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

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In the Matter of the Title V
Operating Permit Issued to

STARRETT CITY, INC. Permit ID: DEC 2-6105-00263/00008
located in Brooklyn, New York

Issued by the New York State Department of
Environmental Conservation
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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF THE TITLE V OPERATING PERMIT FOR STARRETT CITY, 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 Title V Operating Permit issued to Starrett City. 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 September 19, 2000. According to that letter, U.S. EPA's 45-day review period ended on November 6, 2000. Starrett City received a final Title V permit on November 10, 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 Starrett City's 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 Kings County, where Starrett City is located.

The U.S. EPA Administrator must object to the Title V permit issued to Starrett City 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 permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c) (see p. 5 of this petition);

(3) the permit lacks an adequate statement of basis as required by 40 CFR § 70.7(a)(5) (see p. 7 of this petition);

(4) the permit distorts the annual compliance certification requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5) (see p. 9 of this petition);

(5) the 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. 9 of this petition);

(6) the permit fails to require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B) (see p. 15 of this petition); and

(7) the 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 monitoring that is sufficient to assure the permittee's compliance and are not practicably enforceable (see p. 16 of this petition).

(8) the permit fails to include the applicable particulate matter limitation that is part of New York's State Implementation Plan.

If the U.S. EPA Administrator determines that Starrett City's permit does not comply with legal requirements, 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."). The numerous and significant violations of 40 CFR Part 70 discussed below require the Administrator to object to the permit issued to Starrett City.

## 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 permit includes 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 air quality requirements.

The permit issued to Starrett City does not assure the facility's compliance with all applicable requirements. U.S. EPA must require DEC to remedy the flaws in the permit that are identified in this petition. If DEC refuses to remedy these flaws, U.S. EPA must draft a new permit for Starrett City that complies with federal requirements.

### 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." NYPIRG requested a public hearing in written comments submitted to DEC during the applicable public comment period.

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

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

> 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.

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

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 19 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

[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

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 Starrett City.

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

The Administrator must object to the permit issued to Starrett City because Starrett City 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, Starrett City's permit application lacks an initial compliance certification. Starrett City 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 Starrett City is currently in violation of an applicable requirement, the Title V permit must include an enforceable schedule by which it will come into compliance with the requirement (the "compliance schedule"). Because Starrett City failed to submit an initial compliance certification, neither government regulators nor the public can feel confident that Starrett City is currently in compliance with every applicable requirement. Therefore, it is unclear whether Starrett City's Title V permit must include a compliance schedule.

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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.

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, Starrett City 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, Starrett City'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 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 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.

Starrett City's 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. Almost a year and a half 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 Starrett City 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 A.

The Administrator must object to the permit issued to Starrett City because the permit is based upon a legally deficient permit application and therefore does not assure Starrett City's compliance with applicable requirements.

### C. The Permit is Accompanied by an Insufficient Statement of Basis

In our previous petitions to U.S. EPA regarding Title V permits issued by the New York DEC, we pointed out that DEC is not complying with the requirement under 40 CFR §70.7(a)(5) that each draft permit be accompanied by a "statement that sets forth the legal and factual basis for draft permit conditions." NYPIRG appreciates that DEC is now including a "permit description" with each draft Title V permit. While the permit description is certainly a step in the right direction, this document does not satisfy Part 70 requirements since it fails to include certain essential information.

For the purpose of this discussion and the remainder of our comments, we refer to the permit description as the "statement of basis."

The most glaring deficiency in the statement of basis is the failure to provide the legal and factual basis for the adequacy of monitoring requirements included in the permit (or lacking from the permit). Without an adequate statement of basis, it is virtually impossible for the public to evaluate DEC's 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:

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 B. 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.

40 CFR Part 70 is clear on the requirement that every permit must be accompanied with a 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. The Administrator must object to the issuance of the permit and insist that DEC draft a new permit that includes a statement of basis.

### D. 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 Starrett City's permit (identified as Condition 26 in the permit) does not require Starrett City 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 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 monitoring (a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal regulations. Starrett City 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 at 4. 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 permit that fails to require the permittee to certify compliance (or noncompliance) with all permit conditions on at least an annual basis.

Unofficially, it appears that DEC is trying to remedy the problem with the compliance certification language by labeling almost every permit condition "compliance certification." (This approach has the side effect of making the table of contents at the front of the permit entirely useless, since every permit condition is labeled "compliance certification.") NYPIRG is concerned about this ad-hoc approach to remedying the compliance certification problem because this approach still results in some conditions remaining exempt from the compliance certification requirement. See, e.g., Condition 33 (Open Fires Prohibited at Industrial and Commercial Sites). U.S. EPA must require DEC to address the compliance certification problem comprehensively by including language in the general

compliance certification condition that makes it clear that the permittee must certify compliance with each and every term and condition of the permit, regardless of whether the term or condition is labeled "compliance certification."

### E. 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 Starrett City's permit 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, Starrett City's 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).[3]

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.

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 C). 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.

[3] The excuse provision is identified as Condition 5 in the permit.

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 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 Starrett City 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 Starrett City are described below.

1. Any Title V permit issued to Starrett City 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.[4]

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

- 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;

The proposed permit does not include the restrictions set out in (1), (3), and (4). Moreover, the permit lacks most of the evidentiary requirements referred to in (5). As for (2), both the language of the 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 the proposed permit for Starrett City and require DEC to draft a new permit that includes the limitations described in the 1999 memorandum.

2. The 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 Starrett City must be clear that violation of such a requirement may not be excused.

The 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 permit lacks this language. Any Title V permit issued to Starrett City must be clear that a violation of a federal requirement that does not provide for an affirmative defense will not be excused.

3. Any Title V permit issued to Starrett City must define significant terms.

For a Title V permit to assure compliance with applicable requirements, each permit condition must be enforceable as a practical matter. Limitations on the scope of the excuse provision are not practicably enforceable because the 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 §

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- 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.

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 DEC 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.[5] 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.

4. Any Title V permit issued to Starrett City 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 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 Starrett City must define RACT as it applies during startup, shutdown, malfunction, and maintenance conditions.

[5] 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.

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 Starrett City must 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).

Any Title V permit issued to Starrett City must require the facility to submit prompt 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.

Unfortunately, the excuse provision in the permit (Condition 5) fails to require adequate reporting of deviations of permit conditions during startup/shutdown, maintenance, malfunction, and upset conditions. In the case of deviations that occur during startup/shutdown or maintenance, the facility isn't required to submit a deviation report at all "unless requested to do so in writing." In the case of deviations that allegedly occur due to malfunction, the permit requires deviation reports, but allows these 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.

DEC responded to NYPIRG's comments regarding the lack of written deviation reports by stating:

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

DEC Responsiveness Summary at 5. DEC's response is misleading because the agency fails to acknowledge that written deviation reports are only required if they are specifically requested by the DEC Commissioner. In addition, DEC fails to acknowledge the circumstances under which a deviation report is simply not required unless specifically requested by the DEC Commissioner.

40 CFR § 70.6(a)(3)(iii)(B) provides no exceptions to the requirement that a Title V permit require prompt reporting of all deviations from permit requirements. DEC may not waive this requirement under any circumstance. Furthermore, given that 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. Additional support for the argument that these reports must be made in writing is found in 40 CFR § 70.5(d), which provides that "[a]ny application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness." U.S. EPA's White Paper #1 interprets this provision of Part 70 as requiring "responsible officials to certify monitoring reports, which must be submitted every 6 months, and 'prompt' reports of any deviations from permit requirements whenever they occur." U.S. EPA, *White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995) at 24. A deviation report that is submitted by telephone rather than in writing cannot be "certified" by a responsible official as required by Part 70.

The permit issued to Starrett City 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 Starrett City must include the following reporting obligations:

(1) *Violations due to Startup, Shutdown and Maintenance*.[6] The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (The permit only requires reports of violations due to startup, shutdown, or maintenance "when requested to do so in writing").[7] The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report promptly after a deviation occurs. (The permit does not require submittal of a report "if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements").[8] 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 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).[9] The facility must submit a detailed written report within thirty days after

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

[7] See Condition 5.1(a) in the permit.

[8] Id.

[9] See Condition 5.1(b) in the permit.

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 permit only requires the facility to submit a detailed written report "when requested in writing by the commissioner's representative).[10]

### F. The Proposed Permit Fails to Require Prompt Reporting of All Deviations From Permit Requirements as Mandated by 40 CFR § 70.6(a)(3)(iii)(B)

As discussed above, 40 CFR § 70.6(a)(3)(iii)(B) requires prompt reporting of all violations of permit requirements. Condition 5, discussed above, does not require prompt reporting of all deviations, but only reporting of violations which might be considered excusable under 6 NYCRR § 201-1.4.

The permit issued to Starrett City lacks a condition that requires prompt reporting of all deviations from permit terms, both excusable and non-excusable. Absent such a condition, U.S. EPA must object to issuance of this permit.

The draft permit for Starrett City that was released for public comment included a condition that stated:

> 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.

This condition was deleted from the permit following the public comment period. In commenting on the draft permit, NYPIRG explained that that condition was also flawed. The only reporting required by that condition was 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, that condition would allow the permittee to withhold information about the violation from government authorities for six months. Six months cannot possibly be considered "prompt reporting".

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[10] Id.

The old permit condition could have been rehabilitated by simply deleting the phrase "as prescribed under Section 201-1.4 of Part 201." Instead of taking that simple step, DEC deleted the condition altogether without explanation (or even notification).

Starrett City must be compelled to submit prompt written reports of all deviations, not just those that may be excusable. The Administrator must object to the permit because it does not require prompt reporting of all deviations from permit limits.

### G. 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 Monitoring That is Sufficient to Assure the Permittee's Compliance and 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 permit conditions identifies requirements for which monitoring is either absent or insufficient and permit conditions that are not practicably enforceable.

## Analysis of specific permit conditions

Under 40 CFR § 70.7(c)(ii), "[p]ermit 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." Similarly, 6 NYCRR § 201-6.7(a)(5) provides that "[a]ll the terms and conditions of a permit shall be automatically continued pending final determination by the Department on a request for renewal application for a permit provided a permittee has made a timely and complete application and paid the required fees. Thus, though the front page of this permit indicates that it will expire on 11/09/2005, the term will be extended after that date so long as the facility submits a timely permit application. Unfortunately, after the public comment period on the Starrett City permit DEC modified each permit condition to include a clause stating "Effective between the dates of 11/10/2000 and 11/09/2005." This is not the correct way to limit the overall permit term. As a result of these statements, if a renewal permit is not issued by the 5 year deadline, each of the individual permit conditions may expire even though the permit itself will persist (as a "hollow" permit without most applicable requirements). DEC must be required to remove these clauses from the permit so that permit conditions can be enforced after the expiration of the five year permit term.

**Condition 7, Condition 8 (air contaminants collected in air cleaning devices):**

Conditions 7 and 8 both apply to the handling of air contaminants collected in an air cleaning device. This permit must specifically explain how 6 NYCRR § 201-1.7 and § 201-1.8 applies to Starrett City, and include recordkeeping requirements sufficient to assure that Starrett City 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 "[t]his condition is included with all air permits regardless of whether or not air pollution controls are in place. DEC Responsiveness Summary, p. 6.

DEC's response does not justify the agency's failure to identify whether the requirement applies to Starrett City and, if the requirement applies, the agency's failure to include sufficient periodic monitoring to assure compliance. A Title V permit must identify the requirements that apply to the permitted facility, not provide a shopping list of requirements that might apply. As explained in U.S. EPA's preamble to 40 CFR Part 70:

> The [Title V] program will generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the [Clean Air] Act. Currently, a source's obligations under the Act (ranging from emissions limits to monitoring, recordkeeping, and reporting requirements) are, in many cases, scattered among numerous provisions of the SIP or Federal regulations. In addition, regulations are often written to cover broad source categories, therefore it may be unclear which, and how, general regulations apply to a source.

(emphasis added) 57 Fed. Reg. 32250, 32251 (July 21, 1992). 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.

DEC's refusal to identify how this requirement applies to Starrett City and to include sufficient monitoring is a clear violation of Part 70 and requires the Administrator to object to this permit.

**Condition 12, Item 12.1 (Applicable Criteria):**

Condition 12 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 comments by stating that "[a]ll of the relevant requirements of any supporting documents have been fully incorporated into the draft permits." DEC Responsiveness Summary at 6.

Even if all relevant requirements are *not* incorporated into Starrett City's permit, there is no reason to include this unenforceable condition in the permit. Because of its vagueness, this permit condition adds absolutely nothing to the 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 Progr*am, March 5, 1996, at 37. The 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 Starrett City is clear.

**Condition 14, Item 14.3 (Compliance Requirements):**

The permit makes reference to "risk management plans" if they apply to the facility. Somewhere in the permit, it needs to say whether or not CAA § 112(r) applies to this facility. As explained above in connection with Conditions 7 and 8, the permit must explain what 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. If Starrett City is required to submit a § 112(r) plan but has not done so, the permit must include a compliance schedule.

**Condition 27 (Required Emissions Tests):**

In comments on the draft permit, NYPIRG pointed out that Condition 27 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 Starrett City 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 some of the requirements, while entirely failing to describe or reference other requirements.

**Condition 30 (Visible emissions limited):**

NYPIRG's comments on the draft permit with respect to this pointed out that the draft permit lacked any kind of monitoring to assure Starrett City's 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. 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 at 7. While NYPIRG is encouraged by the fact that DEC plans to develop an appropriate visible emission monitoring policy, 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 monitoring sufficient to assure compliance. While a national policy would certainly be helpful to DEC, such a policy is not a prerequisite for inclusion of appropriate monitoring in each individual Title V permit.[11] Further, it is unclear how the information provided by DEC regarding the "emission point universe" relates to Starrett City. Starrett City's Title V permit must assure compliance at each emission point. DEC may not omit adequate monitoring from Starrett City's permit on the basis that DEC has not gotten around to developing appropriate monitoring requirements.

The permit conditions referred to in DEC's responsiveness summary are incorporated into Starrett City's Title V permit as Conditions 31 and 32. Unfortunately, the monitoring required under these two conditions 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. 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.

[11] 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.

It is fair to assume that the best monitoring regime to assure compliance with applicable opacity limits 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 that the observer check for visible emissions at a specific time each day. Otherwise the observer could simply wait to perform the required observation until there are not visible emissions. In addition, 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."

The Administrator must object to the proposed permit because it does not assure Starrett City's compliance with the applicable opacity limitation. The Administrator must insist that DEC draft a new permit for Starrett City that includes conditions (such as those suggested above) that actually assure compliance with applicable opacity limitations.

**Conditions 34 and 35 (Sulfur Limitation):**

In commenting on the draft permit, NYPIRG asserted that the statement of basis must include an explanation as to why retaining fuel supplier certifications is sufficient to assure compliance with this requirement. We appreciate that DEC did attempt to explain the basis for this monitoring decision in the response to comments, but this explanation still does not appear in the statement of basis that accompanies the permit. The point is that for every permit that DEC issues, the statement of basis

accompanying the permit must provide an explanation for permit conditions, and particularly for the adequacy of monitoring conditions.

In addition, DEC's explanation as to why Starrett City is never required to directly sample its own fuel oil is unsatisfactory. While DEC responds that random sampling of fuel suppliers (by DEC, we assume) is an effective means of utilizing limited resources to enforce the sulfur-in-fuel requirement, this does not explain why the facility itself is not required to perform the sampling itself on a periodic basis. A key benefit of the Title V program is that sources are required to supplement government inspections by monitoring their own compliance with applicable requirements and submit regular compliance certifications. In addition to requiring the facility to maintaining fuel supplier certifications, the permit should required the facility to sample and test its fuel on a regular, periodic basis in order to assure compliance with the sulfur-in-fuel requirement.

In commenting on the draft permit, NYPIRG also pointed out that Conditions 34 fails to cite to the correct applicable requirement. Because the current state regulation has not been approved by U.S. EPA for incorporation into New York's SIP, the Condition 34 must cite specifically to the SIP version of the rule as the applicable requirement.

**Condition 36 (NOx RACT):**

NYPIRG commented to DEC that while the permit states that Starrett City is subject to NOx RACT, the permit fails to indicate whether the facility had submitted a NOx RACT plan. In response, DEC stated that the facility submitted a NOx RACT plan on 4/24/95 and that the plan is included as an attachment to the permit application. This information must be incorporated into the statement of basis accompanying the permit. Also, any requirement included in the plan must be incorporated into the permit.

**Conditions 40 - 47 (NOx emission limit for boilers):**

NYPIRG commented to DEC that the draft permit entirely lacked monitoring designed to assure ongoing compliance with the NOx emission limit. In reply, DEC incorporated a requirement into the permit for Starrett to perform a stack test "once during the term of the permit." While it appears at first that this means that Starrett City will perform a stack test once every five years, this is highly unlikely. As discussed earlier in this petition, NYPIRG expects that DEC will not issue a new permit to Starrett City immediately upon expiration of the permit term. Instead, the permit is likely to be extended while DEC processes Starrett City's permit renewal application. Thus, as a practical matter, Starrett City will monitor its compliance with the NOx limit less than once every five years. DEC has not demonstrated that the monitoring included in this permit is sufficient to assure the facility's ongoing compliance with the NOx limit. NYPIRG asserts that a stack test must be performed once each year,

and must be supplemented with other types of monitoring and maintenance activities that are sufficient to assure compliance.

In addition, the permit must be modified to state the NOx emissions limit more clearly. As currently written, the permit simply states that the "upper limit of monitoring" is 0.3 pounds per million Btus. Stating that 0.3 lbs/mmBtu is the upper limit of monitoring is not the same as stating that the facility may not exceed 0.3lbs/mmBtu.

**Condition 48-55 (Opacity limits on boilers pursuant to 6 NYCRR 227-1.3(a)):**

The monitoring required under these conditions is the same as that required under Condition 30. The same comments that NYPIRG made with respect to the monitoring under Condition 30 apply to Conditions 48-55. In addition, under 6 NYCRR § 227-1.3(b) a violation of the opacity limit can be determined based upon any credible evidence. The Starrett City 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 monitoring method, but the permit may not make Method 9 the exclusive benchmark for demonstrating compliance.

NYPIRG commented to DEC that an inspection report dated 3/9/98 indicates that each boiler has an alarm setting for opacity at 15%. NYPIRG asked that DEC incorporate these alarms into the monitoring regime for Starrett City, but DEC failed to respond to this request.

**Condition 56 (NOx emissions recordkeeping):**

NYPIRG commented to DEC that the draft permit failed to include a number of requirements related to NOx emissions control that are contained in a previously issued permit (DARID 610000ST01 (May 22, 1996)). A copy of the conditions included in the pre-existing permit are attached as Appendix D. Of particular importance are the following requirements:

1. The reciprocating engines shall have relays installed so that valve timing is maintained along the curves described in attachment 1, derived from August 1995 stack test data.

2. Using data from the August 1995 stack test, boiler controls shall be calibrated and maintained such that the boilers continue low-NOx operation as tested in August 1995.

3. The reciprocating engines shall not operate below 1000kw output except during periods of startup, shutdown, and malfunction.

4. The reciprocating engines shall be physically limited to operating at a maximum of 1875kw output in dual fuel mode or 2000kW output in diesel-only mode.

Though DEC failed to respond to NYPIRG's comments on this topic, it appears that DEC decided to incorporate a number of these requirements into Condition 56 of the final permit. In particular, Condition 56 now states:

> The reciprocating engines shall have relays installed so that valve timing in maintained along the revised curves described in Appendix J derived from the August 1995 stack test. The reciprocating engines shall not operate below 1000KW output except during periods of startup, shutdown, and malfunction.

While NYPIRG is pleased that DEC decided to add these conditions to the final permit, there are a few problems with this condition. First, there is no mention of requirements 2 and 4 above. Second, the condition is unsupported by monitoring, recordkeeping, and reporting requirements designed to assure Starrett City's compliance with this condition. Third, the condition is unenforceable as a practical matter because a member of the public does not have access to "Appendix J." Fourth, the condition fails to cite to the pre-existing permit as the underlying source of the conditions. Finally, DEC lacks authority to exempt this facility from applicable requirements during startup, shutdown, and malfunction.

**Conditions 57-62 (NOx emission limit for generators):**

NYPIRG commented to DEC that these conditions violated 40 CFR Part 70 because they entirely lacked any type of monitoring to assure Starrett City's ongoing compliance with the NOx emissions limit for generators. In response, DEC added a requirement that a stack test be performed "once during the term of the permit." As stated above with respect to conditions 40 through 47, this monitoring condition is inadequate to assure ongoing compliance with the NOx limit.

In addition, the permit must be modified to state the NOx emissions limit more clearly. As currently written, the permit simply states that the "upper limit of monitoring" is 9.0 grams per brake horsepower hour. Stating that 9.0 g/bph is the upper limit of monitoring is not the same as stating that the facility may not exceed 9.0 g/bph.

**Conditions 63-68 (Opacity limits on internal combustion engines pursuant to § 227-1.3):**

See comments on Conditions 30 and 48-55.

**Missing from the draft permit: Requirements that apply to the 400,000 Gallon #6 Fuel Oil Storage Tank.**

NYPIRG commented to DEC that though Item 25.3 provides that the facility is authorized to operate "ONE (1) 400,000 GALLON #6 FUEL OIL STORAGE TANK. VERTICAL FIXED ROOF TANK," the permit fails to identify any requirements that apply to the tank. In response, DEC

simply replied that "Storage tank of 400,000 gallon for #6 oil is an exempt source." DEC Responsiveness Summary at 10. DEC's response is unsatisfactory. It appears to NYPIRG that the tank is governed by 6 NYCRR Part 229 (Petroleum and Volatile Organic Liquid Storage and Transfer). § 229.1(b) provides that in New York City the owner or operator of "any petroleum liquid fixed roof tank with a capacity of 40,000 gallons or more must have demonstrated compliance with the requirement of this Part by October 1, 1982." Neither the permit application nor the permit contains information that indicates that the tank is exempt from Part 229. Moreover, it appears that the tank is subject to the requirements of 6 NYCRR Part 204 (Effective August 12, 1974). Part 204 is part of New York's SIP but no longer part of New York's current regulations. Part 204 is attached to this petition as Appendix E.

### H. The Permit Fails to Include the Applicable Particulate Matter Limitation that is Part of New York's State Implementation Plan.

U.S. EPA must object to issuance of this permit because it does not include the federally enforceable particulate emission limit that is included in New York's State Implementation Plan (SIP). The federally enforceable SIP limitation is found at 6 NYCRR § 227.2(b)(1) (State Effective Date 5/1/72, SIP Approval Date 9/22/72, 37 FR 19814), and provides:

> No person shall cause, permit, or allow a two hour average emission into the outdoor atmosphere of particulates in excess of 0.10 pound per million BTU heat input from:
> 1. any oil fires [sic] stationary combustion installation.

(The regulation is attached as Appendix F). This particulate emissions rate is stricter than the standard provided in New York's current 6 NYCRR § 227-1.2(a)(2), which allows Starrett City to emit particulates at a rate of 0.2 pounds per million BTUs. U.S. EPA explicitly rejected New York's current 6 NYCRR § 227-1.2(a)(2) for approval into the SIP in 1984 (at the time it was numbered 227.3(a)(2), stating that "Section 227.3(a)(2) of 6 NYCRR, as submitted on August 10, 1979, is disapproved because it is inconsistent with 40 CFR Subpart G, Control Strategy: Sulfur oxides and particulate matter." 40 CFR § 52.1679. U.S. EPA rejected § 227-1.2(a)(2) a second time on 4/19/00. See 65 Fed. Reg. 20905 (April 19, 2000).

In response to NYPIRG's comments on the Starrett City permit, DEC replied:

> The state has been operating under the particulate limit set forth under §227-1.2(a)(2) for over 20 years. As NYPIRG must be aware, the ultimate purpose of the SIP is to achieve and maintain air quality with the National Ambient Air Quality Standards or NAAQS. Since the limit went into effect, New York has gone from major non-attainment to attainment status for particulates. One minor exception to this is New York County which remains designated as in moderate non-attainment despite the fact that ambient air monitors have not shown any violations in several years. Given the above evidence, there appears to be little reason to change the state limit however the Bureau of Abatement Planning within the Division of Air Resources which is responsible

> for SIP related issues, has been and continues to be in discussion with EPA Region 2 to resolve the discrepancy between state and federal limits.

DEC Responsiveness Summary at 11. DEC's response is unacceptable because the particulate emissions limit contained in the SIP is a generally applicable limit that is not contingent on whether New York is in attainment or non-attainment with the federal particulate matter standard.

40 CFR § 70.1(b) provides that "[a]ll sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements." SIP requirements are specifically included in the definition of "applicable requirements" under 40 CFR § 70.2 and 6 NYCRR § 201-2.1(b)(5). Thus, neither DEC nor U.S. EPA possess legal authority to leave the 0.1 mm/Btu particulate matter emissions standard out of the federally enforceable section of Starrett City's Title V permit. In addition, Starrett City's Title V permit must include monitoring, recordkeeping, and reporting that is sufficient to assure Starrett City's compliance with the 0.1 mm/Btu standard. In the absence of the inclusion of the 0.1 mmBtu standard and monitoring sufficient to assure Starrett City's compliance with that standard, U.S. EPA must object to the permit as violating the requirements of 40 CFR Part 70.

## Conclusion

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the Title V permit issued to Starrett City.

Respectfully submitted,

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

(212) 349-6460