

On February 27, 2003, the U.S. Court of Appeals for the Second Circuit vacated EPA's denial of NYPIRG's petitions seeking objections to the draft Title V permits for the Kings Plaza Total Energy Plant, Action Packaging Corporation, and Yeshiva University's Albert Einstein College of Medicine. On August 26, 2004, the Administrator issued an Order responding to the court's remand.

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
ACTION PACKAGING CORP.)	ORDER RESPONDING TO
To operate a flexographic printing facility)	PETITIONER'S REQUEST THAT
Plant located in Brooklyn, New York)	THE
)	ADMINISTRATOR OBJECT TO
Permit ID: 2-6105-00168/00002)	ISSUANCE OF A STATE OPERATING
)	PERMIT
Issued by the New York State)	
Department of Environmental Conservation)	Petition No.: II-2000-2
Region 2)	
_____)	

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

On April 7, 2000, the Environmental Protection Agency ("EPA") received a petition from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, to Action Packaging Corporation ("Action Packaging Permit"). The Action Packaging Permit was issued by the New York State Department of Environmental Conservation, Region 2 ("DEC"), and took effect on February 11, 2000, 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, 616, 621, and 624. DEC issued a revised permit to the Action Packaging Corporation with an effective date of March 7, 2001.

The petition alleges that the Action Packaging Permit does not comply with 40 CFR part 70 in that: (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing; (2) the permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c); (3) the permit entirely lacks a statement of basis as required by 40 CFR § 70.7(a)(5); (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; (5) the permit distorts the annual compliance certification requirement of the CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (6) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it illegally sanctions the systematic violations of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions; (7) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); and (8) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable. The petitioner has requested that EPA object to the issuance of the Action Packaging Permit pursuant to § 505(b)(2)

of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

Subsequent to receipt of the NYPIRG petition, the EPA performed an independent and in-depth review of the Action Packaging title V permit. Based on a review of all the information before me, including the permit application; a December 17, 1999 letter from Elizabeth Clarke of DEC to Steven C. Riva of EPA regarding Responsiveness Summary/Proposed Final Permit [hereinafter, “Responsiveness Summary” or “response to comments document”]; the initial Action Packaging permit of February 11, 2000; the revised permit that took effect on March 7, 2001; a letter dated July 18, 2000, from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2 to Robert Warland, Director, Division of Air Resources, DEC, I deny the petitioner’s request in part and grant it in part for the reasons set forth in this Order. Petitioner has raised valid issues on the Action Packaging permit, some of which DEC has addressed in the amended permits. This petition also raised programmatic issues, some of which DEC has already addressed and others which DEC plans to address. Letter dated November 16, 2001 from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 (“commitment letter” or “November 16 letter”).

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of New York effective December 9, 1996. 61 Fed. Reg. 57589 (Nov. 7, 1996); *see also* 61 Fed. Reg. 63928 (Dec. 2, 1996) (correction); 40 CFR Part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to New York’s title V operating permit program. 66 Fed. Reg. 63180 (Dec. 5, 2001). 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 operating permits proposed pursuant to title V to EPA for review and EPA

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

II. ISSUES RAISED BY THE PETITIONER

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

EPA received a letter dated November 16, 2001, from DEC Deputy Commissioner Carl Johnson, committing to address various program implementation issues by January 1, 2002, and to ensure that the permit issuance procedures are in accord with state and federal requirements. DEC's fulfillment of the commitment set forth in the November 16, 2001 letter will resolve some administration problems. As a result, EPA has not issued a notice of deficiency at this time. EPA will monitor New York's title V program over the next three to six months to ensure that the permitting authority is implementing the program consistent with its approved program, the CAA, and EPA's regulations. Failure to properly administer or enforce the program will result

¹ See CAA § 505(b)(2); 40 CFR § 70.8(d). Petitioner here commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. See Letter from Keri Powell, et al. Attorneys for NYPIRG to DEC (July 22, 1999) ("NYPIRG Comment Letter").

² EPA responded to NYPIRG's March 11, 2001 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. This response letter is available on the internet at: <http://www.epa.gov/air/oaqps/permits/response/>.

in issuance of a Notice of Deficiency pursuant to § 502(i) of the Act and 40 CFR § 70.10(b) and (c).

A. Public Hearing

1. Flawed Public Notice

Petitioner alleges that DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying its request for a public hearing. Petition at page 3. Pursuant to 40 CFR § 70.8(c)(iii), failure to process the permit under procedures approved to meet § 70.7(h) may be grounds for objection.

Petitioner asserts that the public notice did not meet the requirement of 40 CFR § 70.7(h)(2) because it did not indicate the “time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled).” *See also* § 502(b)(6) of the Act. In this case, the DEC did not schedule a hearing and did not inform the public of how to request a hearing. Petitioner is correct that technically this is a defect in the DEC’s public notice procedure for this permit. However, there is no allegation that NYPIRG was harmed as a result of DEC’s failure to indicate the procedures that must be followed to request a hearing. To the contrary, petitioner requested a hearing, this request was considered by DEC and responded to in the Responsiveness Summary. *See Cover Letter to Responsiveness Summary*. Moreover, no additional comments or hearing requests were received on this proposed permit and no other petitions have been filed concerning this permit.³ Therefore, EPA finds this to be harmless error that did not hinder the petitioner’s ability to request a hearing on this draft permit. *See e.g. Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 248 (1964) (an error can be dismissed as harmless “when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached”). Accordingly, EPA denies the petition on this point.

This determination, however, does not relieve DEC of its responsibility to provide all members of the public with an opportunity to participate in the title V process consistent with New York State and EPA regulations. 6 NYCRR § 621.6 and 40 CFR § 70.7(h). DEC’s failure to provide in its public notice a procedure by which members of the public can request a hearing may be grounds for granting a petition. Therefore, EPA has determined that the failure to provide a clear statement as to how to request a public hearing must be corrected through a

³ In the July 18, 2000, letter, from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC, EPA pointed out to the DEC that the failure to provide directions for requesting a hearing is a programmatic failure. DEC reiterated its understanding of the public hearing process in its November 16, 2001 commitment letter at page 5.

programmatic correction and has so advised the DEC.⁴ In a letter dated November 16, 2001 DEC committed to revise the language in the public notice to indicate who the public should contact to request a public hearing. *See* Commitment letter at p. 5. Failure to consistently adhere to the requirements of 40 CFR § 70.7(h)(2) and § 502(b)(6) of the Act will result in a program deficiency.⁵ Furthermore, EPA retains the authority to review the need for public hearings for all permits and may object to any permit in the future that is not properly noticed. 40 CFR § 70.8(c)(3)(iii).

2. Application of Improper Standard

Petitioner also contends that the DEC applied the wrong standard in reaching the decision to deny the petitioner's request for a public hearing. Petition at page 4. Petitioner points out that in denying the public hearing, DEC asserted in the Responsiveness Summary that a public hearing would be appropriate if DEC determined that "there are substantive and significant issues because the project, as proposed, may not meet statutory or regulatory standards." Petitioner argues that DEC applied the standard that governs when DEC can hold a hearing on its own initiative, rather than the standard that governs when DEC receives a request from a member of the public for a hearing.⁶

40 CFR § 70.7(h) provides that "all permit proceedings, including initial permit issuance...shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." Part 70 does not provide specific guidance on when, or under what circumstances, a hearing should be held. Accordingly, permitting authorities have considerable discretion when determining whether to hold a public hearing. A review of New York's regulations finds that the requirements of 6 NYCRR § 621.7 are in accord with the provisions of 40 CFR § 70.7(h) and closely parallel the language of 40

⁴ Part 70 does not require permitting authorities to hold a public hearing each time one is requested. Members of the public seeking to participate in the permitting process should not expect that a hearing will always be held on a draft permit and should also submit any comments or concerns in writing.

⁵ Pursuant to 40 CFR § 70.10(b)(1) if EPA determines that a permitting authority is not adequately administering a part 70 program, EPA will notify the permitting authority of the determination and publish such notice in the Federal Register.

⁶ Petitioner points out that 6 NYCRR § 621.7 defines two types of hearings: adjudicatory and legislative. Under 6 NYCRR § 621.7(b), DEC determines to hold an adjudicatory public hearing when "substantive and significant issues relating to any findings or determinations the [DEC] is required to make" or 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." Under 6 NYCRR § 621.7(c), DEC must determine to hold a legislative public hearing based on whether a significant degree of public interest exists.

CFR § 71.11(f)(1).⁷

DEC acknowledges that the correct standard for the permitting authority to apply when carrying out the title V function is whether there is a significant degree of public interest in the permit. In this instance, however, DEC's denial of a hearing is at most harmless error and does not warrant EPA objection to the Action Packaging permit. Part 70 requires an opportunity for a hearing but does not specify what standard a permitting authority must apply when a member of the public requests a hearing. *See* 40 CFR § 70.7(h). In response to NYPIRG's request for a public hearing on the draft permit, DEC wrote: "Based on a careful review of the subject application and comments received thus far, the [DEC] has determined that a public hearing concerning this permit is not warranted." Cover letter to Responsiveness Summary. In addition, DEC noted that it received detailed comments on the permit from petitioner, who was the only commenter, and responded to those comments in writing. Given the nature of the source and the fact that the petitioner was the only commenter DEC could have reasonably concluded that there was not sufficient public interest to hold a hearing on this permit.⁸ Furthermore, the DEC has held hearings on draft permits, especially where there was a significant degree of public interest⁹, so it appears that DEC is not simply nullifying its own rule as implied by the petitioner. Accordingly, EPA denies the petition on this issue.

This determination does not mean that DEC may be inconsistent in the application of its own regulations. As previously discussed, New York's regulations provide that when a member of the public requests a hearing on a draft title V permit, the determination to hold such hearing shall be based on whether "a significant degree of public interest exists."¹⁰ 6 NYCRR § 621.7(c)(1). Thus, to ensure a consistent approach and to prevent further confusion as to what

⁷ Pursuant to 40 CFR § 71.11(f)(1) EPA will hold a public hearing "whenever it finds, on the basis of requests, a significant degree of public interest in the draft permit." Section 71.11(f)(2) provides that EPA "may also hold a public hearing at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision."

⁸ It is not EPA's position that under all circumstance a request from only one citizens' group, no matter how many people it represents, automatically constitutes insufficient public interest. The permitting authority must independently analyze each request and make a reasonable judgment as to whether the facts before it warrant granting a particular request.

⁹ *E.g.*, Village of Freeport (DEC Permit No. 1-2820-00358/00002); Orange Recycling and Ethanol Production Facility, Pencor Masada Oxynol, LLC (Permit ID: 3-3309-00101/00003); Poletti Power Project (DEC Permit No. 2-6301-00084/00015).

¹⁰ DEC's legislative type of public hearing meets the title V program requirement and sets forth a standard consistent with the 40 CFR Part 71 standard of "a significant degree of public interest" rather than the "substantive and significant issues" standard which was applied by the DEC. The significant difference is that the public need only express an interest to be informed and need not try to establish that they have specific issues relating to the findings or determinations of the DEC. The DEC can provide for hearings in addition to those required by the title V program but it is not correct to grant or deny a public hearing only on the basis of the substance and significance of the issues presented.

standard applies to public hearing requests, DEC has agreed to express the proper standard in its public notices. *See* Commitment letter at page 5. Failure to express the proper standard and procedure in the public notices after January 1, 2002, will result in a finding of program deficiency pursuant to 40 CFR § 70.10(b). Furthermore, where EPA concludes that there is appropriate grounds for objecting to a permit on the grounds of inadequate public notice or improper denial of a public hearing, EPA may order a timely objection to any permit. 40 CFR § 70.8(c)(3)(iii); *see also* letter from Steven Riva, Chief, Permitting Section, EPA Region 2, to Roger Evans, DEC Region 1, dated August 29, 2001, concerning Village of Freeport, Power Plant Number 2 (advising DEC to hold a public hearing based on the degree of public interest and indicating that a failure to do so will result in an objection by EPA).

B. Incomplete Permit Application

Petitioner's second claim alleges that the applicant did not submit a complete permit application in accordance with the requirements of the Clean Air Act, 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d), especially as these provisions incorporate provisions of CAA § 114(a)(3)(C). Petition at page 5. In making this claim, petitioner incorporates a petition that it filed with the Administrator on April 13, 1999, contending that the DEC's application form is deficient because even a properly completed form would not 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.

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

- The application form lacks an unequivocal initial compliance certification with respect to all applicable requirements;
- The application form lacks a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based;
- The application form lacks a description of all applicable requirements that apply to the facility. That is, the form only requires applicants to supply numerical citations to regulations, unaccompanied by any description; and
- The application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

EPA agrees with petitioner that the compliance certification process in the DEC's application form enables an applicant to avoid revealing noncompliance in some circumstances. Contrary to EPA and DEC regulations, the DEC form allows an applicant to certify that it expects to be in compliance with requirements when the permit is issued rather than make a concrete statement as to its compliance status at the time of permit application. If the facility is not in compliance and in fact achieves compliance before the permit is issued, it may be possible

to conceal any previous noncompliance. As provided in 40 CFR § 70.5(c)(9)(i), permit applicants are required to submit “a certification of compliance with all applicable requirements by a responsible official consistent with . . . section 114(a)(3) of the Act.” EPA interprets this language as requiring that sources certify their compliance status as of the time of application submittal. Where certifications do not address compliance status as of the time of permit application, the State, EPA and the public have been deprived of meaningful information on compliance status which may have a negative effect on source compliance and could impair permit development. Compliance certifications are public documents. Thus, one purpose of the initial compliance certification is to provide an incentive for sources to come into compliance with applicable requirements before they complete their applications. Another purpose is to alert the permitting authority to compliance issues in advance so that it can work with the source on such problems and develop an appropriate schedule of compliance in the title V permit. *See* 40 CFR §§ 70.5(c)(8) and 70.6(c)(3) and (4).

Accordingly, defects in the application process can provide a basis for objecting to a title V permit when flaws in the application could result in a defective permit. There is no evidence that in this case problems with the application caused defects in the final permit. Section 70.5(c)(8)(i)-(iii) provides, in part, that a standard application form shall include “a compliance plan that contains . . . a description of the compliance status of the source with respect to all applicable requirements.” This provision also requires that the plan contain a compliance schedule and “a statement that the source will continue to comply” with the applicable requirements described in the plan. *Id.* DEC’s rules at § 201-6.3(d)(9) track these part 70 requirements. Thus, the only consequence for the permit of the absence of a compliance certification is that it fails to include a compliance schedule for any applicable requirements for which the source might be out of compliance at the time of submission of the application. That cannot harm petitioner here, as the permit requires immediate compliance with all its terms and conditions. Thus, the absence of a compliance certification that might have led to a schedule of compliance giving the permittee additional time to comply with applicable requirements is at most harmless error.

In any event, the permit provides adequate means of assuring that the permittee does in fact comply with applicable requirements. The issuance of the permit triggers various attendant compliance requirements including the six-month report [§ 70.6(a)(3)(iii)(A)], the annual report [§ 70.6(c)(5)], and the requirement to promptly report permit deviations [§ 70.6(a)(3)(iii)(B)]. Whether the permittee has complied with all these requirements -- which are enforceable by petitioner through citizen suit under Sec. 304 of the CAA -- is not a basis for objection to the permit itself. Accordingly, EPA denies the petition with respect to this issue.

Although in this case EPA finds no basis for objection on this issue, the State and EPA agree that the application form submitted by Action Packaging does not properly implement the EPA or the State regulations. Therefore, as detailed in the November 16, 2001 commitment

letter, the State is changing its forms and instructions accordingly.¹¹

The other three deficiencies in the application noted by petitioner similarly do not demonstrate that the process leading to the development of this permit could have resulted in a deficient permit. The first of these is that the regulations require the statements in the permit application regarding the compliance status of the facility to include “a statement of methods used for determining compliance.” 40 CFR § 70.5(c)(9)(ii). Although the application submitted by Action Packaging did not specifically require the facility to include a statement of methods, in this case, the applicant did include a copy of an April 1994 stack test report which contains details on the methods used to determine compliance with the Reasonably Available Control Technologies (RACT) requirements for VOC at 6 NYCRR Part 234. Thus, even if the DEC forms did not unequivocally require this information, the applicant submitted it anyway. Accordingly, EPA denies the petition on this point.

Petitioner’s next point is that EPA regulations call for the legal citation to the applicable requirement accompanied by the applicable requirement expressed in descriptive terms. EPA has developed guidance, in the form of “White Papers” which were issued in order to enable States to take immediate steps to reduce the costs of preparing and reviewing initial part 70 permit applications. In “White Paper for Streamlined Development of Part 70 Permit Applications” dated July 10, 1995 (“White Paper 1”), EPA clarified that citations may be used to streamline how applicable requirements are described in an application, provided the cited requirement is readily available. The permitting authority may allow the applicant to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject, provided the referenced materials are currently applicable and available to the public (e.g., regulations printed in the Code of Federal Regulations or its State equivalent). The Action Packaging permit application contains codes or citations associated with applicable requirements that are readily available; that is, these codes refer to federal and state regulations that are printed in rule compilations and also are available on-line. Again, even though the application form in this case did not clearly require more than a citation to the applicable requirement, the applicant correctly submitted the additional required information.

This issue regarding citations also was addressed in detail in the July 18, 2000 letter from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection to Robert Warland, Director, Division of Air Resources, DEC (“July 18, 2000 letter”). The letter explained that the DEC application form and/or instructions for its operating permits program should be

¹¹ In summary, in accordance with the DEC’s November 16, 2001 commitment letter, the DEC permit application form was changed to clearly require the applicant to certify as to compliance with all applicable requirements at the time of application submission. The application form and instructions were changed to clearly require the applicant to describe the methods used to determine initial compliance status. With respect to the citation issue, the application instructions were revised to require the applicant to attach to the application copies of all documents (other than published statutes, rules and regulations) that contain applicable requirements.

clarified with respect to the “non-codified” documents that include applicable requirements, such as NO_x RACT plans, pre-construction and operating permits, etc. EPA pointed out that the application and instructions should make it clear that all supporting information is required in the application with clear cross-referencing to the emission point and applicable requirement cited in the printed form. Accordingly, in its November 16 commitment letter the DEC agreed to amend the application instructions to ensure that applicants include all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing. The DEC is aware that the documentation necessary to insure the adequate public participation called for in 40 CFR § 70.7(h) must be available with the application during the public comment period.

Petitioner’s final point is that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. Although Action Packaging did not fill out the Monitoring Information portion of Section IV of DEC’s application form which would have provided information on test method as well as others, Action Packaging included a copy of an April 1994 stack test report to provide the necessary information. The stack test report provided a description of the applicable test method for determining compliance with the applicable requirements. Thus, petitioner’s fourth issue regarding the application form is without merit.

C. Statement of Basis

Petitioner’s third claim alleges that the proposed permit entirely lacks a statement of basis, as required by 40 CFR § 70.7(a)(5), that sets forth the legal and factual basis for the draft permit conditions. Petition at page 7. Petitioner notes that, subsequent to the public comment period for the Action Packaging permit, the permitting authority commenced incorporating a “Permit Description” in all draft permits being issued.

The provision for the “statement of basis” is found at 40 CFR § 70.7(a)(5) which states:

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

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

A statement of basis 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 are not otherwise required or are intended to fill in monitoring gaps in existing rules, especially the SIP rules. The statement of basis should draw attention to items that would be the highest priority for EPA or any other person to review because they represent new conditions rather than mere recitation of applicable requirements. In a December 22, 2000 Order responding to petition for objection to the Fort James Camas Mill permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring method be documented in the permit record. In re In the Matter of Fort James Camas Mill, (“Fort James”), Petition No. X-1999-1, at page 8 (December 22, 2000). (available on line at: http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/fort_james_decision1999.pdf).

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

While EPA agrees with petitioner that a statement of basis was not made available with the draft permit, we conclude that its absence does not, in this case, warrant objection to the permit. There is no evidence that the petitioner was harmed by the absence of a statement of basis. NYPIRG provided extensive, detailed and thoughtful comments on this draft permit establishing that they had a basic understanding of the terms and conditions of this permit. Furthermore, NYPIRG was the only member of the public who filed comments on this draft permit.

It should be noted that while the draft permit did not include a “Permit Description,” such a description was incorporated as part of the revised permit that took effect on March 7, 2001. This description includes the reasons for the permit revisions (in this case the permit was revised to incorporate additional monitoring, record keeping and reporting and the addition, as a permit condition, the requirement that Action Packaging operate its incinerator more than 214 days per year when requested by DEC); a description of the nature of the “business” (10 flexographic printing presses with drying ovens and a natural gas fired catalytic incinerator for VOC emissions control); a discussion of the equipment and operations at the facility; and air permit applicability. While this discussion does not fully satisfy the requirements of § 70.7(a)(5), it

does provide needed information on the permit and attendant requirements. Given the simplicity of this source, a more detailed explanatory document as sought by petitioner is not necessary to understand the legal and factual basis for the draft permit conditions. However, EPA recognizes that the contents of such a statement also aid the public in its review of draft permits, and therefore, later in this decision, we explain the applicable requirements and monitoring issues in the permit as raised by the petitioner, consistent with EPA's direction from the Fort James decision.

While failure to include a statement of basis with the draft permit does not, in this case, constitute a reason to object to this permit, it can be such a hindrance to carrying out EPA's responsibilities that EPA can object to a permit on such grounds. In this instance, however, EPA is able to address the remaining substantive permit issues because of the relative simplicity of the source, the subsequent changes to the permit, the additional information provided in the permit description and the DEC's response to comments.

EPA has recently provided guidance to permitting authorities that addresses the contents of a "statement of basis" in terms that aid both EPA and the public.¹² As a result, the DEC has incorporated certain elements into its "permit review reports."¹³ In the cited letters, EPA explains that the "statement of basis" is to be used to highlight significant decisions or interpretations that were necessary to issuing the permit. These reports are intended not simply to be redundant to the permit but to assist in reviewing what is in the permit. In the case of this permit, such a statement would not have added significantly to EPA's review of the permit. However, as previously discussed, EPA recognizes that a statement of basis may have added significantly to the public's ability to review the draft permit. Accordingly, EPA is providing the following explanation to aid the public's understanding of the Action Packaging permit conditions.

As a result of NYPIRG's petition on Action Packaging's permit, EPA identified instances where the permit entirely lacked periodic monitoring and the periodic monitoring contained therein was not sufficient to assure compliance. As a result, the EPA Region 2 office held discussions with the DEC and, subsequently, DEC revised Action Packaging's permit to incorporate additional monitoring to assure compliance (the revised permit was effective on March 7, 2001). Monitoring requirements included in the permit are for the flexographic presses

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

¹³ In order to comply with the requirements of 40 CFR § 70.7(a)(5), DEC has committed to prepare and make available at time of issuance of draft permits, a "permit review report," which will serve as New York's statement of basis. The contents of this permit review report were described in DEC's November 16, 2001 commitment letter.

and the incinerator. The applicable requirements listed in this permit as applying to this facility include several regulations contained in the New York State Implementation Plan (SIP): (1) the opacity requirements of 6 NYCRR § 211.3; (2) monitoring, recordkeeping and reporting requirements of 6 NYCRR § 201-6; (3) requirements applicable to graphic arts operations in 6 NYCRR part 234; (4) emissions statement requirements of 6 NYCRR part 202; (5) prohibition on open fires of 6 NYCRR part 215; and requirements for printing; publishing industries at 40 CFR §63.829(d) and §63.830(b)(1); and recycling requirements of 40 CFR part 82, Subpart F. The periodic monitoring and sufficiency monitoring that was incorporated into the Action Packaging permit to assure compliance are as follows:

1. For opacity, daily observances of the stack which vents the incinerator will be made once per day with such observations recorded. If the observer notes any visible emissions, other than steam, for two consecutive days, then a Method 9 test must be conducted within 2 business days of such an occurrence. This monitoring methodology was developed based on discussions between the DEC and EPA Region 2 during the early stages of New York's title V program, and is appropriate for these types of emission units.
2. Action Packaging is required to perform a stack test following Method 25 once during the term of the permit to assess VOC emissions. This is appropriate monitoring for this type of facility where there is unlikely any variation in source operation and the method of printing does not change with time. Once per permit term testing using Method 25 to verify the destruction efficiency of the incinerator is adequate given that the facility is also required to monitor the incinerator temperatures, ink purchases and usage, and opacity.
3. Action Packaging will monitor the temperature at the catalytic inlet bed and outlet of the incinerator to ensure minimum temperature is achieved. 6 NYCRR § 234.4. Temperature monitoring is sufficient to assure compliance because incinerators operate on the principle of thermal destruction. Therefore, if the temperature is within the proper operating range, the correct level of destruction can be assured.

Accordingly, we do not believe that the circumstance of this case warrant an objection to this permit. Objection to this permit is granted on other grounds. *See* Section H. DEC's permit issuance process now provides that a permit may not be issued unless it is accompanied by a statement of basis. Therefore, when the DEC revises the permit in response to the objection, it must also submit a complete statement of basis (permit review report) meeting the requirements of § 70.7(a)(5).

D. Reporting of Monitoring

Petitioner's fourth claim alleges the proposed 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. Petition at page 9. Petitioner identified contradictory language in the permit with regard to the submittal of monitoring reports. Petitioner asserts that while the general conditions section requires that monitoring reports be submitted at least every six months, the emission unit section of the permit contains individual conditions that require monitoring reports only upon request by the regulatory agency. The petitioner asserts, “Unless this proposed permit is modified to clearly identify the monitoring results that must be included in Action Packaging’s six month monitoring reports, the reports are unlikely to be useful in assuring the facility’s compliance with applicable requirements.” Petition at page 10.

In DEC’s response to petitioner’s comments, DEC described the general condition entitled, “Monitoring, Related Recordkeeping and Reporting Requirements” (Condition 18 in the draft permit) as the “default” condition which applies unless a more frequent reporting period is required by a rule. Condition 18 required, among other things, that the permittee submit required monitoring reports every 6 months from the date of permit issuance, include all instances of deviations from permit requirements and be certified by the facility’s responsible official. However, as petitioner correctly notes, other conditions incorporated into the original permit could be read as conflicting with Condition 18. For example, Condition 38 only required reporting “upon request by the regulatory agency.”

On March 7, 2001, DEC amended the permit¹⁴ to change “upon request by regulatory agency” to “semi-annually.” Conditions 1-6, 1-7, 1-9, 1-10, and 1-11, regarding opacity monitoring, ink storage in open containers, VOC control, and incinerator temperature monitoring now require semi-annual reporting. In addition, the amended permit incorporated a new condition, Condition 1-1, that clarifies the 6-month reporting requirement. Therefore, DEC has clarified the reporting of monitoring provisions in its revised permit to ensure that the individual permit conditions and the general provisions of the permit requiring semi-annual reporting are consistent.¹⁵ Accordingly, EPA finds that there is no basis to object to the permit regarding this issue.¹⁶

¹⁴ EPA Region 2 met with DEC in the Spring of 2000 to discuss the NYPIRG petition and the Action Packaging permit and, as a result, DEC subsequently revised the Action Packaging title V permit, effective March 7, 2001. In addition, Region 2 met at various times starting in March 2000 with NYPIRG to discuss the Action Packaging petition and other program issues. Upon receipt of the revised permit by EPA Region 2, a copy was transmitted by EPA to NYPIRG on April 25, 2001. The revision was processed by DEC via “administrative amendment” procedures.

¹⁵ EPA does not intend to limit the states from providing for more frequent but less formal reports such as “upon request” as long as the reports necessary for title V purposes are clearly expressed and required by the permit and are in writing.

¹⁶ Since February 11, 2000, the original effective date of the Action Packaging permit, the state has made revisions to the permit in response to certain issues raised by NYPIRG, EPA and Region 2. The revisions that were made with respect to the monitoring requirements correct the permit obviating any basis to object. Although EPA takes no position in this Order regarding the adequacy of the process DEC employed to revise this permit, it is clear that a permit may not be revised via the “administrative amendment” process [40 CFR § 70.7(d)] to add periodic

E. Annual Compliance Certification

Petitioner's fifth claim alleges that the proposed permit distorts the annual compliance certification requirement of the Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5). Petitioner alleges that the proposed permit does not require the facility to certify compliance with all permit conditions, but rather just requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." Petition at page 10. 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 asserts that the only way of interpreting the compliance certification designation is as a way of identifying which conditions are covered by the annual compliance certification. Finally, NYPIRG asserts that permit conditions that lack periodic monitoring are excluded from the annual compliance certification.

EPA notes, first, that the language in the Action Packaging permit follows directly the language in 6 NYCRR § 201-6.5(e) which in turn, follows the language of 40 CFR §§ 70.6(b)(5) and (6). Section 201-6.5(e) requires certifications with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Section 201-6.5(e)(3) requires the following in the annual certification: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the Department and to the Administrator and shall contain such other provisions as the Department may require to ensure compliance with all applicable requirements. Action Packaging's original permit included this language at condition 15, item 15.2. In the revised permit this language is found in Condition 1-4.

EPA disagrees with petitioner that "the basis of the certification" should be interpreted to mean that facilities are *only* required to certify compliance with the permit terms labeled as "compliance certification." "Compliance certification" is a data element in New York's computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. Condition 1-4 delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

The references to "compliance certification" found in the permit terms do not appear to negate the DEC's general requirement for compliance certification of all terms and conditions.

(footnote 16 continued) monitoring where the original permit contained no monitoring. Such a modification must be accomplished through significant modification procedures. See 40 CFR § 70.7(e)(4).

Because the permit and New York's regulation require the source to certify compliance or noncompliance, annually for each permit term, EPA is denying the petition on this point.

Nonetheless, EPA has conferred with DEC in an effort to minimize confusion on this point. DEC has agreed, by letter dated November 16, 2001, to include language regarding the revised annual compliance certification in draft permits issued on or after January 1, 2002, and in all future renewals. DEC will add language from 40 CFR § 70.6(c)(5) to the current provision for the annual compliance certification, as follows:

“Requirements for compliance certification with terms and conditions contained in this facility permit include the following:

- i. Compliance certifications shall contain:
 - the identification of each term or condition of the permit that is the basis of the certification;”

To clarify the annual reporting requirements, DEC will also add the following language to the annual compliance certification provision:

“The responsible official must include in the annual certification report all terms and conditions contained in this permit, including emission limitations, standards, or work practices. That is, the provisions labeled herein as “Compliance Certification” are not the only provisions of this permit for which an annual certification is required.”

Although this issue does not present grounds for objecting to the Action Packaging permit, the DEC has nonetheless elected to take the appropriate step to improve the administration of its program in this regard.

F. Startup, Shutdown, Malfunction

Petitioner's sixth claim is that the proposed permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. Petition at page 11. Petitioner asserts that 6 NYCRR § 201-1.4 conflicts with EPA guidance and must be removed from the SIP and federally enforceable permits as soon as possible. In addition, petitioner asserts that the permit lacks proper limitations on when a violation may be excused and lacks sufficient public notice of when a violation is excused.

Permit Condition 5 states in part: “At the discretion of the commissioner a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable.” Petitioner argues that condition 5 is so expansive that it makes emission limits

very difficult to enforce and departs from EPA guidance that requires facilities to make every reasonable effort to comply with emission limitations even during startup/shutdown, maintenance and malfunction conditions.¹⁷ Accordingly, petitioner asserts, the Administrator must object to the proposed permit because it does not include conditions to assure compliance with all applicable requirements as required by 40 CFR § 70.6(a)(1).

With respect to enforcement discretion, EPA recognizes and approves such provisions in State SIPs in accordance with EPA guidance, and Condition 5 is modeled upon a provision in the New York SIP. It sets forth the notification requirements that a facility owner and/or operator must follow in the case of excess emissions caused by start-up, shutdown, malfunctions, or upsets. The conditions provide a detailed and thorough procedure to report such violations. These notice requirements are included in the approved SIP and must be adhered to. Moreover, failure to notify the DEC of the emission violation on a timely basis precludes consideration of the reason for the emission violation in order to mitigate the enforcement response. This procedure is required for occurrences where a source hopes to avail itself of enforcement discretion, but does not establish any right be excused for the excess emission occurrence.

It is EPA's view that the Act, as interpreted in EPA policy, does not allow for automatic exemptions from compliance for periods of excess emissions and that improper operation and maintenance practices do not qualify as malfunctions under EPA policy. *See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1, November 16, 2000 ("Pacificorp"), at page 22, available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>. To the extent that a malfunction provision or any provision which gives substantial discretion to the state agency broadly excuses sources from compliance with emission limitations during periods of malfunction, EPA believes it should not be approved as part of the federally approved SIP. *See Pacificorp* at 23.

¹⁷ *See* Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," (Bennett Memo September 1982); memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," dated February 15, 1983 (Bennett Memo February 1983); Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation to Regional Administrators, Regions I - X, titled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated September 20, 1999 ("September 1999 Guidance"); and Memorandum from Eric Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards to Regional Administrators, titled "Clarification - State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated November 8, 2001 ("November 2001 Clarification").

EPA is not aware of, and the petitioner has provided no evidence of, any instances where the DEC relied on these rules to provide blanket exceptions for non-compliance merely because the incidents were reported. Moreover, DEC's response to comment letter to EPA and NYPIRG on the draft title V permit for the facility¹⁸ demonstrates to EPA that the DEC's interpretation and application of section 201-1.4 is not inconsistent with the Act, as interpreted by EPA in its guidance.

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

The position set forth in Pacificorp was reiterated in the November 2001 Clarification which confirms that the September 1999 Guidance provides guidance to States and EPA regarding SIP provisions related to excess emissions during malfunctions, startups, and shutdowns. It was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA. Similarly the September 1999 Guidance was not intended to affect existing permit terms or conditions regarding malfunctions, startups and shutdowns that reflect approved SIP provisions including opacity provisions, or to alter the emergency defense provisions at 40 CFR § 70.6(g). Existing SIP rules and 40 CFR § 70.6(g) may only be changed through established rulemaking procedures and existing permit terms may only be changed through established permitting processes. Thus, EPA did not intend the September 1999 Guidance to be legally dispositive with respect to any particular proceedings in which a violation is alleged to have occurred. Rather, it is in the context of future rulemaking actions, such as the SIP approval process, that EPA will consider the September 1999 Guidance and the statutory principles on which this Guidance is based. *See* November 2001 Clarification at page 1.

In sum, Condition 5 merely restates requirements for reporting certain excess emissions and does not, itself reduce the effectiveness of any applicable requirements derived from State

¹⁸Letter from Elizabeth Clarke, Environmental Analyst, DEC, Region 2, to Steven C. Riva, Chief, Permitting Section, EPA Region 2, dated December 17, 1999, Responses to NYPIRG Comments re: General Permit Conditions, number 10, Unavoidable Noncompliance and Violations, page 4 of 7. The response reads, "This condition is as explicit as necessary and does not excuse or diminish, in any way, the accountability of a source for pollution exceedances. It sets forth a practical procedure for notifying the agency....[T]he agency uses engineering judgment on a case-by-case basis to make a determination as to the unavoidable status of an exceedance. The department also cannot exercise more discretion than federal requirements allow."

requirements. The DEC's unavoidable non-compliance and emergency requirements are part of the approved SIP. Whether the SIP meets the guidance is not an appropriate subject for an objection to a specific permit and is not a reason to object to the permit. Accordingly, the petition is denied on this point.

NYPIRG further asserts that the requirement of 40 CFR § 70.6(a)(1), that permits contain monitoring sufficient to assure compliance, also applies to the excuse provision of 6 NYCRR § 201-1.4 to assure that the provision is not abused. EPA agrees with this general proposition. However, since the DEC Commissioner has discretion to excuse certain violations, any abuse of the excuse provision would be by DEC and not by the source for simply asking for the excuse. In accordance with the provisions of the title V permit, the source is required to monitor compliance, and any violation for which an excuse is sought will show up in deviation reports, semi-annual reports and annual reports. Petitioner has not demonstrated that any additional monitoring of the source is required to assure proper exercise of the excuse provision by DEC.

As previously discussed, 6 NYCRR §§ 201-1.4 and 201-1.5(e) provides the Commissioner with a discretionary authority to excuse unavoidable non-compliance and violations when certain conditions are met. Moreover, 6 NYCRR § 201-6.5(c)(3)(ii), as amended, clarifies that the DEC's own rules did not attempt to authorize expansion of the Commissioner's discretion by expressly providing that violations of a federal regulation expressed as permit terms may not be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). In DEC's Response to Comments Document, DEC acknowledges that it "cannot exercise more discretion than federal requirements allow." *Id.* at page 4. While the DEC may recognize the limits of its discretion, the permit term as written may be misleading to the permit recipient and should be revised to be consistent with requirements of the Act and the applicable scope of 6 NYCRR § 201-1.4. Accordingly, for permits issued after January 1, 2002, DEC has committed to move this condition to the state side of the permit. While a source operator may be misled into seeking the Commissioner's action on a violation during start-ups, shutdowns, malfunctions or upsets, EPA believes that the Commissioner is aware of the limits on the authority to excuse emission exceedances existing under the DEC's own regulations, and believes that it is unlikely that the Commissioner will exceed the discretion allowed under the state regulations. Accordingly, the petition is denied on this point.

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

1. Petitioner states that New York's regulation 6 NYCRR § 201-1.4 and the corresponding language in the permit do not conform to EPA's September 20, 1999 guidance entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" ("September 1999 Guidance"). The petitioner generally alleges that the New York regulation has created a loophole for facilities complying with emission limits because facilities routinely use the excuse provision without proving the violation was

unavoidable. The petitioner, however, does not provide any specific examples of sources relying on the excuse provision improperly nor does petitioner allege that any abuses of the excuse provision or commissioner discretion provision occurred in this case. Rather, the petitioner suggests that terms addressed in the September 1999 Guidance should be added to the permit. We conclude that it is not necessary for the DEC to restate the September 1999 Guidance in the permit as the guidance is policy and does not constitute an applicable requirement. *See* November 2001 Clarification. In addition, in its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it would include the provision of 6 NYCRR § 201-1.4 on the state side of all permits.

2. Petitioner asserts the permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation “unavoidable.” As discussed in section F, above, the commissioner discretion conditions apply only to State requirements and cannot apply to federally promulgated requirements. In its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it would include the revised provision of 6 NYCRR § 201-6.5(c)(3)(ii) on the federal side of all permits.

3. Petitioner states that all significant terms must be defined in the permit. The petitioner alleges that the permit is not practically enforceable because the permit lacks definitions for “malfunction,” “upset,” and “unavoidable.” EPA disagrees with the petitioner on this issue. The purpose of the permit is to ensure that a source operates in compliance with all applicable requirements. To the extent petitioner argues that this requirement extends to compliance with the SIP-based commissioner discretion provision, EPA agrees. However, the lack of definitions for the terms “malfunction,” “upset” or “unavoidable” does not, on its face, render the permit unenforceable. These are commonly used regulatory terms. Moreover, petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. In addition, in its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it will include the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, on the state side of all permits. This will help further assure that the excuse provision is not expanded beyond its proper bounds.

4. Petitioner also states that the permit must define reasonably available control technology (RACT). 6 NYCRR § 201-1.4(d) and 6 NYCRR § 201-5 require facilities to use RACT during any maintenance, startup/shutdown, or malfunction condition. The petitioner claims that the proposed permit does not define what constitutes RACT or how the government or public knows whether RACT is being utilized at those times. As explained above, EPA cannot properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the “applicable requirement” as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions. Pacificorp at 23-24; *see also* November 2001 Guidance at page 1.

5. Petitioner next asserts that any title V permit issued to Action Packaging must require

prompt written reporting of all deviations from permit requirements including those due to startup, shutdown, malfunction, and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B). Petitioner states that the permit must require written reports of all deviations.

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

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

Reporting so as to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See* Discussion in Section G *infra*. For a violation to be properly excused, the DEC must properly apply the regulation authorizing such discretion and must properly document its findings to ensure the rule was reasonably applied and interpreted. As discussed below, EPA denies the petition on this point.

G. Prompt Reporting of Deviations

Petitioner’s seventh claim is that the proposed permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). Petition at page 16. The petitioner states that the only prompt reporting of deviations is that required by 6 NYCRR § 201-1.4, which governs unavoidable noncompliance and violations during necessary scheduled equipment maintenance, start-up/shutdown conditions and upsets or malfunctions. *See* Condition 18.2 of the February 11, 2000 permit; Condition 1-3 of the March 7, 2001 permit. Thus, petitioner argues, any other deviations, including situations where the permittee could have avoided a violation but failed to do so, will not be reported until the six-month monitoring report. The petitioner alleges that six months cannot be considered “prompt reporting” in all cases.

EPA agrees with petitioner’s comment. EPA raised this issue with DEC in the July 18, 2000 letter at Attachment III, item 2. While Condition 18.2 of the February 11, 2000 permit refers only to unavoidable violations, prompt reporting of violations is required by other portions of the Action Packaging permit, as amended.

The DEC may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. In any case, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting

requirements of the explicit applicable requirements. As discussed above, EPA does not consider the type of reporting involving preserving potential claims of an excuse to be prompt reporting requirements because they are reports not of deviations but reports of potentially unavoidable violations that the source seeks to have excused. All deviations must be reported regardless of whether the source qualifies for the excuse. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case concern under the rules applicable to the approved program although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).¹⁹

In the subject case, there are two provisions that appropriately require that prompt reports be made to the DEC. These relate to the daily monitoring for opacity and the continuous monitoring of the catalyst inlet bed temperature and exhaust gas temperature of the incinerator. When the daily observances require that a Method 9 test be performed, and that test indicates a violation, the facility owner/operator must contact the DEC representative within one business day of the test and, upon notification, any corrective actions or future compliance schedules are to be presented to the DEC for acceptance. This is an appropriate use of the prompt reporting mechanism as it gives discretion to the DEC representative whether to require a written timely report be filed (in cases where the contravention is significant) or whether to defer the written report until the six-month monitoring report (in either case, the source will provide a written report of the incident). Likewise, when the continuous temperature monitors show that the catalyst inlet bed temperature or the exhaust gas temperature of the incinerator drops below 550 degree F, Action Packaging is required to contact the DEC representative within two business days. Reporting such deviations to DEC within two business days followed by a written report in the semi-annual report satisfies the prompt reporting requirement. With respect to the other applicable requirements that relate to emissions limitations, reporting deviations more frequently than every six months, or the frequency specified in the underlying applicable requirement, whichever is more frequent, is not necessary. EPA finds this permit to have included adequate prompt reporting of deviations, and finds no basis to object to the permit on this issue.

EPA has addressed the prompt reporting requirement with the DEC in order to clarify how the DEC will properly exercise this discretion in such a large program. In the November 16 commitment letter DEC agreed that for all permits issued on and after January 1, 2002, it will include a requirement for reporting deviations consistent with 6 NYCRR § 201-6.5(c)(3)(ii). While this regulation requires inter alia that deviations be reported at least every six months, DEC stated that it will specify less than six months for “prompt” reporting of certain deviations that result in emissions of, for example, a hazardous or toxic air pollutant that continues for more than an hour above permit limits. DEC has scrutinized the procedures for prompt reporting contained in 40 CFR § 71.6(a)(3)(iii)(B), from the federal operating permit program regulations, and finds these procedures to be reasonable and compatible with what is provided for in DEC regulations. Therefore, DEC intends to utilize these provisions to define “prompt” reporting in permit conditions. When prompt reporting of deviations is required, the reports will be

¹⁹ Prompt reporting requirement applicable to sources under the federal operating permit program.

submitted to the DEC, in writing, certified by a responsible official, in the time frame established in the permit condition.

Whether or not the state has adopted a general policy on prompt reporting, the specific application of the prompt reporting requirement is a matter of discretion and is subject to review and objection by EPA.

H. Monitoring

Petitioner's eighth claim is that the proposed permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable. Petition at page 17. The petitioner addresses individual permit conditions that allegedly either lack periodic monitoring or are not practically enforceable.²⁰ The specific allegations for each permit condition are discussed below.

As noted above, DEC amended the permit effective March 7, 2001. Many of the changes in the revised permit address periodic monitoring and in many instances remedy the problems identified by NYPIRG.

Section 504 of the Act makes it clear that each title V permit must include "conditions as are necessary to assure compliance with applicable requirements of [the Act], including the requirements of the applicable implementation plan" and "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(a) and (c). In addition, Section 114(a) of the Act requires "enhanced monitoring" at major stationary sources, and authorizes EPA to establish periodic monitoring, recordkeeping, and reporting requirements at such sources. 42 U.S.C. § 7414(a).

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

²⁰ With respect to lack of adequate periodic monitoring, the petitioner cites 40 CFR §§ 70.6(a)(3) and (c)(1) which requires: monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance; and permits to contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. With respect to practical enforceability, the petitioner cites the U.S. EPA's Periodic Monitoring Guidance, September 15, 1998, at 16 which has since been vacated. Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

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

EPA summarized the relationship between Natural Resources Defense Council and Appalachian Power and described their impact on monitoring provisions under the Clean Air Act in two recent orders responding to petitions under title V requesting that the Administrator object to certain permits. See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, Nov. 16, 2000 ("Pacificorp") (available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>), and In re Fort James Camas Mill, December 22, 2000. Please see pages 16-19 of the Pacificorp order for EPA's complete discussion of these issues. In brief, EPA concluded that in accordance with the D.C. Circuit decisions, where the applicable requirement does not mandate any periodic testing or monitoring, the requirement of § 70.6(c)(1) that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." See 40 CFR § 70.6(a)(3)(i)(B). EPA also pointed out that where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such circumstances, EPA found, the separate regulatory standard at § 70.6(c)(1) applies instead. The factual circumstances of Pacificorp and Fort James Camas Mill are analogous to this case. Accordingly, the reasoning of those decisions is being followed in this case as well.

Facility-Specific Petition Issues

1. Petitioner alleges that general permit Condition 3, item 3.1, which reiterates the requirement under 6 NYCRR § 200.7 that pollution control equipment should be maintained according to ordinary and necessary practices, including manufacturer specifications, should not be included in the Action Packaging permit unless Action Packaging actually operates such equipment. If control equipment is used at Action Packaging, petitioner alleges that the permit condition must be supplemented with periodic monitoring.

In DEC's Response to Comments, DEC stated that this condition is a general requirement that applies to all air permits. DEC responded that the condition is included even where no applicable requirement necessitates the use of control equipment since many facilities voluntarily opt to have control equipment. DEC further stated that control equipment maintenance plans are typically submitted as part of the application, but do not become enforceable parts of the permit. Response to Comments Document, re: General Permit Conditions, at 3.

EPA agrees with DEC that many SIPs contain generic requirements for facilities to maintain all equipment in proper condition. These generic requirements may be provided in the general permit conditions section of the title V permit. EPA agrees with petitioner that it may be confusing to include such generic conditions when a facility does not have control equipment. Nonetheless, EPA finds that permitting authorities have discretion to develop a general permit condition section that applies to all title V sources. EPA also agrees that many facilities, although not subject to any specific applicable requirement, maintain control equipment. Thus, including the generic SIP condition is proper. However, in order to alleviate any confusion this general condition may cause, DEC has been advised that, the statement of basis should describe the control devices that are installed at the facility. See July 18, 2000 letter, Item 7.

Furthermore, EPA disagrees with petitioner that periodic monitoring must be added to this provision. As a general matter, where control equipment is installed under an applicable requirement, the appropriate permit condition is included in the emission units section of the title V permit, not in the general permit condition section. Where controls are maintained under an applicable requirement, DEC would need to include periodic monitoring, unless the control equipment is subject to the Compliance Assurance Monitoring Rule (CAM). 40 CFR part 64. If an emission unit is subject to CAM, the permit would then provide specific operation and maintenance procedures. In this particular case of Action Packaging, it is not subject to CAM since its title V permit application was deemed complete before the cutoff date for CAM applicability. 40 CFR § 64.5(a) requires a CAM plan if the part 70 application is not deemed complete by the permitting authority by April 20, 1998. As periodic monitoring, DEC requires Action Packaging to continuously monitor the temperatures of the incinerator in order to show compliance with the VOC RACT standard. Therefore, there is adequate periodic monitoring included in the permit for the control device. EPA denies the petition on this issue.

2. Petitioner also raises concern about Condition 4, Item 4.1 relating to unpermitted emission sources. The condition, restating 6 NYCRR § 201-1.2, (adopted March 20, 1996) provides that if an existing emission source was subject to the permitting requirements of 6 NYCRR part 201 at the time of construction or modification and the owner or operator failed to apply for a permit, then the owner or operator must now apply for a permit. The condition further states that the emission source or facility is subject to all regulations that were applicable to it at the time of construction or modification and any subsequent requirements applicable to existing sources or facilities. Petitioner asserts that the condition is confusing because if the facility is subject to NSR or PSD, such condition should be in the permit. Petitioner argues that it is unclear from the permit or the application whether the facility is subject to a pre-existing permit. Petitioner is also concerned that a source may not be subject to penalties if it applies for a permit as required by Condition 4, Item 4.1.

EPA notes that this provision does not relieve the permitting authority or permittee from including applicable construction permit conditions in the permit. In addition, if the facility is in violation for not having proper construction permits, the permit must include a compliance schedule. 40 CFR § 70.6(c)(3). Condition 4 expands on what is required by the SIP at 6

NYCRR § 201.2(a), that no person shall commence construction or proceed with a modification of an air contamination source without having a valid permit, by providing additional terms for those who violate permitting requirements.

NYPIRG's specific concern that the permit shield could preclude the imposition of penalties is unfounded. The permit shield provides that compliance with the conditions of the permit is deemed to be compliance with those applicable requirements specifically identified in the permit or those requirements that the State specifically identifies as not applicable. 40 CFR § 70.6(f). Therefore, the permit shield does not exonerate a facility that fails to have any proper construction permits. Furthermore, there is no determination in the permit that NSR is not applicable to Action Packaging. Therefore, if a violation were later discovered, the permittee would need to apply for the proper construction permits, the title V permit would be reopened to include the necessary NSR requirements, and the facility would be liable for any other appropriate enforcement actions. Condition 4 directs what the permittee must do to achieve compliance; it does not address the penalties that may result from non-compliance. Therefore, the condition does not preclude the public, DEC or EPA from bringing an enforcement action and seeking penalties from the facility. Accordingly, EPA denies the petition on this point.

3. Petitioner alleges that the two permit conditions addressing the handling of air contaminants collected in an air cleaning device should not be included if Action Packaging does not operate control devices. If Action Packaging does have control devices, then the petitioner alleges that the condition should include record keeping requirements. DEC responded that the condition is in all permits regardless of whether the facility has air pollution control devices.

EPA denies the petition on this point. As stated in response to issue H.1 above, States have discretion to include as general permit conditions, language from the general provisions of the SIP. For facilities where an applicable requirement specifies a control device, then appropriate monitoring requirements must be included under the emissions unit section of the title V permit.

4. Petitioner asserts that Condition 13, Item 13.1 of the initial February 11, 2000 permit, the general condition which says the facility shall operate in accordance with any accidental release plan, response plan or compliance plan, is problematic because the requirements in these documents should be incorporated into the permit as permit terms. If not incorporated, the petitioner asserts that such documents should be clearly cross referenced in the permit. Petitioner also suggests that this general condition should be deleted from the permit altogether since it adds nothing to the permit.

EPA disagrees with petitioner. Not all types of plans are properly included as part of a title V permit. For instance, risk management plans under 112(r) are not incorporated into a title V permit. Startup/shutdown plans under a maximum achievable control technology (MACT) standard are also only required to be incorporated by reference into title V permits. 40 CFR § 63.6(e)(3).

In certain cases a facility must comply with a plan that is not part of the title V permit. Thus, the general condition is essential to the title V permit since it also serves to remind the source and the public of those plans that are not part of the title V permit. Where the facility is subject to plans such as NO_x RACT or MACT start-up, shut down and malfunction plans, the permit must specifically say so. The general condition can serve only as a reminder to the permittee to comply and apply for requisite permit amendments on a timely basis. In this case there is no allegation that this facility requires such plans.

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

5. The petitioner alleges that the general permit condition, Condition 15, item 15.3 in the initial February 11, 2000, permit (Condition 1-1, Item 1-1.2, in the March 7, 2001, permit revision) stating “[r]isk management plans must be submitted to the Administrator if required by Section 112(r)” should state whether the facility is or is not subject to 112(r).

While EPA agrees with petitioner that this provision is very general and does not affirmatively state whether § 112(r) applies to this particular source, we do not believe that the absence of such a determination provides a basis for EPA to object to this particular permit. Action Packaging did not submit a Risk Management Plan (RMP) to EPA under § 112(r) of the Act and 40 CFR part 68,²¹ and given what we know about this source, EPA does not believe that Action Packaging is in fact subject to these statutory and regulatory requirements. Accordingly, at most it was harmless error in this case that the permit does not specify the applicability of § 112(r) and part 68 to this facility.

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

6. The petitioner alleges that the permit lacks any kind of periodic monitoring to assure compliance with the applicable opacity limitation found in the SIP at 6 NYCRR 211.3. The petitioner specifically points to Condition 30 which prohibits the emissions units at Action Packaging from exceeding 20% opacity over a six-minute average, and 57% in any single 6 minute period during each hour. This condition is a Facility Level condition, and applies to all

²¹ All Risk Management Plans (RMP) are filed with EPA and EPA can verify the submission of an RMP by contacting the RMP Reporting Center at (703) 816.4434.

emissions units, whether listed in the permit or not. DEC responded that this condition is in the SIP and applies to all sources. Petitioner alleges that the permit does not say what kind of monitoring is to be performed and how often it should be performed and does not specify a particular reporting requirement except “upon request by regulatory agency.” Petition at page 24.

EPA disagrees with petitioner except with regard to the frequency of reporting. Condition 30 is part of the facility level section of the permit. Under the emission unit specific limits, periodic monitoring of the incinerator is provided. To address the monitoring frequency issue, DEC added Condition 1-5 to require daily visible emissions observation of the incinerator stack or the bypass stack once a day. If visible emissions are observed for 2 consecutive days, then a Method 9 analysis will be conducted within 2 business days. DEC would be contacted within 1 business day of the Method 9 test if the Method 9 test shows violation of the opacity standard. Since the incinerator uses natural gas for combustion, EPA finds the periodic monitoring DEC proposed for opacity to be adequate. However, EPA agrees with the petitioner that reporting should be semi-annual. As discussed in section D, DEC already corrected this issue.

7. With regard to conditions 32, 41, and 48, petitioner alleges that DEC does not provide the method by which the VOC content of inks are measured or the VOC emissions are calculated. The petitioner states that the method for determining the VOC content of the inks, and the method for calculating VOC emissions must be provided in the permit. Further, petitioner asserts that the permit must require that a report of the VOC monitoring be submitted every six months. The same issue is raised with regards to HAPs in condition 33.

EPA disagrees with petitioner that the methods (formulas for determining VOC emissions) need to be listed in the permit since they are already listed in the SIP Rule, 6 NYCRR part 234.3(a). In addition, Action Packaging is complying with VOC RACT by utilizing a control device that ensures 60% reduction of VOCs. Actual compliance with the VOC RACT rule is based on testing the incinerator efficiency and continuously monitoring the temperature to ensure there is at least 60% destruction.

EPA agrees with the petitioner on the issue of semi-annual reporting. The permit conditions cited require the facility to maintain purchase and usage records of VOC content of inks on a per delivery basis and report “upon request by regulatory agency.” All monitoring reports are required to be submitted at least every six months. 40 CFR § 70.6(A)(3)(iii)(A).

DEC replaced Conditions 32 and 33 with Condition 1-6 in the permit revision that took effect on March 7, 2001, to expand on the record keeping requirements and correct the record keeping frequency from per delivery to monthly. Condition 1-6 also changed the reporting requirement of the original Conditions 32 and 33 from “upon request by regulatory agency” to semi-annually, as requested by petitioner.

Petitioner had questioned the applicability of Part 63, Subpart KK to this facility as a

comment on the draft permit during the public comment period. In the Response to Comments, DEC asserted that Action Packaging is not subject to said requirements because it emits less than the threshold levels that would render Action Packaging a major source under Section 112 of the Act. DEC asserted that since Action Packaging is not a major source under Section 112, it is not subject to Subpart KK. EPA disagrees with DEC on this issue. Subpart KK applies to both major sources and area sources of the printing industry. Emission of a small amount of HAP does not exempt the source from all requirements under Subpart KK. Area sources are subject to the monitoring and recordkeeping requirements found under 40 CFR §§ 63.829(d) and 63.830(b)(1). Omitting these requirements from the Action Packaging permit is a violation of 40 CFR § 70.6(a)(3). Therefore, EPA objects to the Action Packaging permit on this issue. DEC must reopen the permit to incorporate the applicable requirements under Subpart KK for the HAP emissions.

8. The petitioner raises questions about the legality of the seasonal variance granted by DEC which allows Action Packaging to stop operating the incinerator from November 1 to March 31 each year. Petitioner first alleges that, before the source can operate under the seasonal variance, the variance needs EPA approval. Petitioner next alleges that Action Packaging did not submit evidence with its permit application that the seasonal variance would not jeopardize air quality. Third, petitioner asserts that if Action Packaging did submit an air quality analysis or if DEC performed a NSR non-applicability determination, such analysis should be included in a Statement of Basis. Finally, petitioner alleges that New Source Review might apply to the facility as a result of the seasonal variance because the emissions appear to have increased by more than 50 tpy after issuance of the seasonal variance.

First, the seasonal variance allowed for natural gas fired afterburners in 6 NYCRR § 234(f)(3) does not need to be EPA approved as a source-specific SIP. In the table found at 40 CFR § 52.1679, EPA required only facilities seeking a lesser degree of control under 6 NYCRR § 234(f)(1) to have the control approved by EPA as a revision to the SIP. The table does not require SIP approval for seasonal variances under § 234(f)(3). Therefore, EPA denies the petition on this point.

Second, according to DEC's response to comments document, the facility did perform an air quality analysis in November 1995 pursuant to the guidelines set forth in "New York State Air Guide 1: Guidelines for the Control of Toxic Ambient Air Contaminants." When EPA reviewed the title V file for Action Packaging in the DEC Region 2 Office, EPA found the air quality analysis attached to Action Packaging's application for the seasonal variance. As long as the state follows its SIP approved rules in granting a seasonal variance, EPA will not object to the incorporation of a term from a part 201 minor source operating permit, which allowed the variance, into a title V permit. Based on the title V file for Action Packaging, it appears Action Packaging met the requirements for DEC to grant the seasonal variance. Therefore, EPA denies the petition on this point.

Third, EPA does not agree with petitioner that the air quality analysis submitted by

Action Packaging as part of its application for the seasonal variance and certificate to operate need to be included in the statement of basis. The purpose and role of the statement of basis is discussed in section C, *supra*. The statement of basis is not intended to compile applications and supporting documents submitted by the applicant. Therefore, EPA denies the petition on this point. Petitioner also pointed out that the NSR non-applicability determination should have been included in the statement of basis. EPA disagrees with petitioner on this point. DEC issued the certificate to operate to Action Packaging pursuant to Part 201 over five years ago. DEC determined that granting the seasonal variance to Action Packaging was not subject to Part 231 nor would it have an adverse impact on air quality. Based on a review of DEC's files, EPA found that DEC followed its rules (6 NYCRR Part 231) and policies in determining that Action Packaging was not subject to NSR as a result of the seasonal variance. Therefore, it was appropriate for DEC to grant the seasonal variance via a certificate to operate under Part 201. Since DEC appropriately followed its rule in approving Action Packaging's permit and variance and did not treat it differently than similar sources, it is not crucial to discuss the NSR non-applicability determination in the statement of basis. Therefore, EPA denies the petition on this point.

Finally, EPA disagrees with Petitioner that Action Packaging is subject to Part 231 for NSR based on the seasonal variance for VOC emissions. NSR applies to a modification at an existing major stationary source, defined as a physical or operational change that results in a significant net emissions increase. *See* 40 CFR 52.21(b)(2)(i). The change that petitioner complains of here was the seasonal shut down of an air pollution control device designed to reduce the emissions of VOC – a gas fired afterburner – during the Winter months. The seasonal shut down apparently began some time after the installation and initial operation of the afterburner, which was installed under the SIP rule, which in turn provided for a variance allowing the seasonal shut down. The variance was actually granted as part of a (non-Title V) permanent operating permit for the afterburner, following a period of initial year-round operation pursuant to a permit to install. It appears that neither the SIP itself nor the permit to install required any particular enforceable level of emissions reflecting use of the afterburner. Since the reduction in emissions during the period prior to granting of the seasonal variance was not enforceable, it was not creditable for purposes of assessing whether the increase in annual emissions following the granting of the seasonal variance constituted an increase in emissions for NSR applicability purposes. *See* 40 CFR 52.21(b)(3)(vi)(b). Thus, approval of the seasonal variance was not an operational change that resulted in a significant net increase in emissions, and did not require an NSR permit.

9. The petitioner alleges that Action Packaging was required to submit a CAM (Compliance Assurance Monitoring) plan as part of its application and that the requirements of this plan must be incorporated into Action Packaging's title V permit. The basis for this assertion is that Action Packaging allegedly received an incomplete application determination on August 19, 1998. 40 CFR § 64.5(a) requires a CAM plan if the Part 70 application is not deemed complete by the permitting authority by April 20, 1998. Since Action Packaging did not have a complete permit by the April 20, 1998 date provided in the CAM rule at 40 CFR § 64.4,

petitioner alleged that the CAM plan was left out of the application.

EPA denies this aspect of the petition. In its Response to Comments, DEC stated that the application was found timely and complete for purposes of commencing review on December 8, 1997. The August 19, 1998 letter from DEC to Adam Kulger of Action Packaging Corporation, referred to by petitioner, did not find that the application was not timely or complete pursuant to 40 CFR §70.5(a)(2). The August 1998 letter, while called a “Notice of Incomplete Application,” was essentially a request that the applicant sign and date a computer printout that identified some errors found in the permit application. The errors found were technical in nature and do not rise to an incompleteness determination as provided in 40 § CFR 70.5

Specifically, the errors included an invalid range code and the listing of an incorrect contaminant name, a missing SCC, an invalid design capacity, and an improper code for a source/control device. As provided by § 70.5(a)(2), the state may request additional information to evaluate and take final action on an application, and set a reasonable deadline for a response. The August 1998 letter asked the applicant to fix or confirm the errors by September 1, 1998. Action Packaging responded within the deadline, thus preserving the completeness determination.

Once the technical review of an application begins, including drafting the permit, the permitting authority may need to contact an applicant many times for additional information or clarifications. This process does not mean that the permitting authority has made a finding that an application is not timely or complete under 40 CFR § 70.5, so as to subject a facility to CAM or loss of the application shield.

However, EPA finds that labeling the computer printouts as “Notice of Incomplete Application” may create confusion, and EPA Region 2 has suggested that DEC change the labeling of the letters requesting more information or fixing application errors found by the DEC computer system. DEC has agreed to make this change in its computer system in the future. Nonetheless, because DEC found the application to be complete in December 1997, (4 months before the cutoff date) and the August list of fixes were truly technical in nature and not requirements under § 70.5 for a timely and complete application, EPA denies this aspect of the petition.

10. The petitioner alleges that condition 36, which states that DEC may extend the number of days of operation of the incinerator beyond the 214 days during episodic conditions, must be a permit condition and not just a description of a process.

EPA agrees with petitioner. The part 201 permit (state certificate to operate) issued to Action Packaging included a permit condition that provided the incinerator would be activated upon notification by the DEC. This condition should have been but was not carried over to the title V permit as a permit condition. It was included in the process description part of the permit. EPA agrees with petitioner that a condition requiring Action Packaging to operate the incinerator

for more than 214 days when requested by DEC must be included in the title V permit as an applicable requirement.

DEC amended the permit to include this extension as a permit condition (addition of Condition 1-8). Because DEC has fixed this issue, there is no longer a basis to object to the permit.

11. The petitioner alleges that the title V permit lacks periodic monitoring because the frequency of Method 25 testing is not provided in the permit. DEC's response to comments document states that periodic monitoring of VOC destruction occurs by continuous monitoring of the incinerator temperatures. Petitioner also alleges that the statement of basis should explain why monitoring the temperature of the exhaust gas assures compliance with the 60% destruction efficiency.

EPA denies this claim. Temperature monitoring is sufficient to assure compliance because incinerators operate on the principle of thermal destruction. Therefore, if the temperature is within the proper operating range, the correct level of destruction can be assured. VOC RACT for Graphic Arts, 6 NYCRR § 234.3(a)(3)(iii), requires monitoring the temperature of the exhaust gas and the temperature rise across the catalytic bed of the incinerator as the monitoring method used to assure compliance with the VOC RACT limit of 60% destruction. DEC need not address the rationale for temperature monitoring as required by the VOC RACT in a particular permit since that is more appropriate in a rulemaking process.

As far as whether DEC must prescribe some frequency of testing in the permit, EPA agrees with petitioner that it should be clearly defined. For the type of facility where there is not likely to be any variation in source operation, the method of printing does not change with time, once per permit term testing using Method 25 to verify the destruction efficiency of the incinerator is adequate. Temperature monitoring, opacity monitoring and record keeping of purchases and usage of inks also serve as good indicators of the compliance status of the source with the VOC RACT. Therefore, EPA finds the requirement for once per permit term testing stipulated in the revised March 7, 2001 permit with the first test to be completed within 180 days following permit issuance to be acceptable. Therefore, EPA does not object to the permit on this basis.

12. Petitioner alleges that no frequency of Method 9 testing or reporting for opacity was provided for conditions 38 and 44. Petitioner also stated that the Action Packaging "permit must specify whether the facility operates a COMs [Continuous Opacity Monitoring system] or if an employee is paid to watch for opacity emissions 24 hours a day." Petition at page 31. Petitioner pointed out that the permit must specify what kind of records need to be maintained to keep track of opacity monitoring.

EPA agrees with petitioner that the permit should specify under what circumstance a

Method 9 test would be required. The opacity monitoring results will serve as indicators for the need of a Method 9 test. In the revised permit, Conditions 38 and 45 were replaced by Condition 1-7, which addresses petitioner's concerns point by point. Petitioner raised concerns about the daily visible emissions at the facility, including the qualifications of the observer and the timing of notifying DEC, among other concerns. First, only a certified visible emission reader can definitively determine the percent opacity emanating from a stack. It is understood that the facility observer referenced in Condition 1-7 of the Action Packaging permit would not be so certified. It is the duty of this facility observer to identify any emissions from the stack, whether or not such emissions would constitute an opacity violation. Once two consecutive days of emissions are observed, then the facility would need to have a Method 9 evaluation performed by a certified smoke reader. It is the EPA's belief that the two-day time frame for this next step to occur is reasonable. Also reasonable is the next step of the process which is, if an opacity violation has been documented, then the facility must notify the DEC within one business day of the Method 9 opacity test. It must be noted that the observances by the facility employee are not Method 9 readings and, therefore, the requirements of the Method 9 do not apply until visible emissions are observed.

Given the fact that the incinerator at Action Packaging burns natural gas, it is highly unlikely that Action Packaging will have opacity problems. There is no applicable requirement that requires Action Packaging to install and maintain continuous opacity monitors (COMs). Furthermore, title V does not mandate the installation of COMs. As such, installation of a COM in the case of Action Packaging does not appear to be economically appropriate. EPA concludes the monitoring procedure delineated in Condition 1-7 is appropriate. EPA disagrees with petitioner with regard to the hiring of an employee to observe visible emissions 24 hours a day. There is currently no title V requirement, or any other applicable requirement to which this facility is subject, that requires the facility to have on the premises at all times a person trained in Method 9 readings who can conduct a reading within one hour after visible emissions are observed. Not all facilities have environmental or plant managers who are trained in Method 9 readings. Therefore, DEC's decision to require a Method 9 reading two days after observing visible emissions over a two day period is acceptable. This time frame is necessary for the facility to hire a trained Method 9 reader. The revised permit condition specifies the information that needs to be recorded and maintained in a log book for five years. Therefore, conducting daily visible inspections and logging the results of such inspection is adequate to assure that the facility complies with the 20% opacity standard.

Because EPA finds that the periodic monitoring for opacity is adequate, EPA denies the petition on this issue. It should be reiterated that the adequacy of monitoring is always a case-by-case decision. The specific situation or circumstance associated with a particular source needs to be taken into consideration in making such decisions.

13. Petitioner alleges that reporting requirements, report content, and frequency of reporting must be added to the permit for conditions 43 and 49 on open containers.

EPA agrees with petitioner. The permit must include a provision that requires Action Packaging to keep a daily log book of when the daily inspections for open containers occurs and the inspection results. In addition, reporting must meet the six-month reporting requirements of 6 NYCRR part 201 and 40 CFR part 70. The six-month report could just be a record of the results of the daily inspections (e.g., “no open containers discovered during daily inspections”), DEC addressed petitioner’s concerns by replacing Conditions 43 and 49 by 1-9 which requires semi-annual reporting and contains the details of the information that must be logged. Therefore, there is no longer a basis to object to the permit on this issue.

14. Petitioner asserts that DEC must explain why temperature monitoring assures that the incinerator is operating in compliance with VOC RACT.

EPA disagrees with the petitioner. DEC is not adding periodic monitoring to the permit, but is only including the applicable monitoring requirement from the standard. When 6 NYCRR part 234 was promulgated, the rule underwent public review. The rule requires temperature monitoring to assure compliance with the VOC destruction limits and was so incorporated into the permit. Since the rule was included in the permit verbatim, EPA does not agree that DEC needs to provide further explanation of the rule itself in a particular permit.

15. Petitioner asserts that the statement of basis should say whether Action Packaging has already installed continuous temperature monitors. Petitioner also questions whether all applicable monitoring is provided in the permit because the permit only requires continuous monitoring of the temperature of the exhaust gas and not monitoring the temperature rise across the catalytic incinerator bed. Petitioner questioned the practical enforceability of this condition regarding whether 550 degrees Fahrenheit is the lower limit of monitoring or that the temperature cannot fall below 550 degrees Fahrenheit. Petitioner also stated that the monitor should be periodically calibrated and the monitoring report should be submitted at least every six months.

EPA agrees with petitioner on this issue. 6 NYCRR part 234 indeed requires monitoring and continuous recording of both the catalyst inlet bed temperature and the exhaust gas temperature. However, this monitoring scheme was not included in the original permit. It appears this was an oversight since DEC stated in the response to comments document that they agreed with the original NYPIRG comment and made the appropriate changes in the revised permit.

DEC amended the permit on March 7, 2001, by deleting Condition 47 (petitioner erroneously identified this condition as Condition 48) and replacing it with Condition 1-11. Condition 1-11 requires Action Packaging to include continuous monitoring of the catalyst inlet bed temperature and a frequency to calibrate the monitor. However, DEC neglected to retain the original condition which requires monitoring and recording of the exhaust gas temperature. 6 NYCRR § 234.4(c)(1) requires monitoring of both exhaust gas temperature and the catalytic inlet bed temperature of the incinerator. DEC’s revision is still not acceptable since it added one of the requirements and deleted the other. Therefore, EPA objects to the permit on the issue of the

omission of an applicable requirement, namely 6 NYCRR § 234.4(c)(1). DEC must reinstate the requirements of the deleted Condition 47.

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I grant in part and deny in part NYPIRG's petition requesting the Administrator to object to the issuance of the Action Packaging Permit. In sum, NYSDEC is ordered to address the deficiencies identified under Sections H.7 and H.15 of this order. This decision is based on a thorough review of the original permit dated February 11, 2000 and the March 7, 2001 revisions to the permit which EPA has concluded corrected some of the objectionable conditions of the original permit.

January 16, 2002

Dated:

/ S /

Christine Todd Whitman
Administrator