

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

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In the Matter of the Proposed Operating Permit for

MAIMONIDES MEDICAL CENTER  
located in Brooklyn, New York

Permit ID: 2-6102-00103/00002

Proposed by the New York State Department of  
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF  
THE PROPOSED TITLE V OPERATING PERMIT FOR  
MAIMONIDES MEDICAL CENTER**

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. (“NYPIRG”) hereby petitions the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to proposed Title V Operating Permit for Maimonides Medical Center (hereinafter “Maimonides” or “the facility”). NYPIRG submitted comments on the draft permit on October 1, 1999. The permit was proposed to U.S. EPA by the New York State Department of Environmental Conservation (“DEC”) on July 11, 2001. EPA’s 45-day review period ended on August 27, 2001. This petition is filed within sixty days following the end of U.S. EPA’s 45-day review period as required by Clean Air Act § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. Id.

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

Below, we discuss numerous and significant violations of 40 CFR Part 70 that occur in the permit proposed for Maimonides. If the U.S. EPA Administrator determines that this 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.”). We hope that U.S. EPA will act expeditiously, and in any case, within the 60-day timeframe mandated in the Clean Air Act, to respond to NYPIRG’s petition.

## **I. General Comments**

### **A. The Proposed Permit is Based Upon an Inadequate Permit Application**

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

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

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

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

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

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

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

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

In addition to omitting an initial compliance certification, Maimonides' 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 permit fails to clear up the confusion. Without clear documentation in the permit application of the requirements of pre-existing permits, it is difficult for members of the public to ascertain when permit requirements have been erroneously left out of a Title V permit.

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

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

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

## **B. The Proposed Permit is Accompanied by an Insufficient Statement of Basis**

This proposed Title V permit is defective because DEC failed to include an adequate "statement of basis" or "rationale" with the draft permit explaining the legal and factual basis for draft permit conditions. The sparse "permit description" fails to satisfy this federal requirement. Without an adequate statement of basis, it is virtually impossible for concerned citizens to evaluate DEC's periodic monitoring decisions and to prepare effective comments during the 30-day public comment period. The only remedy for this problem is for DEC to develop a statement of basis for the draft permit and re-release it for a new public comment period.

40 CFR §70.7(a)(5) provides that “the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.” It is NYPIRG’s understanding that no such document exists with respect to this permit.

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

The statement of basis should include:

- i. Detailed descriptions of the facility, emission units and control devices, and manufacturing processes including identifying information like serial numbers that may not be appropriate for inclusion in the enforceable permit.
- ii. Justification for streamlining any applicable requirements including a detailed comparison of stringency as described in White Paper 2.
- iii. Explanations for actions including documentation of compliance with one time NSPS and NOC requirements (e.g. initial source test requirements), emission caps, superseded or obsolete NOCs, and bases for determining that units are insignificant IEUs.
- iv. Basis for periodic monitoring, including appropriate calculations, especially when periodic monitoring is less stringent than would be expected (e.g., only quarterly inspections of the baghouse are required because the unit operates less than 40 hours a quarter.)

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

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

Region 10 Permit Review at 4.

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

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

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

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

**C. 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 requirements included in this proposed permit (Condition 29) do not require Maimonides to certify compliance with all permit conditions. Rather, the proposed permit only requires that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” DEC then proceeds to identify certain conditions in the draft permit as “Compliance Certification” conditions. Requirements that are labeled “Compliance Certification” are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. The permit conditions that lack monitoring (often a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal law. The 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.

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

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

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

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

60 Fed. Reg. 36083 (July 13, 1995). The proposed permit for Maimonides fails to specify either a general prompt reporting requirement or requirement-specific prompt reporting requirements. The Administrator must require DEC to include prompt reporting requirements in the permit for Maimonides that are consistent with U.S. EPA’s past interpretations of what qualifies as “prompt.”

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

## **E. The Proposed Permit’s Startup/Shutdown, Malfunction, Maintenance, and Upset Provision Violates 40 CFR Part 70**

Condition 8 in this proposed permit states in part that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused if such violations are unavoidable.” The condition goes on to describe the actions and recordkeeping and reporting requirements that the facility must adhere to in order for the Commissioner to excuse a violation as unavoidable. In this petition, we refer to this condition as the “excuse provision.” As detailed below, the excuse provision included in this proposed permit violates 40 CFR Part 70 in a number of ways.

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

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

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

The excuse provision included in the draft permit and in New York’s SIP mandates that “[r]easonably available control technology, as determined by the commissioner, shall be applied during any maintenance, start-up, or malfunction condition.” See 6 NYCRR § 201.5(e); see also 6 NYCRR § 201-1.4. Under 40 CFR § 70.6(a)(1), each Title V permit must include “operational requirements and limitations that assure compliance with all applicable requirements.” Since the requirement to apply RACT during maintenance, startup, or malfunction conditions is included in New York’s SIP, it is an applicable requirement. To assure each facility’s compliance with this requirement, DEC must include terms and conditions in each permit that clarify what constitutes RACT for this facility during maintenance, startup, and malfunction conditions. The final permit issued for this facility must also include monitoring, recordkeeping, and reporting requirements that will assure that RACT is employed during maintenance, startup, and malfunction conditions. See 40 CFR § 70.6(c)(1) (requiring each Title

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

V permit to include “monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit”). In situations where RACT is no different during these periods from what is required under other operating conditions, DEC must explain and justify this determination in the statement of basis. The permit must be clear that compliance with the requirement to employ RACT during startup, maintenance, and malfunction conditions does not excuse the facility from compliance with applicable emission limitations.

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

New York’s SIP-approved excuse provision gives the Commissioner the authority to excuse a violation of an applicable requirement during startup, maintenance, and malfunction conditions if they qualify as “unavoidable.” The standard by which the Commissioner is to determine whether a violation is unavoidable is not included in either the regulation or the draft permit. Without a clear standard to guide the Commissioner’s determination as to whether a violation is unavoidable, there is no basis on which a member of the public or U.S. EPA may challenge a Commissioner’s decision to excuse a violation. Since New York’s SIP provision allows the Commissioner to entirely excuse a violation, rather than simply exercising her discretion by not bringing an enforcement action, the lack of a practicably enforceable standard by which the excuse provision will be applied seriously undermines the enforceability of this permit.<sup>2</sup> The permit must explicitly define the circumstances under which a facility can apply for a violation to be excused.<sup>3</sup>

Though New York’s SIP-approved excuse provision lacks an explicit definition as to what qualifies for an excuse, the Commissioner must exercise her discretion in accordance with Clean Air Act requirements. In other words, the Commissioner must define “unavoidable” as it is defined by EPA in its Startup/Shutdown/Malfunction Policy, as set forth in EPA’s 9/28/82, 2/15/83, and 9/20/99 memorandums. In order to clarify the standard that applies to the Commissioner’s determinations regarding whether a violation is unavoidable and therefore assure the public that permitted facilities are not allowed to operate in violation of applicable requirements, the permit must be modified to state that the Commissioner shall determine whether a violation is unavoidable based on the criteria in U.S. EPA’s memorandum dated September 20, 1999 entitled “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown.” In addition, the permit must include specific criteria regarding when this permittee’s emission exceedances may qualify for an excuse. Specifically, what constitutes “startup,” “malfunction,” and “maintenance” must be explicitly defined in

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

<sup>3</sup> DEC’s recommendation that NYPIRG look in a dictionary for the definition of “unavoidable” is unsatisfactory.



the permit. This clarifying language is necessary in order to assure each facility's compliance with all applicable requirements under 40 CFR § 70.6(a)(1).

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

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

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

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

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

- (1) *Violations due to Startup, Shutdown and Maintenance.*<sup>4</sup> The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (The draft permit condition 5 only requires reports of violations due to startup, shutdown, or maintenance "when requested to do so in writing").<sup>5</sup> The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report explaining why the violation was unavoidable. (The draft permit does not require submittal of a report "if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting

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<sup>4</sup> NYPIRG interprets U.S. EPA's 1999 memorandum as prohibiting excuses due to maintenance.

<sup>5</sup> See Condition 8(a) in the proposed permit.

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

- (2) *Violations due to Malfunction.* The facility must provide both telephone and written notification and to DEC within two working days of an excess emission that is allegedly unavoidable due to “malfunction.” (The draft permit condition 8 only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement.)<sup>6</sup> The facility must submit a detailed written report within thirty days after the facility exceeds emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The draft permit only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”).<sup>7</sup>

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

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

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<sup>6</sup> See Condition 8(b) in the draft permit.

<sup>7</sup> Id.

**F. The Draft Permit Does Not Assure Compliance With All Applicable Requirements Because Many Individual Permit Conditions Lack Adequate Monitoring and are not Practicably Enforceable**

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

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

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

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

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

### Analysis of specific proposed permit conditions

#### **Condition 5 (Maintenance of Equipment):**

The proposed permit recites the general requirement under 6 NYCRR § 200.7 that pollution control equipment be maintained according to ordinary and necessary practices, including manufacturer's specifications. This requirement applies to Maimonides because it relies upon an abator to control emissions from its ethylene oxide sterilizer. Unfortunately, this condition is unenforceable because the proposed permit does not explain exactly how Maimonides must do to comply with the condition. For a permit condition to be practically enforceable, it must define exactly what the facility must do to comply with the requirement, and must require the facility to monitor its own compliance. Because ethylene oxide gas is a suspected carcinogen, it is essential that Maimonides' permit assures proper maintenance of equipment intended to control ethylene oxide emissions.

DEC responded to NYPIRG's comments on this condition by stating:

Based on engineering judgment, we believe that incorporating this information as enforceable permit conditions would be both onerous and unnecessary. If the required control equipment fails to operate properly and permit limits are exceeded an enforcement action would be initiated.

*DEC Response to NYPIRG's Comments on the Title V Operating Permit for Maimonides Medical Center* (hereinafter, "DEC Response"), p. 4. DEC's response is inadequate to justify the lack of adequate monitoring to assure the facility's compliance with this applicable requirement. 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 proposed permit lacks conditions designed to assure Maimonides' compliance with an applicable SIP requirement. DEC does not provide a valid justification for its determination that no monitoring is necessary to assure compliance with this condition. Instead, DEC simply alleges that based upon "engineering judgment," periodic monitoring would be "onerous and unnecessary."

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 the facility 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 Maimonides complies with this requirement because the permit condition is not supported by monitoring.

DEC does assert that Conditions 74, 75, 89, 90, 91 and 92 are sufficient to assure proper maintenance of the ethylene oxide sterilizer. A review of these conditions reveals that DEC's assertion is obviously false. Conditions 74 and 75 both require that the ethylene oxide abator be in operation

whenever ethylene oxide sterilization is conducted. Neither condition requires any kind of monitoring to assure the facility's compliance. Moreover, neither condition has anything to do with whether the abator is being properly maintained. The remaining conditions listed by DEC are not included in the federally enforceable section of the operating permit, which means that they cannot be relied upon for purposes of fulfilling the Clean Air Act requirement that each Title V permit include conditions that assure compliance with applicable requirements. Conditions 89-92 also suffer from other defects, and are discussed in more depth later in this petition.

The Administrator must object to the proposed permit because it lacks monitoring sufficient to assure the facility's compliance with the equipment maintenance requirement, and DEC fails to provide a reasonable justification for why the proposed permit assures the facility's compliance despite the lack of such monitoring.

**Conditions 9 and 10 (air contaminants collected in air cleaning devices):**

Conditions 9 and 10 both apply to the handling of air contaminants collected in an air cleaning device. The proposed permit violates 40 CFR Part 70's monitoring requirements because it lacks any kind of monitoring to assure the facility's compliance with these conditions. NYPIRG agrees that general conditions should be included in Title V permits, but such general conditions must be supplemented with facility-specific conditions that cover equipment that is in use at the facility at the time of permit issuance. Though DEC claims that sufficient monitoring is included in this proposed permit, DEC provides no explanation as to what this monitoring consists of and NYPIRG is unable to locate such monitoring in the proposed permit.

**Condition 14 (Applicable Criteria):**

This condition provides that the facility must comply with "approved criteria, emission limits, terms, conditions, and standards in the permit." It then goes on to state that applicable requirements include reporting requirements and operations under an accidental release plan, response plan, and compliance plan, as well as support documents submitted as a part of the permit application. In commenting on the draft permit, NYPIRG told DEC that a vague reference to "support documents" is insufficient to create legally enforceable permit requirements. The requirements of any accidental release plan, response plan, or compliance plan must be incorporated into the draft permit. If such documents exist, they are applicable requirements and must be included as permit terms. Furthermore, any requirements contained in "support documents submitted as part of the permit application for this facility" must be incorporated directly into the permit. In response, DEC told NYPIRG that all of the relevant requirements of any supporting documents have been fully incorporated into the draft permit. Specifically, "by reference, the requirements that may be contained in any of these plans are included in the permit." DEC Response, p. 8.

DEC's assertion that Condition 14 is sufficient to incorporate all applicable requirements into the permit by reference is incorrect. 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. This proposed 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 Bergen Point is clear. If U.S. EPA allows DEC to proceed with this approach to incorporating requirements into New York Title V permits, government officials and members of the public are bound to be confronted with enforcement difficulties in the future.

**Condition 26 (Clean Air Act § 112 Requirements):**

NYPIRG submitted the following comment to DEC regarding this condition in the draft permit:

This is the first draft permit released for a facility in New York City that explains the applicability of §112(r) to the facility. We appreciate the addition of this condition to the draft permit and we hope that DEC will include this information in all other Title V permits. To satisfy legal requirements, however, more detail needs to be included in the draft permit regarding the facility's §112(r) plan. Much of this information could be placed in the statement of basis accompanying the draft permit. In particular, the permit must include information about whether the facility has already created a §112(r) plan, what type of requirements are contained in the §112(r) plan, and whether the "annual certification" described in Condition 29 is the same as the annual compliance certification or whether it is a different document requiring more detailed information. Also, the draft permit must clarify the legal status of the §112(r) plan. To do this, the draft permit must explicitly incorporate the requirements of the §112(r) plan for the facility. NYPIRG has reviewed the file on this facility that is maintained at DEC's Long Island City office, and there is no indication that a §112(r) plan exists for the facility. If the § 112(r) plan is not readily available to the public, the terms of the plan must be included in the facility's Title V permit.

DEC responded by stating that “[i]f the provisions do apply, the permittee would be referred to the requirements listed under 40 CFR Part 60.” DEC Response, p. 8. Needless to say, NYPIRG is confused by DEC’s response because the permit continues to say that § 112 applies to the facility, but there is no reference in the permit to 40 CFR Part 60.

If Clean Air Act § 112(r) does apply to this facility, the requirements of the § 112(r) plan are applicable requirements that must be included in this Title V permit.

**Condition 29 (Compliance Certification):**

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

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

**Condition 32 (Required Emissions Tests):**

Condition 32 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 Maimonides 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. The EPA Administrator must object to this condition because it does not adequately incorporate the underlying applicable requirement.

**Condition 35 (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 the facility'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 (COMS). This is a nationwide issue that is being dealt with on a source category-by-source category basis. At this point in time the Department has 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. The Department is currently working to establish engineering parameters that will result in an appropriate visible emission periodic monitoring policy which will be applicable to all facilities for which visible emissions monitoring is required.

*DEC Response*, p. 11. The two conditions that DEC claims to have added to the proposed permit are not actually included in the permit. Even if they were, they would in no way address the lack of monitoring, since they simply restate the old condition in a much longer fashion and still do not require any monitoring.

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.<sup>8</sup>

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<sup>8</sup> In fact, the Clean Air Act scheme of providing state agencies with responsibility for and a degree of discretion over the design of Title V programs operates as an incentive for each state permitting authority to make determinations regarding issues that have not been fully resolved by U.S. EPA.



It is also unclear how the information provided in DEC's regarding the "emission point universe" relates to Maimonides. Maimonides' Title V permit must assure compliance at each emission point. DEC may not omit required monitoring from this permit on the basis that DEC has not gotten around to developing an appropriate monitoring regime.

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

**Condition Requiring Annual Tune-up of Small Boilers:**

6 NYCRR 227-2.4(d) requires the owners of small boilers to perform an annual tune-up in accordance with the manufacturer's recommended procedures or the procedures of an approved specialist. NYPIRG commented to DEC on the draft permit that the permit must include detail as to what procedures must be included in the annual tune-up. DEC not only refused to add detail, but actually deleted the part of the conditions that required the tuneups to be performed in accordance with "procedures provided by the manufacturer."

To assure compliance with the underlying applicable requirement, DEC must include additional detail with respect to what kind of procedures must be employed during the annual tuneup. In addition, the facility must be required to keep records that specify exactly what was done in the annual tuneup. This is not an onerous requirement given that the tuneup only happens once each year. Under the conditions included in the proposed permit, the facility would be in compliance so long as someone did something to adjust the equipment each year. NYPIRG asked DEC to require Maimonides to submit a report of required monitoring at least once every six months. DEC replied that "DEC will not request the facility to submit the log book every six months as is requested by NYPIRG." DEC Response, p. 12. NYPIRG is not requesting that the entire log book be submitted every six months. Rather, the facility must submit reports of any required monitoring at least every six months as required by the Title V program.

**Condition 56, 71 (opacity limit under 6 NYCRR § 227-1.3(a):**

This condition does not assure the facility's compliance with 6 NYCRR § 227-1.3(a) because it fails to specify exactly what kind of monitoring is to take place. While it states that the "reference test method" is Method 9, it does not make it clear that the permittee must perform a Method 9 test each day. According to DEC, these conditions establish that the permittee "can conduct Method 9 monitoring daily using the 6-Minute Average Method (Method 9)." Of course, there was never any dispute over the fact that the permittee has the right to perform a Method 9 test whenever it wants. The issue is the lack of required monitoring under this permit. In addition, the proposed permit fails to require the facility to keep records of monitoring results that could be used by government officials and members of the public to monitor the facility's ongoing compliance.

**Missing Conditions Governing Particulates:**

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

No person shall cause, permit, or allow a two hour average emission into the outdoor atmosphere of particulates in excess of 0.10 pound per million BTU heat input from:

1. any oil fires [sic] stationary combustion installation.

This particulate emissions rate is stricter than the standard provided in New York's current 6 NYCRR § 227-1.2(a)(2), which allows Maimonides to emit particulates at a rate of 0.2 pounds per million BTUs. U.S. EPA explicitly rejected New York's current 6 NYCRR § 227-1.2(a)(2) for approval into the SIP in 1984 (at the time it was numbered 227.3(a)(2), stating that "Section 227.3(a)(2) of 6 NYCRR, as submitted on August 10, 1979, is disapproved because it is inconsistent with 40 CFR Subpart G, Control Strategy: Sulfur oxides and particulate matter." 40 CFR § 52.1679. At no time was the 1972 version of the rule as approved into the SIP removed from the SIP.

In response to NYPIRG's comments on the draft Maimonides permit, DEC replied:

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

DEC Response, p. 14. DEC's response is unacceptable because the particulate emissions limit contained in the SIP is a generally applicable limit that is not contingent on whether New York is in attainment or non-attainment with the federal particulate matter standard.

40 CFR § 70.1(b) provides that "[a]ll sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements." SIP requirements are specifically included in the definition of "applicable requirements" under 40 CFR § 70.2 and 6 NYCRR § 201-2.1(b)(5). Thus, neither DEC nor U.S. EPA possess legal authority to leave the 0.10 mm/Btu particulate matter emissions standard out of the federally enforceable section of Maimonides' Title V permit. In addition to including the proper limit, Maimonides' Title V permit must include monitoring,

recordkeeping, and reporting that is sufficient to assure its compliance with the 0.10 mm/Btu standard. In the absence of the inclusion of the 0.10 mmBtu standard and monitoring sufficient to assure the facility's compliance with that standard, U.S. EPA must object to the permit as violating the requirements of 40 CFR Part 70.

### **Conditions Governing the Ethylene Oxide Sterilizer:**

Conditions 74 and 75: These conditions require the abator to be in operation whenever ethylene oxide sterilization is conducted. The proposed permit fails to assure the facility's compliance with this condition, however, because there are no federally enforceable conditions that require the facility to monitor the operation of the abator.

Conditions 89, 90, 91, and 92 are all based on 6 NYCRR § 212.9 and are included in the permit as state-only conditions. These conditions are federally enforceable and must be moved to the federally-enforceable section of the permit. Though the most recent version of 6 NYCRR Part 212 has not been approved into New York's SIP, an older version was approved on 7/19/85. The SIP rule supports these conditions. According to DEC, "[e]thylene oxide is an extremely hazardous material and is given an environmental rating of "A." Under SIP rule 6 NYCRR § 212.3(a), "No person shall cause or allow emissions that violate the requirement specified in Table 2 or Table 3 of this Part for the environmental rating issued by the commissioner." Table 2 indicates that any facility that emits more than 1.0 lb/hr of an A-rated contaminant must achieve 99% or greater control or best available control technology." DEC explains that emissions from Maimonides are in fact greater than 1.0 lb/hr. DEC response, p. 15. Thus, permit conditions 89-92 are all based on applicable requirements that must be placed on the federal side of the Title V permit.

The Administrator must also object to proposed permit conditions 89-92 because they are insufficient to assure the facility's compliance with the requirement that Maimonides achieve 99% or better control of ethylene oxide emissions. First, each condition states that compliance will be measured based on a 24-hour average, but DEC provides no explanation in the statement of basis for why a 24-hour average is appropriate in the case of a highly carcinogenic air pollutant. The SIP rule does not provide for a 24-hour average. Second, the proposed permit fails to explain whether the facility is required to achieve the 99% reduction or, alternatively, whether the facility is required to apply BACT. Third, while Conditions 90 and 92 establish certain recordkeeping requirements, DEC provides no evidence that would justify a determination that these recordkeeping requirements are sufficient to assure the facility's compliance. There is no explanation whatsoever for the link between the parameters being monitored and the control requirement.

Finally, SIP rule 6 NYCRR § 212.7(a) states that:

No person will cause or allow emissions having an average opacity (six minute) of 20 percent or greater from any process or exhaust and/or ventilation system, except only the emission of uncombined water.

This applicable requirement is missing from the proposed permit.

### **Conclusion**

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the proposed Title V permit Maimonides Medical Center.

Respectfully submitted,

Dated: October 24, 2001  
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