BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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In the Matter of the Proposed Operating Permit for

DYNERGY NORTHEAST GENERATION
to operate the Danskammer Generating Station
located in Newburgh, New York

Permit ID: 3-3346-00011/00017

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 DANSKAMMER GENERATING STATION

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. ("NYPIRG") hereby petitions the Administrator ("the Administrator") of the United States Environmental Protection Agency ("U.S. EPA") to object to proposed Title V Operating Permit for Dynergy Northeast Generation's Danskammer Generating Station. The permit was proposed to U.S. EPA by the New York State Department of Environmental Conservation ("DEC") on August 6, 2001. EPA's 45-day review period ended on September 20, 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 Danskammer Generating Station is located.

On August 3, 2001, DEC mailed a Responsiveness Summary to NYPIRG that addressed the comments NYPIRG made to DEC on the draft permit. At that time, DEC rejected nearly all of NYPIRG's comments. On September 26, 2001, EPA Region 2 sent comments to DEC on the draft permit that covered many of the same concerns that NYPIRG raised in its comments on the draft permit. EPA asked DEC not to issue the permit until the agencies reached agreement. (The September 26, 2001 letter is attached to this petition as Exhibit 1.) On October 15, 2001, EPA Region 2 sent a second letter to DEC with additional comments on the Danskammer permit. (Attached to this petition as Exhibit 2). On November 13, DEC provided NYPIRG with an electronic copy of the most recent draft permit for the Danskammer Generating Station. Because several of NYPIRG's concerns were

not adequately addressed, we are now filing this petition with EPA seeking the Administrator's objection to this proposed permit.

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 is Based on an Inadequate Permit Application

Dynergy's application for a Title V permit for the Danskammer Generating Station must be denied because Dynergy 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, Dynergy's permit application lacks an initial compliance certification. Dynergy 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 Dynergy failed to submit an initial compliance certification, neither government regulators nor the public can truly determine whether the Danskammer Generating Station is currently in compliance with every applicable requirement.

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

> [I]n § 70.5(c)(9), every application for a permit must contain a certification of the source's compliance status with all applicable requirements, including any applicable enhanced monitoring and compliance certification requirements promulgated pursuant to

> section 114 and 504(b) of the Act. This certification must indicate the methods used by the source to determine compliance. This requirement is critical because the content of the compliance plan and the schedule of compliance required under § 70.5(a)(8) is dependent on the source's compliance status at the time of permit issuance.

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

In addition to omitting an initial compliance certification, Dynergy'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 permit fails to clear up the confusion. According to DEC, "[e]mission limits stated in pre-existing permits, but not in any regulation or Consent Order, are not applicable." *DEC Responsiveness Summary*, Draft Title V Permit for Danskammer Generating Station, August 3, 2001, p. 9. 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 Dynergy 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 3.

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

II. The Administrator Must Object to the Proposed Permit Because it is Not Supported by an Adequate Statement of Basis

This 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.

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." According to DEC's Region 3 office, no such statement was prepared for this permit. For the purpose of this discussion and the remainder of our comments, we refer to the permit description as the "statement of basis."

NYPIRG is particularly concerned about the fact that DEC fails to provide any information regarding the adequacy of monitoring conditions in this proposed permit. NYPIRG's review of this proposed permit reveals a significant number of permit conditions that do not appear to require sufficient monitoring to assure the plant's ongoing compliance with applicable requirements. For example, Condition 5 requires the plant to monitor a number of different operating parameters to assure that the plant's electrostatic precipitators are operating properly, but the Condition fails to identify what parameter ranges are indicative of compliance. Without the inclusion of specific parameter ranges, NYPIRG does not see how the permit assures the facility's compliance. DEC bears the burden of justifying the adequacy of the monitoring included in the permit. Nevertheless, DEC fails to include any information in a statement of basis or any other supporting documentation that explains why Condition 5 is adequate to assure the plant's compliance. Similarly, Condition 78 only requires the plant to undertake one Method 9 reading each year of opacity from the coal handling and storage operation. Since opacity emissions vary according to a number of different factors, NYPIRG does not believe that a single opacity reading each year is sufficient to assure the plant's ongoing compliance with the opacity limit. Once again, however, no support for DEC's monitoring determination can be located in the permit record. The Administrator must object to this proposed permit based on DEC's failure to carry its burden in justifying the type and frequency of monitoring required under the terms of this proposed permit.

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 fails to include any sort of justification for DEC's choice of monitoring requirements.

The Administrator must object to the issuance of the permit and insist that DEC provide the public with a statement of basis for this permit. The public must be given a new opportunity to comment on the draft permit once a statement of basis is available.

III. 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 29) do not require the permitee 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.

In response to NYPIRG's comments on the inadequate compliance certification conditions, DEC stated:

> The format of the annual compliance report is being discussed internally and with EPA. The Department is dealing with this issue, as are other States, in light of the uncertainly regarding the implementation of the Part 70 requirements. The States and EPA are currently in discussions on this issue but no policy statements have been forthcoming from EPA. The Department does not see any reason to believe that it distorts the annual compliance certification requirement of § 114(a)(3) and 40 CFR 70.6(c)(5).

DEC Responsiveness Summary, Draft Title V Permit for Danskammer Generating Station, August 3, 2001, p. 1. While NYPIRG agrees that U.S. EPA has been negligent by not providing state permitting authorities with guidance on how to properly implement the Part 70 program, U.S. EPA's failure to provide guidance does not excuse DEC from complying with Part 70 requirements. 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.

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

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

With respect to the prompt reporting requirement, DEC may either (1) include a general condition that defines what constitutes "prompt" under all possible circumstances, or (2) develop facility-specific conditions that define what constitutes "prompt" for each individual permit requirement. While Part 70 gives DEC discretion over how to define "prompt," the definition that DEC selects must be reasonable. U.S. EPA has already issued statements in dozens of Federal Register notices setting out what it believes to be a reasonable definition of "prompt." For example, when proposing interim approval of Arizona's Title V program U.S. EPA stated:

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

60 Fed. Reg. 36083 (July 13, 1995). The proposed permit for the Danskammer Generating Station fails to specify either a general prompt reporting requirement or requirement-specific prompt reporting

requirements. The Administrator must require DEC to include prompt reporting requirements in the permit for the Danskammer Generating Station that that are consistent with U.S. EPA's past interpretations of what qualifies as "prompt."

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

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

Condition 8 in this draft permit states in part that "[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused is 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[1] (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 draft permit.

[1] 40 CFR 52.1679 (2001).

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

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

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

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

[2] 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.

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

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

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

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

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

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

(1) *Violations due to Startup, Shutdown and Maintenance*.[3] The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (Proposed permit condition 8 only requires reports of violations due to startup, shutdown, or maintenance "when requested to do so in writing").[4] The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report explaining why the violation was unavoidable. (The draft permit does not require submittal of a report "if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements"). Finally, a deadline for submission of these reports must be included in the permit.

(2) *Violations due to Malfunction*. The facility must provide both telephone and written notification and to DEC within two working days of an excess emission that is allegedly unavoidable due to "malfunction." (Proposed permit condition 8 only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement.)[5] 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".)[6]

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

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

[4] See Condition 8(a) in the draft permit.

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

[6] Id.

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.

VI. 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 CFR § 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 CFR § 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 CFR § 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.

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

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

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

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

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

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

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

The Danskammer Generating Station includes 4 steam generating boilers. Units 1 and 2 are capable of burning #6 fuel oil and natural gas. Units 3 and 4 are capable of burning coal, #6 fuel oil, and natural gas. Units 1 and 2 are subject to a particulate matter (PM) emission limit of 0.10 pounds per million BTU heat input when burning fuel oil. (See Conditions 66 and 68). Units 3 and 4 are subject to a PM limit of 0.10 pounds per million BTU heat input when burning fuel oil (See Conditions 70 and 74) and a PM limit of 0.03 pounds per million BTU heat input when using coal. (See Conditions 72 and 76). The 0.10 limit is derived from a regulation in New York's State Implementation Plan (SIP); the 0.03 limit is required in pre-existing federally-enforceable permits issued to the Danskammer Plant. Particulate Emissions from all of the boilers are controlled by cold side electrostatic precipitators (ESP).

In accordance with 40 CFR § 70.6(a)(3)(i)(B), the permit must contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's

compliance with the permit.[7] The proposed permit violates this requirement because it only requires the Danksammer Plant to perform one Method 5 test per permit term and it fails to require surrogate monitoring that could assure the plant's ongoing compliance with PM limits between stack tests.

According to DEC, "annual emission testing of particulates is not necessary, because the facility is continuously monitoring opacity as the primary method for assuring compliance with particulate emission standards." DEC Responsiveness Summary, p. 7. NYPIRG strongly disagrees with DEC's position. First, surrogate monitoring does not replace regular emission testing but is meant to assure compliance between emission tests. Emission tests must be performed on an annual basis to establish the reliability of any surrogate or parametric monitoring that is being used to assure the facility's compliance on an ongoing basis.[8] Second, the proposed permit fails to establish any link whatsoever between opacity and particulates, or even state that opacity is being used as a surrogate for particulates. (See Condition 45). For opacity to serve as a surrogate, the permit must identify the opacity level that indicates a possible violation of the PM standard. Finally, DEC failed to include any justification in the statement of basis for its determination that this proposed permit assures the plant's compliance with the applicable particulate emission limits. Without any support in the permit record for DEC's choice of monitoring, the Administrator must deem DEC's determination arbitrary and veto the proposed permit.

U.S. EPA has objected to numerous proposed permits based on monitoring deficiencies that are analogous to the deficiencies in this proposed permit. For example, EPA objected to the proposed Title V permit for a plant in Florida based in part upon the lack of correlation between VOC emissions and CO/O_2 emissions where CO/O_2 was being measured as a surrogate for VOCs. In the objection letter, U.S. EPA stated:

> [T]he Title V permit does not contain any detailed explanation linking CO/O_2 monitoring to VOC, for the purposes of compliance. To resolve this concern, the permit must require the source to conduct routine VOC monitoring, or a technical demonstration, such as a comparison of historical emission data to emission limits, must be included in the statement of basis explaining why the State has chosen to allow CO monitoring as a surrogate for VOC. A discussion of how carbon monoxide monitoring indicates good combustion, which affects VOC emissions, could be provided along with historical data to support the current monitoring strategy.

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

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[7] The underlying applicable requirement does not specify a compliance monitoring method.

[8] U.S. EPA Region 2 has already stated that if the final permit includes the 0.3 lbs/MMBtu emission limit on Units 3 and 4 (which it apparently will), U.S. EPA recommends "more stringent monitoring to be imposed on those units, relating to monitoring of the ESPs and/or more frequent testing, to assure compliance." See Exhibit 1.

In response to a NYPIRG comment on the draft permit urging DEC to establish a "trigger opacity level" at which the plant would be required to take remedial action to assure compliance with the PM limits, DEC responded that "[i]t is the facility's responsibility to comply with the 20 percent opacity limit and to take action as necessary to avoid exceeding this limit. Defining a "trigger opacity level" as suggested by NYPIRG is unnecessary." DEC Responsiveness Summary, p. 7. Certainly, DEC has discretion over exactly what kind of monitoring is required in the plant's Title V permit. DEC does not have discretion, however, to issue a permit that lacks sufficient monitoring to assure the plant's ongoing compliance. If DEC wishes to use opacity as a surrogate for PM, the permit must state the opacity level that is representative of a PM violation. Any such determination must be justified in the statement of basis.

Instead of or in addition to opacity monitoring, DEC could have required monitoring of the ESPs as a method for assuring the plant's compliance with both PM and opacity limits. The only ESP monitoring required under the proposed permit is in Condition 5, however, and that monitoring is insufficient to qualify as parametric monitoring. Though Condition 5 requires the plant to monitor the number of operational fields, spark rate, primary and secondary voltage and current, the proposed permit does not establish indicator ranges for each parameter that could be used to monitor whether the ESPs are functioning properly. Without indicator ranges, the parameters are useless for assuring the facility's compliance with the PM limits.[9]

The U.S. EPA Administrator has already taken the position that parametric monitoring designed to assure a facility's compliance with an applicable requirement must include indicator ranges that have been correlated with emissions. For example, in objecting to the proposed permit for a Kentucky plant, the Administrator explained:

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

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[9] In response to NYPIRG's comments on the draft permit regarding the lack of indicator ranges, DEC replied:

> The Department and the facility negotiated and agreed upon the requirements specified in Condition 6. The regulatory basis of these requirements is Part 200.7. The intent of these requirements is to observe trends and problems, and what the correlation may be with opacity levels. Then preventative and corrective actions can be determined, in order to assure compliance with opacity limits. A change to Condition 6 is unnecessary.

DEC Responsiveness Summary, p. 7. The fact that DEC and the facility agreed upon what is now Condition 5 of the proposed permit does not satisfy DEC's burden of demonstrating that the permit assures the facility's compliance.

U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Oxy Vinyls, LP, Louisville Kentucky, Permit NO. 212-99-TV, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Arthur Williams, February 1, 2001, (emphasis added). This objection letter is attached as Exhibit 5. Similarly, U.S.EPA objected to the proposed Title V permit for Tampa Electric Company's F.J. Gannon Station for, among other things, not including an acceptable performance range for the parameters being monitoring. U.S. EPA stated:

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

U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Tampa Electric Company, F.J. Gannon Station, Permit no. 0570040-002-AV, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, September 8, 2000. This objection letter is attached as Exhibit 6. See also *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Tampa Electric Company, Big Bend Station, Permit no. 0570039-002-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, September 5, 2000. This objection letter is attached as Exhibit 7. See also *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, North County Regional Resource Recovery Facility, Permit no. 0990234-001-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, August 11, 2000. This objection letter is attached as Exhibit 8. See also *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Pinellas County Resource Recovery Facility, Permit no. 1030117-002-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, July 20, 2000. This objection letter is attached as Exhibit 9.

Even if the proposed permit did include an indicator range for each parameter and a justification in the statement of basis for why the indicator ranges are sufficient, NYPIRG would still have concerns

about Condition 5. First, condition 5 states that "data shall be recorded by distributed control system (DCS) or similar digital data acquisition system, or as an alternative, this data shall be manually recorded for each six-minute period during which average opacity exceeds 20 percent." Recording data continuously with a digital data acquisition system is clearly more reliable than manually recording data only at times when the six-minute average opacity exceeds 20 percent. DEC fails to provide any support in the statement of basis for why the manual data recording method is an adequate substitute for digital recording. While there may be a justification for allowing manual recording to be used as a back-up method when digital recording devices are not functioning properly, NYPIRG does not see how manual recording serves as a trustworthy recording method for regular use. If ESP monitoring is to be used as parametric monitoring to assure compliance with the PM limits, the permit must mandate use of the digital recording device at all times, with only narrowly-defined circumstances where manual recordkeeping may be substituted. In addition, the permit must set out what kind of remedial measures need to be taken when monitors record excursions outside of the acceptable indicator ranges. The proposed permit simply states that the ESP must be operated and maintained in a manner consistent with good air pollution control practice for minimizing emissions. This generic language is insufficient to assure ongoing compliance with either the PM limits or the equipment maintenance requirement set forth in 6 NYCRR § 200.7. The permit must provide more detail in order to make this condition enforceable as a practical matter.

Finally, in addition to requiring DEC to add sufficient monitoring to this permit to assure the plant's compliance with PM limits, U.S. EPA must instruct DEC to include a proper legal citation for the 0.03 lbs/MMBtu PM limit that applies when units 3 and 4 are burning coal. DEC correctly states in the "monitoring description" section of Conditions 72 and 76 that the basis for the limit is, in part, "pre-existing permits." The 0.03 lbs/MMBtu limit is clearly set out in the pre-construction permit issued to the plant under New York's SIP-approved permitting regulations. Unfortunately, both conditions state that the "applicable federal requirement" is 6 NYCRR § 227-1.2(a)(3). That regulation states that the applicable PM emission limit is 0.10 lbs/MMBtu. By listing 6 NYCRR § 227-1.2(a)(3) as the applicable requirement, DEC makes the 0.03 limit appear to be a typographical error, which will most certainly lead to enforcement problems in the future.

Ordinarily, NYPIRG would say that DEC must cite to the underlying construction permit as the basis for the 0.03 lbs/MMBtu limit. This is the position that U.S. EPA has taken with respect to Title V permits in other parts of the country. See, e.g., *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Oxy Vinyls, LP, Louisville Kentucky, Permit NO. 212-99-TV,* under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Arthur Williams, February 1, 2001 (stating that "a PSD permit allowable is cited as the applicable requirement for the PM limit of 0.03 lb PM/mmBtu. Please specify the PSD # (if applicable) and the date of issuance.).

Unfortunately, U.S. EPA is planning to give full approval to New York's Title V program despite the fact that New York's Title V regulations make is so that ALL pre-existing permits issued to a Title V facility expire at the time that the Title V permit is issued. Under the state regulations that existed prior to the Title V program, all preconstruction permits were issued for a term of one year. These permits were then converted into state operating permits at the end of the one year term. Under

the new state Title V rules, "Expiration dates for all certificates to operate that are valid on the effective date of this Part are extended until such time as the title V facility permit is issued . . . All permits to construct valid on the effective date of this Subpart shall expire according to the terms of their issuance." 6 NYCRR § 201-6.2(e). In New York, all air permits have always been issued pursuant to 6 NYCRR Part 201, which has been part of New York's SIP for decades. After the Title V program is implemented, all of these permits will vanish.

Since all of the Danskammer Plant's existing permits will expire when the Title V permit is issued, listing the underlying permit as the legal basis for the limit is dangerous. In an enforcement action, the plant could argue that the limit is invalid because the permit no longer exists. Thus, NYPIRG urges U.S. EPA to require DEC not just to cite to the underlying permit, but also to cite to 6 NYCRR § 200.6 as the legal basis for the PM limit.[10] Of course, NYPIRG continues to insist that U.S. EPA must not give DEC full approval for its Title V program when such approval endangers decades of emission limitations established under New York's pre-existing SIP-based permitting program.

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

The Administrator must object to this proposed permit because the monitoring conditions that apply to the plant's coal unloading and handling process are inadequate to assure the plant's compliance with applicable requirements. The permit lists the following requirements as applicable to the coal handling process:
6 NYCRR § 212.3(a): particulate emissions from coal crushing and coal storage emission sources must be reduced by at least 99 percent. (See condition 77)

6 NYCRR § 212.6(a): opacity from coal handling and storage is limited to 20%. (See Condition 78)

40 CFR 60.252(c): emissions from the conveyor may not exceed 20% (See Condition 70).

1. Monitoring associated with 6 NYCRR § 212.3(a).

NYPIRG's review of this proposed permit reveals that the monitoring conditions associated with the applicable requirements identified above are woefully inadequate. With respect to 6 NYCRR § 212.3(a), the proposed permit requires the facility to use a baghouse to achieve a 99 percent reduction in particulate emissions. The only monitoring required under the permit, however, is an

[10] 6 NYCRR § 200.6 is in New York's SIP and states:

> Notwithstanding the provisions of this Subchapter, no person shall allow or permit any air contamination source to emit air contaminants in quantities which alone or in combination with emissions from other air contamination sources would contravene any applicable ambient air quality standard and/or cause air pollution. In such cases where contravention occurs or may occur, the commissioner shall specify the degree and/or method of emission control required.

emissions test once during the term of the permit. As a preliminary matter, the Administrator must object to this proposed permit because DEC failed to provide a statement of basis that explains why one emissions test per permit term is adequate to assure the plant's compliance with 6 NYCRR § 212.3(a). In addition, the Administrator must object to this proposed permit because even in the absence of a statement of basis, it is clear that the proposed permit does not contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit as required by 40 CFR § 70.6(a)(3)(i)(B). The monitoring specified with respect to this requirement is not periodic because it is only required once during the term of the permit. Moreover, one emissions test per permit term cannot possibly assure the plant's compliance with the PM limit as required by 40 CFR § 70.6(c)(1).

To assure the plant's ongoing compliance, emissions testing must take place at least once per year using a test method that is specified in the permit (the proposed permit does not specify a test method). In addition, the plant must be required to perform surrogate and parametric monitoring between stack tests to assure the plant's ongoing compliance. According the U.S. EPA's CAM Technical Guidance Document:

> Opacity is the typical method used for baghouse performance monitoring; a continuous opacity monitor may be used, or opacity (Method 9) or visible emissions (similar to Method 22) observations may be made by plant personnel. Triboelectric monitors, light scattering monitors, beta gauges, or acoustic monitors may also be used. Parameter monitoring usually includes pressure drop, sometimes in conjunction with exhaust gas temperature. An increase in pressure drop my indicate blinding of the fabric. A decrease in temperature may indicate inleakage of outside air, which may cool the exhaust gas stream below its dew pint (important if condensible emissions are involved). Temperature excursions may damage the filter bags. Other parameters that may be monitored include gas flow rate, pulse jet compressed air pressures, and reverse air cleaning cycle static pressure drop.
>
> Common baghouse problems and malfunctions include: broken or worn bags; blinding of the filter media; failure of the cleaning system; leaks in the system or between filter bag and tube sheet; reentrainment of dust; wetting of the bags; plugging of manometer lines; malfunction of dampers or material discharge equipment; and low fan speed. The following illustrations present compliance assurance monitoring options for fabric filters:
>
> 1a: Daily observations of visible emissions (VE) or opacity using RM9 or modified RM22.
> 1b: Continuous instrumental monitoring of opacity using COMS or other analytical device.
> 1c: Monitoring pressure drop across baghouse.
> 1d: Fabric filter condition monitoring.
> 1e: Use of a bag leak detection monitor.

U.S. EPA, *Technical Guidance Document: Compliance Assurance Monitoring*, Revised Draft, August 1998 (Available on EPA's website, www.epa.gov).

None of the compliance monitoring methods identified above appear in the proposed permit for purposes of assuring compliance with 6 NYCRR § 212.3(a). The only monitoring condition included in the proposed permit that comes close to serving as compliance assurance monitoring between emission tests is Condition 6, but this condition only requires a monthly inspection of the baghouse and provides no detail about what is to be inspected.

Finally, the Administrator must object to this proposed permit because Condition 77 is not enforceable as a practical matter because it lacks an averaging period for measuring compliance with the 99% PM emission reduction requirement. See, e.g., *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Tampa Electric Company, Big Bend Station, Permit no. 0570039-002-AV* (stating that "[t]he emission limits for particulate matter in conditions A.7 and B.5, and for carbon monoxide in condition B.10 do not contain averaging times. Because the stringency of emission limits is a function of both magnitude and averaging time, appropriate averaging times must be added to the permit in order for the limits to be practicably enforceable").

2. Monitoring associated with 6 NYCRR § 212.6(a) and 40 CFR 60.252(c).

Conditions 78 only requires the plant to perform one Method 9 reading per year to assure compliance with 6 NYCRR § 212.6(a), and Condition 79 only require the plant to perform a one-time Method 9 reading to assure compliance with 40 CFR 60.252(c). The Administrator must object to this proposed permit because DEC failed to provide a statement of basis that explains why such sparse monitoring is adequate to assure the plant's compliance with 6 NYCRR § 212.6(a) and 40 CFR 60.252(c). In addition, the Administrator must object to this proposed permit because even in the absence of a statement of basis, it is clear that the proposed permit does not contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit as required by 40 CFR § 70.6(a)(3)(i)(B).

U.S. EPA has already object to a proposed Title V permit based on a similar deficiency. In objecting to the proposed permit for the Pinellas County Resource Recovery Facility, U.S. EPA stated:

> The permit does not require sufficient monitoring of visible emissions from the lime storage silos (EU-004 and EU-007) or the activated carbon storage silo (EU-006). Condition C.13 allows the facility to comply with a 5 percent visible emissions limit in lieu of particulate matter testing for these units. However, Condition C.10 only requires the facility to conduct an annual Method 9 visible emissions test for these units. In most cases, this infrequent testing does not constitute adequate periodic monitoring to assure compliance with the visible emissions standard. The permit should require the source to conduct visible emissions observations on a daily basis (Method 22), and that a Method 9 test be conducted within 24 hours of any abnormal qualitative survey. As an alternative to the approach described above, a technical demonstration can be included

> in the statement of basis explaining why the State has chosen not to require any additional visible emissions testing for these units. The demonstration needs to identify the rationale for basing the compliance certification on data from a short-term test performed once a year.

See Exhibit 9, *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Pinellas County Resource Recovery Facility, Permit no. 1030117-002-AV*. The Administrator should object to this proposed permit based on the same rationale as set forth in U.S. EPA's objection to the Pinellas County Resource Recovery Facility permit.

C. The Proposed Permit Fails to Assure the Plant's Compliance with Requirements that Apply to Fly and Bottom Ash Handling

Condition 80 only requires the plant to perform one Method 9 opacity evaluation on an annual basis to demonstrate compliance with the opacity limit that applies to fly and bottom ash handling under 6 NYCRR § 212.6(a). As stated above, one Method 9 opacity evaluation each year cannot possible assure the plant's ongoing compliance with the opacity standard. Moreover, DEC provided no information in the statement of basis explaining why the plant can certify compliance with § 212.6(a) based on a single Method 9 reading each year. The Administrator must object to this proposed permit based on its failure to assure that the Fly and Bottom Ash Handling operations at this plant comply with § 212.6(a).

D. The Proposed Permit Fails to Assure Compliance with 6 NYCRR § 211.3

The proposed permit fails to include any monitoring designed to assure the plant's compliance with 6 NYCRR § 211.3, which limits opacity emissions from anywhere at the plant to 20 percent, except for one continuous six-minute period per hour of not more than 57 percent opacity. This requirement is particularly important for parts of the plant that are not covered by an additional, more stringent opacity requirement. Any decision on the part of DEC to streamline this requirement with another opacity requirement must be explained in the statement of basis. The Administrator must object to this proposed permit due to its lack of any monitoring to assure compliance with this applicable requirement.

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

Under a construction permit issued to the Danskammer Plant in 1985 (later converted to an operating permit in 1998), the two coal crushers and tail pulley area of the two belt conveyors are subject to a PM emission limit of 0.05 lbs/hr.[11] See Exhibit 10. Under a construction permit issued in 1996, the coal handling system (conveyor runs and transfer hoppers) is limited to PM emissions of 0.48

[11] The permit provides a code # for the units in which this standard applies. Though we do not have the code book for these old Part 201 permits, we assume that the applicable unit is lbs/hr.

lbs/hr[12] and 196 lbs/year, and is limited to VOC emissions of 0.30 lbs/hr[13] and 121 lbs/yr. See Exhibit 11. These construction permits were issued pursuant to 6 NYCRR Part 201, which has been part of New York's SIP for decades. Thus, the emission limits are applicable requirements that must be included in the Danskammer Plant's Title V permit.

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

In addition to objecting to the proposed permit based on the missing PM limit, U.S. EPA should object to the proposed permit if the agency identifies any other requirements in pre-existing permits that are left out of this permit. A letter to DEC from the prior owners of the Danskammer Plant suggests that DEC's general policy is to exclude conditions from preconstruction permits as "non-essential." That letter states:

> I am enclosing the Permit to Construct for the Danskammer Waterborne Coal Delivery System. In the telephone conversation which took place this morning between Mr. Bob Stanton of your office and Central Hudson's Andy Matura (Air Quality Coordinator), Mr. Stanton agreed that the restrictions for particulates and VOCs (which were included in the Permit to Construct), are non-essential and can be removed from the Certificate to Operate. Consequently, I respectfully request that both those restrictions be removed.

Letter from Wayne J. Mancroni, Central Hudson Gas & Electric, to Cheryl O'Brien, DEC Region 3, dated June 3, 1997. (Attached as Exhibit 12).

U.S. EPA is already on record requiring the terms and conditions of permit issued pursuant to SIP regulations to be included in Title V permits. In a letter to Robert Hodanbosi of STAPPA/ALAPCO, U.S. EPA stated:

> Title V and the part 70 regulations are designed to incorporate all Federal applicable requirements for a source into a single title V operating permit. To fulfill this charge, it is important that all Federal regulations applicable to the source such as our national

[12] The unit of measurement is unclear from the permit.
[13] The unit of measurement is unclear from the permit.

> emission standards for hazardous air pollutants, new source performance standards, and the applicable requirements of SIP's and permits issued under SIP-approved permit programs, are carried over into a title V permit.[1] All provisions contained in an EPA-approved SIP and all terms and conditions in SIP-approved permits are already federally enforceable (see 40 CFR § 52.23).[2] The enactment of title V did not change this. To the contrary, all such terms and conditions are also federally enforceable "applicable requirements" that must be incorporated into the Federal side of a title V permit [see CAA § 504(a); 40 CFR § 70.2)]. Thus, if a State does not want a SIP provision or SIP-approved permit condition to be listed on the Federal side of a title V permit, it must take appropriate steps in accordance with title I substantive and procedural requirements to delete those conditions from its SIP or SIP-approved permit. If there is not such an approved deletion and a SIP provision or condition in a SIP-approved permit is not carried over to the title V permit, then that permit would be subject to an objection by EPA.

Letter from John Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO, dated May 20, 1999. The relevant portions of this letter are attached to this petition as Exhibit 13. Based on the rationale set forth in that letter, the Administrator must object to the proposed permit for the Danskammer Plant based on DEC's failure to include the PM and VOC limits that apply to the coal handling operation.

IX. The Administrator Must Object to the Proposed Permit Because it does not Properly Include Clean Air Act 112(r) Requirements

The Administrator must object to this proposed permit because it does not properly include the requirements of Clean Air Act § 112(r). NYPIRG submitted the following comment to DEC regarding Condition 17 of the draft permit:

> Item 17.2 makes reference to "risk management plans" if they apply to the facility. The permit must state whether CAA § 112(r) applies to this facility. A Title V permit must identify the requirements that apply to the permitted facility, not simply indicate what requirements might apply. If DEC does not know whether the rule applies, it must say so in the statement of basis.

DEC responded by stating that "The Department has agreed to incorporate in Title V permits a requirement that facilities comply with CAA Section 112r. The Department notes that it does not have any delegation agreement with EPA to actually enforce this requirement." *DEC Responsiveness Summary*, p. 11. NYPIRG's review of condition 17 in the proposed permit reveals that no change has been made. Regardless of whether DEC has a delegation agreement with EPA to enforce any given applicable requirement, the requirement must be included in Title V permits. If CAA § 112(r) does not apply to this facility at this time, DEC must, at a minimum, provide the legal and factual basis for Condition 17 in a statement of basis accompanying the permit. A Title V permit is supposed to give the public and the facility a degree of certainty regarding which requirements apply to the facility. As written, Condition 17 is ambiguous regarding the applicability of § 112(r).

U.S. EPA has already objected to proposed Title V permits based on a similar deficiency. In an objection to a number of proposed permits in EPA Region 9, U.S. EPA said:

> The District did not include permit conditions for sources subject to the requirements under 112(r). The following language could be used to meet this applicable requirement. When the owner or operator knows the source is already subject to Part 68 provisions, the permit language should be:
>
> > This stationary source, as defined in 40 CFR §68.3, is subject to 40 CFR Part 68. This stationary source shall submit a risk management plan (RMP) by the date specified in § 68.10. This stationary source shall certify compliance with the requirements of Part 68 as part of the annual compliance certification as required by 40 CFR Part 70.

U.S. EPA Comments on BAAQMD Major Facility Review Permits, under cover of letter from David P. Howekamp, U.S. EPA Region 9 to Ellen Garvey, Bay Area Air Quality Management District, January 31, 1999. (Attached as Exhibit 13). The Administrator must object to the proposed Danskammer permit and propose the inclusion of language similar to that proposed for Title V facilities located in Region 9.

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

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

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

XI. The Administrator Must Object to the Proposed Permit Because it Does Not Assure the Plant's Compliance With Applicable Sulfur Dioxide Emission Limitations

According to a 1987 Judicial Order dealing with coal reconversion, coal burned at Units 3 and 4 is subject to a sulfur limit in coal of 0.7 percent. According to the public notice released by DEC for the Danskammer Plant's draft Title V permit, the department determined that it was unnecessary to include this limit in the Title V permit. Though this limit may be "equivalent" to the 1.1 pounds per million BTU emission limit contained in Conditions 71 and 75, including this limit in the permit would provide additional assurance that the Danskammer Plant is complying with sulfur limitations. In fact, it is often the case that a permit will include multiple "equivalent" limits because when if there is ever a problem with the monitoring of one of the limits, monitoring of the other limit will serve as a reliability check.

According to U.S. EPA Region 2:

> [T] he SO2 limit of 1.1 pound per million Btu when firing coal in units 3 and 4 is only equivalent to 0.7% sulfur when burning coal with a certain range of heating values. Over the last several years, the coal received at Danskammer has remained within a range where these limits do appear to be equivalent. However, the permit should be written to assure compliance at all times. For higher than normal heating values, the 0.7% sulfur content is more restrictive; for lower than normal heating values, the emission-based limit is more restrictive.

See Exhibit 1. The Administrator must object to this proposed permit because it does not include an assure compliance with all applicable sulfur dioxide emission limitations.

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 Danskammer Generating Station

Respectfully submitted,

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New York, New York

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