



things:

- (a) the Act's New Source Review ("NSR") provisions including the Prevention of Significant Deterioration ("PSD") provisions of 42 U.S.C. §§ 7470-92 and 40 C.F.R. § 52.21, incorporated into New York law in 6 N.Y.C.R.R. § 200.10; and related claims under New York regulations;
- (b) the common law of public nuisance regarding emissions of nitrogen oxides ("NO<sub>x</sub>") and sulfur dioxide ("SO<sub>2</sub>") from the Huntley and Dunkirk Stations;
- (c) the common law of restitution and damages regarding alleged harm to human health and the environment in New York stemming from alleged violations of state and federal law at the Huntley and Dunkirk Stations; and
- (d) State Executive Law § 63(12) regarding fraudulent or illegal acts in the conduct of business in New York causing harm to human health and environment in New York.

WHEREAS, the alleged violations are based upon actions and/or omissions of Niagara Mohawk Power Corporation, the prior owner and operator of the facilities relevant herein, to which a Notice of Violation ("NOV") was issued on or about May 25, 2000, regarding such actions and/or omissions;

WHEREAS, NRG filed a Motion to Dismiss the Complaint on March 28, 2002, for failure to state a claim against NRG because it alleged that the PSD requirements relate only to the owner or operator alleged to have undertaken modifications in violation of the Act, and not

to a subsequent purchaser of the assets;

WHEREAS, the State filed an Amended Complaint on July 17, 2002, amending allegations as to ownership and control by certain non-owner NRG entities, but leaving the substantive allegations against NRG in place, and also dropping NRG Northeast Generation as a party;

WHEREAS, the Court granted NRG's Motion to Dismiss in its entirety on March 27, 2003, ruling that NRG has not violated, and could not have violated, the PSD requirements of the Act relating to modifications undertaken by Niagara Mohawk Power Corporation;

WHEREAS, following the Court's March 27, 2003 ruling, the State sought leave to file a Second Amended Complaint on April 28, 2003, which was granted by the Court on December 31, 2003;

WHEREAS, the Second Amended Complaint removed allegations that NRG has violated the PSD requirements of the Act and the ECL, and adds allegations that NRG has violated the terms of its Title V operating permit and that NRG has operated its Huntley and Dunkirk Stations with a deficient Title V operating permit, in violation of Sections 502(a) and 504(a) of the Act, 42 U.S.C. §§ 7661a(a) and 7661c(a), respectively, and associated federal and state regulations at 40 C.F.R. Part 70 and 6 N.Y.C.R.R. Part 201;

WHEREAS, NRG asserts that it cannot be liable for any violation, nor have any obligations under its Title V permit, absent a judicial determination that the alleged actions of Niagara Mohawk Power Corporation regarding underlying modifications at the Huntley and Dunkirk Stations violated the Act and the ECL;

WHEREAS, NRG, on its own behalf and without prejudice to the rights, arguments, and defenses of the prior owners, denies the violations alleged in the Complaint, the Amended Complaint, and the Second Amended Complaint, and maintains that it has been and remains in compliance with the Act and related federal and state regulations and laws and is not liable for civil penalties or injunctive relief;

WHEREAS, the State and NRG agree that, notwithstanding their respective positions on the issues herein, settlement of this action is in the best interest of the Parties and in the public interest, and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter; and

WHEREAS, in the interest of resolving the dispute, NRG commits to reducing SO<sub>2</sub> and NO<sub>x</sub> emissions from the Dunkirk and Huntley Stations by 86.8% and 80.9%, respectively, below baseline emissions of 107,144 tons SO<sub>2</sub> and 17,005 tons NO<sub>x</sub>, and the State agrees to release NRG from liability for any violations alleged in this action and to other terms as set forth herein.

NOW, THEREFORE, without any admission of fact or law, without any adjudication on the merits of the allegations set forth in the NOV, the Complaint, Amended Complaint, or Second Amended Complaint and without any admission of the violations alleged in the NOV, Complaint, Amended Complaint, or Second Amended Complaint, it is hereby ORDERED AND ADJUDGED as follows:

**I. JURISDICTION AND VENUE**

1. The Court has jurisdiction of this matter pursuant to section 304 of the Act, 42 U.S.C. § 7604 and pursuant to 28 U.S.C. §§ 1331, 1355 and 1367 and ECL §§ 71-2103 and 2107. Solely for the purposes of this Consent Decree and the State's underlying complaints,

NRG waives all objections that it may have to the jurisdiction of the Court, and to venue. Except as expressly provided for herein, this Consent Decree shall not create any rights in any Party other than the State and NRG.

## **II. APPLICABILITY**

2. The provisions of this Consent Decree shall apply to and be binding upon the State and upon NRG, its affiliates, successors and assigns. NRG's obligations under this Consent Decree are independent of, and in addition to, any applicable requirements under federal and state law, including but not limited to those requirements set forth in existing and/or future operating permits issued by the Department of Environmental Conservation to the Huntley or Dunkirk Stations.

3. If NRG proposes to sell or transfer any of its assets or operations subject to the requirements of this Consent Decree prior to the fulfillment of NRG's obligations under this Consent Decree, it shall advise the purchaser or transferee in writing of the existence of this Consent Decree before such sale or transfer. The purchaser or transferee shall be made a Party-Defendant to this Consent Decree and thereby consent to joint and several liability with NRG for all the requirements of this Consent Decree that may be applicable to each such unit subject to sale or transfer. Upon a showing by NRG and/or the purchaser or transferee that (a) the purchaser or transferee has the financial capability, technical capability, and recent history of compliance to justify a transfer of liability from NRG to the purchaser or transferee; and (b) the purchaser or transferee has contracted or will contract with NRG to assume the obligations and liabilities applicable to each unit subject to such sale or transfer, the State shall agree to such a modification of this Consent Decree that shall make the purchaser or transferee solely liable as a

Party-Defendant to this Consent Decree for all requirements under this Consent Decree that are applicable to the purchased or transferred unit.

4. Nothing in this Consent Decree shall be construed to impede NRG and any purchaser or transferee of assets or operations subject to this Consent Decree from contractually allocating as between themselves the burdens of compliance with this Consent Decree; provided, however, that both NRG and such purchaser or transferee shall remain jointly and severally liable to the State for the obligations of this Consent Decree until such time as a modification to this Consent Decree occurs under Paragraph 3 of this Consent Decree, except that NRG shall not be liable for stipulated or other penalties for the acts and omissions of a bona fide purchaser of the assets.

5. In any action to enforce this Consent Decree, NRG shall not assert as a defense the failure of its employees, servants, agents, or contractors to take actions necessary to comply with this Consent Decree, unless NRG establishes that such failure resulted from a Force Majeure event, as defined in this Consent Decree.

### **III. DEFINITIONS**

The following definitions apply solely for purposes of this Consent Decree:

6. “Annual Tonnage Limitation” means the maximum tons of SO<sub>2</sub> or NO<sub>x</sub> emissions that the Huntley and Dunkirk Stations may collectively emit during any calendar year covered by this Consent Decree.

7. “Baseline Emissions” means the average annual rate, in tons per year, that the Huntley and Dunkirk Stations emitted SO<sub>2</sub> or NO<sub>x</sub> from July 1, 1999 to June 30, 2001.

Baseline SO<sub>2</sub> Emissions are 107,144 tons. Baseline NO<sub>x</sub> Emissions are 17,005 tons.

8. “Consent Decree” means this Consent Decree.
9. “Continuous emissions monitoring system” or “CEMS” has the same meaning as in 40 C.F.R. § 72.2 and shall be installed and maintained as required by 40 C.F.R. Part 75 for emissions of both SO<sub>2</sub> and NO<sub>x</sub>.
10. “DEC” refers to the New York State Department of Environmental Conservation.
11. “Dunkirk Station” means the Dunkirk Generating Station located in Dunkirk, Chautauqua County, New York, owned and operated by NRG. The Dunkirk Station consists of four generating units known as Units 1, 2, 3, and 4.
12. “Emissions Shortfall” refers to a situation at an electricity generating station owned or operated by NRG in which in a calendar year, the actual annual emissions of SO<sub>2</sub> exceed SO<sub>2</sub> allowances allocated to all the units at the station.
13. “Huntley Station” means the C.R. Huntley Generating Station located in Tonawanda, Erie County, New York, owned and operated by NRG. The Huntley Station consists of six generating units known as Units 63, 64, 65, 66, 67, and 68.
14. “KW” means a kilowatt, which is one thousandth of a megawatt (“MW”).
15. “lb/mmBTU” means pounds per million British Thermal Units of heat input.
16. “MW” means a megawatt or one million watts.
17. “NO<sub>x</sub>” means oxides of nitrogen.
18. “NO<sub>x</sub> RACT” means Reasonably Available Control Technology for Oxides of Nitrogen under 6 N.Y.C.R.R. Subpart 227-2.

19. “PSD” means Prevention of Significant Deterioration within the meaning of Subchapter I of the Act, 42 U.S.C. §§ 7470-7492 and 40 C.F.R. Part 52.

20. “SO<sub>2</sub>” means sulfur dioxide.

21. “SO<sub>2</sub> allowance” has the same definition of “allowance” found at 42 U.S.C. § 7651a(3): “an authorization, allocated to an affected Unit, by the Administrator [of EPA] under [Subchapter IV of the Clean Air Act] to emit, during or after a specified calendar year, one ton of sulphur dioxide.”

All other terms have the same meaning as, and shall be construed consistent with, the definitions given such terms in 40 C.F.R. Part 60.

#### **IV. EMISSION REDUCTIONS**

##### **A. Planned Retirement of Units**

22. Within six (6) months from the date of entry of the Consent Decree, NRG shall submit a petition to the New York State Public Service Commission (“PSC”) for a determination as to whether PSC approval is required before NRG permanently discontinues operation of Huntley Units 63 and 64 and shall provide notice to the New York Independent System Operator (“NYISO”) of NRG’s intent to retire these units. NRG shall permanently discontinue operation of Huntley Units 63 and 64 within thirty (30) days of receiving a decision on the petition to PSC or, if PSC approval is required, within thirty (30) days of receiving approval from the PSC of the planned retirements. Within eighteen (18) months from the date of entry of the Consent Decree, NRG shall submit a petition to the PSC for a determination as to whether PSC approval is required before NRG permanently discontinues operation of Huntley Units 65 and 66 and shall provide notice to the NYISO of NRG’s intent to retire these units.

NRG shall permanently discontinue operation of Huntley Units 65 and 66 within thirty (30) days of receiving a decision on the petition to PSC or, if PSC approval is required, within thirty (30) days of receiving approval from the PSC of the planned retirements.

B. Annual Tonnage Limitations For SO<sub>2</sub>

23. Beginning in 2005, NRG shall meet the below-listed, cumulative Annual Tonnage Limitations for emissions of SO<sub>2</sub> from the Huntley and Dunkirk Stations. Subject to the stipulated penalties at Paragraph 46, NRG shall not emit SO<sub>2</sub> cumulatively from the Huntley and Dunkirk Stations in an amount greater than the following:

From January 1, 2005 through December 31, 2005	59,537 tons
From January 1, 2006 through December 31, 2006	34,230 tons
From January 1, 2007 through December 31, 2007	30,859 tons
From January 1, 2008 through December 31, 2008	22,733 tons
From January 1, 2009 through December 31, 2009	19,444 tons
From January 1, 2010 through December 31, 2010	19,444 tons
From January 1, 2011 through December 31, 2011	19,444 tons
From January 1, 2012 through December 31, 2012	16,807 tons
From January 1, 2013 through December 31, 2013, and annually thereafter	14,169 tons

24. NRG shall reduce its emissions to meet the above Annual Tonnage Limitations for SO<sub>2</sub> through installation of control technology, fuel switching, repowering, and/or reduced utilization of any units and the retirement of Huntley 63-66, or any combination thereof. If, due to unforeseen circumstances, NRG retires unit(s) other than Huntley 63-66, the parties agree to meet and confer regarding appropriate revision of the Annual Tonnage

Limitation in Paragraph 23. If the parties cannot reach agreement, they will follow the dispute resolution procedures set forth in Section X.

25. By June 1, 2013, NRG shall apply to DEC for an operating permit modification or, if authorized under applicable law, a plantwide applicability limit (“PAL”) permit to convert the 2013 Annual Tonnage Limitation for SO<sub>2</sub> into plant-specific permit limits for the Huntley and Dunkirk Stations. NRG may propose the allocation of the 2013 Annual Tonnage Limitation at the Huntley and Dunkirk Stations; such proposal shall be subject to DEC approval. DEC’s approval of any proposed allocation of the Annual Tonnage Limitation by NRG shall not be unreasonably withheld and DEC shall not use this Consent Decree as a basis to impose additional emission reductions in the permitting process. If DEC does not issue a revised operating permit or PAL permit incorporating the plant-specific permit limits by December 31, 2013, Paragraph 46 of this Consent Decree (Stipulated Penalties) shall continue in effect until the revised operating permit or PAL permit is issued. In such case, Paragraph 46 shall be triggered if NRG exceeds, at either the Huntley or Dunkirk Stations, its proposed allocation of the Annual Tonnage Limitation. To the extent NRG desires to convert the 2013 Annual Tonnage Limitation into a PAL in an earlier year, NRG may do so, to the extent allowed by otherwise applicable law. NRG may also comply with this paragraph by choosing, as part of the renewal of the Huntley and Dunkirk Stations’ Title V permits prior to June 1, 2013, to convert the 2013 Annual Tonnage Limitation to plant-specific permit limits that will become effective on January 1, 2014, subject to the review and approval of DEC pursuant to 6 N.Y.C.R.R. § 201-6 and § 621.

26. Within ninety (90) days after entry of this Consent Decree, NRG shall submit a protocol for the modeling of SO<sub>2</sub> from the Dunkirk Station for approval by DEC and shall meet with DEC to discuss the modeling protocol and whether other steps are necessary to ensure that SO<sub>2</sub> emissions from the Dunkirk Station will not cause or contribute to nonattainment of the twenty-four (24) hour national ambient air quality standard (“NAAQS”) for SO<sub>2</sub>.

C. Annual Tonnage Limitations For NO<sub>x</sub>

27. Beginning in 2005, NRG shall meet the below-listed, cumulative Annual Tonnage Limitations for emissions of NO<sub>x</sub> from the Huntley and Dunkirk Stations. Subject to the stipulated penalties at Paragraph 46, NRG shall not emit NO<sub>x</sub> cumulatively from the Huntley and Dunkirk Stations in an amount greater than the following:

From January 1, 2005 through December 31, 2005	10,777 tons
From January 1, 2006 through December 31, 2006	6,772 tons
From January 1, 2007 through December 31, 2007	6,211 tons
From January 1, 2008 through December 31, 2008	6,211 tons
From January 1, 2009 through December 31, 2009	5,388 tons
From January 1, 2010 through December 31, 2010	4,861 tons
From January 1, 2011 through December 31, 2011	4,861 tons
From January 1, 2012 through December 31, 2012, and annually thereafter	3,241 tons

28. NRG shall reduce its emissions to meet the above Annual Tonnage Limitations for NO<sub>x</sub> through installation of control technology, fuel switching, repowering, and/or reduced utilization of any units and the retirement of Huntley 63-66, or any combination thereof. If, due to unforeseen circumstances, NRG retires unit(s) other than Huntley 63-66, the

parties agree to meet and confer regarding appropriate revision of the Annual Tonnage Limitation in Paragraph 27. If the parties cannot reach agreement, they will follow the dispute resolution procedures set forth in Section X.

29. The Annual Tonnage Limitations for NO<sub>x</sub> shall not affect NRG's system averaging plan for NO<sub>x</sub> RACT Compliance.

30. By June 1, 2013, NRG shall apply to DEC for an operating permit modification or, if authorized under applicable law, a PAL permit to convert the 2012 Annual Tonnage Limitation for NO<sub>x</sub> into plant-specific permit limits for the Huntley and Dunkirk Stations. NRG may propose the allocation of the 2012 Annual Tonnage Limitation at the Huntley and Dunkirk Stations; such proposal shall be subject to DEC approval. DEC's approval of any proposed allocation of the Annual Tonnage Limitation by NRG shall not be unreasonably withheld and DEC shall not use this Consent Decree as a basis to impose additional emission reductions in the permitting process. If DEC does not issue a revised operating permit or PAL permit incorporating the plant-specific permit limits by December 31, 2013, Paragraph 46 of this Consent Decree (Stipulated Penalties) shall continue in effect until the revised operating permit or PAL permit is issued. In such case, Paragraph 46 shall be triggered if NRG exceeds, at either the Huntley or Dunkirk Stations, its proposed allocation of the Annual Tonnage Limitation. To the extent NRG desires to convert the 2012 Annual Tonnage Limitation into a PAL in an earlier year, NRG may do so, to the extent allowed by otherwise applicable law. NRG may also comply with this paragraph by choosing, as part of the renewal of the Huntley and Dunkirk Stations' Title V permits prior to June 1, 2013, to convert the 2012 Annual Tonnage Limitation to plant-

specific permit limits that will become effective on January 1, 2014, subject to the review and approval of DEC pursuant to 6 N.Y.C.R.R. § 201-6 and § 621.

D. Restrictions on the Sale or Transfer of SO<sub>2</sub> Allowances

31. For purposes of ¶¶ 32-36 herein, NRG shall refer to NRG Energy, Inc., and any of its subsidiaries, whether owned in whole or in part.

32. For any and all actions taken by NRG to conform to the requirements of this Consent Decree, NRG shall not sell or transfer to any third party any resulting SO<sub>2</sub> allowances in any emission trading or marketing program of any kind, except as provided in this Consent Decree.

33. SO<sub>2</sub> allowances allocated to the Huntley and Dunkirk Stations by the Administrator of the U.S. Environmental Protection Agency under the Act may be used by NRG to meet federal or any state air pollution regulatory requirements for the Huntley and Dunkirk Stations or for the purpose of addressing an Emissions Shortfall at any other electricity generating stations owned or operated by NRG as of the date of entry of this Consent Decree. NRG also may use Huntley and Dunkirk Station SO<sub>2</sub> allowances for the purpose of addressing an Emissions Shortfall at any electricity generating stations acquired by NRG after the date of entry of this Consent Decree that are not located in the District of Columbia or in any of the following states: Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin. However, nothing in the preceding sentence shall prohibit NRG from using Huntley and Dunkirk allowances at any new electricity generating unit constructed in New York after the date of this Consent Decree.

34. Nothing in this Consent Decree shall preclude NRG from using, selling or transferring SO<sub>2</sub> allowances that are not required for compliance with Title IV of the Act at the Huntley and Dunkirk Stations and that are the result of:

- (a) activities that occur prior to the date of entry of this Consent Decree; or
- (b) achieving SO<sub>2</sub> emission reductions that are below the Annual Tonnage Limitations for SO<sub>2</sub> set forth in this Consent Decree.

35. NRG may not utilize SO<sub>2</sub> allowances from another source for purposes of complying with the requirements of this Consent Decree. However, nothing in this Consent Decree shall prevent NRG from purchasing or otherwise obtaining SO<sub>2</sub> allowances from another source for purposes of complying with federal or state air pollution requirements to the extent otherwise allowed by law.

36. The restrictions on the use, sale or transfer of SO<sub>2</sub> allowances in Paragraphs 32 and 33 of this Consent Decree shall be inapplicable for any year in which any future federal or state emission reduction programs applicable to the Huntley and Dunkirk Stations require the surrender of SO<sub>2</sub> allowances in an amount equal to or greater than two allowances for each ton of SO<sub>2</sub> emitted.

E. Prohibition On Netting Credits For NO<sub>x</sub> And SO<sub>2</sub> Emission Reductions

37. For any and all emission reduction actions taken by NRG to comply with the terms of this Consent Decree, any emission reductions achieved shall not be considered as a creditable contemporaneous emission decrease for the purpose of obtaining a netting credit under

the PSD and non-attainment NSR programs, except to the extent such decrease is greater than that required by this Consent Decree.

## **V. PERMITS AND RESOLUTION OF CLAIMS**

### **A. Permits**

38. Prior to the termination of this Consent Decree, NRG shall apply for amendments to its Title V Operating Permits for the Huntley and Dunkirk Stations as necessary to include in such Title V permit all applicable requirements from this Consent Decree that are consistent with the State Title V program.

### **B. Resolution of Past Claims**

39. The State covenants not to sue and releases NRG for all of the civil claims that were or could have been brought by the State against NRG for violations at the Huntley and Dunkirk Stations prior to and including the date of entry of this Consent Decree, of:

- (a) the PSD or Non-Attainment NSR provisions of Parts C and D of the Act and 40 C.F.R. § 52.21, and the New Source Performance Standards of 42 U.S.C. § 7411 and 40 C.F.R. Part 60;
- (b) 42 U.S.C. §§ 7661a(a) and 7661c(a), and 6 N.Y.C.R.R. §§ 201-1.2 (and any permit conditions in the Huntley and Dunkirk Title V operating permits that incorporate these requirements), 201-6.5(a)(1) and 201-6.5(a)(2);
- (c) 6 N.Y.C.R.R. § 200.10 (to the extent it incorporates the federal regulations at 40 C.F.R. § 52.21 and 40 C.F.R. Part 60) and Part 231; and

- (d) related claims at common law, including, but not limited to, public nuisance law and state common law of restitution and damages, pertaining to emissions of NO<sub>x</sub> and SO<sub>2</sub>.

C. Resolution of Future Claims

40. The State covenants not to sue NRG for civil claims under the PSD or Non-Attainment NSR provisions of Parts C and D of the Act, 42 U.S.C. § 7401 et seq.; the Title V operating permitting program under the Act, and associated federal and state regulations at 40 C.F.R. Part 70 and 6 N.Y.C.R.R. Part 201, respectively; the New Source Performance Standards of 40 C.F.R. Part 60, subpart D or Da, as applied to modifications as defined by 40 C.F.R. § 60.14; 6 N.Y.C.R.R. § 200.10 (to the extent it incorporates the federal regulations at 40 C.F.R. § 52.21 and Part 60, subparts D and Da, as applied to modifications as defined by 40 C.F.R. § 60.14), and 6 N.Y.C.R.R. Parts 201 and 231, at the Huntley and Dunkirk Stations to the extent such claims are based on failure to obtain PSD or non-attainment NSR permits for, or undertaking modifications as defined by 40 C.F.R. §§ 60.14 and 52.21, regarding:

- (a) work undertaken by NRG at the Huntley and Dunkirk Stations to meet the emission reduction requirements of this Consent Decree;  
or
- (b) repairs, replacement or maintenance or other changes to the units at the Huntley and Dunkirk Stations not required by this Consent Decree if:
  - (i) such change is commenced after the date of entry of this Consent Decree,

- (ii) with respect to NO<sub>x</sub> emissions, such change is commenced during the time this Consent Decree applies to the Unit at which this change has been made, is commenced prior to December 31, 2012, and is completed prior to December 31, 2013;
- (iii) with respect to SO<sub>2</sub> emissions, such change is commenced during the time this Consent Decree applies to the Unit at which this change has been made, is commenced prior to December 31, 2013, and is completed prior to December 31, 2014;
- (iv) NRG is otherwise in material compliance with this Consent Decree;
- (v) the Annual Tonnage Limitations for NO<sub>x</sub> and SO<sub>2</sub> are not exceeded; and
- (vi) hourly emission rates of NO<sub>x</sub> and SO<sub>2</sub> at the changed unit(s) do not exceed their respective maximum hourly emission rates prior to the change, as measured by 40 C.F.R. § 60.14(h).

41. The provisions of Paragraph 40 shall terminate on December 31, 2014; provided, however, that the State may not sue NRG at any time thereafter for work encompassed within Subparagraphs 40(a), 40(b)(ii), or 40(b)(iii), above.

## **VI. REPORTING AND RECORDKEEPING**

42. Annual Reports: Beginning on March 1, 2006, and every year thereafter for the duration of this Consent Decree, NRG shall report to the State the following information:

- (a) The total tons of SO<sub>2</sub> and NO<sub>x</sub> emitted from the Huntley and Dunkirk Stations during the prior calendar year and the percentage of SO<sub>2</sub> and NO<sub>x</sub> tons reduced from the Baseline Emissions at each Station.
- (b) Electric generation totals by unit for each of the Stations for the prior calendar year.
- (c) Fuel consumption for each fuel combusted at each unit for each of the Stations for the prior calendar year.

43. Emissions Reduction Reports: Beginning June 30, 2005, and every year thereafter for the duration of this Consent Decree, NRG shall inform DEC in writing of how it plans to achieve the emissions reductions required under this Consent Decree in the following calendar year.

44. Quarterly Reports: On or before thirty (30) days following the end of each calendar quarter for the duration of this Consent Decree, NRG shall report to the State the following information:

- (a) Year-to-date emissions totals for SO<sub>2</sub> and NO<sub>x</sub> by unit for each of the Stations through the calendar quarter just ended; and
- (b) Year-to-date emissions totals for SO<sub>2</sub> and NO<sub>x</sub> for the combined Stations through the calendar quarter just ended.

45. In determining the total tons of SO<sub>2</sub> and NO<sub>x</sub> emitted from the Huntley and Dunkirk Stations to demonstrate compliance with the Annual Tonnage Limitations, NRG shall use CEMS in accordance with those reference methods specified in 40 C.F.R. Part 75. However, for purposes of compliance with this Consent Decree, the Part 75, Table 1 and 2 missing data procedures shall be modified as follows: Table 1 and 2, the missing data procedure for monitor data availability below 80 percent shall not apply. Instead, the duration of outage and calculation routines for “80 or more, but below 90” shall apply for all monitor data availability below 90 percent.

## **VII. STIPULATED PENALTIES AND REMEDIES**

46. For purposes of this Consent Decree, within thirty (30) days after receipt of written demand from the State, and subject to the provisions of Sections IX (Force Majeure) and X (Dispute Resolution), NRG shall pay the following stipulated penalties to the State for each failure by NRG to comply with the terms of this Consent Decree:

- (a) For failure to meet the Annual Tonnage Limitation for SO<sub>2</sub> or NO<sub>x</sub> for a given year:
  - (i) for SO<sub>2</sub>: for emissions up to 1.99% over the Annual Tonnage Limitation, \$1,000 per ton; by 2% to 4.99%, \$3,000 per ton; by 5% to 9.99%, \$5,000 per ton; and by 10% or more, \$27,500 per ton; for NO<sub>x</sub>: for emissions up to 1.99% over the Annual Tonnage Limitation, \$2,000 per ton, by 2% to 4.99%, \$5,000 per ton, by 5% to 9.99%, \$10,000 per ton; and by 10% or more, \$27,500 per ton.

- (ii) NRG will reduce the Annual Tonnage Limitation for the following year by the number of tons that the Annual Tonnage Limitation was exceeded. Such reduction will not be carried forward in any subsequent year. However, in no event will any reduction under this subparagraph be reflected in the emission levels incorporated into the Huntley and Dunkirk Stations' Title V permits.
- (b) For failure to comply with the restriction on the sale or transfer of SO<sub>2</sub> allowances set forth in ¶¶ 32-33: two times the proceeds received from such sale, or for a transfer, two times the market value on the day of transfer.
- (c) For missing a reporting deadline in violation of ¶¶ 42-44 of this Consent Decree, \$1,500 per violation.
- (d) For failure to comply with Paragraph 25 or Paragraph 30 of this Consent Decree, or for failure to pay a disputed penalty into an escrow account pursuant to Paragraph 47 of this Consent Decree, \$1,500 per day, per violation, provided, however, that stipulated penalties for such violations shall not begin to accrue until the State provides written notice to NRG of the violation.

For purposes of this Consent Decree, NRG will not suffer any penalties for failure to meet the Annual Tonnage Limitations of this Consent Decree to the extent that such failure is due to an excused unavoidable event in accordance with the provisions of 6 N.Y.C.R.R. § 201-1.4, and NRG

follows the requirements contained therein. However, for purposes of determining NRG's compliance with the Annual Tonnage Limitations, only those emissions from the unavoidable event that exceed the average emissions rate (lb/mmBtu) over the past two years, multiplied by the actual heat input during the event, shall not be counted.

47. Should NRG dispute its obligation to pay part or all of a demanded stipulated penalty, it may avoid the imposition of a separate stipulated penalty for the failure to pay the disputed penalty and the further accrual of stipulated penalties by depositing the disputed amount in a commercial escrow account pending resolution of the matter and by invoking the Dispute Resolution provisions of this Consent Decree in Section X within the time provided in this Section VII of this Consent Decree for payment of the disputed penalty. If the dispute is thereafter resolved in NRG's favor, the escrowed amount plus accrued interest shall be returned to NRG. If the dispute is resolved in favor of the State, then the State shall be entitled to the amount determined to be due by the Court, plus accrued interest, from the escrow account. The balance in the escrow account, if any, shall be returned to NRG.

48. The State reserves the right to pursue any additional injunctive relief for NRG's violations of this Consent Decree. NRG shall not be required to remit any stipulated penalty that is disputed in compliance with Section X of this Consent Decree until the dispute is resolved in favor of the State.

### **VIII. RIGHT OF ENTRY**

49. Any authorized representative of DEC or the Office of the Attorney General, including independent contractors, upon presentation of credentials, shall have a right of entry upon the premises of the Huntley and Dunkirk Stations at any reasonable time for the

purpose of monitoring compliance with the provisions of this Consent Decree, including inspecting Station equipment and inspecting and copying all records maintained by NRG required by this Consent Decree; and NRG shall not unreasonably interfere with such access. NRG shall retain such records for a period of five (5) years from the termination of this Consent Decree.

#### **IX. FORCE MAJEURE**

50. (a) NRG shall not suffer any penalty under this Consent Decree, or be deemed to be in violation hereof or be subject to any proceeding or action, if NRG's compliance with any requirements hereof, including compliance with emission tonnage limitations, is delayed or NRG is unable to comply because of an action of the federal government or the State of New York, an order of a court, an act of God, war, strike, work stoppage, riot, catastrophe, delays in the issuance of permits or other authorizations (despite NRG's diligent efforts to obtain such permits and authorizations) or any other event or circumstance as to which negligence or misconduct on the part of NRG was not the proximate cause; provided, however, that NRG shall make diligent efforts to comply nonetheless, or minimize such delay, and shall promptly notify the State by telephone and in writing, pursuant to the notice provision of this Consent Decree, after it obtains knowledge of any such condition or event, and request an appropriate extension or modification of this Consent Decree.

(b) NRG shall be entitled to an extension of any deadline for any requirements of this Consent Decree for a period equal to any delay caused by a Force Majeure event. Nothing in this Subparagraph 50(b) of this Consent Decree shall preclude NRG from seeking additional extensions subject to DEC's consent.

(c) For purposes of this Consent Decree, NRG shall not suffer any penalties for failure to meet the Annual Tonnage Limitations of this Consent Decree if (i) the Governor of New York declares an energy or fuel supply emergency under New York Energy Law Section 5-117, (ii) noncompliance with the Annual Tonnage Limitation is authorized pursuant to Section 5-117, and (iii) the Commissioner of DEC decides that the payment of penalties under the circumstances should be excused. This determination by the DEC Commissioner shall be final and shall not be the subject of dispute resolution under this Consent Decree.

51. Unanticipated or increased costs or expenses associated with the performance of NRG's obligations under this Consent Decree shall not constitute circumstances beyond the control of NRG or serve as a basis for an extension of time under this Section.

## **X. DISPUTE RESOLUTION**

52. The dispute resolution procedure provided by this Section X of this Consent Decree shall be available to resolve all disputes arising under this Consent Decree, provided that the Party making such application has first made a good faith attempt to resolve the matter with the other Party.

53. The dispute resolution procedure required in this Section X of this Consent Decree shall be invoked by one Party to this Consent Decree giving written notice to the other advising of a dispute sought to be resolved pursuant to this Section. The notice shall describe the nature of the dispute and shall state the noticing Party's position with regard to such dispute. The Parties shall expeditiously schedule a meeting to discuss the dispute informally not later than fourteen (14) days following receipt of such notice.

54. Disputes submitted to dispute resolution under this Section shall, in the first instance, be the subject of informal good faith negotiations between the Parties. Such period of informal negotiations shall not extend beyond thirty (30) calendar days from the date of the first meeting among the Parties' representatives unless they agree in writing to shorten or extend this period.

55. If the Parties are unable to reach agreement during the informal negotiation period, the State shall provide NRG with a written summary of its position regarding the dispute. The written position provided by the State shall be considered binding on NRG within thirty (30) calendar days after receipt by NRG, unless NRG files with this Court a petition which describes the nature of the dispute and seeks resolution. The State may respond to the petition within forty-five (45) calendar days of its filing.

56. Where the nature of the dispute is such that a more timely resolution of the issue is required, the time periods set out in this Section may be shortened upon motion of one of the Parties to the dispute.

57. As part of the resolution of any dispute under this Section, in appropriate circumstances the Parties may agree to, or this Court may order, an extension or modification of the schedule for emission reductions under this Consent Decree to account for the delay that occurred as a result of dispute resolution.

## **XI. GENERAL PROVISIONS**

58. Effect of Settlement. This Consent Decree is not a permit; and except as specifically provided by this Consent Decree, nothing in this Consent Decree shall relieve NRG of its obligation to comply with all applicable federal, state and local laws and regulations. Subject to Paragraphs 39, 40, and 41 of this Consent Decree, nothing contained in this Consent Decree shall be construed to prevent or limit the State's rights to obtain penalties or injunctive relief under the Act or other federal, state or local statutes, regulations or causes of action existing now or to be enacted in the future.

59. Third Parties. Except as otherwise provided herein, this Consent Decree does not limit, enlarge or affect the rights of any Party to this Consent Decree as against any third parties. However, the State may not obtain, nor seek to obtain, from NRG or any third party any further injunctive relief that would affect the Huntley and Dunkirk Stations with respect to violations that were alleged, or could have been alleged, in the NOV, Complaint, Amended Complaint, and Second Amended Complaint, to have occurred prior to June 11, 1999. Nor shall the State obtain, nor seek to obtain, from NRG or any third party (other than Niagara Mohawk), any relief for alleged harms to human health and the environment, including the natural resources of the State of New York, resulting from operation of the Dunkirk and Huntley Stations prior to June 11, 1999.

60. Summary Abatement. If the Commissioner of the DEC or her duly authorized representative finds, after investigation, that NRG is causing, engaging in, or maintaining a condition or activity which, in her judgment, presents an imminent danger to the health or welfare of the people of this State or results or is likely to result in irreversible or

irreparable damage to natural resources and relates to the prevention and abatement powers of the Commissioner and it therefore appears to be prejudicial to the interests of the people of this State to delay action until an opportunity for a hearing can be provided, the terms of this Consent Decree shall not be construed to prohibit the Commissioner or her duly authorized representative, pursuant to ECL § 71-0301, from ordering NRG by notice, but without prior hearing, to discontinue, abate, or alleviate such condition or activity.

61. Indemnification. NRG shall indemnify and hold DEC, the State, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description (except for claims that may be raised in a citizen suit which seeks to challenge, modify, or add to the penalties or remedies in this Consent Decree) arising out of or resulting from the fulfillment or attempted fulfillment of this Consent Decree by NRG, its directors, officers, employees, servants, agents, successors, or assigns; provided, however, that NRG shall not be liable for any costs related to the defense of any such claims, suits, or actions including attorneys fees and other such costs.

62. Costs. Each Party to this action shall bear its own costs and attorneys fees.

63. Notice. Unless otherwise provided in this Consent Decree, notifications to or communications with the State or NRG required under this Consent Decree shall be deemed submitted on the date they are postmarked and sent either by overnight mail, return receipt requested, or by certified, or registered mail, return receipt requested and shall be deemed received two days after the date of submission. Notifications shall be sent to the following

representatives by electronic mail and overnight, certified or registered mail at the addresses set forth below:

- (a) State:
  - (i) Michael J. Myers, Assistant Attorney General, State of New York Office of the Attorney General, Environmental Protection Bureau, The Capitol, Albany, NY 12224
  - (ii) Michelle Crew, Counsel, Division of Environmental Enforcement, New York State Department of Environmental Conservation, 625 Broadway, 14<sup>th</sup> Floor, Albany, NY 12233-5500
  - (iii) Regional Air Pollution Control Engineer, Region 9, New York State Department of Environmental Conservation, 270 Michigan Ave., Buffalo, NY 14203-2999
- (b) NRG:
  - (i) Paul Savage, Assistant General Counsel – Regulatory, NRG Energy, Inc., 104 Carnegie Center, Suite 100, Princeton, NJ 08540
  - (ii) William M. Bumpers, Baker Botts LLP, counsel to NRG, 1299 Pennsylvania Avenue, N.W., Suite 1300, Washington, DC 20004

64. Modification. Except as otherwise allowed by law, there shall be no modification of this Consent Decree without written approval by the Parties and, unless the parties agree that the changes are minor, approval of such modification by the Court.

65. Continuing Jurisdiction. The Court shall retain jurisdiction of this case after entry of this Consent Decree to enforce compliance with the terms and conditions of this Consent Decree and to take any action necessary or appropriate for its interpretation, construction, execution, or modification. During the term of this Consent Decree, any Party may apply to the Court for any relief necessary to construe or effectuate this Consent Decree.

66. Complete Agreement. This Consent Decree constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

## **XII. TERMINATION**

67. This Consent Decree shall be subject to termination upon motion by either Party after NRG satisfies the material requirements of this Consent Decree (other than those requirements set forth in Paragraph 49, the requirements set forth therein surviving as enforceable provisions beyond termination of this Consent Decree), including payment of all stipulated penalties that may be due, the receipt of all permits specified herein, and securing modifications to the Title V Operating Permits for the Huntley and Dunkirk Stations that incorporates all operational limits established under this Consent Decree.

68. If NRG believes it has achieved compliance with the material requirements of this Consent Decree (excluding those requirements set forth in Paragraph 49, the requirements set forth therein surviving as enforceable provisions beyond termination of this Consent Decree), then NRG shall so certify to the State. Unless the State objects in writing with specific reasons within sixty (60) days of receipt of NRG's certification, the Court shall order that this Consent Decree be terminated on NRG's motion. If the State objects to NRG's certification, then the matter shall be submitted to the Court for resolution under Section X of this Consent Decree.

### **XIII. RESERVATION OF RIGHTS**

69. Nothing in this Consent Decree shall be construed in any way to limit DEC's authority to enforce all state, local, and federal regulations and requirements, including, but not limited to, taking action under 6 N.Y.C.R.R §§ 200.6 and 257-1.4, to require compliance with the NAAQS.

FOR THE PLAINTIFFS:

Dated: \_\_\_\_\_

\_\_\_\_\_  
ELIOT SPITZER  
Attorney General of the State of New York

\_\_\_\_\_  
J. JARED SNYDER  
MICHAEL J. MYERS  
Assistant Attorneys General  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224  
(518) 402-2594  
*Of counsel*

Dated: \_\_\_\_\_

\_\_\_\_\_  
ERIN M. CROTTY, Commissioner  
New York State Department of  
Environmental Conservation  
625 Broadway  
Albany, New York 12233-5500

\_\_\_\_\_  
JAMES H. FERREIRA, General Counsel  
MICHELLE A. CREW, Counsel  
New York State Department of  
Environmental Conservation  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-5500

FOR NRG ENERGY, INC.,  
NRG DUNKIRK OPERATIONS, INC.,  
DUNKIRK POWER, LLC,  
NRG HUNTLEY OPERATIONS, INC.,  
HUNTLEY POWER, LLC,  
NRG NORTHEAST GENERATING, LLC,  
NORTHEAST GENERATION HOLDING, LLC,  
NRG EASTERN, LLC, and  
NRG OPERATING SERVICES, INC.:

Dated: \_\_\_\_\_

\_\_\_\_\_  
DAVID CRANE  
President and Chief Executive Officer  
NRG Energy, Inc.

SO ORDERED, THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2005.

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WILLIAM M. SKRETNY  
United States District Judge