BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF DUNKIRK POWER LLC Permit ID: 9-0603-00021/00030 Facility DEC ID: 9060300021 Issued by the New York State Department of Environmental Conservation Region 2	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition Number: II-2002-02

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

The United States Environmental Protection Agency ("EPA") received a petition dated January 11, 2002, from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, to Dunkirk Power LLC for the Dunkirk Steam Generating Station located at 106 Point Drive North, Dunkirk, New York. The permittee will be referred to as "Dunkirk" for purposes of this Order.

The Dunkirk facility is owned by NRG Energy, Inc. Dunkirk is an electric utility that has a maximum capacity of producing 600 megawatts. Dunkirk operates four coal-fired boilers, two 922.2 MMBtu/hr boilers and two 1,836 MMBtu/hr boilers, a 750 horsepower emergency diesel generator, a coal unloading and handling operation, and a wastewater treatment plant.

The Dunkirk permit was issued by the New York State Department of Environmental Conservation, Region 9 ("DEC") on October 31, 2001, pursuant to title V of the Act, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR parts 200, 201, 621 and 624.

The petition alleges that the Dunkirk permit, proposed by the DEC, does not comply with 40 CFR part 70 in that: (I) the proposed permit lacks a compliance schedule to address notices of violations issued for alleged opacity violations and violations under the Prevention of Significant Deterioration of Air Quality (PSD) regulations; (II) DEC improperly denied NYPIRG's request for a public hearing on the permit; (III) the proposed permit is based on an

incomplete permit application in violation of 40 CFR § 70.5(c); (IV) the proposed permit distorts annual certification requirements; (V) the permit does not require prompt reporting of any deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (VI) the proposed permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70; (VII) the proposed permit fails to include federally enforceable emission limits established under pre-existing permits; and (VIII) the proposed permit lacks monitoring sufficient to assure the facility's compliance with all applicable requirements. The Petitioner has requested that EPA object to the issuance of the Dunkirk permit pursuant to § 505(b)(2) of the Act and 40 CFR § 70.8(d) for any or all of these reasons.

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

Based on a review of all the information before me, including the petition; the Dunkirk permit application; 2001; the administrative record supporting the permit; a letter dated June 11, 2001 from Thomas F. Coates of NRG Energy, Inc. to Michael J. McMurray of DEC Region 9 providing comments on the draft permit; comments on the draft permit dated June 15, 2001 submitted by NYPIRG to DEC; DEC's response to comments received on the draft operating permit [hereinafter, "response to comments document"]; the Dunkirk permit of October 31, 2001; relevant statutory and regulatory authorities and guidance; and two letters dated July 18, 2000 and July 19, 2000 from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC; I deny the Petitioner's request in part and grant it in part for the reasons set forth in this Order. Petitioner has raised valid issues on the Dunkirk permit, resulting in my granting portions of the petition.

A. STATUTORY AND REGULATORY FRAMEWORK

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

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements") but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, States, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

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

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

B. ISSUES RAISED BY THE PETITIONER

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

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[1] *See* CAA § 505(b)(2) and 40 CFR § 70.8(d). The 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 N. Powell, Esq., Attorney for NYPIRG to DEC (January 9, 2001) ("NYPIRG comment letter").

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

EPA received a letter dated November 16, 2001, from DEC Deputy Commissioner Carl Johnson, committing to address various program implementation issues by January 1, 2002, and to ensure that the permit issuance procedures are in accord with state and federal requirements. EPA monitored New York's title V program to ensure that the permitting authority is implementing the program consistent with its approved program, the Act, and EPA's regulations. Based on EPA's program review, DEC is substantially meeting the commitments made in its November 16, 2001 letter.[3] As a result, EPA has not issued a notice of deficiency ("NOD") at this time. If EPA determines that DEC is not properly administering or enforcing the program, it will publish an NOD in the *Federal Register*.

(I) Compliance Schedule

The Petitioner's first claim is that the proposed permit lacks compliance schedules to bring the Dunkirk Generating Station into compliance with opacity standards and PSD requirements for which Dunkirk has been issued two Notices of Violations (NOVs) by the DEC. NYPIRG provided a copy of an NOV dated December 22, 1999 which alleges that Dunkirk was exceeding the opacity limit specified in the permit in violation of 6 NYCRR § 227-1.3(a). NYPIRG also provided a copy of an NOV dated May 25, 2000 which alleges that the facility has undergone modifications without the necessary PSD permits and application of the Best Available Control Technology (BACT) to control emissions of regulated pollutants.

The Petitioner cites 40 CFR § 70.5(c)(8)(iii)(C), which states that if a facility is in violation of an applicable requirement at the time of receipt of an operating permit, then the facility's permit must include a compliance schedule with milestones that lead to compliance. NYPIRG states that if a power plant is in violation of PSD or SIP requirements, then the facility's title V permit must include a compliance schedule to bring the facility into compliance. The Petitioner also argues that including a compliance schedule in a title V permit will require the facility to immediately begin taking steps to come into compliance, but it would not preclude the facility from contesting the underlying NOV. Petition at 2-4.

The Petitioner is correct that the proposed permit lacked a compliance schedule designed to bring Dunkirk into compliance with opacity requirements, but the issuance of an NOV does not trigger this regulatory requirement. In this case, when Dunkirk submitted its application, it certified that the facility would not be in compliance with the applicable SIP opacity limit at the

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

time of permit issuance, and nothing in the permit record indicates that Dunkirk had come into compliance by the time the DEC issued the final permit.[4] Although Dunkirk did submit a compliance schedule and a compliance plan in its permit application, the Dunkirk permit did not include the compliance schedule from the application and there is nothing in the permit record to explain this omission. Accordingly, the final permit does not contain a compliance schedule as required by EPA's and New York's regulations. *See* 40 CFR §§ 70.5(c)(8)(iii) and 70.6(c)(3); 6 NYCRR §§ 201-6.3(d)(9)(iii) and 201-6.5(d)(1) (title V permit must include a schedule of compliance for a source not in compliance with all applicable requirements at the time of permit issuance).

For the reasons set forth in subsequent sections of the this order, EPA is granting, in part, NYPIRG's request that EPA object to the Dunkirk permit. The Dunkirk permit must accordingly be reissued to address those issues forming the basis for EPA's decision to object to the Dunkirk permit. In reissuing the Dunkirk permit, the DEC must either incorporate into the permit a compliance schedule consistent with the requirements of 40 CFR § 70.5(c)(8)(iii) and 6 NYCRR § 201-6.3(d)(9)(iii), or explain in the public notice or statement of basis that a compliance schedule is no longer necessary because the facility is in compliance with the all applicable requirements.

DEC has alleged that the owner of the Dunkirk facility is in violation of the requirements of the PSD program. *See* New York State Department of Environmental Conservation Notice of Violation, May 21, 2000. However, unlike the opacity violations to which the facility certified noncompliance, the owner of the Dunkirk facility does not concede that the facility is not in compliance with the requirements of PSD and is currently litigating DEC's PSD allegations in the Western District of New York in *State of New York v. Niagara Mohawk Power Corporation, et al.*, No. 02-CV-0024S. Given this litigation is ongoing, it would be premature to require the DEC to include a compliance schedule relating to the alleged PSD violations at this time. Therefore, EPA denies the petition with respect to this issue.

As discussed above, the NOV for alleged PSD violations is currently being litigated in the Western District of New York and a resolution of the NOVs for opacity violations is still being negotiated. It is entirely appropriate for the DEC enforcement process to take its course.[5] Should an Order on Consent be issued or an adjudicated determination be made prior to the time that DEC re-opens the Dunkirk permit in response to this Order, a compliance plan and schedule

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[4] 40 CFR § 70.5(b) requires applicants to promptly submit supplementary facts or new information to the permitting authority if anything contained in the application has changed, was incorrect, or any new requirements have become applicable to the source.

[5] While nothing in the Act would have *prohibited* the DEC from including a compliance schedule in the Huntley title V permit, the question presented in the petition and answered herein is whether inclusion of a compliance schedule is *mandatory* as soon as an NOV is issued, but long before the matter has been resolved and the required steps to come into compliance have been identified.

must be incorporated into Dunkirk's title V permit. In the event that the NOV for the PSD violations have not been resolved in time for incorporation of a compliance schedule into the Dunkirk permit, there are sufficient safeguards in the title V permit to ensure that the permit shield contained in the Dunkirk permit may not be used as a defense during any enforcement proceedings and requirements relating to compliance schedules will be complied with at the appropriate time. For example, Conditions 5, 20, 22, and 28 of the Dunkirk permit address unpermitted emission sources, the permit shield, re-openings for cause, and permit exclusion provisions, respectively.[6] In addition, the "Description" section of the Dunkirk permit discussed in some detail these two unresolved enforcement issues against the facility. Also, the public notice announcing the draft permit acknowledges these enforcement issues and states that "[a]ny compliance schedules developed due to these issues will be included in this permit when they are finalized." Therefore, EPA denies the petition on this issue.

(II) Public Hearing

NYPIRG claims DEC improperly denied its request for a public hearing on the Dunkirk draft permit as provided for by 40 CFR § 70.7(h). NYPIRG submitted written comments to DEC during the public comment period and requested a public hearing. DEC denied the hearing request in its September 10, 2001 letter responding to NYPIRG's comments stating that any substantive issues brought up in the comments have already been addressed in the permit revisions. NYPIRG contends that DEC's basis for denying its request for a hearing is flawed since DEC should not presume only NYPIRG's member would be testifying at the hearing if one were held. NYPIRG further contends that a significant degree of public interest in the permit should have been evident from its submission of thirty pages of written comments. NYPIRG requests EPA's objection to the Dunkirk permit on the basis that it did not undergo the proper public participation procedure before the final permit was issued and requests that DEC hold a public hearing on the permit. Petition at 5.

Neither the CAA or EPA's implementing regulations require a permitting authority to hold a hearing when one is requested. Rather, the CAA and applicable regulations require only that States offer an opportunity for a public hearing. *See* CAA § 502(b)(6) and 40 CFR § 70.7(h)(2). In accordance with these requirements, the New York title V program provides that DEC has the discretion to hold either a legislative or an adjudicatory public hearing. In this case, the DEC determined that a public hearing was not warranted. Response to Comments at 1 (June 11, 2001). As the DEC has the discretion to refuse to hold a public hearing and the Petitioner has not demonstrated that this discretion was not reasonably exercised, NYPIRG's request that EPA object to the permit on these grounds is denied.

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[6] In particular, condition 28 provides in part: "The issuance of this permit by the Department . . . does not and shall not be construed as barring, diminishing, adjudicating or in any way affecting any currently pending or future legal, administrative or equitable rights or claims, actions, suits, causes of action or demands whatsoever that the Department may have against the applicant including, but not limited to, any enforcement action authorized pursuant to the provision of applicable federal law"

(III) Permit Application

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

Petitioner's concerns regarding the DEC's application form as they relate to Dunkirk are summarized as follows:

(a) The application form lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether Dunkirk is in compliance with every applicable requirement and whether DEC was required to include a compliance schedule in the title V permit;

(b) The application form lacks a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based;

(c) The application form lacks a description of all applicable requirements that apply to the facility; and

(d) The application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

NYPIRG alleges that omission of the information described above makes it difficult for a member of the public to determine whether a proposed permit includes all applicable requirements, for example, new source review requirements from pre-existing permits. The Petitioner further states that the lack of information in the application also makes it more difficult for the public to evaluate the adequacy of monitoring in the proposed permit. Petition at 7.

(a) Initial Compliance Certification

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

believes that the petitioner has failed to demonstrate that the lack of a proper initial compliance certification, certifying compliance with all applicable requirements at the time of application submission in this instance, resulted in, or may have resulted in, a deficiency in the permit.

The application form used by DEC did not clearly require the applicant to certify compliance with all applicable requirements at the time of application submission.[7] Rather, Dunkirk certified that it would be in compliance with all applicable requirements, with the exception of opacity requirements for its four boilers, at the time of permit issuance. In its application, the facility included a compliance certification, as well as a recommended course of action (referred to by the facility as a "compliance plan") for addressing the opacity exceedances from its four boilers. This "compliance plan" was included in the final title V permit at conditions 4 and 37. Because the Dunkirk facility was not in compliance with the applicable opacity limit when it submitted its application on June 1997, even if the application form used by Dunkirk had required it to certify to its compliance at the time of application, the ultimate permit issued would have been the same. Accordingly, EPA believes that petitioner has not adequately demonstrated that had Dunkirk submitted a proper initial compliance certification the final permit would have been any different. Therefore, EPA denies the petition on this issue.

(b) Statement of Methods for Determining Initial Compliance

Petitioner alleges that the application form omits "a statement of methods used for determining compliance," as required by 40 CFR § 70.5(c)(9)(ii). The application form completed by Dunkirk did not specifically require the facility to include a statement of methods designated for determining initial compliance, but in this case, the applicant did provide this information for all of the listed applicable requirements. Dunkirk properly completed the "Monitoring Information" section of the application for each emission point with a description of the method for determining compliance with each applicable rule/requirement. For instance, the test method for analyzing sulfur in the startup fuel (distillate oil), the application listed the ASTM or the appropriate EPA test methods. Because Dunkirk already has in place continuous emissions monitors (CEMs) for monitoring the emissions of sulfur dioxide (SO_2) and nitrogen oxides ($NO_{x)}$ and a continuous opacity monitor (COM) for monitoring opacity, the application identified data collection via the CEMs/COM as the methods for demonstrating compliance with emissions standards for the four boilers. On pages 56-59 of the application, Dunkirk stated it will meet its NO_x RACT limit through a system-wide average approved by the DEC. Compliance with particulate matter standards for the boilers are determined by a stack emission test once per permit term (*see* Dunkirk Permit Application at 47, 48, 49, and 50 which resulted in

[7] In accordance with the DEC's November 16, 2001 letter, the permit application form was changed to clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. The application form and instructions were also 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.

Permit Conditions 52, 53, and 54 of the permit). For distillate oil that is only used during start up, Dunkirk samples each batch of oil delivered to determine and record the sulfur content. *See* Dunkirk Permit Application at 16, 22, 26, 32, and 37. In light of the information provided, the Petitioner's general allegations do not adequately demonstrate that, in this case, had the application submitted by Dunkirk specifically required the facility to include a statement of methods, the final permit would have been any different. Therefore, EPA denies the petition on this point.

(c) Description of Applicable Requirements

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

In describing applicable requirements, the Dunkirk permit application refers to State and Federal regulations. These regulations are publicly available and are also available on the internet. The Dunkirk permit also contains references to applicable requirements that as a general matter are not as readily available, such as the NO_x Reasonably Available Control Technology (RACT) plan which were submitted with the application as a separate document and which is part of DEC's permit record files for Dunkirk. Other facility-specific non-codified documents include Dunkirk's "Repowering Extension Plan" and copies of pre-existing Permits to Construct for the installation of low NO_x burners for the four boilers. A copy of the plan and of each permit was submitted with the application and is part of DEC's files. While specific rule citations followed by a description of the applicable requirement would make the application more informative, the lack of it, in this case, did not result in the issuance of a defective permit. The contents of the application include the specific requirements that apply to Dunkirk. The Dunkirk permit accordingly contained a description of the applicable requirements that apply to the facility. The Petitioner has not shown that any of the descriptions were in error or that the referenced material is not available to the public. Therefore, the petition is denied on this issue.

(d) Statement of Methods for Determining Ongoing Compliance

Petitioner alleges that the application form lacks a description of, or reference to, any applicable test method for determining compliance with each applicable requirement. EPA

disagrees with Petitioner that the application failed to describe the methods Dunkirk will use to determine its compliance status relative to each applicable requirement. Dunkirk completed the "Monitoring Information" section of the application for each emission point with a description of the method for determining compliance with each applicable rule/requirement. Consistent with 6 NYCRR § 227-2.6(a)(1) as well as 40 CFR Part 75, Dunkirk will monitor its NO_x emissions with CEMs and submit quarterly NO_x emissions reports as required by 6 NYCRR § 227-2.6(b)(4). As discussed above, a continuous emissions monitor (CEM) is also installed to record the emissions of SO_2[8] and a continuous opacity monitor (COM) is installed to record opacity on a continuous basis. Data collected via the CEM/COM systems disclose the compliance status of the source continually and instantaneously. With respect to the test Method for stack testing to determine compliance with 6 NYCRR § 227, Dunkirk stated in the application that it will use Reference Method 5 as listed in 40 CFR part 60. In addition to installing COMs, Dunkirk identified Reference Test Method 9 to determine opacity compliance in accordance with 6 NYCRR § 227-1.3(a). For the coal handling operation, Dunkirk did not propose in the application any method for determining compliance with the opacity emission associated with the coal handling facility because it assumed that the coal handling facility is not subject to any applicable requirements. Although the application did not address emissions from the coal handling operation, DEC disagreed and included requirements for opacity monitoring and recordkeeping from 6 NYCRR § 212.6(a) and 40 CFR part 60, Subpart Y in the permit applicable to the coal handling facility. As described above, the application lists CEM/COM as the method to determine compliance with regulations for opacity, NO_x, and SO_2, as well as sulfur-in-fuel. Where Dunkirk failed to provide the monitoring strategy for opacity emissions from the coal handling operation, DEC corrected the defect by including the applicable requirements (Condition 57) in the final permit issued to Dunkirk. The Petitioner, therefore, has not adequately demonstrated that the opacity monitoring omitted from the application led to a defective permit. Also, the final permit contained descriptions of, or reference to, applicable testing/monitoring methods for determining compliance with applicable requirements. Therefore, EPA denies the petition on this issue.

(IV) Annual Compliance Certification

Petitioner alleges that the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5) by not requiring the facility to certify compliance with all permit conditions. The Petitioner claims rather that the Dunkirk permit requires only that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification," as stated in Condition 26. *See* Petition at 7. Specifically, the 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

[8] Dunkirk requested in the application to be allowed to monitor the sulfur content of coal fired in the terms of the equivalent sulfur dioxide emissions via the use of the CEM. 6 NYCRR § 225.6(b) allows monitoring and recording of sulfur compound emissions expressed as sulfur dioxide continuously at all times while the combustion installation is in service. As such, DEC included in Conditions 34 and 35, the equivalent sulfur dioxide emission limits that Dunkirk must monitor.

"compliance certification" are those that identify a monitoring method for demonstrating compliance. NYPIRG interprets such compliance certification "designations" as a way of identifying which conditions are covered by the annual compliance certification requirement. NYPIRG further asserts that permit conditions that lack periodic monitoring are thus, excluded from the annual compliance certification. The Petitioner claims such "designation"as an incorrect application of state and federal regulations because facilities must certify compliance with every permit condition, not just those that are accompanied by a monitoring requirement. Petition at 24.

The language in the permit that labels certain terms as "compliance certification" conditions does not mean that the Dunkirk facility is *only* required to certify compliance with the permit terms containing this language. "Compliance certification" is a data element in New York's computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. Condition 26.2 of the permit delineates the requirements of 40 CFR § 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit.

The language in the Dunkirk permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, mirrors the language of 40 CFR §§ 70.6(c)(5) and (6). 6 NYCRR § 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. The following are required in annual certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the Administrator and shall contain such other provisions as the department may require to ensure compliance with all applicable requirements. The Dunkirk title V permit includes this language at Condition 26.

Therefore, the references to "compliance certification" do not negate the DEC's general requirement for compliance certification of terms and conditions contained in the permit. Accordingly, because the Dunkirk permit and New York's regulations properly require the source to certify compliance or noncompliance annually for terms and conditions contained in the permit, EPA is denying the petition on this point. However, when the DEC revises the Dunkirk permit in response to other sections of this Order, it should also add language to clarify the requirements relating to annual compliance certification reporting.[9]

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

(V) 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).[10] NYPIRG raised this issue with DEC during the public comment period and concluded DEC's response to comments was inadequate. Basically, DEC stated that deviations will be reported according to time frames specified in the applicable requirement if such are specified; otherwise, prompt reporting of deviations will be established on a case-by-case basis. Petitioner suggests two options to address this issue: 1) include a general permit condition that defines what constitutes "prompt" under all circumstances, or 2) develop facility-specific permit requirements to define what constitutes "prompt" for individual permit conditions. Petitioner also requests that DEC require all prompt reporting to be done in writing. Petition at 8-9.

Title V permits must include requirements for the prompt reporting of deviations. States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. Moreover, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case determination under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).[11]

In determining whether an objection is warranted for alleged flaws in the content of a particular permit EPA considers whether the petitioner has demonstrated that the permit is not in compliance with the requirements of the Act, including the requirements of the applicable SIP. *See* CAA § 505(b)(2); 40 CFR § 70.8(c)(1). As explained below, petitioner's allegation that the permit does not contain prompt reporting requirements is without merit. Furthermore, the petitioner has not demonstrated that the various reporting requirements contained in the Dunkirk permit fail to meet the standard set forth in part 70.

In this case, there are several provisions in the Dunkirk permit that require prompt reports

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[10] 40 CFR § 70.6(a)(3)(B) states: "[t]he permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirement.

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

to be made to the DEC. These conditions require that reports be submitted quarterly. Quarterly reporting, in these cases, also serves as prompt reporting of deviations. NO_x emissions are monitored by CEMs and are averaged hourly, daily, and monthly and reported quarterly. *See* Permit Conditions 41, 42, and 45. The Dunkirk facility is required to comply with a NO_x averaging plan for compliance with the NO_x requirements of 6 NYCRR § 227-2.5. To determine compliance under this averaging plan, emissions from the Dunkirk facility, as well as four other facilities, are calculated either on a 24-hour or a 30-day rolling averages. As such, quarterly reporting, which was established in the subject averaging plan, is also appropriate because it serves as prompt reporting of deviations in light of the applicable requirement and the degree and type of deviation likely to occur.

The Sulfur content of coal is monitored in terms of SO_2 emissions by the use of CEMs as allowed under 6 NYCRR § 225.6(b). SO_2 emissions are averaged daily and quarterly. *See* Permit Conditions 34, 35, and 36. All SO_2 CEM reports are submitted quarterly to DEC. Since the CEM system alerts the facility of an excursion instantaneously, providing ample opportunity for the facility to make any necessary correction within the 24-hour averaging period to avoid violations of the SO_2 standards, Petitioner has not shown that quarterly reporting on the SO_2 emissions is not acceptable in this case.

Particulate matter (PM) is monitored in terms of opacity from the boiler stack. Dunkirk is require to install a COM to continuously monitor opacity emissions. Data from the COM system are submitted to the DEC quarterly. For the fugitive PM emissions from the coal handling operation, Conditions 56 and 57 require a daily observation during operation of all process exhaust vents and openings in the handling facility. An EPA Method 9 test is conducted if the observation shows a 10% opacity. If the Method 9 shows an opacity reading of 20% or greater, corrective action must be taken immediately to reduce opacity emissions to below 20%. Another set of Method 9 readings must be taken thereafter to assure compliance with the 20% opacity limit of 40 CFR 60, Subpart Y and 6 NYCRR § 212.6(a). Any exceedances that necessitate corrective actions to rectify the problems are required to be reported to DEC no later than the next business day, while a written report is submitted if requested by DEC. Reporting deviations of opacity observed at the coal handling operation is an example of where DEC finds it appropriate to define prompt as less than six months.

Petitioner has not shown that DEC failed to exercise its discretion reasonably in defining "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements as provided in 40 CFR § 70.6(a)(3)(iii)(B). Therefore, the petition is denied on this issue.

(VI) Startup, Shutdown, Malfunction

Petitioner asserts that the proposed permit's startup/shutdown, malfunction, maintenance, and upset provision violates 40 CFR part 70. *See* Petition at 10-13. The petition provides a detailed, 5-part discussion of Condition 6 of the proposed Dunkirk permit, entitled "Unavoidable

Noncompliance and Violations," which it refers to as the DEC's "excuse" provision. Petitioner alleges that the "excuse provision" included in this proposed permit reflects the requirements of New York State regulation, 6 NYCRR § 201-1.4. Permit Condition 6 states, in part, that "[a]t 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."

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

Condition 6 of the Dunkirk/Huntley permit provides the DEC with the discretion to excuse the facility from compliance with applicable emission standards under certain circumstances, based on the State regulation 6 NYCRR § 201-1.4. EPA grants the petition on the point that the DEC improperly included in the Dunkirk permit the "excuse provision" based on a regulation that has not been approved into the New York SIP. In its November 16, 2001 letter, the DEC committed to remove the "excuse provision" that cites 6 NYCRR § 201-1.4 from the federal side of title V permits and to incorporate the condition into the state side. In accordance with its commitment, DEC must remove the "excuse provision" that cites 6 NYCRR § 201-1.4 from the federal side of the permit. In addition, DEC must include in the permit the provision from its rules that states that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-ups, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). With respect to Petitioner's other allegations regarding the startup, shutdown and malfunction provision (RACT, definition of terms, prompt report of deviations, "unavoidable" defense), the removal of the "excuse provision" from the federal side of the permit makes moot these concerns.

(VII) Pre-existing Federally Enforceable Emission Limits

Petitioner alleges DEC failed to include permit limits established from pre-existing permits that are applicable requirements for the Dunkirk title V permit. NYPIRG listed and attached copies of six Certificates to Operate[12] issued to the following emissions units at

[12] In the State of New York, facilities must apply for a Permit to Construct under 6 NYCRR Part 201 prior to construction. The facility's Permit to Construct becomes the Certificate to Operate after it is inspected by DEC and

Dunkirk: (1) the ash silo; (2) the spray paint booth; (3) a 750 horsepower diesel generator; (4) Boiler 1 for the installation of a low NO_x burner; (5) Boiler 2 for the installation of a low NO_x burner; and (6) Boilers 3 and 4 for the installation of a low NO_x burner in each. The certificates for the boilers incorporate by reference "Special Conditions" dated September 25, 1995. NYPIRG asserts these certificates contain emission limits that were either omitted entirely from the permit or were incorrectly included in the "State Only" side of Dunkirk's title V permit. NYPIRG cites the definition of "permissible emission rate" found under 6 NYCRR § 200.1(bj) as designating emission rates specified in Permits to Construct (PC) or Certificates to Operate (CO) by the Commissioner as federally enforceable limits. In addition to the alleged omission of these emission limits, NYPIRG also asserts that DEC increased the amount of wastewater treatment plant sludge that may be burned at Dunkirk from the 10 tons per week limit set forth in the September 25, 1995 Special Conditions to the 12 tons per week in the title V permit without undergoing the proper permitting process. Petition at 13-15. Petitioner also points out that EPA's position on transferring terms and conditions from SIP-approved permits to the source's title V permit is stated in the May 20, 1999 letter from John Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO[13].

The Petitioner is correct that federally-enforceable conditions from permits issued pursuant to requirements approved into the New York SIP generally must be included in the Dunkirk permit as they are applicable requirements. *See* 40 CFR § 70.2. Construction and operating permits issued in the past, however, may contain requirements that are not "applicable requirements" as defined in the title V program or that are obsolete and are no longer applicable to the facility (e.g., terms regulating construction activity during the building or modification of the source where construction is long completed). In this situation, the DEC may delete inapplicable or obsolete permit conditions by following the modification procedures set forth in the New York regulations. *See* 6 NYCRR §§ 201-6.7, 201-1.6 and 621.6; *see also* 40 CFR §§ 70.7(e)(4) and 70.7(h).

(a) The Ash Silo and the Spray Paint Booth

NYPIRG alleges that Dunkirk's PC or CO permit includes particulate matter emission limits for the ash silo and the spray paint booth which were omitted from the title V permit. The particulate matter limits from the PC/CO which NYPIRG alleges are omitted from the title V permit are: 1) 0.05 grains per standard cubic foot (SCF) and 0.76 lbs/yr for the ash silo, and 2) 0.05 grains/SCF and 1.50 lbs/yr for the spray paint booth.

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is found to be in compliance with the terms and conditions of the permit. These certificates contain limitations that apply to the operation of the emission units.

[13] In this letter, EPA states all provisions contained in an EPA-approved SIP and all terms and conditions in SIP-approved permits are federally enforceable. All such terms and conditions are also federally enforceable "applicable requirements" that must be incorporated into the federal side of a title V permit.

DEC needs to review its records to determine whether these emission limits for PM are applicable to the ash silo and spray paint booth. EPA grants the petition on this issue. DEC is ordered to reopen the permit to determine whether the emission limits for the ash silo and the spray paint booth set forth in the PC or the CO are still applicable to these emission sources. If they are, DEC must reinstate the terms and conditions of the Certificates when it reopens the title V permit. However, if they are no longer applicable, DEC must explain in the Statement of Basis for the draft title V permit why the emission limits stated in the Certificates no longer apply and provide the public with notice and an opportunity to comment on any proposed changes to the federally enforceable terms of the pre-existing permit. *See* 6 NYCRR; § 621.6; 201-1.6; and 40 CFR § 70.7(h).

(b) The Diesel Generator

NYPIRG alleges that a condition of the pre-existing permit for Dunkirk's 750 HP diesel generator which limited the generator to 475 hours of operation per year was omitted from its title V permit.

Petitioner is correct that the "Special Conditions" limited the diesel generator's operation to no more than 475 hours year. This condition was included in the Certificate to Operate issued to Dunkirk by DEC on February 29, 1996. DEC may be able to conclude that Dunkirk's diesel generator falls within the exemption for emergency generators "where each individual unit operates at no more than 500 hours per year." 6 NYCRR § 201-3.2(c)(6)(i). Even if DEC concludes that the diesel generator falls within the exemption for emergency generators, DEC must ensure that the 500 hours/year operation limit remains applicable to the unit and the monitoring and reporting requirements of Condition 11 continue to apply to the generator. DEC either must incorporate the hours of operation limit in the title V permit or explain in the Statement of Basis in the draft title V permit any proposed changes in applicability such as determining that the diesel generator is an exempt emergency generator. DEC must provide the public with notice and an opportunity to comment on the appropriateness of any proposed changes to the federally enforceable terms of the pre-existing permit. *See* 6 NYCRR § 621.6; 201-1.6; and 40 CFR § 70.7(h). EPA grants the petition on this issue because DEC neither included the condition limiting the hours of operation of the generator to 475 hours/year in the title V permit nor explained the reason for not doing so.

(c) Boilers 1, 2, 3, and 4

NYPIRG further alleges that the "majority of emission limits" for PM, N0x, and SO_2 in the pre-existing permits applicable to Dunkirk's four boilers were omitted from the title V permit. NYPIRG cites the following emission limits:

- Boiler 1 - - PM (0.23 lbs/mm Btu, 2.07 x 10^5 lbs/yr); SO2 (3.4lbs/mm Btu, 28.2 x 10^6 lbs/yr); N0x (0.42 lbs/mm Btu, 3.18 x 10^5 lbs/yr),

- Boiler 2 - -PM (0.23 lbs/mm Btu, 2.48 x 10^5 lbs/yr); SO2 (3.4 lbs/mm Btu, 27.8 lbs/yr); N0x 0.42 lbs/mm/Btu, 3.18 x 10^5 lbs/yr)

- Boilers 3 and 4 - - PM (0.17 lbs/mm Btu, 12.2 lbs/yr); SO2 (3.4 lbs/mm Btu, 109 x 10^6 lbs yr); N0x (0.42 lbs/mm Btu, 12.2 x 10^6 lbs/yr)

With regard to the three Permits to Construct/Certificates to Operate issued for the four boilers, they were issued with the September 25, 1995 "Special Conditions" and contain federally enforceable permit terms. The emission limits (lbs/mm Btu) on PM and NO_x were properly included for each boiler. Specifically, these emission limits for PM for Boilers 1, 2, 3 and 4 are in Conditions 52, 53,and 54 respectively. The emission limits for NO_x that apply to all four boilers are found in Condition 41 with an averaging period of 30 days and in Condition 42 with an averaging period of 24 hours. NYPIRG listed in the petition additional emission limits for the boilers in pounds per year (lbs/yr) for PM, SO_2, and NO_x as missing from Dunkirk's title V permit. The permit record does not provide sufficient information to determine if these lbs/yr limits are applicable requirements that must be carried over to the title V permit. Therefore, DEC must provide information on these annual limits and explain in the public notice or the new statement of basis whether or not these are applicable requirements for Dunkirk's boilers. If these annual limits are applicable requirements from the pre-existing permits, DEC must incorporate these limits into the title V permit. DEC must also provide the public with notice and an opportunity to comment on the appropriateness of any proposed changes to the federally enforceable terms of the pre-existing permit. *See* 6 NYCRR § 621.6; 201-1.6; and 40 CFR § 70.7(h). EPA grants the petition on this point.

Petitioner is correct that DEC did not include the 12-month average SO_2 emission limits for the four boilers in the federally enforceable side of Dunkirk's title V permit. Instead, the 12-month average SO2 limits for the boilers were set forth in the "State Only" side of the permit. *See* Permit Condition 61. The SIP-approved rule, 6 NYCRR § 225.1(a)(3), allows an average SO_2 emission rate of 1.9 lbs of Sulfur/MMBtu and a maximum SO_2 emission rate of 2.5 lbs of Sulfur/MMBtu applicable to all four boilers. In Dunkirk's permit, DEC included these emission limits. *See* Permit Conditions 34 and 35. However, these emission limits from the SIP are different from those in the subsequently-adopted State rule, 6 NYCRR § 225-1.2(a)(2), and incorporated by DEC in the "Special Conditions" of Dunkirk's pre-existing permit restricting SO_2 emissions to an annual average of no more than 1.7 lbs of Sulfur/MMBtu. DEC did not transfer the SO_2 emission limits from the "Special Conditions" of the pre-existing permit to the federally enforceable side of the title V permit. Instead, DEC incorporated the SIP-approved limits (1.9 and 2.5 lbs/mm Btu) in the permit at Conditions 34 and 35. In addition, DEC included the "Special Conditions" limits of the pre-existing permit at Condition 61 on the

"State-Only " side of the permit. NYPIRG is correct that since the "Special Conditions" are federally enforceable emission limits from a SIP-approved permit, they must be included in Dunkirk's title V permit. Therefore, EPA grants the petition on this issue.

(d) Limits on Burning Sludge

NYPIRG also asserts that DEC increased the amount of sludge Dunkirk may burn in the boilers. The "Special Conditions" of the pre-existing permits limit Dunkirk to burning 10 tons per week of sludge generated from the waste water treatment facility. However, the draft and final title V permits issued to Dunkirk limit Dunkirk to burning 12 tons per week as requested in Table 1 of Dunkirk's title V permit application. NYPIRG raised this particular issue on the draft permit. Response to Comments (June 11, 2001) at 14. DEC responded that Dunkirk's pre-existing special condition which placed the 10 tons per week limit on the amount of sludge did not go through the public notice process. DEC, however, found it appropriate to place a limit on the amount of solid waste that can be burned in the boilers and modified the pre-existing 10 tons/week limit to 12 tons/week. The Petitioner is correct in stating that the 10 tons per week limit of sludge burned from the September 25, 1995 "Special Conditions" must be transferred to the title V permit. DEC may revise this condition to 12 tons per week only after going through the proper permit modification procedures of NYCRR Part 201 including providing the public with notice and an opportunity to comment. Alternatively, DEC may incorporate the original limit of 10 tons per week of sludge. EPA grants the petition on this issue; DEC is ordered to either the incorporate original condition in the title V permit or revise the condition after following proper permit modification procedures of NYCRR Part 201.

(VIII) Monitoring

Petitioner alleges that the Dunkirk permit contains permit conditions that do not have sufficient monitoring to assure compliance with all applicable requirements or are not enforceable as a practical matter. Each of the four boilers at Dunkirk burns coal as a primary fuel and is equipped with an electrostatic precipitator (ESP) to control PM emissions. NYPIRG takes issue with the periodic monitoring requirement imposed to assure compliance with the PM emission limits as well as with opacity standards for the four boilers. Specifically, NYPIRG alleges the permit: (a) fails to assure compliance with the PM limits at each boiler; (b)(1) fails to assure compliance with opacity limits; and (b)(2) fails to include maintenance and calibration requirements on the COM. Petition at 16-19.

(a) Petitioner alleges the permit violates 40 CFR § 70.6(a)(3)(i)(B) for not requiring periodic monitoring sufficient to assure compliance with the PM limits. NYPIRG alleges that the Dunkirk permit fails to 1) establish parametric monitoring; 2) provide data that supports the

link between compliance and the parameter(s) being monitored; 3) include a clear and enforceable indicator range for each parameter; and 4) upgrade the once per permit term stack test to regular stack testing to confirm that the plant is operating in compliance with the PM standard. NYPIRG claims that although Permit Condition 37 imposes monitoring requirements for the ESP, it is inadequate because it fails to establish proper operating ranges for the operating parameters of the ESP. Petitioner asserts such ranges which have been correlated with emissions are necessary to determine proper ESP operation and measure compliance. Petition at 17.

The Petitioner correctly states that the monitoring included in Permit Conditions 52, 53, and 54 of the Dunkirk title V permit is not adequate to assure compliance with the applicable PM limit. EPA believes that one stack test per permit term to measure PM emission from the four boilers is not sufficient "to yield reliable data from the relevant time period that are representative of the source's compliance with the permit," as required by 40 CFR § 70.6(a)(3)(B). Therefore, monitoring sufficient to meet this standard is necessary.

As currently written, Condition 37 fails to include proper operating ranges for each of the ESP parameters, and therefore, fails to provide the means to determine ESP compliance. Should DEC determine that monitoring of the ESP parameters together with the stack testing requirement is an appropriate way for assuring compliance with the PM limit, additional requirements must be incorporated to measure ESP performance. Since the amount of PM that exhausts through the stack is affected by the amount of PM controlled by the ESP, proper operation of the ESP is important in assuring compliance with the PM limit. Improper operation of the ESP increases the amount of uncontrolled PM emissions exhausting through the stacks. Once the proper operating ranges for the ESP parameters are established, ESP performance can easily be monitored. DEC may determine the proper operating ranges for the ESP parameters by recording them during a stack test that shows PM compliance. Dunkirk must maintain the ESP in accordance with manufacturer's instructions as described in Permit Condition 4.

With parametric monitoring of the ESP or other alternative additional monitoring strategies that meet the requirements of 40 CFR § 70.6(a)(3)[14], together with the once per permit

[14] 40 CFR § 70.6 (a)(3) requires monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance; and § 70.6 (c)(1) requires permits to contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. In all the monitoring issues presented here, where we have concluded that additional monitoring is needed, either the underlying applicable requirement imposes no monitoring of a periodic nature or the applicable rule contains sufficient periodic monitoring but it was not properly carried over into the permit. Therefore, we are addressing them exclusively under 40 CFR § 70.6(a)(3) and need not address 40 CFR § 70.6(c)(1). The scope of applicability of § 70.6(a)(3) was addressed by the US Court of Appeals for the DC Circuit in *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). The court concluded that, under section 40 C.F.R. §70.6(a)(3)(i)(B), the periodic monitoring rule applies only when the underlying applicable rule requires "no periodic testing, specifies no

term emission stack test would be adequate for assuring compliance with the PM emission standards for the Dunkirk boilers. Once the operating ranges have been established for the ESP operating parameters, operating the ESP outside of any of these ranges would constitute a violation of the title V permit. Since parametric monitoring of the ESP helps assure compliance with the PM standards, the proper operating ranges for these parameters must be incorporated into Dunkirk's title V permit. Therefore, EPA grants the petition on the issue of inadequate monitoring to assure compliance with the PM limit. DEC is ordered to establish the proper operating ranges for the ESP operating parameters if it determines that monitoring of the ESP parameters together with the stack testing requirement is an appropriate way for assuring compliance with the PM limit. However, if DEC wishes to impose other alternative monitoring strategies that meet 40 CFR § 70.6(a)(3), it may do so by proposing those provisions for public review when the Dunkirk permit is revised in response to this Order.

(b)(1) Petitioner requests EPA objection to the Dunkirk permit because it "does not include monitoring, recordkeeping, and reporting requirements that will allow DEC, U.S. EPA, and the public to know when the plant is violating opacity requirements." NYPIRG concluded the monitoring and reporting requirement undertaken by Dunkirk was inadequate because the DEC Commissioner was unable to determine whether exceedances provided by Dunkirk qualified to be excused as unavoidable emissions.[15] As such, NYPIRG finds it necessary for DEC to impose more detailed reporting requirements. Petition at 18-19.

The letter alluded to by NYPIRG as evidence that Dunkirk did not submit enough information for DEC to determine if the exceedances qualify as unavoidable was misinterpreted by Petitioner. Contrary to NYPIRG's claim, the June 1999 letter from DEC informed ARG Engineering that based on the information submitted, the DEC Commissioner determined not to excuse opacity exceedances due to startup or shutdown as unavoidable. Dunkirk is required to monitor opacity emissions by the use of a continuous opacity monitor (COM) to assure compliance with 6 NYCRR § 227-1.3(a). This rule limits opacity at a stationary combustion

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frequency, or requires only a one-time test." Id. at 1020. The Appalachian Power court did not address the content of the periodic monitoring rule where it does apply, i.e., the question of what monitoring would be sufficient to "yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as is required by 40 C.F.R. §70.6(a)(3)(i)(B) and 6 NYCRR § 201-6.5(b)(2). It is this issue that is raised by the petition at bar. 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 by *Appalachian Power*.

[15] In a June 8, 1999 letter from Anthony Adamczyk of the DEC to Thomas Allen of ARG Engineering states that "simply coding startup as the reason for an opacity excursion was not adequate for demonstrating that a violation was unavoidable" and "without more detailed information regarding opacity at the Albany, Huntley, and Dunkirk facilities, [DEC] cannot recommend that the Commissioner excuse opacity exceedances which occur during startup or shutdown as unavoidable."

installation to no greater than 20% in a six-minute average. *See* Permit Condition 39. EPA considers the use of a COM to be adequate monitoring for opacity emissions because it records opacity readings continuously. Recordkeeping and reporting requirements are stipulated in Condition 40. While the monitoring and recordkeeping of opacity emissions are continuous, reporting is on a quarterly basis. Any excess opacity emissions indicated on the COM will alert the operator to check boiler operation and correct the problems quickly. Thus, the Dunkirk permit contains monitoring, recordkeeping and reporting conditions. Therefore, EPA denies the petition on this issue.

(b)(2) NYPIRG alleges the permit fails to include federally enforceable requirements for the maintenance and calibration of the COMS. Such requirements are stipulated in the State Only side of the permit. *See* Permit Condition 63. While Petitioner acknowledges the state rule that contains the COMS maintenance and calibration requirements are not SIP-approved, Petitioner alleges that DEC should include these requirements as periodic monitoring requirements authorized by title V. NYPIRG asserts that without these requirements, the title V permit "does not assure compliance with the opacity limits because there is no assurance that the COMS will correctly measure opacity." Petition at 19.

EPA agrees these requirements are important in assuring the accuracy of the COMs data collection. However, EPA disagrees with Petitioner that Dunkirk's permit does not include maintenance and calibration requirements to ensure that the COMS will accurately record opacity emissions. The Acid Rain requirements at 40 CFR Part 75 to which Dunkirk is subject, contains maintenance and calibration requirements for COMS. Permit Condition 48 of Dunkirk's title V permit incorporates the various Acid Rain regulations, and references the attached Acid Rain Permit. Therefore, EPA denies the petition on this point.

Conclusion

For the reasons set forth above and pursuant to CAA § 505(b)(2), I deny in part and grant in part the petition of NYPIRG requesting the Administrator to object to the issuance of the Dunkirk title V permit. This decision is based on a thorough review of the October 31, 2001 permit, and other documents that pertain to the issuance of this permit.

July 31 2003
Dated:

/s/
Marianne L. Horinko
Acting Administrator