

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

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In the Matter of the Proposed Title V
Operating Permit for

CONSOLIDATED EDISON CO OF NY, INC.
to operate the 74th Street Station located in
New York, New York

Permit ID: DEC 2-6204-00019/00006

Proposed by the New York State Department of
Environmental Conservation

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF
THE TITLE V OPERATING PERMIT FOR
CONSOLIDATED EDISON'S 74TH STREET PLANT**

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), the New York Public Interest Research Group, Inc. ("NYPIRG") hereby petitions the Administrator ("the Administrator") of the United States Environmental Protection Agency ("U.S. EPA") to object to Title V Operating Permit issued to Consolidated Edison for its 74th Street Plant. The permit was proposed to U.S. EPA by the New York State Department of Environmental Conservation ("DEC") via a letter to Mr. Steven C. Riva (Chief, Permitting Section, Air Programs Branch, U.S. EPA Region 2) dated January 26, 2001. According to that letter, U.S. EPA's 45-day review period ended on March 15, 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.

This is the tenth petition that NYPIRG has filed with U.S. EPA seeking the Administrator's objection to a New York Title V permit. Though the Clean Air Act gives U.S. EPA only sixty days to respond to a Title V petition, more than a year has elapsed since many of NYPIRG's petitions were filed. This is the case even though U.S. EPA has been sending letters to DEC informing them that the Title V permits that NYPIRG objects to need to be corrected. Clearly, U.S. EPA is doing everything that it can to avoid objecting to a New York Title V permit, even when it is clear that a permit is defective.

NYPIRG appreciates the fact that U.S. EPA wishes to have a good working relationship with DEC. However, U.S. EPA may not ignore its legal obligation to comply with the public petition process created by the U.S. Congress. If Congress had intended for U.S. EPA to spend more than a year trying to work issues out with a state agency prior to acting on a public petition that raises those issues,

Congress would not have mandated that U.S. EPA grant or deny a public petition within 60 days after it is filed. In addition to violating the Clean Air Act, U.S. EPA's failure to object to legally-defective New York permits interferes with the ability of the public to bring about overall improvements in the state's implementation of the Title V program. Obviously, NYPIRG cannot review and comment on all Title V permits proposed by DEC. Since each permit contains similar problems, however, if U.S. EPA objects to a permit based on a particular flaw, that objection will serve as precedent for future DEC permits. Once U.S. EPA issues a formal objection to a Title V permit based on specific issues, DEC is less likely to issue future permits with the same problem. If a future permit does contain the same problem, we can simply point to the fact that U.S. EPA has objected based on that issue in the past. Unfortunately, since U.S. EPA seems intent on dealing with each permit on a case-by-case basis rather than achieving overall program improvements by using its objection authority, NYPIRG is faced with the never-ending task of rearguing the same issues with respect to every permit that is issued, and watching helplessly as permits are issued that we are unable to review and comment on.

The proposed permit for Consolidated Edison's 74th Street Plant is a clear illustration of the serious problems that continue to plague New York's implementation of the Title V program. A Title V permit is supposed to give the public an overall picture of the facility's obligations under the Clean Air Act. In addition, the permit is supposed to require sufficient monitoring, recordkeeping, and reporting to assure the facility's compliance with each applicable requirement. The Title V permit for the 74th Street Plant is a far cry from what was intended by Congress. First, the permit is written in such a convoluted fashion that it takes hours just to ascertain which condition applies to which boiler or turbine. Second, monitoring obligations are written in such vague terms that it is either entirely unclear how they relate to an applicable requirement, or they are unenforceable as a practical matter because they do not clearly set out the plant's obligations. Third, the statement of basis that accompanies the permit fails to provide any information whatsoever about how the monitoring that is included in the permit assures Consolidated Edison's compliance with applicable requirements. A review of the 74th Street Plant permit makes it clear that New York's Title V permit program is due for a major overhaul, not simply case-by-case tinkering.

NYPIRG submitted comments on the draft permit for the 74th Street Plant on September 3, 1999. We did not receive a response from DEC until January 26, 2001. DEC rejected almost all of our comments and actually made the permit worse in several respects. As usual, DEC did not provide NYPIRG with a copy of the permit that was being proposed to U.S. EPA. When NYPIRG began preparing a petition to U.S. EPA, we first contacted DEC so that we would review Con Edison's files to see whether anything had changed since we had submitted comments a year and a half earlier. DEC provided the files, but told us that it was a bit of an imposition to let us see the files at that time because the permit engineer was in the process of revising the permit in response to issues raised by U.S. EPA. Next, we contacted U.S. EPA Region 2 for a copy of the proposed permit. NYPIRG asked U.S. EPA whether agency staff had submitted comments to DEC on the permit. We were told U.S. EPA had not submitted comments on the 74th Street Plant permit. In fact, U.S. EPA had not even retrieved the proposed permit from the electronic database shared by U.S. EPA and DEC. We were then told that as DEC revises the permit, these changes are reflected in the permit that is available on the shared database. Unfortunately, the date on the electronic permit does not change as changes are made. Thus,

Consolidated Edison's permit is still dated 7/26/99 despite the fact that it has most certainly been revised since that time, probably on more than one occasion. There is no record of the exact permit that was available for U.S. EPA review during U.S. EPA's 45-day review period. We find this situation troubling because if U.S. EPA does not download a proposed permit during the U.S. EPA review period, no one knows what conditions were included in the permit that was officially proposed to U.S. EPA. This creates serious complications for members of the public, since our opportunity to petition U.S. EPA to object to a permit and our opportunity to sue U.S. EPA for improperly denying a public petition is based on the contents of the proposed permit. NYPIRG has asked in the past for U.S. EPA to require DEC to send anyone who commented on a draft permit a copy of the proposed permit that is later sent to U.S. EPA. So far, our request has not been addressed.

Below, we discuss numerous and significant violations of 40 CFR Part 70 that occur in the permit proposed for Consolidated Edison. If the U.S. EPA Administrator determines that Consolidated Edison's 74th Street Plant 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. Problems With Specific Permit Conditions

We believe that the permit as structured is unnecessarily confusing in that the requirements that apply to each "process" at the plant are scattered throughout the permit and refer to the regulated process by code. Below, we group the conditions according to the process to which they apply rather than the order that they occur in the permit. The permit covers three separate groups of equipment: (1) three very large boilers, (2) three large boilers, and (3) two combustion turbines. Each group of equipment is further broken down into processes based on the type of fuel that is used.

A problem that is endemic throughout the permit is that the permit lacks sufficient monitoring to assure compliance with applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1). One of Congress' primary goals in developing the Title V program was to ensure that it is possible to determine whether a facility is operating in compliance with applicable requirements. The lack of sufficient monitoring in a Title V permit is a serious flaw that requires an objection by the U.S. EPA. While permitting authorities retain some discretion over the type of monitoring that is included in individual permits, U.S. EPA frequently objects to permits (for facilities other than those located in New York) based on the lack of adequate monitoring. 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 proposed permit for Consolidated Edison’s 74th Street Plant contains numerous monitoring conditions that are far too vague to be enforceable.

Finally, many of the permit conditions in Consolidated Edison’s proposed permit fail to require regular reporting of monitoring results as required by 40 CFR Part 70. In particular, many permit conditions state that reporting is only due upon request by DEC. Though DEC told NYPIRG that it was correcting this problem by including a statement in the permit that “upon request” is defined as meaning at least every six months, we are unable to locate this correction in the proposed permit that was provided to us by U.S. EPA.

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

A. Process-specific conditions

3 Very Large Boilers (836 MMBtu/hr each)

Combust #6 oil and waste fuel A, permitted to burn natural gas

CODE NAME FOR PROCESSES:

when combusting natural gas --NG1

when combusting #6 oil -- RO1

when combusting waste fuel A -- WF1

Rules when combusting natural gas (NG1):

Conditions 59 and 60 both place NO_x limits on the operation of the very large boilers when firing with natural gas. Unfortunately, Conditions 59 and 60 contain conflicting limits. It appears that

Condition 60 should actually apply to the “large” boilers rather than the “very large” boilers. This must be changed, because as the permit is currently written, no NO_x limits are provided for when the large boilers are operated firing natural gas.

In addition to the conflict between Conditions 59 and 60, we are concerned that DEC is permitting Con Edison to operate the plant using natural gas even though it appears from our review of the DEC file on the facility that the facility is not currently equipped to fire natural gas. While we certainly prefer natural gas to residual oil, we are concerned that this permit somehow grants Con Edison the right to perform modifications at the facility without proper public notification.

Rules when combusting #6 oil (RO1):

Condition 61: This condition is based on 6 NYCRR § 225-1.7 and provides an assortment of monitoring conditions without any explanation of how they relate to the applicable requirement. We are particularly concerned about the general way in which this condition refers to Con Edison’s obligation to perform appropriate monitoring of the sulfur content of oil being burned at the plant. Under § 225-1.7, if Con Edison does not perform acceptable sulfur sampling, it is required to install continuous monitors to measure sulfur dioxide emissions. Though the sulfur sampling requirement is referred to later in the permit with respect to the allowable sulfur content in distillate oil (see condition 39), the only information that the permit provides with respect to what kind of monitoring will be performed is “per batch of product, raw material change.” This vague description is insufficient to satisfy 40 CFR Part 70’s monitoring requirements. In addition, though the permit description explains that there is a sulfur limit that applies to residual oil, we are unable to locate any condition in the permit that establishes that limit. The statement in the permit description section is not enforceable. Thus, in addition to being defective based on an inadequate description of the plant’s sulfur monitoring obligations, the permit is defective because it does not include the applicable sulfur limit for residual oil found in 6 NYCRR § 225-1.

Condition 62: Condition 62 is based on 6 NYCRR § 227-1.2(a)(1) and governs particulate matter emissions. While condition 62 does not state the applicable particulate emission limit, Condition 81 states that the limit is 0.1 lbs/MMBtu. Unfortunately, Condition 81 does not require any monitoring to be performed to assure compliance, and the monitoring included in Condition 62 is insufficient. In particular, Condition 62 simply states that “combustion sources are maintained and operated to maintain low emissions of particulate matter.” There is no explanation as to what constitutes “low emissions of particulate matter” or what kind of maintenance and operation procedures are required. Further, there is no explanation as to how anyone would even know whether Consolidated Edison engaged in such maintenance and operation practices, and there is no testing to determine whether the procedures being followed by Consolidated Edison are sufficient to assure low particulate matter emissions. It is hard to believe that DEC and U.S. EPA believe that an unenforceable, vague obligation on the part of Consolidated Edison to maintain its boilers and turbines properly is sufficient to assure compliance with the applicable particulate matter standard. In light of the serious threat to public health proposed by particulate matter emissions, U.S. EPA must object to this permit and require DEC to incorporate sufficient monitoring in the permit to assure the plant’s ongoing compliance with the limit.

Rules when combusting Waste Fuel A (WF1)

Condition 66: See comments on condition 61, above.

Conditions 67-70: All of these conditions are based on 6 NYCRR § 225-2.4(b). They place limits on the PCB and halogen content of waste fuel that is burned at the plant, as well as placing a limit on the heat content of the fuel. None of the conditions explain what kind of testing will be performed or what kind of records will be maintained, other than to say that the monitoring frequency is “per delivery” or “per batch of product/raw material change.” These vague descriptions of Consolidated Edison’s monitoring obligations do not assure compliance with applicable requirements.

Condition 71 (particulates): see comments on Condition 62, above.

Condition 73 (continuous monitors): Condition 73 requires that continuous emission monitors for NO_x be employed, but the condition fails to require Consolidated Edison to perform any maintenance or testing on the monitors to ensure that they are functioning properly. Since the installation and operation of continuous NO_x monitors is an applicable requirement, the permit must require the facility to perform monitoring that is sufficient to ensure that the monitors are operating properly.

6 large boilers (180 MMBtu/hr each)

Combust #6 oil and waste fuel A, permitted to burn natural gas

CODE NAME:

when combusting natural gas: NG2

when combusting #6 oil: RO2

when combusting waste fuel A: WF2

Rules when combusting #6 oil (RO2)

Condition 64: See comments on Condition 61, above.

Condition 65 (particulates): See comments on Condition 62, above.

Rules when combusting Waste Fuel A (WF2)

Condition 74: See comments on Condition 61, above.

Condition 75-77: See comments on Conditions 67-70, above.

Condition 79 (particulates): See comments on Condition 62, above.

Condition 80 (NO_x): Condition 80 states that the large boilers are subject to a NO_x limit of 0.3lbs/MMBtu when burning Waste Fuel A, but fails to require Consolidated Edison to monitor its compliance with this limit. The permit simply states that the monitoring frequency is “single occurrence” and fails to state when that test will be performed. A single test is insufficient to assure ongoing compliance with an applicable requirement. DEC’s failure to include appropriate monitoring in this permit is a violation of 40 CFR Part 70.

Rules when combusting natural gas:

As mentioned above with respect to Conditions 59 and 60, the permit does not include a NO_x limit for the large boilers when they burn natural gas. This is probably due to a typographical error in Condition 60.

2 combustion turbines (223 MMBtu/hr each)
burns #2 oil

CODE NAME: GTD

Condition 56: See comments on Condition 61, above.

Condition 57 (Particulates): See comments on Condition 62, above.

Condition 58: (NO_x): Condition 58 states that the combustion turbines must be operated in compliance with a NO_x limit of 100 parts per million by volume. Unfortunately, this condition violates 40 CFR Part 70 by failing to require Consolidated Edison to perform monitoring that is sufficient to assure ongoing compliance with the NO_x limit. Instead, the permit simply states that the monitoring frequency is “single occurrence.”

B. General Requirements that Apply to All Facility Processes

1. Compliance with NO_x RACT

Under Condition 47, the proposed permit states that Consolidated Edison will comply with NO_x RACT under 6 NYCRR § 227-2 by using an averaging plan. Unfortunately, the proposed permit does not provide anywhere near enough information to allow members of the public to understand how determine whether Con Edison is in compliance with NO_x RACT. There is no description of the other plants that will be included in the average, or of how emissions will be averaged to show compliance with NO_x RACT. Condition 47 refers to an assortment of documents that apparently set out the procedures, but these documents are not included with the permit. The Title V permit issued to Con Edison must clearly set out the monitoring and compliance obligations that apply to the 74th Street Plant. An important goal of the Title V program is to allow people to refer to one permit to ascertain all Clean

Air Act obligations that apply to a facility. It is unacceptable for a permit to refer to a myriad of documents that are not readily accessible to the public instead of describing the specific methods that the facility must use to show its compliance with an applicable requirement.

2. Compliance with the NOx Budget Rule

Condition 49 sets out the requirements of New York's NOx Budget rule, contained in 6 NYCRR § 227-3. While NYPIRG is pleased that this condition has been added to the permit, it does not provide sufficient detail with respect to Consolidated Edison's obligations under the rule. For example, Condition 49 indicates that Con Edison was required to submit a monitoring plan by May 1, 1999, but there is no mention of that monitoring plan in either the proposed permit or the statement of basis. Similarly, Condition 49 states that the monitoring systems must be subject to initial performance testing and periodic calibration, but there is no mention in the proposed permit of when testing or calibration will occur. Because of this lack of detail, the proposed permit does not assure Con Edison's compliance with the NOx Budget Rule as required by 40 CFR Part 70.

3. Opacity Monitoring

Condition 82 states that Consolidated Edison must install and operate continuous opacity monitors in accordance with manufacturer's instructions. Since we do not know what the manufacturer's instructions say, this requirement is unenforceable as a practical matter. In addition, even if the manufacturer's instructions were included with the permit, it is doubtful that they are written in an enforceable manner.

4. Coating and Sealer limits

Conditions 31 through 34 contain various coating and sealer limits. Unfortunately, there is no monitoring, recordkeeping, or reporting associated with these limits, and no explanation for this lack of monitoring in the statement of basis. This violates 40 CFR Part 70's requirement that the permit include sufficient monitoring to assure ongoing compliance.

5. Visible Emissions

Condition 35 sets out an opacity limit of 20 percent that applies to the entire facility. The monitoring associated with this condition is obviously inadequate to assure Con Edison's ongoing compliance. In particular, conditions 36 and 37 provide that "Equipment will be maintained according to the manufacturer's recommendations which will minimize the opacity of the exhaust." This condition is unenforceable as a practical matter, since there is no way for the public to know what the manufacturer's recommendations say about minimizing opacity. In addition, there is no recordkeeping associated with the condition. Since the plant is already required to operate COMs, compliance with this opacity limitation should be measured on a continuous basis.

6. Combustion efficiency when firing Waste Fuel A

Condition 43 states that the plant must demonstrate and maintain a combustion efficiency of at least 99%, while firing waste fuel A. This condition violates 40 CFR Part 70 by not including any type of monitoring that will assure Con Edison's compliance with the requirement.

7. Episode Action Plan

Condition 54 fails to adequately establish Consolidated Edison's obligations under its Episode Action Plan. The proposed permit fails to explain whether the facility has an episode action plan, what the episode action plan requires if one exists, how the public would know when an air pollution episode is in effect, or how to obtain a copy of the episode action plan.

8. Opacity Consent Order

Condition 55 indicates that the opacity consent order is attached to the proposed permit, but it is not attached. Under 40 CFR Part 70, a Title V compliance schedule must be at least as stringent as any applicable consent order. Thus, the public must be provided with an opportunity to evaluate and comment on whether the consent order requirements are stringent enough to assure the facility's ongoing compliance. No such opportunity was provided in this case. Moreover, DEC made no attempt to justify the adequacy of the opacity consent order requirements in the statement of basis (the permit description) included with this proposed permit.

II. DEC Violated the Public Participation Requirements of 40 CFR § 70.7(h) by Inappropriately Denying NYPIRG's Request for a Public Hearing

40 CFR § 70.7(h) provides that "all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." NYPIRG requested a public hearing in written comments submitted to DEC during the applicable public comment period.

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

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

A public hearing would be appropriate if the Department determines that there are substantive and significant issues because the project, as proposed, may not meet statutory or regulatory standards. Based on a careful review of the subject application and comments received thus far, the Department has determined that a public hearing concerning this permit is not warranted.

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

§621.7 Determination to conduct a public hearing.

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

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

Apparently, DEC will hold a public hearing on a draft Title V permit only if public comments make it reasonably likely that the "project" (as opposed to the permit) must undergo major modifications.¹ Because a Title V permit is meant to assure that a facility complies with existing

¹ 6 NYCRR § 621.1(q) defines "project" as "any action requiring one or more permits identified in section 621.2 of this Part." (The Title V permit is one of the permits identified in section 621.2). 6 NYCRR § 621.1(o) defines "permit" as "any permit, certificate, license or other form of department approval, suspension, modification, revocation, renewal, reissuance or recertification, including any permit condition and variance, that is issued in connection with any

requirements, not to subject the facility to additional applicable requirements, the vast majority of existing facilities will not need to undertake major modifications before receiving a Title V permit. This does not obviate the need for a public hearing. In the context of a Title V permit proceeding, the objective of a public commenter is to ensure that the Title V permit holds the permit applicant accountable for violations of applicable requirements. Typically, the issue is whether significant modifications need to be made to the *permit*, not whether significant modifications need to be made to the *project*. DEC's interpretation of its regulations constructively denies the public an opportunity for a hearing on virtually any Title V permit application submitted by an existing facility. This clear violation of 40 CFR § 70.7(h) requires the Administrator to object to the proposed permit for Consolidated Edison's 74th Street Plant.

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

The Administrator must object to the proposed permit because Consolidated Edison did not submit a complete permit application in accordance with the requirements of Clean Air Act § 114(a)(3)(C), 40 CFR § 70.5(c), and 6 NYCRR § 201-6.3(d).

First, Consolidated Edison's permit application lacks an initial compliance certification. Consolidated Edison is legally required to submit an initial compliance certification that includes:

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

The initial compliance certification is one of the most important components of a Title V permit application. This is because the initial compliance certification indicates whether the permit applicant is currently in compliance with applicable requirements. If Consolidated Edison is currently in violation of an applicable requirement, the Title V permit must include an enforceable schedule by which it will come into compliance with the requirement (the "compliance schedule"). Because Consolidated Edison failed to submit an initial compliance certification, neither government regulators nor the public can feel confident that Consolidated Edison is currently in compliance with every applicable requirement. Therefore, it is unclear whether Consolidated Edison's Title V permit must include a compliance schedule in addition to the opacity compliance schedule that is already included in the proposed permit.

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

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

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

57 FR 32250, 32274 (July 21, 1992). Despite the importance of knowing whether a permit applicant is in compliance with all requirements at the time of permit issuance, Consolidated Edison is not required to submit a compliance certification until one full year after the permit is issued. A permit that is developed in ignorance of a facility's current compliance status cannot possibly assure compliance with applicable requirements as mandated by 40 CFR § 70.1(b) and § 70.6(a)(1).

In addition to omitting an initial compliance certification, Consolidated Edison's permit application lacks certain information required by 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4), including:

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

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

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

conditions are unaccompanied by any kind of monitoring requirement. Again, there is never an explanation for the lack of a monitoring method.

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

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

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

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

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

The most glaring deficiency in the statement of basis is the failure to provide a sufficient legal and factual basis for the adequacy of monitoring requirements included in the draft permit. Without a statement of basis, it is virtually impossible for the public to evaluate DEC's monitoring decisions and to prepare effective comments during the 30-day public comment period.

According to U.S. EPA Region 10:

The statement of basis should include:

- i. Detailed descriptions of the facility, emission units and control devices, and manufacturing processes including identifying information like serial numbers that may not be appropriate for inclusion in the enforceable permit.

- ii. Justification for streamlining 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 New York, this information is never provided.

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

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

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

On December 22, 2000, U.S. EPA granted a petition for objection to a Title V permit based in part upon the fact that the permit and accompanying statement of basis failed to provide a sufficient basis for assuring compliance with several permit conditions. See U.S. EPA, *In re Fort James Camas Mill, Order Denying in Part and Granting in Part Petition for Objection to Permit*, December 22, 2000 (the “Order”). According to the Order, “the rationale for the selected monitoring method must be

clear and documented in the permit record.” Id. at 8. Thus, the Order affirms the fact that this draft permit fails to comply with legal requirements because the statement of basis developed by DEC includes 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.

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

Under 6 NYCRR § 201-6.5(e), a permittee must “certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices,” at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirement included in Consolidated Edison’s permit (identified as Condition 15 in the permit) does not require Consolidated Edison to certify compliance with all permit conditions. Rather, the condition only requires that the annual compliance certification identify “each term or condition of the permit that is the basis of the certification.” DEC then proceeds to identify certain conditions in the permit as “Compliance Certification” conditions. Requirements that are labeled “Compliance Certification” are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. Those permit conditions that lack monitoring (a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal regulations. Consolidated Edison must certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

DEC’s only response to NYPIRG’s concerns regarding deficiencies in the compliance certification requirement is that “[t]he format of the annual compliance report is being discussed internally and with EPA.” DEC Responsiveness Summary at 2. DEC’s response is unacceptable. The annual compliance certification requirement is the most important aspect of the Title V program. The Administrator must object to any permit that fails to require the permittee to certify compliance (or noncompliance) with all permit conditions on at least an annual basis.

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

The Administrator must object to Consolidated Edison's permit because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions. On its face, 6 NYCRR § 201-1.4 (New York's "excuse provision") conflicts with U.S. EPA guidance regarding the permissible scope of excuse provisions and should not have been approved as part New York's State Implementation Plan ("SIP"). U.S. EPA must remove this provision from New York's SIP and all federally-enforceable operating permits as soon as possible. Meanwhile, Consolidated Edison's permit must be modified to include additional recordkeeping, monitoring, and reporting obligations so that U.S. EPA and the public can monitor application of the excuse provision (and thereby be assured that the facility is complying with applicable requirements).²

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

U.S. EPA guidance explains that facilities are required to make every reasonable effort to comply with emission limitations, even during startup/shutdown, maintenance and malfunction conditions. According to U.S. EPA, an excuse provision only applies to infrequent exceedances. This is not the case for facilities located in New York State. New York facilities appear to possess blanket authority to violate air quality requirements so long as they assert that the excuse provision applies.

40 CFR § 70.6(a)(a) provides that each permit must include "[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." The permit does not assure compliance with applicable requirements because it lacks (1) proper limitations on when a violation may be excused, and (2) sufficient public notice of when a violation is excused.

A Title V permit must include standards to assure compliance with all applicable requirements. The Administrator must object to the proposed permit for Consolidated Edison unless DEC adds terms to the permit that prevent abuse of the excuse provision. Specific terms that must be included in any Title V permit issued to Consolidated Edison are described below.

1. Any Title V permit issued to Consolidated Edison must include the limitations established by recent U.S. EPA guidance.

² The excuse provision is identified as Condition 6 in the permit.

In a memorandum dated September 20, 1999 (“1999 memo”), U.S. EPA’s Assistant Administrator for Enforcement and Compliance Assurance clarified U.S. EPA’s approach to excuse provisions. In particular:

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

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

³ In the case of an exceedance that occurs due to startup, shutdown, or maintenance, the facility must demonstrate that:

- The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design;
- The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- At all times, the facility was operated in a manner consistent with good practice for minimizing emissions;
- The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;
- All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
- All emissions monitoring systems were kept in operation if at all possible;
- The owner or operator’s actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and
- The owner or operator properly and promptly notified the appropriate regulatory authority.

The factual demonstration necessary to justify a defense based upon an unavoidable malfunction is similar to that for startup/shutdown. See 1999 Memo.

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

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

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

3. Any Title V permit issued to Consolidated Edison must define significant terms.

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

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

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

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

The problems caused by the vagueness of the excuse provision could be partially resolved by making it clear that the excuse provision does not shield the facility in any way from enforcement by the public or by U.S. EPA, even after a violation is excused by the DEC Commissioner. In addition to the right to bring an enforcement action against facility that illegally pollutes the air, however, the public must be able to evaluate the propriety of a decision by the DEC Commissioner to excuse a violation. Since the public has the right to bring an enforcement action against a permit violator, the public should have access to any information relied upon by DEC is determining that a violation could not be avoided.⁴ If the permit provides only scanty details about the types of violations that may be excused, DEC and the permittee are unlikely to provide the public with any information justifying the excuse.

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

Though 6 NYCRR § 201-1.4(d) requires facilities to use "reasonably available control technology" ("RACT") during any maintenance, start-up/shutdown, or malfunction condition, the permit does not define what constitutes RACT under such conditions or how the government and the public knows whether RACT is being utilized at those times. Any Title V permit issued to Consolidated Edison must define RACT as it applies during startup, shutdown, malfunction, and maintenance conditions. Also, the permit must include monitoring, recordkeeping, and reporting procedures designed to provide a reasonable assurance that the facility is complying with this requirement.

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

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

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

⁴ It is interesting that while some state agencies and industry representatives assert that citizen suits are sometimes brought against facilities for "minor" violations, DEC's position with respect to the excuse provision in this permit means that the public is denied information about the environmental seriousness of a violation and whether the violation was actually unavoidable. Thus, the public's ability to analyze the significance of a violation is severely constrained.

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

Unfortunately, the excuse provision in the permit (Condition 6) fails to require adequate reporting of deviations of permit conditions during startup/shutdown, maintenance, malfunction, and upset conditions. In the case of deviations that occur during startup/shutdown or maintenance, the facility isn't required to submit a deviation report at all “unless requested to do so in writing.” In the case of deviations that allegedly occur due to malfunction, the permit requires deviation reports, but allows these reports to be made by telephone rather than in writing. Thus, a violation can be excused without creating a paper trail that would allow U.S. EPA and the public to monitor abuse.

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

The permit issued to Consolidated Edison would leave the public completely in the dark as to whether DEC is excusing violations on a regular basis. An excuse provision that keeps the public ignorant of permit violations cannot possibly satisfy the Part 70 mandate that each permit assure compliance with applicable requirements.

Any Title V permit issued to Consolidated Edison must include the following reporting obligations:

- (1) *Violations due to Startup, Shutdown and Maintenance.*⁵ The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (The permit only requires reports of violations due to startup, shutdown, or maintenance “when requested to do so in writing”).⁶ The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the

⁵ NYPIRG interprets U.S. EPA’s 1999 memorandum as prohibiting excuses due to maintenance.

⁶ See Condition 6.1(a) in the permit.

startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report promptly after a deviation occurs. (The permit does not require submittal of a report “if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements”).⁷ Finally, a deadline for submission of these reports must be included in the permit.

- (2) *Violations due to Malfunction.* The facility must provide both written notification and a telephone call to DEC within two working days of an excess emission that is allegedly unavoidable due to “malfunction.” (The permit only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement).⁸ The facility must submit a detailed written report within thirty days after the facility exceeds an emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The permit only requires the facility to submit a detailed written report “when requested in writing by the commissioner’s representative”).⁹

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

As discussed above, 40 CFR § 70.6(a)(3)(iii)(B) requires prompt reporting of all violations of permit requirements. Condition 6, discussed above, does not require prompt reporting of all deviations, but only reporting of violations which might be considered excusable under 6 NYCRR § 201-1.4.

The permit issued to Consolidated Edison lacks a condition that requires prompt reporting of all deviations from permit terms, both excusable and non-excusable. Absent such a condition, U.S. EPA must object to issuance of this permit. Consolidated Edison must be compelled to submit prompt written reports of all deviations, not just those that may be excusable. The Administrator must object to the permit because it does not require prompt reporting of all deviations from permit limits.

Conclusion

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the proposed Title V permit for Consolidated Edison’s 74th Street Plant.

⁷ Id.

⁸ See Condition 6.1(b) in the permit.

⁹ Id.

Respectfully submitted,

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New York, New York

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