPA disagrees with the Petitioner on this issue. Omitting such language from the permit condition does not bar, diminish or in any way affect the right of any person to commence a civil action on his own behalf under CAA § 304. *See* Condition 26. EPA finds no merit in petitioner's claim; therefore, EPA denies the petition on this issue.

### **Required Emissions Tests**

The Petitioner alleges that the permit (Condition 27) includes everything required under 6

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

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

### **Compliance with Opacity Limitations**

Petitioner alleges that Conditions 31 and 37 are deficient because the monitoring strategies in these conditions do not identify and resolve non-compliance with opacity limits. The permit requires NYCTA to perform a Method 9 test within two days of observing visible emissions for two consecutive days. Petitioner claims such a monitoring scheme allows a Method 9 test to be delayed up to four days after visible emissions are observed. Petitioner

believes this monitoring is unacceptable because it does not assure compliance with the opacity limit. Petitioner requests that the permit require a person trained in Method 9 testing to conduct a Method 9 test within one hour after visible emissions are observed. NYPIRG also requests the same be required whenever the continuous opacity monitors for the boilers are not operational for more than 24 hours. In addition, Petitioner asserts that the statement of basis must include a rationale addressing the adequacy of selected monitoring for opacity. Petition at 15.

The underlying applicable requirement for Condition 31 sets forth the general applicable SIP opacity limit which requires the facility to limit visible emissions to no more than 20 percent opacity (six minute average) except for one continuous six-minute period per hour of not more than 57 percent opacity. 6 NYCRR § 211.3. This underlying applicable requirement imposes no monitoring of a periodic nature. Accordingly, under 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) the permit must contain “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit . . . .” In Condition 31, DEC included periodic monitoring that requires daily observations of visible emissions. When visible emissions are observed for two consecutive days, a Method 9 test must be performed within two days of such observation.

Similarly, the underlying applicable requirement for Condition 37 sets forth the general applicable SIP opacity limit which requires the facility to limit visible emissions to no more than 20 percent opacity (six minute average) except for one continuous six-minute period per hour of not more than 27 percent opacity. 6 NYCRR § 227-1.3(a). DEC added a monitoring requirement to Condition 37, selecting the Method 9 test from one of three options provided under the SIP rule at 6 NYCRR § 227-1.3(b). The other two options under § 227-1.3(b) are



continuous monitoring for opacity or credible evidence.

Petitioner asserts that a Method 9 test should be conducted within one hour of observing visible emissions. The mere observation of visible emissions at the stack is not necessarily an indication of a violation of the opacity standards. Many factors, such as sudden change in the ambient temperature, weather, humidity, or combustion temperature could contribute to some visible emissions at the stack. To require a Method 9 test as soon as visible emissions are observed allows the facility no opportunity to verify whether problems actually exist. EPA finds Conditions 31 and 37 acceptable as written and believes they assure compliance with the opacity standards as stipulated in 6 NYCRR §211.3 and 227-1.3(a).

NYPIRG's request that a Method 9 test should be required whenever the continuous opacity monitors for the boilers are not operational for more than 24 hours is also without merit. No continuous monitoring for opacity is required for the three boilers. The SIP rule at 6 NYCRR § 227-1.3(b) provides the subject facility three options from which it may choose to comply with the opacity limits stipulated in 6 NYCRR § 227-1.3(a). These options include a Method 9 test, continuous opacity monitoring, or use of credible evidence. A continuous opacity monitor would have been required under the rule if the sum of the maximum heat input capacity of all three boilers at NYCTA exceeded 250 million Btu per hour (MMBtu/hr). However, the sum of the maximum heat input capacity of all three boilers is 141.789 MMBtu/hr (47.263 MMBtu/hr each); therefore, no continuous opacity monitor is required by the SIP rule.

NYPIRG asserts that the rationale for the selected monitoring should be included in a statement of basis. While a statement of basis should discuss monitoring requirements, the permit record in this instance explains the monitoring selected. NYPIRG raised this allegation

regarding compliance with opacity limitations in its comments to DEC. In its Response to NYPIRG's Comments, January 28, 2002 Responsiveness Summary, DEC explained the rationale for selecting Method 9 for monitoring opacity. DEC pointed out that "[f]rom previous experience with similar type situation using low sulfur distillate fuel oil, opacity is likely to be limited and over a very short term basis, if at all." Responsiveness Summary paragraph 18.C. Therefore, a more detailed explanatory document was not necessary to understand the legal and factual basis for these permit conditions. EPA denies the petition on this point.

**Condition 34 (Sulfur-in-Fuel limit)**

Petitioner alleges the permit to be deficient because DEC fails to specify the test method NYCTA must use to determine compliance with the sulfur limit. Petitioner believes that because NYCTA is not required to perform its own fuel testing to determine compliance with the sulfur-in-fuel limit of 6 NYCRR § 225-1.2(a)(2), the periodic monitoring requirements are inadequate in this permit. Petitioner believes that relying solely on the fuel supplier's certification is insufficient to assure NYCTA's compliance with this requirement. Petitioner also states that the statement of basis must explain how the selected monitoring method assures the facility's compliance with the fuel sulfur content standard. See Petition at 16.

Condition 34 sets a maximum limit of 0.3% sulfur content for fuel oil #4, 5, and 6 at the NYCTA facility. New York State has safeguards in place for ensuring compliance with the sulfur limits before the fuel reaches the consumer. Sulfur-in-fuel certification is a method that EPA itself relies on in certain instances (e.g., certain NSPS rules and PSD provisions). Further, 6 NYCRR § 225.1(a), the applicable requirement relating to sulfur fuel content, states that "no

person shall sell, offer for sale, purchase or use” noncompliant fuels. The sulfur limit in 6 NYCRR 225 applies equally to the seller, purchaser and user; all parties are responsible to demonstrate compliance in their own operations. A certification from the seller of its delivery of a compliant fuel oil to NYCTA does not abrogate NYCTA’s responsibility to ensure that it burns a compliant fuel oil in its boilers. Moreover, the sulfur-in-fuel standards are enforced by the DEC through random sampling of fuel oil suppliers. Accordingly, EPA disagrees with Petitioner that NYCTA should be required to repeat the same sulfur-in-fuel analysis that its supplier has already performed.

NYPIRG asserts that the rationale for the selected monitoring should be included in a statement of basis. While a statement of basis should discuss monitoring requirements, the permit record in this instance explains the monitoring selected. In its Responsiveness Summary, DEC explained that “the sulfur characteristics of the fuel oil do not change between the supplier and the end user” and that random sampling of fuel oil suppliers is an effective means to enforce sulfur-in-fuel requirements. A more detailed explanatory document was not necessary to understand the legal and factual basis for these permit conditions. Therefore, EPA denies the petition on this issue. However, DEC has phrased Condition 34 to hold the fuel-supplier, rather than the permittee, responsible for testing and certifying compliance with the sulfur content requirements of this condition. DEC must reopen the permit to clarify that NYCTA is responsible for ensuring that the sulfur content in the residual fuel oil does not exceed 0.3 percent by weight. DEC must remove language from the permit which creates an obligation for the fuel supplier of NYCTA because the fuel supplier is not the permittee. EPA grants on this issue.

### **Conditions 35, 36 (Equipment Specifications for Cold Cleaning Batch Degreasing)**

Petitioner requests that DEC include an explanation in the statement of basis clarifying whether the facility is already equipped with the covers and control devices as specified in this condition. It should also include justification as to why the monitoring selected assures compliance with 6 NYCRR § 226. Petition at 16.

Conditions 35 and 36 contain provisions regulating the cold cleaning degreasing operation at NYCTA. Condition 35 repeats the requirements of 6 NYCRR § 226, concerning solvent metal cleaning processes including cold cleaning degreaser operations, and Condition 36 specifies the monitoring and recordkeeping requirements to assure compliance with this part. Condition 36 addresses NYPIRG's question about whether the facility is equipped with control devices and covers referred to in this condition because it requires a weekly inspection of the solvent storage containers to ensure that they are closed. The underlying applicable requirements impose no monitoring of a periodic nature. Accordingly, under 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) the permit must contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit . . . ." DEC has included monitoring that requires a weekly visual check of the containers. Condition 36. However, a weekly inspection does not yield reliable data from the relevant time period that is representative of the source's compliance with the permit, because the solvent is used on an as needed basis and the containers remain closed until such use. A weekly inspection could miss on an ongoing basis the relevant time period when containers are not closed and the solvent is being used on an as-needed basis and could yield data that is not reliable for the relevant time period. EPA grants the petition on this issue. DEC is ordered to reopen the

permit to impose daily inspection on the solvent storage containers in Condition 36. DEC is required to include an explanation, similar to the one above, that details why the monitoring assures compliance with 6 NYCRR § 226.

In addition, EPA notes that all of the requirements listed in Condition 35 are not addressed in Condition 36. Specifically, Condition 36 fails to address the following requirements: 1) monitoring of the control system (if one exists) that limits VOC emissions or a water cover (if this is being used) that is lighter than the solvent in use; 2) evaporation that may occur during waste solvent transfer and disposal (if transferring or disposal occurs at the facility) must be limited to less than 20% of the waste solvent by weight; and 3) annual recordkeeping of solvent consumption. If NYCTA is not subject to these requirements, DEC must explain in the permit review report for the revised permit the reasons for non-applicability. Otherwise, DEC must reopen the permit to address each of these requirements. EPA grants the petition on this issue

### **Condition 39 (Gasoline Tanks)**

Condition 39 requires gasoline tanks greater than or equal to 250 gallons capacity and installed after January 1, 1979 to install Stage I vapor collection system for facilities located in the New York City Metropolitan Area (NYCMA). 6 NYCRR § 230.2(b). Petitioner questions whether NYCTA is subject to this requirement and therefore must install the Stage I vapor collection system and requests an explanation in the statement of basis to that effect. If this condition applies to NYCTA, petitioner requests that monitoring provisions be included in the permit to require that the vapor collection system functions properly at all times. Petition at 16.

While Condition 39 does not clearly state whether NYCTA's gasoline tank is greater than or equal to 250 gallons and whether it is subject to 6 NYCRR § 230.2(b), a review of the permit shows that the gasoline storage tank is subject to 6 NYCRR § 230.2(b) because it satisfies all three criteria of applicability. The Permit Description describes the gasoline storage tank as a 4000 gallon capacity tank. This meets the size criterion of 6 NYCRR § 230.2(b). According to Condition 23.4, the gasoline dispensing station was constructed in December 1993, which provides the construction date of the gasoline tank. The construction date of December 1993 meets the date criterion of 6 NYCRR § 230.2(b). Since NYCTA is located in the New York City Metropolitan Area, it is clear that its gasoline storage tank is subject to 6 NYCRR § 230.2(b). Therefore, it must comply with the Stage I vapor collection system requirements stipulated thereunder. A review of the permit indicates that the gasoline tank is subject to 6 NYCRR § 230.2(b). EPA denies the petition on this point. As required elsewhere in this Order, this permit will be re-issued. At that time, for clarification purposes, DEC should include the above discussion on applicability in the Permit Review Report.

#### **Conditions 52 and 54 (Particulate)**

Petitioner requests that Conditions 52 and 54 be revised to add regular inspection (of the light bulb crushers) at specified time with instructions on what must be inspected.

Documentation of all inspections and the results must also be required. Petition at 17.

Petitioner's requests are already addressed in Conditions 52 and 54 which require weekly inspection of areas adjacent to the two light bulb crushers for evidence of particulate fallout.

When observed, these conditions require inspection of the control equipment for proper

operation, integrity and condition of the filters. EPA finds the weekly inspection to be adequate monitoring for assuring compliance with 6 NYCRR § 212.3(b). Since petitioner's requests are already addressed in the permit, EPA denies the petition on this point.

**Conditions 58, 59, 60, 61 (Tanks)**

NYPIRG requests that DEC clarify in Condition 58 whether there are any tanks at the facility that have been constructed, replaced, or substantially modified after June 27, 1987.

Petitioner finds Condition 58 inadequate to assure that the vapor collection systems are maintained and operated properly. Petitioner alleges that this condition does not explain exactly what aspects of the vapor collection system are to be inspected. NYPIRG also claims Conditions 59, 60, and 61 are deficient because they fail to indicate the date when the last tests were performed on the Stage II system rendering the testing requirement every 5 years unenforceable. Also, the statement of basis must explain how the dynamic back pressure is measured, and how these conditions are related. Petition at 17.

Condition 58 does not refer to any tanks. NYPIRG may be referring to Condition 56 which requires Stage I and Stage II vapor collection systems at any gasoline dispensing site within the NYCMA that is constructed, replaced or substantially modified after June 27, 1987. The clarification that Petitioner seeks on the construction date of the tanks can be found in both the Permit Description section as well as Condition 23. *See also* discussion on Condition 39 (Gasoline Tanks) above. Condition 23.4 describes EU G-AS001 as a gasoline dispensing station consisting of two dispensers equipped with Stage I and Stage II controls, two dispensing pumps and one gasoline storage tank. It also states that the gasoline dispensing station was installed in

December 1993.

NYPIRG claims that Condition 58 is inadequate to assure that the vapor collection systems are maintained and operated properly because it does not explain exactly what aspect of the vapor collection systems is to be inspected. EPA finds no merit in petitioner's claim since this condition clearly requires daily inspection of the components of the Stage II vapor collection system. This collection system is defined in Condition 23.4 as the two dispensers in the gasoline dispensing station. Conditions 57 and 58 specify the requirement to ensure the Stage II vapor collection system operates properly. For example, monitoring consists of daily inspection of all components of the Stage II collection system with appropriate record keeping as required in Condition 58. EPA finds that Conditions 57 and 58 properly implement the requirements of 6 NYCRR § 230.2(b). Conditions 59 and 60 include the testing requirement as stipulated in 6 NYCRR § 230.2(k).

With regard to Petitioner's claim that Conditions 59, 60, and 61 are deficient because they do not indicate when the last test was performed, EPA finds no merit in this claim. Although the dates when the Stage II vapor collection system was last tested for leak and liquid blockage were not provided, all of these conditions state that the initial report is due on July 30, 2002. Further, Condition 61 requires all test results on the Stage II system to be reported to DEC within 30 days of the tests. It is apparent that the tests must be performed 30 days prior to the date the reports are due. As long as the date of the initial test is known, it is not difficult to know when NYCTA needs to perform the next test, in this case, within five years. EPA finds no ambiguity as to when NYCTA needs to perform all necessary tests to assure compliance with 6 NYCRR §230.2. Therefore, EPA denies the petition on this issue. Information on the dynamic pressure



test requested by NYPIRG can be found under 6 NYCRR § 230.2(k). When DEC revises the permit in accordance with this Order, it should include a summary of these provisions and the testing requirements in the permit review report.

### **Conditions 71 (Variance)**

Petitioner claims the permit fails to indicate whether NYCTA has been granted a variance from VOC requirements. And, if such a variance has been granted, the statement of basis must include the legal and factual basis for such variance. Petition at 17.

While Condition 71 is not explicit with regard to whether NYCTA has been granted a variance under 6 NYCRR § 228.6(a), the fact that the permit imposes 15 conditions on VOC emissions pursuant to 6 NYCRR § 228, makes it evident that NYCTA was not granted a variance from the part 228 requirements. In addition, DEC in its Responsiveness Summary explicitly addressed this question and stated that “[a] variance has not been granted for the VOC limit.” DEC went on to note that if a variance was granted, it would be listed in the permit. *See* Responsiveness Summary para 26.C. As such, EPA denies the petition on this point.

### **Condition 67 (Opacity limit under 228.4)**

Petitioner claims this condition does not assure the facility’s compliance with 6 NYCRR § 228.4 because it does not require any kind of regular monitoring. DEC must add monitoring to support this condition and provide a rationale for the selected monitoring in the statement of basis. Petition at 17.

EPA agrees with petitioner that this condition is deficient in that it does not assure compliance with the opacity limit of 6 NYCRR § 228.4. In accordance with 6 NYCRR § 228.6, this condition sets an opacity limit of less than 20% for any consecutive six-minute period. However, there is no monitoring requirement to assure compliance with this limit. See 6 NYCRR § 228.4. These underlying applicable requirements impose no monitoring of a periodic nature. Accordingly, under 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) the permit must contain “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit . . . .” The permit states that DEC “reserves the right to perform or require the performance of a Method 9 opacity evaluation.” *See* Condition 67. As this condition specifies no frequency, the permit fails to include periodic monitoring that meets the applicable standard, and therefore, EPA grants the petition on this issue. DEC is hereby ordered to revise Condition 67 of the permit to require periodic monitoring that yields reliable data from the relevant time period that are representative of the source’s compliance with the permit. Accordingly, at a minimum, the NYCTA permit must be revised to require observations of visible emissions whenever a spray paint booth is in operation. DEC may use similar requirements as those in Condition 45, for example, when visible emissions are observed for two consecutive days a Method 9 test must be performed within two days. The facility must also keep records of when the daily observations are conducted and retain all results for at least five years. *See* 40 CFR § 70.6(a)(3)(ii)(B). In addition, a report of the daily inspection results must be submitted to DEC every six months to satisfy the semi-annual reporting requirements of 6 NYCRR part 201 and 40 CFR part 70.

### **VOC Content of Coatings (Conditions 72, 73, 74, 75)**

Petitioner claims that Conditions 72, 73, 74, and 75 are deficient in that they do not assure compliance with VOC limits of 6 NYCRR § 228.8. The monitoring required in these conditions is only “single occurrence.” Petitioner asserts that the permit must assure facility compliance with VOC limits throughout the permit term on an on-going basis. DEC must establish monitoring requirements that are sufficient to assure the facility’s compliance and must include a rationale in the statement of basis explaining why the selected monitoring is sufficient. Petition at 17.

The underlying applicable requirements impose no monitoring of a periodic nature. Accordingly, under 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) the permit must contain “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit . . . .”

Conditions 72, 73, 74, and 75 impose a limit on the VOC content of the coating materials to be used at the spray paint booths. The underlying applicable requirements for these conditions impose no monitoring of a periodic nature. Accordingly, under 40 CFR § 70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2) the permit must contain “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit . . . .” DEC included Method 24 as the test method for determining compliance and a monitoring frequency of single occurrence. However, a single occurrence Method 24 does not yield reliable data from the relevant time period that is representative of the facility’s compliance with its permit and 6 NYCRR § 228.8. A one-time Method 24 test would provide no reliable data on different batches of coating used at different times. Therefore, EPA agrees with the petitioner

that DEC must re-open the NYCTA permit to establish additional monitoring requirements in these conditions. EPA grants the petition on this issue. DEC is ordered to require NYCTA to test the VOC content of each new batch of coating using Test Method 24, as the new coating is applied because such testing will yield reliable data from the relevant time period, i.e, from the batch of coating being used. DEC must also require NYCTA to keep records of the quantity of coating materials purchased and used and of the certifications from its coating supplier/manufacturer that verify parameters used for determining the actual VOC content of each batch of coating used at the facility.

### **Backup Diesel Generator**

The permit description section of the permit indicates that NYCTA operates at least one backup diesel generator. Petitioner claims these generators are subject to the 0.1 pound per mmBtu (lb/mmBtu) particulate matter (PM) limit in New York's SIP. 6 NYCRR § 227.2(b)(1). As such, this limit must be included in the title V permit as an applicable requirement for any diesel generator at the facility. Although NYCTA lists the diesel generators as exempt activities on the application, NYPIRG contends that an emission unit is not exempt from title V permitting if it is subject to an applicable requirement. Thus, any backup diesel generator must be included in the title V permit and the permit must require the facility to perform monitoring, recordkeeping, and reporting that is sufficient to assure that the diesel generator complies with the SIP particulate matter limit. Petition at 18.

The New York SIP contains a PM limit and, therefore, EPA concurs with NYPIRG that an emission unit is only exempt from the permitting requirements of title V if it is not subject to

any applicable requirements. In this case, it appears that the two diesel generators at NYCTA may not qualify as exempt units. EPA grants the petition on this issue. DEC is ordered to evaluate petitioner's claim that the diesel generators are subject to the PM limit of 6 NYCCR § 227.2(b)(1). If the diesel generators are not subject to SIP limit, DEC must provide the factual and legal basis for the non-applicability determination in the permit review report for the revised permit. If they are subject to the SIP PM limit, permit must be revised to add terms and conditions to assure compliance with the SIP.

### **Permissible Emission Rates and other Requirements in Pre-existing Permits**

Petitioner alleges DEC omitted permit limits established from pre-existing permits that are applicable requirements for the NYCTA part 70 permit. Petitioner asserts the SIP makes it clear that the "permissible emission rate" included in SIP-based Part 201 permits is an enforceable requirement. Therefore, petitioner requests EPA's objection to the NYCTA permit on the basis that it fails to include federally enforceable emission limits from permits previously issued by DEC under a SIP-approved permit program. Petition at 18.

The Petitioner is correct that federally-enforceable conditions from permits issued pursuant to requirements approved into the New York SIP generally must be included in title V permits as they are applicable requirements. *See* 40 CFR § 70.2; 6 NYCRR § 201-2.1. Construction and operating permits issued in the past, however, may contain requirements that are not "applicable requirements" as defined in the title V program or that are obsolete and are no longer applicable to the facility (e.g., terms regulating construction activity during the building or modification of the source where construction is long completed). In this situation, the DEC may

delete inapplicable or obsolete permit conditions by following the modification procedures set forth in the NY regulations 6 NYCRR §§ 201-6.7, 201-1.6, and 621-6; see also 40 CFR § 70.7(e)(4) and 70.7(h). The DEC may announce the intended deletion of inapplicable or obsolete permit conditions in the Permit Review Report.

In its petition, however, NYPIRG fails to identify any specific pre-existing permits or conditions that have not been properly incorporated into the title V permit. As such, the Petitioner has not demonstrated, in accordance with CAA § 505(b)(2), that the permit is not in compliance with the Act. Therefore, the petition is being denied with respect to this issue.

**A. CONCLUSION**

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I deny in part and grant in part the petition of NYPIRG requesting the Administrator to object to the issuance of the NYCTA title V permit. This decision is based on a thorough review of the March 22, 2002 permit, and other documents that pertain to the issuance of this permit.

May 24, 2004  
Dated

\_\_\_\_\_/s/\_\_\_\_\_  
Michael O. Leavitt  
Administrator