

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

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In the Matter of the Proposed Title V
Operating Permit for

NORTH SHORE TOWERS APARTMENTS, INC. Permit ID: DEC 2-6307-00339/00002
to operate the Integral Total Energy Plant
located in Floral Park, New York

Proposed by the New York State Department of
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE
OF THE PROPOSED TITLE V OPERATING PERMIT FOR
NORTH SHORE TOWERS APARTMENTS, INC.**

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. (“NYPIRG”) hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to issuance of the proposed Title V Operating Permit for North Shore Towers Apartments, Inc. (“North Shore Towers”). The permit was proposed to U.S. EPA by the New York State Department of Environmental Conservation (“DEC”) via a letter to Mr. Steven C. Riva (Chief, Permitting Section, Air Programs Branch, U.S. EPA Region 2 dated April 17, 2000. This petition is filed within sixty days following the end of U.S. EPA’s 45-day review period as required by Clean Air Act § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. *Id.* In compliance with Clean Air Act § 505(b)(2), NYPIRG’s petition is based on objections to North Shore Towers’ draft permit that were raised during the public comment period provided by DEC.

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

The U.S. EPA Administrator must object to the proposed Title V permit for North Shore Towers because it does not comply with 40 CFR Part 70. In particular:

- (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG’s request for a public hearing (see p. 3 of this petition);

- (2) the proposed permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c) (see p. 5 of this petition);
- (3) the proposed permit lacks an adequate statement of basis as required by 40 CFR § 70.7(a)(5) (see p. 7 of this petition);
- (4) 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 p. 9 of this petition);
- (5) the proposed permit distorts the annual compliance certification requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5) (see p. 10 of this petition);
- (6) the proposed permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions (see p. 11 of this petition);
- (7) 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 p. 16 of this petition); and
- (8) the proposed permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable (see p. 17 of this petition).

If the U.S. EPA Administrator determines that a proposed permit does not comply with legal requirements, he or she must object to the proposed permit. See 40 CFR § 70.8(c)(1) (“The [U.S. EPA] Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part.”). The numerous and significant violations of 40 CFR Part 70 discussed below require the Administrator to object to the proposed Title V permit for North Shore Towers.

Discussion of Objection Issues

The Title V permitting program offers an unprecedented opportunity for concerned citizens to learn what air quality requirements apply to a facility located in their community and whether the facility is complying with those requirements. Unfortunately, a poorly written Title V permit may make enforcement under the Clean Air Act even more difficult than it already is, because each of New York’s Title V permits include a permit shield. Under the terms of the permit shield, a permittee is protected from enforcement action so long as the permittee is complying with its permit, even if the permit

incorrectly applies the law.¹ Thus, a defective permit may prevent NYPIRG's members as well as other New Yorkers from taking legal action against a permittee who is illegally polluting the air in their community. Furthermore, a Title V permit that lacks appropriate monitoring, recordkeeping, and reporting requirements denies NYPIRG's members and all New Yorkers their right to know whether the permittee is complying with legal requirements.

The proposed Title V permit does not assure North Shore Towers' compliance with applicable requirements. U.S. EPA must require DEC to remedy the flaws in the proposed permit that are identified in this petition. If DEC refuses to remedy these flaws, U.S. EPA must draft a new permit for North Shore Towers that complies with federal requirements.

In this petition, we identify permit conditions as they are numbered in the draft permit that was released by DEC for public comment. While we recognize that the permit condition numbers in the proposed permit are most likely different from the permit condition numbers in the draft permit, DEC does not provide NYPIRG with a copy of the proposed permit when it responds to NYPIRG's comments and announces to U.S. EPA that a proposed permit is available for review. NYPIRG has repeatedly asked U.S. EPA to direct DEC to provide any member of the public who submits comments on a facility's draft permit with a copy of the facility's proposed permit. So far, U.S. EPA has not taken this step. NYPIRG urges U.S. EPA to solve this problem. Any member of the public who takes the time to review and comment on a Title V permit deserves, at a minimum, to receive a copy of the proposed and final permit that is issued to the facility.

Appendix A contains a copy of North Shore Towers draft permit.

A. DEC Violated the Public Participation Requirements of 40 CFR § 70.7(h) by Inappropriately Denying NYPIRG's Request for a Public Hearing

40 CFR § 70.7(h) provides that "all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." The public notice announcing the availability of North Shore Towers' draft permit neither gave notice of a public hearing nor informed the public how to request a public hearing. NYPIRG requested a public hearing in written comments submitted to DEC during the applicable public comment period. See Appendix A at 2.

Despite NYPIRG's extensive comments on the draft permit, DEC denied NYPIRG's request for a public hearing. It is difficult to imagine what a member of the public must allege in order to satisfy DEC's standard for holding a public hearing.

In denying NYPIRG's request for a public hearing, DEC asserted that:

¹ The permit shield only applies to requirements that are specifically identified in the permit.

A public hearing would be appropriate if the Department determines that there are substantive and significant issues because the project, as proposed, may not meet statutory or regulatory standards. Based on a careful review of the subject application and comments received thus far, the Department has determined that a public hearing concerning this permit is not warranted.

See DEC Responsiveness Summary (cover letter). An examination of the applicable state regulation, 6 NYCRR § 621.7, reveals that DEC applied the wrong standard in denying NYPIRG's request for a public hearing. § 621.7 provides:

§621.7 Determination to conduct a public hearing.

- (a) After a permit application for a major project is complete (see provisions of sections 621.3 through 621.5 of this Part) and notice in accordance with section 621.6 of this Part has been provided, the department shall evaluate the application and any comments received on it to determine whether a public hearing will be held. If a public hearing must be held, the applicant and all persons who have filed comments shall be notified by mail. This shall be done within 60 calendar days of the date the application is complete. A public hearing may be either adjudicatory or legislative.
- (b) The determination to hold an adjudicatory public hearing shall be based on whether the department's review raises substantive and significant issues relating to any findings or determinations the department is required to make pursuant to the Environmental Conservation Law, including the reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project because the project, as proposed, may not meet statutory or regulatory criteria or standards. *In addition, 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, the department shall hold an adjudicatory public hearing on the application.*
- (c) *Regardless of whether the department holds an adjudicatory public hearing, a determination to hold a legislative public hearing shall be based on the following:*
 - (1) *if a significant degree of public interest exists*

(emphasis added). In denying NYPIRG's request for a public hearing, DEC applied the standard that governs when the agency can hold a hearing upon its own initiative, rather than the standard that governs when the agency must grant a public request for a hearing. Moreover, though DEC can hold a legislative hearing "if a significant degree of public interest exists," DEC apparently determined that NYPIRG's request for a public hearing (made on behalf of NYPIRG's student members at colleges and universities across the state) failed to demonstrate the requisite degree of public interest.

Apparently, DEC will hold a public hearing on a draft Title V permit only if public comments make it reasonably likely that the “project” (as opposed to the permit) must undergo major modifications.² Because a Title V permit is meant to assure that a facility complies with existing requirements, not to subject the facility to additional applicable requirements, the vast majority of existing facilities will not need to undertake major modifications before receiving a Title V permit. This does not obviate the need for a public hearing. In the context of a Title V permit proceeding, the objective of a public commenter is to ensure that the Title V permit holds the permit applicant accountable for violations of applicable requirements. Typically, the issue is whether significant modifications need to be made to the *permit*, not whether significant modifications need to be made to the *project*. DEC’s interpretation of its regulations constructively denies the public an opportunity for a hearing on virtually any Title V permit application submitted by an existing facility. This clear violation of 40 CFR § 70.7(h) requires the Administrator to object to the proposed permit for North Shore Towers.

B. The Proposed Permit is Based on an Incomplete Permit Application

The Administrator must object to the proposed Title V permit for North Shore Towers because North Shore Towers did not submit a complete permit application in accordance with the requirements of Clean Air Act § 114(a)(3)(C), 40 CFR §70.5(c), and 6 NYCRR § 201-6.3(d).

First, North Shore Towers’ permit application lacks an initial compliance certification. North Shore Towers is legally required to submit an initial compliance certification that includes:

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

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

² 6 NYCRR § 621.1(q) defines “project” as “any action requiring one or more permits identified in section 621.2 of this Part.” (The Title V permit is one of the permits identified in section 621.2). 6 NYCRR § 621.1(o) defines “permit” as “any permit, certificate, license or other form of department approval, suspension, modification, revocation, renewal, reissuance or recertification, including any permit condition and variance, that is issued in connection with any regulatory program listed in section 621.2 of this part.” Thus, “project” and “permit” are given distinct definitions under state regulations promulgated by DEC. When DEC asserts that a hearing is warranted only when “the project, as proposed, may not meet statutory or regulatory standards,” this statement can only be interpreted as requiring a demonstration that the underlying action that requires the permit--the operation of the facility--may not meet statutory or regulatory standards.

an applicable requirement, the proposed Title V permit must include an enforceable schedule by which it will come into compliance with the requirement (the “compliance schedule”). Because North Shore Towers failed to submit an initial compliance certification, neither government regulators nor the public can feel confident that North Shore Towers is currently in compliance with every applicable requirement. Therefore, it is unclear whether North Shore Towers’ Title V permit must include a compliance schedule.

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

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

57 FR 32250, 32274 (July 21, 1992). Despite the importance of knowing whether a permit applicant is in compliance with all requirements at the time of permit issuance, North Shore Towers is not required to submit a compliance certification until one full year after the permit is issued. A permit that is developed in ignorance of a facility’s current compliance status cannot possibly assure compliance with applicable requirements as mandated by 40 CFR § 70.1(b) and § 70.6(a)(1).

In addition to omitting an initial compliance certification, North Shore Towers’ permit application lacks certain information required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4), including:

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

The omission of this information makes it significantly more difficult for a member of the public to determine whether a draft permit includes all applicable requirements. For example, an existing facility that is subject to major New Source Review (“NSR”) requirements should possess a pre-construction permit issued pursuant to 6 NYCRR Part 201. Minor NSR permits, Title V permits, and state-only permits are also issued pursuant to Part 201. In the Title V permit application, a facility that is subject to any type of pre-existing permit simply cites to 6 NYCRR Part 201. Because DEC does not require the applicant to describe each underlying requirement, it is virtually impossible to identify existing NSR requirements that must be incorporated into the applicant’s Title V permit. The draft permit fails to clear

up the confusion, especially since requirements in pre-existing permits are often omitted from an applicant's Title V permit without explanation.

The lack of information in the permit application also makes it far more difficult for the public to evaluate the adequacy of periodic monitoring included in a draft permit, since the public permit reviewer must investigate far beyond the permit application to identify applicable test methods. Often, draft permit conditions are unaccompanied by any kind of monitoring requirement. Again, there is never an explanation for the lack of a monitoring method.

North Shore Towers' failure to submit a complete permit application is the direct result of DEC's failure to develop a standard permit application form that complies with federal and state statutes and regulations. Nearly a year ago, NYPIRG petitioned the Administrator to resolve this fundamental problem in New York's Title V program. In the petition, submitted April 13, 1999, NYPIRG asked the Administrator to make a determination pursuant to 40 CFR § 70.10(b)(1) that DEC is inadequately administering the Title V program by utilizing a legally deficient standard permit application form. The petition is still pending. U.S. EPA must require North Shore Towers and all other Title V permit applicants to supplement their permit applications to include an initial compliance certification and additional background information as required under state and federal law.

The entire April 13, 1999 petition is incorporated by reference into this petition and is attached hereto as Appendix B.

The Administrator must object to final issuance of the proposed permit to North Shore Towers because the proposed permit is based upon a legally deficient permit application and therefore does not assure North Shore Towers' compliance with applicable requirements.

C. The Proposed Permit Lacks an Adequate Statement of Basis as Required by 40 CFR § 70.7(a)(5)

The Administrator must object to the proposed Title V permit for North Shore Towers because it lacks a statement of basis as required by 40 CFR § 70.7(a)(5).³ According to § 70.7(a)(5), every Title V permit must be accompanied by a "statement that sets forth the legal and factual basis for the draft permit conditions." Without a statement of basis, it is virtually impossible for the public to evaluate DEC's periodic monitoring decisions (or lack thereof) and to prepare effective comments during the 30-day public comment period.

According to U.S. EPA Region 10:

The statement of basis should include:

³ 40 CFR § 70.7(a)(5) provides that "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 and regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it."

- i. Detailed descriptions of the facility, emission units and control devices, and manufacturing processes including identifying information like serial numbers that may not be appropriate for inclusion in the enforceable permit.
- ii. Justification for streamlining of any applicable requirements including a detailed comparison of stringency as described in white paper 2.
- iii. Explanations for actions including documentation of compliance with one time NSPS and NOC requirements (e.g. initial source test requirements), emission caps, superseded or obsolete NOCs, and bases for determining that units are insignificant IEUs.
- iv. Basis for periodic monitoring, including appropriate calculations, especially when periodic monitoring is less stringent than would be expected (e.g., only quarterly inspections of the baghouse are required because the unit operates less than 40 hours a quarter.)

Elizabeth Waddell, Region 10 Permit Review, May 27, 1998 (“Region 10 Permit Review”), at 4. Region 10 also suggests that:

The statement of basis may also be used to notify the source or the public about issues of concern. For example, the permitting authority may want to discuss the likelihood that a future MACT standard will apply to the source. This is also a place where the permitting authority can highlight other requirements that are not applicable at the time of permit issuance but which could become issues in the future.

Region 10 Permit Review at 4. In New York, this information is never provided.

NYPIRG is not alone in asserting that the statement of basis is an indispensable part of Title V proceedings. According to Joan Cabreza, EPA Region 10 Air Permits Team Leader:

In essence, this statement is an explanation of why the permit contains the provisions that it does and why it does not contain other provision that might otherwise appear to be applicable. The purpose of the statement is to enable EPA and other interested parties to effectively review the permit by providing information regarding decisions made by the permitting authority in drafting the permit.

Joan Cabreza, Memorandum to Region 10 State and Local Air Pollution Agencies, Region 10 Questions & Answers #2: Title V Permit Development, March 19, 1996.

The Statement of Basis that accompanies the Final Air Operating Permit for Goldendale Compressor Station (Northwest Pipeline Corporation), a facility located in Washington State, is

attached to petition as Appendix C. This document is provided as an example of effective supporting documentation for a Title V permit. The statement of basis was prepared by the Washington State Department of Ecology, located in Yakima, Washington.

DEC responded to NYPIRG's comment that the draft permit lacked a statement of basis by making the conclusory statement that "[i]t is the DEC's position that the permit application and draft permit provide the legal and factual background and explanation for the draft permit conditions." Responsiveness Summary, Re: General Permit Conditions, at 2. No reasonable person could conclude that information provided in North Shore Towers' permit application and draft permit suffices as the statement of basis. Moreover, the permit application and draft permit are inappropriate vehicles for the type of information that should be provided in the statement of basis. Assertions made by the applicant in the permit application cannot suffice as DEC's rationale for permit conditions; DEC must make its own statement. In addition, since the statement of basis is not meant to be enforceable, the statement of basis should not be part of the enforceable permit. Rather, North Shore Towers' Title V permit must be accompanied by a separate statement of basis.⁴

Because of the lack of an adequate statement of basis, NYPIRG is left to guess at why DEC believes that North Shore Towers' permit assures the facility's compliance with all applicable requirements. This is not what Congress envisioned when it incorporated the Title V program. DEC is obligated to provide a justification for why periodic monitoring that is included in the permit is adequate to assure compliance. U.S. EPA must take notice of the importance of an adequate statement of basis in terms of the ability of the public to participate in this program.

In the absence of an adequate statement of basis, the proposed permit for North Shore Towers violates Part 70 requirements. The Administrator must object to the issuance of the proposed permit and insist that DEC draft a new permit that includes an adequate statement of basis.

D. 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

Part 70 requires a permitted facility to submit reports of any required monitoring at least once every six months. See 40 CFR § 70.6(a)(3)(iii)(A). Though a blanket statement about the required six month reports is tucked away in the general conditions of the proposed permit, most individual monitoring conditions are followed by a statement that reporting is required only "upon request by regulatory agency."

⁴ Shortly after the close of the public comment period on North Shore Towers' draft permit, DEC began providing a "permit description" to accompany draft permits released for facilities located in New York City. These permit descriptions do not satisfy the requirement for a statement of basis because they fail to explain DEC's rationale for periodic monitoring decisions. Nevertheless, a permit description is at least a start toward creating a statement of basis as required by Part 70.

Under Part 70, the “monitoring” covered by the six month monitoring reports includes any activity relied upon for determining compliance with permit requirements, including general recordkeeping (e.g., maintaining records of gasoline throughput), compliance inspections (e.g. inspections to ensure that all equipment is in place and functioning properly), and emissions testing. Because the proposed permit is contradictory regarding when North Shore Towers must submit monitoring results under particular permit conditions, it is unclear what, if anything, will be included in the six-month monitoring reports. A permit cannot assure compliance with applicable requirements without making it clear that reports of *all* required monitoring must be submitted to the permitting authority at least once every six months.

In response to NYPIRG’s comments on the draft permit with respect to reporting requirements, DEC points to the general condition requiring reports of any required monitoring at least every six months. DEC then asserts that “[i]ndividual permit conditions default to the 6-month reporting requirement unless a more frequent reporting period is required by a rule. Individual monitoring conditions specify reporting requirements.” See Responsiveness Summary, Re: General Permit Conditions, at 3. This explanation is unacceptable. First, the proposed permit does not include the “default” language. Second, other draft permits released by DEC for public comment include monitoring conditions that specifically require submittal of reports on an annual basis rather than every six months, even though the same six month reporting requirement is included as a general condition in those permits. This contradicts DEC’s assertion that monitoring reports are always due every six months unless “a more frequent reporting period is required by a rule.” A better characterization of DEC’s position is that monitoring reports are due every six months unless a *different* reporting period is required by a rule. Following this logic, if a rule only requires reporting “upon request,” DEC considers this to be the applicable reporting requirement. If DEC wanted North Shore Towers to submit reports of a particular type of monitoring every six months, it would say so in the space next to “reporting requirements.” DEC clearly believes that it can circumvent the six-month reporting requirement at will. 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.

The Administrator must object to issuance of this proposed permit because it contains repeated violations of Part 70’s clear cut requirement that reports of all required monitoring must be submitted at least once every six months.

E. The Proposed Permit Distorts the Annual Compliance Certification Requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5)

Under 6 NYCRR § 201-6.5(e), a permittee must “certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices,” at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirement included in North Shore Towers’ proposed permit (Conditions 14 and 25) does not require North Shore Towers to certify compliance with all permit conditions. Rather, the condition only requires that the annual compliance certification identify “each term or condition of the permit that is the basis of the

certification.” DEC then proceeds to identify certain conditions in the proposed permit as “Compliance Certification” conditions. Requirements that are labeled “Compliance Certification” are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. Those permit conditions that lack periodic monitoring (a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal regulations. North Shore Towers must certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

DEC’s only response to NYPIRG’s concerns regarding deficiencies in the compliance certification requirement is that “[t]he format of the annual compliance report is being discussed internally and with EPA.” DEC Responsiveness Summary, Re: General Conditions, at 3. DEC’s response is unacceptable. The annual compliance certification requirement is the most important aspect of the Title V program. The Administrator must object to any proposed permit that fails to require the permittee to certify compliance (or noncompliance) with all permit conditions on at least an annual basis.

F. The Proposed Permit Does Not Assure Compliance With All Applicable Requirements as Mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) Because it Illegally Sanctions the Systematic Violation of Applicable Requirements During Startup/Shutdown, Malfunction, Maintenance, and Upset Conditions

The Administrator must object to the proposed permit for North Shore Towers because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. On its face, 6 NYCRR § 201-1.4 (New York’s “excuse provision”) conflicts with U.S. EPA guidance regarding the permissible scope of excuse provisions and should not have been approved as part New York’s State Implementation Plan (“SIP”). U.S. EPA must remove this provision from New York’s SIP and all federally-enforceable operating permits as soon as possible. Meanwhile, North Shore Towers’ proposed permit must be modified to include additional recordkeeping, monitoring, and reporting obligations so that U.S. EPA and the public can monitor application of the excuse provision (and thereby be assured that the facility is complying with applicable requirements).⁵

The loophole created by exceptions for startup/shutdown, maintenance, malfunction, and upset (the “excuse provision”) is so large that it swallows up applicable emission limitations and makes them extremely difficult to enforce. It is common to find monitoring reports filled with potential violations that are allowed under the excuse provision. Agency files seldom contain information about why violations are deemed unavoidable. In fact, there is no indication that regulated facilities take steps to limit excess emissions during startup/shutdown and maintenance activities.

⁵ The excuse provision is identified as Condition 8 in the draft permit.

U.S. EPA guidance explains that facilities are required to make every reasonable effort to comply with emission limitations, even during startup/shutdown, maintenance and malfunction conditions. (U.S. EPA guidance documents are attached hereto as Appendix D). According to U.S. EPA, an excuse provision only applies to infrequent exceedances. This is not the case for facilities located in New York State. New York facilities appear to possess blanket authority to violate air quality requirements so long as they assert that the excuse provision applies.

40 CFR § 70.6(a)(a) provides that each permit must include “[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.” The proposed permit does not assure compliance with applicable requirements because it lacks (1) proper limitations on when a violation may be excused, and (2) sufficient public notice of when a violation is excused.

A Title V permit must include standards to assure compliance with all applicable requirements. The Administrator must object to the proposed permit for North Shore Towers unless DEC adds terms to the permit that prevent abuse of the excuse provision. Specific terms that must be included in any Title V permit issued to North Shore Towers are described below.

1. Any Title V permit issued to North Shore Towers must include the limitations established by recent U.S. EPA guidance.

In a memorandum dated September 20, 1999 (“1999 memo”), U.S. EPA’s Assistant Administrator for Enforcement and Compliance Assurance clarified U.S. EPA’s approach to excuse provisions. In particular:

- (1) The state director’s decision regarding whether to excuse an unavoidable violation does not prevent EPA or citizens from enforcing applicable requirements;
- (2) Excess emissions that occur during startup or shutdown activities are reasonably foreseeable and generally should not be excused;
- (3) The defense does not apply to SIP provisions that derive from federally promulgated performance standards or emission limits, such as new source performance standards and national emissions standards for hazardous air pollutants.
- (4) Affirmative defenses to claims for injunctive relief are not allowed.
- (5) A facility must satisfy particular evidentiary requirements (spelled out in the 1999 memo) if it wants a violation excused under the excuse provision.⁶

⁶ In the case of an exceedance that occurs due to startup, shutdown, or maintenance, the facility must demonstrate that:

North Shore Towers' proposed permit does not include the restrictions set out in (1), (3), and (4). Moreover, the proposed permit lacks most of the evidentiary requirements referred to in (5). As for (2), both the language of the proposed permit and the DEC's own enforcement policy conflict with U.S. EPA's position that excess emissions during startup, shutdown, and maintenance activities are not treated as general exceptions to applicable emission limitations.

The Administrator must object to North Shore Towers' proposed permit and require DEC to draft a new permit that includes the limitations described in the 1999 memo.

2. The proposed permit makes it appear that a violation of a federal requirement can be excused even when the federal requirement does not provide for an affirmative defense. Any Title V permit issued to North Shore Towers must be clear that violation of such a requirement may not be excused.

The proposed permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation "unavoidable," regardless of whether an "unavoidable" defense is allowed under the requirement that is violated. U.S. EPA was concerned about this issue when it granted interim approval to New York's Title V program. In the Federal Register notice granting program approval, 61 Fed. Reg. 57589 (1996), U.S. EPA noted that before New York's program can receive full approval, 6 NYCRR §201-6.5(c)(3)(ii) must be revised "to clarify that the discretion to excuse a violation under 6 NYCRR Part [sic] 201-1.4 will not extend to federal requirements, unless the specific federal requirement provides for affirmative defenses during start-ups, shutdowns, malfunctions, or upsets." 61 Fed. Reg. at 57592. Though New York incorporated clarifying language into state regulations, the proposed permit lacks this language. Any Title V permit issued to North Shore Towers must be clear that a violation of a federal requirement that does not provide for an affirmative defense will not be excused.

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- The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design;
 - The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
 - If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
 - At all times, the facility was operated in a manner consistent with good practice for minimizing emissions;
 - The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;
 - All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
 - All emissions monitoring systems were kept in operation if at all possible;
 - The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and
 - The owner or operator properly and promptly notified the appropriate regulatory authority.

The factual demonstration necessary to justify a defense based upon an unavoidable malfunction is similar to that for startup/shutdown. See 1999 Memo.

3. Any Title V permit issued to North Shore Towers must define significant terms.

For a Title V permit to assure compliance with applicable requirements, each permit condition must be “practically enforceable.” Limitations on the scope of the excuse provision are not practically enforceable because the proposed permit lacks definitions for “upset,” and “unavoidable.”

A definition for “upset” is elusive. The SIP-approved version of 6 NYCRR Part 201 does not even include the word “upset.” “Upset” shows up mysteriously in the current regulation. Current § 201-1.4 lacks a definition. Current § 200.1 lacks a definition. 40 CFR Part 70 lacks a definition. A definition of this term must be included in the permit. Since no statutory or regulatory authority provides a definition for “upset,” the only logical definition of “upset” is the definition for “malfunction,” above. Otherwise, “upset” should be deleted from the permit.

NYPIRG cannot locate the definition of “unavoidable” in any applicable New York statute or regulation. A definition must be included in the permit because otherwise this condition is impermissibly vague. U.S. EPA’s policy memorandum on excess emissions during startup, shutdown, maintenance, and malfunction, dated February 15, 1983. (“1983 memo”) defines an unavoidable violation as one where “the excesses could not have been prevented through careful and prudent planning and design and that bypassing was unavoidable to prevent loss of life, personal injury, or severe property damage.” Memorandum from Kathleen Bennett, Assistant Administrator for Air, Noise and Radiation, to Regional Administrators, dated Feb. 15, 1983. Either this definition or an alternative definition with the same meaning must be included in the permit.

DEC’s refusal to define critical terms in the excuse provision makes impossible for the public to assess the appropriateness of a decision by the Commissioner to excuse a violation (in the rare situation that a member of the public actually manages to discover that a violation was excused).

The problems caused by the vagueness of the excuse provision could be partially resolved by making it clear that the excuse provision does not shield the facility in any way from enforcement by the public or by U.S. EPA, even after a violation is excused by the commissioner. In addition to the right to bring an enforcement action against facility that illegally pollutes the air, however, the public must be able to evaluate the propriety of a decision by the DEC Commissioner to excuse a violation. Since the public has the right to bring an enforcement action against a permit violator, the public should have access to any information relied upon by DEC is determining that a violation could not be avoided.⁷ If the permit provides only scanty details about the types of violations that may be excused, DEC and the permittee are unlikely to provide the public with any information justifying the excuse.

⁷ It is interesting that while some state agencies and industry representatives assert that citizen suits are sometimes brought against facilities for “minor” violations, DEC’s position with respect to the excuse provision in this permit means that the public is denied information about the environmental seriousness of a violation and whether the violation was actually unavoidable. Thus, the public’s ability to analyze the significance of a violation is severely constrained.

4. Any Title V permit issued to North Shore Towers must define “reasonably available control technology” as it applies during startup, shutdown, malfunction, and maintenance conditions.

Though 6 NYCRR § 201-1.4(d) requires facilities to use “reasonably available control technology” (“RACT”) during any maintenance, start-up/shutdown, or malfunction condition, the proposed permit does not define what constitutes RACT under such conditions or how the government and the public knows whether RACT is being utilized at those times. Any Title V permit issued to North Shore Towers must define RACT as it applies during startup, shutdown, malfunction, and maintenance conditions. Also, the permit must include monitoring, recordkeeping, and reporting procedures designed to provide a reasonable assurance that the facility is complying with this requirement.

5. Any Title V permit issued to North Shore Towers must require prompt reporting of deviations from permit requirements due to startup, shutdown, malfunction and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B).

Any Title V permit issued to North Shore Towers must require the facility to submit timely written reports of any deviation from permit requirements in accordance with 40 CFR § 70.6(a)(3)(iii)(B). 40 CFR § 70.6(a)(3)(iii)(B) demands:

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

North Shore Towers’ proposed permit does not require prompt reporting of all deviations from permit requirements. Furthermore, in most cases the proposed permit allows reports to be made by telephone rather than in writing. Thus, a violation can be excused without creating a paper trail that would allow U.S. EPA and the public to monitor abuse. The proposed permit would leave the public completely in the dark as to whether DEC is excusing violations on a regular basis. An excuse provision that keeps the public ignorant of permit violations cannot possibly satisfy the Part 70 mandate that each permit assure compliance with applicable requirements.

Any Title V permit issued to North Shore Towers must include the following reporting obligations:

- (1) *Violations due to Startup, Shutdown and Maintenance.*⁸ The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or

⁸ NYPIRG interprets U.S. EPA’s 1999 memorandum as prohibiting excuses due to maintenance.

maintenance. (The proposed permit only requires reports of violations due to startup, shutdown, or maintenance “when requested to do so in writing”).⁹ The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report explaining why the violation was unavoidable. (The proposed permit does not require submittal of a report “if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements”).¹⁰ Finally, a deadline for submission of these reports must be included in the permit.

- (2) *Violations due to Malfunction.* The facility must provide both written notification and a telephone call to DEC within two working days of an excess emission that is allegedly unavoidable due to “malfunction.” (The proposed permit only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement).¹¹ The facility must submit a detailed written report within thirty days after the facility exceeds an emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The proposed permit only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”).¹²

G. 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)

Item 20.2 of the draft permit governs the reporting of all types of violations under the permit, not just those that might be considered excusable under 6 NYCRR § 201-1.4. As discussed above, 40 CFR § 70.6(a)(3)(iii)(B) requires prompt reporting of any violation of permit requirements. Item 20.2 violates this clear-cut reporting requirement.

At first glance, Item 20.2 appears to comply with the prompt reporting requirement. It states:

⁹ See Condition 8(a) in the draft permit.

¹⁰ Id. Item 20.2(iv) of the draft permit, which governs “Monitoring, Related Recordkeeping and Reporting Requirements” contains the same flaw.

¹¹ See Condition 8(b) in the draft permit.

¹² Id.

To meet the requirements of this facility permit with respect to reporting, the permittee must: . . .

- ii. Report promptly (as prescribed under Section 201-1.4 of Part 201) to the Department:
 - deviations from permit requirements, including those attributable to upset conditions,
 - the probable cause of such deviations, and
 - any corrective actions or preventive measures taken.

Unfortunately, the only reporting required by Item 20.2 is the reporting required by 6 NYCRR § 201-1.4. As discussed above, § 201-1.4 only governs “Unavoidable Noncompliance and Violations.” A facility is required to comply with § 201-1.4 only if it wants the violation excused as “unavoidable.” 6 NYCRR § 201-6.5(c)(3)(ii) explains that “all other permit deviations shall only be reported as required under 201-6.5(c)(3)(i) unless the Department specifies a different reporting requirement within the permit.” 6 NYCRR § 201-6.5(c)(3)(i) states that the permit must include “submittal of reports of any required monitoring at least every 6 months.”

Thus, if the permittee could avoid a violation but failed to do so, the proposed permit allows the permittee to withhold information about the violation from government authorities for six months. Six months cannot possibly be considered “prompt reporting” The Administrator must object to the proposed permit because it does not require prompt reporting of all deviations from permit limits.

H. The Proposed Permit Does Not Assure Compliance With All Applicable Requirements as Mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) Because Many Individual Permit Conditions Lack Adequate Periodic Monitoring and are not Practicably Enforceable

1. A Title V permit must include periodic monitoring that is sufficient to assure the government and the public that the permitted facility is operating in compliance with all applicable requirements.

A basic tenet of Title V permit development is that the permit must require sufficient monitoring and recordkeeping to provide a reasonable assurance that the permitted facility is in compliance with legal requirements. The periodic monitoring requirement is rooted in Clean Air Act § 504, which requires that permits contain “conditions as are necessary to assure compliance.” 40 CFR Part 70 adds detail to this requirement. 40 CFR §70.6(a)(3) requires “monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance” and §70.6(c)(1) requires all Part 70 permits to contain “testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.” Part 70’s periodic monitoring requirements are incorporated into 6 NYCRR § 201-6.5(b).¹³

¹³ 6 NYCRR § 201-6.5(b) states that:

2. Every condition in a Title V permit must be practicably enforceable.

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

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

3. Analysis of specific proposed permit conditions

Conditions Governing NOx Emissions:

One of the most important requirements that applies to North Shore Towers is the requirement that it employ Reasonably Available Control Technology (RACT) to limit emissions of nitrogen oxides (NOx). 6 NYCRR § 227-2 contains New York’s NOx RACT requirements.

6 NYCRR § 227-2.4(f)(2)(ii) requires that lean burn engines firing fuels other than natural gas) comply with a 9.0 grams per brake horsepower-hour limit. Compliance with this limit is initially ascertained by a stack test. North Shore Towers performed its NOx RACT stack test in 1995. While North Shore Towers met the limit when operating at high loads, two of its engines were unable to meet

Each Title V facility permit issued under this Part shall include the following provisions pertaining to monitoring:

- (1) All emissions monitoring and analysis procedures or test methods required under the applicable requirements, including any procedures and methods for compliance assurance monitoring as required by the Act shall be specified in the permit;
- (2) Where the applicable requirement does not require periodic testing or instrumental or non-instrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit shall specify the periodic monitoring sufficient to yield reliable data from the relevant time periods that are representative of the major stationary source’s compliance with the permit. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirements; and
- (3) As necessary, requirements concerning the use, maintenance, and installation of monitoring equipment or methods.

6 NYCRR § 201-6.5(e)(2) further provides that a Title V permit must include “[a] means for assessing or monitoring the compliance of the stationary source with its emission limitations, standards, and work practices.”

the limit while operating at low loads. See North Shore Towers 1995 NO_x RACT stack test results.

NYPIRG is aware of the above information because it is contained in the file that DEC's Air Resources Division maintains for North Shore Towers. None of this information was provided by DEC in the "statement of basis" for permit conditions or the permit itself. Nevertheless, the permit did include conditions that limited North Shore Towers to only operating the engines at high loads. Condition 49 stated that:

Reciprocating engine-generators shall not operate below 700 kilowatts or above 1250 kilowatts in fuel oil mode. The NO_x emissions average for the six engines operating in the fuel oil mode shall not exceed 9.0 grams per brake horsepower hour.

Condition 50 in the draft permit stated that:

The reciprocating engines shall not exceed 1150 kilowatts operating in dual fuel mode. The system-wide (consisting of emission sources 0001A, 0001B, 0001C, 0001E and 0001F) NO_x emissions may not exceed 9.0 grams per brake horsepower hour.

Emission source 0001D may not operate in the dual fuel firing mode except upon obtaining written permission from NYSDEC"

Condition 48 stated:

Emissions to be reported using power based averaging calculations from actual stack test data curves at various loads. The system-wide average must not exceed 9.0 grams per brake-horsepower-hour.

Condition 46 stated:

The owner/operator must maintain hourly records of the operation of all engines. Such records shall include, for each engine, the kilowatt(kW) output of the engine and the operating mode (i.e. fuel oil mode or dual fuel mode) for the engine.

Because DEC refuses to provide any sort of statement of basis for permit conditions, it is very difficult to ascertain exactly how the above conditions "assure compliance" as required under Clean Air Act s 504(a). First, DEC never explains the basis for the kW limitation in terms of how it assures compliance with NO_x RACT. In commenting on the draft permit, NYPIRG stated:

When a Title V permit relies upon the measurement of operating parameters to demonstrate ongoing compliance with an applicable requirement, an explanation of the relationship between the parameter and compliance with the applicable requirement must be included in the statement of basis. No such explanation is included to explain this permit's reliance upon measurement of kilowatts to demonstrate compliance with a

brake-horsepower-hour requirement. This explanation must be added to the draft permit. Also, the draft permit must explain how kilowatts are measured, and what records the facility is required to maintain to demonstrate compliance with this condition. Finally, a report of this monitoring must be submitted to DEC at least once every six months.

NYPIRG Comments to DEC on the draft Title V permit for North Shore Towers Apartments, Inc., p. 20. In response, DEC stated:

The facility was tested and shows compliance with the 9.0 grams/BHP standard of Part 227-2. Operation at high loads is the most common mode of operation. We will remove the phrase system-wide from all conditions in the permit.

There is no way to compute NO_x emissions at any given moment. There is no correlation between any given operating parameter and the NO_x emissions.

Many factors (operating parameters) are combining their effects to generate the NO_x emissions. For example setting the engine efficiency to an optimum value will not allow us to predict the NO_x emissions.

This permit via a new condition will require the North Shore Plant ownership to stack test the NO_x emissions for RACT compliance evaluation within 3 months of the permit being issued. Also, the plant owner will be asked to stack test its NO_x emissions three months after each anniversary of the TV permit issuance.

DEC Response to NYPIRG Comments, re: Specific Permit Conditions, at 8. DEC goes on to say with respect to NYPIRG's assertion that DEC must justify the relationship between the kW limitations and compliance with NO_x RACT:

The above statement is not true. The TV permit does not rely on monitoring the operating parameters to verify compliance with NO_x-RACT. We are relying on the results of stack tests for NO_x, to verify compliance with the NO_x-RACT requirements. Compliance is not verified by monitoring the monitoring parameters of the energy plant.

DEC Response to NYPIRG Comments, re: Specific Permit Conditions, at 9. DEC's response is baffling. Conditions 49 and 50 in the draft permit, which limited North Shore Towers to only operating at high loads, described the "monitoring type" as "monitoring of process or control device parameters as surrogate." Moreover, both conditions 49 and 50 identify the name of the pollutant that is tied to these conditions as "oxides of nitrogen." NYPIRG sees no other way of reading these conditions other than as "surrogate monitoring" that is designed to assure the facility's ongoing compliance even when direct monitoring of NO_x emissions is not possible.

Furthermore, while DEC counters that it is not relying on monitoring of these parameters to “verify” compliance, NYPIRG never made that assertion. NYPIRG agrees that other indicators may be sufficient to show that North Shore Towers is violating the NO_x RACT limit of 9 grams/BHP standard even when it is in compliance with the kW limitation. Nevertheless, in light of the fact that the 1995 stack test showed that certain engines at North Shore Towers do not comply with the 9 g/BHP standard when operating at low loads, the kW limitations are essential to providing assurance that the facility is complying with the NO_x limit in between stack tests. In commenting on the draft permit, NYPIRG simply asked DEC to clarify why the conditions included in the permit were sufficient to assure compliance. In response, DEC declared that it was impossible to select any particular monitoring parameters that would assure compliance. Instead, DEC asserts that it will rely on one stack test every five years to verify compliance. DEC’s decision that one stack test for NO_x RACT every five years is adequate to assure compliance is entirely unjustified in the permit record. At no point does DEC analyze the likelihood that North Shore Towers will violate the NO_x RACT limit, or the variability of emissions over time. In fact, DEC simply states that “operation at high loads is the most common mode of operation.” Well, what about in the less common circumstance when the facility operates at low loads? Has DEC made the determination that it is acceptable for the facility to violate NO_x RACT at those times?

If DEC believes that there is no parametric monitoring that is sufficient to assure North Shore Towers’ ongoing compliance with applicable requirement over the permit term, DEC must require North Shore Towers to install continuous emissions monitors to measure NO_x emissions.

In addition to refusing to clarify and strengthen the link between kW limitations and the NO_x RACT limit, DEC decided to eliminate a number of permit conditions following the public comment period. In particular, DEC eliminated conditions that required North Shore Towers to maintain records of its compliance with kW limitations. First, DEC eliminated Condition 29, which required North Shore Towers to submit a quarterly report that included:

- a. total fuel oil and natural gas consumption for the engine plant in order to determine the percent operation in each mode
- b. engine hours for each engine and total energy output from the engine plant, in kWh, in order to determine the monthly average emissions for the plant
- c. monthly average NO_x emissions for the engine plant, in g/bhp-hr based on the stack test data developed from the stack test conducted by the owner in August 1995
- d. calculated total NO_x emissions from the entire facility, in tons, for the quarter and for the year to date.

In commenting on the draft permit, NYPIRG was concerned that the data being reported pursuant to Condition 29 may be inadequate to assure North Shore Towers’ compliance with the NO_x RACT limits. DEC’s response was to eliminate Condition 29 entirely. According to DEC, Condition 29 was an error because “it addresses compliance certification requirements that have been addressed at emission unit levels under citations 227-2.4(f)(2)(ii) and 227-2.5(b).” NYPIRG is not satisfied by this explanation. The condition based on citation § 227-2.5(b) is condition 48, which is quoted above.

Condition 48 requires North Shore Towers to maintain a “calendar year average” of emissions “using power based averaging calculations from actual stack test data curves at various loads.” Condition 48 will in no way assure that North Shore Towers operates above minimum allowable loads at all times. Moreover, Condition 48 is not enforceable as a practical matter because it does not identify the averaging calculations that are to be used.

Conditions 49 and 50 are the other conditions that according to DEC encompass the reporting requirements that were contained in the former condition 29. As discussed above, however, Conditions 49 and 50 only contain the operating limitations, not the reporting requirements.

The one other condition that might include monitoring requirements that at least relate to North Shore Towers’ compliance with NO_x RACT operating limitations in Condition 46 in the draft permit. Unfortunately, DEC eliminated Condition 46 as well, because “a similar monitoring (recordkeeping/maintenance) condition was already written at facility level (see Item 2, Condition 29).” Perhaps DEC believed that we wouldn’t notice that Condition 29 was also removed from the permit. The new Condition 29 is simply a statement of the standard requirement that each Title V facility submit an annual compliance certification. An annual compliance certification must be based on records that are maintained by the facility. DEC may not remove a recordkeeping requirement on the basis that the annual compliance certification will serve as a replacement for recordkeeping. If that were the case, there would be no way to investigate the veracity of an annual compliance certification.

In summary, this permit in no way assures North Shore Towers’ compliance with NO_x RACT emission limits. A single stack test once every five years is far too infrequent to assure ongoing compliance. While the operating load restrictions may provide some assurance that North Shore Towers is complying with NO_x RACT limits, DEC has not met its burden of demonstrating that these limits are sufficient to assure compliance. In fact, DEC vehemently denies reliance on operating load limits as “surrogate monitoring” of compliance. Finally, DEC’s removal and jumbling of recordkeeping and reporting requirements makes the permit conditions that relate to NO_x RACT unenforceable as a practical matter.

DEC bears the burden of establishing that the permit conditions are sufficient to assure North Shore Towers’ compliance with applicable requirements. Because DEC has not met its burden in this case, the U.S. EPA Administrator must object to this permit.

Maintenance of Equipment:

Condition 5 recites the general requirement under 6 NYCRR § 200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer’s specifications. It does not appear, however, that North Shore Towers relies on pollution control equipment. If this requirement does not apply to North Shore Towers, it must be deleted from the proposed permit.

If this requirement does apply to North Shore Towers, it must be supplemented with periodic monitoring. The proposed permit does not describe North Shore Towers' pollution control equipment or explain the manufacturer's specifications for maintenance. Nor does the proposed permit require North Shore Towers to perform maintenance activities or document inspections. Under circumstances where an applicable requirement lacks monitoring requirements sufficient to provide a reasonable assurance of compliance, periodic must be added. Thus, this requirement must not be stated generally, but must be applied specifically to this facility. The permit must explain exactly what qualifies as reasonable maintenance practices and spell out the manufacturer's specifications. Furthermore, the proposed permit must require North Shore Towers to perform periodic monitoring that assures the facility's compliance with maintenance requirements.

In response to NYPIRG's comments on the draft permit with respect to this permit condition, DEC asserted:

As noted in the comment, this is a general requirement under 6 NYCRR § 200.7 which is applied to all air permits. While this condition may appear in some instances where no pollution control equipment is in operation, the condition will be retained as is in order to ensure that maintenance is addressed for those instances where control equipment is in place. Source owners may install control equipment voluntarily, that is, without having the permit address the specific control equipment. The condition would apply without having the permit address the specific control equipment. Maintenance plans are typically submitted as part of documentation in support of the application. Based on engineering judgment, we believe that incorporating this information as enforceable permit conditions would be both onerous and unnecessary. If required control equipment fails to operate and permit limits are exceeded an enforcement action would be initiated.

DEC Responsiveness Summary, re: General Permit Conditions, at 3.

DEC's response does not justify the agency's failure to identify whether the requirement applies to North Shore Towers and, if the requirement applies, the agency's failure to include sufficient periodic monitoring to assure compliance. First, a "general requirement" is a requirement that applies to all facilities in the same way. This is not a general requirement because it may not even apply to North Shore Towers. A Title V permit must identify the requirements that apply to the permitted facility, not provide a shopping list of requirements that might apply. DEC's assertion that it is proper to include an inapplicable requirement in a permit without explanation simply because there is a slight chance that the facility may voluntarily install equipment that would subject it to this requirement at some point during the permit term is unacceptable. In the off chance that the facility does voluntarily install pollution control equipment during the permit term, this requirement will apply to the facility even if it is not included in the permit. Part 70 requires a Title V permit to include all requirements that apply to the facility as of the date of permit issuance, not all requirements that might somehow become applicable to the facility during the permit term.

Second, section 504 of the Clean Air Act makes it clear that each Title V permit must include “conditions as are necessary to assure compliance with applicable requirements of [the Clean Air Act], including the requirements of the applicable implementation plan.” Here, the proposed permit lacks conditions designed to assure North Shore Towers’ compliance with an applicable SIP requirement. DEC does not provide a valid justification for its determination that no periodic monitoring is necessary to assure compliance with this condition. Instead, DEC simply alleges that based upon “engineering judgment,” periodic monitoring would be “onerous and unnecessary.”

Finally, the point of requiring a facility to maintain pollution control equipment properly is to prevent an exceedance of applicable pollution limits. DEC dismisses the preventative nature of this applicable requirement and simply asserts that if the control equipment fails AND North Shore Towers violates an emission limitation, an enforcement action will be initiated. Notice that DEC says nothing about the possibility of an enforcement action brought to enforce the requirement that pollution control equipment be maintained properly. This is because DEC will have no way of knowing whether North Shore Towers complies with this requirement because the permit condition is not supported by periodic monitoring.

DEC’s refusal even to identify whether this requirement applies to North Shore Towers, let alone the agency’s failure to include sufficient periodic monitoring to assure compliance with this requirement, is a clear violation of Part 70 requirements and justifies the Administrator’s objection to this proposed permit.

Unpermitted Emission Sources:

Condition 7 states that if the owner failed to apply for a necessary permit, the owner must apply for the permit and the facility will be subject to all regulations that were applicable at the time of construction or modification. We have several concerns.

First, if North Shore Towers is currently subject to a New Source Review (“NSR”) or “Prevention of Significant Deterioration (“PSD”)” permit, the terms of that permit must be included in the Title V permit and the permit must be cited as the basis for the requirements. If North Shore Towers does not have a NSR or PSD permit, DEC must not issue North Shore Towers a Title V permit until it has made a reasonable investigation into whether North Shore Towers is required to have such a permit. The results of this investigation must be explained in a “statement of basis.” Our confusion over whether North Shore Towers is subject to a NSR or PSD permit is based upon the fact that neither DEC’s standard permit application form nor DEC’s draft permits make it clear whether a facility is subject to a pre-existing permit.

Second, based upon the language of Item 7.1, it appears that the only penalty North Shore Towers will face in the event that DEC discovers that the facility lacks a required permit is the requirement to obtain the permit. In other words, the facility will not be penalized. If Item 7.1 remains in the permit, it is essential that a clause be added that states that if it is discovered that North Shore Towers lacks a required permit, North Shore Towers will be subject to all penalties authorized by state

and federal law. Otherwise, there is a possibility that the permit shield will block DEC, U.S. EPA, and the public from imposing such penalties.

NYPIRG recognizes that Condition 7 is simply a recitation of 6 NYCRR § 201-1.2. While this approach may work for some regulatory requirements, it does not work for this one because of the existence of the permit shield. Under the permit shield, compliance with the terms of the condition are tantamount to compliance with the law. In this case, it appears that if the facility goes ahead and applies for a permit that it should have applied for earlier, it will be in compliance with the law and penalties cannot be assessed. While it is possible (and perhaps likely) that a court would not interpret the permit shield in this manner, there is no reason to take that risk.

Air contaminants collected in air cleaning devices:

Conditions 10 and 11 both apply to the handling of air contaminants collected in an air cleaning device. NYPIRG explained in its comments on the draft permit that if North Shore Towers relies upon an air cleaning device that collects air contaminants, the permit must include recordkeeping requirements sufficient to assure that North Shore Towers handles air contaminants in compliance with permit requirements. In response to NYPIRG's comments on the draft permit with respect to these permit conditions, DEC asserted that:

No change is necessary. This condition is included with all air permits regardless of whether or not air pollution controls are in place. It applies in the event that air pollution control devices are installed. As noted in a previous response, source owners may install control equipment voluntarily without having to modify the permit. As a result, this condition would apply without having the permit necessarily address the specific control equipment.

DEC Responsiveness Summary, Re: General Permit Conditions at 5.

As we stated above with respect to Condition 5, if these requirements do not apply to North Shore Towers, they must be deleted from the permit. Alternatively, the currently non-existent statement of basis could explain that while this requirement does not currently apply to North Shore Towers, the rule will apply in the event that such a device is installed. Including inapplicable requirements in a permit without explanation only serves to confuse the public.

Applicable Criteria:

Condition 15 is a generic condition stating that the facility must comply with any requirements of an accidental release plan, response plan, or compliance plan. NYPIRG is concerned that requirements

in these documents might not be incorporated into the permit. If such documents exist, they are applicable requirements and must be included as permit terms. Furthermore, any enforceable requirements contained in “support documents submitted as part of the permit application for this facility” must be incorporated directly into the permit. DEC responded to NYPIRG’s comment on this permit condition by asserting that “[a]ll of the relevant requirements of any supporting documents have been fully incorporated into the draft permits.” DEC Responsiveness Summary, Re: General Permit Conditions at 7. Even if all relevant requirements are *not* incorporated into North Shore Towers’ proposed permit, there is no reason to include this unenforceable condition in the proposed permit. Because of its vagueness, this permit condition adds absolutely nothing to the proposed permit. As U.S. EPA’s White Paper #2 explains:

Referenced documents must also be specifically identified. Descriptive information such as the title or number of the document and the date of the document must be included so that there is no ambiguity as to which version of which document is being referenced. Citations, cross references, and incorporations by reference must be detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation. Where only a portion of the referenced document applies, applications and permits must specify the relevant section of the document. Any information cited, cross referenced, or incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced.

U.S. EPA, *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program*, March 5, 1996, at 37. The proposed permit’s vague reference to “[a]ny reporting requirements and operations under an accidental release plan, response plan and compliance plans as approved as of the date of the permit issuance” (documents that may or may not exist) cannot possibly satisfy the White Paper #2 requirement that referenced documents be specifically identified and detailed enough that the manner in which the material applies to North Shore Towers is clear.

Compliance Requirements:

Condition 17 makes reference to “risk management plans” if they apply to the facility. Simply indicating that the facility might be subject to a risk management plan is insufficient to assure the facility’s compliance with CAA § 112(r). The permit must identify which requirements apply to the facility, not simply indicate what might apply. If DEC does not know whether the rule applies, it must say so in the statement of basis.

Required Emissions Tests:

In comments on the draft permit, NYPIRG pointed out that Condition 30 includes everything that is required under 6 NYCRR §202-1.1 except the requirement that the permittee “shall bear the cost of measurement and preparing the report of measured emissions.” This condition is clearly applicable to North Shore Towers and must be included in the permit. It is inappropriate to paraphrase

a requirement and leave out one or more conditions. This practice results in confusion over what conditions are applicable to the source. In fact, EPA's *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* states explicitly 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 applicable requirement. Such a practice, particularly if coupled with a permit shield, could create dual requirements and potential confusion." White Paper #2 at 40. The difference here is that the draft permit paraphrases some of the requirements, while entirely failing to describe or reference other requirements.

DEC responded to this comment by stating that:

The additional language proposed by NYPIRG is unnecessary. The requirement as stated per 202-1.1 places the burden of conducting and reporting any required emission testing on the permittee.

DEC Response to NYPIRG Comments, re: Specific Permit Conditions at 3. The "language proposed by NYPIRG" is the last sentence of 6 NYCRR § 202-1.1. It must be assumed that if DEC believed that it was necessary to include that last sentence in the underlying applicable requirement, that sentence is worthy of being included in Title V permits.

Visible emission limited:

NYPIRG's comments on the draft permit with respect to condition 34 pointed out that the draft permit lacked any kind of periodic monitoring to assure North Shore Towers' compliance with the applicable opacity limitation. (6 NYCRR § 211.3).

DEC responded to NYPIRG's comment by providing the following information:

This requirement is part of the SIP and applies to all sources however it should be replaced by two separate monitoring conditions (see A and B below). The conditions specify the limit that is not to be exceeded at any time together with an averaging time, monitoring frequency and reporting requirement. To date, EPA has not provided guidance as to the method and frequency of monitoring opacity for general category sources that do not require continuous opacity monitors. This is a nationwide issue that is being dealt with on a source category-by-source category basis. At this point in time we have established a periodic monitoring strategy for oil-fired boilers that are not otherwise required to have COMs. The rest of the emission point universe is divided between those emission points where there is no expectation of visible emissions and those where there are some visible emissions. This category is further subdivided into those source categories where opacity violations are probable and those where opacity violations are not likely. We are currently working to establish engineering parameters that will result in an appropriate visible emission periodic monitoring policy.

DEC Responsiveness Summary, Re: General Conditions at 6. While NYPIRG is encouraged by the fact that DEC plans to develop an appropriate visible emission periodic monitoring policy, the periodic monitoring required to demonstrate North Shore Towers' compliance with 6 NYCRR § 211.3 remains inadequate.

First, NYPIRG suspects that DEC did not actually include these conditions in the proposed permit.

Second, conditions A and B as referred to in DEC's responsiveness summary do not constitute periodic monitoring. Neither requirement specifies what kind of monitoring is to be performed (other than stating that the averaging method is a 6-minute average). Neither requirement specifies how often any monitoring is to be performed, other than stating "as required." Neither requirement specifies a regular reporting requirement, except "upon request by regulatory agency." It cannot be argued that these conditions suffice as periodic monitoring.¹⁴

Third, NYPIRG is concerned by DEC's position that so long as a national policy has not been developed, DEC is free to issue Title V permits that lack periodic monitoring sufficient to assure compliance. This is a clear violation of 40 CFR Part 70. While a national policy would certainly be helpful to DEC, such a policy is not a prerequisite for inclusion of appropriate periodic monitoring in each individual Title V permit.¹⁵

Finally, it is unclear how the information provided by DEC in the responsiveness summary regarding the "emission point universe" relates to North Shore Towers. North Shore Towers' Title V permit must assure compliance at each emission point. DEC may not omit required periodic monitoring from North Shore Towers' permit on the basis that DEC has not gotten around to developing appropriate periodic monitoring.

The Administrator must object to this proposed permit because the permit lacks sufficient periodic monitoring as required by the Clean Air Act and 40 CFR Part 70.

Fuel Sampling for Sulfur Content:

For reasons that remain unclear, DEC insists upon placing the sulfur-in-fuel limitations of 6 NYCRR § 225 in the state-only section of the permit, while placing the monitoring conditions designed to assure compliance with sulfur limitations in the federally enforceable section of the permit. As

¹⁴ It also doesn't appear necessary to break the conditions into two sub-conditions. The only difference between the two sub-conditions is that one specifies that the "upper limit" is 20 percent while the other specifies that the "upper limit" is 57 percent. In all other respects the two conditions are identical.

¹⁵ In fact, the Clean Air Act scheme of providing state agencies with responsibility for and a degree of discretion over the design of Title V programs operates as an incentive for each state permitting authority to make determinations regarding issues that have not been fully resolved by U.S. EPA.

discussed below under “state-only conditions,” the actual limitation is in the SIP and must be on the federal side of the permit.

The draft permit contained two federally enforceable conditions that required recordkeeping in order to assure compliance with the sulfur limit. In comments on the draft permit, NYPIRG pointed out several inadequacies in these conditions. DEC removed the two conditions and replaced them with three similar conditions.

Despite the replacements, NYPIRG remains unconvinced that the permit assures North Shore Towers’ compliance with the sulfur limit. First, the reports are still only due “upon request.” Second, DEC fails to explain why these conditions constitute adequate periodic monitoring. DEC must explain why North Shore Towers is never required to test the sulfur content of the fuel that is delivered to the facility. Periodic sampling of sulfur content is necessary in order to provide a reasonable assurance that the certifications being signed by suppliers are reliable. Third, while the new condition 37 appears to require North Shore Towers to maintain records of fuel analysis and information on the quantity of fuel received and burned, the permit fails to explain how the fuel analysis is performed or who performs the fuel analysis. New Condition 36 does not help because it simply references 6 NYCRR § 225-1.8, which does not provide this information. Moreover, new condition 35 does not appear to add much to the permit because it only applies to owner or operators of facilities who sell oil and/or coal. To our knowledge, North Shore Towers only purchases oil. Finally, the new permit conditions only require North Shore Towers to maintain records of fuel analyses for 3 years. Under 40 CFR Part 70, all monitoring records must be maintained for five years. DEC is incorrect in asserting that the 3 year requirement in 6 NYCRR § 225 overrides the federal requirement that records be maintained for five years.

Opacity Limitation

The proposed permit lacks adequate periodic monitoring to assure compliance with the opacity limitation provided in 6 NYCRR § 227-1.3. NYPIRG submitted extensive comments on the draft permit regarding the lack of adequate opacity monitoring to no avail.

The opacity monitoring included in the permit is not designed to identify and resolve non-compliance with opacity limits and does not assure compliance with applicable requirements as required under 40 CFR Part 70. Under Condition 39, the facility is not required to perform a method 9 test until visible emissions are observed for two days. After the two day trigger the facility has two additional days to perform the Method 9 test. Thus, the facility can be out of compliance with the one-hour average limit for *four* days before a test is performed. This is unacceptable and does not assure compliance with the opacity limit.

It is fair to assume that the best periodic monitoring regime to assure compliance with § 227-1.3 would involve reliance upon continuous opacity monitors. DEC must explain in the statement of basis why this facility is not required to perform continuous monitoring.

If DEC demonstrates that continuous monitoring is not appropriate due to factors that suggest that the facility is not particularly likely to violate the requirement, or if continuous monitors are technically or economically infeasible, then improvements need to be made in the monitoring regime currently included in the proposed permit.

To assure compliance with opacity limits, the permit must require prompt Method 9 testing following the observation of visible emissions. While it may not be necessary for the person performing the daily check to be trained in Method 9, it is essential that there be someone at the facility at all times who is trained in Method 9 so that a Method 9 test can be performed when the daily check triggers the requirement for a Method 9 test. *If visible emissions are observed, a person trained in Method 9 must perform the Method 9 test within one hour after visible emissions are observed.*

Terms similar to the following need to be added to assure that the facility complies with the opacity limit:

- **Qualifications of the daily observer**

“Observer certification for plume evaluation is not required to conduct the survey. However, it is necessary that the observer is educated on the general procedures for determining the presence of visible emissions. As a minimum, the observer must be trained and knowledgeable regarding the effects on the visibility of emissions caused by background contrast, the position of the sun and amount of ambient lighting, observer position relative to source and sun, and the presence of uncombined water.”

- **Details about the daily observation**

“Each stack or emission point shall be observed for a minimum cumulative duration of 15 seconds during the survey.”

“Any visible emissions other than uncombined water shall be recorded as a positive reading associated with the emission point or stack.”

- **Details about Method 9 testing**

“Method 9 testing shall be initiated as soon as possible but not later than 1 hour after the requirement to conduct such testing is triggered.”

“Method 9 testing shall be performed by persons with current EPA Reference Method 9 certification.”

“All Method 9 testing shall be performed during periods when the subject emissions unit is operating.”

“If the subject emissions unit is down for maintenance or not operating, the permittee shall commence Method 9 testing within one hour after the unit comes back on line.”

“If not possible to perform Method 9 readings due to inclement weather conditions, the permittee shall make three attempts within the following 24 hour period to complete the required Method 9 testing.”

“A record of all attempts to conduct Method 9 testing shall be maintained in a permanently bound log book.”

- **Details about Recordkeeping**

“In addition to keeping records of the result of the daily observation, the facility must be required to keep a record of Method 9 measurements, including the date and time attempted and the date and time of actual measurements. Moreover, the facility must be required to keep a record of any remedial measures taken to resolve opacity problems.”

- **Details about reporting**

“The facility must be required to report to DEC the results of any analysis that demonstrates an exceedance promptly. Promptly must be defined as, at a minimum, one business day. The report may be by telephone, but must be followed with a written report that is placed in the facility’s file. Furthermore, a report of all visual monitoring must be submitted to DEC at least once every six months.”

Finally, under 6 NYCRR § 227-1.3(b), a violation of the opacity limit can be determined based upon any credible evidence. Condition 47 of the draft permit specifies that compliance is “based upon the six minute average in reference test method 9 in Appendix A of 40 CFR 60.” This is considered “credible evidence-buster” language and is illegal. The permit can specify Method 9 as the periodic monitoring method, but the permit may not make Method 9 the exclusive benchmark for demonstrating compliance.

In response to NYPIRG’s comments on the inadequacy of opacity requirements in the draft permit, DEC simply restated the language of the draft permit. See Response to NYPIRG Comments, re: Specific Permit Conditions at 7.

The Administrator must object to the proposed permit because (1) monitoring included in the proposed permit is inadequate and (2) the permit illegally limits the type of evidence that can be used to demonstrate compliance. The Administrator must insist that DEC draft a new permit for North Shore

Towers that includes conditions (such as those suggested above) that actually assure compliance with applicable opacity limitations.

Operational Flexibility

NYPIRG is concerned about the part of Condition 50 that provides that “Emission Source 0001D may not operate in dual-fuel firing mode except upon obtaining written permission from NYSDEC.” Since no explanation of this condition was provided for this condition in the statement of basis, we were puzzled until we reviewed the facility file maintained at DEC. We then realized that this is actually an attempt at incorporating “operational flexibility” into the draft permit. We have several concerns about this approach.

North Shore Towers apparently plans to replace one of its electric generating diesel engines within the next two years. NYPIRG would be happy to see this engine replaced, especially since it appears that this engine was one of the engines that was not able to meet NOx RACT requirements at lower operating loads. To accomplish this replacement in the most expedient fashion, North Shore Towers hopes to not be required to seek a permit modification to install the new engine, but instead to get pre-approval for the replacement in this initial Title V permit application.

Allowing North Shore Towers to replace a major piece of equipment without any public notice is inappropriate. The draft permit does not even provide the public notice that such a replacement might be in the works. Instead, it mysteriously suggests that this engine that currently cannot burn natural gas will some day be able to do so. The permit fails to inform the public that someday soon this engine will be removed and a new, as yet unidentified engine will be brought in to replace it. Even if it were appropriate to pre-approve a new, unidentified piece of equipment in a Title V permit, the draft permit must make it clear that this is what is being approved. Also, under New York’s operational flexibility provisions (which are actually located in the regulations that apply to state facility permits, not Title V permits), it does not appear that the proposed engine replacement can be done without a permit modification. 6 NYCRR § 201-5.4(b)(1) provides:

(b) Operational Flexibility.

(1) Certain changes and modifications which meet the criteria under (i) - (iii) below may be conducted without prior approval of the Department and shall not require modification of the permit. The facility owner and/or operator must however maintain records of the date and description of such changes and make such records available for review by Department representatives upon request.

(i) changes that do not cause emissions to exceed any emission limitation contained in regulations or applicable requirements under this Chapter;

(ii) changes which do not cause the source to become subject to any additional regulations or requirements under this Chapter;

- (iii) changes that do not seek to establish or modify a federally-enforceable emission cap or limit.

The proposed engine replacement does not satisfy the criteria for a change that does not require a permit modification. Once the new engine is installed, the facility will be required to test the engine's compliance with NOx RACT. This requirement for a test is an additional requirement. Finally, the draft permit explicitly describes the engine that is currently installed at the facility as the engine covered by the permit. Even if the new engine is cleaner than the existing engine, it is not the engine covered by the permit.

DEC responded to NYPIRG's comments on this issue by stating that:

The Title V permit allows that 0001D burn only oil. This particular unit will never burn gas since the facility could not demonstrate that adjustments and/or fine tuning of this engine will cause the operation of the unit to comply with NOx RACT.

No permit is needed to replace this unit provided the owner can demonstrate that the new unit meets the NOx-RACT and all other emission limitations of 6 NYCRR and 40 CFR 60, once the unit is replaced.

Response to NYPIRG comments, re: Specific Permit Conditions, at 9. Once again, NYPIRG finds DEC's response unsatisfactory. If Emission Unit 0001D cannot comply with NOx RACT when burning natural gas, the permit must not say that it can burn natural gas upon approval by DEC. Moreover, NYPIRG's understanding of 6 NYCRR § 201-5.4(b)(1) is that if a modification triggers a requirement (like the requirement to perform a NOx RACT test), then this is a modification that must be approved by DEC and incorporated into the facility's permit through a permit modification. The Title V permit cannot be used to pre-approve a modification when there are no details provided about the modification, whatsoever.

C. State-Only Requirements

Sulfur limitation:

Condition 58, which provides that no person will sell, offer for sale, purchase or use any #6 fuel oil which contains sulfur in a quantity greater than 0.2 percent by weight, is improperly identified in the proposed permit as a state-only condition. This requirement is included in New York's SIP as 6 NYCRR Subpart 225.1, Table 1 (approved into the SIP on 11/12/81) and is therefore federally enforceable.

In response to NYPIRG comments on the draft permit with respect to this condition, DEC asserted that:

The current version of 6 NYCRR Subpart 225-1 is not included in the State Implementation Plan. In addition the Department does not intend to submit it for approval to the SIP. Therefore, it is appropriate to insert this condition under the State-only requirements.

While DEC asserts that the current version of 6 NYCRR Subpart 225-1 is not included in New York's SIP, the agency does not dispute the fact that the SIP version of Part 225 contains the same requirement for New York City facilities as the current version.

Condition 52 must be placed in the federally enforceable section of North Shore Towers' Title V permit. The permit must accurately identify the legal basis for the federally enforceable permit condition by stating that the condition is based upon a SIP requirement.¹⁶

Conclusion

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the proposed Title V permit for North Shore Towers Apartments, Inc.

Respectfully submitted,

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¹⁶ DEC can enforce the current version of Part 225 but not the version that is part of the SIP. U.S. EPA and the public can enforce the SIP version but not the current version. Thus, any permit issued to North Shore Towers must include the SIP version in the federally-enforceable section and the state version in the state-only section. In doing so, DEC must explain that one version is in the SIP and one version is not. Currently, DEC does not identify which version of a regulation serves as the basis for a requirement. Nor does DEC identify the SIP status of requirements in a Title V permit.