

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

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In the Matter of the Proposed Operating Permit for

SIRMOS DIVISION OF BROMANTE CORP.  
to operate a facility manufacturing lamps and light fixtures  
located in Long Island City, New York

Permit ID: 2-6304-00416/00007

Proposed by the New York State Department of  
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF  
THE PROPOSED TITLE V OPERATING PERMIT FOR  
THE SIRMOS DIVISION OF BROMANTE CORP. LONG ISLAND MANUFACTURING  
FACILITY**

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. (“NYPIRG”) hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to proposed Title V Operating Permit for the Long Island City lamp and fixtures manufacturing facility of the Sirmos Division of Bromante Corp. The permit was proposed to U.S. EPA by the New York State Department of Environmental Conservation (“DEC”) on Dec. 27, 2001. This petition is filed within sixty days following the end of U.S. EPA’s 45-day review period as required by Clean Air Act § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. Id.

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

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

**I. The Administrator Must Object to the Proposed Permit Because it was Issued Without Adequate Opportunity for Public Comment through a Public Hearing.**

DEC violated the public participation requirements of Clean Air Act § 502(b)(6) and 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing on the draft permit. Under 40 CFR § 70.7(h), "all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." According to the public notice announcing the start of the public review period on the draft permit for this facility, "[t]he Department may also schedule a public hearing based upon an evaluation of the nature and scope of any written objections raised." Environmental Notice Bulletin, July 18, 2001. NYPIRG requested a public hearing in written comments submitted to DEC during the applicable public comment period. DEC denied NYPIRG's request for a public hearing, stating simply that "[t]his Department has determined that a public hearing on the proposed permit is not warranted." Cover letter to DEC Responsiveness Summary, Sirmos Division of Bromante Corp., Long Island City, dated December 27, 2001.

NYPIRG submitted 17 pages of relevant comments to DEC on the draft permit. NYPIRG requested a hearing because it has members who reside and attend school in the vicinity of the plant and are affected by air pollution caused by the plant. Apparently, NYPIRG's detailed comments were insufficient in their "nature" or "scope" to qualify for a public hearing. It is difficult to imagine what the "nature" and "scope" of NYPIRG's comments need to be in order to qualify for a public hearing.

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

DEC's refusal to hold a public hearing on the draft permit for Sirmos Division of Bromante Corp. Long Island City manufacturing facility is a violation of the public participation requirements of Clean Air Act § 502(b)(6) and 40 CFR § 70.7(h). The Administrator must object to this proposed permit and direct DEC to hold a public hearing in accordance with federal regulations.

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

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

First, the permit application lacks an initial compliance certification. Each applicant is legally required to submit an initial compliance certification that includes:

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

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

Because the applicant failed to submit an initial compliance certification, neither government regulators nor the public can truly determine whether this facility is currently in compliance with every applicable requirement.

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

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

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

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

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

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

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

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

The Administrator must object to the proposed permit for this facility because the proposed permit is based on a legally deficient permit application and therefore does not comply with 40 CFR Part 70.

### **III. The Administrator Must Object to the Proposed Permit Because DEC Failed to Include an Adequate Statement of Basis With the Draft and Proposed Permit**

The proposed Title V permit is defective because DEC failed to include an adequate “statement of basis” or “rationale” with the draft permit explaining the legal and factual basis for draft permit conditions. The sparse “permit description” fails to satisfy this federal requirement. Without an adequate statement of basis, it is virtually impossible for concerned citizens to evaluate DEC’s periodic monitoring decisions and to prepare effective comments during the 30-day public comment period. Significantly, NYPIRG was the only commenter on the draft permit for this facility. DEC states that the Permit Review Report for this facility prepared by DEC and now available on its website is intended meet the statement of basis requirement. (The Permit Review Report cites an incorrect subsection of 40 C.F.R. 707.7 as the regulation setting out this requirement.) DEC Permit Review Report for Sirmos Division of Bromante Corp., Long Island City facility, Mar. 5, 2002. To NYPIRG’s knowledge, this Permit Review Report was not available to the public during public comment period for the draft permit. The only remedy for this problem is for DEC to develop a statement of basis for the draft permit and re-release it for a new public comment period.

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.”

For the purpose of this discussion and the remainder of our comments, we refer to the permit description as the “statement of basis.” According to U.S. EPA Region 10:

The statement of basis should include:

- 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 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 states 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 the case of the draft permit, the information described above was not provided. The proposed permit’s Permit Review Report provides a description of the manufacturing processes undertaken at the facility, but otherwise fails to provide the information described above.

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, [the statement of basis] 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.

On December 22, 2000, U.S. EPA granted a petition for objection to a Title V permit based in part upon the fact that the permit and accompanying statement of basis failed to provide a sufficient basis for assuring compliance with several permit conditions. See U.S. EPA, *In re Fort James Camas Mill, Order Denying in Part and Granting in Part Petition for Objection to Permit*, December 22, 2000 (the “Order”). According to the Order, “the rationale for the selected monitoring method must be clear and documented in the permit record.” Id. at 8. Thus, the Order affirms the fact that this draft permit fails to comply with legal requirements because the statement of basis developed by DEC includes insufficient justification for DEC’s choice of monitoring requirements,

The absence of an adequate statement of basis is a substantive and significant issue that could result in denial of the permit application, or the imposition of significant conditions thereon. 40 CFR Part 70 is clear on the requirement that every permit must be accompanied by an adequate rationale for permit conditions. See 40 CFR § 70.7(a)(5). Absent a complete statement of basis, the public cannot effectively evaluate and comment upon the adequacy of draft permit requirements.

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

Under 6 NYCRR § 201-6.5(e), a permittee must “certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices,” at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirements included in this proposed permit (Condition 25) do not require the permittee to certify compliance with all permit conditions. Rather, the proposed permit only requires that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” DEC then proceeds to identify certain conditions in the draft permit as “Compliance Certification” conditions. Requirements that are labeled “Compliance Certification” are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. The permit conditions that lack monitoring (often a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal law. The permittee must certify

compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

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

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

The Administrator must object to this proposed permit because it does not clearly require the permittee to submit prompt reports of all deviations from permit requirements as mandated under 40 CFR § 70.6(a)(3)(iii)(B). While the permit now contains a timetable for reporting permit deviations in the emission of hazardous, toxic and regulated air pollutants under some circumstances at item 25.2, the same item contains a default so that all other deviations need only be reported in the six-month monitoring report. Condition 59 of the proposed permit, regarding maintenance, start-up/shutdown conditions, malfunctions or upsets, contains conflicting reporting requirements. Additionally, this requirement applies only where there is no definition of prompt or a timetable for reporting in the underlying requirement.

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

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

*DEC Responsiveness Summary*, Sirmos Division of Bromante Corp., Long Island City, Dec. 27, 2001. DEC's response misinterprets the law. First, 6 NYCRR § 201-1.4 applies only under circumstances where a facility wished for the DEC commissioner to excuse an emission exceedance as "unavoidable." By contrast, the prompt reporting requirement under 40 CFR § 70.6(a)(3)(iii)(B) applies to all violations, regardless of whether they are avoidable. Second, while DEC claims that 6 NYCRR § 201-1.4 requires a "written report within 30 days," this is clearly untrue. Rather, § 201-1.4 only requires a written report "when requested in writing by the commissioner's representative." Clearly, 6 NYCRR § 201-1.4 does not fulfill the prompt reporting requirement under federal Title V regulations.

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

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

Rather than amend its startup/shutdown, malfunction, maintenance, and upset provision to comply with those requirements of New York's federally approved SIP (6 NYCRR § 201.5(e), state effective date 4/4/93, U.S. EPA approval date 12/23/97), DEC moved this provision to the state-only side of the permit. The permit does not include the more stringent SIP-based requirements for claiming this type of affirmative defense. A facility that could not meet the grounds for claiming an affirmative defense under the more stringent SIP-based requirements could apparently claim an affirmative defense under Condition 59 in this proposed permit. This provision states in part that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable.” The condition goes on to describe the actions and recordkeeping and reporting requirements that the facility must adhere to in order for the Commissioner to excuse a violation as unavoidable. In this petition, we refer to this condition as the “excuse provision.” As detailed below, the excuse provision included in this proposed permit violates 40 CFR Part 70 in a number of ways.

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

The excuse provision included in this proposed permit reflects the requirements of a New York State regulation, 6 NYCRR § 201-1.4. This regulation states in part that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable.” The version of Part 201 approved by U.S. EPA as part of New York's SIP contains the same language, except that it does not cover violations that occur during “shutdown” or during “upsets.” See 6 NYCRR § 201.5(e), state effective date 4/4/93, U.S. EPA approval date 12/23/97<sup>1</sup> (stating that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up conditions and malfunctions may be excused if such violations are unavoidable.”). Since the SIP rule is the federally enforceable requirement, DEC must delete the words “shutdown” and “upsets” from the proposed permit.

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

The excuse provision included in the draft permit and in New York's SIP mandates that “[r]easonably available control technology, as determined by the commissioner, shall be applied during any maintenance, start-up, or malfunction condition.” See 6 NYCRR § 201.5(e); see also 6 NYCRR § 201-1.4. Under 40 CFR § 70.6(a)(1), each Title V permit must include “operational requirements and

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<sup>1</sup> 40 CFR 52.1679 (2001).



limitations that assure compliance with all applicable requirements.” Since the requirement to apply RACT during maintenance, startup, or malfunction conditions is included in New York’s SIP, it is an applicable requirement. To assure each facility’s compliance with this requirement, DEC must include terms and conditions in each permit that clarify what constitutes RACT for this facility during maintenance, startup, and malfunction conditions. The final permit issued for this facility must also include monitoring, recordkeeping, and reporting requirements that will assure that RACT is employed during maintenance, startup, and malfunction conditions. See 40 CFR § 70.6(c)(1) (requiring each Title V permit to include “monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit”). In situations where RACT is no different during these periods from what is required under other operating conditions, DEC must explain and justify this determination in the statement of basis. The permit must be clear that compliance with the requirement to employ RACT during startup, maintenance, and malfunction conditions does not excuse the facility from compliance with applicable emission limitations.

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

New York’s SIP-approved excuse provision gives the Commissioner the authority to excuse a violation of an applicable requirement during startup, maintenance, and malfunction conditions if they qualify as “unavoidable.” The standard by which the Commissioner is to determine whether a violation is unavoidable is not included in either the regulation or the draft permit. Without a clear standard to guide the Commissioner’s determination as to whether a violation is unavoidable, there is no basis on which a member of the public or U.S. EPA may challenge a Commissioner’s decision to excuse a violation. Since New York’s SIP provision allows the Commissioner to entirely excuse a violation, rather than simply exercising her discretion by not bringing an enforcement action, the lack of a practicably enforceable standard by which the excuse provision will be applied seriously undermines the enforceability of this permit.<sup>2</sup> The permit must explicitly define the circumstances under which a facility can apply for a violation to be excused.

Though New York’s SIP-approved excuse provision lacks an explicit definition as to what qualifies for an excuse, the Commissioner must exercise her discretion in accordance with Clean Air Act requirements. In other words, the Commissioner must define “unavoidable” as it is defined by EPA in its Startup/Shutdown/Malfunction Policy, as set forth in EPA’s 9/28/82, 2/15/83, and 9/20/99 memorandums. In order to clarify the standard that applies to the Commissioner’s determinations regarding whether a violation is unavoidable and therefore assure the public that permitted facilities are not allowed to operate in violation of applicable requirements, the permit must be modified to state that

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<sup>2</sup> New York’s excuse provision actually goes farther than those provisions adopted in other states that give facilities an “affirmative defense” against enforcement actions resulting from unavoidable violations. This is because under an affirmative defense provision, the facility is required to maintain clear documentation that the excuse provision applies, and bears the burden of proof in establishing that a violation was unavoidable. Here, there are no standards governing when a violation can be deemed unavoidable. Also, in all likelihood, once the Commissioner agrees to excuse a violation, EPA and members of the public are not able to bring their own enforcement action because the violation no longer exists.

the Commissioner shall determine whether a violation is unavoidable based on the criteria in U.S. EPA's memorandum dated September 20, 1999 entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." In addition, the permit must include specific criteria regarding when this permittee's emission exceedances may qualify for an excuse. Specifically, what constitutes "startup," "malfunction," and "maintenance" must be explicitly defined in the permit. This clarifying language is necessary in order to assure each facility's compliance with all applicable requirements under 40 CFR § 70.6(a)(1).

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

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

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

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

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

- (1) *Violations due to Startup, Shutdown and Maintenance.*<sup>3</sup> The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (Proposed permit condition 59 only requires reports of violations due to startup, shutdown, or maintenance "when requested to do so in writing").<sup>4</sup> The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the

<sup>3</sup> NYPIRG interprets U.S. EPA's 1999 memorandum as prohibiting excuses due to maintenance.

<sup>4</sup> See Condition 59(a) in the draft permit.

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”). Finally, a deadline for submission of these reports must be included in the permit.

- (2) *Violations due to Malfunction.* The facility must provide both telephone and written notification and to DEC within two working days of an excess emission that is allegedly unavoidable due to “malfunction.” (Proposed permit condition 59, item 59.(1) (b) 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.)<sup>5</sup> The facility must submit a detailed written report within thirty days after the facility exceeds emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The proposed permit only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”).<sup>6</sup>

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

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

**VII. The Administrator Must Object to the Proposed Permit Because its Emergency Defense Provision is in Violation of 40 C.F.R. 70.6(g)**

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<sup>5</sup> See Condition 5(b) in the draft permit.

<sup>6</sup> Id.

This provision, now at Condition 5 of the proposed permit, replaces DEC's excuse provision, which, as stated above, was moved to the state-only side of the permit. While the language mostly mirrors 40 C.F.R. 70.6(g), its reporting requirement sets out a less timely reporting requirement. Under 40 C.F.R. 70.6(g), the permittee must submit notice of the emergency "within two working days of the time when the emission limitations were exceeded," (*id.*, emphasis added) Permit Condition 5, Item 5.1(a)(4) requires notification "within two working days after the event occurred" (emphasis added). Thus, a facility that had a long-term exceedance of emission limitations could allow the exceedance to go unreported for a much longer period of time, yet still claim the emergency defense.

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

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

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

### **IX. The Administrator Must Object to the Proposed Permit Because it Lacks Monitoring that is Sufficient to Assure the Facility's Compliance with all Applicable Requirements and Many Individual Permit Conditions are not Practicably Enforceable**

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

[W]here the applicable requirement does not require any periodic testing or monitoring, section 70.6(c)(1)'s requirement that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit 'periodic monitoring sufficient to yield reliable

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

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

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

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

#### **Analysis of specific draft permit conditions**

#### **Inadequate Citations:**

Conditions 12 through 24, 41 and 42 simply refer to 6 NYCRR § 201-6 as the citation for the underlying requirement. It is difficult to locate the underlying requirement with only a generic reference to the entire subpart. DEC must include more specific legal citations in the final permit.

#### **Maintenance of equipment:**

The proposed permit 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. This requirement must not be stated generally, but must be applied specifically to this facility. The proposed permit must explain exactly what are considered to be reasonable maintenance practices and spell out the manufacturer's specifications. Furthermore, the proposed permit must provide for monitoring, recordkeeping, and reporting to assure the facility's compliance with the maintenance requirements. The statement of basis must explain why the monitoring (or lack thereof) that is included in the permit is sufficient to assure the facility's compliance with this requirement.

### **Emergency Defense:**

For clarity, a definition for “emergency” should be incorporated directly into the proposed permit. This applicable definition is found at 6 NYCRR § 201-2.1(b)(12), which provides that:

An “emergency” means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which require immediate corrective action to restore normal operation, and that cause the source to exceed a technology-based permit emission limit. An emergency shall not include non-compliance caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error.

### **Air Contaminants Collected in Air Cleaning Devices:**

The proposed permit includes two separate conditions that apply to the handling of air contaminants collected in an air cleaning device. The first, “Recycling and Salvage,” is based on 6 NYCRR § 201-1.7. The second, “Prohibition of Reintroduction of Collected Contaminants to the Air,” is based on 6 NYCRR § 1-8. While NYPIRG agrees that these conditions should continue to be included as a general conditions in the permit, they must also be included as facility-specific conditions if the facility actually uses an air cleaning device. Those facility-specific conditions must explain how these requirements apply to the facility and include sufficient monitoring and recordkeeping requirements to assure the facility’s compliance. Moreover, the statement of basis must explain the factual basis for each condition, i.e., whether the facility actually operates an air cleaning device that collects air contaminants.

### **Applicable Criteria, Limits, Terms, Conditions, and Standards:**

This condition is based generically on 6 NYCRR § 201-6 and provides that the facility must comply with “approved criteria, emission limits, terms, conditions, and standards in the permit.” It then goes on to state that applicable requirements include reporting requirements and operations under an accidental release plan, response plan, and compliance plan, as well as support documents submitted as a part of the permit application. A vague reference to “support documents” is insufficient to create legally enforceable permit requirements. The requirements of any accidental release plan, response plan, or compliance plan must be incorporated into the draft permit. If such documents exist, they are applicable requirements and must be included as permit terms. Furthermore, any requirements contained in “support documents submitted as part of the permit application for this facility” must be incorporated directly into the permit. As currently written, this condition will unnecessarily confuse the public by implying that there are applicable requirements that are not included in the permit.

### **Compliance Requirements:**

This condition, also generically based on 6 NYCRR § 201-6, states that the facility must submit “risk management plans . . . if required by Section 112(r) of the Clean Air Act for this facility.”

NYPIRG understands that U.S. EPA has not delegated authority to DEC to administer the 112(r) program. This does not, however, excuse DEC from including 112(r) requirements in this permit. Section 112(r) is an applicable requirement and must be covered by this Title V permit. The permit must state whether CAA § 112(r) applies to this facility and must indicate which requirements in the facility's 112(r) plan are enforceable by the public. The requirements in the plan must be included in the permit.

### **Six Month Monitoring Reports:**

Under 40 CFR Part 70, reports of any required monitoring must be submitted to DEC and made available to the public at least once every six months. Though many monitoring conditions in this proposed permit include a space for "reporting requirements," DEC chose not to mention the six month reporting requirement. Instead, DEC chose to include the following general condition in the draft permit:

In the case of any condition contained in this permit with a reporting requirement of 'Upon request by regulatory agency' the permittee shall include in the semiannual report, a statement for each such condition that the monitoring or recordkeeping was performed as required or requested and a listing of all instances of deviations from these requirements.

Though NYPIRG appreciates DEC's effort to address NYPIRG's concern about the six month monitoring requirement, DEC's solution does not solve the problem.

First, "reports of any required monitoring" must include more information than simply whether monitoring was performed and whether any deviations were measured. Rather, the reports need to provide a summary of all monitoring results, regardless of whether deviations were recorded. That way, it would be possible to determine whether the facility is operating very close to the limits (in which case more frequent monitoring may be warranted), or whether the facility is periodically failing to perform the monitoring (which could be disguising a compliance problem). NYPIRG urges DEC to develop a standard form that facilities are required to complete for purposes of the six month reports.

Second, DEC is certainly already aware that many monitoring conditions in the permit do not say that reports are due "upon request by regulatory agency," but instead say "Reporting Requirements: As required – See monitoring description." The monitoring description then fails to state that reports are due at least once every six months. DEC must correct this problem by reviewing each permit condition individually to determine whether it conflicts with the six month reporting requirement.

### **Permit Exclusion Provisions:**

This condition must be modified to make it clear that enforcement actions against the facility brought by U.S. EPA or members of the public pursuant to the federal citizen suit provision (CAA § 304) are unaffected by issuance of this permit.

### **Required Emissions Tests:**

This condition 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 requirement is clearly applicable to the facility and must be included in the draft 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 most of the requirement, while entirely omitting part of the requirement.

### **Compliance with Opacity Limitations (Conditions 31, 32, and 43)**

Condition 31 and 32 set forth the opacity limitation that applies generally to the entire plant under 6 NYCRR § 211. Condition 43 sets out the opacity limitation under 6 NYCRR § 228.4 that applies to particular emission units. DEC must explain what monitoring will be undertaken to assure compliance with this requirement. In doing so, DEC must identify each part of the plant where visible emissions are possible, and then provide a justification for the monitoring selected to assure compliance at each part of the plant. If no monitoring is justified because visible emissions are possible but highly unlikely at a particular part of the plant, this information must be provided in the statement of basis.

### **Condition 34 (VOC limits):**

Simply maintaining certifications from the coating supplier indicating the VOC content of each coating is insufficient to assure the facility’s compliance with VOC limits. The coating supplier cannot be held accountable under this permit, and there is no information available regarding how the coating supplier knows the VOC content of the coating. Whatever rationale DEC has for believing that this condition is sufficient to assure the facility’s compliance must be included in the statement of basis.

### **Conditions 35, 36, 38, 39 (open containers):**

These conditions lack monitoring to assure the facility’s compliance with 6 NYCRR § 228.10.

### **Condition 44 (Alternative Analytical Methods):**

The draft permit must be revised to state exactly how this condition applies to the facility. If alternative analytical methods are needed to monitor a particular surface coating, DEC must go ahead and identify the analytical method that is to be used. Otherwise, the public cannot assess whether monitoring is sufficient to assure the facility’s compliance.



**Condition 47, 51 (VOCs):**

These conditions must be revised to indicate whether any coatings used at the facility fall under the exceptions identified in (1) through (3).

**Condition 53 (surface coating of wood products):**

DEC must add monitoring to support this condition that is sufficient to assure the facility's compliance. DEC's rationale for whatever monitoring method is selected must be provided in the statement of basis.

**Conditions 54-58 (environmental rating):**

These conditions are all unenforceable as a practical matter because the permit fails to indicate the "environmental rating issued by the commissioner." This information must be provided.

**Permissible Emission Rates and other requirements in pre-existing permits**

If previously issued SIP-based permits issued to this facility include overall "permissible" emission rates, these emission limitations must be included in the Title V permit. When such permissible emission rates are established in a SIP-based permit, they are federally enforceable and must be included in the Title V permit issued to the facility.

Though NYPIRG is aware of DEC's position that these "permissible" limits from prior permits were not intended to be enforceable, this position runs contrary to the explicit language in New York's SIP. In particular, 6 NYCRR § 200.1(bj) defines "permissible emission rate" as "[t]he maximum rate at which air contaminants are allowed to be emitted to the outdoor atmosphere. This includes . . . (3) any emission limitation specified by the commissioner as a condition of a permit to construct and/or certificate to operate." Similarly, the SIP-approved version of 6 NYCRR § 201 states that "a certificate to operate will cease to be valid under the following circumstances . . . (3) the permissible emission rate of the air contamination source changes." 6 NYCRR § 201.5(d)(3) (effective 4/4/93). Thus, the SIP makes it clear that the "permissible emission rate" included in SIP-based Part 201 permits is an enforceable requirement. The permissible emission rates included in the Part 201 permits previously issued to this facility must therefore be included in this Title V permit.

**Conclusion**

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the proposed Title V permit for the Sirmos Division of Bromante Corp.'s Long Island City manufacturing facility.

Respectfully submitted,

Dated: April 10, 2002  
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