

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
TANAGRAPHICS, INC.)	ORDER RESPONDING TO
To operate a lithographic printing facility)	PETITIONER'S REQUEST THAT
located in Manhattan, New York)	THE
)	ADMINISTRATOR OBJECT TO
Permit ID: 2-6205-00088/00004)	ISSUANCE OF A STATE OPERATING
)	PERMIT
Issued by the New York State)	
Department of Environmental Conservation)	Petition No.: II-2000-05
Region 2)	
_____)	

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

On July 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 Tanagraphics, Inc. ("Tanagraphics"). The Tanagraphics permit was issued by the New York State Department of Environmental Conservation, Region 2 ("DEC"), and took effect on May 17, 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, 211, 228, and 234.

The petition alleges that the Tanagraphics 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 lacks an adequate 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 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); 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 some individual permit conditions lack adequate periodic monitoring and are not practically enforceable; and 9) the opacity requirements of 6 NYCRR § 234.3(e) and 6 NYCRR § 228.4 are omitted from the permit. The petitioner has

requested that EPA object to the issuance of the Tanagraphics Permit pursuant to CAA§ 505(b)(2) 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 Tanagraphics title V permit. Based on a review of all the information before me, including the permit application; a March 23, 2000 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 Tanagraphics permit dated May 17, 2000; and 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 some valid issues on the Tanagraphics permit which resulted in my decision to grant portions of the petition. This petition also raised programmatic issues, some of which DEC has already addressed and others which DEC is in the process of addressing. *See* letter dated November 16, 2001 from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 (“commitment letter” or “November 16, 2001 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 on December 9, 1996. 61 Fed. Reg. 57589 (Nov. 7, 1996); *see also* 61 Fed. Reg. 63928 (Dec. 2, 1996) (correction); 40 CFR part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to New York’s title V operating permit program based, in part, on "emergency" rules promulgated by DEC. *See* 66 Fed. Reg. 63180 (Dec. 5, 2001). Once DEC adopted final regulations to replace the emergency rules, EPA granted full approval to New York’s title V operating permit program based on these final regulations. 67 Fed. Reg. 5216 (Feb. 5, 2002). Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as “applicable requirements”), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, States, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permit 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 CAA §§ 505(a) and (b)(1) and 40 CFR §§ 70.8(a) and (c)(1), States are required to submit to EPA for review all operating permits proposed pursuant to title V 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 40 CFR 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 PETITIONER²

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

EPA received a letter dated November 16, 2001, from DEC Deputy Commissioner Carl

¹ See CAA § 505(b)(2) and 40 CFR § 70.8(d). Petitioner commented during the public comment period by raising concerns with the draft operating permit that are the basis for this petition. See comments from Keri Powell, et al. Attorneys for NYPIRG to DEC (September 23, 1999) ("NYPIRG comment letter").

² Issues A-G have been raised previously by Petitioner and addressed by the Administrator in Orders responding to the petitions. In the Matter of Albert Einstein College of Medicine of Yeshiva University, Petition Number II-2000-01, Jan. 16, 2002 ("Yeshiva"), In the Matter of Action Packaging Corp., Petition Number II-2000-02, Jan. 16, 2002 ("Action Packaging"), In the Matter of Kings Plaza Total Energy Plant, Petition Number II-2000-03, Jan. 16, 2002 ("Kings Plaza"). These Orders are available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb2000.htm>.

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

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

A. 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. *See* 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 an objection.

Petitioner asserts that the public notice did not meet the requirement of 40 CFR § 70.7(h)(2) because it neither gave notice of a hearing nor informed the public of how to request a public hearing. In this case, the DEC did not schedule a hearing and did not inform the public of how to request a hearing in its public notice.

Petitioner is correct that technically this is a defect in the DEC's public notice procedures for this permit. However, there is no allegation that NYPIRG was prejudiced or harmed as a result of DEC's failure to indicate the procedures that must be followed to request a hearing. To the contrary, petitioner was able to request a hearing, this request was considered by DEC and was responded to in the Responsiveness Summary. *See* Cover Letter to Responsiveness Summary. DEC's records showed no additional comments or hearing requests were received on this proposed permit and no other petitions have been filed concerning this permit.⁵ Moreover,

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

⁵ 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 represents improper implementation of the program. DEC reiterated its understanding of the public hearing process in its November 16, 2001 commitment

petitioner has not alleged or demonstrated that had DEC properly listed the procedures for requesting a hearing a different outcome would have resulted. Therefore, EPA finds that DEC's procedural error was harmless and did not prejudice the Petitioner or 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"); *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 466 (D.C. Cir. 1967) ("The Supreme Court's opinion reflects the concern that agencies not be reversed for error that is not prejudicial."). 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. *See* 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, particularly when a member of the public is prejudiced or harmed by the procedural error. Therefore, EPA has determined that the failure to provide a clear statement in the public notice as to how to request a public hearing must be corrected and has so advised the DEC.⁶ In a letter dated November 16, 2001 DEC committed to revising the language in the public notice, to indicate whom the public should contact to request a public hearing. *See* Commitment letter at page 5. According to EPA's program review, the DEC is substantially meeting this commitment. *See* footnote 4, *supra*. Failure to consistently adhere to the requirements of 40 CFR § 70.7(h)(2) and § 502(b)(6) of the Act can result in a program deficiency.⁷ 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. *See* 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. *See* 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

letter at page 5.

⁶ 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.

⁷ 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.

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.⁸

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 CFR § 71.11(f)(1).⁹

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. *See* 6 NYCRR § 621.7(c)(1). In this instance, however, DEC’s denial of a hearing is at most a harmless error and does not warrant an EPA objection to the Tanagraphics 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 petitioner was the only commenter, DEC could have reasonably concluded that there was not

⁸ 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.

⁹ 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.”

sufficient public interest to hold a hearing on this permit.^{10 11} Accordingly, EPA denies the petition on this issue.

This determination does not infer 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 a hearing shall be based on whether "a significant degree of public interest exists."¹² 6 NYCRR § 621.7(c)(1). Thus, to ensure a consistent approach and to prevent further confusion as to what 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 will result in a finding of program deficiency pursuant to 40 CFR § 70.10(b). According to a recent review, DEC is substantially meeting this commitment. *See* footnote 4, *supra*. Furthermore, where EPA concludes that there is appropriate grounds for objecting to a permit due to inadequate public notice or improper denial of a public hearing, EPA may order an objection to any such 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 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

¹⁰ It is not EPA's position that under all circumstances 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.

¹¹ The DEC has held hearings on draft permits where a significant degree of public interest in the permitting action was present. *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).

¹² 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.

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 utilized by the facility in this case, may have enabled the applicant to avoid revealing noncompliance in some circumstances. Contrary to EPA and DEC regulations, the DEC form allowed an applicant to certify that it expects to be in compliance with all applicable requirements when the permit is issued rather than make a certification as to its compliance status at the time of permit application submission. As provided for 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).

Defects in the application process can provide a basis for objecting to a title V permit if flaws in the application could result in a defective permit. There is no evidence that in this case problems with the application caused such substantial defects in the final permit that an objection is warranted. 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. The lack of a compliance certification might have allowed the source to avoid including a compliance schedule in the permit but in this case it would not have delayed the time required to bring the source back into compliance. In the case of a surface coating or graphics arts printing operation, such as Tanagraphics, where the emission control option selected is the use of low VOC content fountain solution and inks/coatings, any violation of the SIP requires immediate compliance with no schedule for achieving compliance at a later date. The applicable requirements provide that the facility must switch to a compliant ink, fountain solution, or coating. 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 used by applicants in New York prior to January 1, 2002 did not properly implement the EPA or the State regulations. Therefore, DEC changed its forms and instructions in accordance with its November 16, 2001 commitment letter¹³.

The petitioner notes three other deficiencies with the permit application that EPA has determined did not result in a deficient permit, although such deficiencies may compromise the process of developing a permit. The first of these issues relates to including “a statement of methods used for determining compliance” as part of Tanagraphics’ initial compliance certification. *See* 40 CFR § 70.5(c)(9)(ii). Although the application submitted by Tanagraphics did not specifically require the facility to include such a statement, in this case, the applicant did provide this information in the “Facility Compliance Certification section of Section III and the “Emission Unit Compliance Certification” section of Section IV of the application for the requirements under 6 NYCRR §§ 234.3(b)(2) and 228.7. The reference test method for determining compliance with these rules has been listed for each piece of printing/coating equipment in the application. Tanagraphics has chosen the use of low VOC content inks, coatings, and fountain solutions as its method of achieving compliance. Pursuant to 6 NYCRR §§ 234.3(b)(2) and 228.7, compliance is determined by taking a sample of the ink, coating, or fountain solution as applied at the facility and sending it to a laboratory for analysis. EPA concludes that although the NYSDEC application form utilized by Tanagraphics omitted the requirement to provide a statement of methods for determining compliance, in this case, Tanagraphics correctly provided the necessary information in its application. Accordingly, EPA denies the petition on this point.

¹³ 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.

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. In "White Paper for Streamlined Development of Part 70 Permit Applications" dated July 10, 1995, EPA clarified that citations may be used to streamline how applicable requirements are described in an application, provided the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. The permitting authority may allow the applicant to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject, provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public (e.g., publically available documents include regulations printed in the Code of Federal Regulations or its State equivalent). The Tanagraphics 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. Therefore, EPA denies the petition on this point.

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 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 requirements cited in the printed form. Accordingly, consistent with its November 16 commitment letter, DEC amended 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.¹⁴ The DEC is aware that the documentation necessary to insure 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 on this issue is that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. In Section IV of DEC's application form, there is a block labeled, "Monitoring Information" that asks applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. In total, five pages in the Tanagraphics application address this point by providing a description of and/or reference to the applicable test methods for determining compliance with each applicable requirement. Thus, petitioner's final point regarding the application form is without merit. EPA denies the petition on this issue.

¹⁴ As previously discussed, DEC amended its application form and instructions in accordance with the November 16 commitment letter.

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. See petition at page 7. Petitioner notes that, subsequent to the public comment period for the Tanagraphics permit, the permitting authority commenced incorporating a "Permit Description" in all draft permits being issued.

The requirement for the "statement of basis" is found in 40 CFR § 70.7(a)(5) and 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 is a separate document¹⁵ which is to be sent to EPA and to interested persons upon request. This requirement for the statement of basis is not contained in 40 CFR § 70.6 which sets forth the required contents of the permit. In fact, 40 CFR § 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. See 40 CFR § 70.6(a)(1)(i).

A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. It should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, any source-specific monitoring requirements, and the permit shield.

EPA has recently provided guidance to permitting authorities that addresses the contents of a "statement of basis" in terms that aid both EPA and the public.¹⁶ As a result, the DEC has

¹⁵ Unlike permits, statements of basis are not enforceable, do not set limits and do not create obligations. Thus, certain elements of statements of basis, if integrated into a permit document, could create legal ambiguities.

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

incorporated certain elements into its “permit review reports.”¹⁷ In the cited letters, EPA explains the “statement of basis” is to be used to highlight significant decisions or interpretations that were necessary to issuing the permit. These reports are intended not simply to be redundant to the permit but to assist in reviewing what is in the permit. Additionally, in a December 22, 2000 Order responding to petition for objection to the Fort James Camas Mill permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring method(s) be documented in the permit record. In re In the Matter of Fort James Camas Mill, (“Fort James”), Petition No. X-1999-1, at page 8 (December 22, 2000).

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

While EPA agrees with Petitioner that a statement of basis was not made available with the draft Tanagraphics permit,¹⁸ we conclude that its absence does not, in this case, warrant an objection to the permit. In this case, it is possible to achieve a sufficient understanding of the source using other available documents in the permit record. The Tanagraphics permit can be easily understood through reading the permit and the application, especially since the source is not subject to applicable requirements or monitoring provisions that rely on source-specific determinations or engineering judgement.¹⁹ As such, EPA believes that a more detailed

¹⁷ In order to comply with the requirements of 40 CFR § 70.7(a)(5), DEC has committed to prepare and make available at time of issuance of draft permits, a “permit review report,” which will serve as DEC’s statement of basis. The contents of this permit review report are described in DEC’s November 16, 2001 commitment letter.

¹⁸ It should be noted that while Tanagraphics’ draft permit did not include a “Permit Description,” such a description was incorporated as part of the Tanagraphics final permit which took effect on May 17, 2000. This description includes the nature of the “business” (nine sheetfed printing presses to product reports, brochures, booklets, etc. and one videojet imaging system for printing labels and bar codes); air permit applicability; and a discussion of one of the methods to be used to monitor compliance at the facility. While this discussion does not fully satisfy the requirements of § 70.7(a)(5), it does provide needed information on the permit.

¹⁹ Several regulations contained in the New York State Implementation Plan (NY SIP) apply to this facility: (1) compliance certification and monitoring, recordkeeping and reporting requirements of 6 NYCRR § 201-6.5; (2) requirements applicable to graphic arts operations in 6 NYCRR part 234; and (3) requirements applicable to surface coating processes in 6 NYCRR part 228. As monitoring, the permit requires Tanagraphics to perform analytical testing using Method 24 (of 40 CFR Part 60, Appendix A) to determine the VOC content of the fountain solutions and inks/coatings used; keep records of purchase, usage and/or production of inks, VOC containing materials, coating materials, and solvents; and keep records of all certifications.

explanatory document was not necessary to understand the legal and factual basis for the draft permit conditions. There is no evidence that the petitioner was harmed by the absence of a statement of basis. In fact, NYPIRG provided detailed and thoughtful comments on the draft permit establishing that it had a basic understanding of the terms and conditions of this permit. Therefore, DEC's failure to include a statement of basis with the draft Tanagraphics permit was at most harmless error.

As discussed in Section H, NYPIRG's petition on this permit is being granted on other grounds and 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 Tanagraphics 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).

At a minimum, the statement of basis should discuss the following items: 1) the overall operation of the facility; 2) which printing presses are used for printing only and which are used for coating including the substrates for each operation; 3) the exhaust system for the printing/coating operations (vented through the windows, hood and stack, etc.); 4) control device or option selected; 5) the exemptions that apply to the boiler, space heaters, hot water heaters and the film and plate-making facilities; 6) the applicability of NSPS Subpart RR to the Videojet Cheshire 4000 Imaging System; 7) the applicability of Section 112(r) to the facility; 8) clarification on how the source will demonstrate compliance with 6 NYCRR § 234.3(b)(2) and 6 NYCRR § 228.7 using Method 24, Method 24A and/or recordkeeping as provided in 6 NYCRR § 234.4(b)(2)&(3) and 6 NYCRR § 228.5(a); 9) the definition of "a batch of product" and "raw material;" and 10) the definition of "prompt" in the reporting of deviations.

D. Reporting of Monitoring

Petitioner 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 Tanagraphics'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 its Responsiveness Summary, DEC described the general condition entitled, "Monitoring, Related Recordkeeping and Reporting Requirements" (Condition 17 of the draft permit) as the "default" condition which applies unless a more frequent reporting period is required by a rule. Condition 17 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. In the final permit, although other conditions, such as Conditions 32, 34, 39, 40, 41, and 42 require reporting only "upon request by the regulatory agency," Condition 25 clarifies that reporting under other conditions will also be subject to the semi-annual requirement per § 201-6.5(c)(3). Specifically, Condition 25 states the following:

In the case of any condition contained in this permit with a reporting requirement of "Upon request by regulatory agency" the permittee shall include in the semi annual report, a statement for each such condition that the monitoring or recordkeeping was performed as required or requested and a listing of all instances of deviations from these requirements."

Above and beyond what is required by § 70.6(a)(3)(iii), Condition 25 requires the semiannual report to include a summary of the testing results of any emission testing performed during the previous six month reporting period. EPA finds the confusion that existed between Condition 17's 6-month reporting requirement and the "upon request" requirement found under Conditions 32, 34, 39, 40, 41, and 42 to have been resolved by the language in Condition 25. EPA disagrees with petitioner that the permit as currently written needs to be modified with regard to the reporting requirement. Therefore, EPA denies the petition on this issue.

E. Annual Compliance Certification

Petitioner 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 that it identifies which conditions are covered by the annual compliance certification. Finally, NYPIRG alleges that permit conditions that lack periodic monitoring are excluded from the annual compliance certification.

EPA notes, first, that the language in the Tanagrahics 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. The Tanagraphics permit included this language at Conditions 14.2 and 26.

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. Conditions 14 and 26 delineate 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. Therefore, contrary to petitioner’s claim EPA finds the Tanagraphics permit and New York’s regulation to require the source to certify compliance or noncompliance, annually for each permit term. As such, EPA denies 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 Tanagraphics permit, the DEC has nonetheless elected to take the appropriate step to improve the administration of its program

in this regard. According to EPA's program review, the DEC is substantially meeting its commitment to add annual compliance certification language to title V permits. *See* note 4, *supra*. As discussed in detail in Section H., below, EPA is granting in part the NYPIRG petition for Tanagraphics. Therefore, when DEC revises the permit in response to this Order, it will also add language to clarify the requirements of the annual compliance certification reports.

F. Startup, Shutdown, Malfunction

Petitioner alleges that 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 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 and sufficient public notice 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. 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 condition provides a detailed and thorough procedure to report and correct 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 to 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 policy²⁰. 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 giving 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.

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 facility²¹ demonstrates to EPA that the DEC’s interpretation and application of section 201-1.4 are 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 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.” See Pacificorp at 23-24.

The position set forth in Pacificorp was reiterated in the November 2001 Clarification which confirms that EPA’s September 20, 1999 guidance entitled “State Implementation Plans:

²⁰ 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”).

²¹ Letter from Elizabeth Clarke, Environmental Analyst, DEC, Region 2, to Steven C. Riva, Chief, Permitting Section, EPA Region 2, dated March 23, 2000, Response 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.”

Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (“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). While existing SIP rules and 40 CFR § 70.6(g) may only be changed through established rulemaking procedures, 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 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 6 NYCRR §§ 201-1.4 and 201-1.5(e) provide the Commissioner with a discretionary authority to excuse unavoidable non-compliance and violations when certain conditions are met, any abuse of the excuse provision would be by DEC and not by the source for simply asking for the excuse. 6 NYCRR § 201-6.5(c)(3)(ii), as amended, clarifies that the DEC’s own rules do not authorize expansion of the Commissioner’s discretion. DEC’s rules, as amended, provide that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). In DEC’s Response to Comments Document, DEC acknowledges that it “cannot exercise more discretion than federal requirements allow.” Responsiveness Summary re: General Permit Conditions No. 10, Page 4 of 7. 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. 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 moved this condition to the state side of the permit as committed. *See* footnote 4, *supra*.

At a source complying through the use of low solvent coating, there is little opportunity for a startup, shutdown or malfunction claim to be made. For example, at this facility, there is no emission control device subject to startup, shutdown or malfunction conditions. In accordance with the provisions of its title V permit, Tanagraphics is required to monitor compliance and report all deviations/violations in the facility's semi-annual and annual reports. Petitioner's claim on this issue has no merit, therefore, EPA denies the petition on this issue.

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 the 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, DEC has fulfilled its commitment to move the provision of 6 NYCRR § 201-1.4 to the state side of permits issued after January 1, 2002. *See* footnote 4, *supra*.

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 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. DEC is substantially meeting this commitment. *See* footnote 4, *supra*. Moreover, the commissioner discretion conditions do not apply to Tanagraphics as discussed above.

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. Petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. In addition, the commissioner discretion provision does not apply to Tanagraphics. In

addition, in its November 16, 2001 Commitment letter DEC agreed that effective January 1, 2002, it will include the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, on the State side of all permits. *See* footnote 4, *supra*. This further assures 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 Tanagraphics 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).

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 in order to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See* Discussion in Part 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 further discussed below, EPA denies the petition on this point.

G. Prompt Reporting of Deviations

Petitioner alleges 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 17.2 of the May 17, 2000 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 in general. EPA raised this issue with DEC in the July 18, 2000 letter at Attachment III, item 2. The DEC may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. In any case, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. As discussed above, EPA does not consider reports submitted for the purpose of preserving potential claims of an excuse to meet prompt reporting requirements because these reports are optional and they may not include all deviations, instead only those 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).²²

In the subject case, although petitioner is correct that Condition 17.2 only refers to unavoidable violations, EPA disagrees with petitioner that the permit needs to be supplemented with additional conditions for prompt reporting of deviations as stipulated in 40 CFR § 70.6(a)(3)(iii)(B). Tanagraphics has selected the use of low VOC content inks, coatings, and fountain solutions as its method of assuring compliance with the applicable VOC content limits of 6 NYCRR § 234.3(b)(2) and § 228.7. Periodic monitoring for these requirements involves analytical testing of the inks, coatings, and fountain solutions used at the facility which directly monitors the facility’s compliance status. Tanagraphics is required to test each time a new batch of ink, coating, or fountain solution is added or changed. The test result unambiguously reveal the compliance status of the material tested. Any deviation must be quickly corrected by switching to a compliant ink, coating, or fountain solution. Deviations at this type of facility usually result from the use of a material that has a VOC content higher than anticipated. The corrective action involves removing the non-compliant material and replacing it with one that is compliant. To minimize the chance for deviations that results from the mixing of unknown VOC content inks and coating, 6 NYCRR § 234.5(b) and § 228.6(b) requires the vendor to provide certification of the VOC content of all inks and coatings supplied. Since ample safeguards are in place to assure compliance with the SIP, deviations are easily determined (no excess emissions resulting from startup, shutdown or malfunction that are associated with a combustion source) and quickly corrected. As such, EPA sees no additional benefits for reporting a deviation more

²² Prompt reporting requirement applicable to sources under the federal operating permit program.

frequently than six months and denies the petition on this issue.

In addition, Conditions 33 and 35 also do not include deviations to be promptly reported. These conditions are derived from 6 NYCRR § 228.10 and 6 NYCRR § 234.6 and require Tanagraphics to keep the containers that store solvents or VOC-impregnated cloth or paper covered or enclosed. The daily inspection requirement ensures that the inspector identifies all deviations (opened containers) and correct them immediately. All daily inspections are required to be logged and reported every six months. EPA finds it unnecessary to require such deviations to be reported more frequently than every six months.

It should be noted that the prompt reporting requirement has been a subject of discussion between EPA and DEC as a program matter. In accordance with its commitment in the November 16 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) for all permits issued on or after January 1, 2002. DEC is substantially meeting this commitment. *See* footnote 4, *supra*. While this regulation requires inter alia that deviations be reported at least every six months, DEC will specify less than six months for “prompt” reporting of certain deviations that result in emissions of, for example, a hazardous or toxic air pollutant that continues for more than an hour above permit limits. DEC has stated that it finds the procedures for prompt reporting contained in 40 CFR § 71.6(a)(3)(iii)(B), the federal operating permit program regulations, to be compatible with what is provided for in DEC regulations. Therefore, DEC intends to mirror these provisions to define “prompt” reporting in permit conditions. When prompt reporting of deviations is required, the reports will be submitted to the DEC, in writing, certified by a responsible official, in the time frame established in the permit condition.

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 alleges that 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. Petition at page 17. The petitioner addresses individual permit conditions that allegedly either lack periodic monitoring or are not practically enforceable.²³ The specific allegations for each permit condition are discussed below.

²³ With respect to the lack of adequate periodic monitoring, the petitioner cites 40 CFR § 70.6(a)(3) which requires: monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance; and § 70.6(c)(1) which requires permits to contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. 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).

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).

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). Accordingly, the reasoning of those decisions is being followed in this case as well.²⁴

Facility-Specific Petition Issues

²⁴ 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, November 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.

1. Petitioner alleges that general permit Condition 3, item 3.1, which reiterates the requirement under 6 NYCRR § 200.7 should not be included in the Tanagraphics permit unless Tanagraphics actually operates such equipment. This condition states that pollution control equipment should be maintained according to ordinary and necessary practices, including manufacturer specifications. The petition alleges that if there is control equipment, such condition must be supplemented with monitoring. Petition at page 18.

In DEC's Response to Comments, DEC stated that this condition is a general requirement that applies to all air permits and 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. Responsiveness Summary re: General Permit Conditions, No. 8, page 3 of 7.

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 acknowledges that permitting authorities have the discretion to develop a general permit condition section that applies to all title V sources. EPA also knows as matter of fact, that although not subject to any specific applicable requirement, many facilities do maintain control equipment. Therefore, EPA does not find DEC's practice of including the generic SIP condition in Tanagraphics' permit to be improper.

With regard to petitioner's assertion that monitoring must be added to this provision, EPA finds no merits in petitioner's suggestion. Where control equipment is installed pursuant to an applicable requirement, DEC includes such requirement under the "Emission Units Level" section of the title V permit, not the general permit condition or "Facility Level" section. To support such a requirement, DEC would then include monitoring sufficient to assure compliance. In this particular case, because Tanagraphics is not subject to any requirements to operate and maintain a control device, no specific monitoring for control equipment is necessary. For other permits, where a control device is maintained, EPA would agree that monitoring should be provided under the "Emissions Unit Level" section of the permit consistent with 40 CFR § 70.6(a)(3). Although inclusion of a permit condition that requires maintenance of control equipment at Tanagraphics, where no control equipment is actually required, created some confusion, EPA does not find this to be serious enough to justify an objection to the permit. As such, EPA denies the petition on this issue. In order to eliminate this confusion in future permits, DEC needs to describe in the statement of basis the control device(s) that are installed at the facility in question.

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 Tanagraphics. 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 (Conditions 7 and 8) addressing the handling of air contaminants collected in an air cleaning device should not be included if Tanagraphics does not operate control devices. If Tanagraphics 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 disagrees with petitioner that this condition needs to be deleted. 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. In this case, Tanagraphics does not operate a control

device; therefore, it is not appropriate to impose additional monitoring requirements on the facility. EPA denies the petition on this point.

4. Petitioner asserts that Condition 12, Item 12.1 of the May 17, 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 be deleted from the permit altogether since it adds nothing to the permit.

EPA disagrees with petitioner that all types of plans must be part of a title V permit. For instance, risk management plans under 112(r) are not incorporated into a title V permit. However, EPA does agree that certain documents should be properly cross-referenced in title V permits. Compliance plans required pursuant to a NO_x RACT SIP rule are not fully incorporated into title V permits, but if a facility is required to have one of these plans, it must be incorporated by reference into the title V permit.

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 a NO_x RACT plan or a start-up, shut down and malfunction plan under a maximum achievable control technology (MACT) standard, 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, no such plans apply to this facility and the petitioner made no allegation that any specific plans have been omitted from the permit as an applicable requirement. Therefore, EPA denies the petition on this issue.

5. The petitioner alleges that the general permit condition, Condition 14 in the May 17, 2000, permit 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. Tanagraphics did not submit a Risk Management Plan (RMP) to EPA under § 112(r) of the Act and 40 CFR part 68,²⁵ because Tanagraphics is not subject to these statutory and regulatory requirements. This is based on the information provided in Tanagraphics application. The pollutants listed on the Tanagraphics application do not belong to Table 1 of 40 CFR part 68, subpart F. Therefore, the risk management plan was not needed. Accordingly, at most it was a

²⁵ 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.

harmless error in this case that the permit does not specify the applicability of § 112(r) and part 68 to this facility. Accordingly, EPA denies the petition on this point.

It should be noted that the general language used in Condition 14 was drafted by DEC under the guidance of EPA. DEC did not take delegation of § 112(r); therefore, EPA is responsible for implementing such requirements in New York. However, since all applicable requirements must be in title V permits, EPA asked DEC to include a general requirement regarding § 112(r) in all permits. As such, during the early stages of implementation of New York's title V program, DEC included such general language regarding § 112(r) (as stipulated in Condition 14) in all title V permits as requested by the EPA. 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.

6. Petitioner alleges that Condition 27 of Tanagraphics' permit which cites the requirements under 6 NYCRR § 202-1.1 is incomplete. It does not reflect the provisions of 6 NYCRR § 202-1.1 in its entirety. The clause requiring the permittee to bear the cost of measurement and preparing emissions reports is omitted. Petitioner cites EPA's White Paper Number 2 titled, "Improved Implementation of the Part 70 Operating Permits Program" ("White Paper 2") which states that "it is generally not acceptable to use a combination of referencing certain provisions of an applicable requirement while paraphrasing other provisions of that same applicable requirement. Such a practice, according to Petitioner, particularly if coupled with a permit shield, could create dual requirements and potential confusion."

EPA disagrees with petitioner that the omitted clause from 6 NYCRR § 202-1.1 needs to be added to Condition 27. The permit unambiguously states that 6 NYCRR § 202-1.1 is an applicable requirement. In addition, 6 NYCRR 202-1.1 places the burden of conducting and reporting any required emissions testing on the permittee. EPA does not find the omitted clause to have resulted in a defect in Tanagraphics' permit since omitting who shall bear the cost of conducting and reporting mandatory emissions tests does not relieve the permittee from the requirement to perform and report such tests. Furthermore, EPA does not believe a reasonable interpretation of the permit would lead a reader to conclude anyone other than the permittee should bear the costs of measuring and testing emissions. Section II.E. of White Paper 2 addresses incorporation by reference in applications and permits, and emphasizes the importance of maintaining clarity with respect to applicability and compliance obligations. EPA finds both elements to have been addressed in Condition 27. For this reason, EPA finds it unnecessary to change Condition 27 as requested by petitioner. EPA denies the petition on this issue.

7. 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 Tanagraphics from exceeding 20% opacity over a six-minute average, and 57% in any single six-minute period during each hour. This condition is a Facility Level condition, and applies to all emissions units, whether listed in the permit or not.

Petitioner also alleges the permit omitted two other regulations under the SIP, namely 6 NYCRR § 234.3(e) and § 228.4, that impose opacity limits specifically on graphic arts and surface coating operations to which Tanagraphics is subject. In fact, 6 NYCRR § 234.3(e) imposes a more stringent 10% opacity limit than 6 NYCRR § 211.3 and § 228.4. Petitioner claims not only must Condition 30 be revised to include periodic monitoring, it should also be changed to include the more stringent requirement of 6 NYCRR § 234.3(e) and cite all three regulations as the basis for the opacity limit. EPA disagrees with petitioner that streamlining the three opacity limits into one is appropriate in this case given that two of the three limits do not apply to the same units or source operation. Unit 0001 which includes the nine printing presses are subject to 6 NYCRR § 234.3(e) and Unit 0002 which only includes the videojet imaging system is subject to 6 NYCRR § 228.4. To properly address the opacity issue in the Tanagraphics permit, EPA finds it more appropriate to leave Condition 30 unchanged in the Facility Level Section of the permit and add the two missing opacity conditions to the Emissions Unit Level Section of the permit with proper periodic monitoring requirements.

While EPA agrees with petitioner that Condition 30 lacks periodic monitoring, EPA denies petitioner's request to revise this facility-wide condition to include periodic monitoring because appropriate periodic monitoring will be included in the two opacity conditions that must be added to the Emissions Unit Level Section of the permit. *See* Section H.13 below.

Monitoring of VOC and HAP Emissions

8. Petitioner alleges that periodic monitoring must be added to Conditions 33 and 35 to assure compliance with 6 NYCRR § 228.10 and § 234.6, respectively regarding handling, storage and disposal of VOCs. Petitioner notes that the permit fails to include requirements for regular inspection of the VOC storage containers and reporting of the inspection results.

EPA agrees with petitioner. EPA finds Conditions 33 and 35 to lack periodic monitoring sufficient to assure compliance with 6 NYCRR § 228.10 and § 234.6. 40 CFR § 70.6(a)(3)(i)(B) provides “[w]here the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), [each permit shall contain] periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit, as reported pursuant to paragraph (a)(3)(iii) of this section.” Conditions 33 and 35 specifies the requirements of 6 NYCRR § 228.10 and § 234.6 but fail to specify how compliance will be assured. These conditions must be supported with periodic monitoring in order to demonstrate compliance. Therefore, EPA grants the petition on this issue. DEC is hereby ordered to revise Conditions 33 and 35 of the permit to require that Tanagraphics perform daily inspections for open containers, keep records of when the daily inspections for open containers occur and keep records of all inspection results for up to five years. In addition, a report of the daily inspection results must be submitted to DEC every six months to satisfy the semi-annual reporting requirements of 6 NYCRR part 201 and 40 CFR part 70. The six-month report may consist of a record of the results of the daily inspections (e.g., “no open containers discovered during daily

inspections”).

9a. Petitioner alleges Condition 39 does not assure compliance with 6 NYCRR § 234.3(b)(2) and notes three deficiencies. Petitioner commented on the inadequacy of the testing frequency during the public comment period. As a result, DEC revised the draft permit and changed the annual testing of fountain solutions to testing per batch of product/raw material change. Nonetheless, petitioner believes that the revised condition is still inadequate to assure compliance with 6 NYCRR § 234.3(b)(2) because it does not specify when testing must be done. Petitioner claims that DEC “failed to make it clear when Tanagraphics must perform a Method 24 test [found in 40 CFR Part 60, Appendix A] on a new coating.” Petitioner further questions whether the permit requires “testing before the coating is first used at the facility? Within thirty days after first use? Within one year?” Petitioner asserts that “each coating must be tested using Method 24 before it is put into use at the facility.” Petitioner also complains that Condition 39 does not require prior notification to DEC each time a coating needs to be changed/tested and does not assure that all inks and coatings used at Tanagraphics whether new or existing would be tested.

Petitioner’s comments on this issue are confusing. It appears that petitioner is confused between fountain solutions and coatings. As defined in 6 NYCRR § 234.2, a fountain solution is “a solution of water, volatile organic compounds, gum arabic, and surfactants used for wetting lithographic press plates.” Surface coating is defined in 6 NYCRR § 228.2(b)(24) as “a material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, primers, sealants, adhesives, inks and maskants.” Condition 39 requires Tanagraphics to comply with 6 NYCRR § 234.3(b)(2) which requires the VOC content of the fountain solution to be less than 10% by weight. 6 NYCRR § 234.3(b)(2) does not regulate the VOC content of the coatings used at an offset lithographic printing facility. The VOC content of the “as applied” coatings used at a surface coating operation, however, is regulated under 6 NYCRR part 228. Since Tanagraphics also performs coating of paper and/or fabric, the coatings used at the facility are subject to 6 NYCRR § 228.7. The requirements that address the VOC content of the coatings used at Tanagraphics are stipulated in Conditions 40, 41, and 42. Condition 39 only addresses the VOC content of the fountain solution.

As written, Condition 39 requires the fountain solution to contain no more than 10% VOC by weight. Periodic monitoring required by the permit that assures compliance with 6 NYCRR § 234.3(b)(2) is a Method 24 test on each batch of product or raw material change. EPA believes DEC has erred in specifying Method 24 as the test method for Condition 39. The correct test method is Method 24A. Method 24 should be used to test the VOC content of inks and coatings and Method 24A should be used for testing the VOC content of fountain solutions. 6 NYCRR § 234.4(b)(2) provides in general terms Method 24 and Method 24A as the “acceptable analytical methods” for determining compliance with the SIP. When DEC revises the permit in response to this Order, DEC needs to revise Condition 39 to specify Method 24A as the correct test method. In the statement of basis to be submitted with the revised permit, DEC

will discuss why Method 24A, and not Method 24, is the appropriate testing methodology for Condition 39. EPA finds the requirement to test for the VOC content of the fountain solution “per batch of product/raw material change” to be sufficient monitoring to assure compliance with 6 NYCRR § 234.3(b)(2). It should be clarified that “a batch of product change” could be a new or different ink/coating or fountain solution and “a raw material change” could be the addition of a new or different solvent.

Petitioner is correct that Condition 39 does not specify when testing needs to be done. EPA notes that Method 24 requires sampling immediately after mixing occurs in a multi-component coating such as fountain solutions. It is EPA’s position that sampling of fountain solutions, inks or coatings be done “as applied” to ensure that the materials tested are representative of that which is actually applied. “As applied” means the fountain solution or ink/coating should be flowing onto the press plates at the time of sampling, and testing is usually done during the first day of usage. Since the test method itself specifies when testing should be performed, EPA finds it unnecessary to repeat the testing procedures in the permit. Therefore, EPA denies the petition on this point.

9b. Petitioner’s next allegation is Condition 39 does not assure compliance with 6 NYCRR § 234.3(b)(2) because it does not require written notification to DEC before each new coating is tested. In addition, petitioner requests that Tanagraphics perform a Method 24 test “on any coating that it is currently in use but has not yet been tested” and on any new coating prior to use or mixing with other coatings. Petitioner suggested that the statement of basis be used to keep record of each coating that has been tested, when it was tested, the result of each test, and a summary of Tanagraphics’ usage records. Petitioner claims that “the permit cannot assure Tanagraphics’ compliance with VOC limits of 6 NYCRR § 234.3(b)(2) if the public is unable to determine whether a coating that is in use at the facility has been tested.”

Petitioner’s allegation that compliance with 6 NYCRR § 234.3(b)(2) cannot be assured if the suggested testing regime for each coating used or to be used at Tanagraphics is not followed is flawed because the cited regulation does not regulate the VOC content of coatings. 6 NYCRR § 234.3(b)(2) regulates the VOC content of the fountain solutions used at any offset lithographic printing process and limits them to containing less than 10% by weight of VOC. The permit properly requires Tanagraphics to test each time a new batch of product or a raw material is added to or changed in the fountain solution. However, the permit incorrectly cites Method 24 as the test method for this condition. The correct Method is 24A. Recordkeeping of inks, VOC, and solvent purchase and usage is also required. Petitioner’s request that advanced written notification be required before a new coating would be tested and put to use is not required by 6 NYCRR § 234.3(b)(2) and is not necessary to assure compliance with the VOC content limit.

Even if EPA were to review petitioner’s allegation using the correct regulation, namely, 6 NYCRR part 228, EPA still finds petitioner’s claims to be without merit. Advanced written notification of the change of coatings is not required under 6 NYCRR part 228. Furthermore, petitioner’s request to test each coating prior to use is not consistent with 6 NYCRR part 228

which requires sampling the coating as it is actually applied. Petitioner appears to be under the impression that the facility is somehow limited to use a certain list of coatings which DEC must update each time the facility uses a new coating. Petitioner suggests the imposition of a process that is not called for by any regulation, policy or guidance and which would require an offset lithographic printing facility to notify the State permitting authority of its intention to use a new coating and then test the coating for compliant VOC content before it can be put to use. Being subject to 6 NYCRR part 228 does not prevent the facility from switching among coatings to meet its business needs. 6 NYCRR part 228 only requires the as applied coatings to contain no greater than a certain level of VOC as specified in 6 NYCRR § 228.7. The VOC content of the coatings is already tested by the coating manufacturer or supplier and the results are provided to the facility in the form of a certification which verifies the parameters used to determine the VOC content. Therefore, the compliance status of the coatings is already determined by the supplier and made known to the facility prior to application. The VOC content of the coatings changes when the coatings are diluted with other VOC containing material, such as solvents, to reach a desired specification for a specific printing/coating job. Method 24 would be used to determine the VOC content of the coatings. However, sampling is to be done as the coating is applied, not before the application of the inks/coatings for purposes of demonstrating compliance with 6 NYCRR § 228.7.

As discussed above, petitioner's requests that coatings be tested prior to use and advanced notification be given to DEC each time a new batch of product or raw material is tested are without merit. Therefore, EPA denies the petition on these issues.

10. Petitioner alleges Conditions 41 and 42 do not assure compliance with 6 NYCRR § 228.7 because the testing frequency is inadequate. As written, these conditions require Method 24 testing on a "single occurrence" only. Petitioner finds the "one-time" Method 24 testing to be inadequate periodic monitoring for assuring compliance with 6 NYCRR § 228.7.

EPA agrees with petitioner that performing a Method 24 test on a single occurrence is inadequate to assure compliance with 6 NYCRR § 228.7. Since the underlying applicable requirement of Conditions 41 and 42 requires only a "one-time" test, section 70.6(c)(1)'s requirement 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 finds it appropriate to include in these two conditions the same testing frequency as imposed in Condition 39. A one-time testing cannot be deemed representative since there may be many coating jobs performed at the facility and each batch could be very different from each other. Accordingly, EPA grants the petition on this issue. DEC must revise Conditions 41 and 42 of Tanagraphics' permit to require a Method 24 test for each new batch of product or raw material change.

As discussed in H.9a above, "a batch of product change" could be a new or different ink/coating and "a raw material change" could be the addition of a new or different solvent. 6

NYCRR § 228.7 requires the coatings “as applied” to meet the limits specified in Table 1 or 2. In other words, the coating should be flowing onto the paper/fabric at the time of sampling and sampling should be done within the first day of usage as discussed in H.9a above. In addition, the changes needed in Condition 39 also apply to Conditions 41 and 42. Specifically, DEC must revise Conditions 41 and 42 to require 1) sampling and testing using Method 24 within the first day of usage of each new or different coating and 2) submittal of testing results to DEC every six months as part of the semi-annual monitoring reports.

11. Petitioner questions how records required under Condition 34 can be used to demonstrate compliance with 6 NYCRR § 234.3(b)(2) and whether the 10% VOC content limit in Condition 39 is an average value or an instantaneous value. Condition 34 requires recordkeeping of the purchase and usage (production record is not needed since Tanagraphics is not a manufacturer) of inks, VOC, and solvents. It clearly lists the information that should go into the records, namely, the name of the product, the VOC content of the product in pounds of VOC per gallon of product, and the amount of usage in gallons for the month. Petitioner questions whether the averaging period of Condition 34 which requires the usage to be recorded “for the month” is appropriate. The regulation in 6 NYCRR § 234.3(b)(2) does not specify any averaging period. Petitioner questions whether the 10% VOC content limit for the fountain solution as stipulated in Condition 39 is based on a monthly average of all solutions used.

EPA agrees with petitioner that there exists some confusion in these conditions making it difficult to understand how compliance with the applicable requirements will be assured. The following discussion explains conditions 32, 41 and 42 for the petitioner. The records required under Condition 34 are not intended for demonstrating compliance with 6 NYCRR § 234.3(b)(2) but with 6 NYCRR § 234.4(b)(3). The records are kept on a monthly basis to facilitate the calculation of the facility’s annual usage of each ink, cleaning solvent, or other VOC containing material. It should be noted that although the reporting requirement is “upon request by regulatory agency” which is inconsistent with 40 CFR § 70.6(a)(3)(iii)(A), Condition 25 corrected the reporting requirement to every six months as discussed in Section D.

EPA disagrees with petitioner that Condition 39 needs further clarification on the averaging period for the fountain solution VOC content limit. 6 NYCRR § 234.3(b)(2) requires “the fountain solution [to contain] 10 percent by weight or less of volatile organic compounds...” The 10% VOC content limit is an instantaneous value, not an averaged value. Condition 39 is very clear that this is an instantaneous value with no averaging. Under “Averaging Method” of Condition 39, DEC states the following:

“Averaging Method: MAXIMUM - NOT TO BE EXCEEDED AT ANY TIME
(INSTANTANEOUS/DISCRETE OR GRAB)”

Accordingly, EPA denies the petition on this point.

Petitioner alleges similar problems with regard to the recordkeeping requirements under

Condition 32 which are intended to assure compliance with Conditions 41 and 42. Although Condition 32 does not specify any averaging period for the recordkeeping requirement, the limit of 2.9 lbs of VOC per gallon of coatings as applied found under 6 NYCRR § 228.7 and stipulated in Conditions 41 and 42, respectively for fabric and paper coating is also an instantaneous limit not subject to any averaging. Under “Averaging Method” of Conditions 41 and 42, DEC states the following:

“Averaging Method: MAXIMUM - NOT TO BE EXCEEDED AT ANY TIME (INSTANTANEOUS/DISCRETE OR GRAB)”

It should be noted that although the reporting requirement under Conditions 32, 41, and 42 is “upon request by regulatory agency” which is inconsistent with 40 CFR § 70.6(a)(3)(iii)(A), Condition 25 corrected the reporting requirement to every six months as discussed in Section D.

12. Petitioner claims that Condition 40 is “not enforceable as a practical matter.” Although Condition 40 provides the equation for the calculation of the actual VOC content of the “as applied” coating, it fails to require Tanagraphics to perform the necessary calculations and report the results to DEC.

EPA agrees with petitioner that Condition 40 is confusing and difficult to understand the purpose it serves as written. The equation found under 6 NYCRR § 228.2(b)(11) is listed in Condition 40 without any explanation or instructions. It should be noted Conditions 40, 41, and 42 apply to the videojet imaging system only, not to the printing presses. Compliance with 6 NYCRR § 228.7 can be demonstrated using recordkeeping (and calculation) or Method 24 (and calculation). *See* 6 NYCRR § 228.5(a) and (b). The records required under Condition 32 provide the parameters needed for the calculations using the equation in Condition 40. Alternatively, these parameters can also be determined analytically by using Method 24. In either case, the results will be calculated and compared with the VOC content limit established in 6 NYCRR § 228.7 as reflected in Condition 41 (for fabric coating) or Condition 42 (for paper coating) for purposes of determining the compliance status of the videojet imaging system. Tanagraphics is required to determine compliance with 6 NYCRR § 228.7 by using Method 24 to obtain the needed parameters for the calculations each time a new or different batch of product is used or a raw material is changed. Therefore, petitioner’s request to require Tanagraphics to perform the calculations using the equation in Condition 40 is redundant. The calculated results from Method 24 will be recorded and reported every six months pursuant to Conditions 41 and 42. However, when DEC revises the permit in response to this Order, it must clarify the purposes of the equation in Condition 40.

Requirement Left Out of the Permit

13. The petitioner alleges that the permit neglected to address two opacity requirements that apply to Tanagraphics. NYPIRG submitted comments to DEC during the public comment period for the draft permit. *See* March 23, 1999 letter at page 20. NYPIRG identified two different opacity requirements that appeared to apply to Tanagraphics but were not included in

the permit. In particular, NYPIRG identified 6 NYCRR § 228.4 and 6 NYCRR § 234.3(e) as requirements applicable to Tanagraphics that were omitted. In its response to NYPIRG, DEC did not deny the applicability of these requirements. Rather, DEC asserted that the opacity requirement is already established under Condition 30 as required by 6 NYCRR § 211.3. Furthermore, as previously discussed petitioner asserts that Condition 30 lacks periodic monitoring.

EPA agrees with petitioner that the more stringent opacity requirements under 6 NYCRR § 228.4 and 6 NYCRR § 234.3(e) are omitted from the permit and must be included.

6 NYCRR § 228.4 states, “[n]o person shall cause or allow emissions to the outdoor atmosphere having an average opacity of 20 percent or greater for any consecutive six-minute period...” This is more stringent than the requirements of NYCRR § 211.3. Therefore, compliance with this requirement would assure compliance with NYCRR § 211.3. However, EPA will not order DEC to streamline these two opacity requirements because while NYCRR § 211.3 applies to all sources as a general provision, 6 NYCRR § 228.4 only applies during the surface coating operation.

In addition, 6 NYCRR § 234.3(e) states, “[n]o person shall cause or allow emissions to the outdoor atmosphere having an average opacity of 10 percent or greater for any consecutive six-minute period...” This is more stringent than the requirements of NYCRR § 211.3 and 6 NYCRR § 234.3(e). However, it is not appropriate for DEC to streamline these three opacity requirements because they are not all applicable to Tanagraphics during the same time period. For instance, NYCRR § 211.3 applies to all sources as a general provision, 6 NYCRR § 228.4 only applies during the surface coating operation, and 6 NYCRR § 234.3(e) only applies during the printing operation. If the opacity limits were streamlined, it would require Tanagraphics to meet the more stringent opacity limit under 6 NYCRR § 234.3(e) at all times, even when the facility is not performing the printing operation.

EPA finds it appropriate to add two opacity requirements in the Emissions Unit Level Section of the permit to address the respective opacity requirements of 6 NYCRR § 228.4 and 6 NYCRR § 234.3(e). Therefore, EPA grants the petition on this issue. DEC is ordered to add a condition to the Tanagraphics permit stipulating the opacity requirements of 6 NYCRR § 228.4 which applies when the facility is performing surface coating. Another condition must be added that stipulates the opacity requirements of 6 NYCRR § 234.3(e) which applies when the facility is performing printing operations. DEC must include periodic monitoring in both conditions to assure compliance with the applicable requirements. The periodic monitoring requirements should address such questions as the type and frequency of monitoring. It should be noted 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. EPA considers the following to be sufficient periodic monitoring to assure compliance with these opacity limits:

“Require daily visible emissions observation of the stack or vent once a day when

the facility is performing surface coating (or printing as the condition may serve). 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. All daily observations will be logged and records kept for up to five years.”

Reporting of opacity monitoring must also be added to require submittal of monitoring reports to DEC at least every six months as required under 40 CFR § 70.6(a)(3)(iii)(A).

With regard to petitioner’s request to revise Condition 30 to include periodic monitoring to assure compliance with 6 NYCRR § 211.3, EPA disagrees with petitioner given the additional opacity requirements imposed under the facility’s Emissions Unit Level Section of the permit. As instructed above, sufficient periodic monitoring must be stipulated in the opacity conditions to assure compliance with the more stringent limits of 6 NYCRR § 228.4 and 6 NYCRR § 234.3(e). EPA finds it unnecessary to revise Condition 30 which is a facility-wide opacity condition to insert the same periodic monitoring requirements as specified in the emission unit section of the permit. Compliance with either of the two new opacity conditions would also be compliance with Condition 30. *See* discussion at Section H.7.

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 Tanagraphics Permit. In sum, NYSDEC is ordered to address the deficiencies identified under Section H.8, H.10, and H.13 of this order. I deny NYPIRG’s petition on the other issues.

Dated:

Christine Todd Whitman
Administrator