



January 3, 2002

Christine Todd Whitman, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. Whitman:

Enclosed is a petition by the New York Public Interest Research Group, Inc. requesting that you object to issuance of the proposed Title V operating permit the Huntley Steam Generating Plant (Permit I.D.: 9-1464-00130/00020), a major air pollution source located Tonawanda, New York. This petition is made pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d). In accordance with Clean Air Act § 505(b)(2), you must grant or deny this petition within sixty days after it is filed.

Sincerely,

Keri Powell, Esq.
New York Public Interest Research
Group, Inc.
9 Murray Street, 3rd Floor
New York, NY 10007

Enclosure

cc (with enclosure):

Jane M. Kenny, Region 2 Administrator, United States Environmental Protection Agency
Erin Crotty, Commissioner, New York State Dept. of Environmental Conservation
Thomas F. Coates, NRG Energy, Inc.

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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In the Matter of the Proposed Operating Permit for

HUNTLEY POWER LLC
to operate the Huntley Steam Generating Station
located in Tonawanda, New York

Permit ID: 9-1464-00130/00020

Proposed by the New York State Department of
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF
THE PROPOSED TITLE V OPERATING PERMIT FOR
THE HUNTLEY STEAM GENERATING STATION**

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. (“NYPIRG”) hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to proposed Title V Operating Permit for the Huntley Steam Generating Station. The permit was proposed to U.S. EPA by the New York State Department of Environmental Conservation (“DEC”) on approximately 9/21/01.¹ This petition is filed within sixty days following the end of U.S. EPA’s 45-day review period as required by Clean Air Act § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. Id.

NYPIRG is a not-for-profit research and advocacy organization that specializes in environmental issues. NYPIRG has more than 20 offices located in every region of New York State. Many of NYPIRG’s members live, work, pay taxes, and breathe the air in the area where the Huntley Steam Generating Station is located.

If the U.S. EPA Administrator determines that this permit does not comply with applicable requirements or the requirements of 40 CFR Part 70, she must object to issuance of the permit. See 40 CFR § 70.8(c)(1) (“The [U.S. EPA] Administrator will object to the issuance of any permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part.”). We hope that U.S. EPA will act expeditiously, and in any case, within the 60-day timeframe mandated in the Clean Air Act, to respond to NYPIRG’s petition.

¹ A permit is “proposed” by a permitting authority when it is received by U.S. EPA. Due to confusion in the wake of the terrorist attack, it is unclear exactly when the proposed permit for the Huntley Plant was received by U.S. EPA. U.S. EPA informed NYPIRG, however, that the permit was proposed no earlier than 9/21/01.

I. The Administrator Must Object to the Proposed Permit Because it Lacks a Compliance Schedule Designed to Bring the Huntley Plant Into Compliance With Clean Air Act Requirements

The permit description accompanying the Huntley Steam Generating Station states that DEC has issued three separate Notices of Violation (“NOVs”) to plant operators for Clean Air Act violations. Two of these NOVs relate to violations that are clearly ongoing at the plant. The first involves ongoing violations of opacity limitations that are part of New York’s approved State Implementation Plan (“SIP”) and are published as 6 NYCRR Subpart 227-1. (The Opacity NOV is attached as **Exhibit 1**.) The plant has been violating the opacity standard on a regular basis for many years and there is no reason to believe that these violations will cease after issuance of the Title V permit. The second NOV alleges that the plant was modified in violation of the federal Clean Air Act Prevention of Significant Deterioration Program (“PSD”). (the PSD NOV is attached as **Exhibit 2**). According to DEC, the plant owners were required to apply for and obtain a PSD permit prior to plant modification and were required to control plant emissions with the Best Available Control Technology (“BACT”). Continued operation of the plant without a PSD permit and without BACT is an ongoing violation of the Clean Air Act.

Under 40 C.F.R. § 70.1(b) and Clean Air Act § 504(a), each facility that is subject to Title V permitting requirements must obtain a permit that “assures compliance by the source with all applicable requirements.” Applicable requirements include, among others, the requirement to comply with SIP requirements and the requirement to obtain a preconstruction permit that complies with applicable preconstruction review requirements under the Clean Air Act, U.S. EPA regulations, and state implementation plans (“SIPs”). See 40 C.F.R. § 70.2. If a facility is in violation of an applicable requirement at the time that it receives an operating permit, the facility’s permit must include a compliance schedule. See 40 C.F.R. § 70.5(c)(8)(iii)(C). The compliance schedule must contain “an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance.” See 40 C.F.R. § 70.5(c)(8)(iii)(C). Thus, if a power plant is in violation of PSD or SIP requirements, the plant’s operating permit must include an enforceable compliance schedule designed to bring the plant into compliance with those requirements. The plant is then bound to comply with that schedule or risk becoming the target of an enforcement action for violating the terms of its permit. (This violation would be in addition to the original violation resulting from the plant’s failure to obtain a PSD permit). Such an enforcement action could be brought by the permitting authority (usually the state or local environmental agency), U.S. EPA, or the public.

Since DEC has already determined that the Huntley Steam Generating Station is operating in violation of PSD and SIP requirements, the plant’s Title V permit must include a compliance schedule designed to bring the plant into prompt compliance with these requirements. DEC’s position that the Part 70 compliance schedule requirement “is intended for a facility that wishes to be proactive” (See DEC Responsiveness Summary, p. 1) is absurd. Federal regulations are clear that a Title V permit must include “a schedule of compliance for sources that are not in compliance with all applicable

requirements at the time of permit issuance.” 40 CFR § 70.5 (c)(8).² It is DEC’s responsibility to determine whether a facility is in violation of an applicable requirement at the time that the facility receives a Title V permit. If DEC determines that a facility is in violation of an applicable requirement, DEC must include a compliance schedule in the facility’s Title V permit.

DEC’s argument that including a compliance schedule in the proposed permit would “override the proper enforcement settlement negotiating process” or “eliminate the source’s right to contest the NOV” is also without merit.

First, a Title V compliance schedule does not override an enforcement proceeding. Rather, “[a]ny such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.” 40 C.F.R. § 70.5(c)(8)(iii)(C). An enforcement proceeding may be commenced regardless of whether a facility is in compliance with or subject to a Title V compliance schedule. There is no reason why DEC cannot place a compliance schedule in the Huntley Plant’s Title V permit and still proceed with the enforcement action.

Second, the “enforcement settlement negotiating process” in which DEC is engaging is apparently not working, since opacity violations at the Huntley Plant continue unabated more than four years after DEC issued the first opacity NOV to the plant. Similarly, it appears that settlement negotiations over the plant’s PSD violations are floundering. It is under these circumstances that a Title V compliance schedule is needed the most. In the absence of a Title V compliance schedule, the Huntley Plant will continue polluting the air illegally while plant owners argue with DEC about how to settle the enforcement action. If a compliance schedule is included in the plant’s Title V permit, the plant must immediately begin taking steps to bring the plant into compliance with air quality requirements. The fact that the plant is subject to a compliance schedule does not mean that the plant can no longer contest the NOV.

The key distinction between a compliance schedule and an enforcement action is that while an enforcement action is based on a facility’s past violations, a Title V compliance schedule is meant to avoid future violations. Certainly, a facility has a right to contest an enforcement action brought by DEC for past violations. When DEC decides whether to grant the facility a permit for future operations, however, DEC is charged with responsibility for issuing a permit that assures that the facility will operate in compliance with all applicable requirements. If DEC believes that a facility will be in violation of a requirement at the time that the permit is issued, DEC has both the authority and the legal obligation to place that facility on a compliance schedule. If the facility believes that the compliance schedule is unjustified, it can challenge its permit. If the facility chooses to continue operating while it challenges the permit, it runs the risk that the permit will be upheld and the facility will be charged with violations of both the underlying applicable requirement AND the compliance schedule in the permit.³

² 40 C.F.R. § 70.6(c)(3) provides that a Title V permit must include “[a] schedule of compliance consistent with § 70.5(c)(8).

³ It is possible that a plant could successfully defend itself against an enforcement action but lose its challenge to a Title V compliance schedule based on the same compliance issue. First, the government’s burden of proof will likely

A Title V compliance schedule is quite useful in cases where it is clear that a facility is in violation of an applicable requirement, but the parties to an enforcement action are unable to agree on the monetary penalty. There is no reason why people must continue to breathe dirty air while settlement negotiations proceed. Title V requires that a facility begin the process of achieving compliance even while the “enforcement settlement negotiating process” plays out. In the case of the Huntley Plant, it cannot be disputed that the plant is in ongoing violation of the opacity standard. It is likely that there is dispute over exactly how many violations occurred, whether they were avoidable, and the appropriate penalty for each violation. Regardless of how these issues are resolved, it is clear that the plant must take additional steps to control opacity. DEC must include a compliance schedule in the Huntley Plant permit that is designed to bring the plant into full compliance within a reasonable time frame. Negotiations over the amount of the penalty for past violations can continue after the Title V permit is issued.

A Title V compliance schedule is also quite useful in moving the “enforcement settlement negotiation process” forward under circumstances where the facility is otherwise inclined to drag the process out indefinitely. For example, Huntley Plant owners probably have little incentive to quickly settle the PSD NOV. The longer the plant operates without expensive pollution controls, the more profitable the plant will be. If the plant is made subject to a compliance schedule, however, plant owners have less of an incentive to delay resolution of an NOV. As mentioned above, the facility could be found in violation of not just the underlying applicable requirement, but also in violation of the compliance schedule. The facility will have more of a financial interest in settling the issue quickly if it is subject to a compliance schedule. Moreover, as far as the public interest is concerned, incorporation of a compliance schedule in a Title V permit ensures that ongoing non-compliance at a plant is addressed promptly. Due to political considerations, a state government may not be interested in taking a polluter to court. If the polluter is uncooperative, violations may continue for years on end while the state environmental agency cajoles and threatens the violator but never files a lawsuit. A Title V compliance schedule puts a stop to this delay in bringing a plant into compliance.

DEC apparently only intends to include a compliance schedule in a Title V permit if (1) the facility proposes inclusion of such a schedule, or (2) the facility is already subject to an administrative order or consent decree. 40 C.F.R. Part 70 does not support such an interpretation of the compliance schedule requirement. Under 40 C.F.R. § 70.5(c)(8)(iii)(C), a Title V compliance schedule “shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject.” By stating that the compliance schedule must be at least as stringent as “any” existing consent decree or administrative order, U.S. EPA indicated that a facility can be subject to a Title V compliance schedule even if the facility is not subject to a consent decree or administrative order. If U.S. EPA intended for a permit to include a compliance schedule only if the applicant is also subject to a consent decree or administrative order, it could have said so quite easily.

be less in defending against a challenge to a permit than it would be in an enforcement action. Second, an enforcement action can be won or lost based on a wide variety of legal arguments, many of which have little to do with whether the plant is actually guilty of a violation. The defenses that a plant might raise to contest an enforcement action may not suffice to challenge the incorporation of a compliance schedule in its Title V permit.

The U.S. EPA Administrator has already objected to at least one proposed Title V permit due to the fact that the permit lacked a compliance schedule even though the facility was subject to an ongoing enforcement action. According to U.S. EPA's objection to the permit proposed for Gallatin Steel Company in Warsaw, Kentucky:

The EPA filed a civil judicial complaint against the Gallatin Steel Company in February 1999 for prior Clean Air Act violations and anticipates amending that complaint to include violations cited in a January 27, 2000 Notice of Violation (NOV). Therefore, the permit must include a schedule of compliance in accordance with 40 C.F.R. 70.6(c)(3). In addition, EPA and Gallatin have been engaged in settlement negotiations. If the permit is issued prior to completion of these negotiations, any compliance schedule included may have to be revised.

U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Gallatin Steel Company, Permit No. V-99-003, under cover of letter from Winston A. Smith, EPA Region 4, to John E. Hornback, Kentucky DEP, dated August 7, 2000 (Attached as **Exhibit 3**).

As U.S. EPA stated in its objection to the Gallatin Steel permit, a facility that is operating in violation of an applicable requirement must be made subject to a compliance schedule even if a related enforcement action remains unresolved as of the date of permit issuance. No such schedule is included in the proposed permit for the Huntley Plant, despite DEC's clear determination that the plant is currently operating in violation of PSD and opacity requirements. Since the lack of a compliance schedule under these circumstances is a violation of 40 C.F.R. Part 70, the U.S. EPA Administrator must object to this proposed permit.

II. DEC Violated the Public Participation Requirements of Clean Air Act § 502(b)(6) and 40 CFR § 70.7(h) by Inappropriately Denying NYPIRG's Request for a Public Hearing

Under 40 CFR § 70.7(h), "all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." According to the public notice announcing the start of the public review period on the draft permit for the Huntley Steam Generating Station, "[t]he Department may also schedule a public hearing based upon an evaluation of the nature and scope of any written objections raised." Environmental Notice Bulletin, April 25, 2001. NYPIRG requested a public hearing in written comments submitted to DEC during the applicable public comment period. DEC denied NYPIRG's request for a public hearing, stating simply that "[t]his Department has determined that a public hearing on the proposed permit is not warranted." Cover letter to DEC Responsiveness Summary, Huntley Steam Generating Station, dated September 11, 2001.

NYPIRG submitted 30 pages of relevant comments to DEC on the draft permit. NYPIRG requested a hearing because it has members who reside and attend school in the vicinity of the plant and are affected by air pollution caused by the plant. Apparently, NYPIRG's detailed comments were

insufficient in their “nature” or “scope” to qualify for a public hearing. It is difficult to imagine what the “nature” and “scope” of NYPIRG’s comments need to be in order to qualify for a public hearing.

DEC appears to believe that the public is provided with an “opportunity” for a public hearing so long as the public has the opportunity to request a hearing and be denied. NYPIRG disagrees. Instead, NYPIRG believes that Congress intended for the public to have a real opportunity to participate in Title V permitting by attending a public hearing on a draft permit. Nothing in the Clean Air Act or 40 CFR Part 70 suggests that a permitting authority has discretion to refuse to hold a public hearing when one is requested. Even if DEC retained such discretion, DEC could not exercise its discretion in an arbitrary and capricious manner. Here, DEC’s decision was obviously arbitrary and capricious in that the agency failed to provide any justification for its refusal to hold a public hearing.

DEC’s refusal to hold a public hearing on the draft permit for the Huntley Steam Generating Station is a violation of the public participation requirements of Clean Air Act § 502(b)(6) and 40 CFR § 70.7(h). The Administrator must object to this proposed permit and direct DEC to hold a public hearing in accordance with federal regulations.

III. The Administrator Must Object to the Proposed Permit Because it is Based on an Inadequate Permit Application

Huntley Power LLC’s application for a Title V permit for the Huntley Steam Generating Station must be denied because Huntley Power LLC did not submit a complete permit application in accordance with the requirements of CAA § 114(a)(3)(C), 40 CFR §70.5(c), and 6 NYCRR § 201-6.3(d).

First, Huntley Power LLC’s permit application lacks an initial compliance certification. Huntley Power LLC is legally required to submit an initial compliance certification that includes:

- (1) a statement certifying that the applicant’s facility is currently in compliance with all applicable requirements (except for emission units that the applicant admits are out of compliance) as required by Clean Air Act § 114(a)(3)(C), 40 CFR §70.5(c)(9)(i), and 6 NYCRR § 201-6.3(d)(10)(i);
- (2) a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based as required by Clean Air Act §114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201-6.3(d)(10)(ii).

The initial compliance certification is one of the most important components of a Title V permit application. This is because the initial compliance certification indicates whether the permit applicant is currently in compliance with applicable requirements.

Because Huntley Power LLC failed to submit an initial compliance certification, neither government regulators nor the public can truly determine whether the Huntley Steam Generating Station is currently in compliance with every applicable requirement.

In the preamble to the final 40 CFR part 70 rulemaking, U.S. EPA emphasized the importance of the initial compliance certification, stating that:

[I]n § 70.5(c)(9), every application for a permit must contain a certification of the source's compliance status with all applicable requirements, including any applicable enhanced monitoring and compliance certification requirements promulgated pursuant to section 114 and 504(b) of the Act. This certification must indicate the methods used by the source to determine compliance. This requirement is critical because the content of the compliance plan and the schedule of compliance required under § 70.5(a)(8) is dependent on the source's compliance status at the time of permit issuance.

57 FR 32250, 32274 (July 21, 1992). A permit that is developed in ignorance of a facility's current compliance status cannot possibly assure compliance with applicable requirements as mandated by 40 CFR § 70.1(b) and § 70.6(a)(1).

In addition to omitting an initial compliance certification, Huntley Power LLC's permit application lacks certain information required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4), including:

- (1) a description of all applicable requirements that apply to the facility, and
- (2) a description of or reference to any applicable test method for determining compliance with each applicable requirement.

The omission of this information makes it significantly more difficult for a member of the public to determine whether a draft permit includes all applicable requirements. For example, an existing facility that is subject to major New Source Review ("NSR") requirements should possess a pre-construction permit issued pursuant to 6 NYCRR Part 201. Minor NSR permits, Title V permits, and state-only permits are also issued pursuant to Part 201. In the Title V permit application, a facility that is subject to any type of pre-existing permit simply cites to 6 NYCRR Part 201. Because DEC does not require the applicant to describe each underlying requirement, it is virtually impossible to identify existing NSR requirements that must be incorporated into the applicant's Title V permit. Without clear documentation in the permit application of the requirements of pre-existing permits, it is difficult for members of the public to ascertain when permit requirements have been erroneously left out of a Title V permit.

The lack of information in the permit application also makes it far more difficult for the public to evaluate the adequacy of monitoring included in a draft permit, since the public permit reviewer must investigate far beyond the permit application to identify applicable test methods.

On April 13, 1999, NYPIRG petitioned the U.S. EPA Administrator, requesting a determination pursuant to 40 CFR § 70.10(b)(1) that DEC is inadequately administering the Title V program because the agency relies upon a legally deficient standard permit application form. The petition is still pending. Because Huntley Power LLC relied upon this legally deficient Title V permit application form, the legal arguments made in the petition are relevant to this permit proceeding. Thus, the entire petition is incorporated by reference into this petition and is attached at **Exhibit 4**.

The Administrator must object to the proposed permit for the Huntley Steam Generating Station because the proposed permit is based on a legally deficiency permit application and therefore does not comply with 40 CFR Part 70.

IV. The Administrator Must Object to the Proposed Permit Because it Distorts the Annual Compliance Certification Requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5)

Under 6 NYCRR § 201-6.5(e), a permittee must “certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices,” at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirements included in this proposed permit (Condition 26) do not require the permittee to certify compliance with all permit conditions. Rather, the proposed permit only requires that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” DEC then proceeds to identify certain conditions in the draft permit as “Compliance Certification” conditions. Requirements that are labeled “Compliance Certification” are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. The permit conditions that lack monitoring (often a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal law. The permittee must certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

The annual compliance certification requirement is the most important aspect of the Title V program. The Administrator must object to any permit that fails to require the permittee to certify compliance (or noncompliance) with all permit conditions on at least an annual basis.

V. The Administrator Must Object to the Proposed Permit Because it Does Not Require Prompt Reporting of All Deviations From Permit Requirements as Mandated by 40 CFR § 70.6(a)(3)(iii)(B)

The Administrator must object to this proposed permit because it does not require the permittee to submit prompt reports of any deviations from permit requirements as mandated under 40 CFR § 70.6(a)(3)(iii)(B). Currently, no prompt reporting condition is included in the proposed permit.

With respect to the prompt reporting requirement, DEC may either (1) include a general

condition that defines what constitutes “prompt” under all possible circumstances, or (2) develop facility-specific conditions that define what constitutes “prompt” for each individual permit requirement. While Part 70 gives DEC discretion over how to define “prompt,” the definition that DEC selects must be reasonable. U.S. EPA has already issued statements in dozens of Federal Register notices setting out what it believes to be a reasonable definition of “prompt.” For example, when proposing interim approval of Arizona’s Title V program U.S. EPA stated:

The EPA believes that prompt should generally be defined as requiring reporting within two to ten days of the deviation. Two to ten days is sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems. For sources with a low level of excess emissions, a longer time period may be acceptable. However, prompt reporting must be more frequent than the semiannual reporting requirement, given this is a distinct reporting obligation under Sec. 70.6(a)(3)(iii)(A).

60 Fed. Reg. 36083 (July 13, 1995). The proposed permit for the Huntley Steam Generating Station fails to specify either a general prompt reporting requirement or requirement-specific prompt reporting requirements. The Administrator must require DEC to include prompt reporting requirements in the permit for the Huntley Steam Generating Station that that are consistent with U.S. EPA’s past interpretations of what qualifies as “prompt.”

In addition to requiring DEC to include a prompt reporting requirement in this proposed permit, U.S. EPA must require that these reports be made in writing. Under 40 CFR § 70.5(d), “[a]ny application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness.” U.S. EPA’s White Paper #1 interprets this provision of Part 70 as requiring “responsible officials to certify monitoring reports, which must be submitted every 6 months, and ‘prompt’ reports of any deviations from permit requirements whenever they occur.” U.S. EPA, *White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995) at 24. A deviation report that is submitted orally rather than in writing cannot be “certified” by a responsible official as required by Part 70.

In response to NYPIRG comments on the draft permit, DEC stated that:

The condition for 201-1.4 clearly states that deviations from permit requirements are to be reported promptly (as prescribed under 6 NYCRR Subpart 201-1.4.). It includes all deviations without distinction to avoidable or unavoidable, according to the reporting requirements specified in 6 NYCRR Subpart 201-1.4, which, in turn, requires a communication within 2 days and written report within 30 days.

DEC Responsiveness Summary, Huntley Steam Generating Station, September 10, 2001. DEC’s response misinterprets the law. First, 6 NYCRR § 201-1.4 applies only under circumstances where a facility wished for the DEC commissioner to excuse an emission exceedance as “unavoidable.” By contrast, the prompt reporting requirement under 40 CFR § 70.6(a)(3)(iii)(B) applies to all violations,

regardless of whether they are avoidable. Second, while DEC claims that 6 NYCRR § 201-1.4 requires a “written report within 30 days,” this is clearly untrue. Rather, § 201-1.4 only requires a written report “when requested in writing by the commissioner’s representative.” Clearly, 6 NYCRR § 201-1.4 does not fulfill the prompt reporting requirement under federal Title V regulations.

The Administrator must object to this proposed permit and order DEC to require Huntley Power LLC to submit prompt written reports of deviations from permit conditions. “Prompt” must be defined based on “the degree and type of deviation likely to occur and the applicable requirements,” not based on whether the permittee wishes for the violation to be excused. See 40 CFR § 70.6(a)(3)(iii)(B).

VI. The Administrator Must Object to the Proposed Permit Because its Startup/Shutdown, Malfunction, Maintenance, and Upset Provision Violates 40 CFR Part 70

Condition 5 in this proposed permit states in part that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable.” The condition goes on to describe the actions and recordkeeping and reporting requirements that the facility must adhere to in order for the Commissioner to excuse a violation as unavoidable. In this petition, we refer to this condition as the “excuse provision.” As detailed below, the excuse provision included in this proposed permit violates 40 CFR Part 70 in a number of ways.

A. The Excuse Provision Included in the Proposed Permit is Not the Excuse Provision that is in New York’s SIP

The excuse provision included in this proposed permit reflects the requirements of a New York State regulation, 6 NYCRR § 201-1.4. This regulation states in part that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable.” The version of Part 201 approved by U.S. EPA as part of New York’s SIP contains the same language, except that it does not cover violations that occur during “shutdown” or during “upsets.” See 6 NYCRR § 201.5(e), state effective date 4/4/93, U.S. EPA approval date 12/23/97⁴ (stating that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up conditions and malfunctions may be excused if such violations are unavoidable.”). Since the SIP rule is the federally enforceable requirement, DEC must delete the words “shutdown” and “upsets” from the proposed permit.

⁴ 40 CFR 52.1679 (2001).

B. The Draft Permit Must Describe What Constitutes “Reasonably Available Control Technology” During Conditions that Are Covered by the Excuse Provision

The excuse provision included in the draft permit and in New York’s SIP mandates that “[r]easonably available control technology, as determined by the commissioner, shall be applied during any maintenance, start-up, or malfunction condition.” See 6 NYCRR § 201.5(e); see also 6 NYCRR § 201-1.4. Under 40 CFR § 70.6(a)(1), each Title V permit must include “operational requirements and limitations that assure compliance with all applicable requirements.” Since the requirement to apply RACT during maintenance, startup, or malfunction conditions is included in New York’s SIP, it is an applicable requirement. To assure each facility’s compliance with this requirement, DEC must include terms and conditions in each permit that clarify what constitutes RACT for this facility during maintenance, startup, and malfunction conditions. The final permit issued for this facility must also include monitoring, recordkeeping, and reporting requirements that will assure that RACT is employed during maintenance, startup, and malfunction conditions. See 40 CFR § 70.6(c)(1) (requiring each Title V permit to include “monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit”). In situations where RACT is no different during these periods from what is required under other operating conditions, DEC must explain and justify this determination in the statement of basis. The permit must be clear that compliance with the requirement to employ RACT during startup, maintenance, and malfunction conditions does not excuse the facility from compliance with applicable emission limitations.

C. The Excuse Provision Does Not Assure the Facility’s Compliance Because it is Contains Vague, Undefined Terms that are Not Enforceable as a Practical Matter

New York’s SIP-approved excuse provision gives the Commissioner the authority to excuse a violation of an applicable requirement during startup, maintenance, and malfunction conditions if they qualify as “unavoidable.” The standard by which the Commissioner is to determine whether a violation is unavoidable is not included in either the regulation or the draft permit. Without a clear standard to guide the Commissioner’s determination as to whether a violation is unavoidable, there is no basis on which a member of the public or U.S. EPA may challenge a Commissioner’s decision to excuse a violation. Since New York’s SIP provision allows the Commissioner to entirely excuse a violation, rather than simply exercising her discretion by not bringing an enforcement action, the lack of a practicably enforceable standard by which the excuse provision will be applied seriously undermines the enforceability of this permit.⁵ The permit must explicitly define the circumstances under which a facility can apply for a violation to be excused.

⁵ New York’s excuse provision actually goes farther than those provisions adopted in other states that give facilities an “affirmative defense” against enforcement actions resulting from unavoidable violations. This is because under an affirmative defense provision, the facility is required to maintain clear documentation that the excuse provision applies, and bears the burden of proof in establishing that a violation was unavoidable. Here, there are no standards governing when a violation can be deemed unavoidable. Also, in all likelihood, once the Commissioner agrees to excuse a violation, EPA and members of the public are not able to bring their own enforcement action because the violation no longer exists.

Though New York's SIP-approved excuse provision lacks an explicit definition as to what qualifies for an excuse, the Commissioner must exercise her discretion in accordance with Clean Air Act requirements. In other words, the Commissioner must define "unavoidable" as it is defined by EPA in its Startup/Shutdown/Malfunction Policy, as set forth in EPA's 9/28/82, 2/15/83, and 9/20/99 memorandums. In order to clarify the standard that applies to the Commissioner's determinations regarding whether a violation is unavoidable and therefore assure the public that permitted facilities are not allowed to operate in violation of applicable requirements, the permit must be modified to state that the Commissioner shall determine whether a violation is unavoidable based on the criteria in U.S. EPA's memorandum dated September 20, 1999 entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." In addition, the permit must include specific criteria regarding when this permittee's emission exceedances may qualify for an excuse. Specifically, what constitutes "startup," "malfunction," and "maintenance" must be explicitly defined in the permit. This clarifying language is necessary in order to assure each facility's compliance with all applicable requirements under 40 CFR § 70.6(a)(1).

D. The Proposed Permit Fails to Require Prompt Written Reports of Deviations From Permit Requirements Due to Startup, Shutdown, Malfunction and Maintenance as Required Under 40 CFR § 70.6(a)(3)(iii)(B).

The Administrator must object to this proposed permit because it does not require the facility to submit timely written reports of any deviation from permit requirements in accordance with 40 CFR § 70.6(a)(3)(iii)(B). 40 CFR § 70.6(a)(3)(iii)(B) demands:

Prompt reporting of deviations from permit requirements, *including those attributable to upset conditions as defined in the permit*, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.

(Emphasis added). As currently written, the permit violates the above requirement because the permittee is allowed to submit reports of "unavoidable" violations by telephone rather than in writing. Thus, a violation can be excused without creating a paper trail that would allow U.S. EPA and the public to monitor whether the facility is abusing the excuse provision by improperly claiming that violations qualify to be excused. Since a primary purpose of the Title V program is to allow the public to determine whether polluters are complying with all applicable requirements on an ongoing basis, reports of deviations from permit requirements must be in writing so that they can be reviewed by the public. An excuse provision that keeps the public ignorant of violations cannot possibly satisfy the Part 70 mandate that each permit assure compliance with applicable requirements.

U.S. EPA must require DEC to add the following reporting obligations to the proposed permit:

- (1) *Violations due to Startup, Shutdown and Maintenance.*⁶ The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (Proposed permit condition 8 only requires reports of violations due to startup, shutdown, or maintenance “when requested to do so in writing”).⁷ The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report explaining why the violation was unavoidable. (The draft permit does not require submittal of a report “if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements”). Finally, a deadline for submission of these reports must be included in the permit.
- (2) *Violations due to Malfunction.* The facility must provide both telephone and written notification and to DEC within two working days of an excess emission that is allegedly unavoidable due to “malfunction.” (Proposed permit condition 8 only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement.)⁸ The facility must submit a detailed written report within thirty days after the facility exceeds emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The proposed permit only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”).⁹

E. The Proposed Permit Fails to Clarify That a Violation of a Federal Requirement Cannot be Excused Unless the Underlying Federal Requirement Specifically Provides for an Excuse.

The proposed permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation “unavoidable,” regardless of whether an “unavoidable” defense is allowed under the requirement that is violated. U.S. EPA was concerned about this issue when it granted interim approval to New York’s Title V program. In the Federal Register notice granting program approval, 61 Fed. Reg. 57589 (1996), U.S. EPA noted that before New York’s program can receive full approval, 6 NYCRR §201-6.5(c)(3)(ii) must be revised “to clarify that the discretion to excuse a violation under 6 NYCRR Part 201-1.4 will not extend to federal requirements,

⁶ NYPIRG interprets U.S. EPA’s 1999 memorandum as prohibiting excuses due to maintenance.

⁷ See Condition 5(a) in the draft permit.

⁸ See Condition 5(b) in the draft permit.

⁹ Id.

unless the specific federal requirement provides for affirmative defenses during start-ups, shutdowns, malfunctions, or upsets.” 61 Fed. Reg. at 57592. Though New York incorporated clarifying language into state regulations, the proposed permit lacks this language. U.S. EPA must require DEC to make it clear that a violation of a federal requirement that does not provide for an affirmative defense will not be excused.

VII. The Administrator Must Object to the Proposed Permit Because it Lacks Federally Enforceable Conditions that Govern the Procedures for Permit Renewal

Currently, the only condition governing permit renewal is condition 3 under “DEC General Conditions.” Since this condition is not in the “Federally Enforceable Conditions” section of the Title V permit but is instead included in an attachment that does not appear to create federally enforceable obligations, this condition is insufficient to satisfy Part 70 requirements. Under 40 C.F.R. § 70.7(c)(ii), “Permit expiration terminates the source’s right to operate unless a timely and complete renewal application has been submitted consistent with paragraph (b) of this section and § 70.5(a)(1)(iii) of this part.” 40 C.F.R. § 70.5(a) provides that “For each Part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this section.” § 70.5(a)(1)(iii) provides that “For purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time as may be approved by the Administrator that ensures that the term of the permit will not expire before the permit is renewed.” Thus, the requirement that a facility submit a timely permit application is a federal requirement.

A Title V permit may not be issued unless “the conditions of the permit provide for compliance with all applicable requirements and requirements of this part.” 40 C.F.R. § 70.7(a)(iv). Thus, this Title V permit violates 40 CFR Part 70 because it lacks the federally enforceable requirement that the facility apply for a renewal permit within six months of permit expiration.

IX. The Administrator Must Object to the Proposed Permit Because it Fails to Include Federally Enforceable Emission Limits Established Under Pre-Existing Permits

The Huntley Steam Generating Station is subject to a number of preconstruction/operating permits that contain short term and annual limits on the plant’s emission of regulated air contaminants.¹⁰ These permits were issued pursuant to 6 NYCRR Part 201, which has been part of New York’s SIP for decades. Thus, the emission limits are applicable requirements that must be included in the Huntley Plant’s Title V permit. Nevertheless, these limits do not appear in the proposed permit. DEC gave no notice to the public that these limits were being eliminated. Nor did DEC evaluate the air quality impact of eliminating these limits or assess whether the removal of these limits triggers applicability of the Clean Air Act Prevention of Significant Deterioration (“PSD”) program or Nonattainment New Source Review (“NNSR”) program.

¹⁰ Though the permits indicate that they expired several years ago, current 6 NYCRR Part 201 extends the expiration date for all pre-existing certificates to operate until the date that a facility receives a Title V permit.

Pre-existing permits issued to the Huntley Plant are attached to this petition as **Exhibit 5**. Permit I.D. A1464001700000020 applies to Boiler units 67 and 68 and contains the following emission limits:

Particulates: 0.165 lbs/MMBtu; 18.9×10^9 lbs/yr
Sulfur dioxide: 2.8 lbs/MMBtu; 63×10^6 lbs/yr
Carbon monoxide: 0.08 lbs/MMBtu; 18×10^5 lbs/yr
Nitrogen oxides: 0.42 lbs/MMBtu; 9.4×10^6 lbs/yr
Non-methane VOC: 0.003 lbs/MMBtu; 6.8×10^4 lbs/yr

Permit I.D. A146400170000003I applies to three welding booths and three welding tables which are connected to one common stack and one exhaust fan. Particulate emissions from this unit are limited to 100 lbs/year. A short term limit also applies to this unit, but the units of measurement are unclear in the underlying permit. Permit I.D. 146400170000004I applies to the wastewater treatment plant lime silo. Particulate emissions are limited to 1.6 lbs/yr. A short term limit of 0.5 also applies, but the unit of measurement is unclear from the underlying permit.

NYPIRG suspects that an underlying operating permit also exists for Boilers 63-66, DEC did not provide such a permit in response to our state Freedom of Information Law request. Instead, it appears that DEC provided NYPIRG with copies of the facility's applications for operating permits as well as a permit for the boilers that expired in 1982. Since the rule in New York's State Implementation Plan requires all facilities to possess a valid certificate to operate at all times, NYPIRG assumes that the facility received several renewal operating permits since 1982.

Apparently, DEC has a general policy of omitting terms and conditions of pre-existing permits from a facility's Title V permit unless those terms and conditions were explicitly mandated by an applicable rule. Thus, NMPC explained in its Title V permit application that:

It is NMPC's understanding that DEC will approve permit terms and conditions based upon specific applicable rules cited in the completed Title V application. For this reason, the application includes only those permit conditions from previous operating permits which have been deemed necessary to comply with specific applicable requirements. NMPC requests that other permit conditions from previous operating permits be removed because they have no underlying applicable requirement.

Title V Application Supporting Narrative, Niagara Mohawk Power Corporation, C.R. Huntley Steam Station, p. 3 (Relevant pages attached as **Exhibit 6**).

DEC and NMPC are incorrect in believing that terms and conditions from SIP-approved permits may be omitted from a facility's Title V permit. Regardless of whether an emission limit in a pre-existing permit issued pursuant to a SIP rule is specifically mandate by an applicable regulation, that emission limit constitutes a federally enforceable requirement. U.S. EPA is already on record requiring the terms and conditions of permit issued pursuant to SIP regulations to be included in Title V permits.

In a letter to Robert Hodanbosi of STAPPA/ALAPCO, U.S. EPA stated:

Title V and the part 70 regulations are designed to incorporate all Federal applicable requirements for a source into a single title V operating permit. To fulfill this charge, it is important that all Federal regulations applicable to the source such as our national emission standards for hazardous air pollutants, new source performance standards, and the applicable requirements of SIP's and permits issued under SIP-approved permit programs, are carried over into a title V permit. All provisions contained in an EPA-approved SIP and all terms and conditions in SIP-approved permits are already federally enforceable (see 40 CFR § 52.23). The enactment of title V did not change this. To the contrary, all such terms and conditions are also federally enforceable "applicable requirements" that must be incorporated into the Federal side of a title V permit [see CAA § 504(a); 40 CFR § 70.2]. Thus, if a State does not want a SIP provision or SIP-approved permit condition to be listed on the Federal side of a title V permit, it must take appropriate steps in accordance with title I substantive and procedural requirements to delete those conditions from its SIP or SIP-approved permit. If there is not such an approved deletion and a SIP provision or condition in a SIP-approved permit is not carried over to the title V permit, then that permit would be subject to an objection by EPA.

Letter from John Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO, dated May 20, 1999. The relevant portions of this letter are attached to this petition as **Exhibit 7**.

The emission limits in the underlying permits issued to the Huntley Plant are expressed as "permissible" emission rates. "Permissible emission rate" is defined in 6 NYCRR § 200.1(bj) as "[t]he maximum rate at which air contaminants are allowed to be emitted to the outdoor atmosphere. This includes . . . (3) any emission limitation specified by the commissioner as a condition of a permit to construct and/or certificate to operate." Similarly, the SIP version of 6 NYCRR § 201 states that "a certificate to operate will cease to be valid under the following circumstances . . . (3) the permissible emission rate of the air contamination source changes." 6 NYCRR § 201.5(d)(3) (effective 4/4/93). Thus, the SIP makes it clear that the "permissible emission rate" included in SIP-based Part 201 permits is an enforceable requirement. The permissible emission rates included in the Part 201 permits previously issued to this facility must therefore be included in this Title V permit.

The EPA Administrator must object to the proposed Title V permit for the Huntley Steam Generating Station based on the fact that the permit does not include all requirements from the plant's pre-existing SIP-approved permits.

X. The Administrator Must Object to the Proposed Permit Because it Lacks Monitoring that is Sufficient to Assure the Facility's Compliance with all Applicable Requirements

A basic tenet of Title V permit development is that the permit must require sufficient monitoring and recordkeeping to provide a reasonable assurance that the permitted facility is in compliance with legal requirements. As U.S. EPA explained in its recent response to a Title V permit petition filed by the Wyoming Outdoor Council:

[W]here the applicable requirement does not require any periodic testing or monitoring, section 70.6(c)(1)'s requirement that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit 'periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.' See 40 C.F.R. § 70.6(a)(3)(I)(B). Where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, however, as noted above the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such cases the separate regulatory standard at § 70.6(c)(1) applies instead. By its terms, § 70.6(c)(1) - like the statutory provisions it implements - calls for sufficiency reviews of periodic testing and monitoring in applicable requirements, and enhancement of that testing or monitoring through the permit necessary to be sufficient to assure compliance with the terms and conditions of the permit.

U.S. EPA, *In re PacifiCorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Order Partially Granting and Partially Denying Petition for Objection to Permits*, November 16, 2000, pp. 18-19.

In addition to containing adequate monitoring, each permit condition must be "enforceable as a practical matter" in order to assure the facility's compliance with applicable requirements. To be enforceable as a practical matter, a condition must (1) provide a clear explanation of how the actual limitation or requirement applies to the facility; and (2) make it possible to determine whether the facility is complying with the condition.

The following analysis of specific proposed permit conditions identifies requirements for which monitoring is either absent or insufficient and permit conditions that are not practicably enforceable.

A. The Proposed Permit Because Fails to Assure the Plant's Ongoing Compliance with Particulate Matter Emission Limits That Apply to the Boilers

The Huntley Steam Generating Station includes 6 coal-fired boilers. Particulate emissions from all of the boilers are controlled by cold side electrostatic precipitators (ESP). According to the proposed Title V permit, the boilers are subject to a particulate matter emission limit of 0.17 lbs/mmBtu under 6 NYCRR § 227-1.2(a)(4). (See Conditions 58 and 64).

In accordance with 40 CFR § 70.6(a)(3)(i)(B), the permit must contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.¹¹ The proposed permit violates this requirement because it only requires the Huntley Plant to perform one Method 5 test per permit term and it fails to require surrogate monitoring that could assure the plant's ongoing compliance with PM limits between stack tests.

In commenting on the draft permit, NYPIRG stated that the parametric monitoring required under conditions 58 and 64 is insufficient to assure the plant's compliance because the permit fails to establish any sort of indicator range for each parameter that could be used to measure compliance. DEC responded that:

As mentioned above for opacity, which is a surrogate for monitoring particulate matter, conditions 56, 57, 61 and 62 specify monitoring to insure compliance with the particulate and opacity standards. Specific monitoring limits for voltage, current, spark rate is not appropriate. The indicate of a problem is more relative to variations from day to day than a specific reading and this data is available at the plant or upon request. Huntley maintains volumes of manufacturer's specifications and recommended maintenance, as well as maintenance plans developed by the facility. Conditions 56 and 61 summarize the maintenance requirements sufficiently to allow an inspector to make the determination if it is being performed appropriately. Opacity is used as a surrogate for particulate matter monitoring and is continuously monitored and recorded. The 20% standard was developed around data that would correlate to the particular standard for sources of particulates. Knowing this, we can conclude that a stack test once per permit term is sufficient to determine compliance.

DEC Responsiveness Summary, p. 8. DEC's response to our comments is unsatisfactory because the proposed permit fails to establish any link whatsoever between opacity and particulates, or even state that opacity is being used as a surrogate for particulates. For opacity to serve as a surrogate, the permit must identify the opacity level that indicates a possible violation of the PM standard. DEC's assumption that opacity of no greater than 20% correlates with compliance with the particulate matter emission standard is arbitrary because DEC fails to provide any data supporting such a correlation at this plant. It is well known that there is only a rough correlation between opacity and particulates and that the relationship between the two varies significantly from facility to facility. See, e.g., U.S. EPA, Title V Monitoring Technical Reference Document, Section 6.4.2 ("Selection of an appropriate opacity trigger level and frequency of monitoring will be dependent upon the source type and characteristics, and available site-specific information on emission levels, variability of emissions, and the margin of compliance.")

DEC must justify the correlation between opacity and particulate matter emissions with respect to this particular facility. That information must be provided in the statement of basis. Since DEC has made no

¹¹ The underlying applicable requirement does not specify a compliance monitoring method.

effort to justify the adequacy of the particulate matter monitoring included in this permit, the U.S. EPA Administrator must object.

U.S. EPA has objected to numerous proposed permits based on a permitting authority's failure adequately establish the correlation between a monitoring parameter and compliance with the applicable emission limit. For example, U.S. EPA objected to the proposed Title V permit for a plant in Florida based in part upon the lack of correlation between VOC emissions and CO/O₂ emissions where CO/O₂ was being measured as a surrogate for VOCs. In the objection letter, U.S. EPA stated:

[T]he Title V permit does not contain any detailed explanation linking CO/O₂ monitoring to VOC, for the purposes of compliance. To resolve this concern, the permit must require the source to conduct routine VOC monitoring, or a technical demonstration, such as a comparison of historical emission data to emission limits, must be included in the statement of basis explaining why the State has chosen to allow CO monitoring as a surrogate for VOC. A discussion of how carbon monoxide monitoring indicates good combustion, which affects VOC emissions, could be provided along with historical data to support the current monitoring strategy.

U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Southdown, Inc - Brooksville Plant, Hernando County Florida, Permit No. 0530010-002-AV, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Management, June 19, 2000. This objection letter is attached as **Exhibit 8**.

Because of opacity is typically not a very effective indicator of a facility's compliance with a particulate matter limit, many permitting authorities require facilities to monitor parameters related to the electrostatic precipitators (ESPs) as a way of assuring compliance with particulate emission limits between stack tests. As indicated above, DEC refuses to take this approach because "[s]pecific monitoring limits for voltage, current, spark rate is not appropriate." Without indicator ranges, the parameters are useless for assuring the facility's compliance with the PM limits. The U.S. EPA Administrator has already taken the position that parametric monitoring designed to assure a facility's compliance with an applicable requirement must include indicator ranges that have been correlated with emissions. For example, in objecting to the proposed permit for a Kentucky plant, the Administrator explained:

Since several of the emission points are equipped with a control device to control PM emissions, EPA recommends using parametric monitoring to assure that PM emissions are adequately controlled. For example, a parametric range that is representative of the proper operation of the control equipment could be established using source data to develop a correlation between control parameters(s) and PM emissions. The permit must specify the parametric range or procedure used to establish that range, as well as the frequency for re-evaluating the range.

U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Oxy Vinyls, LP, Louisville Kentucky, Permit NO. 212-99-TV, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Arthur Williams, February 1, 2001, (emphasis added). This objection letter is attached as **Exhibit 9**. Similarly, U.S.EPA objected to the proposed Title V permit for Tampa Electric Company's F.J. Gannon Station for, among other things, not including an acceptable performance range for the parameters being monitoring. U.S. EPA stated:

While the permit does include parametric monitoring of emission unit and control equipment operations in the O & M plans for these units . . . the parametric monitoring scheme that has been specified is not adequate. The parameters to be monitored and the frequency of monitoring have been specified in the permit, but the parameters have not been set as enforceable limits. In order to make the parametric monitoring conditions enforceable, a correlation needs to be developed between the control equipment parameter(s) to be monitored and the pollutant emission levels. The source needs to provide an adequate demonstration (historical data, performance test, etc.) to support the approach used. In addition, an acceptable performance range for each parameter that is to be monitored should be established. The range, or the procedure used to establish the parametric ranges that are representative of proper operation of the control equipment, and the frequency for re-evaluating the range should be specified in the permit. Also, the permit should include a condition requiring a performance test to be conducted if an emission unit operates outside of the acceptable range for a specified percentage of normal operating time. The Department should set the appropriate percentage of the operating time that would serve as trigger for this testing requirement.

U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Tampa Electric Company, F.J. Gannon Station, Permit no. 0570040-002-AV, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, September 8, 2000. This objection letter is attached as **Exhibit 10**. See also *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Tampa Electric Company, Big Bend Station, Permit no. 0570039-002-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, September 5, 2000. This objection letter is attached as **Exhibit 11**. See also *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, North County Regional Resource Recovery Facility, Permit no. 0990234-001-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, August 11, 2000. This objection letter is attached as **Exhibit 12**. See also *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Pinellas County Resource Recovery Facility, Permit no. 1030117-002-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, July 20, 2000. This objection letter is attached as **Exhibit 13**.

This proposed permit fails to satisfy the monitoring requirements contained in 40 C.F.R. Part 70 because it does not establish a monitoring regime that is designed to assure the facility's compliance

over the course of the permit term. In addition, DEC failed to provide information in the statement of basis that explains why it believes that the monitoring requirements contained in the permit are adequate to assure compliance. The Administrator must object to this proposed permit and require DEC to (1) establish parametric monitoring to assure compliance with the PM limit, (2) provide data that supports the link between compliance and the parameter(s) being monitored, (3) include a clear and enforceable indicator range in the permit for each parameter, and (4) require the plant to perform regular stack testing to confirm that the plant is operating in compliance with the PM standard so long as it is operating within the specified indicator ranges. The Administrator must require DEC to release the new monitoring conditions for a 30-day public comment period.

B. The Proposed Permit Fails to Assure that the Plant Will Operate in Ongoing Compliance with Emission Limits that Apply to the Coal Unloading and Handling Process

NYPIRG commends DEC for adding the requirements of 40 C.F.R. 60, Subpart Y to the proposed permit. However, NYPIRG is concerned that the language of new permit condition 70 is too vague to assure the plant's ongoing compliance. Specifically, the condition states that spray equipment is to be used to control fugitive emissions, but use of the equipment is "dependent on moisture content of the coal/weather." Similarly, Condition 70 states that "Facility operators must maintain spray equipment in working order and use as necessary." The vague language continues throughout Condition 70. Part 2 states that "dust entrainment minimized by washing down work areas as necessary. Coal chutes shall be maintained at acceptable height levels for operation and minimal dust." To be enforceable as a practical matter, the permit must create mandatory obligations. While NYPIRG does not expect DEC to include every detail regarding exactly what procedures are to be followed at the plant, the permit must include sufficient detail to allow the public to ascertain whether the plant is operating in compliance with applicable requirements. The permit must set some cognizable standard for when each fugitive control procedure must be employed.

NYPIRG is also concerned about loopholes in the opacity monitoring regime. Specifically, if opacity is observed, a method 9 analysis shall be performed "if corrective action does not work or is not an option." Unfortunately, the permit fails to set out a specific time frame by which corrective action must be attempted and a method 9 test is to be performed. Also, Condition 70 fails to specify what kind of detail must be included in records maintained by the facility. Instead, Condition 70 states that "[r]ecords of any observations and corrective action will be maintained on site." To assure compliance, the permit must require the facility to keep a record of each Method 22 observation, indicating the time the reading was taken, who performed the reading, and the results of the reading. If opacity is observed, the permit must require that the facility record the time corrective action was taken and the type of correction that is made. The permit must require the facility to perform follow-up readings that establish that the corrective action was successful. Records must be kept of those readings.

The Administrator must object to this proposed permit because the monitoring conditions that apply to the plant's coal unloading and handling process are inadequate to assure the plant's compliance with applicable requirements.

C. The Proposed Permit is Defective Because it Fails to Assure the Plant's Compliance With Applicable Opacity Limits

1. The proposed permit must include more detailed reporting requirements.

The Administrator must object to this proposed permit because it does not include monitoring, recordkeeping, and reporting requirements that will allow DEC, U.S. EPA, and the public to know when the plant is violating opacity requirements. It is obvious that monitoring and reporting undertaken by Huntley Plant operators in the past was inadequate. In particular, the information provided has been inadequate for the DEC Commissioner to determine whether exceedances were unavoidable and therefore qualify to be excused. For example, in a letter to Thomas Allen, ARG Engineering from Anthony Adamczyk, DEC dated June 8, 1999, we find that "DEC staff advised [Niagara Mohawk] that simply coding startup as the reason for an opacity excursion was not adequate for demonstrating that a violation was unavoidable." The letter continued to say that "without more detailed information regarding opacity at the Albany, Dunkirk and Huntley facilities, [DEC] cannot recommend that the Commissioner excuse opacity exceedances which occur during startup or shutdown as unavoidable."

In addition to lacking sufficient information to determine whether opacity exceedances are unavoidable, DEC has also at times found that it lacked sufficient information to determine whether exceedances had actually occurred. In a notice of violation issued on 8/25/99, DEC told Niagara Mohawk, the former owner of the Huntley Plant:

The COMS summary data contained in these reports indicate that you have operated your stationary combustion installation in such a manner as to exceed the 20% opacity limit. This is a violation of § 227-1.3(a). The number of opacity exceedances is indeterminate because of the inadequate quarterly reporting.

Exhibit 14. In light of the problems that DEC has experienced with the amount of information provided by Huntley Plant operators, the permit must include detailed requirements regarding reporting.

In response to NYPIRG's concerns regarding the inadequacy of reporting requirements in the draft permit, DEC stated:

The lack of reporting that NYPIRG is referring to is for information to determine whether exceedances were unavoidable and therefore qualify to be excused. The Department's position is that all exceedances identified in the quarterly reports are inexcusable. This is as conservative as once can get and is in the best interest of the public. This is an issue that will be addressed in the settlement of the opacity NOV and is a reason why a condition detailing an excusable violation is not included in this permit, as well as a reason why a compliance plan cannot be included in the permit.

DEC Responsiveness Summary, p. 6. DEC's response is unsatisfactory. If enforcement decisions were as simple as DEC wants us to believe, one would assume that it would not take DEC many years to negotiate a settlement, as it has in the case of violations at this plant. In reality, while DEC may start with the assumption that all exceedances identified in the quarterly reports are inexcusable, this assumption may change over the course of negotiations with the plant. As DEC is well aware, a court is likely to evaluate whether a violation should have qualified for an excuse in determining liability and penalties for a violation. Certainly, DEC takes this into account when determining how an NOV should be settled. The ongoing negotiations between the owners of the Huntley Plant and DEC involve a great deal of discussion regarding whether certain violations should be excused. Unless Title V monitoring reports include sufficient information regarding whether a violation was unavoidable, the public's ability to determine whether an enforcement action against the plant would be appropriate is seriously limited. Since the Clean Air Act establishes the public's right to bring a citizen suit when the government fails to take effective enforcement action, the Title V permit must provide the public with sufficient information to perform this oversight role effectively.

2. The requirement that the plant maintain and calibrate the COMS must be identified as a federally enforceable condition.

The Administrator must object to this proposed permit because it fails to include federally enforceable requirements for the maintenance and calibration of the COMS. Instead, this requirement is identified as only enforceable by the state. Since maintenance and calibration of the COMS is necessary to assure the plant's compliance with federally enforceable opacity limits, these requirements must be placed in the federally enforceable section of the permit.

In response to NYPIRG's comments on the draft permit, DEC stated:

The concern for including Part 227-1.4(a) on the federal side of the permit instead of the State side is valid. However, Part 227-1.4(a) is not in the SIP and, as such, is only State enforceable and will remain in the permit as State enforceable. Also note that this permit cites 6 NYCRR Part 227-1.3 on the federal side of the permit for opacity and uses method 9 for determining compliance.

DEC Responsiveness Summary, p. 6. DEC's position that the COMS maintenance and calibration requirement may not be made federally enforceable because it is not contained in the SIP reflects a misunderstanding of the monitoring requirements under 40 C.F.R. Part 70. As discussed above, a Title V permit must include monitoring that is sufficient to assure the plant's compliance with all applicable requirements. Thus, DEC is obligated to add monitoring to a Title V permit under circumstances where the underlying SIP requirement does not specify sufficient monitoring to assure the plant's ongoing compliance. The fact that the COMS maintenance and calibration requirements are contained in a state regulation that has not been incorporated into New York's SIP does not prevent DEC from including COMS maintenance and calibration requirements as federally enforceable requirements in a Title V permit. Only monitoring requirements that are included in the federally enforceable section of the Title V permit can be used to fulfill the Part 70 requirement that monitoring be sufficient to assure ongoing

compliance. Without the COMS maintenance and calibration requirements, this proposed Title V permit does not assure compliance because there is no assurance that the COMS will correctly measure opacity.

The fact that the permit cites 6 NYCRR Part 227-1.3 on the federal side of the permit does not make up for the fact that the COMS maintenance and calibration requirements are not included in this proposed permit as federally-enforceable conditions. DEC is apparently referring to Condition 49 in the proposed permit. Contrary to DEC's assertion, Condition 49 does not require the plant to perform Method 9 readings, but instead specifically explains that a continuous opacity monitor will be used to monitor compliance. Even if Condition 49 did require the plant to perform periodic Method 9 readings, DEC has not provided any justification for why periodic method 9 tests would be sufficient to assure the plant's ongoing compliance with the opacity standard. In light of the plant's extensive history of violating the opacity standard, COMS must be employed to assure compliance and the permit must include a federally enforceable requirement that the COMS be maintained and calibrated on a regular basis.

D. The Administrator Must Object to the Proposed Permit Because It States Emission Limits in a Manner that is Unenforceable as a Practical Matter

Throughout the proposed permit, emission limitations are described in terms of the "upper limit of monitoring." See e.g., Conditions 58, 60, 61, 64, 66. DEC provides no explanation for why the phrase "upper limit of monitoring" is used instead of "emission limit." It is critical that the terms and conditions of a Title V permit be unambiguous. Though NYPIRG has commented to DEC for years about the fact that this phrase is confusing, DEC refuses to make this simple change. The Administrator must object to this permit on the basis that the imprecise language used to describe emission limits makes those limits unenforceable as a practical matter.

XI. The Administrator Must Object to the Proposed Permit Because Compliance Requirements that Pertain to the Ash Silo are Inappropriately Placed in the State-Only Side of the Permit

As explained in the statement of basis accompanying this proposed permit, DEC issued a notice of violation to the Huntley Plant on November 27, 2000 due to the plant's violation of 6 NYCRR § 201-1.8, Reintroduction of collected contaminants to the air. Specifically, the flyash silo was overfilled, causing the pressure valve to open. As a result, the entire neighborhood was coated with ash. In cooperation with DEC, the plant agreed to take a number of steps to assure that such a violation would not recur. In a letter from Michael L. Boesl to Alfred Carlacci dated January 15, 2001, NRG explained:

We are currently installing a Ramsey C-Level Continuous Level Indicator. The C-Level is a micro-processor based, continuous level indicator unit. The unit monitors strain sensors located in the support legs of the Fly Ash Silo, and displays the level of ash in them. An Alarm, with low and high set points, will also be installed in the Unit 67 and 68 Control Room. This installation is scheduled for completion by January 31, 2001.

Exhibit 15. This remedial measure is included in the state enforceable section of this proposed permit. DEC cites to 6 NYCRR § 211.2 as the legal basis for the condition.

The prohibition against reintroduction of collected contaminants into the air is included in New York's SIP and is routinely placed on the federal side of Title V permits. In fact, the requirement appears as Condition 8 in the federally enforceable section of this proposed permit. The remedial measures described by NRG are clearly designed to prevent a future violation of the prohibition against reintroducing collected contaminants into the air. Thus, these remedial measures must be included in the federal section of this permit. The new indicator and alarm will serve to assure the facility's compliance with a federally enforceable requirement. While the reintroduction of collected air contaminants would also qualify as a public nuisance under 6 NYCRR Part 211, this does not justify DEC's decision to place this monitoring requirement in the state-only section of this permit. The Administrator must object to this proposed permit based on the fact that it does not include sufficient monitoring in the federally enforceable section of the permit to assure the plant's compliance with applicable requirements.

XII. The Administrator Must Object to the Proposed Permit Because it Improperly Describes the Annual Compliance Certification Requirement

DEC inadvertently left the compliance certification requirement out of the draft version of this permit. The proposed permit now states that the annual certification is "due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the permit anniversary date, unless another quarter has been acceptable by the Department." This language of this condition creates a number of problems. First, it is possible that a facility would not be required to submit the first compliance certification until after the end of the first annual period following the date of permit issuance. This violates 40 CFR § 70.6. Second, by adding "unless another quarter has been acceptable by the Department," DEC makes it so that this requirement is unenforceable by the public, since it is unclear how the Department will go about revising the date that the certification is due. If the Department can change the due date through an oral conversation with the permittee, a member of the public could never prove that the deadline had not been changed. Also, the phrase "calendar quarter that occurs just prior to the permit anniversary date" is vague, since it is unclear when quarters begin and end, and the permit does not specify whether a quarter "occurs" by beginning or by ending.

Given the importance of the annual compliance certification requirement, it is essential that the deadline for submission of the certification be clear and enforceable. The Administrator must object to this proposed permit because the annual compliance certification is unenforceable as a practical matter.

Conclusion

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the proposed Title V permit for the Huntley Steam Generating Station

Respectfully submitted,

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