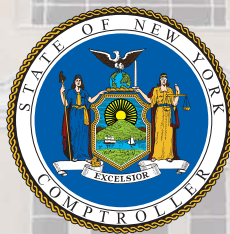




# **New York State Department of Environmental Conservation**

## **REPORT OF TITLE V OPERATING PERMIT PROGRAM REVENUES, EXPENSES AND CHANGES IN FUND BALANCE FOR THE TWO FISCAL YEARS ENDED MARCH 31, 2009**

**Report Number 2010-S-61**



**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, 2009**

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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 Balance for the Title V Operating Permit Program (Program) for the two fiscal years ended March 31, 2009. 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 represent, 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, 2009 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. Furthermore, 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: August 17, 2011*

**EXHIBIT A**

**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, 2009**

Beginning Fund Balance	<u>\$ 1,754,000</u>
Revenues	
Operating Permit Fees (Note 5)	\$ 9,363,000
Fines and Penalties (Note 8)	89,000
Interest	3,000
General Fund Appropriation (Note 10)	<u>2,700,000</u>
Total Revenues	<u>\$ 12,155,000</u>
Direct Expenditures	
Personal Service (Note 6)	
Department of Environmental Conservation	\$ 7,541,000
Department of Health	325,000
Empire State Development Corporation	<u>162,000</u>
Total Personal Service	<u>\$ 8,028,000</u>
Fringe Benefits (Note 3)	
Department of Environmental Conservation	\$ 3,435,000
Department of Health	150,000
Empire State Development Corporation	<u>73,000</u>
Total Fringe Benefits	<u>\$ 3,658,000</u>
Non-Personal Service (Note 7)	
Department of Environmental Conservation	\$ 1,207,000
Department of Health	24,000
Empire State Development Corporation	0
Environmental Facilities Corporation	<u>767,000</u>
Total Non-Personal Service	<u>\$ 1,998,000</u>
Total Direct Expenditures	<u>\$ 13,684,000</u>
Indirect Expenditures	
Department of Environmental Conservation	\$ 3,992,000
Department of Health	77,000
Empire State Development Corporation	<u>7,000</u>
Total Indirect Expenditures	<u>\$ 4,076,000</u>
Total Expenditures	<u>\$ 17,760,000</u>
Ending Fund Balance	<u>\$ (3,851,000)</u>

**EXHIBIT B**

**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, 2008**

Beginning Fund Balance	\$ <u>803,000</u>
Revenues	
Operating Permit Fees (Note 5)	\$ 9,670,000
Fines and Penalties (Note 8)	612,000
Interest	4,000
General Fund Appropriation (Note 10)	<u>6,395,000</u>
Total Revenues	\$ <u>16,681,000</u>
Direct Expenditures	
Personal Service (Note 6)	
Department of Environmental Conservation	\$ 6,761,000
Department of Health	350,000
Empire State Development Corporation	<u>134,000</u>
Total Personal Service	\$ <u>7,245,000</u>
Fringe Benefits (Note 3)	
Department of Environmental Conservation	\$ 3,175,000
Department of Health	164,000
Empire State Development Corporation	<u>67,000</u>
Total Fringe Benefits	\$ <u>3,406,000</u>
Non-Personal Service (Note 7)	
Department of Environmental Conservation	\$ 962,000
Department of Health	29,000
Empire State Development Corporation	6,000
Environmental Facilities Corporation	<u>716,000</u>
Total Non-Personal Service	\$ <u>1,713,000</u>
Total Direct Expenditures	\$ <u>12,364,000</u>
Indirect Expenditures	
Department of Environmental Conservation	\$ 3,340,000
Department of Health	22,000
Empire State Development Corporation	<u>4,000</u>
Total Indirect Expenditures	\$ <u>3,366,000</u>
Total Expenditures	\$ <u>15,730,000</u>
Ending Fund Balance	\$ <u>1,754,000</u>

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

## **Notes to the Consolidated Statements**

### **1. 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.

### **2. 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.

### **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, 2008 and March 31, 2009 were 46.96 percent and 45.55 percent, respectively.

#### **4. Affiliated Agencies**

The Department's Consolidated Statements include the Program-related costs of DOH, ESDC, and EFC. These agencies, which account for approximately 9 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 contracts 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 December 31, 2009, 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. However, in January of 2010, the Legislature approved a per ton maximum rate of \$65. 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 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 contracts 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:

	<u>Fiscal Year Ended March 31, 2009</u>	<u>Fiscal Year Ended March 31, 2008</u>
Total	<u>\$767,000</u>	<u>\$716,000</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 per pollutant permit fee charged to regulated entities, for the years ended March 31, 2008 and March 31, 2009, the State Legislature approved a general fund appropriation of \$6,395,000 and \$2,700,000, respectively, to cover the Program's operating deficit.



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

**Comptroller's Report**

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According to Section 72-0303 of the Environmental Conservation Law (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 fees and penalties 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 fees and penalties imposed during the current fiscal year; and an estimate of any balance in the account that will be available at the end of 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, 2009, we are required to assess the estimates of revenues and expenses prepared by Department officials for the fiscal year ending March 31, 2010. However, AICPA standards do not allow auditors to examine forecasted data once the actual period covered by the forecast has ended. Instead, auditors must then examine actual financial results. Although we made numerous requests for timely financial data, including the Program's 2010 Annual Report, Department officials did not provide the necessary information. Consequently, we do not express an opinion with respect to the presentation of, or the assumptions underlying, the accompanying forecast for March 31, 2010, nor do we express such an opinion on the March 31, 2011 forecast since it is also based on the 2010 data.

***Office of the State Comptroller***  
***Date: August 17, 2011***

**TITLE V OPERATING PERMIT PROGRAM  
CONSOLIDATED SCHEDULE OF FORECASTED REVENUES,  
EXPENDITURES AND CHANGES IN FUND BALANCES  
FOR TWO FISCAL YEARS ENDING MARCH 31, 2010 and 2011**

	<u><b>2009-2010</b></u>	<u><b>2010-2011</b></u>
Beginning Fund Balance	\$ (3,851,000)	\$(10,487,000)
Revenues		
Operating Permit Fees	\$ 11,226,000	\$ 11,226,000
Fines and Penalties	195,000	195,000
Interest	<u>4,000</u>	<u>4,000</u>
Total Estimated Receipts	<u>\$ 11,425,000</u>	<u>\$ 11,425,000</u>
Expenditures		
Department of Environmental Conservation	\$ 16,028,000	\$ 16,622,000
Environmental Facilities Corporation	800,000	800,000
Department of Health	733,000	823,000
Empire State Development Corporation	<u>\$ 500,000</u>	<u>\$ 500,000</u>
Total Estimated Expenditures	<u>\$ 18,061,000</u>	<u>\$ 18,745,000</u>
Ending Fund Balance	<u>\$(10,487,000)</u>	<u>\$(17,807,000)</u>



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, 2009. 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 three 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: August 17, 2011*

## **Summary Conclusions and Status of Prior Audit Recommendations**

We have followed up on the actions taken by Department officials to implement the three recommendations contained in our prior audit, Report # 2008-S-94, issued February 10, 2010, for the two fiscal years ended March 31, 2007. We found that Department officials have implemented one recommendation, partially implemented one recommendation and not implemented one recommendation.

### **Follow-Up Observations**

#### **Recommendation 1**

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

**Status:** Not Implemented

**Agency Action:** The 2007-08 and 2008-09 fiscal year reports show that the Program is running in a deficit for both years. The loss for Fiscal Year 2007-08 was \$5,444,000 (total expenses \$15,730,000 less total revenues \$10,286,000), and the loss for Fiscal Year 2008-09 was \$8,305,000 (Total expenses \$17,760,000 less total revenues \$9,455,000). The Department requested that the Legislature approve a new fee schedule each year; however, each request was denied.

#### **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.*

**Status:** Implemented

**Agency Action:** As of October 29, 2009, the Department started using an in-house billing system called Financial Management Information System (FMIS). This system allows them to track and write off their receivables if determined to be uncollectible. We reviewed the FMIS on an employee's computer and received an up-to-date receivable report.

#### **Recommendation 3**

*Assess interest and penalties on late payments in compliance with 6 NYCRR Part 481.3 and 481.5.*

**Status:** Partially Implemented

**Agency Action:** As of October 29, 2009, the Department started using an in-house billing system (FMIS) which allows them to bill on a 30-day cycle and assess penalties at 75 days. However, according to the company transaction files, the penalties were assessed on the 77<sup>th</sup> day for the 2009 billings. Interest is assessed on the 60<sup>th</sup> day, retroactive to the 31<sup>st</sup> day from the date billed and continues to accrue and post in 30-day increments. The new system allows for this to be done automatically and we were able to review individual company's accounts to see if the penalties and interest were assessed according to the laws. We found the interest was assessed as per requirements, but the penalties were assessed two days late.

## **Auditors Comments and Recommendations**

### **Compliance with Section 502 of the Federal Clean Air Act**

Section 502 of the Federal Clean Air Act (Act) requires that annual fees paid by permit holders be sufficient to cover all direct and indirect costs required to develop and administer the Program. We found the Department is not complying with this Law in that the Program is not self-sufficient. In fact, the taxpayers of New York have contributed \$15.3 million, for the three year period ended March 31, 2009, to cover costs incurred by the Department that exceeded Program revenue. For example, for the fiscal year ended March 31, 2008, total Program revenue was \$10,286,000 while Program expenditures totaled \$15,730,000. During fiscal year ended March 31, 2009, Program revenue dropped to \$9,455,000, while Program expenditures increased to \$17,760,000.

General fund appropriations to cover Permit Program expenditures violate Federal EPA guidelines. Consequently, 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. We noted in our previous review (2008-S-94) the Federal EPA's Regional Administrator wrote a letter, in March 2008, 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.

In Fiscal Year 2009-10 the legislature approved a graduated fee increase, effective January 1, 2010, that establishes a fee of \$45 per ton per pollutant for sites that produce annual emissions less than 1,000 tons, \$50 per ton for sites that have annual emissions of 1,000 tons or more but less than 2,000 tons, \$55 per ton for sites that have annual emissions from 2,000 tons but less than 5,000 tons, and \$65 per ton for sites that have annual emissions of 5,000 tons or more. The maximum cap was raised to 7,000 tons per contaminant. While these fee increases will alleviate some of the shortfall in the account, additional measures will need to be taken to keep this account solvent. The Department estimates that as of March 31, 2011, the Program fund balance was \$-17.8 million. That projected deficit, if accurate, will again be borne by the taxpayers.

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.

## **Recommendation**

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

## **Timely Filing of Annual Reports**

The Department is required by New York State Environmental Conservation Law - Title 3 - §72-0303(10) Operating Permit Program Fees, to report to the governor, the legislature and the Comptroller before September thirtieth of each year, on: "(i) the actual direct and indirect costs of the operating permit program incurred, and the revenues received pursuant to fees imposed by this section, during the previous fiscal year; (ii) the estimated direct and indirect costs of the operating permit program that will be incurred, and the anticipated revenues received or anticipated to be received pursuant to fees imposed by this section, during the current fiscal year; (iii) an estimate of the direct and indirect costs of the operating permit program that will be incurred, and the tonnages of pollutants anticipated to be subject to the fees imposed by this section, during the subsequent fiscal year; (iv) an estimate of any balance in the operating permit program account of the clean air fund that will be available at the end of the current fiscal year; (v) a recommendation regarding adjustments to the fees imposed under this section necessary to assure that the operating permit program account has adequate funds to finance the direct and indirect cost of the operating permit program during future fiscal years; and (vi) the number of operating permit applications upon which the department has taken final action in the previous fiscal year, the average review time per permit, the number of person hours spent per permit, and the number of completed permit applications which are pending final action."

We found the Department does not comply with this requirement. In fact, the Department does not submit the annual reports to the Comptroller's Office and for the last three years has submitted the reports to the Governor's Office late. The Department submitted the Fiscal Year 2007-08 Annual Report to the Governor's Office on January 29, 2009, nearly four months late, submitted the Fiscal Year 2008-09 Annual Report on December 30, 2009, three months late and submitted the Fiscal Year 2009-10 Annual Report on January 12, 2011, over three months late.

Consequently, the Governor, the Legislature, the State Comptroller, Title V facilities and other interested parties are not informed of the results of Program operations and financial activities in a timely manner. The lack of timely reported information affects the Department's ability to adjust program operations as necessary. Beyond that the Comptroller's Office cannot attest to the accuracy of the information reported timely.

## **Recommendation**

2. File the Title V Program Annual Reports by September 30, each year, as required by NYS regulations.

## **Program-Related Penalties**

In accordance with 6 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 up to 25 percent of the unpaid fee. We found the interest was assessed as per requirements, but the penalties were assessed two days late.

As of October 29, 2009, the Department started using an in-house billing system (FMIS) which allows them to bill on a 30-day cycle and assess penalties at 75 days as allowed by the Law. However, according to the company transaction files, the penalties were assessed on the 77<sup>th</sup> day for the 2009 billings.

## **Recommendation**

3. Assess penalties on late payments in compliance with 6 NYCRR Part 481.5.