

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

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In the Matter of the Title V
Operating Permit Issued to

COLUMBIA UNIVERSITY
located in New York, New York

Permit ID: DEC 2-6202-00167/00005

Issued by the New York State Department of
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF
THE TITLE V OPERATING PERMIT FOR
COLUMBIA UNIVERSITY, INC.**

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. (“NYPIRG”) hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to Title V Operating Permit issued to Columbia University. 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 June 16, 2000. According to that letter, U.S. EPA’s 45-day review period ended on Aug.1, 2000. Columbia University received a final Title V permit on August 3, 2000. (See Attachment A). 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 Columbia University’s draft permit that were raised during the public comment period provided by DEC.

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

The U.S. EPA Administrator must object to the Title V permit issued to Columbia University because it does not comply with 40 CFR Part 70. In particular:

- (1) DEC violated the public participation requirements of 40 CFR § 70.7(h) by inappropriately denying NYPIRG's request for a public hearing (see p. 3 of this petition);
- (2) the permit is based on an incomplete permit application in violation of 40 CFR § 70.5(c) (see p. 5 of this petition);
- (3) the permit entirely lacks a statement of basis as required by 40 CFR § 70.7(a)(5) (see p. 7 of this petition);
- (4) the permit distorts the annual compliance certification requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5) (see p. 10 of this petition);
- (5) the permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions (see p. 10 of this petition);
- (6) the permit fails to require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B) (see p. 16 of this petition); and
- (7) the permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practicably enforceable (see p. 17 of this petition).

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

Discussion of Objection Issues

The Title V permitting program offers an unprecedented opportunity for concerned citizens to learn what air quality requirements apply to a facility located in their community and whether the facility is complying with those requirements. Unfortunately, a poorly written Title V permit may make enforcement under the Clean Air Act even more difficult than it already is, because each permit includes a permit shield. Under the terms of the permit shield, a permittee is protected from enforcement action so long as the permittee is complying with its permit, even if the permit incorrectly applies the law.¹ Thus, a defective permit may prevent NYPIRG's members as well as other New Yorkers from taking legal action against a permittee who is illegally polluting the air in their community. Furthermore, a Title V permit that lacks appropriate monitoring, recordkeeping, and reporting requirements denies NYPIRG's members and all New Yorkers their right to know whether the permittee is complying with air quality requirements.

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

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

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

A public hearing would be appropriate if the Department determines that there are substantive and significant issues because the project, as proposed, may not meet statutory or regulatory standards. Based on a careful review of the subject application

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

and comments received thus far, the Department has determined that a public hearing concerning this permit is not warranted.

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

§621.7 Determination to conduct a public hearing.

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

(emphasis added). In denying NYPIRG's request for a public hearing, DEC applied the standard that governs when the agency can hold a hearing upon its own initiative, rather than the standard that governs when the agency must grant a public request for a hearing. Moreover, though DEC can hold a legislative hearing "if a significant degree of public interest exists," DEC apparently determined that NYPIRG's request for a public hearing (made on behalf of NYPIRG's student members at 19 colleges and universities across the state) failed to demonstrate the requisite degree of public interest.

Apparently, DEC will hold a public hearing on a draft Title V permit only if public comments make it reasonably likely that the "project" (as opposed to the permit) must undergo major modifications.² Because a Title V permit is meant to assure that a facility complies with existing

² 6 NYCRR § 621.1(q) defines "project" as "any action requiring one or more permits identified in section 621.2 of this

requirements, not to subject the facility to additional applicable requirements, the vast majority of existing facilities will not need to undertake major modifications before receiving a Title V permit. This does not obviate the need for a public hearing. In the context of a Title V permit proceeding, the objective of a public commenter is to ensure that the Title V permit holds the permit applicant accountable for violations of applicable requirements. Typically, the issue is whether significant modifications need to be made to the *permit*, not whether significant modifications need to be made to the *project*. DEC's interpretation of its regulations constructively denies the public an opportunity for a hearing on virtually any Title V permit application submitted by an existing facility. This clear violation of 40 CFR § 70.7(h) requires the Administrator to object to the proposed permit for Columbia University.

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

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

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

Therefore, it is unclear whether Columbia University's Title V permit must include a compliance schedule.

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

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

57 FR 32250, 32274 (July 21, 1992). Despite the importance of knowing whether a permit applicant is in compliance with all requirements at the time of permit issuance, Columbia University 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, Columbia University'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.

Columbia University's failure to submit a complete permit application is the direct result of DEC's failure to develop a standard permit application form that complies with federal and state statutes and regulations. Almost a year and a half ago, NYPIRG petitioned the Administrator to resolve this fundamental problem in New York's Title V program. In the petition, submitted April 13, 1999, NYPIRG asked the Administrator to make a determination pursuant to 40 CFR § 70.10(b)(1) that DEC is inadequately administering the Title V program by utilizing a legally deficient standard permit application form. The petition is still pending. U.S. EPA must require Columbia University 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 Columbia University because the permit is based upon a legally deficient permit application and therefore does not assure Columbia University's compliance with applicable requirements.

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

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

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

The most glaring deficiency in the statement of basis is the failure to provide the legal and factual basis for periodic monitoring (or the lack thereof). 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.
- 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.

40 CFR Part 70 is clear on the requirement that every permit must be accompanied with some sort of a rationale for permit conditions. See 40 CFR § 70.7(a)(5). Absent a complete statement of basis, the public cannot effectively evaluate and comment upon the adequacy of draft permit requirements. The Administrator must object to the issuance of the permit and insist that DEC draft a new permit that includes a statement of basis.

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

Under 6 NYCRR § 201-6.5(e), a permittee must “certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices,” at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirement included in Columbia University’s permit (identified as Condition 14 in the permit) does not require Columbia University to certify compliance with all permit conditions. Rather, the condition only requires that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” DEC then proceeds to identify certain conditions in the permit as “Compliance Certification” conditions. Requirements that are labeled “Compliance Certification” are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. Those permit conditions that lack 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. Columbia University 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.” Response to NYPIRG Comments, 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.

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

The Administrator must object to Columbia University’s permit because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and

upset conditions. On its face, 6 NYCRR § 201-1.4 (New York’s “excuse provision”) conflicts with U.S. EPA guidance regarding the permissible scope of excuse provisions and should not have been approved as part New York’s State Implementation Plan (“SIP”). U.S. EPA must remove this provision from New York’s SIP and all federally-enforceable operating permits as soon as possible. Meanwhile, Columbia University’s permit must be modified to include additional recordkeeping, monitoring, and reporting obligations so that U.S. EPA and the public can monitor application of the excuse provision (and thereby be assured that the facility is complying with applicable requirements).³

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

U.S. EPA guidance explains that facilities are required to make every reasonable effort to comply with emission limitations, even during startup/shutdown, maintenance and malfunction conditions. (U.S. EPA guidance documents are attached hereto as Appendix 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 permit does not assure compliance with applicable requirements because it lacks (1) proper limitations on when a violation may be excused, and (2) sufficient public notice of when a violation is excused.

A Title V permit must include standards to assure compliance with all applicable requirements. The Administrator must object to the proposed permit for Columbia University 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 Columbia University are described below.

1. Any Title V permit issued to Columbia University 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:

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

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

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

The Administrator must object to the proposed permit for Columbia University and require DEC to draft a new permit that includes the limitations described in the 1999 memorandum.

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

- The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design;
- The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- At all times, the facility was operated in a manner consistent with good practice for minimizing emissions;
- The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;
- All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
- 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.

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

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

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

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

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

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

The problems caused by the vagueness of the excuse provision could be partially resolved by making it clear that the excuse provision does not shield the facility in any way from enforcement by the public or by U.S. EPA, even after a violation is excused by the DEC Commissioner. In addition to the right to bring an enforcement action against facility that illegally pollutes the air, however, the public must be able to evaluate the propriety of a decision by the DEC Commissioner to excuse a violation. Since the public has the right to bring an enforcement action against a permit violator, the public should have access to any information relied upon by DEC is determining that a violation could not be avoided.⁵ If the permit provides only scanty details about the types of violations that may be excused, DEC and the permittee are unlikely to provide the public with any information justifying the excuse.

4. Any Title V permit issued to Columbia University must define "reasonably available control technology" as it applies during startup, shutdown, malfunction, and maintenance conditions.

Though 6 NYCRR § 201-1.4(d) requires facilities to use "reasonably available control technology" ("RACT") during any maintenance, start-up/shutdown, or malfunction condition, the permit does not define what constitutes RACT under such conditions or how the government and the public knows whether RACT is being utilized at those times. Any Title V permit issued to Columbia University 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 Columbia University must require prompt written reports of deviations from permit requirements due to startup, shutdown, malfunction and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B).

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

Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define

⁵ It is interesting that while some state agencies and industry representatives assert that citizen suits are sometimes brought against facilities for "minor" violations, DEC's position with respect to the excuse provision in this permit means that the public is denied information about the environmental seriousness of a violation and whether the violation was actually unavoidable. Thus, the public's ability to analyze the significance of a violation is severely constrained.

“prompt” in relation to the degree and type of deviation likely to occur and the applicable requirements.

Unfortunately, the excuse provision in the permit (Condition 5) fails to require adequate reporting of deviations of permit conditions during startup/shutdown, maintenance, malfunction, and upset conditions. In the case of deviations that occur during startup/shutdown or maintenance, the facility isn't required to submit a deviation report at all “unless requested to do so in writing.” In the case of deviations that allegedly occur due to malfunction, the permit requires deviation reports, but allows these reports to be made by telephone rather than in writing. Thus, a violation can be excused without creating a paper trail that would allow U.S. EPA and the public to monitor abuse.

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

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

Responses to NYPIRG Comments, re: General Permit Conditions at 4. DEC's response is misleading because the agency fails to acknowledge that written deviation reports are only required if they are specifically requested by the DEC Commissioner. In addition, DEC fails to acknowledge the circumstances under which a deviation report is simply not required unless specifically requested by the DEC Commissioner.

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

The permit issued to Columbia University would leave the public completely in the dark as to whether DEC is excusing violations on a regular basis. An excuse provision that keeps the public

ignorant of permit violations cannot possibly satisfy the Part 70 mandate that each permit assure compliance with applicable requirements.

Any Title V permit issued to Columbia University must include the following reporting obligations:

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

- (2) *Violations due to Malfunction.* The facility must provide both written notification and a telephone call to DEC within two working days of an excess emission that is allegedly unavoidable due to “malfunction.” (The permit only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement).⁹ The facility must submit a detailed written report within thirty days after the facility exceeds an emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The permit only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”).¹⁰

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

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

⁷ See Condition 5.1(a) in the permit.

⁸ *Id.* Item 17.2(iv) of the permit, which governs “Monitoring, Related Recordkeeping and Reporting Requirements” contains the same flaw.

⁹ See Condition 5.1(b) in the permit.

¹⁰ *Id.*

Item 17.2 of the permit governs the reporting of all types of violations under the permit, not just those that might be considered “unavoidable” 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 17.2 violates this clear-cut reporting requirement.

At first glance, Item 17.2 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 17.2 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 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 permit because it does not require prompt reporting of all deviations from permit limits.

G. The Proposed Permit Does Not Assure Compliance With All Applicable Requirements as Mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) Because Many Individual Permit Conditions Lack Adequate 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).¹¹

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

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

The following analysis of specific 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 permit conditions

- a. Facility Level Permit Conditions

Condition 3, Item 3.1 (Maintenance of Equipment):

The permit recites the general requirement under 6 NYCRR § 200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer's specifications. In commenting on Columbia University's draft permit, NYPIRG argued that this permit

¹¹ 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."

condition must define exactly what Columbia University must do to comply with the requirement, and mandate that the facility perform periodic monitoring that is sufficient to assure its compliance. NYPIRG pointed specifically to the flue gas recirculation equipment employed by Columbia University as an indication that § 200.7 applies to Columbia University.

DEC responded to this comment twice. First, DEC asserted:

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

Responses to NYPIRG Comments, re: General Permit Conditions, at 3.

DEC's response does not justify the agency's failure to identify whether the requirement applies to Columbia University and, if the requirement applies, the agency's failure to include sufficient periodic monitoring to assure compliance. First, a "general requirement" is a requirement that applies to all facilities in the same way. This is not a general requirement because it may not even apply to Columbia University. A Title V permit must identify the requirements that apply to the permitted facility, not provide a shopping list of requirements that might apply. As explained in U.S. EPA's preamble to 40 CFR Part 70:

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

(emphasis added) 57 Fed. Reg. 32250, 32251 (July 21, 1992). DEC's assertion that it is proper to include an inapplicable requirement in a permit without explanation simply because there is a slight chance that the facility may voluntarily install equipment that would subject it to this requirement at some point during the permit term is unacceptable. In the off chance that the facility does voluntarily install pollution control equipment during the permit term, this requirement will apply to the facility even if it is

not included in the permit. Part 70 requires a Title V permit to include all requirements that apply to the facility as of the date of permit issuance, not all requirements that might somehow become applicable to the facility during the permit term.

Second, section 504 of the Clean Air Act makes it clear that each Title V permit must include “conditions as are necessary to assure compliance with applicable requirements of [the Clean Air Act], including the requirements of the applicable implementation plan.” Here, the permit lacks conditions designed to assure Columbia University’s compliance with an applicable SIP requirement. DEC fails to provide a justification for its failure to include periodic monitoring to assure Columbia University’s compliance with this condition. Instead, DEC simply alleges that based upon “engineering judgment,” periodic monitoring would be “onerous and unnecessary.”

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

DEC’s failure to clearly identify how this requirement applies to Columbia University, as well as the agency’s failure to include sufficient periodic monitoring to assure compliance with this requirement, is a clear violation of Part 70 requirements and justifies the Administrator’s objection to this permit.

Condition 4, Item 4.1 (Unpermitted Emission Sources):

The 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. Based upon the language of Item 4.1, it appears that the only penalty Columbia University 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 4.1 remains in the permit, it is essential that a clause be added that states that if it is discovered that Columbia University lacks a required permit, Columbia University 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 4 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.

Condition 7, Condition 8 (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. This permit must specifically explain how 6 NYCRR § 201-1.7 and § 201-1.8 applies to Columbia University, and include recordkeeping requirements sufficient to assure that Columbia University handles air contaminants in compliance with permit requirements.

In response to NYPIRG's comments on the draft permit with respect to these permit conditions, DEC asserted that "[t]his condition is included with all air permits regardless of whether or not air pollution controls are in place." DEC Response to NYPIRG Comments, re: general conditions, pp. 4-5. DEC's refusal to identify how this requirement applies to Columbia University and to include sufficient periodic monitoring is a clear violation of Part 70 and requires the Administrator to object to this permit.

Condition 10 (Exempt Sources):

NYPIRG is concerned that in the permit application, Columbia University claims that 10 activities are "exempt" from permitting because they are "research and development" activities. In identifying these "research activities," the only information provided is the building in which the "research activities" are taking place. There is no explanation of what these activities might be, making it impossible to determine whether they are correctly exempt from Title V. NYPIRG is particularly concerned that Columbia's use of coatings that emit VOC's and various toxic air pollutants is ignored in this draft permit. Simply because an activity takes place at a university does not make it a "research and development" activity. There must be a full accounting and reasonable assessment of all of the activities that Columbia University claims are exempt from the Title V permitting process.

In response to NYPIRG's comments on the draft permit, DEC stated that "[a]ccording to Sub Part 201-3.2(c)(44) the research and development activities are exempt until such time as the administrator completes a rule making to determine how the permitting program should be structured for these activities." Responsiveness Summary, Specific Comments on Columbia University Draft Permit at 1. This response failed to address our fundamental concern that there is no evidence that these activities qualify for exemption as "research and development" activities. § 201-3.2(c)(44) simply exempts "research and development activities, including both stand-alone and activities within a major stationary source, until such time as the Administrator completes a rulemaking to determine how the permitting program should be structured for these activities." Simply citing and quoting the regulation does not confirm that the activities being performed as Columbia University are in fact "research and development activities" for purposes of the Title V program.

The fact is that while DEC insists that the primary pollution sources at the university are the four boilers, the facility's permit application identifies a long list of toxic air pollutants that are being released

by the university that are almost certainly being produced by these “exempt” activities. It is unacceptable for DEC to finalize a draft permit for Columbia University that fails to regulate a significant number of the University’s activities without provided a detailed explanation for why these activities are exempt from Title V permitting--especially since NYPIRG specifically requested this information. Because information sufficient to determine whether many of Columbia University’s activities are subject to applicable requirements, U.S. EPA must object to this Title V permit.

Condition 12, Item 12.1 (Applicable Criteria):

Condition 12 is a generic condition stating that the facility must comply with any requirements of an accidental release plan, response plan, or compliance plan. NYPIRG is concerned that requirements in these documents might not be incorporated into the permit. If such documents exist, they are applicable requirements and must be included as permit terms. Furthermore, any enforceable requirements contained in “support documents submitted as part of the permit application for this facility” must be incorporated directly into the permit. DEC responded to NYPIRG’s comments on this condition by stating that “[a]ll of the relevant requirements of any supporting documents have been fully incorporated into the draft permits.” Responses to NYPIRG Comments, Re: General Permit Conditions at 5. Even if all relevant requirements are *not* incorporated into Columbia University’s permit, there is no reason to include this unenforceable condition in the permit. Because of its vagueness, this permit condition adds absolutely nothing to the permit. As U.S. EPA’s White Paper #2 explains:

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

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

Condition 14, Item 14.3 (Compliance Requirements):

The permit makes reference to “risk management plans” if they apply to the facility. Somewhere in the permit, it needs to say whether or not CAA § 112(r) applies to this facility. As explained above in connection with Condition 3, the permit must explain what requirements apply to the facility, not simply indicate what might apply. If DEC does not know whether the rule applies, it must say so in the statement of basis. If Columbia University is required to submit a § 112(r) plan but has not done so, the permit must include a compliance schedule.

Condition 24 (Emission Unit Definition):

In comments on the draft permit, NYPIRG stated:

The description of the only emission unit (4 boilers) explains that only three boilers will be operated at one time. This requirement needs to be separated from the description and included in the permit as a free-standing requirement. The facility must be required to keep records indicating whether the facility is complying with this requirement at all times. Particularly since the permit fails to require the facility to monitor its compliance with the hourly limit that supposedly keeps the facility’s potential to emit from exceeding major source levels for purposes of PSD (discussed below), it is important for the permit to require the facility to report whether it is in fact only operating three of its four boilers at any one time.

In response, DEC stated that “[t]he requirement to keep records in an operator’s log book which three boilers operate at all times will be included in this condition.” DEC Response to NYPIRG Comments, Specific Comments on Columbia University Draft Permit at 7.

NYPIRG cannot locate the promised permit condition in the permit issued to Columbia University.

Condition 27 (Required Emissions Tests):

In comments on the draft permit, NYPIRG pointed out that Condition 27 includes everything that is required under 6 NYCRR §202-1.1 except the requirement that the permittee “shall bear the cost of measurement and preparing the report of measured emissions.” This condition is clearly applicable to Columbia University and must be included in the draft permit. It is inappropriate to paraphrase a requirement and leave out one or more conditions. This practice results in confusion over what conditions are applicable to the source. In fact, EPA’s *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* states explicitly that “it is generally not acceptable to use a combination of referencing certain provisions of an applicable requirement while paraphrasing other provisions of that same applicable requirement. Such a practice, particularly if coupled with a permit shield, could create dual requirements and potential confusion.” *White Paper #2* at 40. The difference here is that the draft permit paraphrases some of the requirements, while entirely failing to describe or reference other requirements.

DEC did not respond to this comment.

Conditions 30 (Visible emissions limited):

NYPIRG's comments on the draft permit with respect to this pointed out that the draft permit lacked any kind of periodic monitoring to assure Columbia University'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.

Responses to NYPIRG Comments: General Permit 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 Columbia University's compliance with 6 NYCRR § 211.3 remains inadequate.

Conditions A and B as referred to in DEC's responsiveness summary are incorporated into Columbia University's Title V permit as Conditions 39 and 40. Unfortunately, Conditions 39 and 40 also lack 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.¹²

NYPIRG is also 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

¹² 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.

helpful to DEC, such a policy is not a prerequisite for inclusion of appropriate periodic monitoring in each individual Title V permit.¹³

Finally, it is unclear how the information provided by DEC regarding the “emission point universe” relates to Columbia University. Columbia University’s Title V permit must assure compliance at each emission point. DEC may not omit required periodic monitoring from Columbia University’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.

Condition 35 (PTE limits):

The limits on SO₂ and NO_x described in this condition are meant to cap the potential to emit for this facility. It appears from the rest of the permit that the way Columbia University will remain under these limits is by limiting the amount of fuel that it burns. Condition 38 provides that:

Fuel meters in each of the 4 boilers continuously measure cubic feet of gas and gallons of oil being burned. Using EPA emission factors, automated data acquisition system calculates SO₂ emissions for any 12 month rolling period not to exceed the PSD cap of 149 tons.

For a limit on a facility’s potential to emit to be practically enforceable, it must include more than just a blanket emission limit. Here, while it appears as though there is a limit on fuel use in place in addition to the blanket emissions limits, this is not the case. Instead, monitors keep track of fuel use and use this data to calculate total emissions over the 12 month rolling period. Using fuel use to calculate overall emissions is not the same as having a fuel use limit in addition to an annual limit. When you have two types of limits—one a production/operation limit, one an annual limit—it is more likely that the facility can be held accountable for compliance with the potential to emit limit. Here, there is only one type of limit.

Page 6 of USEPA’s Memorandum entitled “EPA Guidance on Limiting Potential to Emit in New Source Permitting,” dated June 13, 1989, provides that:

To appropriately limit potential to emit consistent with the opinion in Louisiana-Pacific, all permits issued pursuant to 40 C.F.R. §§51.160, 51.166, 52.21, and 51.165 must contain a production or operational limitation in addition of the emission limitation in cases where the emission limitation does not reflect the maximum emission of the source operating at full design capacity without pollution control equipment. Restrictions on production or operation that will limit potential to emit include limitations on quantities of raw materials consumed, fuel combusted, hours of operation, or conditions which

¹³ 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.

specify that the source must install and maintain controls that reduce emissions to a specified emission rate or to a specified efficiency level. Production and operational limits must be stated as conditions that can be enforced independently of one another. For example, restrictions on fuel which relates to both type and amount of fuel combusted should state each as an independent condition in the permit. This is necessary for purposes of practical enforcement so that, if one of the conditions is found to be difficult to monitor for any reason, the other may still be enforced.

Thus, this permit must explicitly include a production or operational limitation as a specific, enforceable permit condition. Based upon the language of Condition 38, it appears that Columbia University could limit its fuel use as a method for demonstrating compliance with its PTE limit--at least in the case of SO₂. If this is the case, then the fuel use limit must, standing alone, be included as permit condition. Also, specific operational limits must be added to the permit to assure compliance with the NO_x emission limit. The statement of basis must include an explanation of the relationship between the operational limit and the PTE limit. Finally, Columbia University must regular submit reports of any monitoring designed to show compliance with a PTE limit based on an operational restriction.

In response to NYPIRG's comments on the draft permit with respect to this issue, DEC simply informed NYPIRG that "[t]he facility has installed CEMs for NO_x and conditions 40 and 39 requires the facility to submit quarterly reports for these emissions. Once a year the facility performs Relative Accuracy Test Audit for the NO_x and O₂ CEMS." DEC Response to NYPIRG Comments, Specific Comments on Columbia University Draft Permit at 8. DEC's response to NYPIRG's concerns misses the point. According to EPA Guidance, a permit that establishes a PTE limit "must contain a production or operational limitation in addition of the emission limitation in cases where the emission limitation does not reflect the maximum emission of the source operating at full design capacity without pollution control equipment." Monitoring emissions using CEMS and testing the CEMS to make sure that they are providing accurate readings is an important aspect of assuring a facility's compliance with PTE limits, but these activities do not remove the need to establish a productional or operational limitation that is separate and distinct from the annual emission limitation.

In addition to concerns about the lack of productional or operational limits to assist in establishing compliance with the applicable PTE limits, we are concerned about the fact that the applicable PTE limits contained in Condition 35 are framed as both hourly limits and yearly limits, but the permit conditions governing continuous emissions monitoring is directed exclusively at establishing compliance with the annual limit. Thus, Columbia University is apparently not required to demonstrate compliance with the hourly limit.

Condition 36 (Process Permissible Emissions):

The PTE limits contained in Condition 36 are basically the same as those in Condition 35, except that Condition 36 also limits Columbia University to using fuel oil that does not exceed 0.3 percent sulfur by weight. The draft permit fails to include monitoring that assures that Columbia University is complying with this limit. Periodic monitoring must be added to demonstrate compliance.

In response to NYPIRG's comments on the draft permit, DEC explained that "condition 46 requires Columbia University to monitor the sulfur content in the #6 fuel oil on a per delivery basis, and to submit the results to the regulatory agency upon request." DEC Response to NYPIRG comments, Specific Comments on Columbia University Draft Permit at 8. Strangely, Condition 46 in the final permit has nothing to do with a sulfur limit, and there is no Condition 46 in the draft permit that was released for public review. The closest that the final permit comes to requiring measurement of the sulfur content of fuel burned at the facility is Condition 49 in the final permit. Unfortunately, Condition 49 fails to require any specific monitoring, and is also identified in the state-only section of the permit. Since it appears that the sulfur content of fuel oil is being used in this permit as an aspect of the facility's PTE limit, the permit must include monitoring to assure compliance with this limit. This monitoring must be placed in the federally enforceable section of the permit.

Condition 41 (NSPS Subpart Dc):

Initially, the draft permit included a citation to 40 CFR 60.43c(c) as an applicable requirement. This requirement was later removed from the permit by DEC because "the fuel burned by this facility is not included under this section." DEC assured NYPIRG that the particulate matter standard contained in 6 NYCRR § 227-1.2(a) is included in the permit. NYPIRG is unable to locate this particulate matter limit in the final permit.

Condition 37 (NO_x):

As stated above, NYPIRG believes that limitations on fuel usage must be included as separate conditions in the draft permit. In addition, the NO_x limit that applies to this facility is an hourly limit. This condition only requires the facility to calculate compliance with a yearly limit rolled monthly. Thus, this condition does not assure compliance with the hourly limit.

Condition 38 (SO₂):

As stated above, NYPIRG believes that limitations on fuel usage must be included as separate conditions in the draft permit. In addition, the SO₂ limit that applies to this facility is an hourly limit. This condition only requires the facility to calculate compliance with a yearly limit rolled monthly. Thus, this condition does not assure compliance with the hourly limit.

Conditions 41, 43, 45 (opacity):

None of the opacity conditions in the final permit include the SIP-based limit, which was originally included in the draft permit (but not identified as the SIP requirement). The current state version of § 227-1 has not yet been approved by U.S. EPA as part of New York's SIP. The SIP contains an older, somewhat different opacity requirement. Until the current state version is approved by U.S. EPA, DEC must include both requirements in Columbia University's Title V permit. This can be accomplished by streamlining the two requirements to create one federally enforceable requirement.

In situations such as this, it is essential that DEC identify whether an applicable requirement is derived from the SIP.

The SIP version of Part 227 at § 227.4 provides:

Smoke emissions. (a) No person shall operate a stationary combustion installation which emits smoke the shade or appearance of which is equal to or greater than:

- (1) Number 2 on the Ringlemann Chart, or 40 percent opacity, for any time period, or
- (2) Number 1 on the Ringlemann Chart, or 20 percent opacity, for a period of three or more minutes during any continuous 60 minute period.

Current Part 227 contains a similar requirement at §227-1.3(a) which states that:

No person shall operate a stationary combustion installation which exhibits greater than 20 percent opacity (six minute average), except for one six-minute period per hour of not more than 27%.

If the SIP requirement and the state-only requirement are placed in the permit separately, both must be accompanied by periodic monitoring. In other words, though continuous monitoring should be used to assure compliance with both requirements, the public must be able to rely upon the monitoring reports to determine the facility's compliance with the federally enforceable SIP requirement, not just to determine the facility's compliance with the state-only requirement found in the most current state regulation.

State-Only Requirements

Condition 49 (Sulfur limitation):

This federally-enforceable condition is improperly described in the permit as a state only enforceable condition. Condition 49 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 49 is vague because it does not identify which table applies to Columbia University. 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 draft 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 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. While EPA and the public can bring enforcement actions under Table 1, DEC cannot. Instead, DEC must bring any enforcement action under Table 2 in the current version of 6 NYCRR Subpart 225-1.

Condition 49 must be placed in the federally enforceable section of Columbia University's Title V permit. Also, the permit must accurately identify the legal basis for the permit condition. In particular, the permit must state that the condition is federally enforceable as a SIP requirement. Finally, the condition must include a requirement that Columbia University 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 proposed Title V permit for Columbia University.

Respectfully submitted,

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New York, New York

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