

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

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In the Matter of the Title V
Operating Permit issued to

KINGS PLAZA
to operate the Kings Plaza Total Energy Plant
located in Brooklyn, New York

Permit ID: DEC 2-6105-00301/00010

Issued by the New York State Department of
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO THE
FINAL TITLE V PERMIT ISSUED TO
KINGS PLAZA**

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 the final Title V Operating Permit issued to Kings Plaza. 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 January 19, 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 Kings Plaza’s draft permit that were raised during the public comment period provided by DEC. NYPIRG’s comments on the draft permit (minus attachments) are included in Appendix A for reference purposes, only.¹

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.

¹ The original comments on the draft permit are attached to this petition for reference, only. NYPIRG does not wish for all issues raised in the original comments on the draft permit to be incorporated into this petition. Some of the original comments were recommendations for how DEC could make the permit more understandable and useful to the public. DEC’s refusal to consider these recommendations is unfortunate, but not illegal. This petition focuses on aspects of the proposed permit that violate federal law.

Many of NYPIRG's members live, work, pay taxes, and breathe the air in Kings County, where Kings Plaza is located.

The U.S. EPA Administrator must object to the final Title V permit for Kings Plaza 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 final permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c) (see p. 5 of this petition);
- (3) the final permit entirely lacks a statement of basis as required by 40 CFR § 70.7(a)(5) (see p. 7 of this petition);
- (4) the final permit repeatedly violates the 40 CFR § 70.6(a)(3)(iii)(A) requirement that the permittee submit reports of any required monitoring at least every six months (see p. 9 of this petition);
- (5) the final permit distorts the annual compliance certification requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5) (see p. 10 of this petition);
- (6) the final permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions (see p. 11 of this petition);
- (7) the final permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B) (see p. 16 of this petition); and
- (8) the final permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable (see p. 17 of this petition).

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

Discussion of Objection Issues

The Title V permitting program offers an unprecedented opportunity for concerned citizens to learn what air quality requirements apply to a facility located in their community and whether the facility is complying with those requirements. Unfortunately, a poorly written Title V permit may make enforcement under the Clean Air Act even more difficult than it already is, because each of New York's Title V permits include a permit shield. Under the terms of the permit shield, a permittee is protected from enforcement action so long as the permittee is complying with its permit, even if the permit incorrectly applies the law.² Thus, a defective permit may prevent NYPIRG's members as well as other New Yorkers from taking legal action against a permittee who is illegally polluting the air in their community. Furthermore, a Title V permit that lacks appropriate monitoring, recordkeeping, and reporting requirements denies NYPIRG's members and all New Yorkers their right to know whether the permittee is complying with legal requirements.

The final Title V permit does not assure Kings Plaza's compliance with applicable requirements. U.S. EPA must require DEC to remedy the flaws in the final permit that are identified in this petition. If DEC refuses to remedy these flaws, U.S. EPA must draft a new permit for Kings Plaza 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." The public notice announcing the availability of Kings Plaza's draft permit neither gave notice of a public hearing nor informed the public how to request a public hearing. NYPIRG requested a public hearing in written comments submitted to DEC during the applicable public comment period. See Appendix A at 2.

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

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

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.

² 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 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.³ Because a Title V permit is meant to assure that a facility complies with existing

³ 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,

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 final permit for Kings Plaza.

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

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

reissuance or recertification, including any permit condition and variance, that is issued in connection with any regulatory program listed in section 621.2 of this part." Thus, "project" and "permit" are given distinct definitions under state regulations promulgated by DEC. When DEC asserts that a hearing is warranted only when "the project, as proposed, may not meet statutory or regulatory standards," this statement can only be interpreted as requiring a demonstration that the underlying action that requires the permit--the operation of the facility--may not meet statutory or regulatory standards.

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, Kings Plaza 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, Kings Plaza's permit application lacks certain information required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4), including:

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

The omission of this information makes it significantly more difficult for a member of the public to determine whether a draft permit includes all applicable requirements. For example, an existing facility that is subject to major New Source Review ("NSR") requirements should possess a pre-construction permit issued pursuant to 6 NYCRR Part 201. Minor NSR permits, Title V permits, and state-only permits are also issued pursuant to Part 201. In the Title V permit application, a facility that is subject to any type of pre-existing permit simply cites to 6 NYCRR Part 201. Because DEC does not require the applicant to describe each underlying requirement, it is virtually impossible to identify existing NSR requirements that must be incorporated into the applicant's Title V permit. The draft permit fails to clear up the confusion, especially since requirements in pre-existing permits are often omitted from an applicant's Title V permit without explanation.

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

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

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

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

C. The Final Permit Entirely Lacks a Statement of Basis as Required by 40 CFR § 70.7(a)(5)

The Administrator must object to the Title V permit issued to Kings Plaza because it lacks a statement of basis as required by 40 CFR § 70.7(a)(5).⁴ According to § 70.7(a)(5), every Title V permit must be accompanied by a "statement that sets forth the legal and factual basis for the draft permit conditions." Without a statement of basis, it is virtually impossible for the public to evaluate DEC's periodic monitoring decisions (or lack thereof) and to prepare effective comments during the 30-day public comment period.

According to U.S. EPA Region 10:

The statement of basis should include:

- 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.

⁴ 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."

iii. Explanations for actions including documentation of compliance with one time NSPS and NOC requirements (e.g. initial source test requirements), emission caps, superseded or obsolete NOCs, and bases for determining that units are insignificant IEUs.

iv. Basis for periodic monitoring, including appropriate calculations, especially when periodic monitoring is less stringent than would be expected (e.g., only quarterly inspections of the baghouse are required because the unit operates less than 40 hours a quarter.)

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

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

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

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

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

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

The Statement of Basis that accompanies the Final Air Operating Permit for Goldendale Compressor Station (Northwest Pipeline Corporation), a facility located in Washington State, is attached to petition as Appendix C. This document is provided as an example of effective supporting documentation for a Title V permit. The statement of basis was prepared by the Washington State Department of Ecology, located in Yakima, Washington.

DEC responded to NYPIRG’s comment that the draft permit lacked a statement of basis by making the conclusory statement that “[i]t is the DEC’s position that the permit application and draft permit provide the legal and factual background and explanation for the draft permit conditions.” Responsiveness Summary, Re: General Permit Conditions, at 2. No reasonable person could conclude

that information provided in Kings Plaza’s permit application and draft permit suffices as the statement of basis. Moreover, the permit application and draft permit are inappropriate vehicles for the type of information that should be provided in the statement of basis. Assertions made by the applicant in the permit application cannot suffice as DEC’s rationale for permit conditions; DEC must make its own statement. In addition, since the statement of basis is not meant to be enforceable, the statement of basis should not be part of the enforceable permit. Rather, Kings Plaza’s Title V permit must be accompanied by a separate statement of basis.⁵

In the absence of a statement of basis, the final permit for Kings Plaza violates Part 70 requirements. The Administrator must object to the issuance of the final permit and insist that DEC draft a new permit that includes a statement of basis.

D. The Final Permit Repeatedly Violates the 40 CFR § 70.6(a)(3)(iii)(A) Requirement that the Permittee Submit Reports of any Required Monitoring at Least Every Six Months

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

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

In response to NYPIRG’s comments on the draft permit with respect to reporting requirements, DEC points to the general condition requiring reports of any required monitoring at least every six months. DEC then asserts that “[i]ndividual permit conditions default to the 6-month reporting requirement unless a more frequent reporting period is required by a rule. Individual monitoring conditions specify reporting requirements.” See Responsiveness Summary, Re: General Permit Conditions, at 3. This explanation is unacceptable. First, the final permit does not include the “default”

⁵ Shortly after the close of the public comment period on Kings Plaza’s draft permit, DEC began providing a “permit description” to accompany draft permits released for facilities located in New York City. These permit descriptions do not satisfy the requirement for a statement of basis because they fail to explain DEC’s rationale for periodic monitoring decisions. Nevertheless, a permit description is at least a start toward creating a statement of basis as required by Part 70.

language. Second, other draft permits released by DEC for public comment include monitoring conditions that specifically require submittal of reports on an annual basis rather than every six months, even though the same six month reporting requirement is included as a general condition in those permits. This contradicts DEC's assertion that monitoring reports are always due every six months unless "a more frequent reporting period is required by a rule." A better characterization of DEC's position is that monitoring reports are due every six months unless a *different* reporting period is required by a rule. Following this logic, if a rule only requires reporting "upon request," DEC considers this to be the applicable reporting requirement. If DEC wanted Kings Plaza to submit reports of a particular type of monitoring every six months, it would say so in the space next to "reporting requirements." DEC clearly believes that it can circumvent the six-month reporting requirement at will. Unless this final permit is modified to clearly identify the monitoring results that must be included in Kings Plaza's six month monitoring reports, the reports are unlikely to be useful in assuring the facility's compliance with applicable requirements.

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

E. The Final 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 Kings Plaza's final permit (Condition 15) does not require Kings Plaza 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 final permit as "Compliance Certification" conditions. Requirements that are labeled "Compliance Certification" are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. Those permit conditions that lack periodic monitoring (a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal regulations. Kings Plaza must certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

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

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

The Administrator must object to the final permit for Kings Plaza 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, Kings Plaza’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).⁶

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 D). According to U.S. EPA, an excuse provision only applies to infrequent exceedances. This is not the case for facilities located in New York State. New York facilities appear to possess blanket authority to violate air quality requirements so long as they assert that the excuse provision applies.

40 CFR § 70.6(a)(a) provides that each permit must include “[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.” The final 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 permit issued to Kings Plaza 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 Kings Plaza are described below.

⁶ The excuse provision is identified as Condition 6 in the proposed permit.

1. Any Title V permit issued to Kings Plaza 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.⁷

Kings Plaza’s final permit does not include the restrictions set out in (1), (3), and (4). Moreover, the final permit lacks most of the evidentiary requirements referred to in (5). As for (2), both the language

⁷ 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;
- 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.

of the final 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 Kings Plaza's final permit and require DEC to draft a new permit that includes the limitations described in the 1999 memo.

2. The final 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 Kings Plaza must be clear that violation of such a requirement may not be excused.

The final 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 final permit lacks this language. Any Title V permit issued to Kings Plaza 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 Kings Plaza must define significant terms.

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

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

NYPIRG cannot locate the definition of "unavoidable" in any applicable New York statute or regulation. A definition must be included in the permit because otherwise this condition is impermissibly vague. U.S. EPA's policy memorandum on excess emissions during startup, shutdown, maintenance, and malfunction, dated February 15, 1983. ("1983 memo") defines an unavoidable violation as one where "the excesses could not have been prevented through careful and prudent planning and design

and that bypassing was unavoidable to prevent loss of life, personal injury, or severe property damage.” Memorandum from Kathleen Bennett, Assistant Administrator for Air, Noise and Radiation, to Regional Administrators, dated Feb. 15, 1983. Either this definition or an alternative definition with the same meaning must be included in the permit.

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

The problems caused by the vagueness of the excuse provision could be partially resolved by making it clear that the excuse provision does not shield the facility in any way from enforcement by the public or by U.S. EPA, even after a violation is excused by the commissioner. In addition to the right to bring an enforcement action against facility that illegally pollutes the air, however, the public must be able to evaluate the propriety of a decision by the DEC Commissioner to excuse a violation. Since the public has the right to bring an enforcement action against a permit violator, the public should have access to any information relied upon by DEC is determining that a violation could not be avoided.⁸ 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 Kings Plaza 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 final 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 Kings Plaza must define RACT as it applies during startup, shutdown, malfunction, and maintenance conditions. Also, the permit must include monitoring, recordkeeping, and reporting procedures designed to provide a reasonable assurance that the facility is complying with this requirement.

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

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

⁸ 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 constricted.

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.

Kings Plaza’s final permit does not require prompt reporting of all deviations from permit requirements. Furthermore, in most cases the final permit allows reports to be made by telephone rather than in writing. Thus, a violation can be excused without creating a paper trail that would allow U.S. EPA and the public to monitor abuse. The final permit will 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 Kings Plaza must include the following reporting obligations:

- (1) *Violations due to Startup, Shutdown and Maintenance.*⁹ The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (The final permit only requires reports of violations due to startup, shutdown, or maintenance “when requested to do so in writing”).¹⁰ 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 final permit does not require submittal of a report “if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements”).¹¹ 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 final 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).¹² The facility must submit a detailed written report within thirty days

⁹ NYPIRG interprets U.S. EPA’s 1999 memorandum as prohibiting excuses due to maintenance.

¹⁰ See Condition 6(a) in the proposed permit.

¹¹ *Id.* Item 18.2(iv) of the proposed permit, which governs “Monitoring, Related Recordkeeping and Reporting Requirements” contains the same flaw.

¹² See Condition 6(b) in the proposed permit.

after the facility exceeds an emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The final permit only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”).¹³

G. The Final Permit Does Not Require Prompt Reporting of All Deviations From Permit Requirements as Mandated by 40 CFR § 70.6(a)(3)(iii)(B)

Item 18.2 of the final permit governs the reporting of all types of violations under the permit, not just those that might be considered excusable under 6 NYCRR § 201-1.4. As discussed above, 40 CFR § 70.6(a)(3)(iii)(B) requires prompt reporting of any violation of permit requirements. Item 18.2 violates this clear-cut reporting requirement.

At first glance, Item 18.2 appears to comply with the prompt reporting requirement. It states:

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

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

Unfortunately, the only reporting required by Item 18.2 is the reporting required by 6 NYCRR § 201-1.4. As discussed above, § 201-1.4 only governs “Unavoidable Noncompliance and Violations.” A facility is required to comply with § 201-1.4 only if it wants the violation excused as “unavoidable.” 6 NYCRR § 201-6.5(c)(3)(ii) explains that “all other permit deviations shall only be reported as required under 201-6.5(c)(3)(i) unless the Department specifies a different reporting requirement within the permit.” 6 NYCRR § 201-6.5(c)(3)(i) states that the permit must include “submittal of reports of any required monitoring at least every 6 months.”

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

H. The Final Permit Does Not Assure Compliance With All Applicable

¹³ Id.

Requirements as Mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) Because Many Individual Permit Conditions Lack Adequate Periodic Monitoring and are not Practicably Enforceable

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

A basic tenet of Title V permit development is that the permit must require sufficient monitoring and recordkeeping to provide a reasonable assurance that the permitted facility is in compliance with legal requirements. The periodic monitoring requirement is rooted in Clean Air Act § 504, which requires that permits contain “conditions as are necessary to assure compliance.” 40 CFR Part 70 adds detail to this requirement. 40 CFR §70.6(a)(3) requires “monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance” and §70.6(c)(1) requires all Part 70 permits to contain “testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.” Part 70’s periodic monitoring requirements are incorporated into 6 NYCRR § 201-6.5(b).¹⁴

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

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

¹⁴ 6 NYCRR § 201-6.5(b) states that:

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

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

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

whether the facility is complying with the condition.

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

3. Analysis of specific final permit conditions
 - a. Facility Level Permit Conditions

Condition 4, Item 4.1 (Maintenance of Equipment):

The final permit recites the requirement under 6 NYCRR § 200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer’s specifications. In response to NYPIRG’s comments on this condition in which NYPIRG insisted that periodic monitoring must be added to assure compliance with this condition, DEC explained that Kings Plaza does not have any control equipment. See DEC Responsiveness Summary, Kings Plaza Total Energy Plant at 1. In addition, DEC explained that:

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

DEC Responsiveness Summary, re: General Permit Conditions, at 3.¹⁵

Given DEC’s assertion that Kings Plaza does not have pollution control equipment, Condition 4 must be deleted from the permit. A “general requirement” is a requirement that applies to all facilities in the same way. This is not a general requirement because it does not even apply to Kings Plaza. A Title V permit must identify the requirements that apply to the permitted facility, not provide a shopping list of requirements that might apply. DEC’s assertion that it is proper to include an inapplicable requirement in a permit without explanation simply because there is a slight chance that the facility may voluntarily install equipment that would subject it to this requirement at some point during the permit term is

¹⁵ DEC responded twice to many of NYPIRG’s comments.

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 is incorrect in asserting that in cases where a facility does have pollution control equipment, it is not necessary to include periodic monitoring in the facility's Title V permit that assures compliance with this requirement. This comment is superfluous, however, since DEC concedes Kings Plaza does not use pollution control equipment and that this requirement is inapplicable.

Condition 5, Item 5.1 (Unpermitted Emission Sources):

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

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

Second, based upon the language of Item 5.1, it appears that the only penalty Kings Plaza will face in the event that DEC discovers that the facility lacks a required permit is the requirement to obtain the permit. In other words, the facility will not be penalized. If Item 5.1 remains in the permit, it is essential that a clause be added that states that if it is discovered that Kings Plaza lacks a required permit, Kings Plaza will be subject to all penalties authorized by state and federal law. Otherwise, there is a possibility that the permit shield will block DEC, U.S. EPA, and the public from imposing such penalties.

NYPIRG recognizes that Condition 5 is simply a recitation of 6 NYCRR § 201-1.2. While this approach may work for some regulatory requirements, it does not work for this one because of the existence of the permit shield. Under the permit shield, compliance with the terms of the condition are tantamount to compliance with the law. In this case, it appears that if the facility goes ahead and applies for a permit that it should have applied for earlier, it will be in compliance with the law and penalties cannot be assessed. While it is possible (and perhaps likely) that a court would not interpret the permit shield in this manner, there is no reason to take that risk.

In response to NYPIRG's comments on the draft permit, DEC explained that "Kings Plaza is not subject to New Source Review." DEC Responsiveness Summary, Kings Plaza Total Energy Plant at 1. While we appreciate DEC's effort to establish whether Kings Plaza is subject to NSR, a more detailed explanation must be provided in the statement of basis. Even if DEC does not believe that Kings Plaza is subject to NSR, there is no need to include a provision in the permit that has the potential of making it more difficult to assess penalties against the facility if this assessment turns out to be incorrect.

Condition 8, Condition 9 (air contaminants collected in air cleaning devices):

Conditions 8 and 9 both apply to the handling of air contaminants collected in an air cleaning device. NYPIRG explained in its comments on the draft permit that if Kings Plaza relies upon an air cleaning device that collects air contaminants, the permit must include recordkeeping requirements sufficient to assure that Kings Plaza handles air contaminants in compliance with permit requirements. If these requirements do not apply to Kings Plaza, they must be deleted from the permit. Alternatively, the currently non-existent statement of basis could explain that while this requirement does not currently apply to Kings Plaza, the rule will apply in the event that such a device is installed. Including inapplicable requirements in a permit without explanation only serves to confuse the public.

In response to NYPIRG's comments on the draft permit with respect to these permit conditions, DEC asserted that:

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

DEC Responsiveness Summary, Re: General Permit Conditions at 5. DEC also explains that "Kings Plaza does not have any control equipment." DEC Responsiveness Summary, Kings Plaza Total Energy Plant at 1. As stated above with respect to Condition 4, DEC must not include inapplicable requirements in a facility's Title V permit. This condition must be deleted from the permit.

Condition 13, Item 13.1 (Applicable Criteria):

Condition 13 is a generic condition stating that the facility must comply with any requirements of an accidental release plan, response plan, or compliance plan. NYPIRG is concerned that requirements in these documents might not be incorporated into the permit. If such documents exist, they are applicable requirements and must be included as permit terms. Furthermore, any enforceable requirements contained in "support documents submitted as part of the permit application for this facility" must be incorporated directly into the permit. DEC responded to NYPIRG's comment on this permit condition by asserting that "[a]ll of the relevant requirements of any supporting documents have

been fully incorporated into the draft permits.” DEC Responsiveness Summary, Re: General Permit Conditions at 7. Even if all relevant requirements are *not* incorporated into Kings Plaza’s final permit, there is no reason to include this unenforceable condition in the final permit. Because of its vagueness, this permit condition adds absolutely nothing to the final permit. As U.S. EPA’s White Paper #2 explains:

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

U.S. EPA, *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program*, March 5, 1996, at 37. The final 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 Kings Plaza is clear.

Condition 15, Item 15.3 (Compliance Requirements):

The final 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. The permit must tell us 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. It is notable here that DEC did not respond to NYPIRG’s comment by saying whether CAA § 112(r) applies to Kings Plaza.

Condition 30 (Visible emission limited):

NYPIRG’s comments on the draft permit with respect to the condition identified in the final permit as Condition 30 pointed out that the draft permit lacked any kind of periodic monitoring to assure Kings Plaza’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 (see A and B below). The conditions specify the limit that is not to be exceeded at any time together with an averaging time,

monitoring frequency and reporting requirement. To date, EPA has not provided guidance as to the method and frequency of monitoring opacity for general category sources that do not require continuous opacity monitors. This is a nationwide issue that is being dealt with on a source category-by-source category basis. At this point in time we have established a periodic monitoring strategy for oil-fired boilers that are not otherwise required to have COMs. The rest of the emission point universe is divided between those emission points where there is no expectation of visible emissions and those where there are some visible emissions. This category is further subdivided into those source categories where opacity violations are probable and those where opacity violations are not likely. We are currently working to establish engineering parameters that will result in an appropriate visible emission periodic monitoring policy.

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

First, the additional conditions described by DEC in its response to NYPIRG's comments appear to be missing from the final permit.¹⁶

Second, conditions A and B as referred to in DEC's responsiveness summary do not constitute periodic monitoring. Neither requirement specifies what kind of monitoring is to be performed (other than stating that the averaging method is a 6-minute average). Neither requirement specifies how often any monitoring is to be performed, other than stating "as required." Neither requirement specifies a regular reporting requirement, except "upon request by regulatory agency." It cannot be argued that these conditions suffice as periodic monitoring.¹⁷

Third, NYPIRG is concerned by DEC's position that so long as a national policy has not been developed, DEC is free to issue Title V permits that lack periodic monitoring sufficient to assure compliance. This is a clear violation of 40 CFR Part 70. While a national policy would certainly be helpful to DEC, such a policy is not a prerequisite for inclusion of appropriate periodic monitoring in each individual Title V permit.¹⁸

¹⁶ A copy of the proposed permit was provided to NYPIRG by U.S. EPA Region 2. DEC does not provide public commenters with a copy of a proposed permit when it responds to comments. In light of the fact that the proposed permit is different from the draft permit (and that the proposed permit doesn't always match up with the changes described in DEC's response to comments), NYPIRG requests that U.S. EPA direct DEC to provide commenters with a copy of the proposed permit when it is forwarded to U.S. EPA for review.

¹⁷ It also doesn't appear necessary to break the conditions into two sub-conditions. The only difference between the two sub-conditions is that one specifies that the "upper limit" is 20 percent while the other specifies that the "upper limit" is 57 percent. In all other respects the two conditions are identical.

¹⁸ 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.

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

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

B. Emission Unit Level Requirements

1. **Conditions that apply to the two 16.7 MMBtu/hr boilers when combusting #2 fuel oil or natural gas**

Condition 39, Condition 40 (opacity limitation):

In response to NYPIRG’s comments on the draft permit with respect to the lack of periodic monitoring to assure compliance with the opacity limitation, DEC did add an opacity monitoring regime. Unfortunately, this monitoring 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.

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

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

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

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

- **Qualifications of the daily observer**

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

- **Details about the daily observation**

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

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

- **Details about Method 9 testing**

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

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

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

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

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

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

- **Details about Recordkeeping**

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

- **Details about reporting**

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

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

The Administrator must object to the Kings Plaza’s permit because (1) monitoring is inadequate, and (2) the permit illegally limits the type of evidence that can be used to demonstrate compliance. The Administrator must insist that DEC draft a new permit for Kings Plaza that includes conditions (such as those suggested above) that actually assure compliance with applicable opacity limitations.

2. Conditions that apply to the three identical 7.65 MMBtu/hr internal combustion engines, firing natural gas

Conditions 41, 42, 43 (NO_x emission limit):

NYPIRG appreciates that DEC chose to add at least minimal monitoring to support this condition in response to NYPIRG’s comments on the draft permit. However, it is doubtful that one stack test every five years is sufficient to assure Kings Plaza’s compliance with the NO_x emission limit. Some form of surrogate monitoring, in addition to the stack test, must be added to the permit to assure ongoing compliance. Moreover, DEC must explain the basis for its periodic monitoring decision in the currently non-existent statement of basis. DEC must explain why this one stack test over the course of the permit term is sufficient to assure compliance. DEC’s failure to require Kings Plaza to perform adequate periodic monitoring to assure compliance with the NO_x emission limit, in addition to DEC’s failure to provide a statement of the basis for its periodic monitoring determination, requires the EPA Administrator to object to this permit.

Conditions 44, 45, 46 (opacity limits):

DEC explains the lack of periodic monitoring to support this condition by stating that “It is the position of the Department that for natural gas-fired internal combustion engines, Method 9 analyses are to be conducted upon the request of the Department or the USEPA.” DEC Responsiveness Summary, Kings Plaza Total Energy Plant at 3. While DEC does not explain this in its response to our comments, we recognize that natural gas fired engines are not as likely to suffer from opacity problems as other fossil fuel powered engines. If DEC believes that periodic monitoring is not necessary to assure compliance with this condition, however, DEC must provide some reasonable explanation for its decision in the statement of basis. The lack of an explanation in the statement of basis to support DEC’s decision not to include periodic monitoring to support this condition requires the EPA Administrator to object to this permit.

3. Conditions that apply to the five similar Nordberg diesel generators, fired using dual fuel or #2 fuel oil

Condition 47 (averaging):

This condition allows emissions from the five generators to be averaged to demonstrate compliance with 6 NYCRR § 227-2.4(f)(2). In commenting on this condition in the draft permit, we stated that:

Under § 227-2.5, “A weighted average allowable emission rate, based on the weighted average of actual emission from units that are operating, is permissible.” However, § 227-2.5 says nothing about the averaging period. That is because the averaging period is determined based upon the requirements of the applicable substantive rule. Thus, while it is acceptable for compliance to be determined by averaging the emissions of the five generators, § 227-2.5 provides no support for the creation of the “30-day rolling average” that accompanies condition 54. The averaging period must be eliminated from Condition [47].

DEC responded by claiming that “[t]he 30-day rolling average was incorporated into the referenced condition in order to be consistent with the NOx RACT condition (see comment regarding Condition #60).” DEC Responsiveness Summary, Kings Plaza Total Energy Plant at 3. In the comments regarding Condition #60, DEC asserted that “[t]his agreement is considered to be a modification to the NOx RACT Plan.” Id. at 4.

DEC’s response to our comments are unresponsive to the issue of where DEC obtains the legal authority to allow Kings Plaza to average its NOx emissions over a rolling 30-day period rather than requiring DEC to meet the hourly standard established in the applicable regulation. Rather than contest our argument that the 30 day rolling average is illegal, DEC simply asserted that the 30-day rolling average was derived from the NOx RACT plan (which was modified for the purpose of the Title V permit). In light of the fact that DEC is unable to point to a justifiable legal basis for its decision to allow

compliance with NOx RACT requirements to be determined based upon a 30 day rolling average, the Administrator must object to this permit.

NYPIRG's concerns with the NOx RACT plan are discussed further below with respect to Condition 53.

Conditions 48, 49, 50, 51, 52, (NOx monitoring for engines burning dual fuel):

The same issues that apply to Conditions 41, 42, and 43 apply to these conditions.

Condition 53 (NOx RACT):

This lengthy condition prohibits the use of #2 fuel oil as the sole fuel during the ozone season except in the case of an emergency. It allows Kings Plaza to burn #2 fuel as the sole fuel during the non-ozone season provided that NOx emissions provided that the average NOx emission, based upon a 30-day rolling average, is not greater than 9.0 g/bhp. If Kings Plaza exceeds the 9.0 g/bhp limit, it must notify the Regional Air Pollution Control Engineer within three days of the determination. It concludes that NOx emissions shall be calculated based upon the results presented in the November 1995 stack test report. It states that monitoring takes place daily.

Condition 53 fails to adequately protect New York City's air quality. Instead, Condition 53 is a sham limitation that only serves to allow Kings Plaza to operate in violation of legal requirements.

The final permit cites to 6 NYCRR § 227-2.4 as the legal basis for Condition 53. Unfortunately, § 227-2.4 is a lengthy regulation and it is difficult to ascertain where this requirement might be found. As it turns out, locating these requirements is even more difficult because they are not included in § 227-2.4. Instead, they appear to be derived from Kings Plaza's NOx RACT compliance plan submitted in accordance with § 227-2.3. To make matters yet more complicated, it appears that the NOx RACT conditions in the draft permit differ from the conditions in the original NOx RACT Plan. Nothing in the draft permit or the permit application explains the origin or justification for Condition 53. The failure to identify the correct origin for this Condition directly violates 40 CFR § 70.6(a)(1)(i), which provides that a Title V permit "shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based."

In response to NYPIRG's comments on the draft permit regarding DEC's failure to correctly identify the origin of this permit condition, DEC stated that "Since the 9.0 g/bhp-hr standard is incorporated into § 227-2.4(f), that citation was considered to be the applicable regulation." Of course, the permit doesn't cite to § 227-2.4—the permit cites simply to § 227-2.4. Moreover, there is no excuse for DEC not explaining that this condition is based on a NOx RACT plan that was negotiated between the agency and the facility. The public must not be left to guess at the origin of permit conditions.

Aside from DEC's failure to cite to the underlying basis for this condition, this condition allows Kings Plaza to operate in violation of legal requirements. As of May 31, 1995, Kings Plaza was required to comply with §227-2.4(f). It provides:

(f) Internal combustion engines: Effective May 31, 1995, any owner or operator of a stationary internal combustion engine of 225 horsepower or larger in the severe nonattainment area, and 400 horsepower in the rest of the State, which provides primary power or is used for peak shaving generation, must comply with the following emission limit:

(1) For rich burn engines, 2.0 grams per brake horsepower-hour.

(2) For lean burn engines:

(i) 3.0 grams per brake horsepower-hour for gas only fired units; or

(ii) 9.0 grams per brake horsepower-hour for units firing other fuels.

Compliance with these emission limits shall be determined with a one hour average in accordance with paragraph 227-2.6(a)(7) unless the owner/operator opts to utilize CEMS under the provisions of section 227-2.6(a)(2) of this Subpart. If CEMS are utilized, the requirements of section 227-2.6(b) apply, including the use of a 24 hour averaging period.

Kings Plaza's five Nordberg internal combustion engines fire using dual fuel or #2 fuel oil. Thus, the generators must comply with the 9.0 g/bhp limit. Kings Plaza does not utilize CEMs, so it must demonstrate compliance with a one hour average in accordance with § 227-2.6(a)(7), which provides that "The owner/operator of internal combustion engines shall perform initial compliance stack tests as described in subdivision (c) of this section." § 227-2.6(c) simply refers to a number of acceptable types of compliance test methods.

Kings Plaza performed the required initial compliance stack tests in 1995. When burning dual fuel, the Nordberg engines averaged 4.93 grams NO_x/bhp-hr, which is well within the legal limit. When burning #2 fuel oil as the sole fuel, however, emissions ranged from 9.1 to 11.3 grams NO_x/bhp-hr (averaging 10.6 grams NO_x/bhp-hr). Without a doubt, the Nordberg engines failed the initial stack test when burning #2 fuel oil.

Following the 1995 stack test, there was some dispute over how Kings Plaza would come into compliance with NO_x RACT limits. A memorandum from Alon Dominitz (DEC) to Harold Dickey (DEC) dated May 23, 1996, stated: "Please return the [Title V] application as incomplete. The stack test report from this facility shows non-compliance with the RACT limit of 9.0 g/bhp-hr when firing in diesel-only mode for the Nordberg engines. Please have applicant submit revised compliance plan/operating plan indicating how these engines will be brought into compliance."

Instead of correcting the problem, Kings Plaza set about devising a plan to circumvent the NOx RACT limits. Kings Plaza was highly successful in this endeavor; its representatives obtained almost everything they asked for.

First, Kings Plaza asked for the option to demonstrate compliance with NOx RACT limits by averaging emissions from the 5 engines. As discussed above in connection to Condition 47, 6 NYCRR § 227-2.5 provides that: “[a] weighted average allowable emission rate, based on the weighted average of actual emission from units that are operating, is permissible.” Kings Plaza wanted more than just the average of emissions from all five engines, however. Even when averaging the engines, if they are all burning #2 fuel oil, they fail to meet the requirements of NOx RACT. Instead, Kings Plaza asked to average emissions over a thirty day period. That way, the engines could burn #2 fuel oil for most of the month, so long as they burned dual fuel at least a quarter of the month so that the average monthly average emission rate would not exceed 9.0 g/bhp-hr.

In a December 3, 1998 letter to Kings Plaza, DEC stated that “NOx emission standards that apply to the diesel generators may be averaged generally over a one-hour period.” Nevertheless, as the draft permit reveals, DEC eventually consented to allow the averaging period to be extended from one hour to thirty days.

The second request by Kings Plaza was to be allowed to burn #2 fuel oil as the sole fuel 262 days each year. By their calculations, they would still meet the NOx RACT limit on an annual basis if they burned dual fuel for the remaining 103 days of the year. In effect, they were asking for a yearly average. In the original NOx RACT plan submitted prior to the Title V application, Kings Plaza proposed to be allowed to burn #2 fuel as the sole fuel for 90 days out of the year.

In response to that request, John Barnes (DEC) states in a 12/22/98 memo to DEC staff, “I have advised their consultant that we would not agree to allow Kings Plaza to contravene the 9 g/bhp standard 75% of the time. Further, I advised them that the EPA may not agree to the 90 day limit that was initially proposed.”

After meeting with representatives from Kings Plaza, however, DEC resolved to strike a deal. Kings Plaza would be prohibited from using No. 2 fuel oil as the sole fuel during the ozone season (May 1 through September 30) except in emergency situations. They would be allowed to use No. 2 fuel oil as the sole fuel the rest of the year provided that the average NOx emissions (based upon a 30 day rolling average) was equal to or less than 9.0 grams per brake horsepower-hr. The justification? To allow Kings Plaza some operational flexibility. After all, as John Barnes concludes in the 12/22/98 memo: “Currently, it is most economical for them to use dual fuel. However, with the cost of fuel oil dropping, it may become more economical in the future to use No. 2 oil as the sole fuel for these generators.”

NOx RACT does not allow for a monthly average. The relevant time period for compliance under §227-2.4(f) is a one hour average. Under the law, Kings Plaza may not operate the Nordberg

generators using #2 fuel oil as the sole fuel unless the generators pass the initial compliance test, which measures compliance based upon a one hour average. They never passed the test. By changing the relevant time period from one hour to thirty days, DEC is illegally changing substantive pollution control requirements. While NOx RACT requires ongoing compliance with NOx emission limits over the course of every hour of every day, this draft permit allows Kings Plaza to operate in violation of this requirement for three quarters of every month outside of the ozone season. By allowing this to happen, DEC is sacrificing the health of New York City residents for the sake of allowing Kings Plaza “operational flexibility” and an “economic benefit.”

DEC claims, without providing any sort of guarantee, that under the NOx RACT plan included in the Title V permit “NOx emissions will be less than if the 9.0 g/bhp-hr were met throughout the year.” The trouble with this reasoning is that if Kings Plaza was required to comply with NOx RACT, the facility wouldn’t be allowed to burn #2 fuel oil as the sole fuel at any point during the year because the facility failed the required stack test. Obviously, NOx emissions would be much lower in that case than under the deal established between DEC and the facility in this Title V permit.

Even if the limitations contained in Condition 53 were legal, the condition violates 40 CFR Part 70 because it fails to satisfy periodic monitoring requirements. DEC claims that “the facility must maintain fuel use records in order to comply with this condition. Failure to do so would be a violation of Condition [53].” DEC Responsiveness Summary, King Plaza Total Energy Plant at 5. An examination of condition 53 reveals that with respect to monitoring it simply states that “work practice type” is “process material thruput” and “monitoring frequency” in “daily.” Unfortunately, the permit does not require Kings Plaza to maintain regular records of its fuel use or fuel type. The draft permit never requires Kings Plaza to report anything that relates to compliance with this requirement, with the exception of the requirement that the facility notify the Regional Air Pollution Control Engineer within three days of a determination that the facility is exceeding the NOx RACT limit over a thirty day period. Since the permit does not require Kings Plaza to ever make such a compliance determination, there is absolutely no chance that this will ever happen. In light of the absence of any concrete monitoring associated with this important permit condition, it cannot be disputed that this condition fails to satisfy periodic monitoring requirements.

The Administrator must object to this permit on the basis that it does not assure compliance with NOx RACT and fails to satisfy periodic monitoring requirements.

Conditions 54, 55, 56, 57, 58 (NOx RACT):

All of these condition purport to require periodic monitoring to demonstrate compliance with NOx RACT. As discussed in relation to Condition 60, NOx RACT is being applied to this facility incorrectly and the periodic monitoring requirements are a sham. All of our comments pertaining to Condition 53 also apply to Conditions 54-58.

Condition 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73 (Opacity limits):

The comments made above on conditions 39 and 40 also apply to these conditions.

C. State-Only Requirements

Condition 78 (Sulfur limitation):

This federally-enforceable condition is improperly described in the final permit as a state only enforceable condition. Condition 78 provides that no person will sell, offer for sale, purchase or use any distillate oil fuel which contains sulfur in a quantity greater than .2 percent by weight. The legal basis for this requirement is 6 NYCRR § 225-1.2(a)(2).

§ 225-1.2(a)(2) actually provides that the applicable sulfur limit is “as otherwise specified in Table 1, Table 2 or Table 3 of this section.” Thus, at the outset, Condition 78 is vague because it does not identify which table applies to Kings Plaza. Table 1 indicates that the applicable sulfur limit for a facility located in New York City burning distillate oil is .20 percent by weight, which is the requirement included in the final permit. However, the regulation states that Table 1 expired on January 1, 1988.

Table 2 also indicates that the applicable sulfur limit for a facility located in New York City burning distillate oil is .20 percent by weight. Furthermore Table 2 indicates that the Table 2 limitations go into effect on January 1, 1998. Thus, at first reading, it appears that Table 2 is the applicable table.

DEC’s draft program policy, “State Implementation Status of New York Regulations,” states that Table 1 is in New York’s State Implementation Plan (SIP), but Table 2 is not. Since Table 1 in the current version of 6 NYCRR Subpart 225 has expired, it appears that DEC is relying upon Table 2 for the requirement. Since Table 2 is not in the SIP, the requirement is listed as “state-only.” As it turns out, however, under the SIP version of 6 NYCRR Subpart 225, Table 1 did not expire on January 1, 1988. Instead, the SIP version of Table 1 remains applicable and federally enforceable.

Condition 78 must be placed in the federally enforceable section of Kings Plaza’s Title V permit. Also, the permit must state that this condition based on a SIP requirement. Finally, the condition must require Kings Plaza to maintain a record of the sulfur content of each fuel delivery and submit a copy of that record to DEC at least once every six months.

Conclusion

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the final Title V permit for Kings Plaza.

Respectfully submitted,

Dated: May 4, 2000
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