

OFFICE OF THE COMMISSIONER

New York State Department of Environmental Conservation
625 Broadway, 14th Floor, Albany, New York 12233-1010
P: (518) 402-8545 | F: (518) 402-8541
www.dec.ny.gov

AUG 08 2019

Mr. Peter Lopez
Regional Administrator
United States Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

Dear Mr. Lopez:

The New York State Department of Environmental Conservation (DEC) has reviewed the Environmental Protection Agency's (EPA) final audit report on DEC's Title V Operating Permit Program. The enclosed contains DEC's response to the final report dated April 25, 2019.

Thank you for the opportunity to respond to EPA's final audit report. Please call Steve Flint at (518) 402-8452 if you have any questions.

Sincerely,



Basil Seggos
Commissioner

Enclosure

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Air Resources

625 Broadway, Albany, New York 12233-3250

P: (518) 402-8452 | F: (518) 402-9035

www.dec.ny.gov

MEMORANDUM

TO: Commissioner Seggos through Jared Snyder, Deputy Commissioner,
Office of Climate, Air and Energy

FROM: Steve Flint, Director, Division of Air Resources and Ann Lapinski, Director,
Office of Internal Audit & Investigation

SUBJECT: DEC's Response to Title V Operating Permit Program Final Report
dated April 25, 2019

40 CFR Part 70 (Part 70) requires DEC to develop and implement a program for the issuance of Title V permits to major sources of air pollution. Once developed, the Title V Operating Permit Program (OPP) must be approved by the United States Environmental Protection Agency (EPA). DEC's Title V OPP, codified in 6 NYCRR Parts 201 and 621 (Part 201), was fully approved by the EPA on February 5, 2002.

As part of its oversight role in the development and issuance of Title V permits, the EPA conducts an audit of DEC's Title V OPP every 4 years. The most recent audit was conducted on July 16, 2018. The objectives of the audit are:

1. To assess whether DEC's Title V OPP is being implemented consistently with the requirements of Part 70 and DEC's federally approved program;
2. To identify potential areas of DEC's Title V OPP that need improvement; and
3. To identify areas where EPA's oversight role can be improved.

Following the audit, EPA sends DEC a final report detailing any findings related to the stated objectives above. The final audit report includes several action items related to EPA's findings, and charges DEC with providing a response to those items. The attached document contains the Division of Air Resource's proposed responses to the action items identified by EPA in its most recent audit report dated April 25, 2019.

The attached responses consider each action item proposed by EPA and discusses the approach DEC will take to address each issue. However, some of the action items identified by EPA, where we disagree, have been discussed at length outside of the audit. In those cases, the response indicates that DEC disagrees with the EPA's suggestion and provides a detailed explanation of why we cannot or will not act in the manner EPA suggests.

Attachment

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Air Resources

625 Broadway, Albany, New York 12233-3250

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www.dec.ny.gov

MAY 10 2019

Elizabeth Lewis-Michl
Director, Division of Environmental Health Assessment
NYS Department of Health
Empire State Plaza, Corning Tower, Room 1619
Albany, NY 12237

Dear Ms. Lewis-Michl:

Last summer, the NYS Department of Environmental Conservation's (DEC) Title V Operating Permit Program (OPP) was audited by the US Environmental Protection Agency (EPA). I believe your staff called in to the audit meeting on July 16, 2018.

EPA released the final report on April 25, 2019 (enclosed). On page 38 of EPA's final report a recommendation concerning the Department of Health's (DOH) portion of the annual OPP report states "For all DOH activities that are paid for by title V funds, NYSDEC should provide justification, in its future annual reports, on how the activities are related to the title V permitting program."

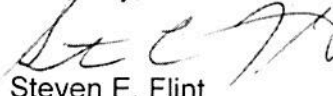
Based on EPA's recommendation, DEC requests that all future submittals of the DOH portion of the annual OPP report include justification on how DOH's reported activities are related to the Title V operating permitting program.

My letter to you dated April 23, 2019 requested the narrative and fiscal portions of the OPP report covering your agency for State fiscal years 2018/19, 2019/20 and 2020/21.

Please ensure that your submittal, due on June 21, 2019, contains sufficient justification to satisfy EPA's recommendation.

Should you have any questions, please contact Cathy Jo Rogers of my staff at 518-402-8401.

Sincerely,



Steven E. Flint
Director, Division of Air Resources

**New York State Department of Environmental Conservation
Title V Operating Permit Program Evaluation
Response to Final Report**

The New York State Department of Environmental Conservation (DEC) has reviewed the final Title V Operating Permit Program (OPP) report dated April 25, 2019 containing the findings and recommendations of the United States Environmental Protection Agency (EPA) resulting from EPA's audit of DEC's OPP. DEC's response is broken into three sections. The first section provides DEC's general comments regarding this report. The second section provides DEC's comments regarding certain report content used as justification for the Action Items detailed throughout the report and various recommendations made by EPA. The third section contains DEC's specific comments on action items provided by EPA.

1. General Comments

DEC is committed to implementing an effective Title V OPP. As set forth in Title 6 of the New York Codes, Rules and Regulations (6 NYCRR) Parts 201 and 621 (approved by EPA), DEC's Title V OPP meets the requirements of the Clean Air Act (Act) and EPA's implementing regulations at 40 CFR Part 70. While DEC's permitting program is effective and results in the issuance of permits of high quality, DEC also agrees that collaboration with EPA Region 2 can help to improve the program.

The final audit report identifies various ways in which DEC's Title V OPP could be improved. As described below in our responses to the Action Items identified by EPA, DEC agrees with many of EPA's recommendations. For example, DEC is committed to improving the content of permit review reports (PRR), ensuring that the emissions caps it issues are federally and practically enforceable, and continuing to include non-delegated federal regulations in its Title V permits. With respect to the Title V fee program, the annual Executive Budget often proposes increased Title V fees for legislative action. DEC will address each Action Item as described in the responses below.

DEC also disagrees with some of EPA's action items, as explained in our responses below. For instance, DEC disagrees that it is necessary or appropriate to include all exempt and trivial activities in Title V permits simply because an applicable requirement exists. In other cases, DEC disagrees that its method for posting draft permit modifications on its website causes confusion. In all cases, DEC's responses explain the reasons DEC does not intend to act in the manner suggested by EPA.

DEC appreciates EPA's efforts, through the Title V OPP audit and otherwise, to identify issues and recommend improvements to DEC's Title V OPP. DEC looks forward to working with EPA Region 2 to address these items.

2. Comments on Specific Report Content

This section discusses DEC's comments on various sections of the final report to the extent that they are used in support of the Action Items discussed later in this document.

Implementation and Enforcement of Non-delegated Regulations

DEC strongly disagrees with the assertion made on Page 13 of the final report that "...while a state has discretion in deciding when or if to take delegation of a federal standard, that does not excuse a state from including all applicable requirements in Title V permits it issues or from enforcing them." DEC understands the requirements of 40 CFR Section 70.6 with respect to its obligation to include all applicable requirements in Title V permits. However, Section 111(c)(1) of the Act clearly states that upon acceptance of a state's proposed implementation procedure, the Administrator (i.e. EPA) shall delegate "any authority he has under this Act to implement and enforce such standards" to the state. Accordingly, until and unless delegation is received from EPA and New York has incorporated the standard into state law, DEC has no legal authority to enforce federal standards. Therefore, any enforcement action against a facility for non-compliance with a federal standard for which DEC has not been granted delegation of and subsequently incorporated into state law would necessarily fall to EPA.

Further, Page 15 suggests that DEC should follow EPA guidance to develop templates for permit conditions to be included in Title V permits for facilities that are subject to one or more non-delegated regulations. As discussed above, by not applying for and therefore not being granted delegation of these standards, DEC does not have any authority to interpret, implement or enforce them. Accordingly, the development of relevant permit conditions is the responsibility of EPA. DEC has repeatedly stated that it is willing to review the proposed conditions developed by EPA for conformance with New York State permitting procedures and law and to provide them to regional permitting staff for inclusion in Title V permits as required by 40 CFR Section 70.6. However, any enforcement of those conditions remains the responsibility of the EPA.

Insignificant Activities

DEC disagrees with EPA's interpretation of DEC's authority to consider certain insignificant activities (i.e. exempt and trivial activities) to be exempt from permitting requirements. DEC's primary concern relates to EPA's assertion that 6 NYCRR Subpart 201-3 should explicitly state that exempt and trivial activities subject to an applicable requirement are subject to Title V permitting and, therefore, cannot be considered exempt or trivial. Most applicable federal

requirements (i.e. New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants) do not require Title V permits for minor or area sources. Accordingly, simply being subject to such a regulation does not necessitate the issuance of a Title V permit as EPA suggests.

To ensure that major sources are not inadvertently exempted from Title V permitting, 6 NYCRR Section 201-3.1(c) states that activities described in 6 NYCRR 201-3 with the potential to emit (PTE) one or more criteria contaminants exceeding, or causing the facility to exceed, the major facility thresholds are no longer considered to be exempt or trivial and must be appropriately permitted. Further, 6 NYCRR Section 201-3.1(d) states that if physical or operational restrictions (i.e. an emissions cap) are required to maintain the PTE of one or more contaminants below the applicable major source threshold, those activities are no longer considered to be exempt or trivial. Finally, 6 NYCRR Section 201-3.2(b) requires emissions from exempt and trivial activities to be included in the facility's PTE calculations when determining whether the facility is a major source.

The final report also suggests that DEC should ensure that each application includes the necessary information to determine potential regulatory applicability in relation to exempt and trivial activities. As discussed at 6 NYCRR Section 201-6.2(d)(6) and in DEC's Title V permit application instructions, each Title V permit application must include a description of any exempt and trivial activities. Further, 6 NYCRR Section 201-6.2(d)(3) requires emissions information to be provided in sufficient detail to determine the applicability of various requirements.

DEC believes that the regulatory language and permit application requirements discussed above appropriately address EPA's concerns regarding exempt and trivial activities.

Response to EPA Comments on Proposed Title V Permits

DEC disagrees with EPA's characterization on Page 37 of the final report that it is not sufficiently "*vigilant in providing a response to the EPA's comments before moving forward with final permit issuance*". As discussed with respect to several Title V permits and in the context of this audit, DEC's regulations relating to public notice and comment stipulate that DEC shall prepare a responsiveness summary that addresses relevant comments received during the public comment period (see 6 NYCRR Section 621.10(e)). Accordingly, DEC is legally obligated to address all relevant comments made by EPA and the public during the 30-day public notice and comment period. However, New York has no legal mechanism by which to address any comments made by EPA after the 30-day public comment period.

Further, DEC notes that 40 CFR Section 70.8(a), which outlines DEC's responsibility to submit proposed Title V permits to EPA for a 45-day review period, does not provide EPA any authority to comment, nor does it require DEC to address comments made by EPA on the proposed permit. In fact, DEC is required to provide a summary of its responses to any comments received on the draft permit at the beginning of the 45-day period. DEC also notes that the only recourse provided to EPA by federal law with respect to issues EPA identifies in the proposed permit during the 45-day review period is the formal objection process described in 40 CFR Section 70.8(c). Should EPA determine that a formal objection is warranted, DEC will respond as required by 40 CFR Section 70.8(c)(4).

3. Comments on EPA Action Items

The following are DEC's responses to Action Items discussed in the final report:

Rationale for Gap Filling Monitoring in Permit Record

Action Item 1: DEC should identify and document the rationale for all gap-filling monitoring included in the permit in the PRR.

DEC Response – DEC agrees with this Action Item. Following the 2014 Audit of DEC's Title V OPP, DEC developed and implemented the DAIG-10: Permit Review Reports guidance document. This document is intended to provide permitting staff with guidance for developing effective and informative PRRs. DEC recognizes that there can be variation in the level of detail regarding gap-filling monitoring provided by different permit writers. Accordingly, DEC will review this guidance and the expected content of PRRs with staff to ensure consistent implementation.

Capping Limits

Action Item 1: DEC should ensure that all capping limits and the rationale for the corresponding compliance determination are adequately documented in the PRR.

DEC Response – DEC agrees with this Action Item. As discussed previously, DEC has developed and implemented guidance for permit writers to follow when writing PRRs. DEC recognizes that there can be variation in the level of detail regarding capping conditions and their technical and factual basis provided by different permit writers. Accordingly, DEC will review this guidance and the expected content of PRRs with staff to ensure consistent implementation.

Action Item 2: DEC should ensure that all capping limits are federally and practically enforceable, consistent with DEC's regulations and DAR-17 guidance.

DEC Response – DEC agrees with this Action Item. As discussed in the Action Item, and following comments received from EPA during the 2014 Title V OPP audit, DEC has developed and implemented the DAR-17: Federal Enforceability of Air Pollution Control Permits guidance document. This document describes the necessary components of each emission cap to ensure federal and practical enforceability. Due to the legal and administrative process DEC is required to follow when adopting guidance documents, DAR-17 was not formally issued until March 30, 2017. Accordingly, many Title V permits have not been renewed or modified since its issuance, and therefore the existing emission caps have not been reviewed with the principles outlined in the guidance document in mind. DEC anticipates that there will be improvements in this area as Title V permits are renewed or modified in the future.

Federal Enforceability

Action Item 1: DEC should ensure that Title V permits include, in sufficient detail, all applicable requirements, including those from federal regulations for which DEC has not yet accepted delegation. DEC should remove language that directs enforcement of permit conditions deriving from non-delegated regulations to EPA.

DEC Response – DEC agrees with this Action Item in part. As discussed in Section 2 of this document, DEC understands its responsibilities under 40 CFR Part 70 with respect to the inclusion of applicable requirements in Title V permits. However, until and unless DEC has been delegated the authority to implement and enforce a federal standard pursuant to Section 111(c)(1) of the Act, that authority is retained by EPA. Accordingly, DEC has no legal authority to undertake enforcement action for non-compliance with a non-delegated regulation, and any such enforcement must be referred to EPA.

DEC understands EPA's request for this language to be removed from permits because it is inconsistent with EPA's implementation approach. Accordingly, DEC will ensure the referenced language is not included in permits in the future.

Action Item 3: EPA encourages DEC to take delegation of National Emission Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS) that apply to emission units at Title V facilities in

the State of New York, including standards noted in this report and outstanding items noted in EPA's June 2014 letter. DEC should finalize the 6 NYCRR Section 200.10 revisions as expeditiously as possible.

DEC Response – *DEC disagrees with this Action Item. DEC will continue to evaluate the appropriateness of accepting delegation of standards on an individual basis. As DEC has previously discussed with EPA staff, the onerous and complex nature of some recent NESHAP and NSPS regulations together with DEC's decreased staff makes accepting delegation and subsequently implementing the regulations infeasible.*

Case-by-Case RACT Variances

Action Item 5: DEC should continue working cooperatively with EPA in handling case-by-case RACT variances.

DEC Response – *DEC agrees with this Action Item and will continue to follow the established procedure for handling these variances. DEC urges EPA to continue to address the backlog of case-by-case RACT SIP revisions.*

Title V Fee Program

Action Item 1: DEC should take actions to ensure that Title V program expenses are covered solely by Title V revenues.

DEC Response – *DEC agrees with this action item. It is important to note that DEC proposals to alter the Title V fee structure must go through the NYS legislative process and be adopted into law. DEC plans to continue to propose legislation that would increase the Title V fee and other solutions, but ultimately the decision to change the fee structure resides with the New York State Legislature.*

Action Item 4: DEC should take steps to improve its Title V permit issuance rate.

DEC Response – *DEC agrees with this Action Item. As discussed during the July 16, 2018 in-person meeting with EPA staff, DEC is working with reduced staffing following the retirement of several experienced permit writers. Further, the training of newer staff often negatively impacts the permit issuance rate until they become familiar with the facility and the Title V permitting process. DEC anticipates improvement in this area as*

new staff become more proficient in the development and issuance of Title V permits. Further, DEC is encouraged by EPA's suggestion of synchronizing the 30-day public comment period and EPA's 45-day review period as this would positively contribute to reducing the time needed to process Title V permit applications.

Action Item 7: For all Department of Health (DOH) activities that are paid for by Title V funds, DEC should provide justification, in its future annual reports, on how the activities are related to the Title V permitting program.

DEC Response – *DEC agrees with this Action Item. However, the requested justification must be provided by DOH. The NYS Legislature appropriates Title V funds directly to DOH. DEC has no role in making that appropriation or approving expenditures against that appropriation. DEC has provided a copy of EPA's evaluation report to DOH highlighting this Action Item. DEC has requested that henceforth DOH justify how their activities relate to the Title V permit program in their reports which become appendices to the DEC Title V Operating Permit Program Annual Report. (See Attachment 1: Letter from S. Flint to E. Lewis-Michl, dated May 10, 2019).*

Permit Review Report Content

Action Item 1: The PRR should adequately document all permitting decisions, including the applicability and non-applicability of federal standards.

DEC Response – *DEC agrees with this Action Item in part. As discussed in the DEC's responses to several other Action Items above and in the DAIG-10 guidance document, DEC agrees that each PRR should document the technical and factual basis for permitting decisions, including the applicability of various federal standards. DEC will continue to include this information in the Basis of Monitoring and Facility Specific Requirements sections of the PRR as appropriate.*

However, DEC disagrees that it is appropriate or necessary to include a specific non-applicability determination for each federal standard that is not applicable to the facility's operations. As discussed in the EPA memorandum "Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits" dated April 30, 2014, the statement of basis (i.e. the PRR in New York State) should include "A description and explanation of any complex non-applicability determination (including any request for a

permit shield under 40 CFR Section 70.6(f)(1)(ii) or any determination that a requirement applies that the source does not agree is applicable...” (emphasis added). DEC agrees with this approach and has instructed its permitting staff to discuss only complex non-applicability determinations in the PRR.

Compliance Assurance Monitoring

Action Item 1: DEC should ensure that the Title V permit for sources subject to Compliance Assurance Monitoring (CAM or 40 CFR Part 64) contains a CAM plan that includes all required elements of 40 CFR Part 64.

***DEC Response** – DEC agrees with this Action Item and will continue to include CAM plans in Title V permits wherever 40 CFR Part 64 requirements are applicable.*

Action Item 2: DEC should ensure that for sources subject to CAM, the PRR identifies each emission unit to which CAM applies, explains why CAM applies, and provides the rationale for approving the CAM plan.

***DEC Response** – DEC agrees with this Action Item. Upon further review of the DAIG-10 guidance document, DEC has determined that the requirement to document CAM plans in the PRR is not explicitly stated. As an interim measure, permitting staff were made aware of this requirement following DEC’s receipt of the final report. DEC will consider revising DAIG-10 in the future to better articulate the required documentation for CAM plans in the PRR.*

Document Changes Made in Permit Modifications

Action Item 1: DEC should ensure that all permit modifications are adequately documented in the PRR and public notice.

***DEC Response** – DEC agrees with this Action Item and will continue to include relevant information about permit modifications in both the public notice and PRR.*

Title V Permit Renewals

Action Item 1: DEC should ensure that all Title V permit renewal applications meet the application content requirements of 6 NYCRR Section 201-6.2 and 40 CFR Section 70.5.

DEC Response – DEC agrees with this Action Item and will continue to review permit renewal applications in a manner that is consistent with 6 NYCRR Parts 201 and 621 and 40 CFR Part 70.

Insignificant Activities (Sources)

Action Item 1: DEC should continue to implement 6 NYCRR Subparts 201-3 and 201-6 as approved by EPA as part of the DEC's Title V permit program. Changes to the Title V program, including changes to the exempt and trivial activities in 6 NYCRR Subparts 201-3 and 201-6, must be submitted to EPA as a Title V program revision.

DEC Response – DEC agrees with this Action Item in part. As discussed in Section 2, DEC believes that it is unnecessary to include all exempt and trivial activities in Title V permits simply because an applicable requirement exists as many applicable requirements do not require the source owner or operator to obtain a Title V permit. DEC understands its obligation to submit revisions to its Title V OPP to EPA for review and approval.

Action Item 2: DEC should ensure that insignificant activities, referred to by DEC as exempt or trivial activities, which are subject to any applicable requirement are not omitted from Title V permitting, consistent with the DEC's Title V permit program approved by the EPA. Those insignificant activities and their corresponding applicable requirements should be included in the Title V permits.

DEC Response – DEC disagrees with this Action Item as discussed in Section 2 of this document. DEC will continue to include exempt and trivial activities in Title V permits only when specifically required to do so by an applicable requirement or as a result of the activity's PTE.

Action Item 3: DEC should ensure that each application contains the necessary information to determine what requirements apply to the trivial or exempt activities.

DEC Response – DEC agrees with this Action Item and will continue to collect information related to exempt and trivial activities with Title V permit applications.

Public Participation

Action Item 1: DEC should continue to post the complete draft Title V permit (as opposed to only portions that pertain to the modification) on its website during the

public comment period. In those instances where the DEC does not post the complete draft Title V permit version on its website during the public comment, the draft permit cover page (i.e., description section) should clearly state that the draft permit includes only the newly added and/or the existing modified conditions, and the draft permit should also clearly indicate which ones of the current permit existing conditions were removed.

DEC Response – *DEC disagrees with this Action Item. As was discussed during the July 16, 2018 in-person meeting with EPA staff, when noticing a proposed modification to a Title V permit, DEC posts the ‘changes only’ version of the draft permit modification on its website. The bottom of each page states it is “changes only”, therefore the cover page does not need to contain this information. The ‘changes only’ version includes only the terms and conditions of the permit that have been added, removed, or altered by the draft modification. By posting this version, DEC is inviting public comment only on those items which are part of the permit action, and therefore directing interested parties to the pertinent changes as EPA suggests. With respect to EPA’s comment that the draft permit should clearly indicate any existing permit conditions which have been removed, the ‘changes only’ version of the permit also includes this information. For these reasons, DEC disagrees that it is necessary or appropriate to change its long-standing procedures for posting Title V permit modifications on its website.*

Availability of Permit Related Documents During Public Review

Action Item 1: DEC should continue to ensure that the permit record that supports the draft permit decision is readily available upon request.

DEC Response – *DEC agrees with this Action Item and is committed to continuing an open and transparent permitting process in accordance with state and federal requirements.*

DEC’s Title V Rule Changes

Action Item 1: DEC should submit all revisions to 6 NYCRR Subpart 201-6 to EPA for approval as a Title V program revision.

DEC Response – *DEC agrees with this Action Item.*

Quality Assurance Process for Reviewing Draft Permits and PRR Prior to Public Review

Action Item 1: DEC should consider implementing a quality assurance process for all draft permits (and PRRs) by involving the first line supervisors, prior to public review.

***DEC Response** – DEC agrees with this Action Item. First line supervisors will continue to be involved with draft permit review.*

Action Item 2: DEC should continue its efforts to periodically update its permit manual.

***DEC Response** – DEC agrees with this Action Item and will continue to provide its staff with up to date permitting guidance.*

Communications Between the DEC and EPA

Action Item 1: DEC should ensure that it provides a response to EPA's comments on permits.

***DEC Response** – As discussed in Section 2, DEC's regulations relating to public notice and comment stipulate that DEC shall prepare a responsiveness summary that addresses relevant comments received during the public comment period (see 6 NYCRR Section 621.10(e)). Accordingly, should EPA submit relevant comments during the public comment period, DEC will address EPA's comments on record as part of the responsiveness summary. DEC's regulations do not allow DEC to address comments received after the close of the public comment period. Furthermore, 40 CFR Part 70 does not require DEC to respond to comments made after the conclusion of the public comment period; therefore, it would not be appropriate to do so.*

DEC also notes that the provisions of 40 CFR Section 70.8(a) outlining DEC's responsibility to submit proposed Title V permits to EPA for a 45-day review period do not allow EPA to provide, or require DEC to address, comments on the proposed permit. In fact, DEC is required to provide the responsiveness summary to EPA at the beginning of the 45-day review period. However, 40 CFR Section 70.8(c) does provide for a formal objection process should EPA find that the proposed permit is not in compliance with applicable requirements or the requirements of 40 CFR Part 70. Should EPA determine that a formal objection is warranted, DEC will respond as required by 40 CFR Section 70.8(c)(4).

