

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
NORTH SHORE TOWERS	)	
APARTMENTS, INC.	)	ORDER RESPONDING TO
	)	PETITIONER'S REQUEST THAT THE
	)	ADMINISTRATOR OBJECT TO
Permit ID: 2-6307-00339/00002	)	ISSUANCE OF A STATE OPERATING
Facility DEC ID: 2630700339	)	PERMIT
Issued by the New York State	)	
Department of Environmental Conservation	)	Petition Number: II-2000-06
Region 2	)	
_____	)	

ORDER GRANTING IN PART AND DENYING IN PART  
PETITION FOR OBJECTION TO PERMIT

On August 1, 2000, the Environmental Protection Agency ("EPA") received a petition from the New York Public Interest Research Group, Inc. ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, for North Shore Towers Apartments, Inc. ("North Shore Towers"). The North Shore Towers permit was issued by the New York State Department of Environmental Conservation's ("DEC") Region 2 Office, and took effect on June 22, 2000, pursuant to title V of the Act, the federal implementing regulations at 40 CFR part 70, and the New York State implementing regulations at 6 NYCRR parts 200, 201, 616, 621, and 624. DEC issued a revised permit to North Shore Towers with an effective date of August 7, 2001.

The NYPIRG petition alleges that the North Shore Towers permit does not comply with 40 CFR part 70 in that: (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing; (2) the permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c); (3) the permit lacks an adequate statement of basis as required by 40 CFR § 70.7(a)(5); (4) the permit repeatedly violates the 40 CFR § 70.6(a)(3)(iii)(A) requirement that the permittee submit reports of any required monitoring at least every six months; (5) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (6) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions; (7) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); and (8) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable. The Petitioner has requested that EPA object to the issuance of the North Shore Towers permit pursuant to CAA § 505(b)(2) and 40 CFR § 70.8(d).

Subsequent to receipt of the NYPIRG petition, the EPA performed an independent and in-depth review of the North Shore Towers title V permit. Based on a review of all the information before me, including the NYPIRG petition; the permit application; an April 17, 2000 letter from Elizabeth Clarke of DEC to Steven C. Riva of EPA regarding Responsiveness Summary/Proposed Final Permit (hereinafter, “Responsiveness Summary”); the initial North Shore Towers permit effective on June 22, 2000 (“June 22, 2000 permit”); a revised permit that took effect on August 7, 2001 (“August 7, 2001 permit”); and a letter dated July 18, 2000, from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC (“July 18, 2000 letter”); I deny the Petitioner’s request in part and grant it in part for the reasons set forth in this Order. The Petitioner has raised valid issues on the North Shore Towers permit, some of which DEC has addressed in the August 7, 2001 permit. NYPIRG’s petition also raised programmatic issues, some of which DEC has already addressed and others which DEC is in the process of addressing. *See* letter dated November 16, 2001 from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, Division of Environmental Planning and Protection, EPA Region 2 (“November 16, 2001 letter”).

## **I. STATUTORY AND REGULATORY FRAMEWORK**

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of New York, effective on December 9, 1996. 61 Fed. Reg. 57589 (Nov. 7, 1996); *see also* 61 Fed. Reg. 63928 (Dec. 2, 1996) (correction); 40 CFR part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to New York’s title V operating permit program based, in part, on “emergency” rules promulgated by DEC. 66 Fed. Reg. 63180 (Dec. 5, 2001). Once DEC adopted final regulations to replace the emergency rules, EPA granted full approval to New York’s title V operating permit program based on these final regulations. 67 Fed. Reg. 5216 (Feb. 5, 2002). Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as “applicable requirements”) but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, States, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under CAA §§ 505(a) and (b)(1) and 40 CFR §§ 70.8(a) and (c)(1), States are required to submit all proposed title V operating permits to EPA for review, and EPA will object to permits determined by the Agency not to be in compliance with applicable requirements or the requirements of 40 CFR part 70. If EPA does not object to a permit on its own initiative, CAA § 505(b)(2) and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. To justify exercise of an objection by EPA to a title V permit pursuant to CAA § 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of 40 CFR part 70. Petitions must, in general, be based on objections to the permit that were raised with reasonable specificity during the public comment period.<sup>1</sup> A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

## **II. ISSUES RAISED BY THE PETITIONER**

On April 13, 1999, NYPIRG sent a petition to EPA asserting programmatic problems with DEC's application form and instructions. NYPIRG raised those issues and additional program implementation issues in individual permit petitions, including the instant petition, and in a citizen comment letter dated March 11, 2001 that was submitted as part of the settlement of litigation arising from EPA's action extending title V program interim approvals. Sierra Club and the New York Public Interest Research Group v. EPA, No. 00-1262 (D.C.Cir.).<sup>2</sup> EPA has conferred with NYPIRG and DEC relative to these program implementation concerns.

EPA received a letter dated November 16, 2001, from DEC Deputy Commissioner Carl Johnson, committing to address various program implementation issues either by December 1, 2001 or by January 1, 2002, and to ensure that permit issuance procedures are performed in accordance with state and federal requirements. DEC's fulfillment of the commitments set forth in its November 16, 2001 letter will resolve some administration problems. EPA is monitoring New York's title V program to ensure that the permitting authority is implementing the program consistent with its approved program, the Act, and EPA's regulations. Based on a recently-initiated EPA review ("EPA program review"), the DEC is substantially meeting the

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<sup>1</sup> See CAA § 505(b)(2) and 40 CFR § 70.8(d). The Petitioner commented during the public comment period by raising concerns with the draft operating permit that are the basis for this petition. See comments from Keri Powell, et al., Attorneys for NYPIRG to DEC (September 23, 1999) ("NYPIRG comment letter").

<sup>2</sup> EPA responded to NYPIRG's March 11, 2001 comment letter by letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc. The response letter is available on the internet at: <http://www.epa.gov/air/oaqps/permits/response/>.

commitments made in its November 16, 2001 letter.<sup>3</sup> As a result, EPA has not at this time issued a notice of program deficiency (“NOD”) pursuant to CAA § 502(i) and 40 CFR §§ 70.10(b) and (c). However, failure to properly administer or enforce the program will result in the issuance of a NOD by EPA.

#### A. Public Hearing

The Petitioner alleges that DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying its request for a public hearing. *See* petition at page 3. Pursuant to 40 CFR § 70.8(c)(iii), failure to process the permit under procedures approved to meet 40 CFR § 70.7(h) may be grounds for objection.

##### 1. Flawed Public Notice

The Petitioner asserts that the public notice did not meet the requirement of 40 CFR § 70.7(h) because it neither gave notice of a hearing nor informed the public of how to request a public hearing. In this case, the DEC did not schedule a hearing and did not inform the public of how to request a hearing in its public notice.

There is no allegation that NYPIRG was prejudiced or harmed as a result of DEC’s failure to indicate the procedures that must be followed to request a hearing. To the contrary, the Petitioner was able to request a hearing, this request was considered by DEC, and was responded to in the Responsiveness Summary by denying the request. *See* cover letter to Responsiveness Summary. Moreover, the Petitioner has not alleged or demonstrated that had DEC properly listed the procedures for requesting a hearing a different outcome would have resulted. No additional comments or hearing requests were received on this proposed permit, and no other petitions have been filed concerning this permit. Therefore, EPA finds the public notice omission to be harmless error that did not hinder the Petitioner’s ability to request a hearing on the draft North Shore Towers permit. *See e.g. Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 248 (1964) (an error can be dismissed as harmless “when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached”); *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 466 (D.C. Cir. 1967) (“The Supreme Court’s opinion reflects the concern that agencies not be reversed for error that is not prejudicial.”). As such, the petition is denied on this issue.

The determination to deny the petition on this issue does not, however, relieve DEC of its responsibility to provide all members of the public with an opportunity to participate in the title

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<sup>3</sup> *See* letter dated March 7, 2002, from Steven C. Riva, Chief, Permitting Section, USEPA Region 2, to John Higgins, Chief, Bureau of Stationary Sources, DEC. This letter summarizes an EPA review of draft permits issued by the DEC from December 1, 2001 through February 28, 2002. EPA is providing DEC with monthly updates to supplement the information provided in the March 7, 2002 letter. The purpose of this ongoing EPA review is to determine whether the DEC is making changes to public notices and to select permit provisions that the State committed to doing in its November 16, 2001 letter.

V process consistent with New York State and EPA regulations. *See* 6 NYCRR § 621.6 and 40 CFR § 70.7(h). DEC's failure to provide in its public notice a procedure by which members of the public can request a hearing may be grounds for granting a petition, particularly when a member of the public is prejudiced or harmed by the procedural error. Therefore, EPA has determined that the failure to provide a clear statement in the public notice as to how to request a hearing must be corrected, and has so advised the DEC.<sup>4</sup> In its November 16, 2001 letter, DEC committed to revising language in the public notice to indicate who the public should contact to request a public hearing. *See* November 16, 2001 letter at page 5. According to EPA's program review, the DEC is substantially meeting this commitment. *See* note 3, *supra*. Failure to consistently adhere to the requirements of CAA § 502(b)(6) and 40 CFR § 70.7(h)(2) can result in a program deficiency.<sup>5</sup> Furthermore, EPA retains the authority to review the need for public hearings for all permits and may object to any permit in the future that is not properly noticed. *See* 40 CFR § 70.8(c)(3)(iii).

## 2. Application of Improper Standard

The Petitioner also contends that the DEC applied the wrong standard in reaching the decision to deny the Petitioner's request for a public hearing. *See* petition at page 4. The Petitioner points out that in denying the public hearing, DEC asserted in its Responsiveness Summary that a public hearing would be appropriate if DEC determined that "there are substantive and significant issues because the project, as proposed, may not meet statutory or regulatory standards." The Petitioner argues that DEC applied the standard that governs when DEC can hold a hearing on its own initiative, rather than the standard that governs when DEC receives a request from a member of the public for a hearing.<sup>6</sup>

40 CFR § 70.7(h) provides that "all permit proceedings, including initial permit issuance...shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." Part 70 does not provide specific guidance on when, or under what circumstances, a hearing should be held. Accordingly, permitting authorities have considerable discretion when determining whether to hold a public

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<sup>4</sup> Part 70 does not require permitting authorities to hold a public hearing each time one is requested. Members of the public seeking to participate in the permitting process should not expect that a hearing will always be held on a draft permit and should, therefore, also submit any comments or concerns in writing.

<sup>5</sup> Pursuant to 40 CFR § 70.10(b)(1), if EPA determines that a permitting authority is not adequately administering a part 70 program, EPA will notify the permitting authority of the determination and publish such notice in the Federal Register.

<sup>6</sup> The Petitioner points out that 6 NYCRR § 621.7 defines two types of hearings: adjudicatory and legislative. Under 6 NYCRR § 621.7(b), DEC determines to hold an adjudicatory public hearing when "substantive and significant issues relating to any findings or determinations the [DEC] is required to make" or where "any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon." Under 6 NYCRR § 621.7(c), DEC must determine to hold a legislative public hearing based on whether a significant degree of public interest exists.

hearing. A review of New York's regulations finds that the requirements of 6 NYCRR § 621.7 are in accord with the provisions of 40 CFR § 70.7(h) and closely parallel the language of 40 CFR § 71.11(f)(1).<sup>7</sup>

With respect to the issue at hand, there is no allegation that NYPIRG was prejudiced or harmed as a result of DEC's use of the incorrect standard. In response to NYPIRG's request for a public hearing on the draft North Shore Towers Permit, DEC wrote: "Based on a careful review of the subject application and comment received thus far, the [DEC] has determined that a public hearing concerning this permit is not warranted." *See* cover letter to Responsiveness Summary. In addition, DEC noted that it received detailed comments on the permit from the Petitioner, who was the only commenter, and responded to those comments in writing. Given the fact that the Petitioner was the only commenter, DEC could have reasonably concluded that there was not sufficient public interest to hold a hearing on this permit.<sup>8</sup> Accordingly, EPA denies the petition on this issue.

This determination does not mean that DEC may be inconsistent in the application of its own regulations. As previously discussed, New York's regulations provide that when a member of the public requests a hearing on a draft title V permit, the determination to hold such hearing shall be based on whether "a significant degree of public interest exists."<sup>9</sup> *See* 6 NYCRR § 621.7(c)(1). Thus, to ensure a consistent approach and to prevent further confusion as to what standard applies to title V public hearing requests, DEC has agreed to express the proper standard in its public notices. *See* November 16, 2001 letter at page 5. Failure to consistently express the proper standard and procedures in public notices may result in a finding of program deficiency pursuant to 40 CFR § 70.10(b). According to EPA's program review, the DEC is substantially meeting this commitment. *See* note 3, *supra*. Furthermore, where EPA concludes that there is appropriate grounds for objecting to a permit due to inadequate public notice or improper denial of a public hearing, EPA may order a timely objection to any permit. *See* 40 CFR § 70.8(c)(3)(iii).

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<sup>7</sup> Pursuant to 40 CFR § 71.11(f)(1) EPA will hold a public hearing "whenever it finds, on the basis of requests, a significant degree of public interest in the draft permit." Section 71.11(f)(2) provides that EPA "may also hold a public hearing at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision."

<sup>8</sup> It is not EPA's position that under all circumstances a request from only one citizens' group, no matter how many people it represents, automatically constitutes insufficient public interest. Nor is the converse true. The permitting authority must independently analyze each request and make a reasonable judgment as to whether the facts before it warrant granting a particular request.

<sup>9</sup> DEC's legislative type of public hearing meets the title V program requirement and sets forth a standard consistent with the 40 CFR part 71 standard of "a significant degree of public interest," rather than the "substantive and significant issues" standard which was applied by the DEC in this case. The significant difference is that the public need only express an interest in the draft permit, and need not try to establish that they have specific issues relating to the findings or determinations of the DEC. The DEC can provide for hearings in addition to those required by the title V program but it is not correct to grant or deny a public hearing only on the basis of the substance and significance of the issues presented.

## B. Incomplete Permit Application

The Petitioner's second claim is that the applicant did not submit a complete permit application in accordance with the requirements of the Act, 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d), especially as these provisions incorporate provisions of CAA § 114(a)(3)(C). *See* petition at page 5. In making this claim, NYPIRG incorporates a petition that it filed with the Administrator on April 13, 1999, contending that the DEC's application form is deficient because even a properly completed form would not include specific information required by both the EPA regulations and the DEC regulations. This earlier petition asks EPA to require corrections to the DEC program.

The Petitioner's concerns regarding the DEC's application form are summarized as follows:

- The application form lacks an unequivocal initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether North Shore Towers was out of compliance and, therefore, whether DEC was required to include in the title V permit a compliance schedule;
- The application form lacks a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based;
- The application form lacks a description of all applicable requirements that apply to the facility. That is, the form only requires applicants to supply numerical citations to regulations, unaccompanied by any description; and
- The application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

EPA agrees with the Petitioner that the compliance certification process in the application form utilized by North Shore Towers in this case could enable applicants to avoid revealing non-compliance in some circumstances. Contrary to EPA and DEC regulations, the DEC form used allows applicants to certify that it expects to be in compliance with all applicable requirements at the time of permit issuance, rather than to make a certification as to the facility's compliance status at the time of permit application submission. As provided for in 40 CFR § 70.5(c)(9)(i), permit applicants are required to submit: "a certification of compliance with all applicable requirements by a responsible official consistent with...section 114(a)(3) of the Act." EPA interprets this language as requiring that sources certify their compliance status as of the time of permit application submission.

However, EPA disagrees with the Petitioner regarding the uncertainty of whether a compliance schedule must be included in the North Shore Towers title V permit. Based on the application form that the facility official completed, North Shore Towers certified that it would be in compliance with all applicable requirements at the time of permit issuance, which occurred on June 22, 2000. This certification is further supported by additional information. Routine

facility inspections performed by the DEC before and since application submission indicate that the North Shore Towers facility has been in compliance during this period. Also, since the time of permit issuance, North Shore Towers has submitted two six-month monitoring reports (dated January 21, 2001 and July 21, 2001) and two annual compliance certification reports (dated July 21, 2001 and January 30, 2002), all of which have certified compliance. EPA does not believe that submission by North Shore Towers of a different application (that is, one which would have required compliance certification as of the time of application submission) would have resulted in a title V permit any different from the one ultimately issued. Accordingly, EPA denies the petition with respect to this issue. However, the State and EPA agree that the application form submitted by North Shore Towers does not properly implement EPA or State regulations. Therefore, as detailed in its November 16, 2001 letter, the DEC has changed its forms and instructions accordingly.<sup>10</sup>

The Petitioner notes three other deficiencies in the application that EPA has determined did not result in a deficient permit, although such deficiencies may compromise the process of developing a permit. The first of these issues relates to including in the application, with the compliance certification, "a statement of methods used for determining compliance." *See* 40 CFR § 70.5(c)(9)(ii). Although the application submitted by North Shore Towers did not specifically require the facility to include a statement of methods, in this case, the applicant did provide information on certain methods used for determining compliance by reference to monitoring and recordkeeping procedures used to assure compliance with nitrogen oxides (NO<sub>x</sub>) reasonably available control technology (RACT) requirements, on pages 2, 6 and 10 of the application.

The application did not include methods for determining compliance with other requirements, including those delineated in New York State opacity and sulfur-in-fuel regulations; however, EPA believes this omission to be harmless error for a source such as this. There are no monitoring, recordkeeping or reporting requirements in these corresponding New York State Implementation Plan (SIP) regulations. With respect to these applicable requirements, however, DEC has established in its title V program generic monitoring, recordkeeping and reporting provisions to assure compliance. These are described in detail in Section H of this Order, below. In addition, as noted above, a review of historical DEC inspection results indicates that the North Shore Towers facility has been in compliance since the time of permit application submission. Since the time of permit issuance, compliance has also been certified in the two annual compliance certification reports submitted to the DEC. Because EPA believes that submission by North Shore Towers of a complete statement of the methods used to determine compliance would not have resulted in any significant change to the permit issued by the DEC, EPA denies the petition on this issue.

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<sup>10</sup> In accordance with the DEC's November 16, 2001 letter, the permit application form was changed to clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. The application form and instructions were changed to clearly require the applicant to describe the methods used to determine initial compliance status. With respect to the citation issue, the application instructions were revised to require the applicant to attach to the application copies of all documents (other than published statutes, rules and regulations) that contain applicable requirements.



The Petitioner's next point is that EPA regulations call for the legal citation to the applicable requirement to be accompanied by the applicable requirement expressed in descriptive terms. In "White Paper for Streamlined Development of Part 70 Permit Applications" dated July 10, 1995, EPA clarified that citations may be used to streamline how applicable requirements are described in an application, provided the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. The permitting authority may allow the applicant to cross-reference previously issued preconstruction and part 70 permits, State or local rules and regulations, State laws, Federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject, provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public (e.g., publically available documents include regulations printed in the Code of Federal Regulations or its State equivalent). The North Shore Towers permit application contains codes or citations associated with applicable requirements that are readily available. That is, these codes refer to federal and state regulations that are printed in rule compilations and also are available on-line. The one applicable requirement that would not be readily available is that corresponding to the facility's NO<sub>x</sub> RACT averaging plan. However, the applicant references this plan at page 2 of the application, "Facility Description." Although not attached to the permit application, this Plan was properly incorporated by reference and is thus part of the permit application file. A copy of the Plan is available in the DEC's North Shore Towers title V file. Even though the application form in this case did not clearly require more than a citation to the applicable requirement, the applicant correctly referenced the additional required information. Therefore, the petition is denied on this issue.

With respect to "non-codified" documents that include applicable requirements, such as NO<sub>x</sub> RACT plans, pre-construction and operating permits, etc., in its November 16, 2001 letter, the DEC agreed to amend the application instructions to ensure that applicants include in their title V permit applications, by attaching thereto, all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing. DEC has revised its title V permit application instructions to so state.

The Petitioner's final point is that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. In Section IV of DEC's application form there is a block labeled, "Monitoring Information" that asks applicants to provide test method information as well as other monitoring information such as work practices and averaging methods. The pages of the North Shore Towers application numbered page 6 (a total of 2 such pages) address this point. In these pages of the application, North Shore Towers provides a description of and/or reference to the applicable test methods for determining compliance with each applicable requirement. Thus, the Petitioner's fourth issue regarding the application form is without merit and is therefore denied.

### C. Statement of Basis

The Petitioner's third claim alleges that the proposed permit lacks an adequate statement of basis, as required by 40 CFR § 70.7(a)(5), that sets forth the legal and factual basis for the draft permit conditions. *See* petition at page 7.

The requirement for the “statement of basis” is found in 40 CFR § 70.7(a)(5), which states: “The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.”

The statement of basis is not a part of the permit itself. It is a separate document which is to be sent to the EPA and, also, to interested persons upon request.<sup>11</sup> This requirement for a statement of basis is not contained in 40 CFR § 70.6 which sets forth the required contents of the permit. In fact, 40 CFR § 70.6(a) requires that the permit contain all the explanation that ordinarily would be necessary to determine whether the permit conditions have been accurately expressed. For example, the permit must contain the references to the applicable statutory or regulatory provisions forming the legal basis of the applicable requirements on which the conditions are based. *See* 40 CFR § 70.6(a)(1)(i).

A statement of basis should contain a brief description of the origin or basis for each permit condition or exemption. It should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should support and clarify items such as any streamlined conditions, any facility-specific monitoring requirements, and the permit shield.

EPA has recently provided guidance to permitting authorities that addresses the contents of a “statement of basis” in terms that aid both EPA and the public.<sup>12</sup> As a result, the DEC has incorporated certain elements into its “permit review reports.”<sup>13</sup> In the cited letters EPA explains that the “statement of basis” is to be used to highlight significant decisions or interpretations that were necessary in issuing the permit. These reports are intended not to simply be redundant to the permit but to assist in reviewing what is in the permit. Additionally, in a December 22, 2000 Order responding to a petition for objection to the Fort James Camas Mill permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for selected monitoring methods be documented in the permit record. *See In re In the Matter of Fort James Camas Mill* (“Fort James Camas Mill”), Petition No. X-1999-1, at page 8, December 22, 2000 (available on line at:

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<sup>11</sup> Unlike title V permits, statements of basis are not enforceable, do not set limits, and do not create obligations on the permittee.

<sup>12</sup> *See* letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri N. Powell, Esq., New York Public Interest Research Group, Inc., responding to NYPIRG’s March 11, 2001 letter; the November 16, 2001 commitment letter; a letter dated December 20, 2001, from EPA Region V to the Ohio EPA (available on the internet at: <http://www.epa.gov/region07/programs/artd/air/title5>); *see also* Notice of Deficiency for the State of Texas, 62 Fed. Reg. 732, 734 (Jan. 7, 2002).

<sup>13</sup> In order to comply with the requirements of 40 CFR § 70.7(a)(5), DEC has committed to prepare and make available at time of issuance of draft permits, a “permit review report,” which will serve as DEC’s statement of basis. The contents of this permit review report are described in the DEC’s November 16, 2001 letter.

<http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/petitiondb1999.htm>).

The regulation at 40 CFR § 70.8(c)(3)(ii) requires that the permitting authority submit any information necessary to review adequately the proposed permit. Accordingly, EPA may object to the issuance of a permit simply because of the lack of necessary information. The missing information could be a statement of basis or any other information deemed necessary to adequately review the draft permit in question. Since the statement of basis can serve a valuable purpose in directing EPA's attention to important elements of the permit and since it is important that EPA perform reviews as quickly as possible, it is a required element of an approved program that EPA receive an adequate statement of basis with each proposed permit.

While EPA agrees with the Petitioner that a statement of basis was not made available with the draft North Shore Towers permit,<sup>14</sup> we conclude that its absence does not in this case warrant objection to the permit. EPA believes that it is possible to achieve a sufficient understanding of this source using other available documents in the permit record including the permit application and DEC's Responsiveness Summary. North Shore Towers is not subject to applicable requirements or monitoring provisions that rely on source-specific determinations or engineering judgement. Accordingly, a more detailed explanatory document was not necessary to understand the legal and factual basis for the draft permit conditions. Furthermore, there is no evidence that petitioner was harmed by the absence of a statement of basis. In fact, NYPIRG provided detailed and thoughtful comments on the North Shore Towers' draft permit establishing that it had a basic understanding of its terms and conditions.

While failure to include a statement of basis with the draft permit does not, in this case, constitute a reason to object to this permit, EPA can object to a permit on such grounds. In this instance, the substantive statement of basis requirements were met through other available documents in the permit record. Accordingly, EPA does not believe that the circumstances of this case warrant an objection to the North Shore Towers permit.

Nonetheless, DEC's permit issuance process now provides that a permit may not be issued in draft unless a permit review report has been prepared for the draft permit. This requirement also applies to issuance of draft permits for renewed, and revised or modified permits. As noted above and discussed in detail in Section H, below, EPA is granting in part the NYPIRG petition for North Shore Towers. Therefore, when DEC revises the permit in response to this Order, it will also prepare a permit review report pursuant to the requirements of 40 CFR § 70.7(a)(5).

#### D. Reporting of Monitoring

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<sup>14</sup> It should be noted that the North Shore Towers' June 22, 2000 permit included a "Permit Description." This description includes a general description of the facility and the air emission units located thereon, discussion of the NO<sub>x</sub> RACT requirements applicable to the units, and ancillary units that are exempt from title V permit requirements. While this discussion does not fully satisfy the requirements of 40 CFR § 70.7(a)(5), it does provide needed information on the permit and attendant requirements.

The Petitioner's fourth claim alleges that the proposed permit repeatedly violates the 40 CFR § 70.6(a)(3)(iii)(A) requirement that the permittee submit reports of any required monitoring at least every six months. *See* petition at page 9. The Petitioner identified contradictory language in the permit with regard to the submittal of monitoring reports. That is, while the general conditions section requires that monitoring reports be submitted every six months, the emission unit section of the permit contains individual conditions that require monitoring reports only upon request by the regulatory agency. The Petitioner further asserts that: "Unless this proposed permit is modified to clearly identify the monitoring results that must be included in North Shore Towers' six month monitoring reports, the reports are unlikely to be useful in assuring the facility's compliance with applicable requirements." *See* petition at page 10.

In its Responsiveness Summary, DEC described the general condition entitled, "Monitoring, Related Recordkeeping and Reporting Requirements" (Condition 20 in the draft permit) as the "default" condition which applies unless a more frequent reporting period is required by a rule. However, in the North Shore Towers' June 22, 2000 permit, a new condition, Condition 28, entitled "Compliance Certification" was added. This condition was replaced by Condition 1-3 in the August 7, 2001 permit. Condition 1-3 includes the requirement that: "In the case of any condition contained in this permit with a reporting requirement of "Upon request by regulatory agency" the permittee shall include in the semi-annual report, a statement for each such condition that the monitoring or recordkeeping was performed as required or requested and a listing of all instances of deviations from these requirements." In addition, the reporting requirements in individual conditions in the emission unit section of the August 7, 2001 permit no longer state that reports are due upon request of the regulatory agency. These individual conditions now include a specific time frame in which reports are due (e.g., semi-annually). Accordingly, EPA finds that there is no basis to object to the permit and, therefore, denies the petition on this issue.<sup>15</sup>

#### E. Annual Compliance Certification

The Petitioner's fifth claim alleges that the proposed permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5). The Petitioner further alleges that the proposed permit does not require the facility to certify compliance with all permit conditions, but rather just requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." *See* petition at page 10. Specifically, the Petitioner is concerned with the language in the permit that labels certain permit terms as "compliance certification" conditions. NYPIRG notes that requirements that are labeled "compliance certification" are those that identify a monitoring method for demonstrating compliance. NYPIRG asserts that the only way of interpreting the compliance certification designation is as a way of identifying which conditions are covered by

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<sup>15</sup> EPA does not intend to limit States from providing for more frequent but less formal reports such as "upon request" as long as the reports necessary for title V purposes are clearly expressed and required by the permit, and are in writing.

the annual compliance certification. Thus, NYPIRG asserts, permit conditions that lack periodic monitoring are excluded from the annual compliance certification.

EPA is denying the petition on this issue. EPA disagrees with the Petitioner that “the basis of the certification” should be interpreted to mean that facilities are *only* required to certify compliance with the permit terms labeled as “compliance certification.” “Compliance certification” is a data element in New York’s computer system that is used to identify terms that are related to monitoring methods used to assure compliance with specific permit conditions. The references to “compliance certification” found in the permit terms do not appear to negate the DEC’s general requirement for compliance certification of all terms and conditions. Additional discussion can be found in the Yeshiva Order, which addressed the corresponding NYPIRG petition wherein the identical annual compliance certification issue was raised. *See* Yeshiva Order at pages 15 through 17.

Nonetheless, EPA has conferred with DEC in an effort to minimize confusion on this point. DEC has agreed in its November 16, 2001 letter to include additional language in the annual compliance certification provision in permits. This language indicates that the annual compliance certification must address all terms and conditions of the permit, not just those conditions labeled “Compliance Certification.” According to EPA’s program review, the DEC is substantially meeting its commitment to add annual compliance certification language to title V permits. *See* note 3, *supra*. As discussed in detail in Section H, below, EPA is granting in part the NYPIRG petition for North Shore Towers. Therefore, when DEC revises the permit in response to this Order, it will also add language to clarify the requirements of the annual compliance certification reports.

#### F. Startup, Shutdown, Malfunction

The Petitioner’s sixth claim is that the proposed permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. *See* petition at page 11. The Petitioner asserts that 6 NYCRR § 201-1.4, New York’s “excuse provision,” conflicts with EPA guidance and must be removed from the SIP and federally enforceable permits as soon as possible. NYPIRG states that, in the meantime, the North Shore Towers permit needs to be modified to include additional monitoring, recordkeeping and reporting so that EPA and the public can monitor the application of this provision (Condition 8 of the draft permit).

The Petitioner further argues that this condition is so expansive that it makes emission limits very difficult to enforce. NYPIRG alleges that it is common to find monitoring reports with potential violations allowed under the excuse provision, and that DEC files seldom include information as to why violations are deemed unavoidable. The Petitioner goes on to state that EPA guidance requires that facilities make every reasonable effort to comply with emission limitations, even during startup, shutdown, maintenance and malfunction conditions. That is, excuse provisions should only apply to infrequent exceedances. NYPIRG asserts that this is not the case for facilities located in New York State, as such facilities appear to possess blanket

authority to violate air quality requirements as long as they cite the excuse provision.

In addition, the Petitioner asserts that the proposed North Shore Towers permit does not assure compliance with applicable requirements because it lacks proper limitations on when a violation may be excused and lacks sufficient public notice of when a violation is excused. NYPIRG asks that the EPA Administrator object to the permit unless DEC adds permit terms to prevent the abuse of the excuse provision, including the following:

1. The permit must include the limitations established by EPA's September 20, 1999 guidance entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" ("September 1999 Guidance"). This guidance clarifies the EPA's approach to State excuse provisions. *See* petition at pages 12 and 13;

2. The title V permit issued to North Shore Towers must be made clear to indicate that a violation of a federal requirement may not be excused. *See* petition at page 13;

3. To assure practical enforceability, the permit must define the significant terms "upset," and "unavoidable." *See* petition at pages 13 and 14;

4. The permit must also define the term "reasonably available control technology" (RACT) as it applies during startup, shutdown, malfunction and maintenance conditions. *See* petition at pages 14 and 15; and

5. The North Shore Towers must require prompt written reporting of all deviations from permit requirements including those due to startup, shutdown, malfunction, and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B). *See* petition at pages 15 and 16.

Condition 8 in the draft permit is entitled, "Unavoidable Noncompliance and Violations," and cites 6 NYCRR § 201-1.4 as the applicable requirement. This provision corresponds to Condition 7 in the June 22, 2000 and August 7, 2001 permits and states in part: "At 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." 6 NYCRR § 201-1.4 is a State regulation that has not been approved into the SIP. There is, however, a SIP-approved excuse provision at 6 NYCRR § 201.5(e). In its November 16, 2001 letter, the DEC committed to removing the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of title V permits and incorporating the condition into the state side. Based on EPA's program review, DEC is substantially meeting this commitment. *See* note 3, *supra*. As discussed in detail in Section H, below, EPA is granting in part the NYPIRG petition for North Shore Towers. Therefore, when DEC revises the permit in response to this Order, it will also remove the excuse provision that cites 6 NYCRR § 201-1.4 from the federal side of the permit, and incorporate the condition into the state side.

With respect to NYPIRG's assertion that the DEC excuse provision conflicts with EPA

guidance,<sup>16</sup> EPA recognizes and approves such enforcement discretion provisions in State Implementation Plans in accordance with EPA guidance available at the time of SIP approval. This issue was addressed in a previously-issued Administrative Order. *See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1, (“Pacificorp”), November 16, 2000, available on the internet at: <http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/petitiondb1999htm>), which explained “even if the provision were found not to satisfy the Act, EPA could not properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the ‘applicable requirement’ as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions.” *See Pacificorp* at pages 23 and 24. This position was reiterated in the November 2001 Clarification which confirms that the September 1999 Guidance provides guidance to States and EPA regarding SIP provisions related to excess emissions during malfunctions, startups, and shutdowns. It was not intended to alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA. Similarly the September 1999 Guidance was not intended to affect existing permit terms or conditions regarding malfunctions, startups and shutdowns that reflect approved SIP provisions including opacity provisions, or to alter the emergency defense provisions at 40 CFR § 70.6(g). Existing SIP rules and 40 CFR § 70.6(g) may only be changed through established rulemaking procedures and existing permit terms may only be changed through established permitting processes. Thus, EPA did not intend the September 1999 Guidance to be legally dispositive with respect to any particular proceedings in which a violation is alleged to have occurred. Rather, it is in the context of future rulemaking actions, such as the SIP approval process, that EPA will consider the September 1999 Guidance and the statutory principles on which this guidance is based. *See* November 2001 Clarification at page 1.

EPA is not aware of, and the petitioner has provided no evidence of, any instances where the DEC relied on these rules to provide blanket exceptions for non-compliance merely because the incidents were reported. Moreover, DEC’s Responsiveness Summary demonstrates to EPA that the DEC’s interpretation and application of section 201-1.4 is not inconsistent with the Act, as interpreted by EPA in its guidance. *See* Responsiveness Summary, Response to NYPIRG

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<sup>16</sup> *See* Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled “Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions,” (Bennett Memo September 1982); Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, EPA, to Regional Administrators, Regions I-X, titled “Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions,” dated February 15, 1983 (Bennett Memo February 1983); Memorandum from Steven A. Heman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation to Regional Administrators, Regions I - X, titled “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,” dated September 20, 1999 (“September 1999 Guidance”); and Memorandum from Eric Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards to Regional Administrators, titled “Clarification - State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,” dated November 8, 2001 (“November 2001 Clarification”).

Comments re: General Permit Conditions at page 4.<sup>17</sup> While a source operator may be misled into seeking the DEC Commissioner's action on a violation during start-ups, shutdowns, malfunctions or upsets, EPA believes that the Commissioner is aware of the limits on the authority to excuse emission exceedances existing under the DEC's own regulations, and believes that it is unlikely that the Commissioner will exceed the discretion allowed under the State regulations. Accordingly, the petition is denied with respect to this issue.

With respect to the NYPIRG assertion that monitoring be added to the permit to assure compliance, because the DEC Commissioner has discretion to excuse certain violations, any abuse of the excuse provision would be by DEC and not by the source for simply asking for the excuse. In accordance with the provisions of the title V permit, the source is required to monitor compliance, and any violation for which an excuse is sought will be included in the facility's deviation reports, semi-annual reports and annual reports. The Petitioner has not demonstrated that any additional monitoring of the source is required to assure proper exercise of the excuse provision by DEC.

The following discussion is in response to the five additional specific points raised by the Petitioner.

1. With respect to the Petitioner's suggestion that terms addressed in the September 1999 Guidance be added to the permit, EPA concludes that it is not necessary for the DEC to restate the September 1999 Guidance in the permit. This guidance is policy and does not constitute an applicable requirement. *See* November 2001 Clarification. Accordingly, the petition is denied with respect to this issue.

2. Regarding the issue of whether the DEC can excuse violations of a federal requirement, DEC's own rules do not authorize such expansion of the Commissioner's discretion. These rules provide that violations of a federal regulation may not be excused unless the specific federal regulation provides for an affirmative defense during start-up, shutdowns, malfunctions or upsets. *See* 6 NYCRR § 201-6.5(c)(3)(ii). In its Responsiveness Summary, the DEC acknowledges that it "cannot exercise more discretion than federal requirements allow." *See* Responsiveness Summary, Response to Comments re: General Permit Conditions at page 4. As noted above, upon re-opening of this permit, the DEC shall remove the "Unavoidable Noncompliance and Violations" provision from the federal side of the permit.

3. EPA disagrees with the Petitioner that definitions for "upset," and "unavoidable" must be included in the permit. The purpose of the permit is to ensure that a source operates in compliance with all applicable requirements. To the extent the Petitioner argues that this requirement extends to compliance with the SIP-based commissioner discretion provision, EPA

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<sup>17</sup> The response reads, "This condition is as explicit as necessary and does not excuse or diminish, in any way, the accountability of a source for pollution exceedances. It sets forth a practical procedure for notifying the agency....[T]he agency uses engineering judgment on a case-by-case basis to make a determination as to the unavoidable status of an exceedance. The department also cannot exercise more discretion than federal requirements allow."



agrees. However, the lack of definitions for the terms “upset” or “unavoidable” does not, on its face, render the permit unenforceable. These are commonly used regulatory terms. Moreover, the Petitioner has not demonstrated that DEC has improperly interpreted them in practice so as to broaden the scope of the excuse provision. In addition, moving the provision of 6 NYCRR § 201-1.4, which has not been approved into the SIP, to the state side of the permit will further assure that the excuse provision is not expanded beyond its proper bounds.

4. EPA also disagrees with the Petitioner that the permit must define reasonably available control technology (RACT) as it applies during startup, shutdown, malfunction and maintenance conditions. 6 NYCRR § 201-1.4(d) and 6 NYCRR § 201.5 require facilities to use RACT during any maintenance, startup/shutdown, or malfunction condition. As explained above, EPA cannot properly object to a permit term that is derived from a provision of the federally approved SIP. Such a provision is inherently a part of the “applicable requirement” as that term is defined in 40 CFR § 70.2, and the Administrator may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP provisions. *See Pacificorp* at pages 23 and 24; *see also* November 2001 Guidance at page 1.

5. The Petitioner’s final point is that the permit must require written reports of all deviations. As written, the permit only requires the permittee to inform DEC of an exceedance when seeking to exercise the excuse provision of 6 NYCRR § 201-1.4. Otherwise, the permit provides that written notifications be provided when requested to do so by the DEC Commissioner. Prompt reporting of deviations is required by 40 CFR § 70.6(a)(3)(iii)(B) which states: “Prompt reporting of deviation 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.”

Reporting in order to preserve the claim that the deviation should be excused is not a required report. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See* Discussion in Part G *infra*. For a violation to be properly excused, the DEC must properly apply the regulation authorizing such discretion and must properly document its findings to ensure the rule was reasonably applied and interpreted. This issue is discussed in more detail below.

#### G. Prompt Reporting of Deviations

The Petitioner’s seventh claim is that the proposed permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B). *See* petition at page 16. The Petitioner states that the only prompt reporting of deviations is that required by 6 NYCRR § 201-1.4, which governs unavoidable noncompliance and violations during necessary scheduled equipment maintenance, start-up/shutdown conditions and upsets or malfunctions. Thus, the Petitioner argues, any other deviations, including situations where the permittee could have avoided a violation but failed to do so, will not be reported until the 6 month monitoring report. The Petitioner alleges that 6 months cannot be considered “prompt reporting” in all cases. The provisions that govern reporting of violations are: Condition 20 of

the draft permit, Condition 19 of the June 22, 2000 permit, and Condition 1-2 of the August 7, 2001 permit.

In general, EPA agrees with the Petitioner's comment.<sup>18</sup> However, while Condition 1-2 of the August 7, 2001 permit refers only to unavoidable violations, prompt reporting of deviations is required by other portions of the North Shore Towers permit, as revised.

States may adopt prompt reporting requirements for each condition on a case-by-case basis, or may adopt general requirements by rule, or both. In any case, States are required to consider prompt reporting of deviations from permit conditions in addition to the reporting requirements of the explicit applicable requirements. As discussed above, EPA does not consider reports submitted for the purpose of preserving potential claims of an excuse to meet prompt reporting requirements because these reports are optional, and they may not include all deviations, instead only those potentially unavoidable violations that the source seeks to have excused. All deviations must be reported regardless of whether the source qualifies for an excuse. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case concern under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).<sup>19</sup>

In the subject case, there are several provisions in the August 7, 2001 permit that appropriately require that prompt reports be made to the DEC (Conditions 1-7, 1-8, 1-19, 1-21 and 56). These relate to the daily monitoring for opacity. That is, when daily observances require that a Method 9 test be performed, and that test indicates a violation, the facility owner/operator must contact the DEC representative within one business day of the test and, upon notification, any corrective actions or future compliance schedules are to be presented to the DEC for acceptance. This is an appropriate use of the prompt reporting mechanism as it gives discretion to the DEC representative whether to require that a written timely report be filed within a relatively short time frame (in cases where the contravention is significant), or whether to defer the written report until the 6-month monitoring report. In either case, the source will provide a written report of the incident. With respect to the other applicable requirements that relate to emission limitations, reporting deviations more frequently than every 6 months or within the time frame established by the applicable requirement, whichever is sooner, is not necessary. Where stack tests are required for NO<sub>x</sub> emissions, the test protocols will set forth the reporting requirements of the test results. Normally, test results must be reported within 30-days of the test. This is also the case for the once per permit term requirement to perform a Method 9 test for opacity. Each engine-generator and boiler will also undergo annual tune-ups pursuant to NO<sub>x</sub> RACT requirements, during which adjustments will be made to optimize boiler combustion efficiency and thereby minimize emissions. Requiring the source to report the results of such tune-ups more frequently than the 6-month reporting requirement would provide no measurable

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<sup>18</sup> EPA raised this issue with the DEC in the July 18, 2000 letter at Attachment III, item 2.

<sup>19</sup> Prompt reporting requirement applicable to sources under the federal operating permit program.

environmental benefit, yet may be unnecessarily burdensome to the source. Finally, the sulfur content of the fuel-oil must be monitored by submission of a report, from the supplier to the facility, for each fuel-oil delivery. Because it is highly unlikely that fuel-oil outside of the specifications would be delivered and used, deferring the monitoring reports to the 6-month report is also appropriate in this case. Thus, EPA denies the petition on this issue.

Although DEC properly applied the prompt reporting requirement in this case, EPA has addressed this issue with the DEC in order to clarify how it will properly exercise this discretion. In its November 16, 2001 letter, DEC agreed that it will include a requirement for reporting deviations consistent with 6 NYCRR § 201-6.5(c)(3)(ii). Based on EPA's program review, the DEC is substantially meeting this commitment. *See* note 3, *supra*. While this regulation requires inter alia that deviations be reported at least every six months, DEC stated that it will specify less than six months for "prompt" reporting of certain deviations that result in emissions of, for example, a hazardous or toxic air pollutant that continues for more than an hour above permit limits. DEC has scrutinized the procedures for prompt reporting contained in 40 CFR § 71.6(a)(3)(iii)(B), and finds these procedures to be reasonable and compatible with what is provided for in DEC regulations. Therefore, DEC is mirroring these provisions to define "prompt" reporting in permit conditions. When prompt reporting of deviations is required, the reports will be submitted to the DEC, in writing, certified by a responsible official, and in the time frame established in the permit condition. As discussed in detail in Section H, below, EPA is granting in part the NYPIRG petition for North Shore Towers. Therefore, when DEC revises the permit in response to this Order, it will also incorporate these additional prompt reporting requirements into the permit.

#### H. Monitoring

The Petitioner's eighth claim is that the proposed North Shore Towers permit does not assure compliance with all applicable requirements as mandated by 40 CFR §§ 70.1(b) and 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practicably enforceable. *See* petition at page 17. The Petitioner addresses individual permit conditions that allegedly either lack periodic monitoring or are not practicably enforceable.<sup>20</sup> The specific allegations for each permit condition are discussed below.

As noted above, DEC revised the North Shore Towers permit effective on August 7, 2001. Many of the changes in the revised permit address periodic monitoring and, in many instances, remedy the problems identified by NYPIRG.

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<sup>20</sup> With respect to lack of adequate periodic monitoring, the Petitioner cites 40 CFR §§ 70.6(a)(3) and 70.6(c)(1) which require: monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance; and permits to contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. With respect to practical enforceability, the Petitioner states that to be enforceable as a practical matter, a condition must: provide a clear explanation of how the actual limitation or requirement applies to the facility; and make it possible to determine whether the facility is complying with the condition.

Section 504 of the Act makes it clear that each title V permit must include "conditions as are necessary to assure compliance with applicable requirements of [the Act], including the requirements of the applicable implementation plan" and "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." *See* 42 U.S.C. §§ 7661c(a) and (c). In addition, CAA § 114(a) requires "enhanced monitoring" at major stationary sources, and authorizes EPA to establish periodic monitoring, recordkeeping, and reporting requirements at such sources. *See* 42 U.S.C. § 7414(a).

The regulations at 40 CFR § 70.6(a)(3) specifically require that each permit contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring). In addition, 40 CFR § 70.6(c)(1) requires that all part 70 permits contain, consistent with 40 CFR § 70.6(a)(3), "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." These requirements are also incorporated into New York's regulations at 6 NYCRR § 201-6.5(b).

Recent decisions by the U.S. Court of Appeals for the District of Columbia Circuit shed light on the proper interpretation of these requirements. Specifically, the court addressed EPA's compliance assurance monitoring ("CAM") rulemaking (62 Fed. Reg. 54940 (1997) (promulgating, *inter alia*, 40 CFR part 64) in Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Cir. 1999), and reviewed EPA's periodic monitoring guidance under title V in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

EPA summarized the relationship between Natural Resources Defense Council and Appalachian Power and described their impact on monitoring provisions under the Act in two recent orders responding to petitions under title V requesting that the Administrator object to certain permits. *See* Pacificorp and Fort James Camas Mill. Please see pages 16 through 19 of the Pacificorp Order for EPA's complete discussion of these issues. In brief, EPA concluded that in accordance with the D.C. Circuit decisions, where the applicable requirement does not mandate any periodic testing or monitoring, the requirement of 40 CFR § 70.6(c)(1) 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 CFR § 70.6(a)(3)(i)(B). EPA also pointed out that where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, the court of appeals has ruled that the periodic monitoring rule in 40 CFR § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such circumstances, EPA found, the separate regulatory standard at 40 CFR § 70.6(c)(1) applies instead. The factual circumstances of Pacificorp and Fort James Camas Mill are analogous to this case. Accordingly, the reasoning of those decisions is being followed in this case as well.

#### Facility-Specific Petition Issues

1. The Petitioner alleges numerous concerns regarding the conditions included in the draft permit that relate to NO<sub>x</sub> emissions. *See* petition at pages 18 through 22. The Petitioner asserts that because DEC has not met its burden of incorporating permit conditions to assure North Shore Towers' compliance with applicable requirements, the U.S. EPA Administrator must object to the permit.

Specifically, the Petitioner asserts the following:

- It is unclear how measuring the hourly kilowatt output and fuel-use of the engines demonstrates compliance with the NO<sub>x</sub> emission limit of 9.0 grams per brake horsepower-hour (g/bhp-hr), without explaining such in a statement of basis. NYPIRG also contends that if the DEC does not believe that this surrogate or parametric monitoring is sufficient to assure compliance,<sup>21</sup> then continuous emission monitors must be installed to measure NO<sub>x</sub> emissions.
- DEC eliminated several draft permit conditions from the final permit that would have required reporting of the following information for each engine: (1) total fuel-oil and natural gas consumption; (2) hours of operation and energy output in kilowatt-hours; (3) monthly average NO<sub>x</sub> emissions based on data from the August, 1995 stack test; and (4) total NO<sub>x</sub> emissions in tons per year. Although NYPIRG had questioned the DEC on the adequacy of these reporting requirements, the specific conditions that incorporated these reporting requirements were eliminated from the final permit.
- A single stack test once every 5 years is far too infrequent to assure ongoing compliance.

EPA is basing its response on these allegations, and all other monitoring issues addressed in this Order, on the conditions contained in the revised, final permit that became effective on August 7, 2001. The monitoring conditions contained therein, for the engine-generators to assure compliance with NO<sub>x</sub> emissions applicable requirements, are (paraphrased) as follows:

Condition 1-12: Maintain hourly records for each engine of the kilowatt output and the operating mode (i.e., whether firing only fuel-oil, or firing both fuel-oil and natural gas, the dual-fuel mode).

Condition 1-13: Perform tune-ups of each engine annually and maintain a log of the adjustments made.

Condition 1-14: Average NO<sub>x</sub> emissions on a daily basis, using stack test data reported on October 5, 1995, to demonstrate compliance with the limit of 9.0 g/bhp-hr, and report such calculations semi-annually.

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<sup>21</sup> In its Responsiveness Summary, the DEC states that: "There is no way to compute NO<sub>x</sub> emissions at any given moment. There is no correlation between any given operating parameter and the NO<sub>x</sub> emissions." *See* Responsiveness Summary, Response to NYPIRG Comments re: Specific Permit Conditions, page 8.

Condition 1-15: Perform one stack test during the term of the permit, for each engine when firing number 2 fuel-oil, at the following loads: 700 kw, 950 kw, and 1,250 kw.

Condition 1-16: When firing number 2 fuel-oil, each engine shall only be operated between 700 kw and 1,250 kw, inclusive.

Condition 1-17: When operating in the dual-fuel mode, each engine shall not be operated in excess of 1,150 kw.

Condition 1-18: Perform one stack test during the term of the permit, for each engine when operating in the dual-fuel mode, at the following loads: 700 kw, 950 kw, and 1,150 kw.

With one exception discussed below relating to Condition 1-14, it is EPA's position that the conditions summarized above from the North Shore Towers' August 7, 2001 permit constitute adequate monitoring to assure compliance with the NO<sub>x</sub> standard of 9.0 g/bhp-hr for the 6 engines. The required annual tune-ups will maintain optimal operational conditions for the engines, and the one stack test for each engine during the permit term will provide definitive data on NO<sub>x</sub> emissions. EPA does not fully agree with the statement provided by the DEC in its Responsiveness Summary (see footnote 21, above). While it is true that definitive NO<sub>x</sub> emissions cannot be ascertained at any given point in time without the use of continuous emission monitors, the surrogate method developed by DEC in the final, revised permit is sufficient to demonstrate compliance. Stack test results allow the facility to develop emission curves, wherein NO<sub>x</sub> emissions at the three different loads are graphed for each engine and each operating mode, and the annual tune-ups will assure continued optimal operation of the units. By tracking each engine's kilowatt output and fuel use (as required in Condition 1-12), the facility representative can, and is required to, use the stack test graphs to calculate NO<sub>x</sub> emissions and report the results semi-annually pursuant to Condition 1-14. By keeping the engines properly tuned, it is likely that the NO<sub>x</sub> emissions will remain in the range indicated by the stack test results.

The one area where the permit remains insufficient relates to Condition 1-14. NO<sub>x</sub> emission calculations should be based on the results from the most recent stack test performed. Therefore, this condition must be revised accordingly. DEC can incorporate the following language, or language that is similar in intent:

“The emissions for engines 0001A, 0001B, 0001C, 0001D, 0001E, and 0001F may be averaged in order to demonstrate compliance with the 9.0 gram/brake horsepower-hour (g/bhp-hr) standard set forth at 6 NYCRR 227-2.4(f)(2)(ii). The emission rates used for each engine shall be based upon the approved results of the most recent stack test. The NO<sub>x</sub> emissions graphs from the August, 1995 stack test should be used until such time as the stack tests required pursuant to Conditions 1-15 and 1-18 are performed and the results approved by the Department.”

As such, EPA denies the petition in part and grants the petition as described above

regarding Condition 1-14, as it relates to monitoring of NO<sub>x</sub> emissions for the 6 engine-generators.

2. The Petitioner next alleges that general draft permit Condition 5, which reiterates the requirement under 6 NYCRR § 200.7 that pollution control equipment should be maintained according to ordinary and necessary practices, including manufacturer specifications, should not be included in the North Shore Towers permit unless North Shore Towers actually operates pollution control equipment. If control equipment is used at North Shore Towers, the Petitioner alleges that the permit condition must be supplemented with periodic monitoring. *See* petition at pages 23 and 24.

In its Responsiveness Summary, the DEC stated that this condition is a general requirement that applies to all air permits. DEC responded that the condition is included even where no applicable requirement necessitates the use of control equipment. The DEC further stated that control equipment maintenance plans are typically submitted as part of the application, but do not become enforceable parts of the permit. *See* Responsiveness Summary re: General Permit Conditions at page 3.

EPA agrees with DEC that many SIPs contain generic requirements for facilities to maintain all equipment in proper condition. These generic requirements may be provided in a general permit condition section of the title V permit. EPA also agrees with the Petitioner that it may be confusing to include such generic conditions when a facility does not have control equipment. Nonetheless, EPA finds that permitting authorities have discretion to develop a general permit condition section that applies to all title V sources. EPA also agrees that many facilities, although not subject to any specific applicable requirement, maintain control equipment. Thus, including this generic SIP condition in title V permits is proper. However, in order to alleviate any confusion that this general condition may cause, DEC has been advised that its statement of basis should describe the control devices that are installed at the facility. *See* July 18, 2000 letter at Attachment II, item 7.

Furthermore, EPA disagrees with the Petitioner that periodic monitoring must be added to this provision. As a general matter, where control equipment is installed under an applicable requirement, the appropriate permit condition is included in the emission units section of the title V permit, not in the general permit condition section. In this particular case, because North Shore Towers is not subject to any requirements to operate and maintain a control device, no specific periodic monitoring for control equipment is necessary. For other permits, where a control device is maintained, any necessary monitoring would be provided under the emissions unit section of the title V permit, and not under the general permit condition section.

Therefore, EPA denies the petition on this issue.

3. The Petitioner also raises concerns about Condition 7, relating to unpermitted emission sources. *See* petition at page 24. This condition, restating 6 NYCRR § 201-1.2 (adopted March 20, 1996), provides that if an existing emission source was subject to the permitting requirements of 6 NYCRR Part 201 at the time of construction or modification and

the owner or operator failed to apply for a permit, then the owner or operator must now apply for a permit. The condition further states that the emission source or facility is subject to all regulations that were applicable to it at the time of construction or modification, and any subsequent requirements applicable to existing sources or facilities. The Petitioner asserts that the condition is confusing because if the facility is subject to NSR or PSD, corresponding conditions should be in the permit. The Petitioner argues that it is unclear from the permit or the application whether the facility is subject to a pre-existing permit. The Petitioner is also concerned that a source may not be subject to penalties if it applies for a permit as required by Condition 7, Item 7.1.

EPA notes that this provision does not relieve the permitting authority or permittee from including applicable construction permit conditions in the permit. In addition, if the facility is in violation for not having proper construction permits, the permit must include a compliance schedule. *See* 40 CFR § 70.6(c)(3). Condition 7 of the draft permit merely expands on what is required by the SIP at 6 NYCRR § 201.2(a), that no person shall commence construction or proceed with a modification of an air contamination source without having a valid permit, by providing additional terms for those who violate permitting requirements.

NYPIRG's additional concern that the permit shield could preclude the imposition of penalties is unfounded. The permit shield provides that compliance with the conditions of the permit is deemed to be compliance with those applicable requirements specifically identified in the permit and/or those requirements that the State specifically identifies in the permit as not applicable. *See* 40 CFR § 70.6(f). A permit shield cannot exonerate or protect from enforcement a facility that lacks proper construction permits. Furthermore, there is no determination in the permit that NSR is not applicable to North Shore Towers. Therefore, if a violation were later discovered, the permittee would need to apply for the proper construction permits, the title V permit would be reopened, and the facility may be subject to any other appropriate enforcement actions. Condition 7 directs what the permittee must do to achieve compliance; it does not address the penalties that may result from non-compliance. Therefore, the condition does not preclude the public, DEC or EPA from bringing an enforcement action and seeking penalties from the facility. Accordingly, EPA denies the petition on this issue.

4. The Petitioner next alleges that two conditions of the draft permit, Conditions 10 and 11, addressing the handling of air contaminants collected in an air cleaning device, should not be included if North Shore Towers does not operate control devices. If North Shore Towers does have control devices, then the Petitioner asserts that the conditions should include recordkeeping requirements. *See* petition at page 25. DEC responded that these conditions are in all permits regardless of whether the facility has air pollution control devices. *See* Responsiveness Summary re: General Permit Conditions at pages 4 and 5.

EPA denies the petition on this issue. As stated in the response to issue H.2, above, States have discretion to include as general permit conditions, language from general provisions of the SIP. For facilities where an applicable requirement specifies a control device, then appropriate monitoring requirements must be included under the emissions unit section of the title V permit.



5. The Petitioner next asserts that Condition 15 in the draft permit, the general condition which states that the facility shall operate in accordance with any accidental release plan, response plan or compliance plan, is problematic because the requirements in these documents should be incorporated into the permit as permit terms. If not incorporated, the Petitioner asserts that such documents should be clearly cross-referenced in the permit. The Petitioner also suggests that this general condition should be deleted from the permit altogether since it adds nothing to the permit. *See* petition at pages 25 and 26.

EPA disagrees with the Petitioner that all types of plans must be a part of a title V permit. For instance, risk management plans under CAA § 112(r) are not incorporated into a title V permit. However, EPA does agree that certain documents should be properly cross-referenced in title V permits. Compliance plans required pursuant to a NO<sub>x</sub> RACT SIP rule are not fully incorporated into title V permits, but if a facility is required to have one of these plans, it must be incorporated by reference into the title V permit.

In certain cases, a facility must comply with a plan that is not part of the title V permit. Thus, DEC's general condition is essential to the title V permit since it also serves to remind the source and the public of those plans that are not part of the title V permit. Where the facility is subject to a plan such as a NO<sub>x</sub> RACT plan or a start-up, shutdown and malfunction plan under a maximum achievable control technology (MACT) standard, the permit must specifically say so. However, the general condition can serve only as a reminder to the permittee to comply and apply for requisite permit amendments on a timely basis. In this case there is no allegation that this facility requires such a plan or plans.

Because the Petitioner does not allege any specific plans that should have been, but were not included in the permit as an applicable requirement, EPA denies the petition on this issue.

6. The next allegation of the Petitioner relates to a general permit condition, Condition 17 in the draft permit, which states that: “[r]isk management plans must be submitted to the Administrator if required by Section 112(r).” The Petitioner alleges that this condition should state whether the facility is or is not subject to CAA § 112(r). *See* petition at page 26.

While EPA agrees with the Petitioner that this provision is very general and does not affirmatively state whether CAA § 112(r) applies to this particular source, we do not believe that the absence of such a determination provides a basis for EPA to object to this particular permit. North Shore Towers did not submit a Risk Management Plan (RMP) to EPA under CAA § 112(r) and 40 CFR part 68<sup>22</sup> and, given what we know about this source, it is reasonable to assume that North Shore Towers is not subject to these statutory and regulatory requirements. Accordingly, at most it was harmless error in this case that the permit does not specify the applicability of CAA § 112(r) and 40 CFR part 68 to this facility.

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<sup>22</sup> All Risk Management Plans (RMP) are filed with EPA and EPA can verify the submission of an RMP by contacting the RMP Reporting Center at (703) 816-4434.

Furthermore, DEC did not take delegation of CAA § 112(r) and, therefore, EPA is responsible for implementing such requirements in New York. However, it is understood that all applicable requirements must be in title V permits. As such, during the early stages of implementation of New York's title V program, EPA asked the DEC to include a general requirement regarding CAA § 112(r) in all permits (based on language prepared by EPA). DEC has included such general language on CAA § 112(r) in all title V permits as requested by the EPA, and although we agree with the Petitioner that this condition is not optimal, as discussed above, the circumstances of this case do not warrant objecting to the permit and, therefore, the petition is denied on this issue.

7. The Petitioner next comments that Condition 30 of the draft permit, "Required Emissions Tests," includes everything required under 6 NYCRR § 202-1.1 except the requirement that the permittee "bear the cost of measurement and preparing the report of measured emissions." *See* petition at pages 26 and 27. The Petitioner goes on to cite EPA's "White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program" ("White Paper 2"), which states that it is generally not acceptable to use a combination of referencing certain provisions of an applicable requirement while paraphrasing other provisions of that same requirement.

EPA disagrees with petitioner that the omitted clause from 6 NYCRR § 202-1.1 needs to be added to Condition 30. The permit unambiguously states that 6 NYCRR § 202-1.1 is an applicable requirement. In addition, 6 NYCRR § 202-1.1 places the burden of conducting and reporting any required emissions testing on the permittee. EPA does not find the omitted clause to have resulted in a defect in the North Shore Towers permit since omitting who shall bear the cost of conducting and reporting mandatory emissions tests does not relieve the permittee from the requirement to perform and report such tests. Furthermore, EPA does not believe a reasonable interpretation of the permit would lead a reader to conclude anyone other than the permittee should bear the costs of measuring and testing emissions. Section II.E. of White Paper #2 addresses incorporation by reference in applications and permits, and emphasizes the importance of maintaining clarity with respect to applicability and compliance obligations. EPA finds both elements to have been addressed in Condition 30. For this reason, EPA finds it unnecessary to change Condition 30 as requested by Petitioner. EPA denies the petition on this issue.

8. The next allegation made by the Petitioner is that the permit lacks any kind of periodic monitoring to assure compliance with the applicable opacity limitation found in the SIP at 6 NYCRR § 211.3. *See* petition at page 27. The Petitioner specifically points to condition 34 of the draft permit which prohibits the emissions units at North Shore Towers from exceeding 20 percent opacity over a six minute average, and 57 percent opacity in any single 6 minute period during each hour. Condition 34 was a facility level condition. DEC responded that this condition is in the SIP and applies to all sources. The Petitioner further asserts that the provisions do not specify what kind of monitoring is required (only stating that the averaging method is a 6-minute average), how often monitoring is to be performed (only stating that monitoring shall be performed as required), and what the reporting requirements are (only stating that reports will be required upon request of the regulatory agency).

In the August 7, 2001 permit, DEC added two conditions that relate to monitoring for 6 NYCRR § 211.3, Conditions 1-7 and 1-8. These conditions parallel the opacity monitoring requirements listed under the emission units section of the permit, as discussed in item number 10, below. That is, for each of these new conditions (Condition 1-7 addresses the opacity limit of 57 percent and Condition 1-8 addresses the 20 percent limit), a facility representative must perform daily observations for opacity and record such observations in a log book. If visible emissions are observed for two consecutive days, a Method 9 test must be performed within two days thereafter. As discussed in more detail below, this monitoring procedure is sufficient to assure compliance with the subject applicable requirement. As such, the petition is denied on this issue.

9. The Petitioner next alleges that the permit includes the sulfur-in-fuel limitations of 6 NYCRR § 225 in the state-only section of the permit, but this requirement must be listed on the federal side. The Petitioner asserts that this is further confused by placing on the federal side monitoring conditions designed to assure compliance with the sulfur limits. *See* petition at page 28. In addition, the Petitioner alleges that the provisions for monitoring the sulfur requirements of 6 NYCRR § 225 are inadequate given that: (1) sulfur-in-fuel reports are only due upon request; (2) North Shore Towers is never required to independently test the fuel delivered to the facility; (3) the permit does not describe how the fuel is to be analyzed or by whom; and (4) the monitoring conditions only require North Shore Towers to maintain records for 3 years, not the 5-years as required by 40 CFR part 70.

EPA agrees with the Petitioner that sulfur-in-fuel limitations should be identified as federally-applicable requirements and, therefore, be placed on the federal side of the permit. The North Shore Towers' August 7, 2001 permit brought the sulfur-in-fuel requirement into the federal side of the permit (*see* new conditions 1-9, 1-10 and 1-11). The state only condition, condition 58 in the draft permit, has been deleted from the August 7, 2001 permit. In addition, these new permit conditions require semi-annual reporting to DEC.

The monitoring condition to obtain fuel supplier certifications is appropriate for the sulfur-in-fuel applicable requirement for the North Shore Towers facility. A number of regulations rely on certifications, a responsibility that most sources and suppliers take seriously. While some sources may not comply with this requirement, and spot monitoring can be helpful in identifying them, fuel certification is the method that EPA itself relies on in certain instances (e.g., certain NSPS rules, PSD permits, etc.). While ever more stringent monitoring requirements can always be applied, it is necessary to use methods that are appropriate to the case at hand, based on the applicable requirement, the type and size of the facility, economics, facility location, and other factors, while avoiding the imposition of gratuitously, onerous conditions on the source.

With respect to retention of records, EPA agrees with the petitioner that 40 CFR part 70 requires facility owners or operators to retain all monitoring-related records for a period of at least 5-years from the time that the monitoring was performed. *See* 40 CFR § 70.6(a)(3)(ii)(B). As such, DEC must revise Condition 1-10 to state that: "All records shall be available for a minimum of five years."

Therefore, EPA grants in part and denies in part the petition on these issues.

10. The Petitioner next addresses emission unit-specific opacity issues. *See* petition at pages 29 through 31. The Petitioner alleges that the Administrator must object to the North Shore Towers permit because the monitoring included in the permit is inadequate, and the permit illegally limits the type of evidence that can be used to determine compliance. With respect to the first issue, the Petitioner's allegation is that the permit lacks adequate periodic monitoring to assure compliance with the applicable opacity limitation found at 6 NYCRR § 227-1.3. That is, the permit provision is unacceptable because a Method 9 test to determine opacity does not have to be scheduled until visible emissions are observed for two consecutive days, and then the facility has an additional two days to perform the test. The Petitioner further alleges that the DEC must explain in a statement of basis why continuous opacity monitors (COMs) are not required. If DEC concludes that COMs are not necessary because the facility is not likely to violate the opacity standard, or COMs are not technically or economically feasible, then the permit must require that the facility maintain a person at all times trained in Method 9 readings who can conduct a reading within one hour after visible emissions are observed. In its petition, NYPIRG asserts that the permit must incorporate additional terms relative to: (a) qualifications of the daily observer; (b) details about the daily observation; (c) details about the Method 9 testing; (d) details about recordkeeping; and (e) details about reporting. Finally, the Petitioner alleges that the permit includes "credible evidence buster" language by stating "compliance is 'based upon the six minute average in reference test Method 9 in Appendix A of 40 CFR 60.'" Such language makes Method 9 the exclusive benchmark for demonstrating compliance, and precludes the use of other credible evidence in demonstrating noncompliance.

The June 22, 2000 permit included Conditions 47 and 53, which delineated the opacity requirement from the SIP regulation at 6 NYCRR § 227-1.3(a) for the North Shore Towers engine-generators and boilers, respectively, and included a "Method 9" opacity test upon request by the regulatory agency. In the August 7, 2001 permit, Condition 47 was replaced by Conditions 1-19, 1-20, 1-21 and 1-22, which require for the engine-generators daily monitoring to observe visible emissions, and one Method 9 test during the term of the permit (one condition addresses when the units are fired solely with number 2 fuel-oil, and one condition addresses when the units are in the dual-fuel fired mode). Condition 53 was replaced in the August 7, 2001 permit by Condition 56 which addresses for the boilers ongoing periodic monitoring for opacity (that is, daily visible emissions observations). This ongoing periodic monitoring provision was developed by DEC in consultation with EPA Region 2 for facilities of this type. Given the type of emission units that comprise the North Shore Towers facility and the fuel burned in the engines and boilers (that is, low sulfur fuel-oil), the periodic monitoring delineated in Conditions 1-19, 1-21 and 56, which require daily visible inspections when firing oil, is appropriate and sufficient to assure compliance with the applicable opacity limit.

Some additional discussion on the daily monitoring provision is warranted to address the Petitioner's other concerns. Both historically and operationally, opacity exceedances at the North Shore Towers facility do not seem to occur. First, over the past several years, routine DEC inspections have indicated that the facility has been in compliance with applicable requirements. Second, use of low sulfur fuel-oil means less particulate emissions and lower opacity. Third,

North Shore Towers implements an annual tune-up program for all of its Title V-affected emission units to ensure proper and optimal operation.

With respect to continuous opacity monitors, or COMS, this type of monitoring is more widely used in coal-fired applications or where higher sulfur fuel-oil is burned, and where control equipment such as fabric filters (baghouses) or electrostatic precipitators are employed. Monitoring less frequently than on a “continuous” basis is appropriate where there exists a reasonable assurance of compliance over all operating conditions; that is, when there is a low variability of emissions and an ample margin of compliance.

The Petitioner also raised concerns about the daily monitoring for visible emissions at the facility, including the qualifications of the observer and the timing of notifying DEC, among other concerns. First, only a certified visible emission “reader” can definitively determine the percent opacity emanating from a stack. It is understood that the facility observer referenced in Conditions 1-7, 1-8, 1-19, 1-21 and 56 of the August 7, 2001 permit would not be so certified. It is the duty of this facility observer to identify any visible emissions from the stack, whether or not such emissions would constitute an opacity violation. Once two consecutive days of visible emissions are observed, then the facility is required to make arrangements to have a Method 9 evaluation performed by a certified smoke reader. It is the EPA’s belief that the two-day time frame for this next step to occur is reasonable and appropriate. Similarly, EPA believes that the next step of the process is also reasonable. If an opacity violation has been documented, then the facility must notify the DEC within one business day of the Method 9 opacity test. It must be noted that the observances by the facility employee are not Method 9 readings and, therefore, the requirements of Method 9 do not apply. In the absence of using COMs, which in the case of North Shore Towers does not appear to be economically appropriate or reasonable based on the reasons discussed above, the monitoring procedure delineated in the aforementioned conditions is appropriate.

In conclusion, daily visible inspections are appropriate. There is no applicable requirement that requires North Shore Towers to install and maintain COMs. Nor does title V require the installation of COMs. Additionally, neither title V nor any applicable requirement to which this facility is subject require that the facility have on the premises at all times a person trained in Method 9 readings who can conduct a reading within one hour after visible emissions are observed. Not all facilities have environmental or plant managers who are trained in Method 9 readings. Therefore, DEC’s decision to require a Method 9 reading two days after observing visible emissions over a two day period is acceptable. This time frame is necessary for the facility to hire a trained Method 9 reader. Furthermore, the permit requires that the facility maintain a logbook of all readings. Therefore, conducting daily visible inspections and logging the results of such inspection is adequate to assure that the facility complies with the 20 percent opacity standard.

EPA finds that the periodic monitoring for opacity is adequate and, therefore, denies the petition on this issue. While it should be reiterated that the adequacy of monitoring is always a case-by-case decision and the permit writer must evaluate the specific situation and account for individual circumstances as appropriate, EPA would like to address one specific area. DEC is

requiring that one Method 9 test be performed once during the term of the permit for the engine-generators, but not for the boiler units (Emission Unit U-FAC02) when burning number 2 fuel-oil (Process 007). It is unclear whether this was an oversight or was purposefully omitted. For other recent cases reviewed by EPA (e.g., Yeshiva University and Kings Plaza Total Energy Plant), DEC required one Method 9 test be performed once during the term of the permit for similarly-sized boiler units. The re-opening of the permit will provide to DEC the opportunity to incorporate this additional requirement if it so chooses or explain in the statement of basis why a similar condition is not necessary in this case.

EPA disagrees with the final issue raised by the Petitioner. Nothing in the permit limits EPA, DEC or citizens from using any credible evidence to bring an enforcement action for opacity violations. The North Shore Towers permit does not say Method 9 is the sole or exclusive method used to determine compliance. Rather, the permit condition states that: “Compliance Certification shall include the following monitoring” and thus, does not preclude the use of any other method for determining compliance. In addition, the SIP regulation at 6 NYCRR § 227-1 states in part that: “Compliance with the opacity standard may be determined by....or, (3) *considering any other credible evidence.*” See 6 NYCRR § 227-1.3(b) (emphasis added). Therefore, EPA denies the petition regarding the alleged use of credible evidence buster language.

11. The Petitioner expressed concern that Condition 50 of the draft permit provides operational flexibility that will allow North Shore Towers to replace engine-generator 0001D without undergoing any public review. See petition at page 31. The draft permit states that this unit can only burn fuel-oil, and cannot operate in the dual-fuel fired mode except upon written permission from NYSDEC. NYPIRG interprets this condition as the incorporation of operational flexibility into the permit to allow North Shore Towers to replace the subject engine without undergoing a permit modification process, including public participation procedures. NYPIRG also asserts that under New York’s operational flexibility provisions of 6 NYCRR § 201-5.4(b)(1), it does not appear that an engine can be replaced without a permit modification. In its Responsiveness Summary, the DEC stated, regarding Unit 0001D, that: “No permit is needed to replace this unit provided that the owner can demonstrate that the new unit meets the NO<sub>x</sub> RACT and all other emission limitations of 6 NYCRR and 40 CFR 60, once the unit is replaced.” See Responsiveness Summary, Response to NYPIRG Comments re: Specific Permit Conditions at page 9.

First, it should be noted that Condition 50 of the draft permit (Condition 54 of the June 22, 2000 permit) stated in part that: “Emission source 0001D may not operate in the dual-fuel firing mode except upon obtaining written permission from NYSDEC.” This provision was replaced in the August 7, 2001 permit by Condition 1-23, which prohibits Unit D from firing natural gas. Condition 1-23 further allows the permittee to perform, at any time, a stack test of the unit while firing natural gas, and the requirement to forward such results to the DEC; the permittee may subsequently fire natural gas in Unit D upon written approval of the NYSDEC.

EPA does not agree with the petitioner that draft permit Condition 50 (and new Condition 1-23) allow operational flexibility for the replacement of Unit D. These conditions provide, for

an existing engine-generator at the facility, identified as Unit D, operating limits (i.e., the limit to only burn fuel-oil in the engine) and allowances (i.e., the facility may perform a stack test to show that the unit can comply when in the dual-fuel firing mode, in the case of new Condition 1-23). The conditions do not address in any way unit replacement. It should also be noted that, although the permit does not include detailed unit-specific information, the application upon which the permit was developed lists Emission Source 0001D as a Chicago Pneumatic 1025 CPS DF unit, with a design capacity of 1, 500 kilowatts, and having commenced construction and operation in November, 1974. The procedures required to replace an emission unit at a title V facility, including any permitting requirements, are those delineated in New York State regulations, and are not in this case pre-empted by the subject condition. Therefore, the petition is denied on this issue.

### State Only Requirements

12. The final assertion of the Petitioner is that Condition 58 of the draft permit, which describes the sulfur-in-fuel requirements of 6 NYCRR § 225-1, is improperly listed on the State-Only side of the permit. These requirements should be listed on the Federally-Enforceable side of the permit, as this is an applicable requirement of the SIP at 6 NYCRR § 225.1. *See* petition at page 33.

NYPIRG notes that the current State version of the rule (6 NYCRR § 225-1) is only enforceable by DEC, while the SIP version (6 NYCRR § 225.1) is enforceable only by EPA and the public. DEC noted in its Responsiveness Summary that the current State version of 6 NYCRR § 225-1 is slightly different than the version in New York's SIP. *See* Responsiveness Summary, Response to NYPIRG Comments re: Specific Permit Conditions at page 10. EPA and NYPIRG have noted that the two regulations are environmentally equivalent. In the August 7, 2001 permit, DEC placed this applicable requirement at Condition 1-9, on the federally-enforceable side of the permit. Therefore, the petitioner's claim no longer has merit, and EPA denies the petition on this issue.

The rule pertaining to "Fuel Consumption and Use" at 6 NYCRR § 225.1(a)(3), although no longer a current New York State regulation, remains in the SIP and is therefore federally enforceable. The SIP-approved regulation is the applicable requirement that must be included in the Title V permit. Therefore, when DEC reopens the permit to make the other changes required by this Order, EPA recommends that DEC cite the correct applicable requirement, the SIP provision at 6 NYCRR § 225.1(a)(3), in Condition 1-9. It would be improper to cite the current State requirement, at 6 NYCRR § 225-1.2(a)(2), on the federal side of the permit because this rule has not been federally-approved into the New York SIP. There are two other related provisions in the August 7, 2001 permit for sulfur-in-fuel requirements, Conditions 1-10 and 1-11. Upon reopening of the permit, DEC should also change the citation for these two provisions, from 225-1.8 to 225.7 and 225-1.8(a) to 225.7(a), respectively.

Because the substance of these two versions of Part 225 is equivalent, DEC may wish to streamline these requirements. In White Paper 2, EPA presented a procedure whereby States and sources can determine the set of permit terms and conditions that will assure compliance with all

applicable requirements for an emission point or group of emission points, so as to eliminate redundant or conflicting requirements. Accordingly, DEC may choose to subsume the State-only enforceable provision into the SIP provision. If such a streamlining option is chosen, both the permit and the statement of basis should explain that compliance with the SIP-approved rule assures compliance with the State rule, and that both the federally-approved rule and the State rule continue to apply. In addition, the DEC must ensure that the permit shield applies to the subsumed requirement.

## **CONCLUSION**

For the reasons set forth above and pursuant to CAA § 505(b)(2), I deny in part and grant in part the petition of NYPIRG requesting the Administrator to object to the issuance of the North Shore Towers permit. This decision is based on a thorough review of the August 7, 2001 permit, which EPA has concluded corrects objectionable conditions of the original permit.

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Dated:

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Christine Todd Whitman  
Administrator