



New York State Department of Environmental Conservation

Reports of Title V Operating Permit Program Revenues, Expenses, and Changes in Fund Balance for the Two Fiscal Years Ended March 31, 2007

Report 2008-S-94



Thomas P. DiNapoli

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
REPORT OF TITLE V OPERATING PERMIT PROGRAM REVENUES,
EXPENDITURES, AND CHANGES IN FUND BALANCES FOR THE
TWO FISCAL YEARS ENDING MARCH 31, 2007**

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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

**New York State Department of Environmental Conservation
Title V Operating Permit Program**

Independent Auditor's Report

We have examined the Department of Environmental Conservation's (Department) Consolidated Statements of Revenues, Expenditures, and Changes in Fund Balances for the Title V Operating Permit Program (Program) for the two fiscal years ended March 31, 2007. The Statements are the responsibility of Department management. Our responsibility is to express an opinion on the fair presentation of the Statement data based on our examination.

Our examination was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants and the standards applicable to attestation engagements contained in Government Auditing Standards issued by the Comptroller General of the United States. Accordingly, our examination included tests of selected transactions and performing such other procedures as we considered necessary in the circumstances. We believe that our examination provides a reasonable basis for our opinion.

In our opinion, the statements referred to above present, in all material respects, the Title V Operating Permit Program's revenues, expenditures, and changes in fund balance for the two fiscal years ended March 31, 2007 in accordance with the modified accrual basis of accounting.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent examinations.

In accordance with Government Auditing Standards for Attestation Engagements, we have also issued a report on the Department's internal controls over its financial reporting operations and Department compliance with relevant Program-related laws and regulations. The purpose of that report is to describe the scope and results of our testing, and not to provide an opinion thereon. That report is an integral part of an attestation engagement and should be considered in assessing the results of our examination.

*Office of the State Comptroller
Date: February 10, 2010*

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
TITLE V OPERATING PERMIT PROGRAM
CONSOLIDATED STATEMENT OF REVENUES, EXPENDITURES AND
CHANGES IN FUND BALANCE
FOR THE FISCAL YEAR ENDED MARCH 31, 2007**

Beginning Fund Balance	<u>\$ (1,252,912)</u>
Revenues	
Operating Permit Fees (Note 5)	\$12,627,000
Fines and Penalties (Note 8)	181,000
General Fund Appropriation (Note 10)	6,250,000
Interest (Note 11)	<u>(218,000)</u>
Total Revenues	<u>\$18,840,000</u>
Direct Expenditures	
Personal Service (Note 6)	
Department of Environmental Conservation	\$ 6,787,000
Department of Health	338,000
Empire State Development Corporation	<u>209,000</u>
Total Personal Service	<u>\$ 7,334,000</u>
Fringe Benefits (Note 3)	
Department of Environmental Conservation	\$ 3,109,000
Department of Health	153,000
Empire State Development Corporation	<u>113,000</u>
Total Fringe Benefits	<u>\$ 3,375,000</u>
Non-Personal Service (Note 7)	
Department of Environmental Conservation	\$ 2,428,000
Department of Health	109,000
Empire State Development Corporation	<u>38,000</u>
Total Non-Personal Service	<u>\$ 2,575,000</u>
Total Direct Expenditures	<u>\$13,284,000</u>
Indirect Expenditures	
Department of Environmental Conservation	\$ 3,515,000
Department of Health (Note 12)	(23,000)
Empire State Development Corporation	<u>8,000</u>
Total Indirect Expenditures	<u>\$ 3,500,000</u>
Total Expenditures	<u>\$16,784,000</u>
Ending Fund Balance	<u>\$803,088</u>

The accompanying notes are an integral part of the Consolidated Statements.

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
TITLE V OPERATING PERMIT PROGRAM
CONSOLIDATED STATEMENT OF REVENUES, EXPENDITURES
AND CHANGES IN FUND BALANCE
FOR THE FISCAL YEAR ENDED MARCH 31, 2006**

Beginning Fund Balance	<u>\$ 1,683,088</u>
Revenues	
Operating Permit Fees (Note 5)	\$13,165,000
Fines and Penalties (Note 8)	80,000
Interest (Note 11)	<u>(71,000)</u>
Total Revenues	<u>\$13,174,000</u>
Direct Expenditures	
Personal Service (Note 6)	
Department of Environmental Conservation	\$ 6,279,000
Department of Health	323,000
Empire State Development Corporation	<u>261,000</u>
Total Personal Service	<u>\$ 6,863,000</u>
Fringe Benefits (Note 3)	
Department of Environmental Conservation	\$ 2,841,000
Department of Health	142,000
Empire State Development Corporation	<u>97,000</u>
Total Fringe Benefits	<u>\$ 3,080,000</u>
Non-Personal Service (Note 7)	
Department of Environmental Conservation	\$ 2,132,000
Department of Health	79,000
Empire State Development Corporation	<u>52,000</u>
Total Non-Personal Service	<u>\$ 2,263,000</u>
Total Direct Expenditures	<u>\$12,206,000</u>
Indirect Expenditures	
Department of Environmental Conservation	\$ 3,812,000
Department of Health	84,000
Empire State Development Corporation	<u>8,000</u>
Total Indirect Expenditures	<u>\$ 3,904,000</u>
Total Expenditures	<u>\$16,110,000</u>
Ending Fund Balance	<u>\$ (1,252,912)</u>

The accompanying notes are an integral part of the Consolidated Statements.

Notes to the Consolidated Statements

1. Program Background

Title V of the Federal Clean Air Act Amendments of 1990 (Act) requires each state to adopt an operating permit program to regulate “major” and certain other sources of air pollutants. The purpose of this legislation is to help curtail excessive industrial pollution by requiring states to monitor pollutant output and to take action to remedy violators who produce pollutant quantities in excess of established limits. Pursuant to New York State’s Clean Air Compliance Act of 1993 (CACA), the NYS Department of Environmental Conservation (Department) was given the responsibility to establish New York’s Title V Operating Permit Program (Program).

Pursuant to statute, the Department is required to report annually to the Governor, the Legislature and the Office of the State Comptroller, on Program progress, costs, and revenues. CACA specifies the fiscal information to be included in the annual report. The Act and CACA mandate that permit fee revenues shall be sufficient to cover all reasonable direct and indirect costs necessary for the Department to develop, administer and enforce the Program.

The Title V Program includes the following major initiatives: an implementation plan for Program development; hazardous air pollutant controls; new source and prevention of significant deterioration reviews; requirements of the acid rain program; rule-making activities; permit fee administration; compliance and enforcement activities; comprehensive and quality control monitoring of ambient air, as well as compliance assurance monitoring of air emissions by facilities; and the Title V small business technical assistance program.

2. Basis of Accounting

The Department prepares its Consolidated Statements of Revenues, Expenditures, and Changes in Fund Balance using the modified accrual basis of accounting. As such, revenue is recognized when received, and expenditures are recognized when incurred and entered on the State accounting system.

3. Accounting Records

The direct cash disbursements and cash receipts figures used to compile the Program’s Consolidated Statements are based on the financial records maintained by the Department, the Department of Health (DOH), the Environmental Facilities Corporation (EFC), and Empire State Development Corporation (ESDC), and are in agreement with those maintained by the Office of the State Comptroller. Fringe benefit calculations are based on rates developed by the New York State Division of the Budget. The fringe benefit rates for the fiscal years ended March 31, 2006 and March 31, 2007 were 45.24 percent and 45.81 percent.

4. Affiliated Agencies

The Department's Consolidated Statements include the Program-related costs of DOH, ESDC, and EFC. These agencies, which account for approximately 11 percent of total Program disbursements, each maintain their own accounting system and financial reporting mechanisms, which are not subject to Department oversight. The Department does not take responsibility for the accuracy of the data reported by these affiliated agencies. However, each of these agencies is required to comply with established accounting and control procedures as promulgated by New York State. Our testing of the disbursements reported on the Consolidated Statements is limited to tracing the numbers on the Statements back to the disbursement summaries provided by these agencies.

DOH

DOH's Program responsibilities include assessing exposure levels of air contaminants and the associated potential health risks. In addition, DOH assists the Department in developing air concentration guidelines for toxic air contaminants for use in regulating emissions of toxic chemicals. The Department uses these assessments in its permit reviews.

ESDC

The ESDC Small Business Environmental Ombudsman Program was established in February 1992 to provide an advocate for small businesses operating within the State and to assist the small business community in navigating the complexities of local, State, and Federal air quality requirements.

EFC

Pursuant to a contract with the Department, EFC administers the Small Business Environmental Assistance Program (SBEAP), which is mandated under Section 507 of the Act. SBEAP provides free and confidential technical assistance to help small businesses voluntarily achieve compliance with Act requirements.

5. Operating Permit Fees

The Department assesses an annual fee on Title V facilities based on their self-reported emissions from the previous fiscal year. The CACA specifies the formula to calculate the fee. In general, the fee is calculated by dividing the Program's appropriations for the current fiscal year by the total tons of regulated air contaminants emitted during the prior calendar year. The calculation also considers the prior year's collection rate and any surplus or deficit in the Program account. Until March 31, 1999, pursuant to State legislation, the fee has been limited to a maximum fee per ton of pollutants adjusted by the change in Consumer Price Index (CPI) over the prior year. The per ton fees for 2006 and 2007 necessary to cover all Program costs, as calculated by Department officials, were \$64.23 and \$68.86, respectively. However, in August of 1999, the Legislature approved a per ton maximum rate of \$45. The approved maximum rate was used for billing purposes.

Department officials have been charging excess (deficit) Program expenses against the Program's surplus fund balance, when available, and general fund appropriations.

6. Personal Service Costs

The Department charges personal service charges to the Program based on an analysis of staff time and activity charges (percentage of effort). Program-related personal service costs incurred by DOH and ESDC are reported by those agencies using a similar methodology.

7. Non-Personal Service

The Department's non-personal service expenditures comprise contractual services, equipment purchases (computer and other), travel expenditures, training, postage and sundry items. The Program-related services provided by EFC are performed pursuant to a contract with the Department and therefore reported as a non-personal service expenditure on the Consolidated Statements. The EFC expenditures in this reporting category are as follows:

	Fiscal Year Ended <u>March 31, 2007</u>	Fiscal Year Ended <u>March 31, 2006</u>
Personal Service	\$359,000	\$280,000
Fringe Benefits	165,000	127,000
Non-Personal Service	35,000	29,000
Indirect Expenditures	<u>374,000</u>	<u>294,000</u>
Total	<u>\$933,000</u>	<u>\$730,000</u>

8. Fines and Penalties

This revenue category represents the penalties for late payments and fines imposed on regulated entities for Title V violations, as provided for in Article 72, Section 72-0201.12 of the Law.

9. Annual Report

As noted above, Department officials prepare an Annual Report regarding Program operations. The revenue and expense data illustrated in the Annual Report may differ from the data reported in the consolidated statements due to timing differences and as a result of our audit testing.

10. General Fund Appropriation

In lieu of increasing the \$45 per ton permit fee charged to regulated entities, for the year ended March 31, 2007, the State Legislature approved a general fund appropriation of \$6,250,000 to cover the Program's operating deficit.

11. Short Term Investment Pool Interest

During the fiscal year ended March 31, 2006, the Department did not have sufficient funds

to pay Program expenses. As a result, the Department temporarily borrowed funds from the State's Short Term Investment Pool (Pool). Loans obtained from this Pool are subject to interest. For the fiscal year ended March 31, 2006, the interest associated with the Program's temporary loans totaled \$71,287.29. The Program's cash flow did not improve in the following year and, as of March 31, 2007, the interest incurred on the Program's temporary loans totaled \$217,510.38. The Department reported these expenditures as a contra-revenue.

12. Department of Health Indirect Expenditures

During the fiscal year ending March 31, 2007, DOH made a real property lease adjustment totaling \$56,000, this adjustment resulted in a negative indirect expenditure of \$23,000.

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**Title V Operating Permit Program
Consolidated Forecast of Revenues, Expenditures, and Changes in Fund Balances**

Comptroller's Report

According to Section 72-3030 of the Environmental Conservation Law, the State Comptroller is responsible for performing a biennial examination of the fiscal status of the Department of Environmental Conservation's Title V Operating Permit Program. Such examination shall include an assessment of the Program's actual costs, and the revenues received from penalty fees imposed during the previous fiscal year. The statute further mandates that the Comptroller's examination shall include an estimate of the Program costs that will be incurred, and the revenues estimated to be received from penalties imposed, during the current fiscal year; and an estimate of any balance in the account that will be available during the current fiscal year.

To meet this mandate, in addition to our attestation of the Program's actual revenues and expenses for the two fiscal years ended March 31, 2007, we have assessed the estimates of revenues and expenses prepared by Department officials for the two fiscal years ending March 31, 2009. Our assessment of these estimates was performed using the methodologies and procedures promulgated by the American Institute of Certified Public Accountants (AICPA) for financial statement forecasts. As such, we believe that the methodologies and procedures we used during our examination provide a reasonable basis for our opinion.

In our opinion, for the purposes of section 72-3030 of the Environmental Conservation Law, the methodologies used by Department management to estimate Program expenses and revenues for the two fiscal years ending March 31, 2009 provide a reasonable basis for the accompanying Forecast. However, there will usually be differences between the forecasted and actual results, because events and circumstances frequently do not occur as expected, and those differences may be material. We have no responsibility to update this report for events and circumstances occurring after the date of this report.

As illustrated in the accompanying Forecast, if Program revenue and expense trends continue, the Program will have insufficient funds to operate as intended.

Office of the State Comptroller
Date: February 10, 2010

**TITLE V OPERATING PERMIT PROGRAM
CONSOLIDATED SCHEDULE OF FORECASTED REVENUES,
EXPENDITURES, AND CHANGES IN FUND BALANCES
FOR TWO FISCAL YEARS ENDING MARCH 31, 2008 and 2009**

	<u>2007-2008</u>	<u>2008-2009</u>
Beginning Fund Balance	<u>\$803,088</u>	<u>\$669,088</u>
Revenues		
Operating Permit Fees	\$10,463,000	\$10,463,000
General Fund Appropriations	6,395,000	2,700,000
Fines and Penalties	172,000	172,000
Interest	<u>(63,000)</u>	<u>(63,000)</u>
Total Estimated Receipts	<u>\$16,967,000</u>	<u>\$13,272,000</u>
Expenditures		
Department of Environmental Conservation	\$15,217,000	\$15,674,000
Environmental Facilities Corporation	800,000	800,000
Department of Health	583,000	614,000
Empire State Development Corporation	<u>501,000</u>	<u>501,000</u>
Total Estimated Expenditures	<u>\$17,101,000</u>	<u>\$17,589,000</u>
Ending Fund Balance	<u>\$669,088</u>	<u>(\$3,647,912)</u>

The accompanying notes are an integral part of the Consolidated Statements.



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

Comptroller's Report on the Department of Environmental Conservation's Internal Controls Over Financial Reporting and Compliance with Governing Laws, Rules and Regulations for the Title V Operating Permit Program

We have examined the accompanying Consolidated Schedules of Revenues, Expenditures, and Changes in Fund Balance for the Title V Operating Permit Program for the two fiscal years ending March 31, 2007. We conducted our examination in accordance with attestation standards established by the American Institute of Certified Public Accountants and the standards applicable to attestation engagements contained in Government Auditing Standards, issued by the Comptroller General of the United States.

Internal Controls Over Financial Reporting

In planning and performing our attestation engagement, we considered the Department's internal controls over its financial reporting operations in order to determine our procedure steps to attest to the Consolidated Schedules and not to attest to the effectiveness of the internal controls over financial reporting. Reportable conditions involve matters coming to our attention relating to significant deficiencies in the design or operation of the internal controls over the financial report that, in our judgment, could adversely affect the Department's ability to record, process, summarize, and report financial data consistent with the assertion of management in the financial schedule. As a result of our examination, we did not identify matters involving internal controls over financial reporting and its operation that we consider to be reportable conditions.

Compliance with Governing Laws, Rules and Regulations

As part of obtaining reasonable assurance about whether the Department's Consolidated Schedules are free of material misstatement, we assessed Department compliance with certain provisions of law, regulations, and contracts for which noncompliance could have a direct and material effect on the determination of financial schedule amounts. Our examination results disclosed two instances of noncompliance that are required to be reported under Government Auditing Standards. We reported these instances in the Comments Section of this report.

Office of the State Comptroller
Date: February 10, 2010

Auditors Comments and Recommendations

Compliance with Section 502 of the Federal Clean Air Act

Title V assessments are calculated by multiplying each assessable regulated emission ton by \$45. The total fee assessed on any regulated emission cannot exceed \$270,000 (or 6,000 tons). The per-ton fee and 6,000-ton cap is set by the State Legislature. In accordance with Section 502 of the Federal Clean Air Act (Act), annual fees paid by permit holders must be sufficient to cover all direct and indirect costs required to develop and administer the Program. However, for fiscal year ended March 31, 2006, the annual fees paid by permit holders were not sufficient to cover the Program's operating expenditures. As of March 31, 2006 total Program revenue totaled \$13,174,000 while Programs expenditures totaled \$16,110,000. The gap between Program revenues continued to widen in the subsequent year. As of March 31, 2007 Program revenue dropped to \$12,590,000 while Program expenditures increased to \$16,784,000. Thus, the Department is not complying with the Law, and the Program's fiscal viability is in jeopardy.

Department officials have submitted periodic requests to the State Legislature to increase the per-ton fee and/or increase or eliminate the 6,000-ton cap; however, historically the State Legislature has not approved their requests. Instead the State Legislature made special general fund appropriations to cover Program deficits. In fiscal year 2007 (April 1, 2006 – March 31, 2007), the Legislative appropriation was \$6.25 million. General fund appropriations to cover Permit Program expenditures violate Federal EPA guidelines. As a result, the EPA could impose significant sanctions on New York State, including: withdrawing approval of the State's operating permit program, implementing a Federal operating permit program in New York and charging regulated businesses fees to cover the program costs, and applying Federal highway funding and construction permit offset sanctions. In fact, in March 2008 the Federal EPA's Regional Administrator wrote a letter to the New York State Senate Finance Committee Chair and Assembly Ways and Means Chair to convey EPA's concerns about the Program's fiscal crisis and the Department's future ability to comply with the Act.

We estimate based on information provided by the Department, that by March 31, 2009 Program expenditures will cumulatively exceed Program revenues by about \$19 million. That deficit will have to be borne by the taxpayers unless the Program is made self-sufficient.

Department officials attribute the annual Program deficits in part to the success of their regulatory efforts. By reducing the level of pollutant emissions throughout the State, they consequently have lower Program revenues. Officials also assert that a simple solution to the Program's declining revenue is to raise the fee on emissions. However, they also noted that increased fees would place a greater financial burden on the regulated entities. They further assert that reducing Program expenses may reduce the Department's ability to effectively monitor regulated emissions, possibly leading to an increase in pollutants.

We note that the Governor's 2009-10 State Budget does not include a general fund appropriation to cover the Program's funding shortfall. However, the legislature has approved a new permit fee structure (sliding scale based on tonnage) that should increase Program revenues if billings

remain the same or increase. Nevertheless, it is imperative for Department officials to monitor the sufficiency of the new fee and, if it is not sufficient, take action to ensure future Program viability.

Recommendation

1. Comply with the Federal Clean Air Act's requirement to maintain Program self-sufficiency.

Program Receivables

Maintaining complete, accurate, and reliable accounts receivable data is necessary to ensure all Program revenues are pursued and collected, and to promote accurate financial reporting. Program receivables, as with all Department receivables, are maintained by an independent contractor.

The contractor provides the Department with a listing of its receivables every 35 days. The listing reportedly includes all entities which owe money to the Department and does not note the date the debt was incurred; as such the receivables are not aged. Further, the individual accounts are not segregated by Department program, making it time-consuming to identify all Program receivables.

As such, Department officials requested their contractor prepare a report for us segregating and aging the Program's outstanding receivables. To assess the integrity of the report, we randomly selected three accounts for further review. While we found that two of the three companies owe the Department money, these entities are not regulated Title V businesses and therefore would not owe Program fees. Because the third receivable was due from a Program facility that declared bankruptcy in 2003, the probability of the Department collecting the entire receivable is doubtful. These entities owed the Program a total of \$55,359 per the listing.

As a result, we conclude that the Department's accounts receivable records are not accurate as they pertain to the Program. As such, the Program is not in a position to accurately report, or actively pursue, all Program revenues. The identification and pursuit of such receivables might address the Program's annual deficits in full or in part.

Recommendation

2. Develop a reliable system to track Program receivables. Once established, continuously pursue outstanding receivables to maximize Program revenue, and write off receivables determined to be uncollectible.

Program-related Penalties

In accordance with the New York Codes, Rules, and Regulations (NYCRR) Part 481.3 and 481.5, facilities must pay Program fees within 30 days from when the fee is assessed. Facilities which do not pay their fees within 30 days of assessment must pay interest at the rate set by the State Commissioner of Taxation and Finance. Facilities that do not pay Program fees within 75 days of the assessment must also pay a penalty of 50 percent of the unpaid fee.

We found that, after the Department's initial assessment, its billing practice is to invoice Program facilities every 35 days, the Department doesn't charge interest unless fees have not been paid within 70 days, and the Department does not assess nonpayment penalties until 105 days after the initial assessment.

When queried, Department officials stated they have not implemented collection practices that comply with NYCRR because their billing cycles are based on 35 days, which makes complying with the regulations difficult.

We found that, for the two fiscal years ended March 31, 2007, \$415,398 in penalties were not assessed when the Program fee was not paid within 75 days. We did not calculate how much interest revenue was lost because the Department begins to apply interest charges at 71 days rather than the 31-day requirement due to the amount of time it would have taken to do so.

Department officials informed us that regulated facilities know from past practice that the Department will not assess penalties as long as they pay their fee within 105 days of the assessment. As a result, officials feel that penalty revenues will not increase if they comply with NYCRR because the facilities will pay within the required time frame.

Recommendation

3. Assess interest and penalties on late payments in compliance with NYCRR Part 481.3 and 481.5.