December 12, 2001

Ms. Keri N. Powell, Esq.
New York Public Interest Research Group, Inc.
9 Murray Street, 3rd Floor
New York, New York 10007

Dear Ms. Powell:

This is in response to the March 11, 2001 letter from the New York Public Interest Research Group, Inc. (NYPIRG) to the U.S. Environmental Protection Agency (EPA) Administrator Christine Todd Whitman, submitted in accordance with the "Notice of Comment Period on Program Deficiencies," 65 Fed. Reg. 77376 (December 11, 2000).[1] In general, the December 11, 2000 Federal Register notice provided a 90-day public comment period for citizens to identify deficiencies that they perceive to exist in state and local agency operating permit programs.

As a result of the December 11, 2000 Federal Register notice, EPA received numerous citizen comments regarding state and local agency title V operating permit programs. With respect to alleged implementation deficiencies identified by commenters during the 90-day period, EPA agrees with some of the issues raised and has worked early with permitting authorities to ensure that programs are implemented consistent with the permitting program requirements of the Clean Air Act (the Act) and EPA's implementing regulations at Part 70 of Title 40 of the Code of Federal Regulations (40 CFR part 70). With respect to implementation deficiencies (that is, issues that do not indicate an inability of the state's permit preparer to carry out the Act's Title V program because of state law or regulations),

[1]NYPIRG submitted comments, dated November 23, 2001, on EPA's proposed full approval of the New York State operating permit program (66 FR 53966, October 25, 2001). NYPIRG asked that its November 23, 2001 comments also serve as a request that EPA withdraw New York State's authority to administer a title V program. Some of the November 23, 2001 comments were raised previously, others are amendments to previous comments, and yet others were raised therein for the first time. Issues raised in the March 11, 2001 submission will be addressed by December 14, 2001. Accordingly, any comments, or amendments to prior comments, that were raised on November 23, 2001 will be responded to in a timely manner but at a later date.

EPA has received commitments from certain permitting authorities providing that future permits will be issued consistent with federal requirements. EPA is not issuing a notice of deficiency to such permitting authorities because their commitments that future permits will be issued consistent with state and federal requirements correct the alleged deficiency. EPA will monitor compliance of these permitting authorities over the next three to six months, to assure that the program is being implemented consistent with the Act and 40 CFR part 70.

With respect to the New York State Title V operating permit program, the purported deficiencies delineated by NYPIRG in its letter of March 11, 2001 were found not to be related to New York State legislation or regulations corresponding to the State's Title V program. All of the alleged deficiencies were determined to be program implementation issues. On November 16, 2001, the New York State Department of Environmental Conservation (DEC) sent to EPA Region 2 a letter that sets forth DEC's commitment to make certain implementation changes in its Title V program (copy attached). Over the next six months, Region 2 will monitor New York's Title V program to ensure that the permitting authority is adequately addressing these implementation concerns in newly issued permits consistent with the letter of commitment.

As a result of the comments provided by NYPIRG on March 11, 2001, EPA conducted a careful review of the New York State operating permit program. EPA has also met with both NYPIRG and DEC in an effort to understand the issues and help facilitate a resolution of issues raised. As detailed below, the DEC has committed to make certain program changes in future permits. If, based on EPA's review over time, these changes are achieved, then it will be EPA's determination that DEC is implementing its title V program properly and, therefore, a notice of deficiency will not be issued.

NYPIRG Comments Summarized and EPA's Responses

NYPIRG Comment A:
DEC consistently violates the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying requests for a public hearing on draft Title V permits. NYPIRG has requested public hearings on dozens of permits but has been denied on every occasion. DEC is applying the wrong standard in denying NYPIRG's requests; that is, the DEC bases its decision on whether substantive and significant issues are raised, rather than whether a significant degree of public interest exists.

EPA Response:

40 CFR § 70.7(h) requires permitting authorities to provide the public an opportunity to request a hearing on a draft title V operating permit. Although in past cases where New York State received requests for a public hearing, the State applied the incorrect standard in denying the request, the State has committed to apply the proper standard under state law to all future hearing requests. New York regulations at 6 NYCRR § 621.7(c) provide that the determination to hold a public hearing shall be based on whether a significant degree of public interest exists. Under the part 70 regulations, permitting

authorities have discretion in determining what standard shall apply to public hearing requests. EPA believes that the standard provided in 6 NYCRR § 621.7(c) is a reasonable standard and is consistent with the public participation provisions of part 70. In fact, EPA applies a similar standard under the part 71 regulations governing the issuance of federal operating permits. 40 CFR § 71.11(f) provides that EPA "shall hold a hearing whenever it finds... a significant degree of public interest in a draft permit." DEC does hold public hearings on Title V permits, so we cannot conclude that DEC gives no thought at all to whether a hearing is appropriate. As previously discussed, EPA will monitor New York's implementation of this part of its permit program to ensure that the commitment is achieved.

NYPIRG Comment B:
DEC does not prepare a sufficient "statement of basis" to accompany each draft Title V permit. Although some more recently issued draft permits included "permit descriptions," this in and of itself does not comply with the requirement to prepare a statement of basis pursuant to 40 CFR § 70.7(a)(5). The major concern with the respect to an incomplete or absent statement of basis relates to the a lack of discussion on the adequacy of the monitoring requirements included in the draft permit. EPA provided an interpretation of 40 CFR § 70.7(a)(5) that the rationale for the selected monitoring method must be clear and documented. In re Fort James Camas Mill, December 22, 2000 (http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/fort_james_decision1999.pdf).

EPA Response:
40 CFR § 70.7(a)(5) provides: "The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions . . .." EPA agrees with the commenter that DEC had not properly been implementing this requirement. DEC has committed to preparing and making available a permit review report with future draft permits, to meet the requirements of the statement of basis provision of part 70. Examples of information set forth in such reports will include, but not be limited to, a description of the facility, a discussion of any operational flexibility that will be utilized at the facility, the basis for applying the permit shield, any federal regulatory applicability determinations and the rationale for monitoring methods selected. Elements included in these reports may differ, depending on the type and complexity of the facility. As previously discussed, EPA will monitor New York's implementation of this part of its permit program to ensure that the commitment is achieved.

NYPIRG Comment C:
DEC permits distort the annual compliance certification requirement of Section 114(a)(3) of the Act and 40 CFR § 70.6(c)(5). The general compliance certification provision only requires identification of each term or condition that is the basis of the certification. Also, there are certain conditions labeled, "Compliance Certification;" the only way to interpret this labeling is that the annual certification only has to include these provisions. However, annual compliance certifications must include all conditions of the permit.

EPA Response:
EPA agrees with the commenter that the DEC annual compliance certification provision is unclear with respect to the requirements of section 114(a)(3) of the Clean Air Act and 40 CFR § 70.6(c)(5). DEC has committed to revise the annual compliance certification provision in future draft permits. The revision will make clear that the responsible official must include in annual certification reports all appropriate terms and conditions contained in the permit, including emission limitations, standards, or work practices. DEC also agreed to clarify this permit condition to indicate that provisions labeled as "Compliance Certification" are not the only provisions for which the annual certification is required. As previously discussed, EPA will monitor New York's implementation of this part of its permit program to ensure that the commitment is achieved.

NYPIRG Comment D:
Permits issued by DEC do not assure compliance with all applicability requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because they illegally sanction the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. Specifically, NYPIRG asserts that: (1) permits must include the limitations established by EPA guidance set forth in a September 20, 1999 memorandum; (2) permits must make it clear that violations of federal requirements cannot be excused unless the requirement provides for an affirmative defense; (3) permits must include definitions of significant terms such as "upset," "unavoidable," and "reasonably available control technology" as it applies during startup, shutdown, malfunction, and maintenance conditions; and (4) permits must require prompt written reports of deviations.

EPA Response:
DEC has committed to revise future draft permits to include language stating that the "excuse" provision of 6 NYCRR § 201-1.4 is not available to Title V permittees for violations of federal regulations (e.g. NSPS, NESHAPS, PSD). Where applicable, federal regulations address issues of startup, shutdown and malfunction specifically. In addition, the issuance of future draft permits will clarify that the excuse provision of 6 NYCRR § 201-1.4 can only be used for violations of state regulations, and will be incorporated only on the state enforceable side of the permit. These revisions will address NYPIRG's contention that permits must make it clear that violations of federal requirements cannot be excused unless the requirement provides for an affirmative defense and will eliminate the need for EPA to respond to NYPIRG's third point because the referenced startup, shutdown and malfunction provision will be incorporated only on the state enforceable side of the permit. With respect to the contention that permits must include the limitations established by EPA guidance set forth in a September 20, 1999 memorandum, EPA did not approve 6 NYCRR § 201-1.4 as part of New York's SIP. Thus, it is not an "applicable requirement" and will not be included in the federal side of part 70 permits issued by DEC. Although 6 NYCRR § 201.5(e) is currently approved in the New York SIP, EPA does have some concerns regarding whether this regulation is consistent with the guidance EPA has issued to States regarding the types of excess emissions provisions that States may, consistent with the Act, incorporate into SIPs. As part of the SIP-approval process, EPA will evaluate 6 NYCRR § 201-1.4 in light of recent federal guidance (Memorandum from Eric Schaeffer, Director, Office of Regulatory

Enforcement and John S. Seitz, Director, Office of Air Quality Planning and Standards, to Regional Administrators, Regions I-X, "Clarification - State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Nov. 8, 2001) and 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, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Sept. 20, 1999)).

Finally, regarding NYPIRG's contention that permits must require prompt written reports of deviations, DEC has committed to incorporate into future draft permits a requirement for reporting of deviations, in accordance with New York State's authority under 6 NYCRR § 201-6.5(c)(3)(ii). 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. The DEC intends to utilize the procedures for prompt reporting contained in 40 CFR § 71.6(a)(3)(iii)(B), from the federal operating permit program regulation, 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. As previously discussed, EPA will monitor New York's implementation of this part of its permit program to ensure that the commitment is achieved.

NYPIRG Comment E:
New York Title V permits fail to require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). Permits only require reporting of violations that might be considered excusable under 6 NYCRR § 201-1.4. Also, DEC must be required to submit deviation reports in writing.

EPA Response:
As indicated above, DEC has committed to incorporate into future draft permits a requirement for reporting of deviations, in accordance with New York State's authority under 6 NYCRR § 201-6.5(c)(3)(ii). 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. The DEC intends to utilize the procedures for prompt reporting contained in 40 CFR § 71.6(a)(3)(iii)(B), from the federal operating permit program regulation, 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. EPA will monitor New York's implementation of this part of its permit program to ensure that the commitment is achieved.

NYPIRG Comment F:
DEC does not assure compliance with all applicable requirements as mandated by 40 CFR § 70.1(b) and 40 CFR § 70.6(a)(1) because permits lack sufficient monitoring and contain conditions that are not

enforceable as a practical matter. Monitoring must be sufficient to assure compliance, and to yield reliable data from relevant time periods associated with compliance requirements. Also, each permit condition must be practically enforceable; that is, to provide a clear explanation of how the requirement applies, and to allow one to determine whether the facility is complying with the requirement. As examples, NYPIRG refers to the 9 “individual permit petitions.”

EPA Response:
EPA disagrees with the commenter. As provided by section 505(b)(2) of the Clean Air Act, the EPA Administrator will grant or deny individual permit petitions. For example, a number of the facilities for which petitions have been submitted include fossil fuel-fired boilers used for heating, steam production or other uses. Some fossil fuel combustion will be adequately monitored with daily observances by a facility employee and the requirement to perform additional testing if smoke is observed over a set period of time. In addition, stack testing to determine nitrogen oxide emissions is included in the majority of these permits, with one facility monitoring this pollutant by use of a continuous emission monitoring system. Another one of the petitioned facilities uses incineration to control emissions of volatile organic compounds. Among other monitoring requirements in this permit is to continuously monitor the catalyst bed temperature of the incinerator to ensure proper operation and adequate destruction of VOCs. Therefore, EPA does not believe that there exists a systemic problem with the New York State program vis-a-vis insufficient periodic monitoring even though an individual case may reveal the need for additional monitoring.

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).

EPA summarized the relationship between Natural Resources Defense Council and Appalachian Power and described their impact on monitoring provisions under the Clean Air Act in two recent orders responding to petitions under Title V requesting that the Administrator object to certain permits. See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, Nov. 24, 2000 ("Pacificorp") (available on the Internet at: http://www.epa.gov/region07/programs/artd/ air/title5/petitiondb/petitions/woc020.pdf), and In re Fort James Camas Mill, December 22, 2000 (http://www.epa.gov/region07/programs/artd/ air/title5/petitiondb/petitions/fort_james_decision1999.pdf). 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 section 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 section 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 section 70.6(c)(1) applies instead.

What may be required to "assure compliance" is an engineering judgment. In some instances, direct monitoring of the emissions for a pollutant may be the best way to monitor and, in others, tracking process conditions or keeping records for raw materials may be best. Either one requires the conclusion that what is being monitored is directly related to the emissions. Thus, the decision as to what sort of monitoring will assure compliance will be some combination of testing and monitoring which establishes the conditions to achieve compliance and how to monitor those conditions. Necessary monitoring may range from infrequent to continuous monitoring of both parameters and emissions depending on the predictability of emissions and the purpose of the emission limit.

Since the inception of New York State's Title V program in December of 1996, EPA has worked closely with the DEC on program implementation issues. Many of our discussions with DEC have centered on periodic monitoring issues, as EPA's position on this issue has evolved over time. While there have been instances where EPA worked with DEC to improve the adequacy of monitoring in individual permits, this occurred mostly during the early stages of program implementation. EPA believes that there has been marked improvement over time. While there likely remain situations in which some permits are being issued without adequate monitoring, EPA believes that, for the most part, DEC is issuing permits that include the appropriate periodic monitoring. However, EPA will continue to review draft and proposed permits and monitor New York State's operating permit program and,

where we believe that a permit does not contain adequate monitoring, EPA will work with the DEC to ensure that appropriate revisions are made.

NYPIRG Comment G:
Many New York Title V permits fail to include the applicable particulate matter limitation that is part of the New York State Implementation Plan. The federally enforceable SIP limit, found at 6 NYCRR § 227.2(b)(1), requires oil-fired stationary combustion installations to meet a particulate matter emission limit of 0.1 pounds per million Btu. This limit is more stringent than the currently applicable State of New York requirement of 0.2 pound per million Btu for units between 50 and 250 million Btu per hour heat input. Refer to the attached list of Title V permits that omit the 0.1 emission limit (3 individual Title V permits and 1 general permit).

EPA Response:
EPA agrees with the commenter that the SIP-approved particulate matter limit of 0.10 pounds per million Btu has not been incorporated into all applicable Title V permits. DEC has committed to include on the federal side of future draft permits the 0.10 pounds per million BTU particulate matter limit for affected units. Permits that include the incorrect limitation will be corrected on a case-by-case basis or upon renewal unless a SIP revision relating to this standard is approved by EPA in the interim. As previously discussed, EPA will monitor New York's implementation of this part of its permit program to ensure that the commitment is achieved

NYPIRG Comment H:
DEC is issuing a large number of permits pursuant to a defective general permit. Specifically, the permit outlines a variety of conditions that the facility may be subject to depending on individual characteristics, which is not allowed under the general permit provisions of part 70, and the permit includes substantial monitoring and enforceability deficiencies.

EPA Response:
DEC has issued one general permit, which applies to "small boilers." With certain exceptions, for a facility to apply for and receive such a permit, it would have to meet the size applicability criterion of a maximum heat input capacity of 100 million Btu per hour or less. While there are variations within the permits ultimately issued, these are based on the facility's location since different requirements apply throughout New York State depending on the particular attainment status of the area. It is the EPA position that this general permit for such sources meets the intent of 40 CFR part 70 as to general permits. Also, DEC has committed to revise the general permit to reflect the improvements to monitoring and enforceability that it has made to its facility-specific permits for similar sources since issuance of the general permit. With respect to conditions that set forth options (e.g., conditions that set various sulfur in fuel limits depending on source location), DEC has committed to amend such conditions to include a check box to indicate which alternative condition or conditions apply. The general permit condition concerning the annual compliance certification requirements will be revised to require that these reports must be submitted annually. Also DEC has committed to include, on the

federal side of future general permits the 0.10 pounds per million BTU particulate matter limit for affected units. Such permits will not be available if there is noncompliance for which a compliance plan is required. However, such plans should be rare for these types of facilities. These general permit revisions will be proposed when the DEC processes the renewal of the general permit, which is due to expire on April 22, 2002.

NYPIRG Comment I:
New York State's Title V permits improperly supersede previously issued preconstruction permits. Minor NSR conditions are federally enforceable and must be included in Title V permits, and preconstruction permits must remain in effect after issuance of the Title V permit because it is the underlying source of the applicable requirement. New York does not comply with these requirements.

EPA Response:
EPA disagrees that New York State's Title V permits improperly supersede previously issued preconstruction permits. In its November 16, 2001 commitment letter, DEC states, "Although Title V facility permits will replace all prior issued certificates to operate (which will expire upon issuance of a Title V permit), the terms and conditions in those former Part 201 permits pertaining to Federal requirements will be included in the Title V permit and will not lapse." This is consistent with the New York State Attorney General's Opinion dated June 27, 1996, submitted as part of the Title V program submission which asserts, at page 9, that "State law provides authority to incorporate into an operating permit, upon issuance or renewal, all applicable requirements as defined in 40 CFR § 70.2, and as provided generally in the Act and 40 CFR Part 70." The Attorney General's Opinion further asserts, at page 18, "State law provides authority to enforce the terms and conditions of a permit which has expired, if the source files a timely and complete application for renewal, so as to assure compliance with all applicable requirements."

The state permits are only applicable requirements because the state permit programs were submitted to and approved by EPA as part of the New York SIP. EPA only acts on what is submitted for SIP approval. The DEC's permit program requires construction and operating permits for facilities in New York. 6 NYCRR § 201.2(a) and (b)(approved into the SIP effective 12/23/97, 62 FR 67006). The requirements to have such permits in order to operate and to comply with them are SIP requirements. Id. Such permits can expire, in particular if the permittee fails to apply for a renewal of the permit on time. 6 NYCRR § 201.5(a) and (b) (approved into the SIP effective 12/23/97, 62 FR 67006). The SIP approved permit rule requires no specified format. Thus, the DEC's program still requires such permits and the program it currently manages satisfies the current SIP permit requirements. The current program also meets the requirements of title V. Even though the rules being applied by DEC are more elaborate than the SIP calls for, they still carry the same requirements. Except for a change in format, there has been no change in SIP permit requirements. The DEC has committed to identify the title V permit terms and to clarify where they are derived from and EPA and DEC will continue to work to insure that this is made clear in the permit documents. The DEC cannot change conditions of any permit without following the procedures applicable to the change. Existing permits remain applicable

and must be treated as such in the process of issuing the state permit which now also meets title V requirements. Although the state operating permit also serves the purpose of title V, the terms and conditions of the state operating permit remain as applicable requirements outside of the title V permit.

We do not believe that New York's program is deficient in this regard.

If you would like to further discuss the information contained in this letter, please contact Mr. Steven C. Riva of my staff at (212) 637 - 4074.

Sincerely yours,

/s/

George Pavlou, Director
Division of Environmental Planning and Protection