

LEGAL OPINION PURSUANT TO 40 C.F.R. § 70.4(b)(3)

Pursuant to my authority as Attorney General and in accordance with the Clean Air Act (CAA) §502(d), as amended, 42 U.S.C. §7401, et seq., and 40 CFR §70.4(b)(3), it is my opinion that the laws of the State of New York provide adequate authority to carry out all aspects of the program submitted by the New York State Department of Environmental Conservation (NYSDEC) to the EPA for approval to administer and enforce the operating permits program under Title V of the CAA. NYSDEC is seeking some minor revisions to the enabling legislation, to clarify that certain provisions are consistent with federal law, as discussed in greater detail herein. The specific authorities provided, which are contained in statutes, regulations, or other legal authorities which have been or shall in the near future be lawfully adopted<sup>1</sup>, and which shall be fully effective by the time the program is approved, include those identified below.

I. AUTHORITY TO ISSUE PERMITS

State law provides authority for NYSDEC to issue operating permits to all air pollution sources within the State that are required to have permits pursuant to CAA §502(a) and 40 CFR §70.3, and to incorporate into permits and assure compliance with each applicable requirement of the CAA and the requirements of 40 CFR

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<sup>1</sup> NYSDEC will provide to the EPA copies of new authorities upon their adoption.

Part 70. State law also provides authority to issue operating permits for solid waste incineration units combusting municipal waste pursuant to CAA §129(e) that assure compliance with all applicable requirements of the CAA and the requirements of 40 CFR Part 70. For the siting and certifying of major electric generating facilities, as defined in Articles VIII (expired but applied to the permitting of one source) and X of the Public Service Law, the State Board on Electric Generation Siting and the Environment will enter into a memorandum of understanding with NYSDEC which shall provide that NYSDEC will issue the Title V permits and process all modifications and renewals for subject facilities. Currently, there are no new facilities subject to permitting under Article X.

Federal Authority: CAA §§129(e), 502(a)-(b), 503, 504(a), 42 U.S.C. §§7429(e), 7661a(a)-(b), 7661b, 7661c(a); 40 CFR §§70.4(b)(3)(i), 70.4(b)(3)(iv), 70.4(b)(3)(v), 70.5(a), 70.6, 70.7(b).

Citation of State Laws and Regulations:

Statutes: New York Environmental Conservation Law (ECL) §19-0301 et seq., and ECL Article 70 et seq., as amended by Chapter 608 of the Laws of 1993 [the "New York Clean Air Compliance Act" (CACA)], effective August 4, 1993.

Regulations: 6 NYCRR Parts 200\*, 201\*, 219, 616, 621\* and 624.

\* Amendments filed with Secretary of State on June 7, 1996 and effective 30 days thereafter.

Remarks of the Attorney General: NYSDEC is mandated by ECL §19-0311 to establish an operating permit program for sources subject to Title V of the Act. NYSDEC has done so in adopting revisions to 6 NYCRR Parts 200, 201 and 621. In response to concerns voiced by EPA Region 2 that specific provisions of ECL §19-0311 are not consistent with specific provisions of 40 CFR Part 70 or the Act, NYSDEC developed a proposal for legislative amendments to address these concerns. NYSDEC's proposal has been passed by the State Senate and is pending in the Assembly (see Attachment B, Bill #7355).

In addition to correcting the definitional deficiencies that EPA Region 2 noted in comparing ECL §19-0311 to 40 CFR Part 70 and the Act, the bill also makes clear that NYSDEC would list any air contaminants EPA regulates under §§7411 or 7412 of the Act through emergency rulemaking. In accordance with the §202(6) of the State Administrative Procedure Act, which governs NYSDEC's rulemaking process, the provisions of an emergency rulemaking go into effect as soon as the notice of emergency adoption is filed with the office of the Secretary of State. NYSDEC would then proceed to follow the normal rulemaking procedures to finalize the rulemaking. However, the listing of the new contaminants as "regulated air pollutants" or "hazardous air pollutants" through an emergency rulemaking would subject "major" sources of such pollutants to the requirement to obtain a Title V permit at the time of the emergency rulemaking or within whatever time period EPA required.

Section eight of Article IV of the New York Constitution, which requires all regulations to be filed with the Secretary of State, and §102 of the Executive Law prohibit NYSDEC from incorporating by reference future federal requirements. However, Section 102(1)(c) of the Executive Law establishes that NYSDEC may incorporate by reference in any state regulation portions of any United States statute, or code, rule or regulation previously published in the Code of Federal Regulations or in the Federal Register.

I am advised that NYSDEC is committed to adopting and implementing in an expeditious manner all authorities, as needed, to issue Part 70 permits which assure compliance with any new requirements established under §112 of the Act.

## II. AUTHORITY TO ISSUE PERMITS TO NONCOMPLYING SOURCES

State law provides authority for NYSDEC to issue permits to sources that are not in compliance with applicable requirements, and to include compliance schedules in permits to bring sources into compliance.

Federal Authority: CAA §§502(b)(5)(A), 504(a), 42 U.S.C. §§7661a(b)(5)(A), 7661c(a); 40 CFR §§70.5(c)(8), 70.6(c)(3).