

Department of Environmental Conservation

Monitoring of Air Quality (Facility Permits and Registrations)

Report 2021-S-41 | September 2023

OFFICE OF THE NEW YORK STATE COMPTROLLER

Thomas P. DiNapoli, State Comptroller

Division of State Government Accountability



Audit Highlights

Objective

To determine whether the Department of Environmental Conservation is taking necessary action to adequately enforce certain aspects of the State's air contamination and pollution requirements to protect the public and environment from the adverse effects of exposure to pollutants. The audit covered permit and registration data from January 2020 through April 2022 and Department activities related to these permits and registrations through February 2023.

About the Program

Air pollution damages human health and the environment in a variety of ways. It can make breathing difficult, cause cancer, and contribute to other serious health effects. Fish and wildlife show harmful effects from acid rain and mercury in the air. Also, greenhouse gases (chiefly carbon dioxide) in the air are changing the world's climate. Sources of air pollution range from large sources, such as chemical plants and electricity generating facilities, to smaller sources like dry cleaners. The mission of the Department of Environmental Conservation (Department) is to conserve, improve, and protect the State's natural resources and environment. The Department issues air pollution control permits and registrations in accordance with its federally approved Air Pollution Control Permitting Program (Program) under Title 6, Part 201, of the New York Codes, Rules and Regulations (Regulation). The Regulation, along with the Uniform Procedures Act (Article 70 of the Environmental Conservation Law) and its implementing regulations, contains the requirements that certain facilities that generate air pollution, and the Department, must follow for air permit application and permitting processes. Permit or registration type is based on a source's potential to emit air contaminants. Three broad categories of facilities are required to be either permitted or registered with the Department: Title V Facilities (Title Vs), Air State Facilities (ASFs), and Air Facility Registrations (AFRs).

- Title Vs are major sources of air pollution – those that directly emit, or have the potential to emit, air contaminants above federal major source thresholds.
- ASFs are large facilities with sources of air pollution that emit, or have the potential to emit, less than federal major source thresholds.
- AFRs are minor sources of air pollution. AFRs fall into two general categories: those that naturally emit less than 50% of major facility thresholds and those that “cap-by-rule.” Cap-by-rule facilities have the potential to emit air contaminants at or above the threshold of a large source but choose to limit actual annual emissions. The owners or operators of cap-by-rule facilities agree to adhere to additional record-keeping and self-monitoring requirements to demonstrate compliance with the emissions cap.

Title Vs include facilities such as solid waste incineration units (e.g., municipal waste combustors), landfills, manufacturing facilities, and hospitals. ASFs are similar to Title Vs, and may be landfills, manufacturing facilities, mills for refining grain, and the like, but the facilities' potential to emit air pollution is less than the major source thresholds and therefore does not put them in the same category as a Title V facility. ASFs are further categorized as Natural Minor, Synthetic Minor, and Synthetic Minor-80 facilities. AFRs are minor sources of air pollution such as dry cleaners and autobody shops (with paint sprayers).

To obtain an air permit, a facility owner or operator must complete an application that includes information about the facility's emissions and other operating processes, like raw material usage,

and the height and location of stacks or vents. Registration applications require less information than permits. When an application is received, Department staff review the application for environmental justice (EJ) concerns. The Department's Environmental Justice Permitting Policy (Policy) outlines the Department's responsibilities for incorporating EJ into its review of air permit applications. The goal of the Policy is to allow residents within potential EJ communities to obtain information – by requiring applicants covered by the Policy to actively seek public participation through the permit review process – allowing stakeholders to better participate in the decision-making process. Actions should include, among other measures, establishing document repositories in or near the potential EJ area to make pertinent project information available, such as studies, reports, media releases, and the like. The Policy applies only to Title V and ASF applications received after April 18, 2003. Permits issued prior to April 18, 2003 are exempt from its provisions, as are renewals, minor projects, minor modifications, and registrations.

The State Administrative Procedure Act (SAPA) states that an operating permit for a Title V or ASF facility does not expire if application for renewal occurs at least 180 days before the expiration date. If applicable, the permit is classified as SAPA extended and remains valid with no specific limit on how long, unless revoked. Department data indicated that, as of April 2022, there were 8,941 facilities operating under permits or registrations in the State, including 324 Title Vs, 748 ASFs, and 7,869 AFRs. For additional information on permitted and registered facilities throughout the State, click on the image to the right explore our interactive maps.



Key Findings

We identified weaknesses in several aspects of the Department's oversight of the Program – namely, implementation of the Policy and monitoring of permitted and registered facilities – that reduce its ability to ensure compliance with the Program and protect the State's air from harmful pollutants.

- Gaps in the Policy create a risk that the Department's air permitting process is not adequately allowing residents, particularly low-income and minority communities across the State within potential EJ communities, to obtain information about the harmful effects of pollution emitted in their communities and limiting opportunities to address concerns about their community's air quality, which could disproportionately impact residents of EJ areas. From 2011 to 2021, many areas of the State experienced significant shifts in populations and incomes, yet the Department continued to use its outdated static maps from 2003, despite having updated data in 2011 (the year the map could have first been updated with U.S. Census Bureau data), resulting in a 10-year data gap. See our interactive maps demonstrating the effects of this change. Of 71 facilities permitted in the EJ areas that we reviewed, 55 were exempt from EJ requirements. Most of the exempt facilities (35) applied for permits before the Department's implementation of EJ requirements in 2003 – seven were for minor projects or projects that were never executed and 13 are located in an area that was defined as EJ by the 2021 map criteria but was not defined as EJ at the time of the initial application according to the 2003 maps. While the Policy requires the Department to periodically evaluate the need for revision, the Policy has not been updated since its implementation 20 years ago.

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- While SAPA extensions allow Title V and ASF facilities to operate beyond their permit expiration date, and the Department monitors facilities under the original permit conditions, the longer the permits remain extended, the greater the risk that facilities are not operating under requirements that align with the most up-to-date air pollution control standards. For example, one permit for a Title V facility would have expired in September 2021; however, the facility submitted its renewal application timely in March 2021 and therefore qualified for SAPA extension. The facility, since the initial permit was issued, had shifted its operations to cryptocurrency mining, with projected emissions equating to more than six times its previous emissions over a 4-year period. The Department ultimately denied the renewal as the facility's increase in greenhouse gas emissions did not align with the newly issued Climate Leadership and Community Protection Act. The facility has challenged the Department's decision and continues to operate under its previous permit in accordance with SAPA.
 - We also found the Department is not always taking action to enforce compliance with the Program for facilities operating without a valid permit. We identified three facilities (two Title Vs and one ASF) operating without permits, in violation of the Program. While the three facilities – a correctional institution, a sewage treatment plant, and a scrap metal recycler – are operating without a valid permit, they are still being monitored by the Department under the prior permit conditions.

Key Recommendations

- Improve monitoring and enforcement of EJ requirements.
- Enhance oversight of the general Program compliance, which may include, but not be limited to:
 - Developing a course of action to address the upcoming influx of expired permits and registrations;
 - Reducing the populations of facilities operating under permits or registrations with no expiration date; and
 - Addressing long delays in processing SAPA extended permits to reduce the number of facilities operating with outdated permits.
- Focus efforts on monitoring and enforcement of AFRs' compliance with Program requirements, which may include, but not be limited to:
 - Performing additional risk-based inspections of AFRs;
 - Improving follow-up with inspection deficiencies to ensure violations are corrected; and
 - Issuing additional guidance on eligibility for cap-by-rule classification.



**Office of the New York State Comptroller
Division of State Government Accountability**

September 20, 2023

Basil Seggos
Commissioner
Department of Environmental Conservation
625 Broadway
Albany, NY 12233

Dear Commissioner Seggos:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage government resources efficiently and effectively. By so doing, it provides accountability for the tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Monitoring of Air Quality (Facility Permits and Registrations)*. The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Division of State Government Accountability

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Glossary of Terms

Term	Description	Identifier
Department	Department of Environmental Conservation	<i>Auditee</i>
AFR	Air Facility Registration	<i>Key Term</i>
ASF	Air State Facility	<i>Key Term</i>
EJ	Environmental justice	<i>Key Term</i>
EPA	U.S. Environmental Protection Agency	<i>Federal Agency</i>
GIS	Geographic Information System	<i>System</i>
Perc	Perchloroethylene	<i>Key Term</i>
Policy	Environmental Justice Permitting Policy	<i>Policy</i>
Program	Air Pollution Control Permitting Program	<i>Program</i>
Regulation	New York Codes, Rules and Regulations, Title 6, Part 201	<i>Law</i>
SAPA	State Administrative Procedure Act	<i>Law</i>
System	Air Facility System, the Department's system of record for air pollution control permits and registrations	<i>System</i>
Title V	Title V Facility	<i>Key Term</i>

Background

Air pollution damages human health and the environment in a variety of ways. It can make breathing difficult, cause cancer, and contribute to other serious health effects. Fish and wildlife show harmful effects from acid rain and mercury in the air. Additionally, greenhouse gases (chiefly carbon dioxide) in the air are changing the world's climate. Sources of air pollution range from large sources, such as chemical plants and electricity-generating facilities, to smaller sources like dry cleaners and paint spray booths.

As part of its mission, the Department of Environmental Conservation (Department) aims to conserve, improve, and protect New York's natural resources and environment – and prevent, abate, and control water, land, and air pollution – to enhance the health, safety, and welfare of the people of the State and their overall economic and social well-being. The Department issues air pollution control permits and registrations in accordance with its federally approved Air Pollution Control Permitting Program (Program) under Title 6, Part 201, of the New York Codes, Rules and Regulations (Regulation).

The Regulation, along with the Uniform Procedures Act (Article 70 of the Environmental Conservation Law) and its implementing regulations, contains the requirements that certain facilities that generate air pollution, as well as the Department, must follow for air permit application and permitting processes. Permit or registration type is based on a source's potential to emit air contaminants. Three broad categories of facilities are required to be either permitted or registered with the Department: Title V Facilities (Title Vs) and Air State Facilities (ASFs), both of which require a permit, and Air Facility Registrations (AFRs), which require only a registration.

Title Vs are major sources of air pollution – those that directly emit, or have the potential to emit, air contaminants above federal major source thresholds. Examples of Title Vs include solid waste incineration units (e.g., municipal waste combustors), landfills, manufacturing facilities, and hospitals.

ASFs are also sources of air pollution. These facilities can be similar to Title Vs, and may be landfills, manufacturing facilities, mills for refining grain, and the like, but the facilities' potential to emit air pollution is less and therefore does not put them in the same category as a major source. ASFs are further categorized as:

- Natural Minor Facilities
 - Facilities that have the potential to emit regulated pollutants below the threshold that would make them a major source.
- Synthetic Minor and Synthetic Minor-80 Facilities
 - Synthetic Minor facilities have the potential to emit above major source thresholds (Title V thresholds) but have accepted an emissions cap to restrict their emissions below the applicable threshold. These facilities are subject to less restrictive emissions caps requiring less strict oversight from the Department.

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- Synthetic Minor-80 facilities are a subset of Synthetic Minor facilities that have accepted an emission cap at 80% or more of major source thresholds.

Hereafter, Synthetic Minor and Synthetic Minor-80 facilities are referred to collectively as Synthetic Minors unless specific clarification is necessary.

AFRs are minor sources of air pollution, such as dry cleaners and autobody shops (with paint sprayers). Such facilities have annual emissions that are less than half the level of a major source of pollution.

AFRs fall into two general categories:

- Those that naturally emit less than 50% of major facility thresholds; and
- Those that are designated as “cap-by-rule.” Cap-by-rule facilities have the potential to emit air contaminants at or above the threshold of a large source but choose to limit actual annual emissions. Owners or operators of cap-by-rule facilities agree to adhere to additional record-keeping and self-monitoring requirements to demonstrate compliance with the emissions cap.

Permits have varying compliance requirements but can require regular inspections and reporting. Title Vs must certify compliance with each permit monitoring condition at least annually. Synthetic Minors are required to certify compliance with the emissions cap(s) on an annual basis. Federal requirements direct the Department to conduct full compliance evaluations, which include on-site inspections, at least once every 2 years for Title Vs and once every 5 years for Synthetic Minor-80s. Also, Department staff should review these facilities’ annual and semi-annual compliance certifications.

Generally, there are no inspection or reporting requirements for AFRs. However, because the U.S. Environmental Protection Agency (EPA) lists perchloroethylene (perc) vapor as a hazardous air pollutant and a likely human carcinogen, AFRs that use perc equipment (generally dry cleaners) are required by the Department to be inspected annually by an inspector registered with the Department. The resulting inspection report is required to be submitted to Department staff, who review it and act, when necessary, on any potential violations. Further, cap-by-rule facilities must keep compliance records on site for review by the Department upon request, and a responsible facility official must verify annually through a review of records and totaling of emissions that the facility has operated in accordance with its registration.

To obtain an air permit, a facility owner or operator must complete an application that includes information about the facility’s emissions and other operating processes, like raw material usage and the height and location of stacks or vents. Registration applications require less information than permits. Staff at the Department’s nine regional offices receive and review the applications and issue the permits and registrations. Regional staff are also responsible for oversight of issued permits and registrations.

All Title Vs require a permit, which the Department issues for a period of no more than 5 years. ASFs also require a permit; these are currently issued for a period of no

more than 10 years, after which the permit expires. AFRs require only a registration, which is also currently issued for a period of 10 years. While Title Vs have always been issued with a defined expiration period, prior to 2013, permits and registrations for ASFs and AFRs did not expire. However, 2013 revisions to the Regulation require all new permits and registrations for ASFs and AFRs to have an expiration date and established the 10-year permit and registration period. Also, the revised Regulation allows the Department to require previously permitted or registered facilities to apply for updates to existing permits (within 90 days of notification from the Department) so that they could be issued with a defined expiration period.

Operating with an expired permit or registration is considered a violation of the Program, against which the Department can take enforcement action. However, the State Administrative Procedure Act (SAPA) states that an operating permit for a Title V and ASF facility does not expire if application for renewal occurs at least 180 days before the permit expiration date. If applicable, the permit is classified as SAPA extended and remains valid with no limit on how long, unless revoked. If a facility does not submit a permit renewal at least 180 days before the permit expiration date, the permit will expire on the expiration date if a new permit has not been issued.

Permit and registration information is maintained in the Department's Air Facility System (System), which acts as the Department's system of record for air pollution control permits and registrations. The System holds information related to compliance, enforcement, and inspections. The System is linked to the Department's website, which shows current information about issued permits for public consumption.

The Department recognizes environmental justice (EJ) as the fair and meaningful treatment of all people, regardless of race, income, national origin, or color, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. The Department implemented EJ requirements in 2003, with a focus on improving the environment in communities, specifically minority and low-income communities, and addressing disproportionate adverse environmental impacts that may exist in those communities. As of 2020, the Department defines potential EJ areas based on U.S. Census block groups that meet or exceed at least one of several statistical thresholds determined by a statistical analysis of the American Community Survey data from 2014–2018.¹

EJ areas, as defined by the Department, are those where at least:

- 52.42% of the population in an urban area reported themselves to be members of minority groups; or
- 26.28% of the population in a rural area reported themselves to be members of minority groups; or
- 22.82% of the population in an urban or rural area had household incomes below the federal poverty level.

In 2003, the Department developed static maps identifying potential EJ areas (by county) based on U.S. Census block groups, which are established by the

¹ The Department generally refers to EJ areas as “potential EJ areas” because there are shifts in population and income, which change the statistics related to each area. For purposes of this report, we refer to them as EJ areas.

U.S. Census Bureau. The Department used the defined potential EJ areas and considered the 2003 maps current until 2011, when the 2010 Census data was released, but at the time did not create new maps with the latest data. In 2021, the Department converted to a Geographic Information System (GIS) mapping tool, which updated potential EJ areas based on the latest American Community Survey data. The updated data resulted in changes to potential EJ area boundaries due to the changing demographics that occurred, but did not capture information contained within the 2010 Census data, resulting in a 10-year data gap. The current EJ map is no longer static but interactive and can be viewed on the Department's website.

The Department's Environmental Justice Permitting Policy (Policy), which was adopted in 2003 following stakeholder engagement that included Department staff, advocates, and community representatives, outlines the Department's responsibilities for incorporating EJ into its review of air permit applications. The goal of the Policy is to allow residents within potential EJ communities to obtain information – by requiring applicants covered by the Policy to actively seek public participation through the permit review process – allowing stakeholders to better participate in the decision-making process.

The Policy requires Department staff to conduct a preliminary screening to identify whether a proposed action is in or near a potential EJ area and whether the action is likely to have potentially adverse environmental impacts. The Department uses the most current EJ map to determine if a facility falls within an EJ area. If Department staff determine EJ criteria are met, applicants are required to seek public participation throughout their permit application process, including submitting a Public Participation Plan to the Department as part of its application. The Public Participation Plan should demonstrate that the applicant will take action to identify stakeholders related to the proposed action and hold public information meetings. Actions should include, among other measures, establishing document repositories in or near the potential EJ area to make pertinent project information available, such as studies, reports, media releases, and the like.

The Policy applies only to Title V and ASF applications received after April 18, 2003. Permits issued prior to April 18, 2003 are exempt from its provisions, as are renewals, minor projects, minor modifications, and registrations. However, the Policy also requires the Department to periodically evaluate it to determine the need for revision.

Department data indicated that, as of April 2022, there were 8,941 permits or registrations issued to facilities operating in the State²:

- 324 Title Vs
- 748 ASFs
- 7,869 AFRs

² Facilities may operate with multiple permits. Also, System data may contain duplicate permit and registration numbers.

For additional information on permitted and registered facilities throughout the State, click on the image below to explore our interactive maps.



Audit Findings and Recommendations

We identified weaknesses in several aspects of the Department's oversight of the Program – namely, implementation of the Policy and monitoring of permitted and registered facilities – that reduce its ability to ensure compliance with the Program and protect the State's air from harmful pollutants. The Department cited a loss in staff responsible for oversight of the program as a significant cause for these weaknesses. Specifically, the number of staff assigned to work under the program has decreased by 41 positions, or 18%, over the last 10 years.

Gaps in the Policy create a risk that the Department's air permitting process is not adequately allowing residents, particularly low-income and minority communities across the State within potential EJ communities, to access information about the harmful effects of pollution emitted in their communities and limiting opportunities to address concerns about their community's air quality, which could disproportionately impact residents of EJ areas. Further, the Department's monitoring of EJ areas failed to keep pace with the changing demographics over the years. From 2011 to 2021, many areas of the State experienced significant shifts in populations and incomes, yet the Department continued to use its outdated static maps from 2003 despite having updated data in 2011. Of 71 facilities we reviewed, 13 are now located in an area that is currently defined as EJ using the 2021 map criteria but that was not originally defined as such at the time of the facility's initial application. These facilities include operations such as a power plant, a metal processing plant, and a medical facility. Most of the exempt facilities (35) applied for permits before the Department's implementation of EJ requirements in 2003. While the Policy requires the Department to periodically evaluate the need for revision, the Policy has not been updated since its implementation 20 years ago.

Additionally, the Department has not addressed facilities with permits or registrations that were issued prior to 2013 and that do not expire – and may not be operating in compliance with current requirements. As of April 2022, System data indicated that 54% of AFRs (4,271) and 31% of ASFs (234) fell into this subgroup. We also found the Department is not always taking action to enforce compliance with the Program for facilities operating without a valid permit. We identified three facilities (two Title Vs and one ASF) operating without permits, in violation of the Program. One Title V has been operating without a permit for over 10 years; the other two facilities' permits expired in 2018 (Title V) and 2017 (ASF). While the three facilities – a correctional institution, a sewage treatment plant, and a scrap metal recycler – are operating without a valid permit, they are still being monitored by the Department under the prior permit conditions. We recognize that these three facilities represent a fairly low exception rate when considering the population as a whole. However, given the significant length of time the facilities have been operating without a valid permit, we believe increased effort and attention should be provided by the Department to establish valid permits as soon as practicable.

Department data also shows 182 active facilities have SAPA extensions as of April 2022. The length of time that these facilities' permits have been extended beyond their initial expiration date varies, but a significant number (37, or 20%) have been extended between 4 and 9 years. While SAPA extensions allow Title V and ASF

facilities to operate beyond their permit expiration date, and the Department monitors facilities under the original permit conditions, the longer the permits remain extended, the greater the risk that facilities are not operating under requirements that align with the most up-to-date air pollution control standards.

Also, the Department performs limited oversight of AFRs, creating risks that facility operators are not adhering to requirements intended to minimize the negative effects of air pollution. Cap-by-rule AFRs pose an enhanced risk to air quality, and of violating Program requirements, because they can emit pollutants at the levels of large sources. Of the 45 cap-by-rule facilities we reviewed, we found that 40 (89%) did not maintain the required documentation to support that they met all requirements of the Program, including their adherence to emission thresholds. A majority of the facilities were autobody repair shops that operated paint sprayers.

Environmental Justice

Multiple exemptions allowed under the Policy create a risk that the Department's air permitting process is not adequately promoting the fair involvement of low-income and minority communities across the State, which could disproportionately impact residents of EJ areas by limiting their access to information and opportunities to address concerns about their communities' air quality. For example, because permit renewals are exempt, all facilities that were permitted before 2003, when the Policy became effective, are not subject to the EJ requirements. Areas designated as EJ do not reflect demographic shifts that have occurred in the 20-year interim, increasing the risk that potential EJ communities are not being accurately identified and accounted for. This underrepresentation of impacted residents in the permitting process is further compounded by the fact that the maps were not updated between 2011 and 2021 – amounting to a roughly 10-year gap in data. Using GIS information, we found 185 permitted facilities (62 Title Vs and 123 ASFs) located in areas that were originally not defined as EJ in the 2003 maps, or designated as EJ between 2011 and 2020, but have been redefined as EJ in the 2021 map. For more information on the changes to EJ areas and facility locations, click on the image below to explore our interactive maps.



We judgmentally reviewed 71 of 1,072 permits (25 Title Vs and 46 ASFs) identified as active in the Department's System as of April 2022 and issued for facilities in EJ

areas. Using the 2021 map, we determined whether staff applied the requirements of the Policy, including submission of a Public Participation Plan if applicable, to these facilities.

Due to the various exemptions allowed under the Policy, we found many facilities were exempt from EJ requirements; however, we also found the Department did not always enforce the Policy.

Of the 71 facilities permitted in EJ areas, 55 were exempt from EJ requirements. Most of the exempt facilities (35) applied for permits prior to the implementation of EJ requirements in 2003. Seven permits were for minor projects or projects that were never executed. Additionally, 13 facilities are located in an area that is currently defined as EJ using the 2021 map criteria but that was not originally defined as such at the time of the facility’s initial application according to the 2003 maps. These facilities include operations such as a power plant, a metal processing plant, and a medical facility.

Of the 16 permits that were non-exempt from EJ requirements, for nine facilities, Department staff could not determine whether they were subject to EJ requirements due to employee turnover that resulted in errors or missing documentation. For the remaining seven permits, the facilities were subject to the Policy, but the Department only applied it to four. See the table below for a summary of our results by permit type.

Sampled Permits in EJ Areas

Facility Status	Title V	ASF	Total Permits	Percentage
Exempt	19	36	55	77.5%
Undetermined	3	6	9	12.7%
EJ requirements applied	1	3	4	5.6%
EJ requirements not applied	2	1	3	4.2%
Totals	25	46	71	100%

While the Policy requires the Department to periodically evaluate the need for revision, the Policy has not been updated since its implementation 20 years ago. Staff stated they are in the process of updating the Policy and provided us with support for draft updates to the Policy. They also stated that the updates should address some of the Policy’s shortcomings. As of March 2023, a revised Policy has not been approved. Generally, the Department pointed to staff turnover, lack of resources, and the complexities of updating the EJ map as contributing factors in delays with updates to the Policy and the map as well as enforcement of the Policy.

Compliance With Program Requirements

While we found the Department is generally conducting full compliance evaluations as required, it needs to improve controls relating to expired permits, SAPA extensions, and reporting requirements. Each of these areas aids in reducing air pollutants and their impact on residents of the State.

Permit Expirations

The 2013 change to the Regulation, which required expiration dates on ASFs and registrations issued after February 22, 2013, established the 10-year renewal period for ASFs and AFRs. It also empowered the Department to apply this expiration date requirement to all previously permitted or registered facilities. However, the Department hasn't established a strict policy or mechanism for doing so, which would otherwise help to ensure that issued permits continue to align with the most current standards. While the Department provided guidance to regional staff on how to address these facilities, it generally allowed staff to use their discretion on whether to reach out to facilities to submit an updated registration application.

How facilities operate and for what purposes can change rapidly in some instances. For example, old facilities that once housed fossil fuel plants were repurposed to house cryptocurrency mining operations (up until November 2022, when the Executive issued a moratorium on issuing certain types of permits to facilities for specific forms of cryptocurrency mining in the State). In some cases, the repurposed facilities were operating under previously issued permits that did not consider the scope of work needed to run a cryptocurrency mining operation. Holding facilities accountable for renewing permits within prescribed periods helps control air pollution by ensuring facilities are operating under requirements that align with the most up-to-date standards, which lessens the risk of pollution negatively impacting air quality.

Cryptocurrency mining is the process that verifies and adds new cryptocurrency – this may be done through a complex mathematical equation that needs to be solved using many computers. This can require considerable amounts of electricity usage, which can result in greenhouse gas emissions, as well as additional pollution, noise, and other local impacts to communities living near mining facilities.

As of April 2022, the System's data indicated that 54% of AFRs (4,271) and 31% of ASFs (234) are operating with permits or registrations that were issued over 10 years ago with no expiration date. Additionally, the permits or registrations for 346 AFRs and 63 ASFs will expire by the end of the 2023 calendar year – during which time the Department will need to process the renewals. This will create a significant workload for some regional staff, which will further strain the Department's resources, given the Department's reduction in staff over the last 10 years. For example, one region alone has 134 registrations that will need to be renewed. Regional staff stated they are unsure how they will manage the impending workload but have reached out to the Department's central office for assistance.

We also found the Department is not always taking action to enforce compliance with the Program for facilities operating without a valid permit. We identified three facilities (two Title Vs and one ASF) operating without a permit. One Title V has been operating without a permit for over 10 years, and the other two facilities' permits expired in 2018 (Title V) and 2017 (ASF). While the three facilities – a correctional institution, a sewage treatment plant, and a scrap metal recycler – are operating without a valid permit, they are still being monitored by the Department

under the prior permit conditions. We recognize that these three facilities represent a fairly low exception rate when considering the population as a whole. However, given the significant length of time the facilities have been operating without a valid permit, we believe increased effort and attention should be provided by the Department to establish valid permits as soon as practicable. Department staff stated these facilities' permits have been delayed for various reasons, including management changes, ongoing testing, and challenges presented by the COVID-19 pandemic. The Department is aware that these facilities are operating in violation of the Program, and officials stated that they will work with the facilities to become permitted as quickly as practicable.

SAPA Extensions

While SAPA extensions allow Title V and ASF facilities to operate beyond their permit expiration date, and the Department monitors facilities under the original permit conditions, the longer the permits remain extended, the greater the risk that facilities are not operating under requirements that align with the most up-to-date air pollution control standards. For example, one permit for a Title V facility would have expired in September 2021; however, the facility submitted its renewal application timely in March 2021 and therefore qualified for SAPA extension. The facility, since the initial permit was issued, had shifted its operations to cryptocurrency mining, with projected emissions equating to more than six times its previous emissions over a 4-year period. The Department ultimately denied the renewal as the facility's increase in greenhouse gas emissions did not align with the newly issued Climate Leadership and Community Protection Act. The facility has challenged the Department's decision and continues to operate under its previous permit in accordance with SAPA and is continuously monitored by the Department.

The Department's data shows 182 active facilities have SAPA extensions as of April 2022. The length of time these facilities have been extended beyond their initial expiration date varies – but a significant number (37, or 20%) have been extended between 4 and 9 years. Department staff couldn't pinpoint one specific reason for the lengthy SAPA extensions, but stated generally they are caused by protracted legal proceedings, ongoing enforcement action, and lack of staff to manage the extensive workload.

Inspections and Reporting

Reporting is an important mechanism, in addition to full compliance evaluations and additional inspections, to provide assurance that Title Vs and Synthetic Minors are complying with air pollution standards. We found the Department is ensuring facilities receive the required full compliance evaluations. We judgmentally reviewed 125 (50 Title Vs and 75 Synthetic Minors) and found the Department generally completed the required full compliance evaluation on time for all 125. However, the Department didn't always ensure that Synthetic Minors submitted their required annual certification, which provides the Department with assurances that the facilities are complying with the terms of the permit, including meeting certain emissions caps. We

reviewed the certifications submitted for 75 Synthetic Minors for the 2020 and 2021 calendar years. Of the 75, the Department was missing certifications for at least one of the years for 18 (24%) of the facilities. Staff generally attributed the missing certifications to pandemic-related issues for those years.

Oversight of Registrations

AFRs generally produce emissions below those of major or large sources, but they may still pose significant air quality risks, especially in the aggregate and in areas where they are highly concentrated. However, the Department's oversight of AFRs is limited, creating risks that facility operators are not adhering to requirements intended to minimize the negative effects of air pollution from AFRs. Department staff cited low staffing levels as part of the reason AFRs are not strongly monitored. Staff assigned to monitoring of permitted and registered facilities has decreased by 41 positions, or 18%, over the last 10 years. Also, Department staff stated that they rely heavily on facility owners to ensure the AFRs meet the Program's requirements.

Although the Department is not required to inspect AFRs, inspections can identify facilities that may be deviating from Program requirements or understating emissions. Generally, the Department only inspects AFRs if they receive a complaint or, in some cases, when they are issuing a registration for the first time. The Department has issued limited guidance to regional offices on how to record or handle complaints; therefore, regions do not follow a universal method to process complaints received. We judgmentally selected 78 of the 7,869 AFRs active in the System as of April 2022 that the Department had inspected. We reviewed each of the inspection reports to determine if the Department identified any violations or issues and whether staff followed up with the facility to ensure corrective actions were taken.

For 58 of the 78 AFRs (74%), the reports show that either the Department found no problems or staff were able to resolve any issues with facility officials after follow-up, including two cases that were resolved only after we notified the Department that there had been no follow-up on cited violations. However, for the remaining 20 AFRs (26%), there was no documentation to support that the Department followed up on identified problems, which included various Program violations such as emissions violating registration requirements, unregistered emissions units present on site, and emissions exceeding registration levels – the facility subsequently should have been permitted as an ASF and not registered as an AFR. Further, 10 of these facilities were operating perc dry cleaning machines, and the Department's inspection reports noted a range of issues, from minor ones such as missing inspections to more egregious ones such as operating illegal perc equipment. In one instance, the owner of a facility operating illegal perc equipment stated during the inspection that they had no plans to cease operation of the illegal equipment – and while the Department issued a warning to the facility in January 2022, no further follow-up was conducted as of February 2023. The System also indicated that seven facilities, including five operating perc facilities, were referred to the Department's legal division, but no further information was available (within the System or otherwise) on the status of

these cases. Until follow-up action is taken to resolve identified violations, there is a risk that these facilities continue to operate in violation of the Program.

Cap-by-rule AFRs could pose a greater risk to air quality, and of Program requirement violations, than other AFRs because they have the potential to emit pollutants at the levels of large-source facilities. Although not required by the Program, the Department does have the authority to request and review records and to inspect the facilities as needed. We selected a judgmental sample of 56 of 3,086 cap-by-rule facilities to determine whether they were maintaining the required documentation to support their compliance with the Program. We were able to review records for 45 of the 56 facilities; 11 facilities either were exempt, were no longer in operation, or did not have a knowledgeable official available to provide the documentation. Of the 45 facilities, 40 (89%) did not maintain all the required documentation to support that they met all requirements of the Program, including their adherence to emission thresholds. A majority of the facilities were autobody repair shops that operated paint sprayers.

Further, we also found that regional staff do not always follow the Regulation's requirements when determining whether an AFR should be deemed a cap-by-rule facility. Given their potential to generate higher levels of emissions, cap-by-rule facilities must adhere to additional record-keeping and self-monitoring requirements to demonstrate their compliance with the emissions cap. The Regulation is complex, but stipulates, in part, that this determination may be based on an analysis of the facility's operating records for emissions, averaged over 2 years – but also allows for other more representative time intervals or other monitoring activities to be used as well. We found inconsistencies in how regional staff applied the Regulation's requirement and little justification to explain why certain records or time intervals were used to measure facilities' compliance with cap-by-rule requirements. For example, for one facility, regional staff used only 1 year's worth of operating records to determine if the facility would be classified as cap-by-rule, and at a different region, staff requested just 1 month's worth of purchase orders from a similar type of facility to make this determination. Because there was little support for why staff used one method versus another, AFRs may be improperly classified and, therefore, not subject to cap-by-rule requirements. The Department has not issued guidance to staff on how to make classification determinations, and acknowledged the need for additional training, which may have caused the inconsistencies.

System Limitations

Data that is inaccurate or incomplete has reduced value for informed, effective decision making and for promoting strong oversight to ensure facilities comply with the requirements of the Program. We tested the reliability of various data items in the Department's System and found some issues with data reliability – specifically, duplicate entries in the ASF data – as well as general usability of the System.

We found limitations in how the System maintains information, which hindered our ability to readily differentiate between different types of ASFs (i.e., Synthetic Minors)

operating in the State – each of which requires different levels of oversight under the Program. Department staff acknowledged some of the errors in the data were due to clerical errors. However, staff also stated that the System, which is over 20 years old, was not designed to pull and analyze data; therefore, some of the errors may have been due to the method they used to pull information from the System for our review. Further, the Department’s loss of 41 staff over the last 10 years has resulted in fewer staff with System experience and the ability to perform data entry and queries.

Additionally, permit and registration applications can be lengthy and include many documents; however, the System is not capable of maintaining attachments. Instead, completed applications are retained in hard copy at the regional offices. When performing our testing of a sample of 325 permits and registrations, we were unable to verify the completeness of information for 28 applications (9%) because regional staff could not locate any portion of the applications for review. Retaining these documents electronically could not only provide greater assurance that important documents are not lost, but also give regional staff easier access to information that could assist with monitoring facility compliance with the Program. The Department has taken steps to upgrade and/or replace the System since 2014, including contracting with a consultant to develop recommendations and options for upgrades or replacement. As of April 2023, the Department is still awaiting funding approval to proceed with those recommendations and options.

Recommendations

1. Improve monitoring and enforcement of EJ requirements, which may include, but not be limited to:
 - Updating the Policy to improve the coverage of facilities required to comply with EJ requirements;
 - Ensuring permitted facilities located in EJ areas meet EJ permitting requirements; and
 - Periodically reviewing and updating the Policy to best meet EJ needs.
2. Enhance oversight of the general Program compliance, which may include, but not be limited to:
 - Developing a course of action to address the upcoming influx of expired permits and registrations;
 - Reducing the population of facilities operating under permits or registrations with no expiration date; and
 - Addressing long delays in processing SAPA extended permits to reduce the number of facilities operating with outdated permits.
3. Focus efforts on monitoring and enforcement of AFRs’ compliance with Program requirements, which may include, but not be limited to:
 - Performing additional risk-based inspections AFRs;

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- Improving follow-up with inspection deficiencies to ensure violations are corrected; and
 - Issuing additional guidance on eligibility for cap-by-rule classifications.
4. As soon as practicable, update or replace the System to better meet the needs of the Program.

Audit Scope, Objective, and Methodology

The objective of our audit was to determine whether the Department is taking necessary action to adequately enforce certain aspects of the State's air contamination and pollution requirements to protect the public and environment from the adverse effects of exposure to pollutants. The audit covered permit and registration data from January 2020 through April 2022 and Department activities related to these permits and registrations through February 2023.

To accomplish our objective and assess related internal controls, we interviewed staff at the Department's central office and at each of the nine regional offices. We reviewed relevant State and federal laws, applicable State regulations, and Department policies and procedures. We also analyzed data from the Department's System to understand information about permits and registrations in our audit scope, such as their permit status, permit conditions, association with potential EJ areas, and related inspections. While we reported on limitations of the System, we found the data sufficiently reliable for our purposes. We selected three judgmental samples from the data. For the first sample, we selected 150 permits from the population of 1,072 permits identified in the System as of April 2022 based on the permit type, geographic location, and risk areas such as inspection status and expiration dates, ensuring our sample covered all nine regions. For the second sample, we selected 175 registrations based on geographic location, cap-by-rule indicator, expiration dates, and inspection results. We note that the System's data contained some inaccurate expiration dates for permits and registrations; however, the error rate was low enough (4% of our sample) that, for our purposes, it did not compromise our ability to rely on the information. For the third sample, we selected 56 cap-by-rule registrations based on proximity to regional offices. The second and third samples were pulled from the population of 7,869 registrations to determine if the Department is adequately overseeing registrations. Both samples were chosen independent of each other and did not include any overlap of facilities. The results of these samples cannot be projected to the population as a whole.

To identify facilities that were not in a potential EJ area based on the 2003 maps provided by the Department but are in a potential EJ area based on the Department's map update, we performed a GIS risk analysis using the facility address listed on the permit (represented as a geographic point). The GIS analysis was limited by the use of street addresses, which represent an individual geographic point, whereas some of the facilities included in the data appear to represent geographic areas (such as a college campus). Therefore, there may be additional facilities that are not included in the GIS results (185 permits) because the permit address used for analysis was located outside of an EJ area but other parts of the facility's location (geographic area) fell within an EJ area. The Department does not track or record information about which facilities applied for permits in EJ areas; therefore, we could not determine a population of facilities falling into this subgroup.

As part of our audit procedures, we used GIS software for geographic analysis. As part of the geographic analysis, we developed maps as part of external interactive maps. Portions of the map contain intellectual property of Esri and its licensors and are used under license. Copyright © 1987 – 2020 Esri and its licensors. All rights

reserved. As part of the geographic analysis, we developed visualizations (see the interactive maps) to improve understanding of our report. Colors were selected from <https://colorbrewer2.org/> by Cynthia A. Brewer, Geography, Pennsylvania State University.

Statutory Requirements

Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

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. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our professional judgment, these duties do not affect our ability to conduct this independent performance audit of the Department's monitoring of air quality.

Reporting Requirements

We provided a draft copy of this report to Department officials for their review and comment. We considered their comments in preparing this final report, and have included their response in its entirety at the end of this report. Although Department officials expressed exception with certain aspects of the report and offered explanations in response to some findings, they generally agreed with our recommendations and indicated steps they will or have already taken to implement them. We address certain aspects of their response in our State Comptroller's Comments, which are embedded within the response.

Within 180 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Environmental Conservation shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

Agency Comments and State Comptroller's Comments

OFFICE OF THE COMMISSIONER

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SEP 12 2023

Mrs. Nadine Morrell
Office of the State Comptroller
Division of State Government Accountability
110 State Street – 11th Floor
Albany, New York 12236-0001

Dear Mrs. Morrell,

The New York State Department of Environmental Conservation (DEC) has reviewed the Office of the State Comptroller's Draft Audit Report *Monitoring of Air Quality (Facility Permits and Registrations)*.

DEC's comments with respect to this report are contained in the enclosed document. Please contact Andrew Fischler, Director of Internal Audit, at (518) 402-9761 if you have any questions regarding our responses.

Sincerely,



Basil Seggos
Commissioner



Department of Environmental Conservation
Monitoring of Air Quality (Facility Permits and Registrations)
2021-S-41
Response to OSC Draft Report

The Department of Environmental Conservation (DEC) has reviewed the Office of the State Comptroller's (OSC) July 2023 draft audit report of DEC's monitoring of Air Quality (Facility Permits and Registrations) and appreciates the opportunity to respond.

DEC has administered an extensive air pollution control permitting program for more than 20 years. The program combines the federally mandated air operating permitting program for major sources of air pollution with long-standing features of the state operating permit program for minor sources of air pollution. It is administered by DEC's Division of Air Resources (DAR), which issues Title V Permits for major stationary source facilities, State Facility Permits for non-major sources, and Facility Registrations to selected operations that are not required to obtain a permit. In addition, DEC is committed to environmental justice and has some of the strongest policies for disadvantaged communities and environmental justice areas in the nation. DEC takes great pride in advancing climate and environmental justice initiatives and continues its crucial work to protect disadvantaged communities susceptible to climate change risk, environmental burdens, public health outcomes, and socioeconomic population vulnerabilities.

The science-based permit process is complex, rigorous, and includes collaboration amongst DEC's DAR, Division of Environmental Permits, and Office of Environmental Justice, in addition to other divisions and offices as needed. Technical staff from DAR and the Division of Environmental Permits review facility permit applications to determine appropriate levels of control for various air contaminants and to ensure compliance with state and federal air pollution control requirements. Pursuant to the Uniform Procedures Act, all proposed Title V permits, and many proposed state facility permits, are made available for public comment before a final permit is issued. Further, facilities desiring operation in a potential environmental justice area and/or disadvantaged community may be subject to additional public participation requirements to ensure residents are well informed of the proposed project and have an opportunity to weigh in publicly. Once a permit or registration is issued, DAR staff oversee and monitor facilities to ensure compliance with permit and registration requirements.

DAR staff in DEC's nine regional offices are primarily responsible for receipt and review of permit and registration applications, effectively managing a large volume of permit requests and actions. DAR's staffing levels have fluctuated over the last twenty years, functioning currently with 144 (44%) fewer staff members than in early 2001. Significant decreases in staffing in 2003 and 2011, coupled with an increase in new legislative mandates and initiatives, such as the Climate Leadership and Community Protection Act, have impacted the division causing significant workload challenges for those responsible for programmatic oversight and permit and registration application processing. However, the downward trend in staffing is now reversing; the fiscal year 2023-2024 enacted budget included 213 new positions for DEC, a significant portion of which will be used to grow DAR staff. This increased staffing will help address program efficiencies and implementation of OSCs recommendations, in addition to new responsibilities being added to the permitting program.

While DEC generally agrees with several of the report’s findings, and will take appropriate action to implement recommendations, we take issue with certain findings and conclusions, as discussed below. Most critically, we take issue with certain findings that are based on the introduction of cryptocurrency mining into a report focused on DEC’s enforcement of the State’s air contamination and pollution requirements. We believe that the subject of cryptocurrency is irrelevant to the audit’s objective and beyond the scope of this report, which is emphasized by the report’s understandable inability to accurately or adequately cover this complicated and technically nuanced topic. Without proper context, the reader is left with a misleading and inaccurate depiction of DEC’s permitting process as it relates to cryptocurrency. For example, the report provides a confusing definition of “cryptocurrency mining” and references a “moratorium on cryptocurrency mining in the State” when in fact there is no such moratorium. Instead, the November 2022 “moratorium” cited in the report prohibits DEC from issuing certain types of permits to facilities conducting certain specific forms of cryptocurrency mining; DEC fully complies with these restrictions.

State Comptroller’s Comment – None our findings are based on the introduction of cryptocurrency; rather, they are meant to demonstrate the impact related to SAPA extensions. On page 16 of our report, we note that the Department followed established procedures when handling the permitting for a facility that intended to engage in cryptocurrency mining (ultimately denying the permit). Our subsequent findings related to SAPA extended permits are unrelated to cryptocurrency mining. The references to cryptocurrency and its related effects in the report provide the reader with context on a sector that not only influences air permitting but that is also pertinent to the State’s Climate Leadership and Community Protection Act. We have added additional information to this report based on the Department’s response regarding the moratorium on permitting for certain types of cryptocurrency operations.

To clarify, New York State does not prohibit all forms of cryptocurrency mining, and any implication that DEC permitted old fossil fuel power plants “repurposed to house cryptocurrency mining operations” without being aware of changes in operations is not accurate. Moreover, the report seems to suggest DEC allowed a cryptocurrency facility to operate without a valid permit before the moratorium went into effect: in fact, as the report elsewhere acknowledges, DEC denied the facility’s application because of inconsistencies with the State’s Climate Leadership and Community Protection Act and the facility is currently operating under a SAPA extended permit while challenging DEC’s denial.

State Comptroller’s Comment – Our report does not suggest that the Department allowed a facility to operate without a valid permit, and as the Department acknowledges, the report states that the Department denied the facility’s application. Therefore, we are unclear what the Department is taking specific exception to in the report.

In addition to the concerns raised above, the following is DEC’s response to certain findings and statements throughout the report, as well as the report’s recommendations.

Findings and Statements Within the Report:

1. While SAPA extensions allow Title V and ASF facilities to operate beyond their permit expiration date, and the Department monitors facilities under the original permit conditions, the longer the permits remain extended, the greater the risk that facilities are not operating

under requirements that align with the most up-to-date air pollution control standards. *For example, one permit for a Title V facility would have expired in September 2021; however, the facility submitted its renewal application timely in March 2021 and therefore qualified for SAPA extension. The facility, since the initial permit was issued, had shifted its operations to cryptocurrency mining, with projected emissions equating to more than six times its previous emissions over a 4-year period. The Department ultimately denied the renewal as the facility's increase in greenhouse gas emissions did not align with the newly issued Climate Leadership and Community Protection Act. The facility continues to operate under its previous permit in accordance with SAPA.*

DEC Response:

- Pending litigation on the denial of the Title V permit, this facility is operating lawfully under a permit that has remained in effect due to its SAPA extended status and therefore is required to operate in compliance with all emission requirements contained in its currently effective permit. Any suggestion that there has been an increase in the facility's emissions that exceeds its currently effective permit is incorrect.

State Comptroller's Comment – We did not assert that the facility is exceeding permitted emissions; rather, the projected increase was an assessment the Department made during its review of the facility's permit application.

2. Because permit renewals are exempt, all facilities that were permitted before 2003, when the Policy became effective, are not subject to EJ requirements. Areas designated as EJ do not reflect demographic shifts that have occurred in the 20-year interim, increasing the risk that potential EJ communities are not being accurately identified and accounted for. We found 185 permitted facilities located in areas that were originally not defined as EJ in the 2003 map but that have been redefined as EJ in the 2021 map.

DEC Response:

- DEC continues to grow and enhance a model environmental justice program in the nation and has routinely updated key elements of the program as new data, information, and policy advance. As part of DEC's commitment to programmatic updates and refinements, potential environmental justice areas were updated in 2021, based on the latest American Community Survey data, and account for population shifts; there is no evidence of underrepresentation within the current mapping.
 - The map in the report does not demonstrate the effects of the change to potential environmental justice area maps. There is no indication from OSC's analysis that any community would have been in a potential environmental justice area between 2011-2021 if maps were updated, nor that any facility would or would not have been permitted if the maps were changed earlier. Being in a potential environmental justice area in 2021 does not automatically qualify the area as a potential environmental justice area at the time of permit issuance, and DEC will continue to ensure all required elements of our policies and regulations on environmental justice are appropriately followed.
3. The Department has not addressed facilities with permits or registrations that were issued prior to 2013 and that do not expire.

DEC Response:

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- DEC continues to actively pursue facilities with permits or registrations that were issued prior to the 2013 regulatory changes based on prioritization and management of staff workloads. Many of these permits and registrations are updated during the normal course of business as facilities apply for modifications to their permit or registration, change ownership, or otherwise change their operations. Further, DEC developed a “call-in” letter in 2013 to aid regional office staff in directing facilities to apply for a renewal of their permit or registration. For example, data from August 2023 indicates there are currently 3,954 registrations without expiration dates, representing a decrease of 317 since April 2022. In addition, DEC routinely takes enforcement action against facilities for noncompliance with air pollution control requirements regardless of the status of the facility’s permit or registration.
4. Department data shows 182 active facilities have SAPA extensions as of April 2022. The length of time that these facilities’ permits have been extended beyond their initial expiration date varies, but a significant number have been extended between 4 and 9 years.

DEC Response:

- The New York State Administrative Procedure Act (SAPA) extends permits where a timely and complete renewal application has been submitted to DEC. This extension causes the facility’s current permit to remain effective beyond its expiration date while the permit renewal is comprehensively reviewed and evaluated by DEC experts. Importantly, should a new regulation come into effect during the time the permit is extended, the facility is required to comply despite specific conditions not being included in its currently effective permit. DEC prioritizes permits for new facilities and modifications to existing facilities over renewals that do not contain any changes. This can result in extensions in areas where there is a high volume of permit activity requiring careful management of staff workloads, but has no bearing on DEC taking routine enforcement action against facilities for noncompliance with air pollution control requirements regardless of the status of the facility’s permit.
5. In one instance, the owner of a facility operating illegal perc equipment stated during the inspection that they had no plans to cease operation of the illegal equipment – and while the Department issued a warning to the facility in January 2022, no further follow-up was conducted as of February 2023.

DEC Response:

- DEC issued a new air facility registration to the facility in March 2022, which authorized the operation of dry-cleaning equipment using an alternative solvent. The equipment replaces the perc equipment mentioned in the January 2022 inspection notes and warning notice. DEC has verified that perc equipment is no longer operated at the facility and will continue to oversee this facility for compliance.

State Comptroller’s Comment – We were provided no support during our audit or in response to our preliminary findings that the Department conducted follow-up with this facility, nor were we provided with the results of any subsequent actions. Further, we met with Department staff in February 2023 to determine if any action had been taken, and no additional actions were noted in the Department’s system after January 2022.

6. For nine facilities, Department staff could not determine whether they were subject to EJ

requirements due to employee turnover that resulted in errors or missing documentation.

DEC Response:

- We reviewed records for the facilities in question and discovered there were no facility changes or permit actions that would have subjected two of the facilities to the Policy.

Recommendations

1. Improve monitoring and enforcement of EJ requirements, which may include, but not be limited to:
 - Updating the Policy to improve the coverage of facilities required to comply with EJ requirements;
 - Ensuring permitted facilities located in EJ areas meet EJ permitting requirements; and
 - Periodically reviewing and updating the Policy to best meet EJ needs.

DEC Response:

- In addition to the 2021 mapping updates, DEC continues to take steps to update the Policy and anticipates that upcoming revisions will provide a robust framework for the inclusion of environmental justice communities in DEC's permit application review process. DEC is working on several environmental justice policies in parallel with the Policy, and it is imperative that any updates to the Policy adequately reflect the legal and legislative landscape, which has changed repeatedly in the last several years. We look forward to releasing an updated framework for the Policy that captures changes brought on by the Climate Act and other statutes, as we continue grow our leading Environmental Justice program.
 - The Policy requires various steps in the review process for certain permitting actions to which it applies, and in some cases may result in changes in how the facility may operate. Further, the Policy does not fundamentally change the applicable permit issuance standards and there are typically no EJ-specific permit conditions added to a permit.
2. Enhance oversight of the general Program compliance, which may include, but not be limited to:
 - Developing a course of action to address the upcoming influx of expired permits and registrations;
 - Reducing the population of facilities operating under permits or registrations with no expiration date; and
 - Addressing long delays in processing SAPA extended permits to reduce the number of facilities operating with outdated permits.

DEC Response:

- DEC has already taken steps to address permits and registrations that are nearing their expiration dates. A sample reminder letter regarding the need to prepare and submit a renewal application has been developed and shared with DEC's regional offices for distribution to facilities whose permits and registrations are about to expire. Further, assistance from staff in DEC's central office has been made available to help process submitted applications as quickly as possible. DEC will continue to prioritize applications as appropriate based on the overall environmental impact of the facility and as staff workloads are managed.

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- DEC has reduced the population of facilities operating under permits or registrations with no expiration date. This work will continue, and additional staff will be added.
 - Assistance from staff in DEC's central office has been made available to process permit renewals for SAPA extended permits as quickly as possible. DEC will continue to prioritize applications as appropriate based on the overall environmental impact of the facility and as staff workloads are managed.
3. Focus efforts on monitoring and enforcement of AFRs' compliance with Program requirements, which may include, but not be limited to:
- Performing additional risk-based inspections of AFRs;
 - Improving follow-up with inspection deficiencies to ensure violations are corrected; and
 - Issuing additional guidance on eligibility for cap-by-rule classifications.

DEC Response:

DEC will continue to prioritize inspections of registered facilities based on specific criteria; take necessary and appropriate actions to resolve identified violations; provide training to staff on cap-by-rule determinations; and ensure guidance clearly describes procedures for emission cap development.

4. As soon as practicable, update or replace the System to better meet the needs of the Program.

DEC Response:

- DEC will continue to explore the feasibility of System updates or replacement to better meet the needs of the Program.

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